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NAFCU | Your Direct Connection to Education, Advocacy & Advancement

March 16, 2015

Ms. Monica Jackson  
Office of Executive Secretary  
Bureau of Consumer Financial Protection  
1700 G Street NW  
Washington, D.C. 20552

RE: Notice of Proposed Rulemaking and Request for Comment on the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RIN 3170-AA49)

Dear Ms. Jackson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents federal credit unions, I write to you regarding the proposed amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z). *See* 79 FR 74175 (December 15, 2014). The proposal constitutes an important step to achieving improved mortgage servicing rules. However, as discussed in detail in this comment letter, NAFCU cannot support aspects of the amendments as proposed.

### **General Comments**

NAFCU supports the Bureau's ongoing efforts to work with industry stakeholders to find opportunities to adjust previously issued mortgage rules and both reduce their burden on providers and enhance their protections for consumers. Open dialogue with industry stakeholders and the regulatory amendments that result from such dialogue are vital to ensure that rulemaking does not cause a reduction in available credit for consumers.

The proposed amendments are clearly a result of extensive engagement with industry stakeholders, and we commend the Bureau for its responsiveness to feedback and input from credit unions throughout the Dodd-Frank rulemaking process. Despite these efforts, NAFCU

does not believe the CFPB has given adequate consideration to the burden that the proposed amendments would have on small entities.

NAFCU has consistently maintained that the tidal wave of the Bureau's new regulations, taken individually, and more so in their cumulative effect, have significantly altered the lending market in unintended ways. In particular, the ability-to-repay, qualified mortgage, and mortgage servicing rules have required credit unions of various sizes and complexities to make major investments, and incur significant expenses. Taken all together, these regulations have made credit unions rework nearly every aspect of their mortgage origination and servicing operations. Aspects of the proposal would require even more reworking and additional expense, and NAFCU believes such reworking and expense will disproportionately impact small financial institutions that were not responsible for the financial crisis.

### **Successors in Interest**

The CFPB seeks to apply Regulation X's and Z's mortgage servicing rules to successors in interest once the identity and ownership interest in the property is confirmed, regardless of whether the mortgage loan obligation is assumed or not. Proposed Section 1024.30(d) provides that a successor in interest shall be considered a borrower for the purposes of Regulation X's mortgage servicing rules once a servicer confirms the successor in interest's identity and ownership interest in the property. Similarly, proposed Section 1026.2(a)(11) provides that a confirmed successor in interest is a consumer with respect to Regulation Z's mortgage servicing rules. Therefore, under the proposed rule, Regulation X's and Z's mortgage servicing rules would apply to confirmed successors in interest regardless of whether that person has assumed legal liability for the mortgage debt under State law.

NAFCU and our members have concerns about treating individuals who have not assumed legal liability for the mortgage debt as a "consumer" under Regulation X's and Z's mortgage servicing rules. Specifically, the proposal would define a "non-obligor successor in interest" as a "consumer" under Regulation Z. *The Gramm-Leach-Bliley Act*, however, defines a successor interest that is not an obligor on a mortgage loan as neither a consumer nor a customer. The proposal would, nonetheless, require servicers to provide such individuals a periodic statement. Because periodic statements contain Nonpublic Personal Information (NPI), NAFCU is concerned that this aspect of the proposal could expose credit unions, as well as all financial institutions, to violating the *Gramm-Leach-Bliley Act*.

### **Definition of Delinquency**

The Bureau is proposing to add a general definition of "delinquency" that would apply to all of the servicing provisions of Regulation X. Under the proposed definition, a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid.

NAFCU supports the proposed definition of "delinquency." NAFCU members continue to raise concerns about how Regulation X's loss mitigation and mortgage servicing requirements

interplay with state foreclosure law. NAFCU believes the proposed general definition of “delinquency” will help to determine whether a borrower is delinquent for purposes of Regulation X's servicing provisions and when the borrower's delinquency began under federal law.

While NAFCU appreciates the CFPB's attempts to clarify foreclosure notice issues, we firmly believe that this proposal falls short of what is necessary. Specifically, a number of NAFCU's members operate in states where foreclosure notice requirements exceed Regulation X's 120-day Loss Mitigation timing constraint. NAFCU recommends that the Bureau adopt a provision that will allow credit unions to defer to state law when it requires longer notice periods prior to foreclosure. NAFCU and our members believe that adopting such a provision will not only afford consumers more time to bring their loans current, but it will also allow credit unions to comply with state laws without running afoul of Regulation X.

NAFCU would also like to take this opportunity to address delinquency in the context of Regulation Z. NAFCU continues to hear from our members that Regulation Z's prompt payment crediting rule, and its related commentary, make collecting late fees operationally impractical. In particular, the way that the CFPB has drafted its commentary and preamble to the prompt payment crediting rule has created confusion among NAFCU's members about how they can collect late fees without violating the rule. On one hand, the Bureau seems to defer to a credit union's loan agreement. On the other hand, however, where a loan agreement calls for a payment to first apply to outstanding late fees, and then principle, interest and any applicable escrow, it is unclear that such behavior is permissible under the prompt payment crediting rule, the commentary or the preamble. For example, in the preamble to the 2013 Mortgage Servicing Rules, the CFPB advised:

“The Bureau does not believe the rule will prevent collection of late fees or impose operational challenges on servicers regarding the timing for crediting payments. Although a servicer may not delay crediting of a payment until a late fee has been paid, nothing in the rule prevents a servicer from charging and collecting a late fee where appropriate. The Bureau does not believe it is appropriate to mandate a statement to the consumer regarding the consumer's obligation to pay a late fee; however, a servicer may undertake appropriate actions, including potentially through a message on the periodic statement, to collect late fees.”

In light of this text, NAFCU's members have been weary of exercising their contractual rights to collect outstanding late fees before applying a periodic payment to principle, interest and any applicable escrow. NAFCU urges the CFPB to clarify that credit unions may credit payments in accordance with their loan agreements, so long as such crediting does not result in the pyramiding of late fees or treating member payments as a partial payment.

### **Requests for Information**

Regulation X generally requires servicers to provide information about the owner or assignee of a mortgage loan within ten or thirty business days depending on the subject matter of the

borrower's request. The proposal would change how a servicer must respond to requests for information asking about the ownership of loans in trust for which Fannie Mae or Freddie Mac is the trustee, investor or guarantor. Specifically, the proposal would require servicers to maintain information on requests from a potential successor in interest until confirmation of the person's status.

NAFCU opposes this aspect of the proposal because we believe it would impose an unnecessary recordkeeping burden on servicers. A number of NAFCU members have indicated that this proposed requirement would require them to develop and implement costly new systems and expend valuable staff resources in order to accommodate and capture requests from non-obligor potential successors in interests. NAFCU believes the costs of such recordkeeping would significantly outweigh any benefits it might confer. Simply put, the perceived benefits of maintaining consumer information requires prior to establishing a relationship would not justify the associated costs and burden.

### **Force-placed insurance**

The Bureau is further proposing changes to its force-placed insurance notice requirements. Generally speaking, Regulation X requires servicers to meet several requirements in order to impose force-placed insurance charges on consumers. One of these requirements is that servicers must mail two notices to a consumer by first-class mail or better before they can charge borrowers for force-placed insurance. Currently, Section 1024.37 requires the initial and reminder force-placed insurance notices to include a statement that a borrower's hazard insurance has expired or is expiring, as applicable. It does not specify what a notice must state if a borrower has insufficient coverage, such as when the borrower's insurance provides coverage in a dollar amount less than that required by the mortgage loan contract. The proposal, however, would amend Section 1024.37 to provide that the force-placed insurance notices must include a statement that the borrower's hazard insurance is expiring, has expired, or provides insufficient coverage, as applicable.

NAFCU appreciates the CFPB's work to ease force-placed insurance notices requirement in order to accommodate circumstances where a consumer's hazard insurance coverage is insufficient, rather than expiring. While NAFCU welcomes the proposed changes, we urge the CFPB to reconsider other aspects of Regulation X's force-placed insurance rules. Specifically, NAFCU and our members have significant concerns about Regulation X's requirement that servicers advance funds where the borrower's escrow account does not have sufficient funds. The CFPB, we believe, unnecessarily asserts discretionary authority to impose this requirement without sufficiently addressing and considering the risk and costs the rule imposes on credit unions or their members.

Under the current requirement to advance funds, servicers are essentially required to insure the borrower rather than the collateral. This result, NAFCU and our members believe, is perverse and unnecessarily poses the risk of incentivizing borrowers to cease maintenance of hazard insurance with knowledge that the servicer is required to maintain such insurance on their behalf.

### **Early intervention**

Regulation X requires that servicers, at a minimum, establish or make good faith efforts to establish live contact with consumers by the thirty-sixth day of their delinquency and, if appropriate to their situation, promptly inform them of loss mitigation options that may be available. Regulation X, however, provides an exemption from these requirements when a borrower is in bankruptcy. The proposal would preserve the current exemption from Regulation X's live contact requirements, but it would partially lift the exemption from Regulation X's written notice requirements.

NAFCU strongly opposes requiring servicers to provide a written early intervention notice to a borrower in bankruptcy. We believe it is inappropriate to require services to provide a written early intervention notice to a borrower who is jointly liable on mortgage loan with someone who is a debtor in a Chapter 12 or Chapter 13 bankruptcy, as such a requirement may run afoul of the Bankruptcy Code and state bankruptcy laws. Therefore, NAFCU urges the Bureau to maintain the current exemption in order to avoid conflicts with the Bankruptcy Code and state bankruptcy laws.

### **Loss mitigation**

In its current form Regulation X only requires a servicer to evaluate a single loss mitigation application for a borrower's mortgage loan account. The proposal, however, seeks to require that servicers provide certain borrowers with foreclosure protections more than once over the life of the loan. Specifically, the proposal would mandate that servicers evaluate a subsequent loss mitigation application from borrowers who have brought their loans current at any time since their last loss mitigation application.

NAFCU is deeply concerned with this aspect of the proposal. Unlike most other servicers, credit unions have personal relationships with their members because the members are also the owners. Individual credit unions develop programs deliberately designed to meet the needs of their unique membership. However, the "one-size-fits-all" design of Regulation X's current loss mitigation requirements has greatly damaged proven procedures that were tailored for each credit union's membership. NAFCU believes that expanding the scope of these rigid standards will only further stifle credit unions' ability to create loss mitigation options that are necessary to meet their members' needs. Generic methods may work for servicers that assist tens of thousands borrowers but providing inflexible options has proven ineffective for servicers, such as credit unions, that service the mortgages of specific groups with common interests.

Mandating that servicers provide certain borrowers with foreclosure protections more than once over the life of the loan poses significant compliance costs and burdens on credit unions. Credit unions, like many small financial institutions, do not have the depth and breadth of staff resources readily available to evaluate multiple loss mitigation applications in the manner that Regulation X currently requires. While NAFCU and our members support protecting consumers from losses, we are concerned that the additional loss mitigation requirements may not advance this goal and will only serve to further stretch credit unions' already thin resources. Therefore,

NAFCU encourages the CFPB to retain the current requirement to evaluate a single complete loss mitigation application for a borrower's mortgage loan account.

### **Periodic statements**

Under Regulation Z's current mortgage servicing rules, credit unions are required to provide a periodic statement each billing cycle with certain information about the member's closed-end credit transactions secured by a dwelling. Creditors, assignees and servicers who currently own the mortgage or the servicing rights are also responsible for sending periodic statements. The proposal would create an express exemption from these periodic statement requirements for charged-off loans. NAFCU strongly supports this aspect of the proposal.

### **Conclusion**

As the CFPB has itself repeatedly acknowledged, credit unions have not engaged in the type of mortgage servicing practices that the agency is seeking to address through Regulation X's and Z's stringent mortgage servicing rules. Credit unions want to continue to aid in the economic recovery, but are being stymied by overregulation. Regulation X's and Z's current mortgage servicing rules continue stifle growth, innovation and diversification at credit unions, and the proposal does little to provide any meaningful relief. NAFCU and our members, therefore, urge the Bureau to address the compliance costs and regulatory difficulties faced by credits unions raised in this letter.

NAFCU appreciated the opportunity to share its thoughts on the proposed amendments to Regulation X's and Z's mortgage servicing rules and would like to discuss this matter further. Should you have any questions or concerns, please feel free to contact me at [anealon@nafcu.org](mailto:anealon@nafcu.org) or (703) 842-2266.

Sincerely,

A handwritten signature in cursive script that reads "Alicia Nealon".

Alicia Nealon  
Director of Regulatory Affairs