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Comment of Professor Patricia A. McCoy on Docket No. CFPB-2021-0006

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RIN 3170-AB07

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Acting Director Dave Uejio
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Director Uejio:

Thank you for the opportunity to comment on the CFPB's proposed rule on protections for borrowers affected by the Covid-19 emergency under RESPA and Regulation X. I am a law professor at Boston College and previously served as Assistant Director for Mortgage Markets at the CFPB.

I. Introduction And Summary Of Comment

In the wake of the Covid-19 pandemic, millions of people lost their jobs and others had to leave the workforce due to health concerns or lack of childcare. Millions more suffered wage or hours cuts. Although employment is slowly improving, 9.8 million people remain unemployed[1] and an additional 6.6 million people want to work but are not looking for a job (many due to health or childcare concerns).[2] These dislocations have disproportionately harmed Black and Hispanic workers.[3]

This income shock to millions of households has important knock-on consequences, including for mortgage loan performance. To curtail unnecessary foreclosures, federal guarantors and insurers offered forbearance and instituted foreclosure moratoria for federally backed mortgages. Meanwhile, some servicers of home mortgages held in portfolio and of private-label mortgages offered forbearance options of their own.

These loss mitigation programs have been crucial in preventing foreclosures and the further spread of Covid-19 until the economy improves and the pandemic is contained. Nevertheless, as federal forbearance periods expire later this year,[4] numerous distressed homeowners who exit

[1] Bureau of Labor Statistics, *The Employment Situation – April 2021* at 2 (USDL-21-0816, May 7, 2021), https://www.bls.gov/news.release/pdf/empsit.pdf.
[2] *Id.*
[3] *Id.* at 2, 6.
[4] The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted on March 27, 2020, originally provided up to 360 days of forbearance for eligible mortgage borrowers with federally backed mortgages. Pub. L. No. 116-136, 134 Stat. 281 (2020). In February 2021, the Federal Housing Finance Agency (FHFA), Federal Housing Administration (FHA), Department of Veterans Affairs (VA), and Department of Agriculture (USDA) extended their forbearance programs for federally backed mortgages beyond the minimum required by the CARES Act. The extension authorized a maximum forbearance period of up to 18 months for borrowers who

forbearance will immediately hit a "cliff" when their payment obligations resume. Those borrowers include close to 400,000 homeowners who were more than 90 days behind on their mortgage payments in March 2021 and who may face immediate foreclosure when they leave forbearance, absent relief. That month, another 160,000 borrowers who had already left forbearance were delinquent and not in loss mitigation. Finally, an estimated 211,000 mortgage borrowers who never entered forbearance and who were 90 or more days delinquent and not in loss mitigation in March, are also at risk of foreclosure.[5]

In many of those cases, loss mitigation would be more cost-effective to the homeowners and investors involved than foreclosures.[6] However, there are serious concerns that servicers may not be prepared for the unprecedented number of defaulted borrowers expected to hit the "cliff" in September, October, and November of this year. If that happens, loss mitigation applications may be jeopardized as servicers rush to file for foreclosure.

This risk of needless foreclosures would result in multiple harms. From a strictly legal perspective, eligible borrowers would not receive the loss mitigation evaluations they are entitled to receive under RESPA and Regulation X. From an economic vantage, numerous borrowers who *would have* qualified for loss mitigation had they been properly evaluated would lose their homes and an unnecessary amount of equity. The accompanying loss of wealth would exacerbate the existing wealth disparity in the United States, particularly for lower-income households and people of color. Meanwhile, investors who owned the foreclosed borrowers' mortgages would suffer unnecessary financial losses. Homes surrounding the foreclosed homes would also drop in value. Finally, the evicted household's need for immediate relocation could increase the risk of spread of Covid-19.

In response to these concerns, the CFPB has proposed a modest rule to provide for orderly processing of loss mitigation applications for borrowers in default later this fall. The proposed rule would create a short Covid-19 emergency pre-foreclosure review period next fall by prohibiting servicers from instituting foreclosure proceedings until after December 31, 2021. Between the effective date of the rule and year-end 2021, servicers would have to exercise reasonable diligence to complete a full loss mitigation evaluation upon request of any borrower approaching the end of forbearance. In addition, the proposed rule seeks to streamline the loan modification process by allowing servicers to offer certain loan modification options[7] to eligible

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requested an extension by a date certain. For most borrowers who received that extension, their forbearance periods will end in September, October, or November of this fall.

[5] *See* notes 12-18 *infra* and accompanying text.

[6] *See* Patricia A. McCoy, *Barriers to Foreclosure Prevention During the Financial Crisis*, 55 ARIZ. L. REV. 723 (2013).

[7] Importantly, these options would have to incorporate specific consumer protections, including allowing borrowers to delay repaying certain arrears until the mortgage loan is refinanced, the mortgage property is sold, the term of the mortgage ends, or, for FHA-insured mortgages, the mortgage insurance terminates. In addition, the servicer could not charge interest on those arrears. Second, the loan modification could not result in a higher monthly principal and interest payment. Third, the modification could not extend the loan term by more than 480 months from the effective date of the loan modification. Fourth, the service could not charge a fee for the loan modification and would have to waive all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the loan modification. Finally, acceptance by the borrower would end any preexisting delinquency on the mortgage loan, either immediately or when the borrower satisfies the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification.

borrowers based on an incomplete application. The proposed rule would also make temporary amendments to the early intervention and reasonable diligence obligations to ensure that servicers tell borrowers about the availability of forbearance and of loss mitigation options following exit from forbearance.

In short, the Bureau's proposed rule is an appropriate and tailored response to the looming risk of unnecessary mass foreclosures posed by the end of the forbearance periods.

II. <u>When Servicers Are Unprepared For Sudden Spikes In Distressed Loan Servicing, Significant Harm Can Result</u>

The Bureau has proposed the instant rule, fully mindful of the problems that arise when servicers are not prepared to handle a surge in delinquent home mortgages. The experience of the Great Recession is instructive. That financial crisis resulted in millions of delinquent mortgages over the period from 2007 to 2011. Heading into that crisis, servicers mostly serviced performing loans because rising home values kept default rates low. When home values nationally began their long downward slide in the first quarter of 2007, however, mortgage delinquencies skyrocketed and remained high for the next five years.

Servicers were unprepared to handle the deluge of distressed loans. Servicing non-performing loans is significantly more costly and complicated than servicing performing loans. Doing so is more time-consuming, takes much more labor, and requires workers trained in loan underwriting, unlike servicing performing loans. In the lead-up to the financial crisis, however, servicers had not hired or trained sufficient staff to handle delinquent mortgages. Similarly, they had not built out the IT infrastructure or implemented the procedures or controls they needed to resolve those mortgages cost-effectively.

One reason servicers dragged their feet was that servicing distressed loans costs significantly more than servicers were paid under the standard servicing compensation model. That model only pays servicers a fixed fee, ranging from 19 to 69 basis points annually depending on the investor, and does not compensate the likely higher servicing costs due to a rise in delinquent loans.[8] This fixed servicing fee model is still in effect, and so are its perverse incentives to cut corners when servicing distressed mortgage loans.

During the Great Recession, after servicers were inundated with loss mitigation requests, the servicing system could not handle the volume and broke down. Rampant servicing abuses ensued as a result. Borrowers who qualified for loan modifications under HAMP or other programs were unnecessarily foreclosed on. Servicers and their contractors ignored legal protections against foreclosures--sometimes fraudulently, as the robo-signing scandal demonstrated. Servicers routinely lost loss mitigation applications by homeowners and borrowers could not get through to their servicers over the phone.

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[8] *See* Karan Kaul, Laurie Goodman, Alanna McCargo, and Todd Hill-Jones, *Options for Reforming the Mortgage Servicing Compensation Model* 3 (April 2019), https://www.urban.org/sites/default/files/publication/100131/options_for_reforming_the_mortgage_servicing_compensation_model_0.pdf.

These problems resulted in major enforcement actions, including the massive federal-state servicing settlement in 2012. This accord, known as the National Mortgage Settlement, was the largest consumer financial protection settlement in United States history and awarded over $20 billion in direct consumer relief. Meanwhile, the CFPB adopted amendments to Regulation X establishing procedures that mortgage servicers must follow when evaluating loss mitigation applications by mortgage borrowers. The amendments further mandated specific communications between servicers and delinquent borrowers.

III. <u>There Will Be A Spike Of Hundreds Of Thousands Of Seriously Delinquent Mortgage Borrowers In The Next Seven Months</u>

According to Black Knight's *Mortgage Monitor* March 2021 Report, the number of mortgage loans that were seriously delinquent (90 days or more past due) was five times the level pre-pandemic.[9] Few of these loans have proceeded to foreclosure due to foreclosure moratoria, forbearance plans, or both.[10] On June 30 this year, the foreclosure moratoria for federally backed mortgages will expire and this fall, hundreds of thousands of borrowers will exit forbearance. Under the current version of Regulation X, borrowers who are more than 120 days delinquent on their mortgage loans will face an imminent risk of foreclosure when the foreclosure moratoria and forbearance periods end.

As of March, 1.9 million homeowners were 90+ days delinquent on their home loans and an "elevated" number of borrowers rolled from 60+ to 90+ days delinquent.[11]

Three groups of homeowners, totaling approximately 758,350 borrowers, are at risk of imminent foreclosure in the coming months. The first consists of homeowners who will exit forbearance over the next half year. According to Black Knight, the largest number in this group (610,000 borrowers) will leave forbearance in September and October 2021.[12]

Of those 610,000 borrowers, there are strong reasons to believe that the majority will leave forbearance seriously delinquent and at urgent risk of foreclosure. To begin with, 63.5% of all borrowers in active forbearance (1,466,000 out of 2,309,000 borrowers) as of March 2021 were 90+ days delinquent.[13] If that share remains stable, 387,350 of the 610,000 borrowers losing forbearance in September and October could be seriously delinquent. Second, most of these borrowers already received one or more extensions of their forbearance periods, which suggests that they were not able to resume their old monthly payments. Third, borrowers in forbearance are more likely to have factors associated with higher default risk, including higher loan-to-value ratios, living in majority-minority or lower-income census tracts, difficulty paying their auto loan or credit card bills, or single borrower status.[14] Fourth, FHA borrowers are exiting forbearance

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[9] Black Knight, *Mortgage Monitor March 2021 Report* at 3, https://cdn.blackknightinc.com/wp-content/uploads/2021/04/BKI_MM_Mar2021_Report.pdf [hereinafter Black Knight March 2021 Report].

[10] *Id.*

[11] *Id.* at 6.

[12] *Id.* at 9.

[13] *Id.* at 11-12; author's calculations.

[14] Consumer Financial Protection Bureau, *Characteristics of Mortgage Borrowers During the COVID-19 Pandemic* 7-9, 12-14, 17 (May 2021), https://files.consumerfinance.gov/f/documents/cfpb_characteristics-mortgage-borrowers-during-covid-19-pandemic_report_2021-05.pdf [hereinafter CFPB Special Issue Brief].

more slowly and have weaker creditworthiness than borrowers with other federally backed loans on average.[15] Finally, the Bureau reports that "the percent of borrowers making their mortgage payments while in a forbearance program has declined relative to the number of borrowers who remain in forbearance."[16]

The second group consists of 160,000 borrowers who already left their forbearance plans, are not in loss mitigation, and remain delinquent. More than 100,000 of those borrowers were already delinquent at the start of the pandemic.[17]

Finally, there is a third group of 211,000 borrowers who are 90+ days delinquent, are not in loss mitigation, and never entered forbearance.[18]

Most of these 750,000+ seriously delinquent borrowers will not be able to resolve their delinquencies unless their servicers evaluate them for loss mitigation instead of immediately initiating foreclosure proceedings.

IV. There Is Serious Concern That Servicers Are Unprepared For The Surge In Distressed Mortgage Loans

The impending forbearance exit "cliff" foreshadows an unprecedented spike in seriously delinquent mortgages this fall for which servicers are not prepared. The Bureau states that it "is not aware of another time when . . . as many mortgage borrowers were forecast to exit forbearance within a relatively short time frame," continuing: "This lack of historical precedent creates market uncertainty for the future."[19] The high volume of cases and their complexity combined with an influx of new, inexperienced servicing staff and continued uncertainty surrounding unemployment levels and Covid-19 infection rates (particularly in less vaccinated regions and/or due to variants) next fall will put extreme strain on the operating capacity of mortgage servicers.

CFPB Supervision recently reported that mortgage servicers already were hard-pressed to meet the demands of CARES Act forbearance requests starting in March 2020. In a recent issue of *Supervisory Highlights*, the Bureau observed that with the onset of the pandemic, "[m]any servicers reported operational constraints, resource burdens, and service interruptions," with some servicers reporting "disruptions to normal [compliance management systems] and monitoring processes."[20] This is a troubling sign that many mortgage servicers, over the past

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15 *See id.* at 8.

16 Consumer Financial Protection Bureau, *Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X*, 86 Fed. Reg. 18840, 18844 (Apr. 9, 2021) [hereinafter Proposed Rule].

17 Black Knight March 2021 Report, *supra* note 9, at 11; *see also* CFPB Special Issue Brief, *supra* note 14, at 9, 17 (reporting that 59% of delinquent mortgage borrowers were delinquent prior to the pandemic in February 2020).

18 Black Knight March 2021 Report, *supra* note 9, at 12.

19 Proposed Rule, 86 Fed. Reg. at 18844.

20 Consumer Financial Protection Bureau, *Supervisory Highlights COVID-19 Prioritized Assessments Special Edition* Issue 23, at 5 (Winter 2021), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf.

year, did not sufficiently ramp up and train their distressed loan servicing staff and do not have adequate compliance systems in place to handle the pandemic-related workload. In all likelihood, servicers who are having difficulty managing their distressed loan portfolios already are unprepared to handle an even bigger, expected surge of seriously delinquent borrowers in the coming months.

CFPB Consumer Response reports similar problems. In March 2021, consumers filed the highest number of mortgage complaints with the CFPB since April 2018. The most common issue reported since January 2020 has been "trouble during the payment process."[21] Notably, the CFPB observed, "[s]ome consumers expressed frustration that servicers did not communicate clearly about which relief options would be available when their forbearance ended."[22] What "would happen to forborne payments" was of particular concern to many of those consumers, prompting the Bureau to comment: "Some consumer experiences suggest that the possibility of modifying their loans by moving all missed payments to the end of the loan term was not clearly communicated or discussed during some of these conversations."[23] Many of these complaints "stemmed from phone calls with servicers, suggesting that servicers may not be clearly communicating about the variety of available options."[24]

Currently, Regulation X places several important obligations on mortgage servicers to protect to delinquent borrowers. When a borrower becomes 30+ days delinquent, for instance, the servicer must make good faith efforts to establish live contact with the borrower by the 36th day of delinquency and inform him or her, where appropriate, that loss mitigation options may be available.[25] In addition, no later than the 45th day of delinquency, servicers must provide delinquent borrowers with written notice concerning their delinquency and loss mitigation options.[26]

Regulation X further stipulates that servicers cannot make a first foreclosure notice or filing until a mortgage loan obligation is more than 120 days delinquent.[27] Finally, servicers must exercise reasonable diligence to complete any loss mitigation application submitted 45 days or more before a foreclosure sale and may not initiate foreclosure when a complete loss mitigation application is pending.[28] This last provision is designed to prevent dual tracking, in which servicers process loss mitigation applications and foreclosure actions simultaneously.

CFPB Supervision has already identified multiple issues with mortgage servicing during the pandemic posing the risk of consumer harm. These include:[29]

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[21] Consumer Financial Protection Bureau, *Complaint Bulletin* 4 (May 2021), https://files.consumerfinance.gov/f/documents/cfpb_mortgage-forbearance-issues_complaint-bulletin_2021-05.pdf [hereinafter CFPB Complaint Bulletin].

[22] *Id.* at 8.

[23] *Id.*

[24] *Id.*

[25] 12 C.F.R. 1024.39(a).

[26] 12 C.F.R. 1024.39(b).

[27] 12 C.F.R. 1024.41(f)(1).

[28] 12 C.F.R. 1024.41(b)(1); *see* Proposed Rule, 86 Fed. Reg. at 18862.

[29] Consumer Financial Protection Bureau, *Supervisory Highlights COVID-19 Prioritized Assessments Special Edition* Issue 23, at 5-9 (Winter 2021), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf.

- providing “incomplete or inaccurate information to consumers regarding CARES Act forbearances”;
- sending erroneous collection notices, levying late fees, and initiating foreclosure for borrowers in forbearance plans;
- “[c]ancelling or providing inaccurate information about borrowers’ preauthorized electronic funds transfers”;
- “[f]ailing to timely process forbearance requests”;
- enrolling borrowers in unwanted forbearances; and
- failing to properly evaluate delinquent borrowers for loss mitigation and to enroll those who qualified in those plans.

Servicers will have to avoid these and similar issues when borrowers exit their forbearance plans *en masse* later this year. For instance, it will be essential for servicers to provide accurate information to distressed borrowers about their loss mitigation options. However, I lack confidence that servicers will discharge that responsibility dependably, given the problems some servicers exhibited this past year providing correct information about forbearance plans.[30] Similarly, some servicers prematurely instituted foreclosure for borrowers in forbearance, creating a real risk that some servicers will make the same mistake when delinquent borrowers exit forbearance later this year. Finally, the failure of some servicers this past year to evaluate distressed borrowers for loss mitigation or to timely process forbearance requests raises serious concerns about servicers’ ability to process loss mitigation requests (either timely or at all) without the short additional time period that the proposed rule would afford.

V. <u>Unnecessary Foreclosures Would Result in Serious Harm</u>

Unless the CFPB gives servicers more time to process loss mitigation requests and the ability to evaluate loan modification applications more quickly, there is a serious danger that the upcoming spike in non-performing loans will lead to unnecessary foreclosures. It is vital to avoid that outcome because needless foreclosures result in rampant harms.

First and foremost, foreclosure is a drastic measure that results in eviction. As I will discuss below, this harm is not limited to individual families; it has serious distributive consequences and injures the surrounding community.

Second, and in a related vein, a rush to foreclosure often leaves cash on the table that could and should have gone to borrowers and investors. Foreclosures entail such high costs, from lost equity to fees, that loss mitigation can be more cost-effective in many circumstances.[31] When loss mitigation is net present value (NPV) positive compared to foreclosure,[32] the servicer should

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30 For additional evidence of that problem, see Proposed Rule, 86 Fed. Reg. at 18849 & n.89.

31 Proposed Rule, 86 Fed. Reg. at 18868.

32 For the majority of home mortgages that are federally backed, the federal insurers and guarantors have well-established loss mitigation protocols. Investors who hold portfolio loans also often offer flexible loss mitigation options. Meanwhile, pooling and servicing agreements for the small minority of private-label securitized home mortgages usually allow a certain quantum of loss mitigation, although the provisions depend on the deal.

grant it. In these circumstances, loss mitigation is a win-win because it increases investors' expected recovery while preserving homeowners' home equity.

There are special additional reasons why servicers should evaluate all loss mitigation applications by delinquent borrowers this fall. Job market volatility has been a unique feature of the pandemic. As a result, the earnings capacity of many homeowners is in flux from month to month. While labor market growth is not as vibrant as expected, there are strong indications that the labor market is recovering. A borrower who is unemployed or working for lower wages today may well return to the workforce at higher pay and have the ability to resume loan payments on an NPV-positive basis this fall.[33] Rising vaccination levels may speed the return to the workforce, as working conditions become safer, offices and schools re-open, and those who left the workforce due to health or childcare concerns come back to work.

When loss mitigation is appropriate, it is preferable to allow the borrower to stay in the home where possible. However, some borrowers will have to move because they cannot afford the payments on an NPV-positive loan modification. For them, other forms of loss mitigation can cushion the blow of having to relocate. For borrowers with sufficient equity, loss mitigation will allow them to capture as much of that equity as possible while increasing investor recovery by selling at fair market value or through a short sale or deed in lieu of foreclosure. This option may be particularly attractive in markets that are currently experiencing rapid housing price appreciation.

Third, it is important to grant loss mitigation whenever possible due to the large negative externalities from foreclosure. Foreclosures exact a price on surrounding neighborhoods in terms of distressed sales prices generating lower comparables, dilapidated property conditions, and crime. Widespread foreclosures can damage the economy, locally or even nationally, as loan losses impair the solvency of banks. Finally, the forced relocation of households during the Covid-19 pandemic raises serious public health concerns, particularly if those families move to crowded conditions.

Finally, unnecessary foreclosures have serious negative consequences for distributive justice. In the past few years, the racial wealth gap has become an issue of vital national concern. For Black and Hispanic households and lower-income families, the wealth gap chiefly manifests itself as a serious gap in homeownership rates between whites and people of color.

Any failure by servicers to offer loss mitigation equitably and properly is likely to exacerbate the racial wealth gap. According to the CFPB's analysis, Black and Hispanic homeowners are, respectively, two times or 1.5 times as likely to be delinquent on their mortgages as white homeowners.[34] All else being equal, servicing mistakes will likely thus have a disproportionate effect on distressed Black and Hispanic borrowers. Unnecessary foreclosures have a stronger

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[33] This is particularly true if repayment of any forborne payments is deferred.

[34] CFPB Special Issue Brief, *supra* note 14, at 11; *see also* Bureau of Consumer Financial Protection, *Housing insecurity and the COVID-19 pandemic* (March 2021), https://files.consumerfinance.gov/f/documents/cfpb_Housing_insecurity_and_the_COVID-19_pandemic.pdf.

negative effect on wealth for Black and Hispanic homeowners because home equity comprises most of their wealth and they have less home equity than comparable white borrowers.[35]

The Bureau's research casts light on this disparity. The CFPB's recent special issue brief reported that borrowers with higher loan-to-value ratios are more likely to be delinquent on their mortgages.[36] Homeowners with higher LTV ratios are disproportionately Black and Hispanic.[37] Furthermore, in many cases, the LTV ratios reported by the Bureau—which are *current* LTV ratios—reflect low housing price appreciation in the neighborhoods where the houses are located. According to the issue brief, homeowners who live in majority-minority census tracts and in tracts with lower relative income are significantly more likely to be delinquent on their loans. Historically, these tracts have experienced slower housing price appreciation than majority or higher-income tracts.[38]

Because homeowners in these tracts are more likely to be Black or Hispanic, lagging home values may limit their options if they have difficulty repaying their mortgages. High LTV borrowers who are struggling with delinquency may end up underwater on their mortgages and not able to pay off their loans by selling their homes.[39] Similarly, impaired credit may prevent these borrowers from refinancing their loans. Because their ability to retire their mortgage loans may be more limited, servicers will need to evaluate these borrowers carefully for possible loss mitigation.

VI. <u>The Bureau's Proposal Is Modest And Carefully Tailored To Give Needed Breathing Room For Loss Mitigation Evaluations</u>

For the reasons explained above, there is ample reason for the Bureau to mandate a cooling-off period to allow servicers to carefully evaluate the anticipated upswing in loss mitigation applications this fall. The Bureau's proposals for a short special pre-foreclosure period is modest in length and carefully balances the time needed to process the added volume of requests versus any added costs to servicers from foreclosure delays. Moreover, the proposal represents a wise response to the evidence that the servicing system is already under strain. As CFPB Consumer Response recently found, consumers are already reporting long delays by servicers in processing loss mitigation requests.[40] This time pressure will increase as the backlog of delinquent borrowers exiting forbearance hits the servicing system in the coming months. The special pre-foreclosure period will help relieve this pressure by giving servicers—who are already under strain--more time to evaluate loss mitigation applications carefully. Similarly, the streamlined modification option should allow servicers to process more loan modification requests at a time. Accordingly, I am fully supportive of the CFPB's proposal and urge the Bureau to adopt it without haste.

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35 Michael Neal, Jung Hyun Choi & John Walsh, *Before the Pandemic, Homeowners of Color Faced Structural Barriers to the Benefits of Homeownership* 2-4 (Urban Institute, August 2020), https://www.urban.org/sites/default/files/publication/102781/before-the-pandemic-homeowners-of-color-faced-structural-barriers-to-the-benefits-of-homeownership.pdf.

36 CFPB Special Issue Brief, *supra* note 14, at 5, 7, 12.

37 Neal, Choi & Walsh, *supra* note 35, at 5-7.

38 *Id.* at 8.

39 CFPB Special Issue Brief, *supra* note 14, at 7.

40 CFPB Complaint Bulletin, *supra* note 21, at 10.

In my remaining comments, I respond to questions that the Bureau raised in the preamble to the proposed rule.

a. <u>The End Date Of The Special Pre-Foreclosure Period</u>

The proposed rule would effectively end the special pre-foreclosure period on December 31, 2021, by prohibiting servicers from making the first notice or filing for any foreclosure before that date. Based on what we know currently, that end date seems to strike the right balance between minimizing costs to servicers and allowing sufficient time for loss mitigation review. The special pre-foreclosure period is certainly not too long and is probably long enough (except possibly for the smaller number of borrowers exiting forbearance in November 2021).

However, uncertainty remains whether federal authorities will need to extend the federal foreclosure moratoria, forbearance periods, or both. There are vagaries concerning lack of herd immunity, vaccine hesitancy, and the risks from variants, both known and unknown, and the effect on businesses and schools is also unknown. Given these uncertainties, it might make more sense for the Bureau to define the end date for the special pre-foreclosure period as the later of December 31, 2021, or X days after the last-announced forbearance extension by FHFA or FHA.

b. <u>Possible Exemptions From The Special Pre-Foreclosure Period</u>

The Bureau is considering an exemption to allow servicers to make a first foreclosure notice or filing before year end if the servicers had completed a loss mitigation review of the borrower and the borrower was not eligible or had declined all available loss mitigation options. Due to rapid anticipated improvements in employment and the labor market, the Bureau should reject such an exemption. With the employment situation rapidly changing, borrowers who were rejected for loss mitigation before the final rule's effective date could be eligible for loss mitigation later this fall due to reemployment. It would be tragic to deny these borrowers a second chance at loss mitigation due to earlier Covid-19 hardships that were no fault of their own. Instead, servicers should evaluate all interested and eligible borrowers for loss mitigation anew during the special pre-foreclosure period.

Similarly, it would be counterproductive to limit the special pre-foreclosure review period to borrowers who first became delinquent pre-pandemic or who entered a forbearance program after the effective date of any final rule. Doing so would undermine the rationales for the proposed rule. Such an exemption would likely result in otherwise preventable foreclosures that lose money for borrowers and investors, depress property values, and place the health of the community at risk. It would also likely worsen the racial wealth gap. Moreover, those effects would probably be substantial given the not-insignificant number of delinquent borrowers in forbearance who were already delinquent when the pandemic hit.[41] In all likelihood, those costs outweigh the costs to servicers from a few months' delay in foreclosures.

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[41] *See* page 5 *supra*.

c. Special Communication Requirements

The proposed rule would require servicers to provide delinquent borrowers in forbearance with a list and brief description of all loss mitigation options available to the borrower. This provision would make a substantial improvement to Regulation X. However, I urge the Bureau to make minor modifications to this requirement to better serve consumers.

First, the proposal would only require servicers to provide this information during the last required live contact before the end of the forbearance period. Borrowers may need more time, however, to evaluate their options, line up their paperwork and sell their homes, if necessary. Moreover, if a servicer failed to provide the required information during the last required live contact, borrowers would lose valuable time in the loss mitigation process. Such failures are not inconceivable, given the report in the recent CFPB *Complaint Bulletin* that consumers "were not informed that their loan was ineligible for deferrals until after their forbearance plan ended."[42] Consequently, I would require servicers to provide this information starting with the next live contact after the final rule's effective date.

Second, the rule should explicitly require servicers to apprise delinquent borrowers of their loss mitigation options in writing, as well as over the phone. The Bureau's most recent *Complaint Bulletin* documents consumer confusion when servicers relay information about borrowers' loss mitigation options solely orally. This is not surprising, because loss mitigation options are complicated to begin with and especially hard to comprehend over the phone. Separately, if it has not done so already, the CFPB should develop compliance materials containing standard, easy-to-understand language that servicers can use to describe loss mitigation alternatives to borrowers.

Third, for borrowers exiting forbearance, the CFPB should require servicers to affirmatively state (including in writing) whether forborne payments will be deferred until the earlier of refinancing, the sale of the home, the end of the loan term, or the mortgage insurance terminates. The CFPB's latest *Complaint Bulletin* documents considerable consumer confusion and anxiety about the availability of deferral. In particular, borrowers with federally backed mortgages may qualify for deferral. When they do, they may be able to resume mortgage payments and qualify for loss mitigation more easily.

Fourth, the CFPB should require servicers to provide expanded disclosure of loss mitigation options to all delinquent borrowers, not just to those who are (or were) in forbearance. There is no reason to treat the two groups differently because the harms from unnecessary foreclosure are the same for both groups.

Finally, the CFPB should make expanded disclosure of loss mitigation options permanent. The loss mitigation process is complicated and baffling to borrowers as it is. A written list of detailed loss mitigation options may help homeowners evaluate what to do and assist any housing counselors who guide them through that process.

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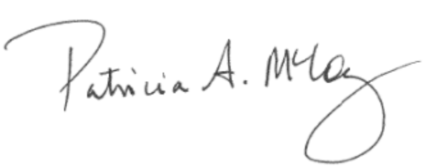
[42] CFPB Complaint Bulletin, *supra* note 21, at 8.

d. Streamlined Modifications

The streamlined modification proposal is an excellent idea that should help servicers process loan modifications more efficiently. In particular, I applaud the Bureau for prohibiting streamlined modifications that would cause the borrower's required monthly principal and interest payment to increase. There is ample empirical research that loan modifications with higher monthly payments cause re-default rates to go up.[43] This important attribute of streamlined modifications would set borrowers up for success, not failure.

Thank you for considering my remarks.

Sincerely,



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[43] For a review of the literature, see Patricia A. McCoy, *The Home Mortgage Foreclosure Crisis: Lessons Learned, in* HOMEOWNERSHIP BUILT TO LAST: BALANCING ACCESS, AFFORDABILITY, AND RISK AFTER THE HOUSING CRISIS 418, 428-30 (Eric S. Belsky, Christopher E. Herbert, & Jennifer H. Molinsky, eds., Brookings Institution Press, 2014).