MORTGAGE BANKERS ASSOCIATION

March 2, 2014

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Advance Notice of Proposed Rulemaking – Debt Collection | CFPB-2013-0033; RIN 3170-AA41

Dear Ms. Jackson:

The Mortgage Bankers Association (MBA)[1] appreciates the Consumer Financial Protection Bureau's (the Bureau) deliberate approach to rulemaking and its efforts to obtain the views of all participants in the complicated area of the debt collection process. As the Bureau notes, many borrowers have debts and are subject to the protections of the FDCPA. MBA is pleased to provide information to assist the Bureau in establishing a bright line that recognizes the robust and unique borrower protections established by the new CFPB Mortgage Servicing Rules (Servicing Rules) and distinguishes the requirements that mortgage servicers must meet from that of other types of debt collection.

The Bureau's Advanced Notice of Proposed Rulemaking (ANPR) explains, "The Bureau seeks input on the basic premise that it should generally seek to harmonize any rules it develops for third-party debt collectors and first-party debt collectors, except to the extent that the law, facts, or policy considerations warrant different treatment." Because the processes and justifications of mortgage servicers collecting their own debts vary widely from that of third-party debt collectors, applying the Fair Debt Collection Practices Act (FDCPA) to mortgage servicers[2] is inappropriate. Through the Servicing Rules, mortgage servicers are now subject to comprehensive mortgage-specific requirements far beyond those generally imposed on debt collectors under the FDCPA. Extending the definition of debt collectors to include both first-party and third-party debt collectors could unnecessarily expose the Bureau to litigation risk for exceeding Congressional intent and unintentionally harm borrowers by damaging their relationship

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.
[2] MBA defines the term "mortgage servicers" for purposes of this comment to include mortgage servicers actively servicing mortgage loans for itself as well as others, including Government Sponsored Entities and private investors.

with their mortgage servicer. The Bureau should instead incorporate a bright line standard that recognizes the separate protections already afforded to mortgage borrowers through the Servicing Rules.

1. The Bureau's recently implemented Servicing Rules should be given an opportunity to operate before overlaying additional, potentially contradictory, rules.

As the Bureau contemplates potential changes to FDCPA requirements, MBA is concerned that such changes may be premature in the mortgage servicing context, especially given the wholesale regulatory changes that went into effect in January 2014. At this point, it is impossible to effectively predict all of the potential conflicts that may arise between potential changes to the FDCPA and the newly established Servicing Rules. At a minimum, any consideration of extending the FDCPA to mortgage servicers must be viewed in the context of the new Servicing Rules and its robust borrower protections.

The Servicing Rules established by Dodd-Frank represent some of the largest-scale changes to servicing operations and borrower protections in our industry's history, especially when viewed in light of state, GSE, other agency, and investor requirements that have built upon the Servicing Rules to provide additional borrower protections. These changes have been effective for less than two months; it would be prudent to allow a period of time to determine whether the required level of protection has been provided through the Servicing Rules before seeking additional wholesale changes as potentially contemplated in this ANPR. MBA also encourages the Bureau to carefully weigh the impact of any potential changes given the high likelihood that additional changes to the Servicing Rules will need to take place within the next year.

As detailed below, the Bureau may wish to consider taking steps to avoid unnecessary overlap, redundancy, and conflict by establishing a bright line rule that ensures Servicing Rule protections carry through for all borrowers and requires FDCPA compliance only once a lien has been extinguished or liquidated and the servicer is pursuing a deficiency.

2. Extending the FDCPA to all mortgage servicers as first-party debt collectors is unnecessary

Mortgage servicers are heavily regulated by a host of different entities, including the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve, states, and the CFPB itself. In addition, servicers need to meet government-sponsored enterprise (GSE) and other investor requirements, which place a premium on establishing a relationship of trust with the borrower, particularly with respect to loss mitigation discussions. Collectively and in coordination with the Federal Trade Commission and the Federal Communications Commission, these entities have the ability to directly affect policy and cause operating process changes today without the need for extension of the FDCPA as contemplated in the ANPR.

Over the past twelve months, the Bureau also implemented a precise and robust set of requirements through updates to Regulations X and Z (the Mortgage Servicing Rules) to monitor mortgage servicers and ensure frequent borrower contact, the transparent provision of information, and a high level of servicer responsiveness. This is especially the case for borrowers who become delinquent. An extension of the FDCPA to mortgage servicers- as contemplated by the ANPR fails to take into account the new Servicing Rules and will only serve to confuse borrowers and complicate the effective implementation of the new borrower protections.

However, it is a mistake to assume that mortgage servicers only seek to provide a positive customer service experience in order to satisfy a heightened regulatory environment. In fact, a positive customer experience is fundamental to the servicing industry's continued success and growth. For example, one MBA member analyzed a random sample of their customers experiencing delinquency in 2011 and found that by 2013, 15.4% had opened new increment accounts with their financial institution.

In passing the FDCPA, Congress recognized the law was limited to third-party collectors of past due debts because, unlike first-party creditors "who are generally restrained by the desire to protect their good will when collecting past due accounts," independent third-party debt collectors are likely to have "no future contact with the borrower and often are unconcerned with the borrower's opinion of them."[3] Mortgage servicers specifically anticipate long-term contact with the borrower and work to leverage that continuing relationship to provide additional products and services beyond mortgage servicing, such as checking accounts or home equity loans. A negative customer experience would only hamper this goal and harm the lending institution, regardless of any overlaid regulatory requirements. Mortgage servicers also provide services beyond simply collecting payments, such as providing tax information to borrowers and establishing and managing escrow accounts for the payment of taxes and insurance.

3. FDCPA "Miranda" warning requirements unnecessarily confuse and scare borrowers

One potential source of conflict between an extension of the FDCPA to mortgage servicers and the new Servicing Rules is a requirement that a debt collector provide a debtor with a "Miranda" warning upon initial contact, and a shorter "mini-Miranda" in all subsequent contacts (both written and oral) for the life of the loan. The Miranda notices require the collector to identify itself as a "debt collector," to disclose that the contact represents an attempt to collect a debt, and that any information will be used for that purpose. These warnings are intended to prevent the use of false or deceptive tactics (such as a phony sweepstakes) to trick debtors into divulging private financial information, home address, or telephone numbers.

[3] Harrison v. NBD, Inc., 968 F.Supp. 837 (E.D.N.Y., 1997) (Citing S. Rpt. No. 95-382, 95th Cong., 1st Sess., reprinted in 1977 U.S.Code Cong. & Admin. News 1695, 1696).

However, in the context of a mortgage servicer collecting its own debt, these requirements are both unnecessary and ultimately harmful to the borrower. In short, these notices:

- **Mislead the borrower about the nature of the servicer's relationship to the borrower.** Unlike third-party debt collectors, mortgage servicers have long-term relationships with their borrowers. A harshly worded Miranda notice may actually discourage delinquent borrowers from contacting their lender or servicer out of fear that they are simply "another debt collector." This casts the servicer/borrower relationship in an unnecessarily adversarial light, frustrating servicers' efforts to work with delinquent borrowers to provide options that may help a borrower bring their loan current.

  The Bureau and other entities imposing borrower contact requirements recognize the difficulty servicers face in establishing consistent contact with delinquent borrowers and have made frequent contact with borrowers a cornerstone of loss mitigation requirements. For example, Fannie Mae's Job Aid guidance to assist servicers in establishing Quality Right Party Contact emphasizes building a rapport with the borrower by expressing empathy and communicating a desire to help. [4] To avoid the borrower terminating the call early, the aid recommends acknowledging the borrower's emotions and letting them know how the servicer can help them.

  Obviously, it is more difficult to build such a rapport with a borrower if the servicer is first required to provide a warning that would seem to contradict that desire to help. This is especially concerning when considering the "least sophisticated consumer," as required under the FDCPA.[5] Such a borrower is likely to take a disclaimer that "any communication is an attempt to collect a debt and any information obtained will be used for that purpose" as a warning that the servicer is actually not intending to help them, and that they should be suspect in providing any information or engaging further with the servicer.

  Implementing Miranda warnings as contemplated in this ANPR will thus make borrower contact more difficult, raising the risk of lengthier delinquencies and ultimately reducing the loss mitigation options available to borrowers. As the Servicing Rules are designed, a servicer's options to assist a borrower to bring their loan current and avoid foreclosure are reduced based on proximity to the foreclosure date. Requirements that discourage borrowers from making contact or responding to their servicers' offers of help stand at odds with the goals of the Bureau's Servicing Rules.

- **"Protects" borrowers from providing information that the mortgage servicer already has in its possession.** Unlike third-party debt collectors,

[4] Fannie Mae Quality Right Party Contact (QRPC) Job Aid, (Date:3/29/12) Available from https://www.fanniemae.com/content/job_aid/achieving-qrpc.pdf; Accessed 2/3/14.
[5] See, e.g. Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (7th Cir. 1985).

mortgage servicers already have detailed information about the borrower, including address, bank account information, credit report information, social security number, etc. While a debt collector seeking payment of an unrelated debt may need to seek additional data from a borrower (such as address or financial data), there is no such need for a mortgage servicer. Such "protections" are unnecessary and evidence that the FDCPA contemplates a relationship far different from that of a borrower and their mortgage servicer.

- **Unnecessarily scares and confuses borrowers following servicing transfers.** It is important to note that servicing rights are actively traded today, which was not the case when the FDCPA was enacted. Such servicing transfers take place for any number of reasons, including managing capital in light of Basel III requirements, business capacity/economies of scale, business model decisions, and to obtain long-term assets and customer relationships. Requiring the inclusion of an initial Miranda warning in conjunction with the required new servicer welcome letter will create customer service problems by hindering a servicer's ability to establish a healthy customer relationship.

  Such a requirement raises a significant risk of confusing and scaring borrowers. A borrower that receives a Miranda warning as their first contact with their new servicer may legitimately worry that their loan has been "sent to collections" and will no doubt fault their new servicer for sending them a misleading and frightening notice. This concern is compounded by the additional requirement to include mini-Miranda warnings in all subsequent contacts with the borrower, even if the customer is with that servicer for decades. And as detailed below, these potentially damaging requirements are unnecessary, since the Servicing Rules include extensive notification and data management requirements that servicers must meet when participating in a servicing transfer. These requirements go far beyond the protections contemplated in the FDCPA.

- **Hinders innovative borrower-focused communication methods such as email and text messaging.** The FDCPA's Miranda requirements and strict requirements regarding communications could unnecessarily hinder innovation by preventing the industry from leveraging the ability of new media to improve the borrower experience. Innovations such as email, text, and social media strategies could all conceivably fall within the FDCPA's restrictions, hampering these promising avenues of communication.

  Research shows that borrowers welcome having an ongoing dialogue with the companies they do business with and want to receive proactive, real-time messages and reminders. A recently commissioned survey of 1,000 American borrowers found that across all industries, more than 75 percent of borrowers report that these messages are extremely helpful and welcome.[6] Research highlights that the most valued messages are critical notices – from credit fraud

[6] "What do customers want? A growing appetite for customer comminications." Varolii Corporation (Date: 10/13) avaialble from: http://www.varolii.com/~/media/Files/Offers/WhatCustomersWant_ResearchReport.ashx

alerts to power restoration notifications – and reminders to take action, such as making a payment or refilling a prescription. This is especially the case for members of younger demographics, who may come to expect servicers to be able to provide information and reminders by text message or online. A recent Western Union survey found that 64 percent of Generation Y consumers[7] receive half or more of their bill statements electronically and 21 percent of Generation Y consumers have never written a paper check to pay a bill.[8] FDCPA requirements limiting such communications unnecessarily should be avoided, especially as the Bureau seeks to encourage informed borrowers.

4. Debt Validation is inappropriate for mortgage servicers and will confuse borrowers by providing potentially misleading information

The FDCPA also requires third-party debt collectors to send, within five days of initial communication with borrowers, debt validation notices (DVN) that contain the amount of the debt and statements concerning verification and validity of the debt, among other information. The DVN contemplates a debt collector who does not have information about the borrower and seeks to ensure that the borrower is aware of who the debt collector is and to confirm that both the debt amount and the debt itself are accurate. The borrower may also request that the debt collector validate the debt prior to engaging in debt collection activities. These requirements fail to contemplate a mortgage servicer's existing relationship with the borrower and are largely duplicative of the Servicing Rules.

- **Fails to contemplate ongoing relationship:** A mortgage servicer has an existing and ongoing relationship with the borrower, and it is unclear in this context what would constitute an "initial communication with the borrower in connection with the collection of any debt" as contemplated by the FDCPA. The FDCPA also anticipates debt collectors obtaining verification of the debt from the original creditor if disputed by the borrower and providing such information to the borrower. The Federal Trade Commission, in its official commentary on 15 U.S.C. § 1692g(a) of the FDCPA, states that this verification requirement is intended to "assist the borrower when a debt collector inadvertently contacts the wrong borrower at the start of his collection efforts." Such a requirement does not contemplate mortgage servicers and will only serve to confuse borrowers.

- **Fails to align with existing Bureau, agency, and investor requirements:** Over the past twelve months, the Bureau has implemented a precise and robust set of requirements (the Servicing Rules) to ensure that, among many other protections, mortgage servicers respond to requests for information or notifications of error from borrowers, especially those borrowers whose loans may be delinquent. The Servicing Rules also set forth specific requirements to protect borrowers when servicing is transferred. FDCPA requirements to validate or substantiate an existing debt that remains with, and is collected by, a

[7] Generation Y defined as the approximately 75 million persons in the United States born between 1979 and 1999.
[8] The Western Union® Money Mindset Index, September, 2013, available at http://payments.westernunion.com/GenYmindsetindex.

mortgage servicer fail to contemplate these requirements and will only serve to confuse borrowers and complicate the servicer's implementation of their Servicing Rule responsibilities.

For example, the Servicing Rules require servicing transferors and transferees to notify borrowers of servicing transfers (§ 1024.33(b)(3)) and to have policies and procedures in place reasonably designed to achieve the objectives of facilitating the transfer of information during mortgage servicing transfers (§ 1024.38(a)). The Servicing Rules also provide significant additional protections for borrowers seeking loss mitigation within the servicing transfer process. The transferee servicer must have policies and procedures reasonably designed to identify whether any loan modification agreement exists with the transferor servicer and to obtain any such agreement from the transferor servicer. The servicer must also ensure that information reflecting the current status of discussions with a borrower regarding loss mitigation options, any agreements entered into with a borrower on a loss mitigation option, and any analysis by a servicer with respect to potential recovery from a non-performing mortgage loan are included within the transfer. The Bureau has also signaled that it will be actively enforcing these servicing transfer requirements and monitoring transfers carefully to ensure borrowers are protected.[9]

The Servicing Rules also address notifications of error and requests for information from borrowers more broadly than the FDCPA. Generally, when a servicer receives a written notice of error, it must now provide the borrower with a written response acknowledging receipt within 5 days and not later than 30 days after receipt of the notice of error, either correct the error and provide the borrower with written notice of the correction, or conduct a reasonable investigation and provide the borrower with written notice that no error occurred. (§ 1024.35(d) and (e)). A servicer must also respond to requests for information on a similar timeline (§ 1024.36(a)) and provide a toll-free phone number for requesting account information on the borrower's periodic statement (§ 1026.41(d)(6)). More generally, servicers must also have policies and procedures in place to ensure a number of additional borrower protections, including ensuring continuity of contact for borrowers in delinquency (§ 1024.40(a)) and providing complete and timely records of a borrower's payment history (§ 1024.40(b)(2)).

It is unclear how FDCPA debt validation requirements would serve borrowers more effectively than the robust requirements found in the Servicing Rules. In addition, state, GSE, and investor requirements have all built upon the Servicing Rules to provide additional borrower protections broader than those contemplated within the FDCPA's DVN requirements.

- **Debt validation notice unnecessarily implies acceleration:** As contemplated by the FDCPA, sending a DVN notice to a delinquent borrower stating the full

[9] See CFPB Bulletin 2013-01 and CFPB Supervisory Highlights Report, Winter 2013, published January 30, 2014.

principal balance owed as the amount due will cause confusion, and runs counter to the just implemented Regulation X periodic statement requirements of the Servicing Rules (§ 1026.41). Mortgage servicers are already spending significant resources to reduce borrower confusion related to the new periodic statement requirements. Providing a separate statement with a wholly different listed amount due, format, and wording will only serve to increase borrower confusion.

As noted above, the adversarial language of the Miranda warnings combined with a listing of the full principal balance owed is highly likely to frighten the least sophisticated consumer and unnecessarily worry them they are at risk of losing their home to foreclosure. The robust response requirements and short deadlines of the Servicing Rules will make it more difficult for servicers to establish right borrower contact and will require servicers to expend significant resources addressing borrower questions related to these notices, with no benefit to the borrower.

5. The Bureau should update and clarify FDCPA requirements to recognize the borrower protections of the Servicing Rules.

A borrower's protections under the FDCPA in the mortgage servicing context are currently variable, depending on whether a borrower was in default when the servicer acquired the right to service that loan.[10] Such a distinction makes little sense given the new borrower protections found in the Servicing Rules, and risks unnecessarily complicating the process for borrowers, mortgage servicers, and the Bureau. The Bureau should instead strive to ensure that the robust borrower protections found in the Servicing Rules apply to all borrowers equally, without regard for loan status upon acquisition.

As currently applied, the FDCPA also fails to anticipate many fundamental, but unique, aspects of the mortgage servicing process. For example, the FDCPA fails to provide a definition of "default," an omission that renders the FDCPA unclear in numerous common mortgage servicing situations:

- a loan acquired when a payment is technically late, but within the grace period;
- a loan acquired when the borrower is in compliance with the terms of a loan modification or forbearance agreement;
- a loan in which the principal and interest payment is made on time, but late fees or other charges are not;
- a loan which the servicer treats as in default, whether or not that belief is mistaken.

With the implementation of the Servicing Rules, the Bureau has the opportunity to address both the variability of borrower protections and the lack of clarity currently found in the FDCPA's application to mortgage servicers. To address these concerns, MBA

[10] The FDCPA generally includes certain exemptions from the definition of "debt collector," including debt which was "not in default at the time it was obtained." *See* letter from Thomas Kane, Attorney, U.S. Fed. Trade Comm'n, to Richard de Mayo, President & CEO, TSYS Total Debt Management, Inc. (May 23, 2002), available at http://www.ftc.gov/os/statutes/fdcpa/letters/demayo.htm.

recommends the Bureau set a bright line for the application of the FDCPA by clarifying that the Servicing Rule requirements protect borrowers regardless of loan status upon acquisition, and FDCPA requirements only attach in the mortgage servicing context when the lien is extinguished or liquidated. This would ensure that every borrower receives the same level of protection afforded by the Servicing Rules, and would eliminate redundancies and inconsistencies posed by the overlaying of FDCPA requirements onto the Servicing Rules' protections. Such a bright line would also allow the Bureau to more easily regulate and enforce its requirements consistently for all borrowers and mortgage servicers, reducing compliance burdens.

As discussed above, it is unclear how FDCPA requirements would serve borrowers more effectively than the robust requirements found in the Servicing Rules. The Servicing Rules already ensure that borrowers are aware of their servicer's identity, the amount and type of their debts, and how they can receive additional information or resolve errors in a manner that more closely aligns with the mortgage servicing process than protections found in the FDCPA. Consequently, the Bureau should establish a bright-line rule that the FDCPA is not applicable in the mortgage servicing context until the lien is extinguished or liquidated and the servicer is pursuing a deficiency.

6. Extending the FDCPA to mortgage servicers may unnecessarily expose the Bureau to litigation risk for exceeding its statutory authority and contravening Congressional intent

Because the Servicing Rules already provide stronger, more targeted protections for borrowers, it is unnecessary to attempt to extend FDCPA requirements to mortgage servicers. Relying on the extensive protections of the Servicing Rules would have the added benefit of avoiding the potential cost, delay, and uncertainty that could arise from litigation challenging such an extension of the FDCPA.

The FDCPA is clearly intended to address third-party debt collectors. "Debt collector" is defined in 15 USC § 1692(a)(6) as, "any person… who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted *to be owed or due another"* (emphasis added). The FDCPA goes on to specify that a creditor collecting his own debts is only subject to the term 'debt collector' when he "uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." As the FDCPA's legislative history notes, this limitation is necessary to address those third-party debt collectors who are not otherwise constrained by the desire to protect the good will of their customers.[11]

Dodd-Frank authorized the Bureau, in the section specifically dealing with amendments to the FDCPA, to "prescribe rules with respect to the collection of debts by debt collectors*, as defined in [the FDCPA]"* (emphasis added). Dodd-Frank made numerous wholesale changes to the law to otherwise ensure borrower protections. Consequently, if Congress intended to amend the definition of debt collector to also incorporate debts

[11] S. REP.NO. 95-382, at 2 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1699.

owed or due to that person, that avenue was available to them. Congress chose not to do so.

Rules of statutory construction hold that where a statute contains a specific provision and a more general related provision, the specific one controls. Here, Congress limited the Bureau's ability to prescribe rules to debt collectors as defined by the FDCPA, in the section amending the FDCPA. If Congress wanted to expand the FDCPA, or to provide the Bureau with the authority to apply the definition of debt collector to first parties collecting their own debts, they could have done so. A more general granting of authority to address unfair, deceptive, or abusive acts or practices under provisions § 1022, 1032, and 1002(6) of Dodd-Frank as cited by the ANPR should not override the specific language of the statute, especially when borrower protections can be much more easily established through the Servicing Rules.

As Director Cordray testified in a March 28, 2012 hearing before the House Committee on Financial Services regarding the Bureau's use of its power to police unfair, deceptive, and abusive practices, the Bureau will rely on the "pretty straightforward and explicit" definition of these terms that Congress laid out in Dodd-Frank. Director Cordray explained, "Congress explicitly defined these terms… and our role as a federal agency is to implement whatever law Congress writes and apply it to specific facts and circumstances… The concern that we hear from businesses is that we will deviate from [those definitions] in some unexpected direction, which we don't expect to do."[12] MBA would respectfully hold that extending the FDCPA's requirements to all mortgage servicers, despite the Servicing Rules already providing significant borrower protections specifically tailored to mortgage servicing, would constitute both an unexpected and unnecessary deviation.

7. Conclusion

Thank you for your time and consideration of this request. Should you have questions or wish to discuss this issue further, please contact John Snook at (202) 557-2861 or via email at jsnook@mba.org.

Sincerely,

Pete Mills
Senior Vice President
Residential Policy and Member Services

[12] Richard Cordray (Director of the Borrower Financial Protection Bureau) Before the United States House of Representatives Committee on Financial Services (Date: 3/29/12). Available from: http://www.law360.com/articles/323852/cordray-says-cfpb-won-t-overstep-dodd-frank-s-scope; Accessed 1/14/14.