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America's Mortgage Banking Attorneys®

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February 26, 2014

Ms. 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:

On behalf of USFN[1], we are grateful for the opportunity to comment on the above-referenced Advance Notice of Proposed Rulemaking (ANPR) – Debt Collection by the Consumer Financial Protection Bureau (CFPB). Debt collection has many facets and there are many types of debt, secured and unsecured. As stakeholders in the mortgage default servicing industry, we recognize the differences in these types of debts, as well as the state and federal laws that govern debt secured by real estate.

As you are aware, in January of 2013, the CFPB issued final rules amending Regulation X, which implements the Real Estate Settlement Procedures Act of 1974 (RESPA), and Regulation Z, which implements the Truth in Lending Act (TILA). Additional amendments were made to some of these final rules and published in the Federal Register on October 1 and October 23, 2013. The comment period for the latest interim final rule closed on November 22, and the new mortgage servicing rules took effect on January 10, 2014.

USFN is concerned that overlap between the ANPR and the changes that have already been made to Regulation X and Regulation Z, as well as state law, may cause confusion or result in conflicts for borrowers and members of the mortgage servicing industry as a whole, including USFN members, should the ANPR be considered in mortgage servicing.

1. Transfer and Accessibility of Information Upon Sale and Placement of Debt

The CFPB has proposed a rulemaking to govern the transfer of information related to debts when those debts are sold or "placed for collection with third parties." The stated reasons for the proposed rulemaking in this area include concerns over the

[1] USFN is a national not-for-profit association of select attorneys, trustee companies and affiliated companies providing comprehensive default services to the mortgage banking industry.

practices of third party debt collectors that seek to maximize profits, and therefore may not acquire sufficient information about the amount of debts that are placed with them before engaging in collection efforts. A footnote goes on to explain that collectors often accept settlement for less than the full amount and are therefore not incentivized to know the precise amount due on the debt. In addition, there is a desire to prevent false or misleading claims that are either brought against the incorrect person, or are inaccurate as to how much is owed.

These concerns, which may certainly be valid in other arenas, are not applicable when enforcing contractual rights under a mortgage or deed of trust (the "security instrument"). Rather, the collateral is being impacted, often in a judicial proceeding but always governed by state law concerning foreclosure proceedings.

1.1 State Rules of Professional Conduct and Foreclosure Laws Provide Effective Protections

Mortgage servicing attorneys performing foreclosures on behalf of the mortgage servicer are governed by their state Rules of Professional Conduct and Rules of Civil Procedure, both of which impose a heightened duty on counsel to proceed only with legal action that has a basis in law and in fact.[2] In addition, most states have specific statutes or court rules that specifically govern mortgage foreclosure proceedings that require certain information to be provided to the borrower and/or to the court in either the form of notices that are published in non-judicial states or legal pleadings that are filed in judicial states.[3] This information is necessarily transmitted to the attorney by the mortgage servicer and is often verified by the mortgage servicer under the penalty of perjury before the filing or publication is made.[4]

1.2 The Existing Mortgage Servicing Rules Provide the Framework Needed to Ensure Accuracy

The Bureau is considering national standards or requirements related to the transfer of specified information or documents as part of the sale or "placement" of debt. Some examples of the particular types of information that the Bureau is concerned with

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[2] ABA Model Rule of Professional Conduct 3.1; See also, Pennsylvania Rule of Civil Procedure 1023.1, which is an example of a state rule of civil procedure that mirrors the requirements of Federal Rule of Civil Procedure 11. Virtually every state has a version of this rule requiring counsel to certify that their legal pleadings have not been presented for any improper purpose, and that the claims set forth have factual support and are warranted by existing law.

[3] For example, see, California Homeowner's Bill of Rights ("HBR"), California Civil Code §2920, et. seq.; New Jersey Fair Foreclosure Act, N.J.S.A. 2A:50-53, et. seq. (defining the content of the required pre-foreclosure notice); Pennsylvania Rule of Civil Procedure 1147 (dictating the information that must be included in a mortgage foreclosure complaint); Connecticut Standing Order requiring use of state-promulgated Loss Mitigation form attesting to pre-foreclsoure loss mitigaitons efforts.

[4] For example, Pennsylvania Rule of Civil Procedure 1024 requires that every pleading containing an averment of fact must be verified by a party under penalty of perjury

are information related to 1) whether there were prior or pending disputes regarding the debt, 2) cease communication requests from the consumer, 3) attorney representation information, and 4) the military status of the consumer.

Additional rulemaking in this area is not necessary because the vast majority of mortgage loans secured by principal residences are subject to either the CFPB Mortgage Servicing Rules, or one of the various consent decrees entered into by the largest mortgage lenders and servicers in the country, or both. It is important that the potential to cause confusion and duplication of effort and expense be avoided.

The CFPB Mortgage Servicing Rules, specifically 12 C.F.R. § 1024.38(b), require mortgage servicers to maintain policies and procedures to ensure 1) that they submit documents or filings required for foreclosure that reflect accurate and current information that comply with applicable law, and 2) that there is adequate supervision of service providers, including service provider personnel that process foreclosure proceedings to ensure that they have adequate and accurate information to conduct foreclosure proceedings. These safeguards are already in place and are adequate to ensure that mortgage servicing attorneys are provided with the timely and accurate information that is needed to properly process foreclosure proceedings in accordance with existing state and federal law. This information would necessarily include the categories of information discussed in the proposed rulemaking if it was applicable to a particular matter. Therefore, it is unnecessary for the CFPB to issue new, duplicative rules that would again require mortgage servicers to provide mortgage servicing attorneys with the information needed to substantiate their claims prior to initiating judicial or non-judicial foreclosure proceedings.

In addition, as far as "cease communication" requests are concerned, to the extent that any such requests have been sent to the mortgage servicer, these requests are generally not applicable to counsel's communications which are state mandated notices and/or legal process that are exempt from cease communication requests.[5] Likewise, the military status of the borrower is determined independently by counsel in every instance and at multiple stages in the proceedings using the Department of Defense ("DMDC") Manpower Data Center.[6] These DMDC checks are mandated directly by servicers, and are required in order to comply with the Servicemembers Civil Relief Act ("SCRA") and state statutes and rules of civil procedure that prohibit the entry of a default judgment without an affidavit confirming that the borrower is either not active duty military, or that their status cannot be ascertained.[7] Because counsel has an independent duty under the SCRA and state law to determine the borrower's military status as part of the proceedings, an additional set of rules governing this area is not needed and has the potential to cause confusion and duplication of effort and expense.

[5] 15 U.S.C. 1692c(c)
[6] 50 U.S.C. App. §521
[7] 50 U.S.C. App. §521

1.3 RESPA Provisions and Rules Regarding Error Notices and Information Requests Already Ensure that Consumers Have Access to Needed Information

Another discussion contained in this section of the proposed rulemaking concerns the question of whether consumers should have a right to basic information about the debt that has been placed for collection with a third party. With respect to residential mortgage loans, this question has already been answered in the affirmative, and robust rules are in place governing information requests by consumers.

The RESPA Error Notice and Information Request rules established by CFPB and effective on January 10, 2014 govern this area and provide vehicles for consumers to obtain information about their mortgages directly from the mortgage servicer. This existing framework is more than adequate to provide needed information to the consumer. Including mortgage servicing attorneys in a similar Error Notice and Information Request scheme would be unnecessarily duplicative and confusing to the consumer, especially in light of the fact that all account records and information are maintained by the mortgage servicer at all times, even if there is an active foreclosure referral with a mortgage servicing attorney.

1.4 A Central Portal Raises Serious Issues Regarding Confidentiality of Privileged Communications

The Bureau has proposed the idea of creating a central portal or repository for sharing and transferring information regarding consumers' accounts between industry participants. The idea of a central portal that includes counsel is problematic considering the privileged and confidential nature of the communications among the mortgage servicer and their counsel.

1.5 Notice of "Placement of Debt" Not Applicable to Mortgage Servicing Attorneys

The Bureau also seeks comment and input on whether a third party debt collector should be required to provide the consumer with a notification at the time of the "placement of the debt."

Because mortgage servicing attorneys do not take on the responsibility of collecting mortgage payments, or any other servicing function, establishing a requirement that applies to mortgage servicing attorneys would be misplaced and confusing to the consumer. Mortgage servicing attorneys generally communicate with consumers through state- mandated foreclosure notices and pleadings. This existing

framework is more than adequate to provide notice to the consumer regarding who the law firm or lawyer is, who they represent and in connection with which mortgage, along with the contact information that they need for the law firm or lawyer, and the opportunity to either obtain more detailed information about a mortgage loan account, or dispute the information provided. Requiring a separate and additional notice would be a further drain on the resources of mortgage servicing attorneys without a corresponding benefit to the consumer and could add to the consumer's confusion.

In summary, this section of the proposed rulemaking seems to be a reaction to perceived pervasive problems in the debt collection arena with attempts to collect a debt against the incorrect individual, or in the incorrect amount. In addition, there are concerns that the parties seeking to collect the debt are doing so without adequate information that would prevent them from pursuing collection wrongfully. Because proceedings to foreclose mortgages are typically brought *in rem*, and are really enforcement of a security interest in real property, the likelihood that the wrong person is named or the wrong debt is claimed is much less likely. In addition, the extensive framework of protections and rights afforded consumers under the mortgage servicing rules, state foreclosure and consumer protection laws, and consent orders that govern the mortgage servicing arena are able to police the conduct of mortgage servicers and their attorneys. These protections and rights already allow consumers the tools they may need to rectify errors and mistakes, and to obtain information through the new enhanced information request and notice of error processes.[8] The pervasive coverage of all of these other notice vehicles is discussed in more detail in the next section.

2. Validation Notices, Disputes and Verifications

FDCPA validation processes are not needed in mortgage servicing given the validation-type provisions already in force affecting entities engaged in default servicing, loss mitigation, mediation and foreclosure of mortgage loans. The validation notice provisions are confusing, do not advance the goals of the FDCPA, do not provide a clear exception for loss mitigation, foreclosure mediation and other default servicing activities, and the validation process is obsolete in the mortgage servicing context given the new Regulation X and Regulation Z servicing requirements.

2.1 The New Mortgage Servicing Regulations Cover Concerns That the FDCPA's Validation and Dispute Processes Were Attempting to Address

[8] 12 C.F.R. §1024.35 and 1024.36

This section focuses on revealing the experience of a consumer who goes through a typical validation process starting with the mortgage servicer, the counsel or trustee who is handling the loss mitigation outreach and then the first notice or filing and foreclosure activity. As of January 10, 2014, mortgage consumers are entitled to a 120-day period during which loss mitigation discussions will occur with any covered servicer. During this time, the servicer will attempt to make live contact with the borrower, will be provided a written notice, and will be entitled to continuity of contact. Assuming the servicer is a debt collector, the borrower will have received a validation notice and several "mini-miranda" warnings with relation to this loan either early in the servicing process or at the time of the loss mitigation contact.

Assuming the borrower is not engaged in active loss mitigation or that prior attempts were unsuccessful, the servicer will refer the loan to foreclosure counsel or a trustee for initiation of the state-covered foreclosure process. In many cases the foreclosure counsel or trustee will be required under servicer requirements, settlement agreement provisions, National Mortgage Servicing Standards, or loan investor guidelines to send out a communication letting the borrower know that foreclosure will be started, but that there is still an opportunity for loss mitigation. Because of the lack of clarity in the law and the possibility that these letters will be deemed "initial communication" under the FDCPA, many of these attorneys and trustees may be sending out another validation notice to the consumer.

Again, assuming loss mitigation is not active at this point, the local attorney or trustee will send out any state-required breach or demand letter, and any loss mitigation letters that are required under state law. Because the due date of the response to the validation notice may be inconsistent with deadline by which to elect mediation or other loss mitigation options, the validation process may run separately. [9]

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[9] In **Washington** State, for example it is probable that up to three validation opportunities would exist if servicing and default servicing activivites are not exempted from the validation process. In the Washington non-judicial foreclosure process, the Foreclosure Fairness Act requires the beneficiary/loan servicer/debt collector to send the consumer a Notice of Pre-Foreclosure Options (in both English and Spanish), alerting the consumer about the rights to engage in a face-to-face meeting, mediation, and to contact housing counselors and legal aid groups. See: http://www.commerce.wa.gov/Programs/housing/Foreclosure/Pages/default.aspx. If this notice is considered an "initial communication" by the beneficiary/loan servicer/debt collector, the validation notice will be issued around this same time, if it is not one could presume the beneficiary/loan servicer/debt collector has already sent the validation notice – FIRST VALIDATION. The borrower is then called three times on three different days by the servicer to discuss possible foreclosure avoidance measures. If the borrower responds, a face-to-face meeting may be scheduled and the borrower would likely receive the mini-miranda warning. If the borrower does not respond the servicer then must send a second letter, letting the borrower know that the loan is going to foreclosure. At that point the loan can be referred to an attorney or trustee for foreclosure. The trustee may then send the notice of default, which may be coordinated with the validation notice, and which contains a statement of the debt, information about housing counselors, and explanation that the borrower has 30 days to dispute the debt, up until 20 days after the recordation of the next notice, the Notice of Trustee's Sale, to elect mediation – SECOND VALIDATION. If the borrower elects mediation, and the beneficiary/loan servicer/debt collector appears

While USFN believes in best practices and promotes compliance with all federal laws, the FDCPA validation process as applied to mortgage default servicing is a difficult area, one that drives up default costs for the loan servicers, default attorneys and trustees, and most importantly consumers - without any additional benefit for any party in the process.

2.2 The Policies Supporting a Validation Process Don't Fit Within the Context of Loss Mitigation and Foreclosure

The goals of the validation process are to eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts in which the consumer has already paid. The validation process was created in the context of debt collectors placing outbound calls, engaging in communication that was free form (not required documents under state foreclosure, mediation and loss mitigation laws) and was potentially misleading to consumers. The mortgage servicing loss mitigation, mediation and foreclosure contexts are not the same. These contexts involve heavily scripted communication. The "initial communication" that might occur is required by federal and state law and it is dictated by forms that are in turn dictated by rule or statute. Though these communications may be confusing to the consumer not familiar

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with a representative attorney (which is the current standard of practice) that attorney may send a validation notice in its initial communication which could give another 30 days in which the borrower could validate the debt, which is confusing in that the loan documents might be due back to the mediator in a shorter timeframe from that initial communication (20 days is required in the Foreclosure Fairness Act) – THIRD VALIDATION. This entire state law process is running in addition to the Regulation X loss mitigation protocol requiring early intervention, live contact, and loss mitigation procedures. Concurrency in these process might not be possible because of the complexity of each of the separate rules. Not only will borrowers have adequate opportunity to look into the "validity of the debt", they will be confused at when those opportunities intersect and what activity might not be occurring while they exercise their rights to have the debt validated.

In **Oregon**, the servicer cannot even cause a first notice or filing to be made until it obtains a certificate of compliance with the state required foreclosure avoidance mediation program. Assuming the beneficiary/loan servicer/debt collector sent the validation before starting the state law mediation process, the borrower would have had an opportunity to validate the debt - **FIRST VALIDATION**. Consumer confusion would abound if the notice triggering the mediation session were followed up by a validation notice indicating that the attorney representing the servicer is a debt collector and is attempting to collect a debt – **SECOND VALIDATION**. In a robust compliance program, a foreclosure attorney in Oregon representing the beneficiary/loan servicer/debt collector in a mediation may issue the validation notice at the same time as the mediation, since in the course of the mediation process that firm might be involved in collecting the payments or a reinstatement amount and be weary of engaging in "debt collecting" without having complied with the validation procedure from which it is not yet exempt. Assuming no foreclosure avoidance measure was agreed upon and the certificate of compliance was issued, the trustee may be engaged to proceed with the non-judicial foreclosure process, during which the notice of trustee's sale is issued in conjunction with the validation notice – **THIRD VALIDATION**.

to loss mitigation and foreclosure, when the FDCPA is layered against a validation process in this arena, the least sophisticated consumer is not enlightened, educated or able to understand his/her rights given the current inconsistency. The very goal the FDCPA rights were attempting to advance are being thwarted by an outdated, inconsistently interpreted area of federal law.

Given the extensive protection allowed under the servicing rules, and the fact that the actions to foreclose are often brought in equity, *in rem*, or are really tied to real property enforcement, the likelihood that the wrong person's property is being foreclosed is less of an issue and there are adequate measures now in federal law and existing state foreclosure and consumer protection law to protect consumers against these potential situations. Consumers will have a means to have errors and mistakes fixed through the revised information request and notice of error processes (12 CFR §1024.35 and .36).

2.3 State Foreclosure Law Is Inconsistent with the Existing Form of the Validation Notice

The validation notice creates inconsistencies with state law foreclosure notices. For example, a "creditor" may be different than the party who is entitled to enforce the debt. The validation notice provides the consumer with the name of the creditor, which might not be the same as the party who is entitled to bring the foreclosure action. A whole body of case law has developed due to confusion within the foreclosure context as to which party has standing to foreclose in the various state foreclosure processes. Generally, states allow the holder, beneficiary, servicer or similar party to foreclose a security interest. A "creditor" as it is defined under the FDCPA is inconsistent with these definitions. A consumer/borrower/grantor/mortgagor is likely to be confused by this new term and the servicer/lender/beneficiary/holder/debt collector is similarly not able to quickly provide the correct answer to this seemingly simple question. The policy of the CFPB should be to ensure provision of information to consumers that is useful.[10] Furthermore the overall policy behind providing the borrower with the name of the creditor to whom the debt is owed is to help the borrower track down which debt they owe and to whom the debt is owed. Servicers are generally the entities to whom the borrower will owe the stream of payments. And if a consumer needs to know the owner

[10] The recent ruling in *Wheeler v. Codilis and Associates* (2013 WL 6632125 (N.D. Ill.) is a good example of this confusion. There, Judge Dow discussed the confusion as to whether a mortgage servicer should be a creditor in a validation notice or whether the owner of the debt, Freddie Mac, should be listed on the validation notice. In that case, the court ruled that "[t]he text of 1692g(a)(2) plainly requires identification of "the creditor to whom the debt is owed" regardless of whether that particular information might in some instances be less useful to a debtor than identification of the loan servicer or other entity." If a judge is interpreting the statute outside of the end goal of its enactment, clearly it is deviating from the overall benefit of the consumers and brings into question whether the statute needs to be revised.

of the debt for any reason, 12 CFR § 1024.36 provides the mechanism by which the mortgage consumer can find out the owner of the debt.

The itemization of the total amount of the debt might be inconsistent with the itemization that is required under state-required foreclosure notices.[11] Also the itemization may be different than how the servicer instructs its counsel to plead in a complaint for judicial foreclosure.

2.4 If An Exemption is Not Granted, the CFPB May Want to Consider Making the FDCPA Validation More Consistent with State Foreclosure Notices

If the CFPB declines to carve out mortgage default servicing from the definition of debt collection, at a minimum the Bureau should consider reviewing the validation process in conjunction with the foreclosure process from the perspective of the consumer who goes through loss mitigation processes at the investor (GSE and private label securitization), national mortgage settlement, and state perspectives and consider a process that will be helpful and clarifying in light of all that is required from mortgage servicers and their counsel. Similar to the 120-day period in Regulation X, the Bureau could define when the attorney/trustee validation notice should be delivered prior to the activity that the Bureau believes to be “debt collection” and then standardize the approach across all jurisdictions. Would validation be a required notice before the attorney seeks a deficiency judgment? Or a notice process that goes out when the borrower asks for a quote to reinstate the loan and is delivering reinstatement figures? Pursuing a deficiency judgment and providing reinstatement and payoff figures are two activities where courts have seemed to define attorney and trustee activity as being debt collection under the current FDCPA schema. The CFPB could help define debt collection and be clear about what next steps the attorney or firm would be prohibited from engaging in if the borrower disputes the debt.

3. Debt Collection Communications

The Bureau is seeking comment and information on a variety of topics related to debt collection communication, including communication with consumers directly and with third parties. Some of the stated concerns that the Bureau has outlined relate to recent changes in technology and how consumers communicate, including the

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[11] For example, the state of Washington Notice of Default includes the requirement for the beneficiary to provide the borrower with an itemized account of the amounts in arrears, itemized account of all other specific charges, costs,or fees that the borrower may be obligated to pay to reinstate the deed of trust prior to the recording of the notice of sale, a statement showing the total of the arrears and specific charges, costs or fees designed clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale.

increased use of mobile phones and social media. There are concerns that advances in technology and social media may create situations where communications occur at inconvenient times, or may mistakenly reach co-workers, family or friends of the consumer.

3.1 Communication with the Consumer

While these concerns about general communications are certainly valid, they really are not applicable to mortgage servicing attorneys retained to pursue foreclosure under existing state law remedies. Mortgage servicing attorneys are not seeking to collect unsecured debt, and are not making collection calls to consumers. Outbound communication from mortgage servicing attorneys directly to the consumer is generally in writing, and is already governed by existing state or local foreclosure statutes or rules of civil procedure. Telephone communication is generally during normal business hours, and is most often in response to an incoming communication from the consumer. This being the case, the timing and method of counsel's communication is generally directed by the consumer.

3.2 Communication with Counsel for the Consumer

The FDCPA governs communication with consumers who are represented by an attorney, and mandates that all such communication must be made through the consumer's attorney unless the attorney provides permission to communicate directly with the consumer, or the consumer's attorney fails to respond within a reasonable period of time to a communication from the debt collector. The Bureau seeks comment and information regarding what is considered a "reasonable period of time" when there is a failure to respond, and how this is being calculated by the industry.

Mortgage servicing attorneys' communications with represented consumers and/or their counsel are governed by their state's Rule of Professional Conduct and/or their state's attorney code of conduct.[12] Attorneys must necessarily comply with their respective State Rules of Professional Conduct promulgated by their respective State Bar Associations. All fifty states have adopted the ABA Model Rules of Professional Conduct, which amply police these types of communications. Any additional rulemaking in this area has the potential to be duplicative or inconsistent, and confusing to the consumer and counsel alike.

[12] ABA Model Rule of Professional Conduct 4.2 (see American Bar Association, Model Rules of Professional Conduct, State Adaptation of the MBA Model Rules of Professional Conduct, available at www.americanbar.org).

3.3 Communications with Third Parties

The proposed rulemaking also seeks comment and information regarding communications with unauthorized third parties in an effort to locate the consumer, when necessary, and also communications with other third parties concerning the debt, such as the consumer's spouse (both during the lifetime, and after the death, of the consumer), and the parent of the consumer if the consumer is a minor. The Bureau has concerns that these types of communications have the potential to reveal information regarding the consumer or their debt to unauthorized third parties.

As a threshold matter, our members represent mortgage servicers in connection with enforcement of security interests in real property. This activity is not the same as collection of an unsecured consumer debt. The enforcement, through foreclosure of a security interest, be it a mortgage or deed of trust, is really a proceeding against the real property itself. The title owners (or "real owners," in some states) of that property are necessary parties to any proceeding to foreclose the property, whether they are the original consumer who signed the underlying promissory note, or not. For this reason, it is sometimes absolutely necessary (and mandated by state law) for foreclosure counsel to communicate, in the form of state-required notices or legal pleadings, with third parties who are in title to the property, but who are different individuals from the person who signed the underlying promissory note or security interest. This activity is required by law and is therefore not in violation of the FDCPA. For this reason, USFN members seek an exemption from any rulemaking that would restrict or complicate these types of communications.

Further, the mortgage servicing activity is subject to the Gramm-Leach-Bliley Act, which protects the privacy of the consumer's information from wrongful dissemination. Many states also have privacy laws mirroring, or even more restrictive than Gramm-Leach-Bliley.[13] Any rulemaking that seeks to overlap the provisions of Gramm-Leach-Bliley and existing state law in this area would be duplicative and would unnecessarily complicate the operations of USFN members. In addition, the ethics rules and/or attorney code of conduct in each state prevents mortgage servicing attorneys from disclosing information regarding consumers, except as necessary to prosecute the foreclosure.

4. UDAAP and Debt Collection Litigation

In the ANPR, the CFPB is seeking comment with respect to unfair, deceptive,

[13] For example, see the Financial Information Privacy Act, California Financial Code §4050-4060

and abusive acts and practices (sections 806, 807, 808, 810, and 812 of the FDCPA).[14] As stated above, mortgage servicing, including default servicing, has previously been addressed by the CFPB. Accordingly, the method of communication with borrowers and the content of such communication is heavily regulated by RESPA,[15] TILA,[16] other consumer federal statutes and the National Mortgage Servicing Standards.

The ANPR generally asks whether the CFPB should promulgate rules that add certain practices to the existing examples of abusive, deceptive, and unfair conduct set forth in sections 806, 807, and 808 of the FDCPA and whether the CFPB should clarify the existing examples of abusive, deceptive, and unfair conduct set forth in those sections. As stated above, RESPA, 12 CFR §§ 1024.30-1024.41, among other federal rules, specifically regulate the manner in which a mortgage servicer communicates with a defaulted borrower and the content of such communications.

Pursuant to Regulation X, a mortgage servicer must acknowledge receipt within five days of receiving a Request for Information from a borrower.[17] Furthermore, the servicer must investigate and respond to the Request for Information within 30 days.[18] In addition to Requests for Information relating to mortgage loans, a servicer must acknowledge any Notice of Error received from a borrower within five days and investigate and respond within 30 days.[19] Section 1024.35(b) specifically states that the following eleven items are Notices of Error: (1) failure to accept a payment that conforms to the servicer's written requirements; (2) failure to apply a payment to principal, interest, escrow, or other charges; (3) failure to credit a payment to a borrower's mortgage loan on the date of receipt; (4) failure to pay taxes, insurance, premiums, or other charges that the servicer agreed to pay on behalf of the borrower; (5) the imposition of a fee that the servicer lacks a reasonable basis to impose upon the borrower; (6) failure to provide an accurate payoff balance upon a borrower's request; (7) failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure; (8) failure to transfer accurately and timely information relating to the servicing of the mortgage loan to a new servicer; (9) making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process; (10) moving for foreclosure judgment or conducting a foreclosure sale in violation of section 1024.41 (g) or (j); and (11) any other error relating to the servicing of a borrower's

[14] Bureau of Consumer Financial Protection, 78 Fed. Reg. 67,848, 67,869 (to be codified at 12 C.F.R. pt. 1006).

[15] Real Estate Settlement Procedures Act of 1974, 12 U.S.C.§ 2601, *et seq.* (2012).

[16] Truth in Lending Act, 15 U.S.C.§ 1601, *et seq.* (2009).

[17] 12 CFR § 1024.36(c).

[18] 12 CFR § 1024.36(d).

[19] 12 CFR § 1024.35(d)-(e).

mortgage loan. In other words, as a result of the new rules set forth at §§ 1024.35 and 1024.36, servicers must acknowledge virtually all questions from a borrower about the loan within 5 days and answer the questions within 30 days.

In addition to servicers' requirements under the Request for Information and Error Resolutions procedures, servicers must acknowledge a Qualified Written Request ("QWR") within five days and investigate and respond to such QWR in 30 days.[20] If the servicer fails to comply with the Request for Information section, the Notice of Error section or the QWR rules, the servicer is subject to statutory damages and the payment of the borrower's costs and attorney's fees.[21]

Section 12 CFR §1024.41 further regulates the form of communication and content of communication between the mortgage servicer and a defaulted borrower. For example, within five business days of receiving an incomplete loss mitigation application, the servicer shall provide a letter to the borrower stating, among other things, the additional documents that the borrower must submit to make the application complete, a statement that the borrower should consider contacting servicers of other loans secured by the property, and a reasonable date by which the borrower should submit the remaining documents.[22] If a servicer fails to comply with section 1024.41, it is subject to statutory damages and the payment of the borrower's cost and attorney's fees. Because the conduct of a mortgage servicer and the relationship between servicers and defaulted borrowers are extensively regulated through Regulation X and other regulations, additional rules relating to unfair, deceptive or abusive practices are not needed, at least with respect to mortgage loans already subject to 12 CFR §§ 1024.30-41, which became effective January 10, 2014.

4.1 Rules of Professional Conduct

Law firms must all comply with their respective State Rules of Professional Conduct promulgated by their respective State Bar Associations. All fifty states have adopted the ABA Model Rules of Professional Conduct (previously the Model Code of Professional Responsibility).[23] Model Rule 3.3(a) provides that an attorney shall not make a false statement of fact or fail to correct a false statement of fact to a tribunal; or

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[20] 12 U.S.C. § 2605.

[21] 12 U.S.C. § 2605(f).

[22] 12 C.F.R. § 1024.41(a)-(b).

[23] American Bar Association,Model Rules of Professional Conduct, *State Adoption of the ABA Model Rules of Professional Conduct, available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html

offer evidence that the attorney knows to be false.[24] Model Rule 3.3(b) provides that an attorney that represents a client who knows that a person intends to engage in fraudulent conduct related to the proceeding shall take reasonable remedial measures including disclosure to the tribunal. The comment section to rule 3.3(a) (3) adds that the lawyer must refuse to offer evidence that the lawyer knows to be false regardless of the client's wishes.[25] This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.

In addition, Model Rule 4.1 provides that in the course of representing a client a lawyer shall not make a false statement of material fact to a third person; or fail to disclose a material fact when disclosure is necessary to avoid assisting a fraudulent act by a client.26 The comment section adds further that a misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Model Rule 8.4 provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.[27]

Law firms are strictly prohibited from engaging in unfair, deceptive, and abusive practices by their respective State Bar rules on professional conduct. It is unnecessary for the CFPB to promulgate additional rules or clarifications of unfair, deceptive or abusive practices at least with respect to practicing attorneys. In fact, creating new rules for attorneys runs the substantial risk of interfering with state courts' and bar associations' ability to adequately supervise and monitor attorneys in their states.

4.2 State UDAAP Laws

Virtually every state has its version of an Unfair, Deceptive, and Abusive Practices Act.[28] For example, the Deceptive Trade Practices Act at Alabama Code section 8-19-5(27) declares that it is unlawful to engage in false, misleading or deceptive acts or practices in the conduct of trade or commerce. Law firms, like other businesses, are subject to their respective deceptive trade practice statutes. It is unnecessary for the CFPB to write rules for law firms regarding unfair, deceptive or misleading practices since law firms are generally prohibited by state law from engaging in such practices.

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[24] MODEL RULE PROF'L CONDUCT R. 3.3(a)(1)-(3).

[25] MODEL RULE PROF'L CONDUCT R. 3.3(a)(3) cmt.

[26] MODEL RULE PROF'L CONDUCT R. 4.1(a)-(b).

[27] MODEL RULE PROF'L CONDUCT R. 8.4(c).

[28] *Cause of Action for Violation of State Deceptive Trade Practices or Consumer Protection Statutes in Connection With Sale of Motor Vehicle,* 11 CAUSES OF ACTION 267 (originally published in 1986, updated December 2013).

4.3 Substantiation of Claims Made by Collectors

The CFPB generally asks whether it should propose rules that impose standards for the substantiation of claims related to debt collection, and, if so, what types should be covered.29 In addition, the CFPB asks whether the documentation relating to substantiating a claim should depend upon the type of debt (e.g. mortgage, credit card, etc.).

The vast majority of mortgage loans secured by principal residences are subject to the National Serving Standards and various consent decrees entered into by the largest mortgage lenders and servicers in the country. Set forth throughout these consent decrees is the requirement that the mortgage servicer reviews its loan records and validate that it has the legal authority to foreclose.[30] A Mortgage servicer must currently substantiate its claims and prove through loan record documentation that it has the legal authority to foreclose a mortgage for non-payment. Therefore, it is unnecessary for the CFPB to issue new rules requiring mortgage servicers and law firms representing mortgage servicers to substantiate their claims prior to initiating judicial or non-judicial foreclosure.

4.4 Debt Collection Litigation Practices

In the ANPR, the CFPB contemplates issuing rules requiring that certain documentation be attached to debt collectors' pleadings to support claims that the creditor has the right to collect the debt. The CFPB also asks whether there is a way for the CFPB to address these issues in proposed rules so that the rules complement state laws and are not inconsistent with state law. As stated above, mortgage servicers and the vast majority of mortgage loans secured by principal residences are subject to the legal authority to foreclose servicing standard enumerated in the National Serving Standards. For this reason, mortgage servicers in foreclosure actions must, through their attorneys, validate their authority to foreclose. In addition, as a result of the financial crisis, state legislatures and the judiciary have passed numerous laws, regulations and rules requiring USFN law firm clients to validate their legal authority to

[29] Bureau of Consumer Financial Protection, 78 Fed. Reg. 67,848, 67,875 (to be codified at 12 C.F.R. pt. 1006).

[30] *See* Consent Judgment, *United States of America, et al. v. Bank of America Corp., et al.,* No. 1:12-cv-00361-RMC, Doc 11 (D.D.C. Apr. 4, 2012); *See also* Consent Judgment, *Consumer Financial Protection Bureau, et al. v. Ocwen Financial Corporation, et al.,* No. 1:13-cv-02025-RMC, Document 1-2 (D.D.C. Dec. 19, 2013).

foreclose prior to instituting the foreclosure action.[31] Accordingly, there is no need for the CFPB to issue rules requiring law firms representing mortgage servicers and lenders to provide additional documentation validating their clients' legal authority to foreclose. In fact, the response by state legislatures and state judiciaries to the financial crisis with the issuance of such rules demonstrates that the states are not only adequately regulating foreclosure actions in their states, but they are best positioned to provide this regulation.

4.5 Attorneys are Subject to Rule 11 Sanctions

The Federal Rules of Civil Procedure, and each of the states' rules of civil procedure, requires through Rule 11 that every pleading, motion and other paper be signed by an attorney. Rule 11 also states that by presenting to the court a pleading or other paper, an attorney is certifying that to the best of his/her knowledge, information and belief, formed after reasonable inquiry, the pleading is not being presented for any improper purpose, such as to harass or cause unnecessary delay. By signing such pleadings, the attorney is certifying that the claims are warranted by existing law, are not frivolous, and the factual contentions have evidentiary support or will likely have evidentiary support after reasonable opportunity for further investigation.[32] If the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on the attorney and may require the sanctioned attorney to pay the opposing party's attorney's fees with respect to the expenses related to the sanctionable conduct.[33] Since law firms are subject to sanctions for harassing opposing parties, including debtors, pursuant to existing rules, it is unnecessary for the CFPB to issue additional rules regulating law firms with respect to debt collection litigation.

5. Registration of Debt Collectors and Record Keeping

A licensed attorney should not be subject to registration as a debt collector, either within this or her jurisdiction or federally. Certainly the situation, and therefore the regulations, would be different in a case in which an attorney purchases a debt and thereafter pursues that debt in his or her capacity as counsel and, therefore, would be subjected to FDCPA regulatory authority. Unless the attorney shares in a portion of the recovery, an attorney should otherwise be exempt from debt collection regulations and registration.

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[31] *See, e.g.,* California Homeowner Bill of Rights, 2012 Cal. Legis. Serv. Ch. 86 (AB 278) (West); 2012 CA. Legis. Serv. Ch. 87 (SB 900) (West); *see also* Home Ownership Security Act, N.J. Stat. Ann. § 46:10B-22 (West).
[32] FED. R. CIV. P. 11 (a)-(b)(1)-(3).
[33] FED. R. CIV. P. 11(c).

5.1 American Bar Association Statement on the Independence of the Legal Profession

"The ABA believes that primary regulation and oversight of the legal profession should continue to be vested in the court of highest appellate authority of the

State in which the attorney is licensed, not federal agencies or Congress, and that the courts are in the best position to fulfill that important function. Therefore, the ABA opposes federal legislation or rules that would undermine traditional state court regulation of lawyers, interfere with the confidential attorney-client relationship, or otherwise impose excessive new federal regulations on lawyers engaged in the practice of law. "

The independence of the legal profession is a bedrock principal of American jurisprudence and provides citizens the right to counsel. Excessive regulation of counsel undermines this concept and deprives citizens of their right to counsel.
Attorneys who are engaged by mortgage servicers primarily to recover real property should be exempt from the FDCPA and any debt collection registration regulations. These mortgage foreclosure attorneys do not retain a portion or percentage of the debt collected and were not the intended targets of the FDCPA. The reality is that excessive FDCPA regulations of mortgage foreclosure attorneys may lead to even less communication with homeowners in foreclosure and would unduly complicate or eviscerate the home retention/mediation/conciliation efforts of all parties.

Conclusion

The above comments illustrate that existing law—including revisions to Reg. X and Reg. Z, state law, a variety of settlements within the mortgage servicing industry, as well as national standards – thoroughly encompasses the concerns that the CFPB wishes to address through the ANPR. As such, we firmly believe that the mortgage servicing industry should be exempted from for the proposals within the ANPR.

Thank you for your consideration in reviewing these comments. Should you have any questions or wish to contact USFN, please advise our CEO Alberta E. Hultman at our national office, who will ensure a timely response.

Thank you once again for the opportunity to provide these comments on issues of great importance to the members of our organization.

Respectfully,

Marcy J. Ford, Esq.
President