National Association
of Federal Credit Unions
3138 10th Street North
Arlington, VA 22201-2149
NAFCU | Your Direct Connection to Education, Advocacy & Advancement

October 9, 2012

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1500 Pennsylvania Ave. NW
(Attn: 1801 L Street)
Washington, D.C. 20220

RE: Docket No. CFPB-2012-0033; RIN 3170-AA14 (Regulation Z)
Docket No. CFPB-2012-0034; RIN 3170-AA14 (Regulation X)

Dear Ms. Jackson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents federal credit unions, I write to you regarding the Consumer Financial Protection Bureau's (CFPB) proposed rules on mortgage servicing. *See* 12 Fed. Reg. 57318 (Sept. 17, 2012) *and* 12 Fed. Reg. 57200 (Sept. 17, 2012).

The proposed rules would amend Regulation Z, which implements the Truth in Lending Act (TILA), and Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA). Both TILA and RESPA were amended in significant ways by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The proposed rules implement the Dodd-Frank Act's amendments that pertain to mortgage servicing, and also propose additional requirements that are not mandated under the Dodd-Frank Act.

General Comments

Credit unions serve 94 million members. They are not-for-profit cooperative entities whose mission is to provide low-cost alternative financial services to their members. Each credit union is unique, in large part because its membership is derived from a defined population (i.e., field of membership).

For decades, credit unions have provided unparalleled personal mortgage services to the members. Credit unions have been able to do so because they are well acquainted with their members and have constructed mortgage servicing practices that are tailored to benefit their unique membership. It is, therefore, critical that the CFPB carefully considers, to the maximum extent practicable, these traits and refrain from implementing, as it is proposing to do, a one-size-fits all approach for all mortgage servicers. Instead, it should provide credit unions with the flexibility necessary to continue to meet their members' needs.

As further discussed in detail below, NAFCU has significant concerns about each component of the proposed rules. Accordingly, we urge the CFPB to withdraw both proposed rules, or at the very least, make significant changes consistent with our comments below.

We would also add that NAFCU is hopeful that the CFPB will carefully reconsider its obligations under the Small Business Regulatory Enforcement Fairness Act (SBREFA). Under SBREFA, the CFPB is required to consider three specific factors during the rulemaking process. First, the agency is to consider "any projected increase in the cost of credit for small entities." Second, the CFPB is required to examine "significant alternatives to the proposed rule which accomplish the stated objective of applicable statutes and which minimize any increase in the cost of credit for small entities." Third, the CFPB is to consider the "advice and recommendations" from small entities. 5 U.S.C. § 603(d). This directive serves an important function. When Congress passed the Dodd-Frank Act, it expected the newly established CFPB to be a proactive regulatory body. NAFCU believes the decision to subject the CFPB to SBREFA was a conscious decision to help ensure that regulations, promulgated with large entities in mind, do not disproportionately impact small financial institutions that were not responsible for the financial crisis. Given the multitude of changes to Regulation Z over the last several years, it is particularly important that new changes to the regulation are subjected to a thoughtful and comprehensive SBREFA analysis. As the CFPB noted in its proposed rulemaking, it provided two exemptions for the periodic statement. NAFCU believes that further exemptions for small entities should be provided.

Proposed Changes to Regulation Z

Prompt Crediting of Payments and Payoff Statements - § 1026.36

Under the proposed rule, a mortgage servicer would be able to hold partial payments in a "suspense account," but must promptly credit payments when the amount reaches a "full contractual payment." Proposed § 1026.36(c)(1)(i) would define "full contractual payment" to include only the principal, interest and escrow (if applicable). It would further specify that "[a] payment qualifies as a full contractual payment even if it does not include amounts required to cover late fees or other fees that have been assessed."

NAFCU supports allowing servicers to hold partial payments in a suspense account until full payment is received; however, we do not agree with the limitation on what constitutes a "full contractual payment." As a result of this limitation, it is conceivable that a borrower could pay only the principal, interest and escrow amounts, and allow late fees and other fees to compound, leaving the account consistently underfunded. Accordingly, the credit union will incur losses from being unable to collect the fees or having to decide whether to proceed with collection activities on those fees.

NAFCU believes it is important that the CFPB does not overlook this unintended consequence, and urges the agency to address it. Specifically, we strongly recommend allowing a credit union the discretion of determining what constitutes a full contractual payment. In the alternative, the CFPB should expand the definition to include at least late fees.

Next, the proposed rule would require, under § 1026.36(c)(3), credit unions to send payoff statements within five business days of receipt of request. The agency states that this requirement would apply to any consumer transaction that is secured by a dwelling, whether an open-end or closed-end transaction.

NAFCU supports allowing credit unions seven days, rather than the current five days, to send the payoff statement. This slight adjustment would especially be helpful if the CFPB's proposal to amend Regulation Z's definition of "business day," issued under a different rulemaking, is adopted as proposed.

Nonetheless, the proposal does not clearly state the scope of the proposed requirement to provide payoff statements, and we are concerned about the likely broad application of this aspect of the proposed rule to include home equity plans and HELOCs. The Dodd-Frank Act's requirement to provide payoff statements addresses "home loans," which the CFPB chose to interpret broadly. NAFCU objects to the agency's broad interpretation and strongly urges the agency to limit the application of the proposed payoff statement provision to loans secured by a principal dwelling.

Rate Adjustment Notices - § 1026.20(c)

Next, the proposed rule addresses adjustable-rate mortgage (ARM) notices. Under the proposed rule, the current annual notice requirement would be removed. However, the proposal would require the provision of two notices: a rate adjustment notice; and an initial rate notice.

NAFCU supports the proposed removal of the annual notice requirement. The current annual notice requirement places an unnecessary compliance burden on credit unions, and removing the requirement is a welcome development. In regards to the proposed rate adjustment notice, while we support combining this notice with the periodic statement, we believe it would be helpful for the CFPB to provide a sample of such combined statement.

Initial Rate Adjustment Notice - § 1026.20(d)

NAFCU strongly opposes the additional information that would be required in the proposed initial rate adjustment notice. The additional information, we believe, would only serve to lead to consumer information overload and confusion while also adding to credit unions' regulatory burden. NAFCU recommends that the CFPB limit the content to only those required by the Dodd-Frank Act, and also apply the notice requirement to ARMs with adjustment periods of two years from the consummation of the mortgage loan. Further, we do not agree with the CFPB that this notice should be mailed or e-mailed separately, including separately from mailings containing the periodic statement. In fact, we believe that a borrower is more likely to benefit from the notice to be combined with the periodic statement rather than a separate mailing or email. By the same token, a credit union would not have to incur the additional costs associated with sending a notice separate.

Periodic Statement Requirement - § 1026.41

In regards to the proposed periodic statement requirement, we first would like to reiterate our position that the CFPB should limit its regulations to those required under the Dodd-Frank Act. In the case of the periodic statement, a number of the proposed content requirements are not required by statute, are far too abundant and would cause confusion to borrowers, while also necessitating additional time and resources from credit unions to answer related inquiries that they otherwise would not have to and should not have to. The proposed periodic statement would require credit unions to incur significant up-front and on-going costs.

Timing Requirements

The timing requirements of the proposed periodic statements will pose tremendous problems for both credit unions and their members. For example, many credit unions service mortgages with due dates throughout the month, and would have to mail statements each day in order to comply with the proposed requirement that a statement be sent within 4 days after the close of the grace period of the previous cycle.

Many credit unions currently provide combined statements at the beginning of each month. The combined statements contain a vast majority of the information that the proposed periodic statement contains. Borrowers are not only used to this format, but prefer it because they are not receiving multiple statements from their credit union throughout the month, but rather, a single combined statement that contains information about their loan, checking, share (savings) and other appropriate accounts. The proposed timing requirements would make this tried and true credit union practice virtually impossible to continue. Accordingly, NAFCU strongly urges the agency to carve out exceptions from the proposed timing and other requirements that would allow credit unions to provide combined statements, and provide a sample form of such combined statement. As the CFPB finalizes the rule, it should reach out to credit unions that currently provide combined statements to construct its final rule and NAFCU would be pleased to assist the agency in this endeavor.

Mortgages with Bi-Weekly Billing Cycles

Next, NAFCU points out that the periodic statement is unworkable for mortgages with bi-weekly billing cycles and urges the CFPB to address this issue in its final rule. In particular, it is not clear if a credit union would have to provide two due dates on a periodic statement, which is a result that would not serve the interest of the borrower, or the credit union, as it merely makes the periodic statement more convoluted and confusing. The CFPB, thus, should consider exempting mortgages with bi-weekly billing cycles made by federally-insured depository institutions.

Daily Simple Interest Loans

Some credit unions offer Daily Simple Interest (DSI) loans, which terms provide that interest accrues daily and allow a borrower to make a payment before a due date. If the borrower does make a payment before the due date, a smaller portion of the payment is applied to the interest and larger proportion of the payment is allocated to the principal.

Clearly, a credit union that offers a DSI loan would not be able to comply with the requirements to disclose the exact amounts that would be applied to principal and interest. And, the credit union would have to discontinue offering the product. To avoid either result, NAFCU calls on the CFPB to indicate, by a note, asterisk or other readily implementable means, on the periodic statement that the stated principal and interest are estimates and are subject to change if the borrows makes a payment before the loan's due date.

E-Sign Act

NAFCU does support allowing credit unions to be able to send notices electronically without following the E-SIGN Act. Under the proposal, the periodic statement may be transmitted in writing or electronically; thus, a credit union would not need to obtain a person's signature as required by the E-SIGN Act. NAFCU strongly supports this proposal and urges the CFPB to pursue legislation that would amend the E-SIGN Act to remove the outdated and onerous requirement of obtaining the borrower's signature in order to transmit communications electronically.

NAFCU requests that the CFPB develop a model opt-in form that credit union can send to their members to facilitate member acceptance of electronic statements. This is especially important considering the new periodic statement requirement would apply to existing mortgages as well as new mortgages.

Content of Periodic Statement

In addition to limiting the content of the statement to those only required by statute, NAFCU believes the statement can further be improved in additional respects. First, we urge the CFPB to explain how corrections made on errors on prior statements can be displayed. This is important as it appears that proposed § 1026.41(d)(4) would require the provision of all transaction activity since the last statement, including corrections. Second, we urge the agency to exclude the requirement to display a prepayment penalty if the mortgage loan does not contain such penalty. As the agency may know, credit unions do not, and by law, cannot, impose prepayment penalties; thus, it would simply be not useful for a credit union member to see, on a statement, this line item, and in fact, may actually lead to further confusion.

<u>Exemptions</u>

The CFPB provides two exemptions from the periodic statement requirement: one implementing the statutory "coupon book" exemption and one for servicers that service 1000 or fewer mortgages. NAFCU supports the "coupon book" exemption, but urges the agency to clarify the condition that a servicer provides "dynamic information" upon request by the borrower.

With respect to the exemption for servicers that service 1000 or fewer mortgages, we strongly urge the agency to greatly increase the number and exclude from this number, refinancings. The number is simply far too low to provide many small credit unions its intended relief.

Proposed Changes to Regulation X

General Comments and Scope

The proposed rule to amend Regulation X is far too onerous and should be greatly scaled back to only include regulations required by the Dodd-Frank Act. In particular, NAFCU believes that the proposed requirements that were gleaned from the Attorneys General Settlement with large servicers should not apply to credit unions. These include: the proposed requirement to have information management policies and procedures (proposed § 1024.38); the proposal to intervene early with delinquent borrowers (proposed § 1024.39); the proposed requirement to continually contact delinquent borrowers (proposed § 1024.40); and the proposal to have loss mitigation procedures (proposed § 1024.41).

NAFCU strongly believes that since credit unions did not engage in the practices that led to the settlement agreement, they should not be subject to many of the requirements contained therein. It would be, simply, unreasonable for credit unions to pay for others' wrongs.

The CFPB is also proposing to expand the coverage of Regulation X to include subordinate liens and requests comments on this issue. NAFCU urges the CFPB to fully withdraw this aspect of the proposed rule. The agency's stated justification for including these loans is to address "piggyback loans," but as the agency is aware, second mortgages are not always "piggyback loans" and closed-end home equity loans are significantly different in structure and purpose. The CFPB, thus, has not provided adequate justification to expand the coverage of Regulation X.

Error Resolution & Information Requests - § 1024.35 and 1024.36

Under the proposed rule, the current "qualified written request" would be replaced by two procedures – error resolution and information requests – that would apply when a borrower provides a notice of error or requests for information. When a credit union receives a notice of error or request for information from the borrower or "a person acting on behalf of the borrower," it would have to acknowledge the receipt of the notice within five days and investigate and respond to the borrower within 30 days. Certain notices of errors, such as notices that repeat the same errors, are expressly excluded from the proposed procedures; however, a credit union must notify the borrower that the notice falls under an exclusion.

NAFCU appreciates the CFPB's work to address "qualified written request," as the current rule has proved problematic. We believe the proposal, especially the fact that it lists the errors that are covered, is a step in the right direction. However, we are gravely concerned, and strongly urge the agency to address, the application of the error resolution provisions to notices made by "a person acting on behalf of the borrower." This provision opens a Pandora's Box for fraud as it would require credit unions to respond to a notice made by *any* person. Both consumers and lenders alike would greatly be harmed. Accordingly, we strongly urge the agency to either eliminate this provision or significantly limit it to an agent with a formal agent relationship, such as the borrower's legal representative. Further, the CFPB should provide guidance, including a model certification, to credit unions regarding how to determine a value "agency relationship."

We would also urge you to address the timing requirements. Specifically, as proposed, the written acknowledgement and response must be provided within five days and thirty days respectably. We believe it is appropriate to apply Regulation Z's definition of "business days" in these situations, rather than the apparent calendar days as is the case in the proposal.

Lastly, we believe the agency should provide examples for each covered error under proposed § 1024.35(b). These examples should be constructed in such a way as to be helpful in determining which errors are covered and which are not.

Forced-Placed Insurance - § 1024.37

Under the proposed rule, a servicer may not obtain forced-placed insurance unless it has a "reasonable basis" that the borrower has failed to maintain hazard insurance and may not charge the borrower for forced-place hazard insurance until 45 days after it sends notice informing the borrower of the lack of insurance. A servicer must also make payments on the premiums of the insurance whether or not there It must also send a reminder notice 30 or more days after the first notice is sent. Finally, it must cancel forced-place insurance within 15 days of receiving verification that the borrower has hazard insurance in place, and refund all premium charges and fees paid by the borrower for the period that the borrower's hazard insurance was in place.

NAFCU generally agrees with the use of "reasonable basis" rather than "actual knowledge" as the standard for allowing a servicer to obtain hazard insurance. We also appreciate that the agency does discuss circumstances that would entail "reasonable basis." We do, however, believe that the final rule should include a broader good-faith "reasonable basis" standard on which a servicer can rely to force place insurance. This catch-all provision could even be mitigated by a requirement to refund the borrower if the borrower did in fact have insurance; however, we believe that servicers must have a tool to protect their collateral at all times.

NAFCU does not have any contentions with the proposed requirement to cancel forced-place insurance after receiving verification that the borrower has hazard insurance. However, as proposed, the provision on refund premium charges and fees can lead a credit union to incur significant losses unless the CFPB also implements corresponding limits. Specifically, a credit union should be able to require a borrower to notify the credit union and to provide documentation to the credit union within a specified time period, the maximum being 5 business days, that the borrower has obtained insurance. Without the ability to apply such constraints, it is entirely possible that a credit union would be required to issue refunds of premium charges and fees paid for multiple months.

Relatedly, we strongly urge the CFPB to withdraw proposed §1024.17(k). Under proposed §1024.17(k), a servicer would be required to advance funds to maintain a borrower's hazard insurance when the borrower's escrow account does not have sufficient funds. The CFPB is also considering whether to require servicers to advance funds in cases where there is no escrow.

NAFCU strongly opposes the proposed rule to require servicers to advance funds where the borrower's escrow account does not have sufficient funds. The CFPB, we believe, unnecessarily asserts discretionary authority to impose this proposed requirement without sufficiently addressing and considering the risk and costs that such rule would impose on credit unions or their members. If the proposed requirement to advance funds is adopted, the servicer would be required to insure the borrower rather than the collateral. This result, we believe, is perverse and could foreseeably lead to moral hazard by unnecessarily creating an incentive for borrowers to cease maintenance of hazard insurance with knowledge that the servicer is required to maintain such insurance on their behalf.

We also strongly oppose any extension of the proposed requirement to advance funds to mortgages without escrows. Simply put, we do not believe that the CFPB has the statutory authority to impose such requirement as the Dodd-Frank Act's provisions on hazard insurance specifically address mortgages with escrows. Even if the CFPB contends that it has legal authority to regulate in this field, we urge the agency to withhold using any perceived authority because doing so would add to the growing number of pressures on lenders and the market as a whole to abandon mortgages without escrow. This would simply leave consumers with fewer choices without adequate justification.

Proposed §§ 1024.38, 1024.39, 1024.40 and 1024.41

NAFCU reiterates our objection to apply each of these sections of the proposal to credit unions. Not only do these sections contain requirements for servicers that are subject to the Attorneys' General Agreements and should not apply to credit unions, but are also not required under the Dodd-Frank Act.

For example, under proposed § 1024.38(c)(2), a credit union would be required to create and maintain a servicing file that would include a host of information and documents. The burden on and cost to credit unions for collecting and centralizing documents, and producing the documents upon requests, will be very significant. While large servicers may be able to bear the costs and burden, credit unions will not. Thus, it is vital that the CFPB fully withdraws this proposed section.

Credit unions are second to none in terms of helping their members avoid financial difficulty. To do so, individual credit unions have developed programs tailored to their unique membership. The rigidity and standardization of the proposal to follow specific intervention requirements under proposed § 1039 would greatly damage proven methods and would undoubtedly be ineffective. A method that would work for a servicer that services tens of thousands of borrowers who have little or nothing in common, will not be effective for a servicer that services mortgages of particular groups (such as teachers or service members).

Proposed § 1024.40 would require a credit union to continually contact a delinquent borrower and assign personnel to the borrower within five days after providing oral notice to the delinquent borrower, as well as impose a number of other specific requirements. Proposed § 1024.41 would require credit unions to follow specific loss mitigation procedures that would apply when a borrower submits a "loss mitigation application." Of note, a credit union would be required to evaluate the application to determine whether the borrower qualifies for each of the loss mitigation options the credit unions offers, and to investigate whether another servicer has a lien on the property and if so, forward the application to the other servicer.

The two sections, both separately and taken together, are deeply troublesome for credit unions. Credit unions, unlike most other servicers, have personal relationships with their members because their members are also their owners. Each credit union has, and should continue to have, unique procedures for handling delinquencies and loss mitigation procedures that are tailored for their membership. Thus, the application of these sections to credit unions would be harmful for both credit unions and their members.

Conclusion

The proposed rules would, by any standard, create near-unprecedented levels of compliance costs for credit unions that service mortgages for their members. NAFCU strongly objects to these proposals on this and other basis detailed in this letter. As the CFPB has itself repeatedly acknowledged, credit unions have not engaged in the type of mortgage servicing practices that the agency is seeking to address. It would truly be unconscionable, thus, for the agency to extend many of the proposed rule's provisions to credit unions.

NAFCU appreciates the opportunity to share our thoughts regarding this matter. If you have any questions or concerns, please feel free to contact me at (703) 842-2234 or chunt@nafcu.org.

Sincerely,

Carrie R. Hunt

Carrie Hunt
Vice President of Regulatory Affairs and General Counsel