Comments to
The Consumer Financial Protection Bureau

Regarding
Treatment of Certain COVID-19 Related Loss Mitigation Options under the Real Estate Settlement Procedures Act (RESPA), Regulation X; Interim Final Rule

Docket No. CFPB-2020-0022

Submitted By

National Consumer Law Center
(on behalf of its low-income clients)

and

National Housing Law Project

August 14, 2020

A. Introduction

Thank you for the opportunity to comment on the Bureau's Interim Final Rule on Treatment of Certain COVID-19 Related Loss Mitigation Options under RESPA and Regulation X (IFR). The National Consumer Law Center[1] (on behalf of its low-income clients) and the National Housing Law Project[2] submit these comments based on the experience of our organizations and the developments advocates and housing counselors in the field have reported to us in response to the COVID-19 pandemic.

Our comments and recommendations focus on needed improvements to the rule to protect the most vulnerable borrowers in the hardest-hit communities. We appreciate that the IFR, as written, is narrowly drafted and applies only to deferrals in connection with COVID-19, and only to deferral options that bring the borrower current and result in no increased expenses for the borrower. This streamlined approach is, we believe, appropriate under the exceptional circumstances of COVID-19 and in connection with a deferral option that does no harm to borrowers, can help many borrowers, and is relatively clear and standardized.

The deferral exception created by the IFR must be viewed in the context of the overall foreclosure prevention purpose of § 1024.41. A guiding principle of the Bureau's regulation is that once a borrower submits a complete loss mitigation application, the servicer must review the borrower not only for any specific option for which the borrower asked, but for all options offered by the owner or assignee of the borrower's mortgage.[3] This is intended to create a "streamlined process in which a borrower will be evaluated for all available loss mitigation options at the same time, rather than having to apply multiple times to be evaluated for different options one at a time."[4] A servicer must not evade this duty to evaluate the borrower for all loss mitigation options by offering the borrower an option based on an incomplete application.[5]

Prior to the issuance of the IFR, the Bureau created a limited exception to the anti-evasion restriction by permitting servicers to offer a short-term payment forbearance or repayment program based on an incomplete application.[6] The Bureau's justification for the exception is that short-term forbearance and repayment programs would apply only when the borrower is experiencing a temporary hardship, and would permit the borrower to obtain a temporary

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[1] Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. www.nclc.org

[2] The **National Housing Law Project (NHLP)** is a non-profit law and advocacy center established in 1968 and based in San Francisco, California. NHLP is dedicated to advancing housing justice by using the power of the law to increase and preserve the supply of decent affordable housing, improve existing housing conditions, expand and enforce low-income tenants' and homeowners' rights, and increase opportunities for racial and ethnic minorities. www.nhlp.org.

[3] *See* Official Interpretations of Reg. X § 1024.41(c)(1)-2. *See also* Section-by-Section Analysis, § 1024.41(c), 78 Fed. Reg. 10,696, 10,827–10,828 (Feb. 14, 2013).

[4] 78 Fed. Reg. 60398 (Oct. 1, 2013).

[5] Reg. X § 1024.41(c)(2).

[6] Reg. X § 1024.41(c)(2)(iii).

solution through an efficient application process.[7] When issuing the final rule creating the short-term exception, the Bureau made clear that "forbearance programs under § 1024.41(c)(2)(iii) should only be used for temporary problems," and that it is important for the servicer to reassess a borrower's situation at the end of the forbearance.[8] Moreover, the Bureau expressed concern that "some servicers may have significantly exacerbated borrowers' financial difficulties by using short-term forbearance programs inappropriately instead of reviewing the borrowers for long-term options."[9] Any expansion of the anti-evasion restriction for a payment deferral option following a forbearance should be carefully circumscribed so as to avoid heightening the risks to borrowers previously identified by the CFPB.

Unlike a forbearance program, a payment deferral option is not a temporary solution but an arrangement intended to provide long-term relief as a permanent loan modification. A deferral option allows a homeowner to resume regular mortgage payments while accounting for the months of missed forborne payments by placing them at the end of the loan term. And while deferrals could be offered without the need for this IFR, as a "blind" offer to a borrower who has submitted an incomplete loss mitigation application when the offer is not based on any evaluation of information submitted by the borrower in connection with the application,[10] the COVID-19 deferral options are being offered based on an evaluation of information from the borrower.

Given the high numbers of homeowners currently in forbearance and the limited capacity of servicers to process loss mitigation applications correctly and timely, permitting servicers to offer a deferral option that allows borrowers to resume their pre-forbearance payments without requiring servicers to do a full evaluation of each borrowers' individual circumstances seems appropriate. But the CFPB must ensure that servicers do not foreclose on borrowers who need relief other than a deferral before evaluating them for a complete loss mitigation application.

While we appreciate and agree with the CFPB that it will be important to facilitate streamlined conversion of borrowers from short-term forbearance plans into long-term loss mitigation options, and recognize that the deferral option is vastly preferable to a lump sum payment requirement, payment deferrals are not suitable for every borrower. Many borrowers are likely to end their forbearances with permanently reduced income or increased expenses, including potentially other debt obligations. Indeed, the CFPB has foregrounded as its response to the pandemic an increase in access to credit, suggesting at least an implicit recognition that borrowers are unlikely to exit their forbearances in stronger financial shape than they went in.[11]

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[7] 85 Fed. Reg. 39057 (June 30, 2020) ("In granting this flexibility, the Bureau explained that borrowers facing only temporary hardships might benefit from a more efficient application process that leads to a temporary solution without exhausting the protections under § 1024.41 that are determined as of the date a complete application is received."), *citing* 78 Fed. Reg. at 60400; 81 Fed. Reg. at 72246.
[8] 78 Fed. Reg. 60401 (Oct. 1, 2013).
[9] *Id*. at 60398.
[10] *Id*.
[11] *See, e.g.,* Consumer Fin. Protection Bureau, *Consumer Financial Protection Bureau Issues Final Rule on Small Dollar Lending*, July 7, 2020, https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-final-rule-small-dollar-lending/ ("[T]oday's action will help to ensure the continued availability of small dollar lending products for consumers who demand them, including those who may have a particular need for such products as a result of the current pandemic.").

Borrowers with increased expenses or decreased income, or both, will not be served by a streamlined offer of a deferral option and will need a full evaluation for all available loss mitigation options. Other borrowers for whom a payment deferral initially seems appropriate may nonetheless find themselves again laid off and need a second or even third forbearance followed by a new review for loss mitigation. We have already seen waves of financial hardship hit across the country as states reopen businesses only to have to close them again after a second spike in infections.[12] The CFPB's rule should recognize that the COVID-19 pandemic is likely to continue to be unpredictable and result in waves of financial hardship. For many borrowers, these waves of hardship will be cumulative rather than discrete events. The IFR, as it stands, while an advance in some ways, leaves many borrowers unprotected from foreclosure and without access to appropriate and timely loss mitigation in the face of significant hardship not of their making and beyond their control.

The CFPB's action or inaction here carries with it significant risk of magnifying existing racial inequities. Communities of color, especially Black and Latinx communities, have been hit the hardest by both COVID-19 and the economic consequences of COVID-19, on top of deep and pre-existing disparities. Aside from the staggering disparities in infection, hospitalization, and death from COVID-19,[13] African Americans and Latinx have borne the brunt of the economic fallout. While the overall unemployment rate during this crisis peaked at 14.7% in April and had fallen to 11.1% in June, the unemployment rate for African Americans peaked at 16.8% in May and remained at 15.4% percent in June.[14] For Latinx, the unemployment rate peaked at 18.9% in April and remained at 14.5% in June.[15] The gap between Black and white unemployment rates is the largest it has been in five years.[16] Even as the number of new unemployment filings falls below 1 million for the first time in months, total unemployment remains high.[17]

This disparity in economic hardship is likely to persist throughout the crisis. African American and Latinx workers are disproportionately either on the front lines of the crisis, placing them at risk of infection, or losing their jobs or a portion of their income to the crisis. The occupations that are most at risk in the crisis—fields that necessitate person-to-person interactions, such as retail, food preparation and service, and construction—disproportionately employ African

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[12] *See, e.g.,* Elise Gould, *The bounceback deflates; Job gains slow considerably in July*, https://www.epi.org/press/the-bounceback-deflates-job-gains-slow-considerably-in-july/ (Aug. 7, 2020).

[13] *See, e.g.,* Ctrs. For Disease Control and Prevention, *COVID-19 in Racial and Ethnic Minority Groups* (2020), *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html (last updated June 25, 2020) (hospitalizations per capita are five times as high for African Americans and Native Americans as for whites, and four times as high for Latinx as for whites); Tiffany Ford, et al., *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, Brookings Institution (June 16, 2020), *available at* https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/..

[14] Bureau of Labor Statistics, *The Employment Situation—June 2020,* at 7 (2020), *available at* https://www.bls.gov/news.release/pdf/empsit.pdf..

[15] *Id.*

[16] Jonnelle Marte, *Gap in U.S. Black and white unemployment rates is widest in five years,* Reuters (July 2, 2020), https://www.reuters.com/article/us-usa-economy-unemployment-race/gap-in-us-black-and-white-unemployment-rates-is-widest-in-five-years-idUSKBN2431X7

[17] Heidi Shierholtz, *Unemployment insurance claims remain historically high; Congress must reinstate the extra $600 immediately,* https://www.epi.org/blog/unemployment-insurance-claims-remain-historically-high-congress-must-reinstate-the-extra-600-immediately/ (Aug. 6, 2020).

Americans and Latinx workers compared to fields that can more easily adjust to work from home.[18] The large reductions in city and state public sector employment have hit Black workers particularly hard.[19] Compounding job loss is the historical reality that African Americans and Latinx have been less likely to receive unemployment benefits when eligible.[20]

As a country, we have still not recovered from the trillions of dollars in lost equity from the Great Recession.[21] The CFPB must ensure that COVID-19 does not result in another devastating round of unnecessary foreclosures, concentrated in communities of color. In order to protect borrowers for whom the deferral option is neither affordable nor sustainable, and to otherwise ensure that this limited exception to the CFPB's appropriate distinction between temporary and longer-term solutions remains appropriately tailored to the circumstances of COVID-19, the following additional safeguards are needed:

- **Foreclosure protections.** The IFR should provide, in addition to new §1024.41(c)(2)(v)(A)(3), that the 120-day delinquency period in existing §1024.41(f)(1)(i) before a servicer may initiate foreclosure shall be tolled for borrowers who have received a COVID-19 forbearance;
- **Sustainable escrow repayment.** New § 1024.41(c)(2)(v)(A)(1) should require that forborne escrow payments be included in the "covered amounts" for a payment deferral;
- **Servicer reasonable diligence.** For borrowers who are not offered or do not accept a COVID-19 payment deferral, the IFR should explicitly provide that servicers have an immediate duty to act with reasonable diligence to obtain complete loss mitigation applications and otherwise comply with § 1024.41;
- **Ongoing access to servicing protections.** The IFR should state unambiguously that that the offer of a loss mitigation option under new § 1024.41(c)(2)(v)(A) is not an evaluation of a complete application for purposes of the duplicative request exclusion in §1024.41(i);
- **Flexiblity on post-deferral repayment through periodic payments.** The IFR should state explicitly in new § 1024.41(c)(2)(v)(A)(1) that deferral options that provide for repayment through periodic payments after the end of the existing loan term are permitted;

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[18] Keith Wardrip & Anna Tranfalgia, Federal Reserve Bank of Philadelphia, *COVID-19: Which Workers Will Be Most Impacted?* (2020), *available at* https://philadelphiafed.org/-/media/covid/which-workers-will-be-most-impacted/covid-19-impacted-workers.pdf?la=en.

[19] David Cooper & Julia Wolfe, *Cuts to the state and local public sector will disproportionately harm women and Black workers,* (July 9, 2020) https://www.epi.org/blog/cuts-to-the-state-and-local-public-sector-will-disproportionately-harm-women-and-black-workers/. *See also,* Nat'l League of Cities, City Fiscal Conditions 2020, https://www.nlc.org/sites/default/files/users/user57221/City_Fiscal_Conditions_2020_FINAL.pdf (noting historical outpacing of expenditures over revenues and cities' general requirements to have balanced budgets; predicting further cutbacks in payroll).

[20] Austin Nichols & Margaret Simms, Urban Institute, *Racial and Ethnic Differences in Receipt of Unemployment Benefits During the Great Recession* (2012), *available at* https://www.urban.org/sites/default/files/publication/25541/412596-Racial-and-Ethnic-Differences-in-Receipt-of-Unemployment-Insurance-Benefits-During-the-Great-Recession.PDF.

[21] Ingrid Gould Ellen & Samuel Dastrup, *Housing and the Great Recession,* (Oct. 2012), https://furmancenter.org/files/publications/HousingandtheGreatRecession.pdf ($7 trillion in home equity lost between 2006 and 2011, with losses concentrated in communities of color).

- **Disclosures about the deferral option**. The Bureau should require that servicers provide borrowers with written disclosures of the terms of any deferral option offered under new § 1024.41(c)(2)(v)(A) and the consequences of accepting the offer;
- **Ongoing review of this rule.** The Bureau should engage in an ongoing process of reevaluating the IFR based on the results of market monitoring, data collection (including its impact on communities of color), supervision, complaints, and borrower and advocate experiences. Both the current crisis and the deferral programs are relatively new, and we cannot yet assess what the risks and benefits are.
- **Proposals to expand this rule.** The Bureau should limit this IFR to the specific COVID-19 deferral option and not extend new § 1024.41(c)(3)(v) to other post-forbearance loss mitigation options made available to borrowers affected by other types of disasters and emergencies.

The current crisis is unprecedented, the financial challenges for homeowners are different from more traditional natural disasters, and the deferral program is new and not tested. Any future exceptions to the anti-evasion provisions, including expansion of the options offered without complete loss mitigation evaluation or changes to the permissible fee charged to borrowers, should be done only after full notice-and-comment rulemaking, and not in this context.

The IFR should provide, in addition to new § 1024.41(c)(2)(v)(A)(3), that the 120-day delinquency period in existing § 1024.41(f)(1)(i) before a servicer may initiate foreclosure shall be tolled for borrowers who have received a COVID-19 forbearance.

New § 1024.41(c)(2)(v)(A)(3) requires that the borrower's acceptance of the COVID-19 deferral offer shall end any preexisting delinquency. The Bureau states that this requirement is meant to ensure that borrowers who accept the deferral option "do not face a risk of imminent foreclosure because, under existing § 1024.41(f)(1)(i), servicers are generally prohibited from making the first notice or filing required under applicable law to initiate the foreclosure process until a mortgage loan obligation is more than 120 days delinquent."[22]

We support this requirement but believe it does not go far enough. In particular, it should protect borrowers who have received a forbearance and: 1) are not offered a COVID-19 deferral, 2) are not eligible for a COVID-19 deferral, 3) were initially offered a COVID-19 deferral that was not completed or the offer was rescinded, or 4) do not accept the COVID-19 deferral offer due to confusion caused by poor servicer communications or because they are not able to resume making regular installment payments and need other loss mitigation.

Because the deferral programs being offered by the Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Company (Freddie Mac), Federal Housing Administration (FHA) and other owners or insurers of mortgage loans generally have limited eligibility requirements, not all borrowers in forbearance will qualify for a COVID-19 deferral option. For example, a borrower is not eligible for a COVID-19 National Emergency Standalone Partial Claim under the FHA program if the borrower was 30 days or more past due as of March

[22] 85 Fed. Reg. 39062 (June 30, 2020).

1, 2020 or if the borrower has already received the maximum partial claim.[23] The Fannie Mae eligibility guidelines for a COVID-19 payment deferral provide that the mortgage loan must not have been more than 31 days delinquent as of March 1, 2020, must be less than 360 days delinquent as of the date of evaluation, must not be subject to a recourse or indemnification arrangement, and must not have previously received a COVID-19 payment deferral.[24] It is likely that mortgages held in private label securitizations will have other limiting eligibility requirements.

Other borrowers will face problems with the processing of their deferral offers. The GSEs have provided that use of a COVID-19 payment deferral agreement executed by the borrower is optional and that payment deferrals may be accepted without a trial plan. However, Fannie Mae's guidance provides that "if the servicer determines the borrower's signature is required on the COVID-19 payment deferral agreement, it must receive the executed agreement prior to completing the COVID-19 payment deferral."[25] Servicers are given discretion to specify the method of evidencing borrower acceptance of a COVID-19 payment deferral,[26] and servicers are required to determine if the deferral agreement must be recorded under local law to ensure that the mortgage loan retains its first lien position.[27] Thus, it is inevitable that some borrowers who are offered a deferral will not actually receive a COVID-19 payment deferral because of processing and acceptance problems.

Additionally, just as we have seen with forbearances, some borrowers will not accept deferral offers due to confusion caused by poor servicer communications.

More concerning are the borrowers who will never receive a deferral offer. We believe that many of the over 4.5 million borrowers who have received forbearances will still be experiencing a financial hardship, or a renewed hardship, at the end of the forbearance period. These borrowers will not be able to resume making their regular mortgage payment and therefore will be ineligible for a COVID-19 payment deferral.

Information about the ongoing financial hardships that many homeowners will face is beginning to emerge, demonstrating the need to address tolling. For example, Corelogic projects that serious mortgage delinquencies will quadruple by the end of 2021 without further federal policy changes, with 3 million homeowners more than 90 days late on their mortgages.[28] While not all serious delinquencies result in foreclosures, they likely will require a more protracted loss mitigation review. Moreover, the recent uptick in homeowners extending their forbearances also highlights that many homeowners' finances will not be returning to business as usual. The

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[23] Mortgagee Letter 2020-06, FHA's Loss Mitigation Options for Single Family Borrowers Affected by the Presidentially-Declared COVID-19 National Emergency in Accordance with the CARES Act, April 1, 2020.
[24] Fannie Mae LL-2020-07, p. 2-3, May 13, 2020.
[25] *Id*. at p. 5.
[26] *See* Fannie Mae sample COVID-19 payment deferral agreement.
[27] Fannie Mae LL-2020-07, p. 5, May 13, 2020.
[28] Marc Rapport, CoreLogic Reports Doubling in Delinquent Mortgages, msn.com (Aug. 11, 2020), *available at* https://www.msn.com/en-us/money/realestate/corelogic-reports-doubling-in-delinquent-mortgages/ar-BB17PYMp.

technology company Sagent reported that between June 7th and July 26th, the number of forbearance extensions rose from 6.52% to 53.28%.[29]

Projections of expected foreclosures also indicate a surge that would be exacerbated by the failure to toll the pre-foreclosure clock during a forbearance. An analysis by ATTOM Data Solutions estimates that between 225,000 to 500,000 homeowners nationwide could be facing foreclosure. In the most likely outcome, the number of homeowners in foreclosure would more than double, from the current level of about 145,000 to roughly 336,000 in the second quarter of 2021.[30]

A survey by the National Housing Resource Center of housing counselors nationwide reinforced the conclusion that many homeowners do not believe they will be able to revert to their regular mortgage payments when their forbearances end. More than half of the counselors surveyed responded that only a few of their clients expected to be financially able to resume regular monthly mortgage payments after forbearance, and almost one-third stated that none of the COVID-affected clients they had seen would be able to resume payments.[31]

Borrowers who do not transition into a COVID-19 payment deferral receive no foreclosure protection under the IFR beyond what is already provided in § 1024.41. These borrowers likely will have received an initial 90-day forbearance, followed by an extension of at least another 90 days. They will face a risk of imminent foreclosure because the 120-day delinquency period in existing § 1024.41(f)(1)(i) will have expired before or at the end of forbearance. Deprived of the 120-day pre-foreclosure review period that the rule was intended to provide, such borrowers will emerge from forbearance struggling to complete loss mitigation applications while at the same time responding to the initiation of the foreclosure process and incurring additional foreclosure related fees that may make finding a workable resolution even more difficult. The IFR does nothing to protect borrowers in the most financial distress as a result of the pandemic.

The CFPB has a special obligation to help these borrowers. The CFPB dramatically increased the risk of harm to these borrowers by relieving servicers of the obligation to comply with the loss mitigation rules, including providing timely and accurate notices.[32] Had the CFPB been enforcing servicer compliance with loss mitigation during the pandemic, borrowers who need deeper loss mitigation assistance than a deferral option would be receiving information from their servicers about their loss mitigation options and the steps needed to complete an application. Instead, the CFPB judged that borrowers would be "confused" by notices about their rights and legal status. Having taken that step, the CFPB should not now allow these

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[29] Bonnie Sinnock, Forbearance Extensions are Skyrocketing: Sagent, National Mortgage News (Aug. 7, 2020).

[30] ATTOM Data Solutions, Residential Foreclosure Activity in U.S. Could Easily Double Over Coming Year (July 31, 2020*), available at* https://www.attomdata.com/news/market-trends/figuresfriday/residential-foreclosure-activity-in-u-s-could-easily-double-over-coming-year/.

[31] National Housing Resource Center, Survey (closed Aug. 11, 2020).

[32] Consumer Fin. Protection Bureau, et al., *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act* (April 3, 2020), at 5-7, https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_mortgage-servicing-rules-covid-19.pdf (suspending indefinitely supervision and enforcement of most loss mitigation rules, including timing and accuracy of notices, timely evaluation of a complete loss mitigation application, and reasonable diligence in completing a loss mitigation application).

borrowers to be foreclosed on without any effort at all by the servicer to provide loss mitigation assistance.

The IFR should provide, in addition to new § 1024.41(c)(2)(v)(A)(3), that the 120-day delinquency period in existing § 1024.41(f)(1)(i) before a servicer may initiate foreclosure should be tolled until a borrower has completed a forbearance program and one of the following has occurred: 1) after evaluation and review for all available loss mitigation options, the borrower has accepted or rejected a loss mitigation option; 2) after evaluation and review for all available loss mitigation options, the borrower has been found ineligible for a loss mitigation option and the servicer has made a determination of any appeal by the borrower of a loan modification denial, or 3) the borrower has failed to provide information and documents within the borrower's control to complete a loss mitigation application within 30 days after the servicer requests such information or documents or any longer period that the servicer has set for the submission of requested information or documents. Without this essential change, borrowers who cannot resume their monthly mortgage payment or who otherwise are denied a COVID-19 payment deferral may immediately face foreclosure after their forbearance ends.

New § 1024.41(c)(2)(v)(A)(3) requires that the borrower's acceptance of the COVID-19 deferral offer shall end any preexisting delinquency, effectively giving the borrower a new 120-day pre-foreclosure review period if the borrower becomes delinquent after accepting the deferral. Again, we strongly support this provision. Our proposal additionally offers protection for a borrower who is not offered or does not accept a deferral, by tolling the 120-day period during the time the borrower is in forbearance. For a borrower who was delinquent before entering a forbearance, but less than 120 days delinquent, the time period under § 1024.41(f)(1) would stop when the borrower enters forbearance and would begin again when one of the triggering events discussed above occurs, assuming the delinquency is not cured. The following examples illustrate how this tolling would apply:

- If a borrower was current when entering into forbearance, an initial 120 days of delinquency would begin when one of the triggering events discussed above occurs, and the servicer must not make the first notice or filing to initiate foreclosure until that 120 day period has expired;
- If a borrower was 30 days delinquent when entering into forbearance, the time period for delinquency would resume again at 30 days when one of the triggering events discussed above occurs, and the servicer must not make the first notice or filing to initiate foreclosure until the borrower is delinquent for an additional 90 day period;
- If a borrower was 160 days delinquent when entering into forbearance, there is no tolling and the servicer may make the first notice or filing to initiate foreclosure (if not already done) once one of the triggering events discussed above occurs.

The Bureau should also clarify what "borrower's acceptance" means for purposes of new § 1024.41(c)(2)(v)(A)(3). If the borrower indicates acceptance of the offer in any manner, either verbally or in writing (such as by signing a deferral agreement), or by making the first required payment, that should end any preexisting delinquency. While making the first required payment may be a form of acceptance, new § 1024.41(c)(2)(v)(A)(3) should be triggered whether or not the borrower has made the first payment under the terms of the deferral agreement. If the

borrower fails to make the first required payment or execute any required documents, and these are conditions set by the servicer for acceptance, the servicer may stop processing and finalizing the deferral agreement. However, the protection under new § 1024.41(c)(2)(v)(A)(3) should not be conditioned upon payment or execution (or recordation) of any required documents. Thus, if the borrower indicates acceptance of the offer in any manner, the failure of the borrower to make the first required payment under a deferral agreement should nevertheless start a new period of delinquency for purposes § 1024.41(f), and require the servicer to comply with the early intervention requirements under § 1024.39.

New § 1024.41(c)(2)(v)(A)(1) should require that forborne escrow payments be included in the "covered amounts" for a payment deferral.

The GSEs, FHFA, FHA and other industry stakeholders have coalesced around payment deferrals as the loss mitigation option best suited for addressing borrowers who are exiting COVID-19 forbearances. The rationale for this option is that the majority of borrowers with forbearances had performing loans before they faced unemployment and other financial hardships caused by the pandemic. Once these borrowers return to work and resolve other financial hardships, they will be able to resume making their pre-forbearance contractual installment payments. Payment deferrals therefore provide the means to address COVID-19-driven delinquencies and reestablish the majority of mortgages as performing loans.

The IFR facilitates this process by permitting servicers to offer payment deferrals without obtaining and evaluating complete loss mitigation applications from the large number of borrowers who are ending forbearances. The Bureau has stated that requiring compliance with existing § 1024.41(b) by servicers under these circumstances "would likely interfere with their ability to provide effective and efficient assistance."[33]

A critical component of this strategy, and an eligibility requirement for payment deferral programs, is that borrowers must once again be able to make their pre-forbearance contractual installment payments. Two factors that control the determination of this eligibility requirement are whether or not 1) the borrower's hardship has been resolved and 2) the borrower's pre-forbearance contractual installment payment has changed (other than changes caused by an adjustment of the index on an adjustable rate mortgage). Our comments here focus on the second factor, essentially whether the COVID-19 payment deferral option has resulted in an increase in the borrower's regular monthly payment that would make the loan unaffordable.

To address the payment affordability issue, new § 1024.41(c)(2)(v)(A)(2) requires that 1) the amount being deferred ("covered amounts") must not accrue interest, 2) the servicer must not charge any fees for the deferral option, and 3) the servicer must waive late fees, penalties and other similar fees upon the borrower's acceptance of the option. The Bureau contends that these cost and fee restrictions, and the other criteria for the new exception, ensure that borrowers "will not face a balloon payment immediately after the forbearance period ends" and that the COVID-

[33] 85 Fed. Reg. 39062 (June 30, 2020).

19 deferral option "will ease the financial strain of having to make additional periodic payments to catch up on a mortgage loan for delinquent borrowers who are not in forbearance."[34]

While we support the cost and fee restrictions in new § 1024.41(c)(2)(v)(A)(2), we are concerned that the definition of "covered amounts" in new § 1024.41(c)(2)(v)(A)(1) requires only that forborne principal and interest payments be included, and does not address how escrow deficiencies and shortages will be paid. The Bureau states that this was done to give servicers flexibility in how escrow amounts are treated: "A loss mitigation option would qualify for the new exception if it defers repayment of escrow amounts, in addition to principal and interest payments, as long as it otherwise satisfies new § 1024.41(c)(2)(v)(A)."[35]

Conversely, servicers will qualify for the exception even if they demand additional payments for the escrow advances that were made during the forbearance period, as well as additional amounts to cover escrow shortages that arise from the forbearances. For borrowers in forbearance for a period of 6 months or more (the CARES Act permits forbearances of up to 12 months), escrow deficiencies and shortages could be several thousands of dollars. Borrowers coming out of forbearance following a COVID-19 financial hardship cannot be expected to make such lump-sum payments, or to pay these amounts in additional installment payments. This potential for payment shock following forbearance is exactly what the IFR is supposed to prevent, so it should be addressed in the final rule.

We urge the Bureau to provide in the final rule that for purposes of new §1024.41(c)(2)(v)(A)(1), "covered amounts" shall include the total amount of all forborne "periodic payments" as defined in §1026.36(c)(1)(i). This would include the amount necessary to cover principal, interest, and escrow (if applicable) for each periodic payment forborne during the forbearance period. This change would be consistent with the FHA's guidance and practice. The FHA guideline provides that a COVID-19 National Emergency Standalone Partial Claim includes all arrearage amounts, which "consists of Principal, Interest, Taxes, and Insurance."[36]

While this approach of including forborne escrow payments in the deferred amount does not completely eliminate the possibility of some small escrow shortage at the time of the borrowers' next annual escrow account analysis (generally not caused by the forbearance itself), it avoids any payment shock for borrowers who receive a COVID-19 deferral option. In fact, it is the only practicable method of confirming that the borrower's post-forbearance contractual installment payment will not increase due to a forbearance-related escrow deficiency or shortage without performing an escrow analysis at the time the borrower receives the COVID-19 deferral option.

Importantly, this change would not preclude servicers from demanding repayment of escrow deficiencies and shortages in accordance with § 1024.17(f), or from excluding such amounts from a loss mitigation option offered to a borrower after an evaluation of a complete loss mitigation application. This would simply provide that if the servicer wishes to qualify for the exception to the anti-evasion requirement by offering a COVID-19-related option under § 1024.41(c)(2)(v)(A), it must provide for deferral of forborne escrow payments.

[34] *Id*. at 39061.
[35] *Id*. at 39061.
[36] FHA Mortgagee Letter 2020-06, p. 4, April 1, 2020.

Alternatively, though far less protective of consumers, the Bureau should at a minimum require that "covered amounts" in new § 1024.41(c)(2)(v)(A)(1) shall include all escrow advances made by the servicer on the loan account while the borrower was in forbearance. This would include the amount of any negative balance in the escrow account at the time the borrower accepts an offer under § 1024.41(c)(2)(v)(A). This change would be consistent with the guidance and practice of the GSEs. For example, the Fannie Mae guidance provides that the servicer must defer "out-of-pocket escrow advances paid to third parties."[37] The Freddie Mae guidance states that "[a]ny Escrow advances must be included in the deferred balance."[38]

For borrowers who are not offered or do not accept a COVID-19 payment deferral, the IFR should explicitly provide that servicers have an immediate duty to act with reasonable diligence to obtain complete loss mitigation applications and otherwise comply with § 1024.41.

On April 3, 2020, the Bureau issued with other agencies a Joint Statement on the impact of the COVID–19 emergency on consumers and mortgage servicers.[39] The Joint Statement provided that as of April 3, 2020, and until further notice, the Bureau and other agencies would not take supervisory or enforcement action against servicers for:

- failing to provide the acknowledgment notice required by § 1024.41(b) within five days of a request for a forbearance (which is an incomplete application), provided the servicer sends the notice before the end of the forbearance period;
- delays in sending other notices and taking the actions described in § 1024.41(b)-(d), (h)(4), and (k), including the 30-day application evaluation and related notices, and the processing of appeals and related notices, provided the servicer makes good faith efforts to provide these notices and take the related actions within a reasonable time;
- delays in establishing or making good faith efforts to establish live contact with delinquent borrowers as required by § 1024.39(a), provided the servicer makes good faith efforts to establish live contact within a reasonable time; and
- delays in sending the written early intervention notice to delinquent borrowers required by § 1024.39(b), provided the servicer makes good faith efforts to establish live contact within a reasonable time.

We are concerned that, because the Bureau has relaxed these loss mitigation requirements and timelines, servicers will not be adequately prepared or incentivized to respond to borrowers who are not offered or do not accept a COVID-19 payment deferral. The Bureau should remind

[37] Fannie Mae LL-2020-07, p. 4, May 13, 2020.
[38] Freddie Mac Bulletin, 2020-15, p. 4, May 13, 2020.
[39] Consumer Fin. Protection Bureau et al., *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act* (Apr. 3, 2020), at 5-7, https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_mortgage-servicing-rules-covid-19.pdf.

servicers that the rule treats a borrower who has received a forbearance as having submitted a loss mitigation application (albeit an incomplete one). If a borrower is not put into a COVID-19-related option under new § 1024.41(c)(2)(v)(A) and the forbearance ends, the anti-evasion exception in existing § 1024.41(c)(2)(iii) no longer applies, and the servicer then has an immediate duty to act with reasonable diligence to collect information needed to complete the application.

The CFPB should explicitly provide that, if the servicer cannot confirm that the borrower is able to continue making the full regular installment payment or otherwise does not offer the borrower a COVID-19 payment deferral, or, if the borrower does not accept a COVID-19 payment deferral offer, the servicer must either offer the borrower an additional forbearance (if this option is available to the borrower) or immediately exercise reasonable diligence in obtaining documents and information to complete the application as required by § 1024.41(b)(1) and evaluate the borrower for all available loss mitigation options within 30 days of receipt of a complete application as required by § 1024.41(c)(1).

The IFR should state unambiguously that the offer of a loss mitigation option under new § 1024.41(c)(2)(v)(A) is not an evaluation of a complete application for purposes of the duplicative request exclusion in § 1024.41(i).

We applaud the Bureau for including the following statement in the section-by-section analysis for the IFR: "The Bureau stresses that servicers are required to comply with § 1024.41, including § 1024.41(b)(1) and (2), if the borrower submits a new application after accepting a loss mitigation option under new § 1024.41(c)(2)(v)(A)."[40] The analysis explains further that the "one-bite" rule in § 1024.41(i) does not apply in this situation because the servicer has not previously complied with § 1024.41 in connection with a complete application submitted by the borrower and the borrower has not been delinquent at all times since submitting a complete application.

However, this analysis is provided in connection with new § 1024.41(c)(2)(v)(B), which provides that the servicer is not required to comply with § 1024.41(b)(1) or (2) with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the loss mitigation option in new § 1024.41(c)(2)(v)(A). We are concerned that without additional explanation in the rule itself, this provision could be construed as suggesting that acceptance of the loss mitigation option under new § 1024.41(c)(2)(v)(A) also relieves servicers of the need to comply with § 1024.41 for complete applications submitted after accepting a loss mitigation option under new § 1024.41(c)(2)(v)(A). There are numerous examples of courts misconstruing the current exceptions to the "one-bite" rule in § 1024.41(i),[41] so it is critical that the Bureau address this in the rule itself rather than in the section-by-section analysis.

[40] 85 Fed. Reg. 39062 (June 30, 2020).

[41] *See., e.g.*, Wheeler v. Specialized Loan Servs., 2018 WL 6334297 (S.D. Cal. Dec. 5, 2018) (RESPA claim dismissed because plaintiff had been delinquent at all times since submitting his prior application, though trial court did not make any findings that prior application was complete and had been fully reviewed); Spinoso v. PHH Mortg. Corp., 2020 WL 4043052, (S.D. Tex. July 17, 2020) (dismissing complaint based on consumer's failure to allege that the loss mitigation application in question was the first complete application during the current period of delinquency); Zermuehlen v. Wells Fargo Bank, N.A., 2018 WL 6118437 (C.D. Cal. Apr. 26, 2018) (placing burden

New § 1024.41(c)(2)(v)(B) should explicitly provide that any deferral option offered pursuant to the exemption shall not be treated as an evaluation of a complete application for purposes of the duplicative request exclusion in section 1024.41(i). This will help ensure that borrowers who face additional financial hardships as the COVID-19 economic challenges persist will have an opportunity to be evaluated for all loss mitigation options through an application subject to § 1024.41.

The IFR should state explicitly in new § 1024.41(c)(2)(v)(A)(1) that deferral options that provide for repayment through periodic payments after the end of the existing loan term are permitted.

For most borrowers with federally-backed mortgage loans, post-forbearance deferral options will generally require repayment of forborne amounts in a lump sum at the end of the loan term, as provided for in the GSEs' COVID-19 Payment Deferral[42] and FHA's COVID-19 Standalone Partial Claim[43]. However, for some loans, servicers may offer deferral options that allow for repayment through additional periodic payments after the end of the existing loan term.[44] In many cases, this type of arrangement may be preferable for a borrower since it does not involve a balloon payment.

In the section-by-section analysis of new § 1024.41(c)(2)(v)(A)(1), the Bureau explains that the rule is "flexible with respect to repayment requirements" and allows for "repayment either in a lump sum or over a specified period at the end of the loan term through additional periodic payments" in an arrangement that "would technically extend the term of the loan… ."[45]

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on consumer to allege that prior application was incomplete and review by servicer was not in compliance with regulation); Kirkpatrick v. Wells Fargo Bank, N.A., 2016 WL 7496757 (C.D. Cal. June 28, 2016) (duplicative request exclusion applied without any findings that earlier application was complete and fully reviewed), *aff'd*, 699 F. App'x 751 (9th Cir. 2017).

Courts have also ignored the CFPB's guidance that the duplicative request exclusion does not apply if the prior evaluation was done on an application submitted before January 10, 2014, the effective date of the loss mitigation rule. See Germain v. US Bank Nat'l Ass'n as Tr. for Morgan Stanley Mortg. Loan Tr. 2006-7, 920 F.3d 269 (5th Cir. 2019) (summarily concluding that servicer's prior notice complied with § 1024.41(c)(1), which was not in effect when notice was sent); Peterson v. Zions Bank N.A., 2017 WL 7053642, (D. Utah Oct. 24, 2017) (exclusion applied based on November 2010 prior application); Allen v. Wells Fargo Bank, 2017 WL 3421067 (N.D. Tex. Aug. 9, 2017); Trionfo v. Bank of Am., 2015 WL 5165415 (D. Md. Sept. 2, 2015) (applications submitted before regulation's effective date counts towards duplicative request exclusion); Bertschy-Gallimore v. U.S. Bank, 2015 WL 3889260, at *7–8 (W.D. Mich. June 24, 2015) (applying exclusion based on denial of December 2013 application); Bobbitt v. Wells Fargo Bank, 2015 WL 12777378 (S.D. Tex. May 7, 2015); Walker v. Driscoll, 2016 WL 617263, at *6 (Md. Ct. Spec. App. Feb. 16, 2016) (borrower's June 2014 application was a duplicative request based on servicer's review of two prior applications submitted in 2013; "[appellant did] not argue that the process required by Regulation X is different from the process that was in fact followed in 2013").

[42] FHFA, *FHFA Announces Payment Deferral as New Repayment Option for Homeowners in COVID-19 Forbearance Plans* (May 13, 2020), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Payment-Deferral-as-New-Repayment-Option-for-Homeowners-in-COVID-19-Forbearance-Plans.aspx.

[43] HUD Mortgagee Letter 2020-06, https://www.hud.gov/sites/dfiles/OCHCO/documents/20-06hsngml.pdf.

[44] *See, e.g.,* Mr. Cooper, *Here's What Really Happens After a Forbearance* (June 28, 2020), https://www.mrcooper.com/blog/2020/06/28/after-a-forbearance/ (listing "[e]xtension of the term of the loan (i.e., tacking on missed payments to the end of your loan)" as one post-forbearance option).

[45] 85 Fed. Reg. 39061 (June 30, 2020).

However, the language of the rule itself does not make that flexibility clear.

The new rule states, in relevant part, that a loss mitigation option qualifies for the new exception if "[t]he loss mitigation option permits the borrower to delay paying covered amounts until the mortgage loan is refinanced, the mortgaged property is sold, [or] the term of the mortgage loan ends… ." It also states, "[f]or purposes of this paragraph (c)(2)(v)(A)(1), 'the term of the mortgage loan' means the term of the mortgage loan according to the obligation between the parties in effect when the borrower is offered the loss mitigation option." Notwithstanding the explanation in the section-by-section analysis, this paragraph appears to limit qualifying options to those that permit a borrower to delay repayment until the end of the existing contractual term (i.e., the balloon payment model) and does not provide for repayment over an extended period after the end of the existing contractual term.

In order to ensure that borrowers who qualify are able to receive deferral options that permit them to repay forborne amounts over time after the end of the existing term rather than as a balloon payment at the end of the existing term, we urge the Bureau to revise new §1024.41(c)(2)(v)(A)(1) to explicitly include a loss mitigation option that permits the borrower to delay paying covered amounts until after the term of the mortgage loan ends.

The Bureau should require that servicers provide borrowers with written disclosures of the terms of any deferral option offered under new § 1024.41(c)(2)(v)(A) and the consequences of accepting the offer.

The Bureau seeks comment on whether to require written disclosures related to payment deferral offers.[46] The evidence has mounted since the CARES Act was enacted that servicer misinformation about COVID-19 forbearances has led to borrower confusion. We have every reason to believe that many borrowers will face a similar experience about end-of-forbearance loss mitigation options. We strongly urge the Bureau to require written disclosures to ensure that borrowers receive some basic, uniform disclosures.

The Federal Housing Finance Agency Office of Inspector General recently reviewed mortgage servicers' compliance with Section 4022 of the CARES Act and the GSE implementing guidance.[47] The Inspector General report contained the following summary findings:

> National surveys conducted by one Enterprise suggest a significant number of homeowners are not aware of the option of mortgage forbearance, and media reports state that some servicers may have provided inaccurate advice to homeowners about repayment options. Because mortgage servicers are the primary point of contact for homeowners experiencing COVID-19 related financial hardship, we reviewed the information provided by a sample of 20 large servicers, 20 medium servicers, and 20 small servicers on their websites. We found

[46] 85 Fed. Reg. 39063 (June 30, 2020).
[47] Federal Housing Finance Agency Office of Inspector General, "Oversight by Fannie Mae and Freddie Mac of Compliance with Forbearance Requirements Under the CARES Act and Implementing Guidance by Mortgage Servicers," OIG-2020-004, July 27, 2020.

> incomplete and/or unclear information about forbearance and repayment on 14 of the 20 websites of the large servicers and generally limited to no information on forbearance and repayment on the remaining 40 websites. In a few cases, information on some servicers' websites appeared to contradict the CARES Act requirements or FHFA and Enterprise guidance. For example, two of the small servicer websites instruct homeowners that they must provide proof of unemployment and other documentation to obtain mortgage forbearance; another servicer website maintains that all missed payments must be repaid in a lump sum at the end of the forbearance period.[48]

We are concerned that many of these same communication problems will be repeated when borrowers are offered deferral options under new § 1024.41(c)(2)(v)(A). The GSE guidances contain few requirements about borrower communications concerning deferral options. In addition, some borrowers will receive "blind" deferral offers without speaking with a servicer representative. For example, the Fannie Mae guidance provides that a servicer who does not achieve Quality Right Party Contact (QRPC) with a borrower who is on a COVID-19 related forbearance must still solicit the borrower for a post-forbearance COVID-19 payment deferral, if potentially eligible, prior to expiration of the forbearance.[49] The offer is communicated in a Payment Deferral Post Covid-19 Forbearance Solicitation Cover Letter, which provides almost no information about the actual deferral option.

When the Bureau issued the initial exception to the anti-evasion requirements for short-term payment forbearance or repayment options, it mandated in § 1024.41(c)(2)(iii) that servicers promptly send borrowers written notification to ensure that borrowers understand the options. The Bureau at that time stated that it believed "providing borrowers this more specific information is important to ensure that borrowers do not face unwarranted delays and paperwork and that servicers do not misuse short-term forbearance to avoid addressing long-term problems."[50] Given the overall disruption caused by the pandemic and its impact on consumer comprehension of relief programs, it is implausible that post-forbearance COVID-19 payment deferral options should be held to a lesser standard. It is deeply disappointing that the IFR failed to mandate this basic consumer protection requirement for deferrals.

We urge the Bureau to amend new § 1024.41(c)(2)(v)(A) to require that promptly after offering a post-forbearance COVID-19 payment deferral option that is not rejected by the borrower, the servicer must provide the borrower a written notice stating:

- an itemization of the covered amounts for which payment will be deferred, including any escrow amounts;
- how any escrow deficiency or shortage existing on the loan at the time the deferral option is accepted will be handled;[51]

[48] *Id*. at p. 2-3.
[49] Fannie Mae LL-2020-07, p. 6, May 13, 2020.
[50] 78 Fed. Reg. 60399 (Oct. 1, 2013).
[51] We urge the Bureau to include this statement only if our proposal to include forborne escrow payments in "covered amounts" is rejected.

- the repayment terms of the covered amounts, including that the covered amounts must be repaid when the mortgage loan is refinanced, the mortgaged property is sold, or the term of the mortgage loan ends, and if not paid in a lump-sum when the term of the mortgage loan ends, the term of any installments;
- that the covered amounts will not accrue interest;
- that the servicer will not charge any fee in connection with the deferral option;
- that the servicer will waive all existing late charges, penalties, stop payment fees, or similar charges upon the borrower's acceptance of the deferral option;
- that borrower's acceptance of the deferral offer will bring the loan current and end any preexisting delinquency;
- that the offer of the deferral option is based on evaluation of an incomplete application,
- that other loss mitigation options may be available, and
- that the borrower may submit a complete loss mitigation application to receive an evaluation for all available loss mitigation options, notwithstanding the borrower's acceptance of the deferral option.

The Bureau should engage in an ongoing process of reevaluating the IFR based on the results of market monitoring, data collection, supervision, complaints, and borrower and advocate experiences.

At the time this IFR was issued, the Bureau stated that approximately 4 million borrowers had entered forbearance since March 2020,[52] that many borrowers had received forbearances with an initial period of 90 days, and that "many of them will expire in June or July 2020."[53] A reasonable expectation at that time was that many borrowers would not need a forbearance extension. With many states and businesses reopening in June and July, it was expected that many borrowers would return to work or otherwise overcome COVID-related financial hardships, and that borrowers would be able to resume making mortgage payments and quickly transition into payment deferral loss mitigation options.[54] As a justification for issuing the rule without notice and comment, the Bureau noted that the payment deferral programs will help "eligible borrowers avoid foreclosure by quickly entering an agreement regarding repayment of their forborne payments."[55]

The experience for most borrowers in forbearance since the IFR was issued is that they continue to experience financial hardship. There are still approximately 4 million borrowers in forbearance programs.[56] Economic conditions have not improved significantly since the IFR, resulting in part from a spike in COVID-19 cases in various parts of the country. These

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[52] 85 Fed. Reg. 39060 (June 30, 2020).
[53] 85 Fed. Reg. 39058 (June 30, 2020).
[54] The Fannie Mae and Freddie Mac COVID-19 payment deferral programs took effect on July 1, 2020.
[55] 85 Fed. Reg. 39060 (June 30, 2020).
[56] *See* National Mortgage News, *New mortgage forbearances decrease for eighth week in a row*, Aug. 10, 2020 (reporting on data from Mortgage Bankers Association, and approximating the number at 4 million); *Loans in Forbearance Fell by 17K This Week; National Forbearance Rate Drops to 7.7%*, Black Knight, July 31, 2020 (estimating 4.1 million loans in forbearance as of the end of July and noting an increase in FHA and VA forbearances).

conditions continue to prevent borrowers from getting out of forbearance. While the unemployment rate dropped to 10.2% in July,[57] down from a high of 14.7% in April, it remains at about the same level that was reached at the peak of the Great Recession.[58] And, as discussed briefly in the introduction, the financial hardship does not fall evenly on all segments on the society; people of color, particularly Black and Latinx people, are experiencing significantly higher unemployment and greater job and income loss, with much less "bounceback."

The inability of Congress to reach agreement on additional stimulus measures, including the extension of additional unemployment benefits, will result in an increase in new forbearance requests. More than 30 million people are still receiving some form of unemployment insurance, and "many say they are being pushed to the brink by the expiration of the extra $600 a week in federal unemployment benefits, in an economy where there is little hope of finding new work."[59] J.P. Morgan research shows that mortgage delinquencies have been kept low due primarily to the additional $600 unemployment benefit many borrowers have been receiving and estimates that "without stimulus payments and the $600 unemployment check, STACR [Structured Agency Credit Risk] delinquencies would have been 40% to 70% higher than current levels."[60]

While we do not question the Bureau's decision to issue the IFR without prior notice and public comment, we believe that the Bureau must not treat this like other IFRs. It is imperative that the Bureau do more than simply evaluate comments received under the IFR to determine whether revisions are needed. The extraordinary circumstances of the COVID-19 emergency demand that the Bureau engage in an ongoing process in which the deferral exception created by the IFR is constantly reevaluated. To guide this reevaluation, the Bureau should collect data, engage in supervision and monitoring of the market, and review borrower complaints and experiences on the implementation of payment deferral options and the effectiveness of the IFR.

In particular the Bureau should determine whether servicers are misusing payment deferrals to avoid compliance with loss mitigation procedures, particularly as borrowers remain in forbearances for extended periods. The Bureau should determine whether servicers are improperly placing borrowers in payment deferrals without evaluating borrowers for other loss mitigation options when requested. The Bureau should also assess whether borrowers placed in payment deferrals do indeed have the capacity to resume making their pre-COVID payments.

We are concerned that without engagement by the Bureau in supervision and data collection, servicer implementation of the IFR will go unexamined and result in a spike of foreclosures. Our concerns are reinforced by the FHFA Inspector General's observation that the GSEs do not believe it is their duty to check whether servicers are implementing and complying with their own guidances:

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[57] Bureau of Labor Statistics, Employment Situation Summary, Aug. 7, 2020.

[58] Pew Research Center, "Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession," June 11, 2020 ("The Great Recession, which officially lasted from December 2007 to June 2009, pushed the unemployment rate to a peak of 10.6% in January 2010").

[59] Washington Post, "U.S. economy added 1.8 million jobs in July as it worked to recover from the coronavirus pandemic," Aug. 7, 2020.

[60] J.P. Morgan North America Securitized Products Research, "$600 goes a long way: Impact of fiscal stimulus on CRT delinquencies, July 29, 2020.

> We learned from the Enterprises that neither views its responsibilities to include testing whether its servicers comply with legal and regulatory requirements. According to the Enterprises, their long-standing business relationships with mortgage servicers, the servicers' familiarity with the Enterprises' servicing requirements, and their continual contact with servicers give them confidence that servicers are well-informed of their legal and contractual obligations under the CARES Act and implementing guidance. The Enterprises rely on representations and warranties made by each servicer that it complies with applicable law and regulations.[61]

The Bureau should not expand the anti-evasion exception at this time.

The Bureau seeks comment on whether the exception under new § 1024.41(c)(3)(v) should be extended to other post-forbearance loss mitigation options made available to borrowers affected by other types of disasters and emergencies.[62] For many of the same reasons discussed in the preceding section, COVID-19 cannot serve as a template for other disasters and emergencies.

The COVID-19 emergency is starkly different than other types of disasters and emergencies. Natural disasters typically do not result in historic levels of nationwide unemployment. While natural disasters certainly produce deteriorating economic conditions, they are generally felt in a limited geographic area and are of a short duration. The existing loss mitigation procedures under § 1024.39 and § 1024.41, including the availability of short-term options such as forbearance and repayment programs and the ability of servicers to make "blind offers" of loss mitigation to borrowers, work well to address borrower and servicer needs during other disasters and emergencies.

The IFR and the COVID-19 deferral option are justified because servicers, understandably, lack the capacity to process the millions of borrowers coming out of COVID-related forbearances under the existing procedures. Servicer operations and their capacity to handle historically high demand have been impacted, like most businesses worldwide, by the COVID-19 disease itself. Such is not true of other natural disasters. Other targeted disasters and emergencies generally do not affect the servicer in the location where it conducts business. When servicers are themselves not directly impacted by natural disasters, the CFPB's general servicing requirements seek to ensure that servicers have the infrastructure, trained staff, and practices and procedures needed to keep processing loss mitigation applications and efficiently handle compliance with § 1024.41 during disasters.[63] The loss mitigation rule, after all, is meant to ensure that borrowers who have suffered the impacts of a natural disaster or other hardship are given every opportunity to access loss mitigation before foreclosure.

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[61] Federal Housing Finance Agency Office of Inspector General, "Oversight by Fannie Mae and Freddie Mac of Compliance with Forbearance Requirements Under the CARES Act and Implementing Guidance by Mortgage Servicers," OIG-2020-004, July 27, 2020.
[62] 85 Fed. Reg. 39063 (June 30, 2020).
[63] See, e.g. 12 C.F.R. § 1024.38.

To the extent the CFPB continues to believe supervisory flexibility is appropriate, it already has those tools at its disposal.[64] But, in general, the CFPB should not encourage servicers to evade the borrower protections of the loss mitigation rules.[65] As the CFPB itself has noted, even in a natural disaster, "[S]ome borrowers may be experiencing a hardship where a longer-term loss mitigation option is more appropriate."[66] Placing borrowers into the wrong product or failing to perform a complete evaluation can cause real consumer harm.

We strongly urge the Bureau to limit this IFR to COVID-19 and the specific deferral option referenced by the CFPB. We are too early to know whether the deferral exception works as intended and what the impact on borrowers and communities will be of permitting deferral offers without determining the borrower's actual needs and ability to repay. As the CFPB, joined with the other members of the FFIEC, recently observed, "The effectiveness of accommodations improves when they are based on a comprehensive review of how the hardship has affected the financial condition and current and future performance of the borrower."[67] Providing borrowers with accommodations that do not match their needs introduces unnecessary risk to both financial institutions and borrowers. There is no justification for doing so on a widespread basis, without the development of a strong factual record to identify the specific circumstances where doing so is appropriate and necessary.

We note that other commenters have urged the CFPB to expand the limited exception created by this IFR to include not only other natural disasters but other kinds of permanent modifications, offered without a complete loss mitigation review.[68] The limited nature of the deferral option contemplated in the IFR and the strong consumer protections embedded in it are critical to minimizing potential consumer harm. Specifically, we urge the CFPB to:

- oppose capitalizing arrears into the loan amount;

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[64] Consumer Fin. Protection Bureau, *Supervisory Highlights, Winter 2020,* at 4-6 (Feb. 2020), *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-21_2020-02.pdf (reporting that the CFPB excused numerous violations of the loss mitigation rules, including failure to provide written communication and placing borrowers in short-term forbearance plans without reviewing them for long-term loss mitigation option, because "servicers developed plans to enhance staffing capacity in response to any future disaster-related increases in loss mitigation applications"); Consumer Fin. Protection Bureau et al., *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act* (April 3, 2020), at 5-7, https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_mortgage-servicing-rules-covid-19.pdf (suspending indefinitely supervision and enforcement of most loss mitigation rules, including timing and accuracy of notices, timely evaluation of a complete loss mitigation application, and reasonable diligence in completing a loss mitigation application).

[65] *See, e.g.,* Federal Fin. Institutions Examination Council, *Joint Statement on Additional Loan Accommodations Related to COVID-19*, at 4 (August 3, 2020), https://www.ffiec.gov/press/PDF/Statement_for_Loans_Nearing_the_End_of_Relief_Period.pdf (encouraging financial institutions to comply with the law and recognizing that doing so is part of effective risk management for both financial institutions and consumers).

[66] Consumer Fin. Protection Bureau, *Supervisory Highlights, Winter 2020,* at 6 (Feb. 2020), *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-21_2020-02.pdf.

[67] Federal Fin. Institutions Examination Council, *Joint Statement on Additional Loan Accommodations Related to COVID-19*, at 3 (August 3, 2020), https://www.ffiec.gov/press/PDF/Statement_for_Loans_Nearing_the_End_of_Relief_Period.pdf.

[68] *See, e.g.,* Comment of Housing Pol'y Council, July 23, 2020.

- maintain in the rule that the suspension of the (b)(1) and (b)(2) requirements are triggered by the borrower's acceptance of the deferral offer rather than the offer by the servicer; and
- forbid the charging of any fees or penalties in connection with the deferral option.

Capitalizing arrears into the loan amount would fundamentally change the nature of the offer. It would no longer be a deferral option, with relatively easy to understand costs. Loan modifications that allow capitalization of the arrears often increase payments and, by charging interest on interest, increase the borrower's overall costs, even if they do not increase the monthly payment. While we recognize that some borrowers may best be served by capitalizing arrears, and that some investors require capitalization of arrears, the decision to capitalize arrears should only be made as part of a complete loss mitigation evaluation, to ensure that the capitalization produces the most affordable and sustainable modification for the borrower.

In terms of suspending the servicer's § 1024.41(b)(1) and (b)(2) obligations, we believe it could be difficult to determine when a borrower has rejected an offer, particularly if the servicer makes no effort to communicate with a borrower beyond sending the offer. A borrower who fails to make a payment on an offered deferral option might be rejecting the offer or might simply have forgotten to resume payments. And communication about the status of the offer and what the borrower's options are could be confused if the servicer simply persists in referencing the deferral option rather than determining if the borrower wants to complete the application. We believe some borrowers could be misled into thinking their only option was the deferral option.

Finally, despite the CFPB's efforts, many homeowners remain unaware of the forbearance option, nearly five months after the passage of the CARES Act.[69] Census Pulse Survey data suggests that Black and Latinx borrowers are, as compared to white borrowers, particularly unlikely to know about the forbearance option and are much more likely to have missed a payment than to be in forbearance.[70] Allowing servicers to assess pre-forbearance fees and charges against borrowers will predictably have a disparate impact on borrowers who, for whatever reason, did not receive a forbearance in a timely way. This impact would likely fall hardest on those least able to bear the costs—Black, Latinx, and low-income homeowners.

Moreover, sorting fees into "allowed" and "not allowed" categories undermines the argument for permitting servicers to offer the default option with reduced notice to borrowers and without a review for all available loss mitigation options. At the least, it complicates the messaging about the COVID-19 deferrals: "you won't have to pay any fees or costs, unless you do," is hardly the simple, clear message needed. It would complicate matters for servicers and increase the risk of errors, and it would complicate compliance review. It would also make it harder for borrowers to understand and evaluate the costs of the deferral option and whether it represented an

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[69] *See, e.g.,* Kathleen Howley, *Low-income borrowers are least likely to know about mortgage relief*, Housing Wire, Aug. 12, 2020, https://www.housingwire.com/articles/low-income-borrowers-are-least-likely-to-know-about-mortgage-relief/ (citing Fannie Mae report that found 60% of borrowers with annual income below $50,000 lacked familiarity with mortgage relief options).

[70] National Consumer Law Center, *A Looming Crisis: Black Communities at Greatest Risk of COVID-19 Foreclosure* (July 2020), *available at* https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Covid_Black_Forbearance_Foreclosure.pdf.

affordable and sustainable option or not. Given that borrowers who accept the deferral option will generally be held to have accepted the terms and conditions of it, including fees, borrowers who might be assessed such fees should properly demand an accounting of all the fees, and evidence that they were actually paid, before accepting the deferral option. Most borrowers won't do that and would consequently waive rights to challenge possibly illegal fees. If any borrowers do exercise their rights to find out what fees they are being assessed, the argument for the deferral option as an exception to the anti-evasion rule collapses. Such needless complexity risks borrower harm and should not be introduced.

Thank you for your consideration of these comments to the IFR. For questions or further discussion, please contact Alys Cohen at acohen@nclc.org, John Rao at jrao@nclc.org, and Lisa Stikin at lsitkin@nhlp.org.