

COMMENTS

to the

Consumer Financial Protection Bureau

12 CFR Part 1026

[Docket No. CFPB-2016-0016]

RIN 3170-AA49

**Amendments to the 2013 Mortgage Rules under the
Real Estate Settlement Procedures Act (Regulation X)
and the Truth in Lending Act (Regulation Z)**

**Consumer Testing of
the Proposed Sample Forms**

by the

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

and the

National Association of Consumer Bankruptcy Attorneys

May 26, 2016

The **National Consumer Law Center**,¹ on behalf of its low-income clients, and the **National Association of Consumer Bankruptcy Attorneys**,² submit the following comments in response to the Bureau’s reopening of the docket to seek public comment specifically on the report summarizing the methods and results of the consumer testing of sample periodic statement forms for consumers in bankruptcy. In our earlier comments, we applauded the Bureau for proposing in this docket a much improved set of bankruptcy exemptions to the mortgage servicing rules. We hope the Bureau will retain in the final rule the many consumer protections contained in the proposal. We also urge the CFPB to make further changes before the rules take effect in accordance with these comments and those we submitted earlier.

As noted in our initial comments, we concur with the Bureau’s statement that “a consumer’s status in bankruptcy” should not “act as a bar to receiving fundamental information about the mortgage loan account.”³ The Bureau should be applauded for proposing in this docket a limited exemption to the periodic statement rule that preserves the ability of bankruptcy borrowers to receive essential account information.

The testing confirms that bankruptcy debtors gain significant benefits from receiving periodic statements. Despite the limitation that the testing was done with some individuals who lacked experience in bankruptcy, based on hypothetical scenarios, the participants generally appreciated the value of receiving statements.

As one chapter 7 participant in Round 1 stated, “I don’t know why anybody would not want to receive these notices.” Report, p. 13. A chapter 13 Round 1 participant noted that the statement information would help avoid calls to the trustee: “I would rather get this. It would help. I would be able to keep up with it a lot more. . . It would alleviate me calling my trustee a lot.” Report, p.13.

A chapter 7 participant in Round 2 stated: “I wish I would have received something like that when I was going through this process, that’s for sure.” Report, p. 33. A chapter 13 Round 1 participant observed: “I don’t find the notice to be threatening. Going through bankruptcy is a traumatic experience. To get a notice that is not threatening or demanding helps a lot. It’s pertinent information that is presented not in a threatening way.” Report, p. 33.

¹ Since 1969, the nonprofit **National Consumer Law Center**® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC’s expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC publishes a series of consumer law treatises including *Consumer Bankruptcy Law and Practice*, *Mortgage Lending*, *Truth in Lending*, and *Foreclosures and Mortgage Servicing*. These comments are written by NCLC attorney John Rao.

² The **National Association of Consumer Bankruptcy Attorneys** (<http://www.nacba.org>) is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA now has 3,000 members located in all 50 states and Puerto Rico.

³ See Section-by-Section Analysis, 79 Fed. Reg. 74249 (Dec. 15, 2014).

In evaluating the testing results, the Bureau should consider that the value of the disclosures for borrowers in bankruptcy is not limited to consumers. Most consumer debtors are represented by attorneys in Chapter 13 cases, and the disclosures will greatly assist these attorneys, and Chapter 13 trustees, in advising consumer debtors, if payment problems arise during the case.

As discussed below, the testing also supports our position that several of the exclusions in proposed rule will deprive consumers of critical account information.

1. Use of “due” in payment amount disclosures

The Round 1 Forms, which include the proposed Chapter 7 and Chapter 13 forms, did not use the word “due” when referring to the current payment amount that was due. The Report notes that “Five of 17 participants (three of nine Chapter 7 Participants; two of eight Chapter 13 Participants) expressed some confusion or hesitation about the due date, explaining that the phrase ‘Payment Date’ did not explicitly indicate that the payment was ‘due’ on that date.” Report, p. 16. We believe that the final forms should be revised to include “due” in the appropriate places, particularly in the coupon location. Use of the word “due” in connection with the payment amount does not somehow transform the statements into a threatening communication that would violate the automatic stay or discharge injunction. There is no sound reason for eliminating this common terminology when a borrower is in bankruptcy or has received a discharge.

The Round 3 results were even more conclusive on this point. The Chapter 7 Delinquency Disclosure Form in Round 3 used the phrases “Amount Due” and “Due Date” instead of “Payment Amount” and “Payment Date.” All Round 3 Chapter 7 participants “expressed a preference for the language used in the Delinquency Disclosure Form ... because of the inclusion of the word ‘due.’” Report, p. 53. Participants noted that the word “due” made it easier for them to distinguish these payment amounts from others on the forms and that they often scan statements quickly looking for the word “due.” Again, this is no different than how borrowers read periodic statements outside the bankruptcy setting.

The Round 1 participants generally preferred having the full amount owed listed in the Payment Amount box, and we concur that this is helpful. The Round 2 forms left the payment amount off of the payment coupon. The Report noted that “The blank payment coupon confused a number of Chapter 7 Participants, as some looked to the coupon to determine how much they owed.” Report, p. 36. Even though the Round 2 Chapter 13 participants did not seem concerned about this omission from the payment coupon, we believe that the payment amount should be reflected on the payment coupon for both Chapter 7 and Chapter 13 forms.

2. Prepetition arrearage disclosure in Chapter 12 and Chapter 13 cases

Most consumers who file a Chapter 13 case are proposing in their plans to cure a pre-petition mortgage default. We believe that disclosure of the pre-petition arrearage amount on

periodic statements will help consumers understand how their Chapter 13 plans are progressing. It will encourage them to complete their plans as they see the arrearage amount being reduced over time.

Our position at the June 16, 2014 bankruptcy roundtable was that disclosure of the pre-petition arrearage is essential, including disclosure of a running balance as payments are made. However, we did not believe that it would be necessary for servicers to disclose how payments on the arrearage are allocated as between principal, interest, escrow and other charges.

Consistent with our earlier comments, we support proposed § 1026.41(f)(3)(vi). It requires a servicer to disclose, if applicable, the total of all pre-petition payments received by the servicer since the last periodic statement, the total of all pre-petition payments received by the servicer since the beginning of the current calendar year, and the current balance of the consumer's pre-petition arrearage. We also support proposed § 1026.41(f)(5) dealing with consumers who receive coupon books rather than periodic statements, which requires servicers to make available upon request by the consumer the pre-petition arrearage information listed in proposed § 1026.41(f)(3)(vi).

Several of the sample Chapter 13 form statements used in the testing included disclosure of the debtor's pre-petition arrearage. The Report describes the results for Chapter 13 participants in Round 1 as follows: "Chapter 13 Participants generally understood that the information presented in the Pre-Petition Arrearage box reflected payments that they were making to the amount that was past due when they filed for bankruptcy. Chapter 13 participants in Round 1 were generally more comfortable with the Proposed Form's technical language (e.g., "pre-petition arrearage" and "post-petition payment") than the Revised Form's plain language (e.g., "pre-bankruptcy debt" and "payment amount") and expressed a preference for this technical language." Report. p. 19.

The Round 2 participants' experience was different. Participants seemed confused by the term "arrearage" and did not understand the distinction between pre- and post-petition. Report, p. 38. This may be because the hypothetical for the Round 2 forms showed a more challenging payment history. Unlike the Round 1 forms that showed the hypothetical borrower made both a full pre-petition and a full post-petition payment the prior month, the Round 2 forms showed the borrower as delinquent on the post-petition payment obligation but having made a timely payment on the pre-petition arrearage.

The results were far more positive for the Pre-Petition Arrearage forms used in Round 3: "Participants immediately noticed the addition of the pre-petition arrearage box on the Arrearage Form and generally (and correctly) interpreted its purpose and contents." Report, p. 56. Nine of the 10 participants correctly indicated that they understood that this disclosed the amount they were behind before filing bankruptcy. They also understood that these payments were being made by the trustee to the servicer.

We have stated in our comments and at the roundtable that this useful information should be provided to consumers. It helps consumers monitor the progress they are making in paying off the arrearage, providing an incentive to remain current. It also avoids unnecessary inquiries

directed to the trustee, consumer's attorney, and the servicer. The participants confirmed the value of this information, stating:

"It shows the amounts that were past due when I filed. And then says that trustee is sending the payments shown here. The trustee doesn't let you know. They just take the money and disperse it."

"You want to see that your payments are being paid. I think you only get a six-month or once-a-year statement from the trustee. I'm sure they're paying it, but you're always hoping."

Report, p. 57.

Based on the high level of comprehension of the Pre-Petition Arrearage forms used in Round 3, we recommend that the language used in those forms be incorporated in the final forms. We have a preference for the pre-petition arrearage disclosure in the Round 3, C.3 Chapter 13 Alternate Arrearage Form.

3. Fee disclosures in the Amount Due, Transaction Activity and Past Payments Breakdown sections

For nonbankruptcy consumers, current § 1026.41(d)(1)(ii) requires a periodic statement to include in the "amount due" section the amount of any late fee and the date on which the fee will be imposed if payment has not been received. Proposed § 1026.41(f)(1) provides that servicers may exclude these late fee disclosures from statements provided to certain consumers.

We stated in our initial comments that while it may be appropriate to permit the omission of this information for statements to consumers who are debtors in a Chapter 13 case, because some servicers do not charge late fees for monthly payments disbursed by Chapter 13 trustees, the exclusion should not apply when a bankruptcy case is no longer pending. If consumers who have discharged their mortgage debts in bankruptcy will be charged a fee for late payments, they should be notified of the amount of the fee and the information they need to avoid the late fee (the date on which the fee will be imposed if no payment is made). Providing this basic information in itself, combined with the required general disclosure that the statement is for informational purposes only, does not violate the discharge injunction. It is fundamentally no different than a servicer providing information about other contractual terms related to payments, such as payment adjustment notices on a variable rate mortgage.

Testing confirms that borrowers find the information about fees being charged to their accounts to be useful and understandable. The third Chapter 7 form (the Delinquency Disclosures Form) used in Round 3 included a disclosure under the Amount Due that a late fee would be charged if the payment was not received by the specified date. The Report notes the Round 3 participants "immediately noticed and comprehended that the \$160 late fee would be assessed after 9/15/2015," and that they "preferred having this late fee information on the form and did not find it threatening." Report, p. 56.

Both Chapter 7 and Chapter 13 participants in Round 1 were able to use the Transaction Activity and Past Payments Breakdown sections on the forms to locate information on fees and past payments. Report, p. 18. All Round 2 participants “were able to use the Transaction Activity and Past Payments Breakdown sections of the forms to locate information on fees and past payments.” Report, p. 37. All Round 2 chapter 7 participants “were able to correctly identify fees they had been charged and the reason for the charge.” Report, p. 37. All of the Chapter 7 Participants in Round 3 were able to correctly answer questions about whether and for what they had been charged fees. Report, p. 54.

As we stated in our initial comments, consumers who are in bankruptcy or have received a discharge should not be deprived of this important information about fees. The testing has also caused us to reconsider our earlier position about providing this information to Chapter 13 debtors. We now believe that the Bureau should require for borrowers in a confirmed Chapter 13 plan the disclosure under the Amount Due that a late fee will be charged if the payment is not received by the specified date.

4. Exclusion of certain delinquency information in Chapter 7 cases

As stated in our initial comments, we support the Bureau’s decision to generally include delinquency disclosures. The delinquency information included in the proposed rule is valuable to all consumers, even those who have discharged their mortgage debts in a bankruptcy case. Testing confirms that the Bureau should retain this information in the final modified statements and should reconsider the proposed deletion of certain delinquency information.

With respect to the specific delinquency information, such as how many days the borrower is delinquent, some participants found the information threatening. However, most found the information helpful and thought it should be provided. The Report found that most participants “expressed a preference for receiving the delinquency-specific disclosures if these disclosures applied to them.” Report, p. 56.

Proposed § 1026.41(f)(1) provides that servicers may exclude the disclosures set forth in § 1026.41(d)(8)(i), (ii), and (v) from the modified statements. These disclosures include: the date on which the consumer became delinquent; a notification of possible risks, such as foreclosure and expenses, that may be incurred if the delinquency is not cured; and a notice of whether the servicer has made the first notice or filing for any judicial or non-judicial foreclosure process. Although the tested forms did not include disclosures of the first notice or filing based on the facts of the hypothetical, it is clear that the participants favor receiving the other excluded information. All seven of the Round 3 Chapter 7 participants preferred to “see how many days delinquent they were,” and five of seven preferred to “receive the potential fees and foreclosure information.” Report, p.56.

As we stated in our initial comments, exclusion of the disclosures set forth in § 1026.41(d)(8)(i), (ii), and (v) may be appropriate for consumers who are in a pending Chapter 7 bankruptcy case. But there is no sound reason to exclude this helpful information about the potential loss of the consumer’s home at foreclosure from statements provided to consumers who

are no longer in bankruptcy and have discharged their mortgage debts in bankruptcy. Our position is supported by the testing.

5. Exclusion of delinquency information in Chapter 12 and Chapter 13 cases

Proposed § 1026.41(f)(3)(i) provides that servicers may exclude all of the remaining delinquency information disclosures (in addition to § 1026.41(d)(8)(i), (ii), and (v)) set forth in § 1026.41(d)(8) from the modified statements sent to a consumer who is a debtor in a Chapter 12 or Chapter 13 case. We opposed this broad exemption and continue to believe that there should be some limited delinquency information provided to consumers in a Chapter 12 or Chapter 13 case. We are disappointed that the Bureau did not conduct testing of the Chapter 13 forms for delinquency information. The value that consumers place on this information, as confirmed by the testing, strongly suggests that the Bureau should reconsider the broad exemption in the proposed rule. If the consumer's confirmed plan provides for maintenance of payments on the mortgage, and the servicer contends that the consumer has failed to maintain these post-petition payments, the servicer should be required to disclose on the modified statement the date on which the consumer became delinquent, which is currently required by § 1026.41(d)(8)(i). We also believe that the servicer should provide in this situation an account history in the manner required by § 1026.41(d)(8)(iii). We do not oppose exclusion of the other required delinquency information disclosures in § 1026.41(d)(8) from modified statements sent to a consumer who is a debtor in a Chapter 12 or Chapter 13 case.

6. Disclosures for explanation of amount due and past payment breakdown for Chapter 12 and Chapter 13 debtors

Our initial comments strongly supported the Bureau's decision to require the explanation of the post-petition payment amount due, which would include a breakdown of how much of the post-petition payment is applied to principal, interest, and escrow. This information is currently required under § 1026.41(d)(2)(i). Similarly, we supported proposed § 1026.41(f)(3)(iv) requirement to disclose 1) the total of all post-petition payments received since the last statement and a breakdown of the amounts applied to principal, interest, and escrow, 2) the amount, if any, currently held in any suspense or unapplied funds account, and 3) a total of all payments applied to post-petition fees or charges since the last statement. Proposed § 1026.41(f)(3)(iv) also requires the periodic statement to include the total of all post-petition payments received since the beginning of the calendar year and a similar breakdown of the amounts applied to principal, interest, and escrow, currently held in any suspense or unapplied funds account, and applied to post-petitions fees or charges since the beginning of the calendar year.

We noted that these disclosures will enable debtors, their attorneys and Chapter 13 trustees to detect when servicers fail to properly apply payments in accordance with bankruptcy law and the terms of a confirmed Chapter 13 plan. Testing has confirmed that Chapter 13 debtors find this information extremely useful. The Round 2 participants were given forms that combined principal and interest into a single, lump sum figure in the Payment Amount and Past Payment Breakdown sections. The majority of participants disliked these statements and

“preferred to see principal and interest as separate figures.” Report, p. 39. Bankruptcy debtors are no different than other consumer borrowers as they clearly pay attention to this information. In noting the importance of this information, the Report stated that some participants “directly said that they currently look to see how much they’re paying in interest and toward their principal when they look at their actual monthly statements.” Report, p. 39.

The mortgage industry has suggested that the disclosure of payment breakdown information should be in accordance with the servicer’s system of records that reflects the application of payments under the original terms of the mortgage loan, as if the borrower’s confirmed Chapter 13 plan does not exist. The testing confirms that Chapter 13 debtors understand the purpose of a Chapter 13 cure plan and that they want to be able to verify on their periodic statements that the confirmed plan is being implemented by the servicer in accordance with bankruptcy law and the terms of their confirmed Chapter 13 plan. The disclosure of payment breakdown information based on the application of payments under the original mortgage terms will be confusing to consumers and will deprive them of information concerning the status of their account under the terms of their reorganization plan. Even more confusing would be separate disclosures of the application of payments under both the confirmed plan and the original mortgage terms. The Bureau should reject industry proposals on this point and should retain in the final rule the disclosure of payment breakdown information as proposed.

7. Disclosure of the source of payments in transaction activity in Chapter 12 and Chapter 13 cases

We stated in our initial comments that disclosure of the transaction activity helps consumers to understand and track transactions on their account, and provides them with information that can help them avoid delinquency. We believe that consumers in a Chapter 13 bankruptcy receive the same benefits from having this information as consumers outside bankruptcy. During the bankruptcy roundtable, we commented that the transaction activity should include both payments for pre-petition arrears and payments for post-petition amounts due that are received by the servicer, irrespective of whether they are disbursed to the servicer by the consumer directly or by the trustee. We stated that disclosure of all payments received by the servicer is essential, so that consumers (and their attorneys and the trustee) may have a complete record of the transaction activity. However, we also noted that it is not as important for the transaction activity disclosure to identify the source of payments - that is, whether the payments have come from the trustee or the consumer.

Based on the testing, we now believe that the proposed rule should require that the pre-petition payments shown on the transaction activity include a disclosure that the payments have been received from the trustee. One of the chapter 13 Round 2 participants thought that the statement was asking for a payment of \$336.43, the amount of the partial payment Springside received during the previous month from the trustee. The Report noted that “This might ultimately stem from overall confusion regarding the difference between pre-petition and post-petition payments.” Report, p. 36. To avoid this confusion, payments reflected in the Transaction Activity box for pre-petition arrearage should be designated as “Payment Received

from Trustee.” This will also make the form consistent with the Pre-Petition Arrearage Payments box, which includes the caption “Received from Trustee last month.”

A more significant concern is the designation of trustee payments as partial payments. The original Chapter 13 Proposed Form correctly refers to a payment received from the trustee as a “Payment Received” (though as mentioned it should indicate “from Trustee”). However, the other tested forms refer to a trustee payment as a “Partial Payment Received.” We strongly oppose this change. It is confusing and inconsistent with bankruptcy law. A payment that is to be applied to the pre-petition arrearage in a confirmed Chapter 13 cure plan is not a scheduled payment, and therefore it can never be deemed “partial.” Not only will this be confusing to consumers, it improperly suggests that consumers’ arrearage payments to the trustee are short when in fact they may be paying the precise amount required under the terms of their Chapter 13 plan and confirmation order.

8. Bankruptcy Notice disclosures

Participants generally preferred seeing the Bankruptcy Notice in a box as opposed to unboxed, with eight of 11 participants mentioning a preference for the box (six of nine Chapter 7 Participants; two of two Chapter 13 Participants [only two of eight Chapter 13 Participants were asked about the box specifically]). Report, p. 15. We agree with the participants that this information should be segregated by placing it a box.