



Supplemental Comments
Submitted to the Consumer Financial Protection Bureau
By the National Consumer Law Center (on behalf of its low-income clients)
Docket No. CFPB-2014-0033
January 26, 2016

The National Consumer Law Center (“NCLC”),¹ on behalf of its low-income clients, submits these supplemental comments related to Docket Number CFPB-2014-0033. We write to address points raised in the memorandum submitted on September 11, 2015 by the Consumer Mortgage Coalition (“CMC”) related to the Bureau’s proposal on successors in interest.

As the CMC acknowledges, “[s]uccessorship claims are not new. Every servicer has always had procedures in place to handle successorship claims.”² Because this is the case, servicers can, without undue burden, make their existing procedures for successors comply with the proposed successor rule and the RESPA rules that already apply to their general servicing and loss mitigation processes.³ The problem is that servicers’ existing procedures for handling successors are uneven and in many cases inadequate.⁴ Some servicers still fail to acknowledge the fact that a right of survivorship deed conveys a home to the surviving joint tenant without it passing through probate. Others continue to improperly tell domestic violence survivors that they must obtain the signature of a violent ex-spouse who is no longer on title in order to obtain a modification, even where a protective order is in place. Examples of inadequate systems for communicating with successors abound. The CFPB’s proposed successor rule is urgently needed to protect this vulnerable population. We urge the Bureau to strengthen the proposed rule in the ways identified in our original comments submitted March 16, 2015 and move ahead with implementation.

Moreover, the issues raised by CMC and other industry commenters should not be a barrier to a strong final rule on successors in interest. In this supplemental comment, we explain why

¹ The National Consumer Law Center® (NCLC®) is a non-profit Massachusetts corporation specializing in low-income consumer issues, with an emphasis on consumer credit. Since 1969, 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 Mortgage Lending, Truth in Lending, and Foreclosures. These comments were written by Chantal Hernandez and Sarah Bolling Mancini.

² Memorandum from Consumer Mortgage Coalition to Joe Devlin et al. (Sept. 11, 2015) (“CMC Memo”) at 1.

³ Indeed, servicers are required to evaluate successors for simultaneous modification and assumption under HAMP, Fannie Mae, Freddie Mac, and FHA servicing rules. See MAKING HOME AFFORDABLE, MAKING HOME AFFORDABLE PROGRAM: HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES ch. II, § 8.8 (Mar. 3, 2014); FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE ch. 65.12; FANNIE MAE, SERVICING GUIDE: FANNIE MAE SINGLE FAMILY § D1-4.1-02 (Nov. 12, 2014); *FHA Single Family Housing Policy Handbook*, U.S. DEP’T HOUSING & URB. DEV. 543. Thus, most servicers should already be addressing these issues for a majority of the loans they service.

⁴ See client examples provided in Appendix A to NCLC’s original comments on this docket, submitted March 16, 2015, and in Appendix A to this document.

neither privacy rights nor the FDCPA should undercut the proposed rule. We go on to discuss the need for protection for all Garn-exempt transferees, in addition to survivors of family violence; practical concerns around documenting successorship; and the problem of dual tracking.

I. The Bureau’s successor proposal does not infringe on borrowers’ privacy rights.

Communicating with a successor homeowner regarding the mortgage does not violate the privacy rights of the borrower. CMC and other industry commenters invoke consumer privacy and, in particular, the provisions of the federal Gramm-Leach-Bliley Act (“GLBA”) and Regulation P, as a basis for objecting to the proposed rule on successors. Under the GLBA, covered financial institutions may not disclose a customer’s “nonpublic personal information” to a “nonaffiliated third party.”⁵ These general, pro-consumer, privacy protections should not bar successor homeowners from accessing the information they need to make decisions about their homes and the debt secured by those homes. Many terms of the mortgage are not “nonpublic,” and successor homeowners are not “nonaffiliated third parties” contemplated by the statute. In addition, specific exceptions to the GLBA apply to successor homeowners.

Disclosure of this kind of information to a successor falls cleanly within exceptions to GLBA protections. GLBA has several relevant exceptions: disclosure is permitted when it is pursuant to a transaction requested by the consumer,⁶ with the consumer’s “consent or at the [consumer’s] direction,”⁷ in connection with servicing the consumer’s account,⁸ to the consumer’s legal representative, or to someone with a legal or beneficial interest “relating to the consumer.”⁹ Requests for information are likely to fit all of these exceptions.

Transfers to successor homeowners are often pursuant to a transaction requested by the consumer, or at the consumer’s consent or direction. The successor homeowner is, in many cases, only the successor homeowner by virtue of some agreement with or designation by the original borrower. Whether the successor homeowner acquires her interest through a judicial deed after divorce, or upon death, or via a transfer during life from her spouse—done for estate planning purposes or to recognize a new marriage—the successor becomes the successor homeowner through a transfer of rights taken by or on behalf of the original borrower. In many of these cases, the original borrower will be providing clear direction, as through a will or a transfer during life to a spouse or child. Where the transfer occurs through a divorce settlement or intestate succession, the original borrower’s consent is, as a legal matter, implied: in both cases, the law directs an outcome on behalf of the original borrower. Where the successor homeowner seeks information pursuant to such a transfer, GLBA provides an exception to its information-sharing restrictions. Servicers are empowered to share with the successor all necessary information to effectuate the transfer.

Successors will often be operating explicitly as the original borrower’s legal representative. They may have been appointed by a court, in a divorce or probate proceeding, or they may be fulfilling their duties under an agreement with the original borrower. Whatever information the

⁵ 15 U.S.C. § 6802(a).

⁶ 15 U.S.C. § 6802(e)(1).

⁷ 15 U.S.C. § 6802(e)(2).

⁸ 15 U.S.C. § 6802(e)(1)(B).

⁹ 15 U.S.C. § 6802(e)(3)(D), (E).

successor homeowner seeks is because of her beneficial and legal interest in the property serving as collateral for the account, and in tandem with her fiduciary and legal representation of the original borrower in connection to the transfer of the property. Successor homeowners fall clearly into the GLBA exception either for “persons acting in a fiduciary or representative capacity for the consumer” or for “holding a legal or beneficial interest relating to the consumer.”¹⁰ Attorneys who represent the lending industry agree that the statute’s exception for persons holding “a legal or beneficial interest relating to the consumer” should enable banks to communicate with the subsequent owner of a home.¹¹

In addition to these specific exemptions, GLBA is completely inapplicable to much of the information successors seek, because it is not private information. The existence of a mortgage lien on the home is public information. Mortgages, or deeds of trust, are public documents.¹² The consumer’s name, address, and the fact that the consumer’s interest in the home is subject to a mortgage are all publicly available at the local land records office, and so excluded from the GLBA’s protections.¹³

Balance and payment history on an account are private, in general, under the GLBA regulations.¹⁴ However, this information is not private once the foreclosure process is initiated.¹⁵ In nearly half of all states, foreclosure is judicial, which means that the foreclosure is initiated by the filing of a public lawsuit.¹⁶ The initial complaint must, to state a cause of action, reveal the date and amount of the delinquency and the outstanding balance.¹⁷ Even if the foreclosure is conducted through a power of sale provision in the mortgage or deed of trust, without the benefit

¹⁰ 15 U.S.C. § 6802(e)(3)(D), (E).

¹¹ See Richard E. Gottlieb and Andrew W. Grant, “Succession Planning Part 2: Communicating with Family Members After the Death of a Customer,” *ILLINOIS BANKER MAGAZINE* (Jan. 2015), available at <http://www.buckleysandler.com/news-detail/succession-planning-part-2-communicating-with-family-members-after-the-death-of-a-customer> (“If no executor, administrator or legal equivalent has been or will be named, the family member must generally demonstrate that he or she holds a legal or beneficial interest relating to the customer. State intestacy law will apply. [] If the family member is entitled to all or part of the conveyed property, the bank may speak with that family member without violating GLBA.”)

¹² *Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d 1142, 1146 (E.D. Cal. 2010) (“The Deed of Trust and Assignment of Deed of Trust are publicly recorded documents. . .”); *Wright v. Bank of Am.*, 3:14-CV-94-RJC-DCK, 2014 WL 1775992, at *3 n.4 (W.D.N.C. May 5, 2014) (“...[d]eeds of Trust are public records.”).

¹³ 12 C.F.R. § 1016.3(p)(1) (*previously codified at* C.F.R. § 216.3(p)(1)(i), *repealed by* 79 FR 30708-01). Since August 2014, pursuant to the Dodd-Frank Act, authority to promulgate rules implementing the GLBA has been transferred from the Federal Reserve to the Consumer Financial Protection Bureau.

¹⁴ 12 C.F.R. § 1016.3(q)(2)(i)(B) (*previously codified at* 12 C.F.R. § 216.3(o)(2)(i)(B), *repealed by* 79 FR 30708-01).

¹⁵ 12 C.F.R. § 1016.14(b)(2)(vi)(a) (*previously codified at* C.F.R. § 216.14(b)(2)(vi)(a), *repealed by* 79 FR 30708-01). 12 C.F.R. § 216.14(b)(2)(vi)(a) (providing that disclosing information as necessary to collect accounts does not violate GLBA). See, e.g., *Lamarque v. Centreville Sav. Bank*, 22 A.3d 1136, 1141 (R.I. 2011) (finding disclosure of payoff amount of senior mortgage to purchaser of junior mortgagee’s interest not violative of Gramm-Leach-Bliley and not an invasion of homeowner’s privacy interests). Cf. *Dunmire v. Morgan Stanley DW, Inc.*, 475 F.3d 956, 961 (8th Cir. 2007) (finding information related to brokerage account lost its private character when the account holder filed a complaint against his brokerage firm, and in the alternative, that delivery of information was part of an “appropriate and acceptable method of settling or collecting a debt it believed [plaintiff] owed—a valid exception under the GLBA.”).

¹⁶ JOHN RAO & GEOFF WALSH, NAT’L CONSUMER L. CTR., *FORECLOSING A DREAM: STATE LAWS DEPRIVE HOMEOWNERS OF BASIC PROTECTIONS* 12 (2009), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf.

¹⁷ See, e.g., 735 Ill. Comp. Stat. 5/15-1504 (setting out form complaint).

of judicial review, information about the foreclosure will be made publicly available through publication in newspapers advertising the sale.¹⁸ Providing this information in a public forum but not to a successor homeowner who is trying to reinstate the mortgage violates both common sense and the underlying policy rationale for GLBA. Public disclosure of a threatened foreclosure, permitted under GLBA, may trigger calls from opportunists hoping to cash in on an anxious and desperate successor homeowner and even, sometimes, identity theft.¹⁹ In these circumstances, successor homeowners are better served by the direct provision of information from servicers, rather than receiving it from a third-party, interested mostly in separating the homeowner from her remaining savings.

Information about the availability of loss mitigation also is not private information. Most information about loss mitigation options is available in some public forum, even if figuring out which options are available in one's particular case is challenging, at best. To the extent loss mitigation options invoke privacy concerns, they are those of the successor homeowner, not the original borrower. Successor homeowners will need to provide information to the servicer about their own income and expenses; the income and expenses of the original borrower are beside the point.

Often, successor homeowners are seeking generic information that will enable the successor homeowner to manage the inherited financial obligations, including information about where to send payments, how payments are applied, and the availability and process for obtaining a loan modification. The original borrower's private financial information, including credit score, income, or expenses, is not relevant to the successor homeowner and need not be disclosed. Successor homeowners may also be seeking to provide their own personal financial information to the servicer, to enable an assumption, a loan modification, or a transfer of a homeowner's insurance policy, for example, or they may be seeking information about the balance of the mortgage encumbering their home.

Some information sought is arguably nonpublic personal financial information, implicating GLBA protections, such as the payment history on an account pre-foreclosure. However, disclosure of mortgage-related information to successor homeowners is not disclosure to a stranger, or using the GLBA language, a nonaffiliated third party. Whether or not the successor homeowner was a party to the original transaction, the terms of the mortgage and note are now her own personal financial information, not those of a third party.²⁰ The successor homeowner

¹⁸ See JOHN RAO ET AL., NAT'L CONSUMER L. CTR., FORECLOSURES AND MORTGAGE SERVICING § 8.2.3 (5th ed. 2014) ("Nearly all states require some form of public notice, either by legal advertisement in a newspaper or posting in a public place.").

¹⁹ See Federal Trade Commission, *Mortgage Relief Scams* (May 2012), available at <http://www.consumer.ftc.gov/articles/0100-mortgage-relief-scams> ("Fraudsters use a variety of tactics to find homeowners in distress. Some sift through public foreclosure notices in newspapers and on the internet or through public files at local government offices, and then send personalized letters to homeowners.")

²⁰ See *In re Garcia*, 276 B.R. 627, 631 (Bankr. D. Ariz. 2002) ("the Bankruptcy Code recognizes a debtor-creditor relationship whenever a creditor holds a claim secured by the debtor's property, even if the debtor has no personal liability") (citing *Johnson v. Home State Bank*, 501 U.S. 78 (1991)). See also *McCaig v. Wells Fargo Bank (Texas)*, N.A., 788 F.3d 463 (5th Cir. 2015) (mortgagor's son could pursue claims under the Texas Debt Collection Act); *Brush v. Wells Fargo*, 911 F. Supp. 2d 445, 471 (S.D. Tex. 2012) (finding homeowner who inherited home from elderly father for whom she was caretaking had authority to assume the mortgage; this authority led to the actual

owns the home that serves as collateral, and her rights are subject to the mortgage. In seeking information about the mortgage, whether the escrow balance, the payoff amount, or the loss mitigation options, the successor homeowner is seeking her own personal financial information. Reliance on GLBA in this context is misplaced because the homeowner is not a third party.²¹

Both Fannie Mae and Freddie Mac have extensive guidance about the treatment of successor homeowners. Freddie Mac's guidance explicitly addresses the need for the servicer to provide the successor homeowner with information. Without discussing GLBA, Freddie Mac requires its servicers to provide whatever information is necessary "to allow the transferee to continue making Mortgage payments or to process a request by the transferee to assume the Mortgage, if applicable."²² Freddie Mac thus mandates the provision of information to successors—in part because providing the information is necessary for servicing the account, for ensuring the steady flow of payments, and in part because providing such information is necessary to complete a transfer initiated by the original borrower.

As CMC points out, the Texas legislature recently passed a law specifically requiring mortgage servicers to communicate with surviving spouses.²³ The fact that the legislature saw a need for this kind of legislative action shows the severity of the problem surviving spouses are facing in attempting to communicate with mortgage servicers. Moreover, the Texas legislature takes the position, consistent with NCLC's explanation here, that the GLBA poses no hurdle to such communications with a surviving spouse.²⁴

GLBA and other privacy concerns do not block the provision of information necessary to allow the successor homeowner to evaluate her responsibilities under the mortgage and take on those responsibilities. The GLBA provisions are largely irrelevant in the case of successor homeowners who seek information about the extent of their own financial obligations, including the debt owed on their own homes. GLBA has so little to say about what information should be provided to successor homeowners that Freddie Mac does not take the trouble to address it when mandating that servicers provide successor homeowners with information about the mortgage. As with many objections raised by servicers to assisting successor homeowners, GLBA and privacy concerns are a red herring.

II. The proposed rule for successors does not conflict with the spirit or purpose of the FDCPA's ban on third party communication. A narrow exemption from FDCPA liability will overcome any problems.

assumption of the mortgage through execution of a loan modification agreement, making her a consumer, "one who has a consumer debt," under the Texas Debt Collection Act).

²¹ See, e.g., Lamarque, 22 A.3d at 1141 (finding disclosure of payoff amount of senior mortgage to purchaser of junior mortgagee's interest not violative of Gramm-Leach-Bliley and not an invasion of homeowner's privacy interests because of the vested property interest held by the purchaser of the junior mortgage).

²² See, e.g., Freddie Mac, *Freddie Mac Bulletin 2013-3* (Feb. 15, 2013), available at <http://www.freddie.com/singlefamily/guide/bulletins/pdf/bl11303.pdf> ("[Freddie Mac, Bulletin 2013-3](#)").

²³ See Tex. Fin. Code Ann. § 343.103.

²⁴ The statute requires a surviving spouse to state in the letter sent to the mortgage servicer that disclosure of information would not violate the GLBA. See Tex. Fin. Code Ann. § 343.103(d). Certainly the legislature would not require spouses to make such a certification if they thought it was inaccurate or misleading.

The CMC takes the position that the FDCPA conflicts with the Bureau's proposed rule on successors.²⁵ First, it is important to note that the majority of mortgage servicers are not "debt collectors" covered by the FDCPA, meaning that this would be a non-issue for most servicers.²⁶ NCLC has not heard a single example from advocates in the field of a servicer claiming that the FDCPA prohibited communication with a successor. Therefore, the FDCPA ban on third party communication should not be a reason to delay or weaken the proposed rule on successors.

Second, we strongly oppose the CMC's proposal of an outright exemption of mortgage loans from the FDCPA's protections. This would be like taking a meat cleaver to the statute where only a surgical incision is needed. Mortgage borrowers need the protections of the FDCPA, including its prohibitions on unfair and deceptive collection tactics and abusive third party contacts. NCLC has heard many examples of homeowners being subjected to abusive and deceptive collection tactics by default servicers and foreclosure law firms, and potential FDCPA liability creates an important check on this behavior.

However, the spirit and purpose of the FDCPA's ban on third party communication would not be violated by creating a narrow exemption for mortgage servicers communicating with alleged successors. In enacting the section 805(b) language, Congress was concerned with invasion of the consumer's privacy as a strong-arm method of collection.²⁷ This section also curtails attempts to pressure relatives or heirs to pay a decedent's debt out of their own (non-estate) assets.²⁸

Communicating with a successor regarding the mortgage secured by his or her home is inherently different from communicating with a relative or friend regarding a debt they have no interest in paying. First, there is no privacy violation stemming from communicating with a successor owner of the home secured by a mortgage, for the reasons discussed above. Congress recognized this fact by explicitly allowing communication with a spouse, executor, or administrator under the FDCPA.²⁹ In any scenario involving the death of the borrower, privacy concerns are less significant, because the privacy interest is reduced after death.³⁰ In a divorce context, until the divorce is finalized, the non-borrower still is a "spouse" with whom a servicer can communicate without fear of FDCPA liability. After the divorce is finalized, the ex-spouse who is awarded ownership of the home is a successor who should be entitled to information regarding the mortgage. There should be no concern that access to this information will be exploited in the divorce, as the divorce case will have been resolved already.³¹ Finally, other Garn-exempt transfers (such as a transfer during life to a spouse or child of the borrower) carry the consent of the borrower, and therefore do not raise privacy concerns.

²⁵ CMC Memo at 45.

²⁶ A mortgage servicer is only a debt collector if it acquired servicing rights after the loan went into default. 15 U.S.C. § 1692a(6).

²⁷ The Act's preamble lists invasion of privacy as one of the evils the act combats. 15 U.S.C. § 1692(a).

²⁸ FTC Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts, 76 Fed. Reg. 44,915, 44,918–44,919 (July 27, 2011), available at www.ftc.gov ("FTC Statement of Policy").

²⁹ 15 U.S.C. § 1692c(d).

³⁰ FTC Statement of Policy at 44920.

³¹ Moreover, information about the mortgage balance and payment terms should be relevant and discoverable in any divorce case – as it relates to the marital assets and debts to be divided equitably by the court.

In addition to reduced privacy concerns, a mortgage successor stands to lose his or her ownership of the home if the mortgage is not paid. Therefore, the successor has a compelling need for information about the loan and a reason to communicate with the mortgage servicer, which outweigh the risk of communications that convey the misimpression of personal liability for the debt.

The FDCPA's clear exemption for communications with a spouse, executor, or administrator will cover the vast majority of successors. However, the reasoning of the FTC's 2011 Statement of Policy regarding decedents' debts demonstrates why communication with other similar successors should not violate the FDCPA. In that statement, the FTC acknowledged that heirs often do not file a formal probate case, and announced that it would forbear from taking enforcement action against a debt collector for communicating with any "individual who has the authority to pay the debts out of the assets of the decedent's estate."³² Similarly, an individual who succeeds to ownership of the home (whether or not that person has authority to pay debts out of estate assets) has a need for information about a mortgage secured by the home and a reason to communicate with the mortgage servicer.

It is still important to protect against communications that "even in the absence of any specific representations... might convey the misimpression that the individual is personally liable for the decedent's debts, or that the collector could seek certain assets to satisfy the debt."³³ The FTC created an appropriate safeguard against this injury in its 2011 Statement of Policy, which the CFPB could adopt in modified form: requiring a collector to disclose "clearly and prominently" that (1) it is seeking payment from the assets in the decedent's estate (where applicable) and from exercising its right to foreclose on the home, and (2) the individual could not be required to use the individual's assets or assets the individual owned jointly with the decedent to pay the decedent's debt.³⁴

Legitimate privacy concerns in this context are few, and can be easily addressed through the language of a narrow exemption. No successor should have a need for information about the original borrower's location or contact information. The successor should not need access to other financial information of the borrower, as it will not be relevant to loss mitigation sought by the successor.

In order to limit the risk posed by wrongful claims of successorship, in situations of fraud or contested probate,³⁵ the servicer need only have a reasonable process for verifying successor status through legally sufficient documentation. Servicers are capable of getting advice from local counsel regarding documents necessary and sufficient to show ownership (and are already doing this routinely). And in cases of contested litigation regarding ownership, a servicer would

³² FTC Statement of Policy at 44919.

³³ FTC Statement of Policy at 44922.

³⁴ Similar language is found in the FTC Statement of Policy at 44922.

³⁵ We wish to emphasize that these situations are exceedingly rare. CMC's comments make it seem that fraudulent attempts to take over paying a mortgage are rampant. In fact, advocates in the field report that the vast majority of situations involving claims of successorship are legitimate and uncontested. See client examples provided in Appendix A to NCLC's original comments on this docket, submitted March 16, 2015, and in Appendix A to this document.

act reasonably by delaying communication with any person of questionable authority until a court decides the issue.

Some successors might be financially unsophisticated and have a difficult time assessing whether it is in their best interest to take over paying a mortgage (with or without assuming personal liability). These successors need independent legal advice in order to best make that decision. However, the majority of successors attempting to communicate with the mortgage servicer are actually living in the property, and for many, it has been their home for years or decades. Such successors are not helped by a lack of information or refusals to communicate regarding the loan.

It is also possible that a successor might, after obtaining some information and getting independent advice, decide not to assume or keep paying the mortgage. In this situation, the successor should be able to revoke his or her consent to third party communications from the mortgage servicer. A third party to the debt should not be subjected to unending communications (which may become harassing or deceptive) if he or she decides not to continue paying on the mortgage.

We believe the following exemption from FDCPA liability under Section 805(b), which could be added to the Regulation X successor rule, would address any valid concerns regarding the FDCPA overlay with the proposed rule on successors:

- (1) Subject to paragraph (2), section 1692c(b) of Title 15 shall not prohibit a debt collector from:
 - (a) Communicating with an individual claiming to be a successor regarding how to establish status as a successor in interest as provided in § 1024.30(d), or
 - (b) Communicating with an individual who is a confirmed successor in interest as provided in § 1024.30(d) regarding the mortgage loan account, so long as the confirmed successor in interest consents to such communication. A confirmed successor in interest may revoke consent for communication by asking the debt collector to cease communication regarding the debt orally or in writing.
- (2) Paragraph (1) shall apply if:
 - (a) A debt collector discloses clearly and prominently that:
 - (1) It is seeking payment only by exercising its right to foreclose, and, where the borrower has died, to be paid from assets of the borrower's estate;
 - (2) The individual is not personally liable for the debt, and could not be required to use the individual's assets or, where the borrower has died, assets the individual owned jointly with a deceased borrower to pay the borrower's debt; and
 - (3) The individual may revoke his or her consent to receive communications regarding the debt by asking the debt collector to cease communication regarding the debt orally or in writing.
 - (b) Information that a debt collector is permitted to share with a confirmed successor in interest regarding the mortgage loan account shall not include the location or contact information of the original borrower or any financial information of the original borrower other than the mortgage terms and status.

III. The broad range of successors needs RESPA protections, especially survivors of domestic violence.

The Bureau and commenters have focused heavily on successors pursuant to death or divorce. While death and divorce are the most common scenarios for successors (and in this we also include successors via inter vivos trust), other Garn-protected transferees also need the protections of RESPA. After a deed transferring the property to the spouse or child of a borrower, these successors should be able to communicate with the mortgage servicer regarding the loan. A child or spouse might need a loan modification to preserve their home even if the borrower has not yet died, for example, if the borrower has become incapacitated or has moved into a nursing home for medical reasons.

In addition, we wish to elaborate on our position regarding RESPA protections for survivors of family violence. A co-owner of the home who is a survivor of family violence might need to communicate with a mortgage servicer or seek loss mitigation before he or she is able to obtain a final divorce decree or separation agreement (or in some cases where there has not been a legal marriage). Contrary to CMC's assertion, addressing the needs of successors would not require the Bureau to rewrite state contract law; it only requires a clarification of RESPA's coverage.

Particularly if the survivor has been a co-owner of the property since the loan was originated, and signed the mortgage (if not the note), he or she should be included in RESPA's definition of "borrower." Many times couples who buy a home together may title the home in both co-owners' names, with both signing the security instrument, although only one signs the note. When the marriage or relationship falls apart, especially in cases of violence, the partner who continues to occupy (and jointly owns) the home needs access to mortgage information and may also need loss mitigation. The term "borrower" for RESPA purposes should include parties who signed the security instrument or the promissory note.

Some survivors of family violence (who did not sign either the original note or security instrument) may already be a successor in interest by virtue of a quitclaim deed, even if there hasn't yet been a divorce. They would be covered under the Garn-protected category for intra-family transfers. Still others may be trying to finalize a divorce decree that will contain such a transfer of ownership. Homeowners with such pending divorce decrees should be considered a "borrower" under RESPA. Still others may only have a protective order (but not a pending divorce decree, either because they were not married or because that process has not begun) but need information about the mortgage to continue making payments.

Thus, in addition to confirmed successors in interest (including domestic violence survivors with a quitclaim deed already covered by Garn intra-family transfers) and co-owners who were on the original mortgage or note, in cases of family violence the term "borrower" for RESPA purposes should include certain additional parties. Where a transfer of property is pending as part of a divorce decree, the occupant of the home should be covered by RESPA's protections. The communication requirements also should apply where there has been family violence and the survivor has an order of protection and is the occupant of the home, especially where the order allows for such communication with the servicer.

The examples provided in Appendix A demonstrate why this remains an important issue. In situations of family violence, the divorce process may be difficult, time intensive, and even dangerous. There is a pressing need to protect non-borrower homeowners who experience family violence where the abusive co-owner borrower no longer resides in the property. Maintaining stable housing during this time of turmoil can be crucial to the wellbeing of the resident spouse and any impacted children.

IV. Verifying successor status is not unduly difficult or burdensome for servicers.

The proposed rule aims to create a clear process for verifying a successor's status. The rule does not require servicers to "determine" successor status; rather it calls for a "confirmation." A servicer's duty is to state to the homeowner what documentation is necessary to verify that status. In the majority of cases, the documents necessary to prove successorship status will be straightforward: a survivorship deed and death certificate; a divorce decree; a probate court order and an executor's deed. Servicers can consult their local counsel to establish which documents are sufficient in a given jurisdiction – a common practice for servicers already, according to the CMC.³⁶ If there are competing successorship claims or allegations of fraud, then those issues would be left to a court to decide. The proposed rule is not inviting or requiring servicers to become probate court judges. Rather, once an ownership dispute is resolved by a court, servicers should accept the relevant court documents indicating proper ownership as a confirmation that the successor has the right to access loan information and request information on available loss mitigation options. If competing claims exist, then arguably a court has not decided the matter and sufficient proof of successorship status has not been provided. CMC distorts the contours of the proposed rules by exaggerating what is required of a servicer verifying a successor's status.

In the majority of cases, verifying successor status is not unlike verifying income. Much like requesting paystubs or a profit and loss statement, a servicer can request proof of ownership, such as a quitclaim deed or divorce decree. Some servicers have already created simple checklists that describe which documents must be sent depending on the way the successor acquired ownership (divorce, inheritance through a will, intestate inheritance, etc).

CMC also claims that servicers should not be required to verify successor status in situations where loss mitigation is unavailable or unnecessary. In some instances, loss mitigation may not be necessary, but that determination cannot be made until the successor has established communication with the servicer and obtained information about the loan, including the monthly payment amount. Some successors attempt to keep the mortgage current, but face hurdles in communicating with servicers, who refuse to speak to them. These successors have trouble obtaining information on where to send payments, or send payments only to have them returned. When these successors try to clarify the situation, they are met with needless roadblocks that push the account into default. Many successors do need loss mitigation, but cannot obtain the necessary information to apply because servicers refuse to speak to them. NCLC has collected numerous examples of servicers refusing to speak to non-borrowers or requesting unnecessary documents to verify successor status; it is a common problem nationwide. The proposed rule is

³⁶ CMC Memo at 17-18.

crucial for addressing the mechanics of the verification process, which has been marked by confusion and a lack of transparency.

Moreover, because successors have faced substantial challenges having their status confirmed, we discuss in section VI below the importance of providing dual tracking and other protections where the successor has submitted reasonable documentation of such status.

V. The CFPB has authority to implement its proposed rule on successors in interest and to provide for a private enforcement mechanism.

In an attempt to deter the CFPB from finalizing the proposed successor rules, CMC questions the CFPB’s authority to create a private right of action for loss mitigation or successorship claims.³⁷ Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)³⁸ established the CFPB to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”³⁹ The CFPB is entrusted with implementing and enforcing the federal consumer financial laws “for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”⁴⁰

In establishing the Mortgage Servicing Rules, the CFPB relied on its rulemaking authority under the Dodd-Frank Act and RESPA to mandate a uniform loss mitigation framework that establishes appropriate mortgage servicing standards in the private market. These rules also further consumer protections by requiring that borrowers receive a full and fair opportunity to be evaluated for a loss mitigation option.⁴¹ One such source of authority under the Dodd-Frank Act is 12 U.S.C. § 5532(a), which authorizes the CFPB to prescribe rules to “ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.”⁴² Moreover, RESPA already contained provisions with private rights of action and the CFPB’s servicing regulations and proposed additions, including on successors, simply further that existing scheme.

The CFPB has recognized that successors are a vulnerable group that faces barriers in accessing essential mortgage information needed to pursue foreclosure alternatives and help avoid

³⁷ CMC Memo at 14-17.

³⁸ 12 U.S.C. §§ 5481 *et seq.*

³⁹ *Id.* § 5491(a); *see also* Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau, 785 F.3d 684, 686-87 (D.C. Cir. 2015) (summarizing the CFPB’s authority in implementing and enforcing the Federal financial consumer laws).

⁴⁰ 12 U.S.C. § 5511(a).

⁴¹ Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10815, 10,818 (Feb. 14, 2013) (*emphasis added*). The CFPB specifically cited 12 U.S.C. § § 2605(k)(1)(C), 2605(k)(1)(E), and 2617(a). *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013), which provide rulemaking and regulatory authority to further broad objectives.

⁴² Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013). The CFPB’s authority under section 5532(a) is broad as it “may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.” 79 Fed. Reg. 74176, 74180 (Dec. 15, 2014).

unnecessary costs and fees.⁴³ Servicers are also already required to maintain policies and procedures to provide timely and accurate information, including communicating with successors upon the death of a borrower.⁴⁴ By integrating successors into the existing loss mitigation framework, the CFPB is faithfully executing its mission to implement and enforce consumer financial protection laws without unduly burdening servicers who are already following the loss mitigation rules.

While the potential of private liability is a useful check on misconduct in light of limited supervisory resources and the need for homeowners who have been harmed to obtain redress in real time, in fact litigation is a last resort and rarely undertaken. Few consumers seek out attorneys even when they are injured and attorneys generally are reluctant to take on cases unless violations are clear. Mortgage and servicing litigation are fairly rare, especially in comparison to the volume of mortgage loans and credit generally outstanding in the United States. Even during a financial crisis that rivaled the Great Depression, only a tiny fraction of mortgage loans became the focus of consumer litigation.

VI. Successors urgently need protection from dual tracking and imminent foreclosure sale.

NCLC applauds the CFPB's proposal to integrate successors into existing RESPA protections, but urges the Bureau to strengthen its proposed rule by applying existing dual tracking protections to successors. The proposed regulation states that only a confirmed successor in interest shall be considered a borrower for purposes of RESPA's servicing rules. What it means for a servicer to "confirm" successor status is not defined or constrained, with no reasonableness requirement built into the proposed amended § 1024.30. Tying coverage to a servicer's decision to "confirm" successor status simply introduces an opportunity for negligent or willful failure by servicers. Instead, the CFPB should include in the definition of borrower any successor in interest who has provided reasonable proof of his or her identity and ownership interest, unless the servicer provides a timely and reasonable response stating that the potential successor will not be confirmed as a successor and giving a reasonable reason for the lack of confirmation.

NCLC's suggestions aim to address the problem of undue delay by servicers. NCLC has not called for a "reset" of the 120-day pre-foreclosure period, as CMC mistakenly claims. The dual tracking prohibitions are tied to the loan's number of days delinquent and number of days prior to a scheduled foreclosure sale, irrespective of whether a borrower or successor is attempting to apply for loss mitigation. NCLC merely suggests that once a successor has submitted a complete loan modification application, including reasonable documentation establishing the successor's identity and ownership interest in the home, the foreclosure process should be paused to the same extent it would for an original borrower under § 1641(f) or (g). NCLC's suggestion does not deprive servicers of their right to pursue foreclosure, but it does prevent unnecessary delay on the part of servicers that could prevent otherwise qualifying successors from obtaining a modification due to a looming foreclosure sale date. Providing successors access to the dual tracking and imminent foreclosure rules also will help avoid unnecessary foreclosures.

⁴³ 79 Fed. Reg. at 74183.

⁴⁴ 12 C.F.R. § 1024.38(b)(1)(vi)

VII. Servicers should not need to comply with the SAFE Act or provide TILA-RESPA disclosures upon processing an assumption by a successor in interest.

CMC also argues that some servicers, who do not typically engage in the business of originating loans, will have to submit to licensing requirements and also comply with the TILA-RESPA Integrated Disclosure Rule.⁴⁵ This argument is incorrect. The CFPB has already clarified that where a successor in interest who has previously acquired title to a dwelling later agrees to assume a loan, this is not an assumption for purposes of Regulation Z § 1026.20(b).⁴⁶ The requirement to provide disclosures only applies to assumptions as defined in § 1026.20(b).⁴⁷ Therefore, servicers processing assumptions will not need to comply with the Know Before You Owe disclosure requirements.

For the same reasons that a successor assumption is not considered an “assumption” for purposes of § 1026.20(b), it should not be considered a “loan origination” subjecting the servicer to licensure requirements. The Bureau could issue commentary to the SAFE Act clarifying this point. State laws implementing the SAFE Act define a loan origination to include taking an application or negotiating loan terms for compensation or gain.⁴⁸ There is generally no compensation paid by a successor to assume a loan after a Garn-exempt transfer. If servicers who do not already comply with licensing laws are concerned about this issue, they could avoid any problem by not receiving compensation specifically for processing an assumption. Moreover, servicers processing assumptions in connection with loss mitigation are also protected by exemptions for “loss mitigation specialists.”⁴⁹ Therefore, licensing requirements and the TILA-RESPA disclosure requirements do not pose a hurdle to compliance with the Bureau’s proposed rule on successors in interest.

VIII. Conclusion

In conclusion, NCLC urges the Bureau to move forward with a strong rule protecting successors in interest, strengthened as we recommended in our initial comments filed March 16, 2015. This rule is urgently needed and will protect vulnerable homeowners seeking to avoid foreclosure.

⁴⁵ CMC Memo at 47-48.

⁴⁶ Application of Regulation Z's Ability-To-Repay Rule to Certain Situations Involving Successors-in-Interest, 79 Fed. Reg. 41631-01 (July 11, 2014).

⁴⁷ Consumer Financial Protection Bureau, FAQs on the TILA-RESPA Integrated Disclosure, Part II – Various Topics, Aug. 26, 2014, available at <https://www.consumercomplianceoutlook.org/outlook-live/2014/FAQ-on-TILA-RESPA-Integrated-Disclosures-Rule/>.

⁴⁸ See, e.g., Ala. Code § 5-26-3.

⁴⁹ See, e.g., Ala. Code § 5-26-4.

Appendix A: Additional Homeowner Examples Involving Domestic Violence

NCLC received these examples from advocates in the field, and provides them to supplement similar examples already provided with our original comments. Any names of survivors are pseudonyms.

Jacksonville, FL:

LF in Nassau County, FL signed the note and mortgage on her home jointly with her then husband, TF, in 2002. In July 2012, LF obtained an injunction for protection from domestic violence against TF as a result of his violent acts against her. In late 2012, she fell behind on the mortgage payments because of her financial struggles related to their separation and impending divorce. She contacted her servicer, CitiMortgage, on many occasions to determine what loss mitigation options were available to help her save her home. After submitting documents multiple times, she was finally approved for a trial plan on April 29, 2013. After she made all three required trial payments, CitiMortgage refused to process the permanent loan modification because she could not obtain the signature of her abusive ex-husband. CitiMortgage denied the modification on this basis even though LF had obtained a final divorce decree awarding her full title to the home on May 2, 2013 and her counsel had also managed to obtain a quit claim deed signed by her ex-husband. Litigation was required in order to resolve this matter.

Brooklyn, NY:

Ms. Smith sought help from Grow Brooklyn to save her home. She had obtained sole title to the home through her divorce, and her abuser had executed a quit claim deed to her as part of the divorce proceeding. However, she was not a borrower on the loan – she had not signed the note or mortgage. As the sole owner of the home pursuant to the divorce, Ms. Smith should have been able to pursue a loan modification without her abuser’s involvement. Unfortunately, the servicer continually asked for additional documents that needed to be signed by the ex-husband. Ms. Smith was able to obtain those documents, but it was extremely problematic. Her attorney said he dreaded relaying the messages to her that they needed something else signed by her ex. Ultimately, with the help of a persistent legal advocate, she obtained an FHA-HAMP loan modification. But the servicer's requests, despite having been made aware of the history of domestic violence, unnecessarily and repeatedly put this homeowner in dangerous situations.

Chicago, IL:

An attorney from Chicago, IL has two clients currently applying for loan modifications who are domestic violence survivors. Both are on title to the home and signed the mortgage but not the promissory note. Each of these women was awarded sole title to the home in the divorce, meaning that the ex-husband should not need to participate in a loan modification request under the applicable program rules. One of the clients received a trial plan in her ex-husband’s name, despite having provided the documentation of the divorce and her ownership of the home to the servicer. She made the trial payments, but the servicer is refusing to honor the permanent modification without her ex-husband’s signature. The second client has submitted a complete loan modification application, along with proof of her divorce and sole ownership of the home, yet the servicer is sending all communication to her ex-husband’s address and refuses to communicate with her. Communication with the servicer has been a huge problem throughout both cases.

Philadelphia, PA:

VH owned her home in Logan, PA together with her husband. The couple took out a mortgage on the home, but for unknown reasons the promissory note for the mortgage was in the husband's name alone. Then Ms. H became a victim of domestic violence when she was attacked by her husband. In response, she obtained a protection from abuse order that removed the husband from the home and a spousal support order that required him to continue making mortgage payments. But Mr. H stopped making the payments and the bank commenced foreclosure. When Ms. H attempted to contact the bank for a loan modification that would take the house out of foreclosure, the bank refused to speak to her or consider her request, saying she was not the "borrower" on the loan. The bank claimed its policies prohibited it from accepting an application from anyone but the husband, and even then, only if the husband continued to "reside" in the property—notwithstanding that he had been evicted by court order as a perpetrator of domestic violence.

Ms. H was referred to a housing counselor who in turn referred the case to a lawyer at Community Legal Services. After months of inconclusive discussions with the bank's lawyer, the CLS lawyer brought the case to the attention of Judge Annette Rizzo and Rachel Gallegos, the judge and court administrator then in charge of the foreclosure diversion program. Judge Rizzo refused to let the foreclosure proceed and insisted that a representative of the bank and the husband both appear in court. She then persuaded the bank representative to allow Ms. H to apply to assume the loan and seek a loan modification in her own name. After many more months of inconsistent document requests from the bank, which Ms. H's attorney and the bank's attorney mediated under the watchful eye of the diversion program, Ms. H was provisionally approved for a workout under FHA-HAMP. The bank required Ms. H to produce a written separation agreement and quitclaim deed from Mr. H as a condition of going forward. Upon approval, she started making trial payments to the bank based on a percentage of her income. The bank required additional paperwork, which Ms. H and her husband completed with the assistance of the housing counselor and CLS lawyer.

Finally, after six months of trial payments and two full years after the foreclosure case was filed, the bank gave final approval to the assumption and loan modification and withdrew the foreclosure case. This outcome would not have been possible without the diversion program and vigorous advocacy by her housing counselor and lawyer. Based on the bank's initial response, Ms. H would have believed there was no way for her to save her home.