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October 1, 2013

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: Conflict Between Monthly Billing Statement Requirements Under Regulation Z and the United States Bankruptcy Code

Dear Director Corday:

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals. Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and Chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the standing Chapter 13 trustees in the United States are voting members of the NACTT. The NACTT's Board of Directors has directly authorized Margaret Burks, Chapter 13 Standing Trustee for Cincinnati, Ohio, and David Peake, Co-Chair of the NACTT Mortgage Committee, to prepare and submit this letter.

The NACTT writes to bring your attention to a fundamental disconnect between the Monthly Billing Statement Requirements under Regulation Z and the United States Bankruptcy Code.

The Consumer Financial Protection Bureau ("CFPB") has recently released final servicing regulations that will require consumer mortgage servicers to send periodic statements to borrowers in most instances.[1] The statements require inclusion of certain information that is helpful to borrowers whose loan is performing or is in the early stages of a delinquency. The new requirements do not take into consideration the many unique circumstances that a bankruptcy filing creates. The result is an inadvertent, but very real, conflict between legal requirements for Regulation Z and the United States Bankruptcy Code. **Servicers will be required to send information that while accurate, will conflict with protections under the Bankruptcy Code and will likely lead to borrower / debtor, debtor attorney, and even court / trustee confusion.** Such confusion will result in inefficiencies and real costs to borrowers and creditors.

Additionally, Chapter 13 debtors will receive information from their loan servicers under Regulation Z that is inconsistent with information they receive from their trustees or their attorneys, which is regularly provided as part of the bankruptcy case. Neither the trustee nor the servicer will be able to readily reconcile the inconsistencies. Consumer confusion will result, again leading to additional costs and frustration.

The Bankruptcy Code is designed to provide struggling debtors with protection from all debt collection activities. This protection is effective immediately through an automatic stay without the need for a judicial hearing or review before the protection becomes effective. The automatic stay is a fundamental bankruptcy protection, providing debtors an opportunity to put their financial affairs in order, free from the pressure of debt collection, so they can emerge from bankruptcy with a fresh financial start. In order to facilitate the ability of a Chapter 13 debtor to retain a home, the Bankruptcy Code permits a debtor to cure any default, maintain payments on a long term debt, and cure any amount owing over a reasonable time. The Bankruptcy Code bifurcates the traditional mortgage into separate components. The pre-petition arrearage through the time of the bankruptcy filed is reduced to a liquidated claim, paid by the Trustee while post-petition payments under the loan contract are resumed the month after filing. By the end of the Chapter 13 Plan, the mortgage is brought current by the combination of cure of pre-petition and post-petition debt service; no part of a mortgage cured as a long term debt is discharged, and the mortgage contract survives the Chapter 13 process. **Requiring monthly disclosures that are designed to communicate information that does not recognize the unique character of the Chapter 13 treatment of mortgages in default threatens to undermine the basic goals and protections of bankruptcy, undermines the stated goals of the Rule - to provide accurate and meaningful information to borrowers - and may arguably be a violation of the automatic stay.**

The new regulations contain a number of required disclosures, and provides a model form

[1] The regulation becomes effective January 10, 2014. The CFPB initially released it in final form in January 2013 (published at 78 Fed. Reg. 10902 (February 14, 2013) (available at http://www.gpo.gov/fdsys/pkg/FR-2013-02-14/pdf/2013-01241.pdf)). The CFPB revised the regulation in a September 13, 2013 release (available at http://files.consumerfinance.gov/f/201309_cfpb_titlexiv_updates.pdf). The revision does not address the conflicts with bankruptcy laws.

periodic statement.[2] Using the model form may provide mortgage servicers with some protection from liability for noncompliance with the regulatory requirements.[3] Liability for violations can be significant, so the incentive to use the model form is strong.

What the regulations require servicers to disclose to borrowers fundamentally conflicts with bankruptcy protections. A CFPB analysis discusses the permissibility of including a disclaimer, but any disclaimer is insufficient to resolve the conflicts between the CFPB's regulation and bankruptcy protections. The CFPB explains in the section-by-section analysis of its final regulation:

"The final rule would allow servicers to make changes to the statement as they believe are necessary when a consumer is in bankruptcy; such servicers may include a message about the bankruptcy and alternatively present the amount due to reflect the payment obligations determined by the individual bankruptcy proceeding."

* * *

"For example, servicers may include a statement such as: 'To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this statement is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation. However, Creditor retains rights under its security instrument, including the right to foreclose its lien.'"[4]

This language is not in the regulation itself, so it is advisory only. Moreover, it would arguably permit revising the singular "amount due" but does not address the many other conflicts, enumerated below. Even if a servicer were to include a disclaimer that "this is not an attempt to collect a debt," the information required in periodic statements will contradict any disclaimer, thereby confusing the borrower.

Even if servicers were willing to forego using the model form, and even if they were to include disclaimers, they still may not violate the regulation itself. The regulation does not permit servicers to do any of the following:

- Stop sending periodic statements to debtors who have filed for bankruptcy;
- Cease sending statements upon a debtor's request;[5] or
- Alter the model disclosure form to accommodate the circumstances of bankruptcy.

Moreover, the regulation requires servicers to disclose the following:

[2] The model form for a delinquent loan is at 78 Fed. Reg. 10902, 11015 (February 14, 2013).
[3] 12 C.F.R. § 1026.41(c) in the regulation published at 78 Fed. Reg. 10902 (February 14, 2013). All regulatory citations herein are to this regulation.
[4] 78 Fed. Reg. 10902, 10966 and note 125 (February 14, 2013).
[5] Comment 41(a)-4 does not permit consumers to opt out of receiving periodic statements.

- The amount due,[6] as a single amount, even if there are multiple amounts due, which is common in a Chapter 13 case (pre-petition and post-petition or "agreed order" amounts due).[7]
- The single amount due must be more prominent than other disclosures,[8] which appears to be debt collection in conflict with an automatic stay or a discharge injunction.
- The payment due date,[9] again in the singular, and without specifying whether it requires disclosure of the due date per the original promissory note, or the due date per the bankruptcy proceedings. If these dates are not the same, compliance with the regulation will be misleading to consumers, and may be inconsistent as "which due date" will be left up to servicer interpretation.[10]
- An explanation of the monthly payment amount, in the singular, including how much of the single payment amount will be applied to principal, interest, and escrow.[11] Again, this does not specify whether the payment amount is the amount under the promissory note or under bankruptcy law. It is not at all clear whether it permits or requires disclosure of amounts repaid through the Chapter 13 Trustee under Section 1322(b)(5) of the Bankruptcy Code.
- Any payment amount past due.[12] This appears to refer to amounts past due per the promissory note. [13] If so, it would require servicers to send what will by all appearances be billing statements in an attempt to collect an overdue debt. It does not prohibit, and therefore may require, disclosure of unpaid amounts that have been discharged. Further, a notice to a Chapter 7 debtor who has not reaffirmed the debt risks seriously misleading the debtor to believe that there is no lien when there is.
- All transaction activity since the last statement.[14] There is no indication whether transaction activity includes transactions that involve the trustee.
- If a partial payment, in the singular, is placed in a suspense or unapplied funds account, the servicer must disclose what must be done for the payment to be applied.[15] The term "partial payment" is in the singular, so it is unclear whether servicers are permitted to distinguish between pre-petition and post-petition partial payments.

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[6] 12 C.F.R. § 1026.41(d)(1).

[7] For example, in a chapter 13 case curing a mortgage default, the plan will often provide an ongoing payment ("conduit"), a payment towards the prepetition arrearage ("cure payment"); additional fees, costs or expenses (added pursuant to Rule 3002.1, F.R. Bankr. P) and court ordered amounts that arise during the pendency of a case.

[8] 12 C.F.R. § 1026.41(d)(1)(iii).

[9] 12 C.F.R. § 1026.41(d)(i).

[10] Often confirmed plans or court orders will specify a particular date when *plan* payments must be made by debtors to trustees. This may, and often will, be inconsistent with the due date on an original mortgage.

[11] 12 C.F.R. §§ 1026.41(d)(2) and (d)(2)(i).

[12] 12 C.F.R. § 1026.41(d)(2)(iii).

[13] Note that courts have held that, upon confirmation, the mortgage has been cured, subject to the completion of the payment plan. *See, e.g.*, *In re Talbot*, 124 F.3d 1201, 1209 (10th Cir.1997). In such jurisdictions, disclosing an amount past due may subject the servicer to litigation and will provide inconsistent information to the borrower.

[14] 12 C.F.R. § 1026.41(d)(4).

[15] 12 C.F.R. § 1026.41(d)(5).

- The amount of the outstanding principal balance.[16] This will by all appearances be an attempt to collect a debt.
- The current interest rate in effect.[17] For a Chapter 7 debtor who has not reaffirmed the debt, this will be irrelevant, and will appear to be impermissible debt collection activity. In some cases, mortgage interest rates may be modified in confirmed chapter 13 cases, subject to the completion of the plan. During the pendency of the plan, however, the interest rate may well be that present value factor imposed by the court.

There are additional disclosure requirements for borrowers more than 45 days delinquent. Delinquency is not defined, but apparently means delinquency under the promissory note. The required delinquency disclosures include:

- The date on which the consumer became delinquent.[18]
- The risks, such as foreclosure and expenses that may be incurred if the delinquency is not cured.[19] For a Chapter 13 debtor, foreclosure is normally not a risk at all – protection from foreclosure as a result of the automatic stay is a fundamental chapter 13 protection.
- An account history, for the past six months or since the account was current if that was shorter, including the amount due from each billing cycle.[20] For Chapter 7 debtors who have not reaffirmed their mortgage loans, it is not clear what a billing cycle is.
- The total payment amount needed to bring the loan current.[21] This fundamentally conflicts with bankruptcy protection. The entire purpose of bankruptcy is to provide relief from debt collection, such that telling a debtor *every month* what is required to bring the loan current will appear to be inappropriate pressure to coerce payment that is not actually due.

The content of the required disclosures in a bankruptcy context is in many instances not defined, leaving servicers to guess what they should disclose. An incorrect guess could be met with severe penalties. An additional problem is that different servicers will provide differing types of information in similar circumstances. Trustees and debtor attorneys will inevitably be inundated with inquiries, and will attempt to make sense of the confusion. But they will not know how each servicer addresses each of the many interpretive issues that the regulation creates. One servicer will inevitably disclose information that another servicer does not, and different servicers will disclose similar information in differing ways. Trustees will not be able to reconcile differing servicers' disclosures, and will not be able to answer the onslaught of desperate consumer inquiries. This confusion will clearly result in increased litigation as the inconsistencies between trustee records and servicer records need to be resolved. This alone will impose costs on all parties.

The CFPB's regulation is simply not designed for the unique circumstances of

[16] 12 C.F.R. § 1026.41(d)(7)(i).
[17] 12 C.F.R. § 1026.41(d)7)(ii).
[18] 12 C.F.R. § 1026.41(d)(8)(i).
[19] 12 C.F.R. § 1026.41(d)(8)(ii).
[20] 12 C.F.R. § 1026.41(d)(8)(iii).
[21] 12 C.F.R. § 1026.41(d)(8)(vi).

bankruptcy. Compliance with the regulation will be required beginning on January 10, 2014. Periodic statements causing widespread confusion could begin as early as four months from now. We oppose requiring mortgage servicers to provide routine, confusing, and highly misleading statements that contradict and undermine important bankruptcy protections.

We would be pleased to work with the CFPB to design information statements that provides only appropriate and relevant information in a bankruptcy context. Until those information statements are carefully designed and tested for consumer understanding, we very strongly urge the CFPB to exclude from the periodic statement requirements loans to borrowers who are protected by bankruptcy. Due to the limited time for a rulemaking, we recommend an interim final regulation to this effect, to take effect on or before January 10, 2014.

Sincerely,

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