MORTGAGE BANKERS ASSOCIATION

April 11, 2022

Comment Intake—Fee Assessment
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No.: CFPB-2022-0003; *Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services*

To Whom it May Concern:

The Mortgage Bankers Association (MBA) appreciates the opportunity to respond to the Consumer Financial Protection Bureau's Request for Information (RFI) Regarding Fees Imposed by Providers of Consumer Financial Products and Services.[1] The MBA and our member companies share the Bureau's goal of promoting a mortgage market that is fair, transparent, and competitive.

MBA has the honor of serving a highly competitive industry where customers can and do shop from a wide array of providers. This is not the "captured" market the RFI seeks to convey. Moreover, the existing regulatory regime and prevailing business practices already ensure that fees in the mortgage industry are well disclosed and charged for actual services provided at the appropriate time in the lifecycle of a loan. Therefore, there is no call for further action in this space, which would only serve to add complexity and cost to lender operations and confuse consumers.

The examination of fees or competition in the mortgage industry must consider the body of extensive statutory and comprehensive regulatory requirements that have shaped the industry since the financial crisis. Both prior to and post Dodd-Frank, Congress has created and the Bureau has implemented a regulatory regime with granular and prescriptive disclosure requirements during the mortgage origination process, aggregate limitations on fees included in a mortgage loan's APR, and clear requirements for consumer understanding and the right to correct improper or unnecessary fees across the mortgage lifecycle. Given this, it is understandable that the MBA's members would be concerned when the RFI fails to mention not only the various federal statutes governing mortgage lending, but the Bureau's own extensive regulatory efforts designed to ensure fairness and transparency in the mortgage market. In addition to the requirements imposed by laws administered by the Bureau, there are those fees charged in connection with mortgages that are subject to substantial additional requirements, including those imposed by state law, investor guidelines, or federal laws administered by other agencies. We enumerate just a part of this comprehensive body below to illustrate why further action by the Bureau is not needed or required.

[1] 87 Fed. Reg. 5801 (Feb. 2, 2021).

I. Federal Consumer Financial Law Promotes Consumer Understanding of Fees Charged in Connection With Mortgages So That Consumers Can Shop for Lower Fees and Take Steps to Avoid Fees Associated With Delinquency, Default, or Foreclosure

Mortgage transactions are highly regulated at both the federal and state level. Fundamentally, a "mortgage agreement or instrument is merely a contract as between the immediate parties who have the right to define their mutual rights and obligations."[2] Most mortgage agreements, are governed by uniform instruments drafted by government sponsored entities or government agencies that purchase or insure mortgages.[3] Various aspects of mortgage transactions are also subject to numerous state statutes, many of which directly regulate fees charged in relation to mortgage transactions.[4] In addition to these laws, of course, are federal consumer financial laws, which, as described below, are chiefly concerned with consumer understanding of fees and directly regulate fees in only certain specific instances.

A core statutory objective of the Bureau is ensuring that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions."[5] This charge is reflected in laws that require transparency regarding fees and regulation of larger incentives rather than individual fees. A review of the federal consumer financial laws that chiefly relate to mortgage lending makes clear how the legal and regulatory infrastructure is designed to promote disclosure and transparency, and substantively regulates fees only in specific, well-defined circumstances, leaving fees to be governed by market forces and state law.

A. The Truth in Lending Act

The enactment of the Truth in Lending Act (TILA) in 1968 enshrined in federal law requirements for the accurate and standardized disclosure of the cost of consumer credit, including fees "imposed directly or indirectly by the creditor as an incident to the extension of credit."[6] TILA's many provisions are designed to ensure that consumers are well informed of the costs and other terms of credit products before they consummate a transaction so that they can shop for the credit product that best meets their needs:

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[2] 59 C.J.S. Mortgages § 1 (citing *Gibson v. Neu*, 867 N.E.2d 188 (Ind. Ct. App. 2007)).

[3] Loans sold to Fannie Mae or Freddie Mac must be originated on uniform instruments. The same is true for loans insured by FHA. As of Q3 2021, loans insured by FHA or purchased by Fannie Mae or Freddie Mac made up roughly 60 percent of the $11.5 trillion in outstanding single-family mortgage debt. *See* Ginnie Mae. "Global Markets Analysis Report." Ginnie Mae, Office of Capital Markets. (Nov. 2021) available at https://www.ginniemae.gov/data_and_reports/reporting/Documents/global_market_analysis_nov21.pdf#search=OFFICE%20OF%20CAPITAL%20MARKETS.

[4] *See, e.g.,* CAL. CIV. CODE §§ 2924c (allowable fees until the notice is put in the mail), 2924d(a) (allowable fees from when notice of sale is mailed until the sale), 2924d(b) (allowable fees post-sale), 2954.4 (allowable late fees), 1719 (allowable NSF fees); GA. OCGA § 13-6-15 (allowable NSF fees), GA. OCGA § 7-6A-3 (allowable late fees); ILL. STAT. COMP. § 5/15-1510 (foreclosure costs and attorneys' fees recoverable); N.J. Ct. R. 4:42-9(a)(4) (allowable attorneys' fees in a foreclosure action); OR. ORS § 30.701 (allowable NSF fees), OR. ORS § 86.165 (late fee).

[5] 12 U.S.C. § 5511(b)(1).

[6] *See* Truth in Lending Act, Pub. L. No. 90-321, § 104 (1968) (codified as amended at 15 U.S.C. § 1605).

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. **It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit**, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[7]

Subsequent amendments to TILA, including the amendments contained in the Dodd-Frank Act that are discussed below, evidence Congress's continued adherence to TILA's original purpose.[8] TILA amendments that substantively regulate the mortgage market generally do so by creating market incentives and imposing general limitations, implemented by the Bureau through regulations promulgated under the Administrative Procedures Act.[9] To the extent Congress has chosen to directly regulate fees charged in connection with mortgage transactions through TILA, it has done so with specificity,[10] while making clear that, as a general matter, the permissibility of particular fees should be governed by state law.[11]

B. The Real Estate Settlement Procedures Act

The 1974 Real Estate Settlement Procedures Act (RESPA) likewise seeks to promote competition and consumer protection through disclosure. RESPA was enacted to ensure "that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process."[12] Accordingly, as subsequently amended, it requires the disclosure of fees charged in connection with mortgage settlements and the provision of information, as determined by the Bureau, to assist borrowers in understanding mortgage transactions, including "the nature and purpose of the costs incident to a real estate settlement" and an "explanation of a consumer's responsibilities, liabilities, and obligations in a mortgage transaction."[13]

RESPA also seeks to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices[,]"[14] specifically kickbacks paid in exchange for the referral of settlement services business.[15] While RESPA prohibits certain types of agreements regarding settlement services, Congress has not established specific fees or limitations on specific fees

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[7] 15 USC § 1601(a) (emphasis added).
[8] *See, e.g.,* 15 U.S.C. §§ 1604(b); 1638(f); 1638a; 1639d(h), (j).
[9] *See generally* 15 U.S.C. § 1639b, 1639c, 1639d, 1639e.
[10] *See, e.g.,* 15 U.S.C. § 1639.
[11] 15 U.S.C. § 1610(b) ("Except as provided in section 1639 of this title, this subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit.").
[12] 12 U.S.C. § 2601.
[13] 12 U.S.C. §§ 2603, 2604.
[14] 12 U.S.C. § 2601.
[15] 12 U.S.C. § 2607.

charged for mortgage settlement services. Indeed, it has specifically cautioned that its prohibition on certain agreements should not be construed as prohibiting fees for "services actually performed."[16] Moreover, "[t]he legislative history makes clear that RESPA was not intended to be a rate-setting statute and that Congress instead favored a market-based approach."[17]

Finally, as amended, RESPA also requires disclosures related to the servicing of federally related mortgage loans. For example, it requires servicers to disclose information about escrow accounts to borrowers,[18] to respond to Borrower inquiries relating to the servicing of their loans, and to respond to borrowers' requests to correct errors related to the servicing of the loan.[19] To the extent Congress has determined that it is necessary to directly regulate fees charged by servicers, it has done so expressly.[20]

C. The Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (FDCPA) was enacted to address certain "abusive, deceptive, and unfair debt collection practices."[21] It applies to mortgage servicers in only limited circumstances.[22] Although the FDCPA prohibits a number of specific practices, it does not prohibit or limit fees, but permits the collection of fees that are "expressly authorized by the agreement creating the debt or permitted by law."[23] While the precise contours of this provision are the subject of ongoing litigation,[24] it clearly expresses Congress's preference that fees that may be imposed in the course of debt collection be determined not by federal law but by the parties' agreement or state law.

D. The Consumer Financial Protection Act

The Consumer Financial Protection Act (CFPA) created the Bureau, granted it certain authorities, and directed the Bureau to exercise those authorities to promote consumers' access to financial products and services and to ensure that the markets for such products and services are

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[16] 12 U.S.C. § 2607(b), (c).

[17] *See, e.g.*, HUD RESPA Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers (citing S. Rep. No. 93-866, *reprinted at* 1974 U.S.C.C.A.N. 6546, 6548 (1974)).

[18] 12 U.S.C. § 2609.

[19] 12 U.S.C. § 2605(e), (k)(1)(C).

[20] *See, e.g.,* 12 U.S.C. §§ 2605(k)(1)(B) (prohibiting fees charged for responding to qualified written requests), 2605(m) (requiring fees, other than those subject to State insurance regulation, charged in connection with force-placed insurance to be bona fide and reasonable); 2610 (prohibiting fees for the disclosure of certain information to borrowers).

[21] 15 U.S.C. § 1692(a).

[22] 15 U.S.C. § 1692a(6)(F). *See also* 81 Fed. Reg. 71977, 7198 (Oct. 19, 2016) ("While many mortgage servicers are not subject to the FDCPA, mortgage servicers that acquired a mortgage loan at the time that it was in default are subject to the FDCPA with respect to that mortgage loan.").

[23] 15 U.S.C. § 1692f(1).

[24] *See, e.g.,* Brief of Amici Curiae Mortgage Bankers Association, American Bankers Association, National Association of Federally-Insured Credit Unions, Credit Union National Association, and American Financial Services Association, in Support of Appellee and Affirming the District Court Order in *Amy Thomas-Lawson et al. v. Carrington Mortgage Services LLC* [Case No. 21-55459] in the U.S. Court of Appeals for the Ninth Circuit available at https://apps.mba.org/pdf/Joint Trades Convenience Fee 9th Cir Amici Curiae Brief MBA.pdf.

fair, transparent, and competitive.[25] Like the statutes described above, the CFPA reflects Congress's intent to regulate fees and other costs charged to consumers in connection with consumer financial products and services by ensuring that they are properly disclosed, while generally leaving substantive regulation of such fees and costs to other regulators. For example, the CFPA authorizes the Bureau 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."[26] This grant of authority contrasts with the express limitation on the Bureau's authority to "establish a usury limit,"[27] again reflecting Congress's intention to leave the regulation of the cost of credit to market competition, the states, or to other federal agencies.

Finally, while the CFPB has authority to take action to prevent unfair, deceptive, or abusive acts or practices, Congress was clear that such acts or practices only arise in certain instances, for example, where consumers are misled about a material aspect of a product or service, where an act or practice causes a consumer substantial injury that they cannot reasonably avoid and that does not provide countervailing benefits to consumers or competition, or when the act or practice takes "unreasonable advantage" of certain consumer vulnerabilities, including consumers' "inability to protect" their interests.[28] As described below, the detailed regulatory regime that the Bureau has established is designed to ensure that consumers receive clear information about fees charged in connection with mortgage transactions, including the information they need to avoid such fees, and that participants in the mortgage industry charge fees only when there is a reasonable basis for doing so.

II. CFPB Rules Are Designed to Ensure That Fees Are Reasonable and Understood

Since soon after its creation, the Bureau engaged in several significant rulemakings related to the mortgage market pursuant to Congressional directives contained in the Dodd-Frank Act that amended TILA, RESPA, and other federal consumer financial laws. These rules were intended to implement Congressional judgments regarding specific practices in the mortgage market and to promote consumer understanding of mortgage transactions, including fees that may be charged throughout the mortgage lifecycle, so that consumers can shop for competitive products and services and avoid fees charged in connection with delinquency, default, and foreclosure. The RFI does not discuss or even acknowledge these regulations, despite the tremendous time and resources spent by the Bureau to develop them, and industry to implement them. Nor does the RFI discuss the Bureau's own assessments of several of these "significant" rulemakings. These assessments, which were required to "reflect available evidence and any data that the Bureau reasonably may collect,"[29] do not identify concerns like those articulated by the RFI.

A. The Qualified Mortgage Rule

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[25] 12 U.S.C. § 5511(a).
[26] 12 U.S.C. § 5532.
[27] 12 U.S.C. § 5517(o).
[28] *See generally* 12 U.S.C. § 5531.
[29] 12 U.S.C. § 5512(d)(1).

The Dodd-Frank Act's amendments to TILA created a new legal requirement generally prohibiting a lender from making a residential mortgage loan without making a good faith determination that the borrower has a reasonable ability to repay the loan, and established certain protections from liability under this requirement for certain classes of mortgages, known as "qualified mortgages" or "QM(s)."[30] As set forth in rules promulgated by the Bureau, certain qualified mortgages are presumed to comply with the ability to repay requirement if they meet specific product feature requirements and the Annual Percentage Rate (APR) does not exceed the Average Prime Offer Rate (APOR) by more than 2.5 percent. A further class of mortgages are given a conclusive presumption of compliance, or safe harbor, if they meet these requirements and their APR does not exceed the APOR by more than 1.5 percent. The risk of liability that comes with making a non-QM loan, as well as the favorable treatment afforded securitized QM loans in the credit risk retention rules, means that the vast majority of mortgage loans made today are QMs.[31]

Congress limited the costs of most creditor fees to 3 percent of the underlying loan amount to qualify for QM treatment[32] and the Bureau has further amended the rule to use the APR-APOR spread as an additional key eligibility requirement for QM.[33] As most fees are reflected in the APR calculation, the new QM rule and the safe harbor's APR-APOR spread requirements also act as a limit on the fees that mortgage companies can charge and retain if they want either QM or the more desirable safe harbor treatment.

This rule demonstrates two important principles regarding how fees have been viewed in the context of mortgage affordability.[34] First, as it uses the APR as a critical gating requirement, almost all mortgage origination fees that are retained by the creditor or paid to an affiliate are weighed in determining a loan's eligibility for QM status.[35] This breadth of coverage incentivizes lenders to minimize fees so as to avoid exceeding the 3 percent aggregate limit. Second, the general construct is notable for what it does not intend to do. Though undoubtedly a factor in loan affordability, Congress did not attempt to "set" or determine the appropriateness of individual fees in the mortgage market.

B. The TILA-RESPA Integrated Disclosure Rule

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[30] *See generally* 15 U.S.C. § 1639c.

[31] *See* Bureau of Consumer Fin. Prot., *Ability to Repay and Qualified Mortgage Assessment Report* (Jan. 2019) at 205. *See also* Carroll, Pete., "*Expiration of the CFPB's Qualified Mortgage "GSE Patch" – Part 1*," CoreLogic Insights Blog, July 11, 2019. Available at: https://www.corelogic.com/blog/2019/07/expiration-of-the-cfpbs-qualified-mortgage-gse-patch-part-1.aspx (Showing that for 2018, non-QM loans constituted just 3.4 percent of total originations.).

[32] 15 U.S.C. § 1639c(b)(2)(A)(vii).

[33] Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition, 85 Fed. Reg. 86308, 86327 (Dec. 29, 2020).

[34] It is worth noting that there are further additional regulations around loans with points and fees greater than 5% or where the APR exceeds APOR by 6.5% in the Home Ownership and Equity Protection Act Rule (HOEPA). There are extremely few HOEPA loans, but HOEPA further demonstrates the already extensive regulation of fees and costs in the mortgage origination market.

[35] Obviously, the ability to make hidden charges is now also further limited by TRID, as discussed above.

One of the Bureau's most extensive rulemaking projects was the TILA-RESPA Integrated Disclosure (TRID) rulemaking. This effort, mandated by Congress,[36] evinces a clear Congressional preference favoring disclosure as opposed to "price setting authority" on particular fees. The TRID rulemaking merged the mortgage disclosures previously required by TILA and RESPA into one set of shopping disclosures (the Loan Estimate) and one set of pre-consummation disclosures (the Closing Disclosure). TRID was intended to ensure more reliable, uniform estimates, which would "increase the level of shopping for mortgage loans and foster honest competition for prospective consumers among financial institutions."[37]

As the Bureau knows, TRID is an extremely granular and prescriptive advance disclosure regime.[38] The rule features strict provisions that require early disclosure of the fees charged and "locking in" of these fees prohibiting most changes to ensure that borrowers can shop and compare those fees between different lenders. Thus, lenders and settlement service providers are penalized for fee underestimation to gain competitive advantage. The fees are also then disclosed before consummation with a mandatory waiting period to ensure borrowers have time to review and fully understand the associated costs of credit. Put simply, the process requires both a clear disclosure of comparable fees before a borrower chooses a lender and clear disclosure of the fees associated with the loan well before the closing table.

Our members believe advanced and clear disclosure of mortgage fees is necessary and important. The industry has spent extraordinary resources to come into compliance and ensure continued compliance with TRID.[39] The prescriptive nature of TRID and its highly technical requirements continue to impose real costs on the marketplace and consumers due to the highly technical nature of the due diligence and compliance reviews. Such an extensive and costly rulemaking should be understood to demonstrate the Bureau's approach to fees in the mortgage origination market. This conclusion is reinforced by the fact that the Bureau undertook significant consumer testing in the development of the rule[40] and subsequently determined that there is significant evidence that the TRID forms have improved consumer understanding of costs and fees when

[36] 12 U.S.C § 5532(f).

[37] Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79730, 79822 (Dec. 31, 2013).

[38] For example, see generally 12 CFR § 1026.37(o).

[39] *See* Comment letter jointly submitted by the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Housing Policy Council, and Mortgage Bankers Association in response to the CFPB's Request for Information Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) Rule Assessment [Docket No. CFPB-2019-0055] (Jan. 21, 2020), available at https://www.regulations.gov/comment/CFPB-2019-0055-0136).

[40] *See* Part III of the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79730 (Dec. 31, 2013) (for discussion of consumer testing conducted in the development of the TRID disclosures); *See also* Kleimann Communication Group, Inc., *Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures* (July 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf.

promulgating the rule[41] and ratified those conclusions in its statutorily mandated assessment of the rule.[42]

C. The TILA Servicing Rule

In 2014, the Bureau issued rules to implement amendments to TILA contained in the Dodd-Frank Act that were designed to provide borrowers with greater information about the servicing of their mortgage loan.[43] Among other things, the TILA Servicing Rule imposed requirements on servicers to provide borrowers with periodic statements containing specified information about their loan. With regard to fees in particular, servicers must disclose the total fees charged since the last statement,[44] "a breakdown of the individual fees" charged since the last statement,[45] and a breakdown of payments applied to fees.[46] For delinquent borrowers, the rule also requires disclosure regarding the risks, including expenses, that may be incurred if delinquency is not cured.[47] Such disclosures work in tandem with the RESPA Servicing Rule, described below, to ensure that consumers understand fees charged in connection with the servicing of their mortgage loan and can seek correction of any fee they believe was not properly charged.[48]

D. The RESPA Servicing Rule

Although the RFI discusses certain fees charged to consumers who are delinquent on their mortgage, it does not address the Bureau's rulemaking efforts under RESPA, which were specifically designed to help struggling borrowers "avoid unnecessary or unwarranted fees."[49] For example, the RFI discusses fees related to force-placed insurance.[50] But the Bureau's rules issued in 2013 implementing the Dodd-Frank Act's amendments to RESPA specifically address such fees. Under these rules, servicers must provide borrowers with notice before force-placing

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[41] *See* Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) (August 2012 Proposed Rule), 77 Fed. Reg. 5116, 51211 (Aug. 23, 2012) (for discussion on how TRID disclosures improved consumer understanding of closing services and costs).

[42] *See generally* Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment (Oct. 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_trid-rule-assessment_report.pdf.

[43] Note these rules became effective January 2014. *See* Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902 (Feb. 14, 2013), *as amended by* 81 Fed. Reg. 72160 (Oct. 19, 2016), 82 Fed. Reg. 30947 (July 5, 2017), 83 Fed. Reg. 10553 (March 12, 2018).

[44] 12 CFR § 1026.41(d)(2)(ii).

[45] 78 Fed. Reg. at 10965; *see also* 12 CFR § 1026.41(d)(4).

[46] 12 CFR § 1026.41(d)(3).

[47] 12 CFR § 1026.41(d)(8); *see also* 12 CFR pt. 1026, App. H-30(B), Sample Form of Periodic Statement with Delinquency Box (providing model language for delinquency notice that "[f]ailure to bring your loan current may result in fees and foreclosure").

[48] *See also* 12 C.F.R. 1006.35(c)(5) (providing that mortgage servicers subject to the FDCPA may satisfy certain disclosure obligations under the Bureau's rule implementing that statute by providing the periodic statement).

[49] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10709 (Feb. 14, 2013); *see also* 78 Fed. Reg. 44686 (July 24, 2013), 78 Fed. Reg. 60382 (Oct. 1, 2013), 78 Fed. Reg. 62993 (Oct. 23, 2013), 81 Fed. Reg. 72160 (Oct. 19, 2016), 82 Fed. Reg. 30947 (July 5, 2017), 82 Fed. Reg. 47953 (Oct. 16, 2017), 85 Fed. Reg. 39055 (June 30, 2020), 86 Fed. Reg. 34848 (June 30, 2021) (amending these rules).

[50] 87 Fed. Reg. at 5802.

hazard insurance so that borrowers can take steps to obtain their own hazard insurance or demonstrate that they currently have such insurance.[51] Apart from charges subject to State regulation or authorized under the Flood Disaster Protection Act of 1973, "all charges related to force-placed insurance assessed to a borrower by or through the servicer must be bona fide and reasonable."[52] Similarly, "[a] servicer may not assess on a borrower a premium charge or fee related to force-placed insurance unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance."[53]

In addition, as amended by the Dodd-Frank Act, RESPA requires servicers to respond to certain "qualified written requests" about the servicing of the loan,[54] and prohibits servicers from failing to take timely action to respond to a borrower's requests to correct certain errors related to the servicing of the loan.[55] Section 35 of the Bureau's RESPA Servicing Rule implements these provisions.[56] Under this provision, if a borrower asserts, in writing, that the servicer has committed an error, the servicer must acknowledge the notice of error and respond by either correcting the error or, after a reasonable investigation, informing the borrower that it has determined that no error occurred and providing the borrower with further information regarding this determination and who to contact for further assistance.[57] To provide both borrowers and servicers with some certainty regarding what types of errors would be subject to this process, the Bureau promulgated a list of "covered errors."[58] With regard to fees, the list includes "[i]mposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower" as a possible error covered by the rule.[59] The commentary to this provision provides examples of fees that a servicer would lack a reasonable basis to impose, such as late fees for payments that are not late, charges imposed by a service provider for a service that was not rendered, default property management fees for borrowers that are not in delinquency status that would justify the charge, or charges for force-placed insurance not permitted by law.[60]

Accordingly, although not discussed by the RFI, the Bureau's own rules acknowledge that imposing fees and charges is a "standard servicer duty" and that servicers may charge fees, including fees that arise upon a mortgage borrower's default, so long as they have a "reasonable basis" for doing so. As described above, the Bureau's rules implementing TILA require disclosure of information regarding fees that have been charged to consumers by servicers.[61] If a borrower believes a servicer lacks a reasonable basis for charging a fee, the borrower has a mechanism for correcting that error.

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[51] 12 CFR § 1024.37(c)-(f).
[52] 12 CFR § 1024.37(h)(1).
[53] 12 CFR § 1024.37(b).
[54] *See* 12 U.S.C. § 2605(e). As noted, servicers are prohibited from charging a fee for responding to valid qualified written requests. 12 U.S.C. § 2605(k)(1)(B).
[55] 12 U.S.C. § 2605(k)(1)(C).
[56] 12 C.F.R. § 1024.35.
[57] *Id.* at 1024.35(a), (d), (e). In the alternative, the servicer may quickly correct the error and notify the borrower. *Id.* at § 1024.35(f).
[58] *Id.* at 1024.35(b).
[59] *Id.* at 1024.35(b)(5).
[60] 12 CFR pt. 1024; Supp. I, Comment 35(b)-2.
[61] 12 CFR § 1026.41(b).

In addition to this provision, the RESPA Servicing Rule established numerous requirements designed to ensure that servicers provide borrowers with the information and the opportunity to "avoid unwarranted or unnecessary costs and fees and to facilitate review of borrowers for foreclosure avoidance options."[62] These requirements, implemented by servicers at significant expense, require servicers to establish policies and procedures to ensure, among other things, that borrowers are provided with "timely and accurate information," including information about loss mitigation options that can help prevent avoidable foreclosures.[63] Many of the Rule's requirements are specifically designed to assist delinquent borrowers, including requirements regarding live contact,[64] continuity of contact,[65] and consideration for available loss mitigation options.[66] The Bureau's own assessment, subject to important caveats, is that the rule did prevent avoidable foreclosures, as well as the associated costs.[67]

E. Other Restrictions on Mortgage Servicing Fees

As the Bureau itself has recognized, in addition to federal and state law, mortgage servicers must abide by detailed servicing requirements. Many of these servicing guidelines have been imposed by federal agencies or by closely supervised government sponsored enterprises that have been operating under federal conservatorship for 13 years. Servicing guidelines, such as those found in the Federal Housing Administration's (FHA) Single Family Housing Policy Handbook or in the servicing guides maintained by Fannie Mae or Freddie Mac, describe the circumstances under which a servicer may charge a fee. For example, when servicing an FHA loan or a loan purchased by Fannie Mae or Freddie Mac, the applicable servicing guidelines hold that a servicer may not assess a late payment charge unless the payment arrives after the 15-day grace period for monthly payments.[68] Similarly, servicing requirements may require mortgage servicers to undertake specific property preservation activities. These property preservation services protect the mortgaged property from further deterioration and prevent blight so as not to negatively impact surrounding properties and communities. Importantly, the potential for such fees is communicated to the consumer in the underlying agreement between the borrower and the lender.[69] In addition and as detailed above, existing Bureau regulations ensure that fees

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[62] *See* 2013 RESPA Servicing Rule Assessment Report, at 114; *see also* 12 CFR § 1024.39-41.
[63] 12 CFR § 1024.38(b).
[64] 12 CFR § 1024.39.
[65] 12 CFR § 1024.40.
[66] 12 CFR 1024.41.
[67] *Id.* at 8.
[68] *See* Selling Guide: Fannie Mae Single Family, FANNIE MAE, 932 (April 6, 2022); Single-Family Seller/Servicer Guide, FREDDIE MAC, 4701-6 (Feb. 5, 2020); FHA Single Family Housing Policy Handbook, HUD, 387 (Oct. 26, 2021).
[69] Typical provisions are evidenced in the "CALIFORNIA--Single Family--Fannie Mae/Freddie Mac UNIFORM INSTRUMENT." Section 9, "Protection of Lender's Interest in the Property and Rights Under this Security Instrument[,]" explains that the "Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. … Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment." While Section 14, "Loan Charges[,]" states that the "Lender may

occurring during loan servicing are disclosed and that consumers are able to seek the correction of any fee the consumer believes was charged without a reasonable basis. Further, the Bureau has imposed extensive requirements on servicers designed to ensure that borrowers who are delinquent are provided with information and opportunity to avoid, if possible, the fees and expenses associated with delinquency, default, and foreclosure.

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As both Congress and past Bureau rulemakings have acknowledged, fees are charged throughout the lifecycle of mortgage transactions for services actually performed. The RFI expresses a general concern about fees charged during the course of a borrower's indebtedness that should properly be included in the "sticker-price," but none of the fees described in the RFI in relation to mortgage lending fit that characterization. Fees that are a necessary aspect of any mortgage origination are disclosed pursuant to the CFPB's own regulations, which are designed to allow consumers to shop for lower fees. Other fees, such as certain mortgage servicing fees mentioned by the RFI, are variable fees charged in relation to a specific consumer-requested service or when a consumer becomes seriously delinquent on their loan obligations.[70] As these fees are contingent on certain actions by a limited number of borrowers, they cannot be reflected in the sticker price charged to all borrowers.

Any Bureau initiative to further regulate fees charged in connection with mortgage transactions must be grounded in actual data and evidence and must acknowledge the extensive contractual and regulatory regime that already governs such fees. As acknowledged by the Bureau, the rules it has promulgated to regulate aspects of the mortgage market have imposed extensive costs on participants in the market, some of which are born by consumers in the form of increased cost or reduced access to credit.

This regulatory regime also affects the competitive landscape, as the costs to comply with the Bureau's regulations and other requirements naturally favor economies of scale and specialization. Despite these pressures, the market for residential mortgages is vibrant, with multitudes of options for consumers and various successful business models. As noted in a recent article by MBA's Chief Economist Michael Fratantoni, "it appears that over the past 10 years, the mortgage market has become even more competitive compared to the period right

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charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law." The model security instrument used for FHA loans contains similar provisions. Specifically, Section 9, "Protection of Lender's Interest in the Property and Rights Under this Security Instrument[,]" of the Model Forward Mortgage Security Agreement states that the " … Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property."

[70] *See* 2013 RESPA Servicing Rule Assessment Report, at 32; *see also* Allowable Foreclosure Attorney Fees Exhibit (02/09/2022) (fanniemae.com); F-1-05: Expense Reimbursement (02/09/2022) (fanniemae.com); Section III of FHA's Single Family Housing Policy Handbook (Handbook 4000.1).

before and right after the great financial crisis. This competition benefits mortgage borrowers who use their power to shop across lenders of different sizes and different business models."[71]

The Bureau must consider how potential policy interventions may impact this market.[72] For example, a reduction in legitimate fee income or curbing the ability to pass through the disclosed and contractually permitted costs for legally-authorized and investor-required services may lessen competition in the mortgage industry by reducing already slim margins and incentivizing entities to consolidate to realize economies of scale needed to remain in operation.

Given the complexity of both the legal and market forces that govern the mortgage industry, should the Bureau decide to act based on any of the information it receives from this RFI, it should do so through a consultative rulemaking process subject to the Administrative Procedures Act. The Bureau must also ground any further regulation and/or guidance in its statutory authority. The federal consumer financial laws that primarily relate to mortgage lending show a clear and appropriate desire on the part of Congress to ensure that fees charged to consumers are appropriately disclosed, and that consumers understand why they may be charged fees so that they can take steps to avoid them. Where Congress has determined that particular fees or market practices should be regulated by federal law, it has done so expressly and with particularity, while leaving most fees to be determined by state law and the market forces. To the extent the Bureau intends to impose additional requirements on participants in the mortgage industry, it must explain its statutory authority for doing so.

Thank you in advance for your consideration of these comments. Should you have questions or wish to discuss further, please contact me at (202) 557-2878 and pmills@mba.org or my colleagues Justin Wiseman at (202) 557-2854 and jwiseman@mba.org or Blake Chavis, at (202) 557-2930 and bchavis@mba.org.

Sincerely,

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[71] *See* Fratantoni, Mike. "*MBA's Mike Fratantoni on measuring mortgage competition*." HousingWire (Feb. 2, 2022) available at: https://www.housingwire.com/articles/mbas-mike-fratantoni-on-measuring-mortgage-competition/.

[72] *See* 12 U.S.C. § 5512(b).