

[Proposed Rule – Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X](#)

COMMENT LETTER

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September 10, 2024

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September 9, 2024

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Comment Intake – Mortgage Servicing
c/o Legal Division Docket Manager
Docket No. CFPB-2024-0024
RIN 3170-AB04

Re: *Proposed Rule – Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X*

Dear Sir or Madam:

The Conference of State Bank Supervisors¹ (“CSBS”) provides the following comments regarding the Consumer Financial Protection Bureau (“CFPB”) proposal to amend mortgage servicing requirements under the Real Estate Settlement Procedures Act (“RESPA”) and Regulation X. The proposed rule, entitled *Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X*² (“proposal”), would remove most of the application-based loss mitigation provisions from 12 C.F.R. § 1024.41 and require servicers to provide foreclosure procedural safeguards as soon as a borrower makes a request for loss mitigation assistance.³

The proposal raises several key issues that warrant additional consultation, clarification, or revision prior to finalizing any changes to Regulation X. State regulators recommend that the CFPB:

- Consult with individual states regarding their loss mitigation requirements, conduct an in-depth preemption analysis, and publish its results prior to finalizing any changes to Regulation X;

- Clarify or amend Regulation X’s preemption standard to ensure consumers continue receiving robust protections under state law;
- Establish additional guardrails on the loss mitigation process that provide clarity to borrowers and servicers; and
- Establish uniform standards for language access requirements to minimize risks to borrowers, provide clear expectations to servicers, and ensure a consistent supervisory approach.
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I. The CFPB should consult with individual states regarding their loss mitigation requirements, conduct an in-depth preemption analysis, and publish its results prior to finalizing any changes to Regulation X.

As the CFPB recognizes, many state laws establish early intervention, loss mitigation, and foreclosure process requirements for mortgage servicers. To the extent these state laws are deemed inconsistent with any revisions to Regulation X, they may be preempted, but only to the extent of such inconsistency. The CFPB has requested comment specifically on these potential preemption issues, including possible preemption determinations it could make if the proposal is finalized.⁴

CSBS has identified at least 22 states that mandate specific loss mitigation requirements for mortgage servicers.⁵ These state statutes outline a wide range of protocols designed to protect struggling borrowers, including specific review periods, loss mitigation fee restrictions, mediation provisions, and timeframes and procedures for responding to a borrower’s appeal of a loan modification denial and error resolution claims. Six of these states also have rules that require a complete loss mitigation application from borrowers to receive foreclosure protections.⁶

Critically, state loss mitigation requirements often bridge the gap between financial services consumer protections and state property law protections. Accordingly, before finalizing any changes to the mortgage servicing rules, CSBS requests that the CFPB consult with each of these 22 states regarding their loss mitigation requirements, ensure proposed modifications to Regulation X do not inadvertently or inappropriately preempt these state protections, and publish the results of its inquiry and analysis.

II. The CFPB should clarify or amend Regulation X's preemption standard to ensure consumers continue receiving robust protections under state law.

Broadly, the CFPB does not discuss how, or clarify when, it will conclude that a state law provides greater protections to consumers than those provided by the proposed changes. As this is the determining factor regarding an “inconsistency” between state and federal law for purposes of preemption, clarity is vital for consumers and states on this issue.⁷ To preserve borrower protections provided by state laws CSBS recommends that the CFPB clarify the scope of Regulation X's preemption provision in the same manner as Regulation Z.⁸ Such clarification would ensure that a state law is only deemed “inconsistent” when it *contradicts* or *conflicts* with Regulation X requirements.

*RESPA contains a common “anti-preemption” provision:*⁹

This Act does not annul, alter, or affect, or exempt any person subject to the provisions of this Act from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this Act, and then only to the extent of the inconsistency.¹⁰

This “anti-preemption” provision is echoed in Regulation X:

State laws that are inconsistent with RESPA or this part are preempted to the extent of the inconsistency. However, RESPA and these regulations do not annul, alter, affect, or exempt any person subject to their provisions from complying with the laws of any State with respect to settlement practices, except to the extent of the inconsistency.¹¹

This “anti-preemption” language in other consumer protection laws is widely accepted to limit preemption.¹² Because Congress utilizes the same anti-preemptive terminology in RESPA (as used in other laws), it is clear that state laws should not be preempted in the current matter.¹³

To cement this understanding, CSBS recommends that the CFPB clarify in the final rule’s Supplementary Information that state laws are not inconsistent unless they require a person to take actions that contradict or conflict with Regulation X. Additionally, CSBS recommends that the CFPB propose amendments to 12 CFR § 1024.5(c)(1) as follows:

- State laws that are inconsistent with RESPA or this part are preempted to the extent of the inconsistency. However, RESPA and these regulations do not annul, alter, affect, or exempt any person subject to their provisions from complying with the laws of any State with respect to settlement practices, except to the extent of the inconsistency. A State law or regulation is inconsistent with this part if it requires a person to take actions that contradict or conflict with the requirements of this part or if the person cannot comply with the State law or regulation without violating this part.

Providing clarity around the CFPB’s Regulation X preemption standard and analysis is critical for ensuring states can effectively protect borrowers.

III. The proposed amendments should establish additional guardrails on the loss mitigation process that provide clarity to borrowers and servicers.

Currently, servicers must follow Regulation X’s provisions for loss mitigation applications unless the servicer has previously done so for a borrower’s complete loss mitigation application and the borrower has been continually delinquent since submitting the prior complete application.¹⁴ The proposal removes existing commentary regarding duplicative requests relating to § 1024.41(i). The proposed revisions provide only that a servicer has to comply with a borrower’s request for loss mitigation assistance during the same loss mitigation review cycle, unless it has met one of the procedural safeguards.¹⁵ However, the CFPB’s proposed procedural safeguards may inadvertently open the door to a series of re-requests, and CSBS recommends that the CFPB establish clearly defined guardrails to prevent a loss mitigation review cycle from continuing indefinitely.

The proposal would also prohibit servicers from charging fees beyond scheduled contractual amounts during the loss mitigation review cycle.¹⁶ Placing this type of restriction on servicers for an undefined period raises a host of supervisory questions and seems to ignore the fact that many such fees are bona fide and legal, and required by investors for delinquency-related services.¹⁷ The proposal also does not outline how such fees are addressed if a borrower fails the loss mitigation process, declines a loss mitigation offer, or does not qualify for available loss mitigation solutions.¹⁸ Clarity on these points would not only benefit borrowers and servicers, but also assist in devising effective supervisory examination procedures and ensure uniform understanding and treatment.

IV. The CFPB should establish uniform standards for language access requirements to minimize risks to borrowers, provide clear expectations to servicers, and ensure a consistent supervisory approach.

The proposal would require that servicers follow new language access requirements to help limited English proficiency (“LEP”) borrowers better understand certain mortgage servicing communications. Servicers would need to accurately translate certain written communications into Spanish, and borrowers would be able to request translations in five additional languages chosen by the servicer based on the languages most frequently spoken by most of their non-Spanish speaking LEP borrowers.

CSBS supports efforts to expand financial services and communications to LEP consumers. However, as previous CFPB efforts on this front have shown,¹⁹ identifying LEP borrowers’ preferred languages and ensuring the accuracy of any translations presents complex challenges, such as addressing different dialects, collecting borrowers’ language preference data, and more. Additionally, the stakes are high for both borrowers and servicers – borrowers could be exposed to potential harm by lack of access to information in their language or from inaccurate translations, while servicers could face potential compliance risks, including unfair, deceptive, or abusive acts or practices (“UDAAP”), for providing inaccurate translations of important loss mitigation documents to borrowers.

If not appropriately and thoughtfully designed, these language access requirements could create significant challenges for borrowers and servicers. State regulators appreciate the CFPB’s decision to wait for public input to inform the drafting of proposed text under Regulation X for the new language access requirements.²⁰

As the CFPB considers how it might implement language access requirements, state regulators provide the following recommendations.

A. The CFPB should consider a standard language selection process rather than require servicers to identify borrowers’ language preferences.

Requiring servicers to identify the five languages most frequently spoken by most of their non-Spanish speaking LEP borrowers could introduce several complications, including how servicers are to collect such language preference data, when in the loan process stage this collection should occur, whether and how to verify this information from borrowers, procedures for documenting language selection decisions, and how often servicers should review their language selection decisions to ensure that they match the majority of their borrowers’ language preferences.

State regulators recommend that the CFPB consider a standard process for servicers to identify language requirements based on more readily available and reliable public information. For example, the CFPB could leverage U.S. Census data to identify the most common non-English languages spoken nationally²¹ or in a certain state, and then require servicers to provide borrowers translations in those languages.²² While this data may not correlate with homeownership levels or borrowers in need of loss mitigation options, a standard language selection process would strike an appropriate balance between expanding language access and minimizing operational hurdles.

B. The CFPB should provide services with model language translations and forms.

State regulators are also concerned about the potential harm to consumers from inaccurately translated early intervention and loss mitigation information. The proposal states that servicers should use translated documents and tools provided by the CFPB and other government agencies. However, these agency resources may not include translations that servicers could be required to provide based on their borrowers’ language preferences.²³

To avoid borrower harm or confusion from inaccurate translations, the CFPB should provide model language translations and sample forms that can be leveraged throughout the early intervention and loss mitigation process. This would be consistent with CFPB practice, promote consumer protection, and help

alleviate compliance risk concerns.²⁴

Under the proposal, in the event of a loan transfer, a borrower's language preference would follow to that subsequent servicer, even if that language falls outside one of the servicer's five selected languages.²⁵ Model language translations and forms would help facilitate accurate and consistent information for borrowers in the event of servicing transfers.

C. The CFPB should align its language access requirements with other federal agencies.

The Federal Housing Finance Agency ("FHFA") provides language access tools specifically designed to help lenders, servicers, and housing counselors serve LEP borrowers.²⁶ Since 2017, FHFA, Fannie Mae, and Freddie Mac ("GSEs") have worked on a multi-year language access plan to identify major obstacles facing LEP borrowers in accessing mortgage credit. As part of this plan, the CFPB collaborated with the FHFA and the GSEs to create standardized glossaries for common terminology in Spanish, Chinese, Vietnamese, Korean, and Tagalog.²⁷ CSBS recommends that the CFPB engage in a similar interagency approach to ensure consistency for borrowers and servicers and commonality in terms from origination to servicing.²⁸

V. Conclusion

As the CFPB considers revisions to Regulation X, it should work directly with states that have loss mitigation requirements to avoid preemption issues in a final rule. The CFPB should also clarify or revise its preemption regulations to promote consistent borrower protections under state law. The CFPB should also enhance borrower protections and design consistent servicer requirements by establishing additional guardrails around the loss mitigation process and standardizing language access requirements.

Sincerely,

Brandon Milhorn

President and CEO

Endnotes

1 CSBS is the nationwide organization of state banking and financial regulators from all 50 states, the District of Columbia, and the U.S. territories.

2 CFPB, Proposed Rule, [*Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X*](#), 89 Fed. Reg. 60204 (July 24, 2024).

3 Foreclosure procedural safeguards under the proposed "loss mitigation review cycle" would start as soon as a request is made (either orally or in writing), provided the request occurs more than 37 days before a foreclosure sale. During this time, a servicer cannot initiate, continue, or advance a foreclosure unless one of the following procedural safeguards is met: (i) the servicer has reviewed all available loss mitigation options and none remain, all required notices have been sent, and, if applicable, the borrower has not requested appeal, or all appeals have been denied; or (ii) the borrower has been uncommunicative for at least 90 days despite regular attempts made by the servicer. The loss mitigation review cycle ends when the loan is brought current or when foreclosure procedural safeguards are met. Currently, after the 120-day pre-foreclosure review period elapses, certain foreclosure protections in § 1024.41 are contingent on a borrower having submitted a completed application. *Id.* at 60210-11.

4 *Supra* note 2, at 60213 (“(ii) Are there State or local foreclosure laws or requirements that might affect a servicer’s ability to comply with this requirement, and if so, how? (iii) Should the CFPB consider excepting any interim foreclosure actions, such as mediation or arbitration, where the borrower would prefer to participate in those meetings, and if so, should the CFPB identify any minimum standards for servicers to determine borrower preference regarding participation in those meetings?”); at 60230 (“(i) Are there inconsistencies between the CFPB’s proposal, if finalized, and existing State law? If so, what are the details of such inconsistency? (ii) Are there specific burdens or costs caused by any potential inconsistency or overlap between the CFPB’s proposal, if finalized, and State laws related to early intervention and loss mitigation?”).

5 CSBS provides *Appendix A – Loss Mitigation Requirements by State* in response to preemption questions raised by the CFPB.

6 California, Colorado, Georgia, Nevada, New York, and Pennsylvania require complete loss mitigation applications to receive foreclosure protections.

7 Supplement I to Part 1024 – Official Interpretation of 12 C.F.R. § 1024.5(c). Relation to State laws (“1. State laws that are inconsistent with the requirement of RESPA or Regulation X may be preempted by RESPA or Regulation X. State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X. In addition, nothing in RESPA or Regulation X should be construed to preempt the entire field of regulation of the practices covered by RESPA or Regulation X, including the regulations in Subpart C with respect to mortgage servicers or mortgage servicing.”).

8 *See* 12 C.F.R. § 1026.28(a) (“A State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law. A State law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the Federal law, or if it requires the use of a term different from that required in the Federal law to describe the same item.”); *see also*, 31 C.F.R. § 212.9 (“A State law or regulation is inconsistent with this part if it requires a financial institution to take actions or make disclosures that contradict or conflict with the requirements of this part or if a financial institution cannot comply with the State law or regulation without violating this part.”).

9 *See, e.g.*, Congressional Research Service, [*Federal Preemption: A Legal Primer*](#), 14 (May 18, 2023) (“Anti-Preemption Provisions[:] Some savings clauses contain language indicating that “nothing in” the relevant federal statute “may be construed to preempt or supersede” certain categories of state law. Others say that the relevant federal statute “does not annul, alter, or affect” state laws “except to the extent that those laws are inconsistent” with the federal statute. Certain statutes containing this “inconsistency” language further provide that state laws are not “inconsistent” with the relevant federal statute if they provide greater protection to consumers than federal law. Some courts and commentators have labeled these clauses “anti-preemption provisions.” Courts have given effect to the plain language of the provisions, concluding that they evince Congress’s intent to allow states to adopt regulations that are consistent with federal law.”).

10 12 U.S.C. § 2616.

11 12 C.F.R. § 1024.5(c)(1).

12 *See, e.g.*, *Bank of Am. v. City & Cty. of S.F.*, 309 F.3d 551, 565 (9th Cir. 2002) (“The EFTA contains an anti-preemption provision which provides that state laws affording greater protection to consumers than the EFTA are not preempted by the EFTA.”).

13 *Perkins v. Johnson*, 551 F. Supp. 2d 1246, 1255 (D. Colo. 2008) (“It is clear that Congress intended to give effect to RESPA over state law only in the limited situation where the two are inconsistent.”).

14 12 CFR § 1024.41(i). The official interpretation states that if a borrower ceases to be delinquent and later becomes delinquent again, the servicer must again comply with all applicable requirements of § 1024.41 for any subsequent loss mitigation application a borrower submits.

15 *Supra* note 2, at 60248. In other words, once all options have been reviewed and appeal rights have been exhausted or the borrower is uncommunicative for at least 90 days.

16 The CFPB acknowledges this broad fee prohibition may result in servicers making payments to third-party companies for delinquency-related services that servicers may not be able to recoup. As justification, the CFPB says servicers may be incentivized to process loss mitigation applications quickly and accurately to minimize costs and lost revenue. *Supra* note 2, at 60215.

17 *See, e.g.*, Fannie Mae, [Servicing Guide / Part F-1-05, Expense Reimbursement](#) (July 10, 2024).

18 *I.e.*, will or can such fees incurred during the loss mitigation review period be added back to the respective borrower account for collection purposes if permissible under the mortgage contract?

19 CFPB,

[Statement Regarding the Provision of Financial Products and Services to Consumers With Limited English Proficiency](#), 86 Fed. Reg. 6306 (Jan. 21, 2021).

20 *Supra* note 2, at 60225.

21 *Id.* at 60224. According to the 2022 American Community Survey of 1-Year Estimates from the U.S. Census, nationally, the most frequently spoken languages among LEP households are Spanish, Chinese (including Mandarin or Cantonese), French/Cajun/Haitian, Russian/Polish/Other Slavic languages, Tagalog (including Filipino), German or West Germanic languages, Vietnamese, Arabic, and Korean. However, additional languages may be more common in particular regions. Nationally, 59% of LEP households are Spanish speaking, while the other languages are used at rates between 1% and 9%.

22 New York law uses U.S. Census data to identify the six most common non-English languages spoken in the state. N.Y. Rel Prop. Acts. Law § 1304(5).

23 Translations of common financial terms on the CFPB's website are limited to Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, and Haitian Creole. CFPB, [Helping multilingual communities and newcomers](#). FHFA provides translations in English, Spanish, traditional Chinese, Vietnamese, Korean, and Tagalog. [FHFA Mortgage Translations Clearinghouse](#).

24 CFPB, Final Rule, [Small Business Lending Under the Equal Credit Opportunity Act \(Regulation B\)](#), 88 Fed. Reg. 35150 (May 31, 2023). In its final rule implementing Section 1071 of the Dodd-Frank Act, the CFPB committed to providing translations of the sample data collection form in several languages for covered financial institutions, though using the translations or the data collection form is not mandatory. Also, the CFPB provides model clauses in other areas of Regulation X. *See, e.g.*, [Appendix MS-4 to Part 1024—Model Clauses for the Written Early Intervention Notice](#).

25 *Supra* note 2, at 60225, 60248.

26 Resources include: [FHFA Mortgage Translations Clearinghouse](#) (documents and resources available in English, Spanish, traditional Chinese, Vietnamese, Korean, and Tagalog) and [FHFA Language Access Policy Page](#).

27 FHFA, CFPB, and GSEs: [Standardized mortgage glossaries.](#)

28 For example, at a minimum, the CFPB should require servicers to align their translations with those listed in FHFA's Mortgage Translations Clearinghouse to promote consistency.

Appendix A

Loss Mitigation Requirements by State

State	Citation(s)
California	<ul style="list-style-type: none">• Cal. Civ. Code§ 1916-1• Cal. Civ. Code§ 1916-2• Cal. Civ. Code§ 2923.5• Cal. Civ. Code§ 2923.6• Cal. Civ. Code§ 2923.7• Cal. Civ. Code§ 2923.55• Cal. Civ. Code§ 2924.9• Cal. Civ. Code§ 2924.11• Cal. Civ. Code§ 2924.17• Cal. Civ. Code§ 2924.18• Cal. Bus. &Prof. Code § 10085.6• Cal. Bus. &Prof. Code § 10147.6• Cal. Civ. Proc.Code § 704.810
Colorado	<ul style="list-style-type: none">• Colo. Rev. Stat. Ann. § 38-38-103

Connecticut	<ul style="list-style-type: none"> • Conn. Gen. Stat. Ann. § 8-265gg • Conn. Gen. Stat. Ann. § 8-265hh
District of Columbia	<ul style="list-style-type: none"> • D.C. Mun. Regs. tit. 26-C, § 2713
Delaware	<ul style="list-style-type: none"> • Del. Code Ann. tit. 10, § 5062A • Del. Code Ann. tit. 10, § 5062B • Del. Code Ann. tit. 10, § 5062C
Florida	<ul style="list-style-type: none"> • Fla. Stat. Ann. § 494.00296 • Fla. Stat. Ann. § 697.07
Georgia	<ul style="list-style-type: none"> • Ga. Comp. R. & Regs. 80-11-6-.02
Hawaii	<ul style="list-style-type: none"> • Haw. Rev. Stat. § 454M-5.5
Idaho	<ul style="list-style-type: none"> • Idaho Code Ann. § 45-1603
Maine	<ul style="list-style-type: none"> • Me. Rev. Stat. Ann. tit. 14, § 6111

Maryland	<ul style="list-style-type: none"> • Code Md. Regs.09.03.06.20 • Code Md. Regs.09.03.12.02 • Code Md. Regs.09.03.12.10 • Md. Code Ann.,Real Prop. § 7-105.1
Massachusetts	<ul style="list-style-type: none"> • 209 Mass. CodeRegs. 18.24
Minnesota	<ul style="list-style-type: none"> • Minn. Stat. Ann.§ 582.043

Montana

- Mont. Code Ann.§ 32-9-170

Nevada

- Nev. Rev. Stat.Ann. § 107.470
- Nev. Rev. Stat.Ann. § 107.510
- Nev. Rev. Stat.Ann. § 107.520
- Nev. Rev. Stat.Ann. § 107.530
- Nev. Rev. Stat.Ann. § 107.550
- Nev. Rev. Stat.Ann. § 673.316

New York	<ul style="list-style-type: none">• N.Y. Comp.Codes R. &Regs. tit. 3, § 419.4• N.Y. Comp.Codes R. &Regs. tit. 3, § 419.5• N.Y. Comp.Codes R. &Regs. tit. 3, § 419.6• N.Y. Comp.Codes R. &Regs. tit. 3, § 419.7• N.Y. Comp.Codes R. &Regs. tit. 3, § 419.10• N.Y. Comp.Codes R. &Regs. tit. 3, § 419.11• N.Y. Comp.Codes R. &Regs. tit. 22, § 202.12-a• N.Y. Civil Practice Law & Rules § 3408
North Carolina	<ul style="list-style-type: none">• N.C. Gen. Stat. Ann. § 45-102• N.C. Gen. Stat. Ann. § 53-244.030• N.C. Gen. Stat. Ann. § 53-244.110• N.C. Gen. Stat. Ann. § 53-244.111• 4 N.C. Admin. Code 3M.0702• 4 N.C. Admin. Code 3M.0703
North Dakota	<ul style="list-style-type: none">• N.D. Admin. Code 13-03-28-02

Pennsylvania	<ul style="list-style-type: none">• 10 Pa. Code § 59.4• 10 Pa. Code § 59.10• 10 Pa. Code § 59.11• 10 Pa. Code § 59.12• 10 Pa. Code § 59.13
Texas	<ul style="list-style-type: none">• Tex. Fin. Code Ann. § 123.111• Tex. Fin. Code Ann. § 342.303• Tex. Fin. Code Ann. § 342.304• Tex. Fin. Code Ann. § 347.151• 7 Tex. Admin.Code § 83.704
Utah	<ul style="list-style-type: none">• Utah Code Ann. § 57-1-24.3
Washington	<ul style="list-style-type: none">• Wash. Admin. Code § 208-620-930• Wash. Rev. CodeAnn. § 61.24.031