



CONFERENCE OF STATE BANK SUPERVISORS

October 9, 2012

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Dear Ms. Jackson,

The Conference of State Bank Supervisors (“CSBS”) appreciates the opportunity to comment on the 2012 Real Estate Settlement Procedures Act (Regulations X) Mortgage Servicing Proposal, Docket No. CFPB-2012-0034. The use of preemptive language in this proposal should be eliminated because the statutory basis in section 6(h) of the Real Estate Settlement Procedures Act (“RESPA”) sufficiently addresses the issue of duplicative or conflicting State laws. Any misconception based on an intentional or unintentional broadening of the limited preemption language of RESPA endangers the States’ ability to ensure consumers are protected or work in conjunction with industry to develop innovative best practices.

PREEMPTION STRUCTURE UNDER RESPA

The proposed preemption provision impermissibly broadens the purposefully narrow preemption structure in RESPA.

Proposed section 1024.33(d) states:

Preemption of state laws. A lender who makes a mortgage loan or a servicer shall be considered to have complied with the provisions of any State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of servicing of a loan if the lender or servicer complies with the requirements of this section. Any State law requiring notice to the borrower at the time of application or at the time of transfer of servicing of the loan is preempted, and there shall be no additional borrower disclosure requirements. Provisions of State law, such as those requiring additional notices to insurance companies or taxing authorities, are not preempted by section 6 of RESPA or this section, and this additional information may be added to a notice provided under this section, if permitted under State law.

Since this preemption provision is not discussed in the proposed rule commentary, it is unclear whether this provision is specifically designed to preempt all State notification and disclosure laws. Regardless of intent, this provision exceeds RESPA’s preemption language. Section 6(h) of RESPA states:

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if

such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.¹

Congress structured this preemption language very narrowly. The statute dictates that lenders are in compliance with State notice laws if the RESPA timing, content, and notification procedure requirements are met. This sets a federal statutory floor that States are permitted to supplement with the knowledge that State law will be considered satisfied if RESPA timing, content, and notification procedure requirements are satisfied. State laws are purposely not invalidated under this statutory language. Accordingly, the CFPB has exceeded statutory authority by including the sentence, “[a]ny State law requiring notice to the borrower at the time of application or at the time of transfer of servicing of the loan is preempted, and there shall be no additional borrower disclosure requirements.”

The proposed rule preempts any State law requiring notice at the time of application or transfer, violating the explicit language written into law by Congress. Declaring State laws fulfilled instead of declaring them invalid is an important statutory difference. Under Congress’s language, a lender is able to voluntarily comply with State law, which may occur as a result of developments in best practices, unique circumstances in a State’s mortgage market, or other developments not contemplated in a broad preemption scheme. Conversely, Congress’s structure makes State laws applicable if RESPA requirements are not satisfied. The statutory language purposely creates these scenarios, and the proposed language preempting any State notice and additional borrower disclosure requirements is entirely beyond the scope of the statute. Accordingly, replacing Congress’s narrow preemption structure with broad preemption is inconsistent with the statutory requirement under § (h), which cannot be supplanted by the CFPB’s authority under RESPA § 6(j)(3).

The proposed preemption provision impermissibly omits statutory language that serves to narrow the scope of preemption under RESPA.

In addition to structural flaws between statute and regulation, the proposed rule omits crucial language existing in the statute that serves to narrow the cases in which preemption applies. First, the proposed rule eliminated “such” from “complied with the provisions of any such State law.” Congress used “such law” to ensure the provision was applied to specific State laws, not broad classes of law. By removing “such” and directly invalidating State laws requiring notice, the CFPB is impermissibly expanding RESPA’s preemption provision.

Second, the proposed rule omits “regarding timing, content, and procedures for notification of the borrower” from “servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.” Congress narrowed the application of RESPA compliance by structuring the law such that non-compliance with one of these factors triggers State law. For example, if a lender does not satisfy RESPA timing provisions, the lender would be in violation of a similar State timing provision. This statutory structure was purposely selected by Congress to allow States to reinforce and supplement federal law as necessary. Accordingly, these factors must be considered as part of any State law analysis related to RESPA.

States typically cite violations of State law, not federal law, in the examination and enforcement process.

The State examination process will be harmed by preempting State laws instead of deeming lenders compliant with State law when compliant with RESPA. States often structure their laws such that in lieu

¹ 12 U.S.C. § 2605(h).

of a state required form, a lender can use the applicable RESPA form. If the lender fails to give the RESPA form, the State would cite a violation of State law, not RESPA. This is important because State fining and license revocation authority may only be a function of state violations, not federal violations. Additionally, in most states it would be a violation to fail to comply with RESPA, but penalties might not attach to the federal violation. Accordingly, changing the structure of RESPA § 6(h) limits the effectiveness of State examination and enforcement.

INCONSISTENCY WITHIN THE RULE REGARDING THE APPLICABILITY OF STATE LAW

A discrepancy exists between § 1024.32(b) and § 1024.33(d).

Section 1024.32(b) states:

Additional information; disclosures required by other laws. Nothing in this subpart shall be construed as prohibiting a servicer from including additional information with a disclosure required by applicable law. Nothing in this subpart shall be construed as prohibiting a servicer from combining disclosures required by other laws or the terms of an agreement with a Federal or State regulatory agency with the disclosures required by this subpart, unless such prohibition is expressly set forth in this subpart, applicable law, or the terms of an agreement with a Federal or State regulatory agency.

Under this framework, § 1024.32(b) reserves a State's right to include additional information with a disclosure, while § 1024.33(d) prohibits a State from requiring additional borrower disclosure requirements. This could be the result of §1024.33(d) being inadvertently broad. Except for subsection (d), section 1024.33 deals exclusively with mortgage servicing transfers. If the preemption provision is meant to apply exclusively to mortgage servicing transfers, this is unclear.

Regardless of intent, as worded, the language added in subsection (d) goes beyond the RESPA standard and impermissibly expands a narrow preemption framework. As reviewed above, even if the preemption provision only applies to the transfer of mortgage servicing rights, lenders would be considered compliant with related State laws if the transfer timing, content, and notification procedure requirements are followed. States are permitted to supplement such laws according to these federal preemption terms.

PREEMPTION POLICY

Broad preemption is bad policy and conflicts with Dodd-Frank's balance of State and federal law.

As a policy matter, declaring a class of State laws preempted is bad policy. The States are the first to recognize many trends in consumer protection and have the ability to appropriately respond through State law. Blanket preemption regulations deter States from engaging in this process. Though States understand the RESPA preemption provision exists in law, it should spawn a conversation between State and federal counterparts when a State law is at issue, not a complete roadblock. This encourages the use of a process intrinsic in a federalist system instead of closing the door on a problem recognized by States.

The Dodd-Frank Act reflects this policy in the procedural steps required for the Office of the Comptroller of the Currency ("OCC") to issue a preemption determination. Under Dodd-Frank § 1044, the OCC is required to determine whether a State law is subject to conflict preemption on a case-by-case basis.² If a

² 12 U.S.C. § 25b(b)(3).

preemption determination is made, the CFPB is then consulted to determine whether the law at issue has “substantively equivalent terms” in other State laws. It stands to reason the CFPB should also limit preemption determinations to a case-by-case basis and limit the scope of laws preempted under RESPA § 6(h) to equivalent State laws only. Fact patterns may emerge whereby a narrow State law does conflict with these RESPA provisions, but a different State law adds protections not in conflict with RESPA. Indeed, claims under State law related to these RESPA provisions are not always preempted.³

CONCLUSION

For the aforementioned reasons, CSBS recommends removing §1024.33(d) from the rule. The statute sufficiently addresses the applicability of State law, which should then be addressed on a case-by-case basis.

Sincerely,

A handwritten signature in black ink, appearing to read "John W. Ryan". The signature is fluid and cursive, with a long horizontal stroke at the end.

John W. Ryan
President & CEO

³ See *Garduno v. National Bank of Arizona*, 738 F.Supp.2d 1004 (D.Ariz.,2010). In *Garduno*, the court made a distinction between conflicting State and federal laws and supplanting a State claim with a federal claim.