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Sent via weblink:

<https://secure.commentworks.com/ftc-mortgageactsandpractices>

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: “Mortgage Acts and Practices Rulemaking, Rule No. R911004”

Dear Commission:

Thank you for the opportunity to provide comments regarding the Federal Trade Commission’s proposed rulemaking proceeding with respect to mortgage loans. Greater regulation and oversight is necessary in all aspects of mortgage lending under review by the FTC including advertising, origination, and appraisals. Our comments today, however, focus on the questions raised in section D regarding mortgage servicing.

Empire Justice Center is statewide legal services organization with four offices throughout New York. We provide support and training to legal services, undertake policy research and analysis, and engage in legislative and administrative advocacy. We also represent low-income individuals, as well as classes of New Yorkers, in a wide range of poverty law areas including consumer law and mortgage lending. Lawyers in our consumer unit have been engaged in predatory and subprime mortgage lending issues for over a decade. Empire Justice is a steering committee member of New Yorkers for Responsible Lending (NYRL), a statewide coalition with 147 members convened by the Neighborhood Economic Development Advocacy Project (NEDAP) in New York City.

We also work closely with housing counselors and legal services lawyers across the state and benefit from their experiences and input. These comments have been prepared with the input of NEDAP, a resource and advocacy center for community groups with a mission to promote community economic justice, and South Brooklyn Legal Services, a non-profit legal services provider with one of the largest foreclosure prevention units in the country.

Question 17 - Disclosure of certain information in a particular manner

One of the most frustrating aspects of working with mortgage servicers has been an overall lack of basic information. Especially for borrowers who fall behind, little is told to them regarding the practices of the servicer and loss mitigation options available to them. Greater transparency and dissemination of information to all borrowers by their mortgage servicers is needed. Information which should be provided to all borrowers includes:

- Copy of servicer manual (including any revisions thereof)
- Information on ownership of the mortgage and note (including notice of any transfer or assignment within 30 days of such transfer or assignment)
- Notice that the servicer is licensed (if required by the state) or is otherwise regulated, with information about how borrower can file a complaint about the servicer

Borrowers in default face additional difficulties in obtaining basic information from their servicers including the payment history and accurate reinstatement and payoff figures. It is far too often the case that resolution of a default depends on the borrower's representative being able to find a higher-level contact at a servicer who can obtain this information for them in a timely manner. In addition to the obvious ramifications on homeowners who potentially lose their homes, these issues create great inefficiency for borrowers and their representatives who have to persistently reach out the to servicer with repeated requests.

For borrowers in default, information sent to borrowers should include:

- A clear written explanation of loss mitigation protocols within 30 calendar days of request of the borrower or authorized representative.
- A complete plain-language payment history within 30 calendar days of a request by borrower or authorized representative
- Written, itemized payoff quote with notice of default and with every subsequent communication from servicer to borrower
- Default interest rate with notice of default

Standardization of payment histories should be required. Long a source of mystery and further questions for borrowers and their representatives, payment histories vary in format, content, and readability. In addition to being easy to read and in plain-language, codes (if necessary at all) should be standardized and borrowers must be given a key to these codes. A basic explanation of each fee must be provided, as well. From the payment history, the reader should be able to ascertain the date the payment was received, the date applied and to which month it was applied, the amount of each payment and how it was applied (breaking down the amount applied to principal, interest, the escrow account and the suspense account), each fee assessed to the account including an explanation of the fee, the monthly payment amount due each month, and each payment made from the escrow account to a third party identifying the third party and reason for disbursement, date and amount.

Reinstatement and payoff quotes should be standardized, as well. Statements should provide a detailed breakdown of all accumulated interest, fees and costs. The information must be set forth in enough detail to enable the borrower to determine whether the interest, fees and costs were actually incurred, are reasonable and are accurate. For example, I received a reinstatement figure recently which only provided a lump sum amount for "delinquent interest" (the loan is an adjustable rate mortgage with varying interest rates during the delinquent time period). Lump sum amounts were also

provided for the “negative escrow balance,” as well as for the “corporate advances.” After a detailed breakdown was requested and provided, the final numbers differed than those initially provided in the lump sum amounts, which is not uncommon.

Question 18 - Practices related to fees and related charges

Fees and costs associated with foreclosures in New York are among the highest in the country. The fees are tacked onto the total arrears or may be required by a mortgage servicer to be paid upfront as a condition of obtaining loss mitigation relief. Fees assessed can be so great that they prohibit a homeowner from reinstating their mortgage loan or entering into a repayment plan or loan modification. Fees should never prevent a homeowner who can otherwise afford the loan from saving their home.

Fees assessed to homeowners in default have become a profit-generating mechanism for both servicers and third parties. They can be routinely assessed regardless of practicality of the fee or reasonableness of the amount. Borrowers often are overcharged fees and pay far more than what is actually incurred or necessary. A prime example is attorneys’ fees. Typical contract language requires the borrower to pay for “reasonable and actually incurred” legal fees incurred as the result of a default. Servicers typically pay legal fees based on a standard fee per foreclosure. A homeowner who reinstates right after a complaint is served can be charged the same amount charged for a foreclosure that goes through the legal process and ends up in default. This borrower is grossly overcharged for legal work actually incurred in their matter.

With regard to mortgage servicing fees and related charges, we recommend:

- General prohibition on fees that are not reasonable, bona fide, are not for services actually rendered, or are not previously disclosed according to reporting requirements
- Regulation of late fees, specifically:
 - No late fees unless specifically authorized by loan documents. Unless explicitly authorized by the loan documents, no late fees can be charged until the payment is more than 15 days past due, and no fees can be charged that are greater than 5% of the past-due payment
 - Payments received should be applied first to current installments, then to delinquent payments, and only then to late fees
 - No late fee may be charged where a payment made is a full payment for the period, and the only insufficiency in payment is due to a late fee charged on an earlier payment (i.e.—no “pyramiding” of late fees)
- No fees for reinstatement or payoff statements, and such statements must be provided within three days of borrower request
- Borrower only liable for attorney fees that are reasonable and actually incurred by the creditor, based on a reasonable hourly rate and number of hours
- Force-placed insurance – servicer must provide written notice to a borrower upon placing force-placed insurance on the property, and must provide a refund for unearned premiums charged to a borrower if the borrower provides proof that the borrower has obtained coverage

Question 19 - Handling of payments, amounts owed, consumer disputes and other

Of the six enumerated aspects for which the FTC seeks comment under question 19, the area of greatest need for reform currently seems to be in the inability of servicers to efficiently and effectively handle consumer disputes. We have heard from borrowers and advocates many problems within servicers to fully respond to inquiries in a timely manner. Efforts to redress wrongs are halted when the borrower is not able to continue dialogue with the same representative from the servicer from call to call.

General standards, as set forth below, must be regulated for mortgage servicers. Additional attention should be given to setting forth higher standards for customer service in all instances, but especially when a borrower has a dispute.

- Timely and proper crediting of payment – each payment received by the servicer should be accepted and credited on the date received, and should be credited toward interest and principal before being credited toward taxes, insurance, or fees
- Escrow: servicer must disclose any payments from escrow account clearly and conspicuously to borrower on monthly statement, and must make all payments from escrow account for taxes, insurance, etc. in a timely manner
- Servicers are prohibited from requiring funds to be remitted by the borrower via Western Union or other costly means. Services may require borrower to submit payment via a certified check, or from an attorneys' account
- Servicers must speak with representatives of borrowers who provide written authorization signed by the borrower. Servicers are prohibited from requiring representatives to provide social security numbers or other non-relevant information
- When a borrower has a dispute, the borrower or their authorized representative should be transferred to a representative of the servicer who has full authority to research the dispute and with whom the borrower or their representative can contact directly until the dispute is resolved
- Borrower should be provided written verification by the servicer confirming the dispute has been rectified and how
- Each borrower is entitled to at least one copy of their loan documents (including all loan origination documents) without charge. If a borrower receives documents and subsequently asks for a second copy of any or all documents, servicers may charge a reasonable fee of no more than fifty cents per page, but not to exceed \$5.00 for the entire loan file

Question 20 – Handling of loan performance and loss mitigation issues.

We hear daily from borrowers and advocates throughout New York regarding the multifarious problems they are experiencing working with mortgage servicers on loss mitigation efforts. The more frequently heard complaints involve inadequate customer service, servicers repetitively losing documents submitted and having to resend, not hearing from servicers for months, and nefarious terms in workout agreements. Noncompliance issues specifically related to Home Affordable Modification Program (HAMP) include borrowers being told they do not qualify because their investor is not participating, requests for upfront payments to have the loan evaluated or get a loan

modification, and borrowers being lead to believe their loan they will not automatically get a loan modification even if they make successful payments through the trial period.

Following is a set of standards for workout/loss mitigation agreements, including repayment plans, forbearance agreements, loan modifications, deeds in lieu of foreclosure, short sales and any other mutual resolutions or settlements between the mortgage servicer and owner of the loan, and the borrower:

- Servicer must notify borrower within 10 days of submission of workout/loss mitigation application if application is incomplete or requires supplemental information/documentation
- Servicer must respond in writing to the homeowner with a decision on workout/loss mitigation application within 30 calendar days of full submission of application
- Loan modification or other workout agreement/repayment plan must be immediately affordable to the borrower based on the borrower's current income, and reasonably affordable in the foreseeable future (loan modifications should not include terms with interest rates that will significantly increase after a time period and adjust into an unaffordable payment amount)
- Where proposed new monthly payment amount under workout agreement is more than the pre-default payment, servicer must document that the workout payment is affordable based on documentation of the borrower's income
- Prohibition on fees (or limitation on fees) for processing workout application, unless the workout results in a loan modification that is affordable over the term of the loan
- Workout agreement must clearly and conspicuously set forth all material terms.
- Agreement should let the borrower know there may be potential tax implications and recommend the borrower consult with a tax professional.
- No waivers of legal claims or defenses as condition for workout, unless the workout results in a loan modification that is affordable over the term of the loan
- Prohibited from including limiting clauses in workout agreements, including loan modifications, such as mandatory binding arbitration clauses and clauses that restrict a borrower from seeking redress to which she would otherwise be afforded access under the law (such as a jury trial).
- Prohibited from including clauses that would release the servicer or owner of the loan from liability for future actions.
- Agreement should contain language regarding steps the servicer and owner of the loan will take to rectify reporting discrepancies that may exist on each borrower's credit report following the workout agreement.
- Compliance with HAMP for participating servicers

Finally, a general code of conduct should be established by rule on mortgage servicers including:

- Duty to act with good faith and fair dealing in any transaction, practice, or course of business associated with mortgage servicing

- Duty to safeguard and account for any money handled for the borrower
- Duty to follow reasonable and lawful instructions from the borrower
- Duty to act with reasonable skill, care, and diligence
- General duty to engage in loss mitigation, which includes a duty to make a good faith effort to negotiate with a borrower to resolve a delinquency or default

Again, we thank you for this opportunity to comment. If you have any questions, please do not hesitate to contact me at (518) 462-6831.

Respectfully submitted,

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