New York Bankers Association
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Ms. Elizabeth Butler
New York State Department of Financial Services
One State Street
New York, NY 10004

Dear Ms. Butler:

The New York Bankers Association ("NYBA") submits this comment letter in response to the New York State Department of Financial Services' ("DFS" or the "Department") Proposed Regulation Part 419 (the "Proposed Regulation") entitled "Servicing Mortgage Loans: Business Conduct Rules" published on May 1, 2019. NYBA is comprised of banks of all sizes across every region of New York State. Together NYBA members employ nearly 200,000 New Yorkers, safeguard $2 trillion in deposits, and extend nearly $70 billion in home and small business loans. We thank you for the opportunity to provide our views and we share in the Department's clear goals of protecting consumers in mortgage transactions.

General Comments

1. Timing of Implementation

While we appreciate that the general scope of the Proposed Regulation is related to emergency regulations adopted on many occasions since July 2010, NYBA is submitting this comment letter due to concerns raised by several of our members that service mortgages in New York. At the outset, NYBA notes that the publication in the State Register on May 1, 2019 included the following note regarding an immediate implementation of the final rule:

Compliance Schedule.
It is anticipated that servicers subject to the regulation are presently complying with many of the requirements of the proposed regulation. Further similar emergency regulations first became effective on October 1, 2010. Therefore, it is not anticipated that regulated persons will need additional time to achieve compliance.

Though NYBA acknowledges that the Proposed Regulation does in fact promulgate a final rule based in some part on longstanding emergency rules, we urge the Department to provide ample time for comment and implementation. We are unaware of any proposed rule that has been imposed immediately upon promulgation when it makes significant changes to existing

regulation. Although mortgage servicers are in many cases already in compliance with the principles that would be established in this rule, the process of resolving ambiguities and fully implementing every provision should not be rushed – and new processes and controls will need to be implemented for any new requirements. Prior to the emergency rule's initial adoption in 2010, the Department spent considerable time reviewing comments and considering potential effects on the industry. We urge the same caution here, given the fact that we view several of the proposed changes to be significant. We therefore encourage the Department to strongly consider further revisions and comment periods after reviewing the feedback received during this period, pursuant to the State Administrative Procedures Act ("SAPA"). We also believe that the Department must provide ample implementation time for any new rules, allowing at least six months between the adoption of new rules and their effective date.

2. State Regulations Should be Consistent With Similar Federal Rules to Promote Efficiency and Reduce Consumer Confusion

By way of background, financial institutions are governed by a wide array of laws and implementing rules at the federal level covering mortgage transactions and mortgage servicing. These rules represent a studied approach to balancing consumer protection needs with regulatory costs burdens, and therefore NYBA urges the Department to remain consistent with federal regulations including those promulgated by the Consumer Financial Protection Bureau ("CFPB"). In addition, federal law may preempt certain provisions of Part 419 for some institutions which fall under this Proposed Regulation. Servicers already have processes, procedures, and controls in place for complying with federal and State consumer protection rules. Making these additional requirements permanent creates regulatory inefficiency by requiring servicers to continue to maintain other processes, many of which are duplicative, thereby increasing the regulatory cost of mortgage servicing and directly impacting the cost and availability of consumer credit.

Specific Comments

1. Crediting of Payments

The Department proposes moving current Section 419.6 relating to the crediting of payments to Section 419.3 and making some changes to the existing emergency rule. While much of the new proposed Section is generally similar to the old, there are certain provisions for which NYBA suggests changes.

Proposed Rule 419.3(e) would require payments made prior to the scheduled due date to be credited no later than the due date or 30 days from receipt, whichever is earlier. However, this does not take into account circumstances when the amount of a customer's next payment is not yet known. For instance, for adjustable rate mortgage loans, it is possible that the next payment is due after the interest rate is scheduled to change, and the payment cannot be credited because the payment amount will not yet be known. Further, there could be circumstances when the customer's intent for a payment is unclear. For instance, for certain customers in bankruptcy, there can be difficulty applying payments if the intent of the payment is unclear (pre-petition vs. post-petition payments, for example). Clarifying the customer's intent could lead to delays in payment application. NYBA respectfully requests exceptions for such circumstances.

In addition, Proposed Rule 419.3(f) would require servicers to send a notice of non-credit "by mail" within a certain amount of time if the servicer receives a payment that it does not credit. A mailing requirement could create significant regulatory inefficiency, adversely impacting cost and availability of consumer credit, while creating little consumer benefit. NYBA

suggests the inclusion of a provision to allow the notice to be sent electronically for customers who have opted for paperless billing statements and other mortgage servicing communications.

2. Statement of Account

The Department proposes moving current Section 419.7 relating to the requirements for a statement of account to Section 419.4, and expanding some requirements under the existing emergency rule.

Proposed Section 419.4(c) would greatly expand requirements for periodic statements including vast amounts of information not required before, deviating extensively from the mortgage statement template already required by the Consumer Financial Protection Bureau. Such requirements would include past payment itemization, transaction activity, potential interest rates, potential prepayment penalties, and notices regarding possible risks for delinquency. We believe these requirements are overly burdensome for the servicer, as well as for the consumer to review, without much benefit to the consumer. There are also privacy concerns, given the vast amount of information that would be shared. In the alternative, NYBA suggests a template that is consistent with the CFPB template, which already requires itemization of any fees incurred over the last billing cycle and shows the total amount of fees and charges due.

3. Fees

The Department proposes moving current Section 419.10 relating to the fees to Section 419.5, and makes widespread changes to those requirements under the existing emergency rule.

Given the vast changes to this section, NYBA urges the Department to recognize the system changes and compliance revisions that would need to be put in place in order to comply with the Proposed Regulation, and therefore again requests that the Department provide at least six months for implementation and testing of new processes and compliance controls.

NYBA is specifically concerned with the proposed rules related to limitations on fees related to property valuation, which would prohibit a servicer from charging a property valuation fee more than once per twelve-month period. Investor requirements govern when a servicer must order a property valuation, and investors may require valuations to be performed more often. Further, property valuations are often triggered by consumer requests, such as a request for mortgage insurance termination or a request for loss mitigation. Forcing servicers to bear the costs of these property valuations is unjust and could result in servicers participating in less loss mitigation programs. Further, imposing these costs on servicers would significantly increase mortgage servicing costs, with the likely unintended consequence of having substantial impacts on cost and availability of consumer credit.

4. Borrower Complaints and Inquiries

The Department proposes moving current Section 419.4 relating to borrower complaints and inquiries to Section 419.6, and eliminates the Department's ability to waive or modify its requirements.

In particular, the Proposed Regulation would require servicers to provide certain information in every welcome packet and periodic statement, as well as stringent requirements following receipt of a consumer complaint through any intake method. The CFPB already has provisions in place for borrowers' complaints and inquiries which differ from the requirements in proposed

rule 419.6. The Bureau's notice of error requirements at 12 C.F.R. § 1024.35(c) requires servicers to follow the proposed rule's requirements only for complaints and inquiries sent to a specific, published address. This requirement is a necessity for servicers to operationalize processes for identifying and responding to consumer complaints and inquiries. In addition, the Bureau's requirements at 12 C.F.R. § 1024.35(g) provide explicit guidance indicating that servicers need not respond to duplicative, overbroad/unduly burdensome, or untimely requests. Provisions within proposed rule 419.6 would unnecessarily increase regulatory risk and may cause confusion for consumers. We strongly urge the Department to promulgate rules consistent with CFPB requirements.

5. Residential Mortgage Loan Delinquencies and Loss Mitigation Efforts

Proposed Section 419.7 would broaden the requirements under existing emergency rule Section 419.11, regarding mortgage loan delinquencies and loss mitigation efforts.

NYBA notes that some provisions within proposed rule 419.7 are inconsistent with current requirements under the Real Estate Procedures Act ("RESPA"). Proposed rule 419.7(b) requires servicers to assign a single point of contact ("SPOC") to any borrower who is at least 30 days delinquent or has requested a loss mitigation application. The requirement to provide a SPOC at 30 days instead of the 45 days required under RESPA would require an entirely new process and programming, which creates an undue burden for servicers. The 30 day requirement is unnecessary due to the existing safeguards provided by RESPA, including the requirement to establish or make a good faith effort to establish contact with a delinquent borrower no later than the 36th day of a borrower's delinquency under RESPA § 1024.39(a). In addition, a borrower may also request loss mitigation assistance during the initial communication and be assigned a SPOC. Proposed rule 419.7(e)(2)(iii) may also be at odds with RESPA § 1024.41(c)(2)(iv) since the borrower could be technically required to produce more documents than actually necessary, thereby creating a higher threshold for submitting a facially complete application. Proposed rule 419.7(d) conflicts with RESPA, as RESPA currently contains an established process requiring information that must be included the 5 day letter. As such, proposed rule 419.7(d) would create an additional and unnecessary requirement.

Furthermore, servicers may not be able to comply with proposed Section 419.7(c)'s requirement to inform the borrower of "all documents and information that a borrower must submit to be considered for any given loss mitigation option" at the loss mitigation solicitation stage. The necessary documents depend on each customer's unique financial situation, and servicers will not yet be able to identify all necessary documents without more information about the customer's circumstances. It would be difficult for servicers to fully comply with this provision at the beginning of the process without providing a potentially daunting list of documents (that may or may not actually apply to a customer based on his or her unique circumstances), which would be the only way to cover all potential loss mitigation options and borrower needs. NYBA suggests that the Department allow servicers to mirror the standard application process under Regulation X, under which servicers already process applications and identify needed documents.

Likewise, servicers may not be able to comply with proposed Section 419.7(f), because a servicer cannot fully identify all of the changes that a modification would make until a customer has completed a trial modification period and is eligible to transition to a final modification. Servicers should only be required to make this disclosure when offering a final modification to a consumer.

NYBA also urges the Department to reconsider Section 419.7(h), which would radically expand the scope of appealable decisions beyond the requirements of Regulation X, which

limits appeals to denials of loan modification requests. Enlarging the scope of appealable decisions will have significant impacts on mortgage servicing costs, which will directly impact cost and availability of consumer credit – and may even cause servicers to stop participating in certain loss mitigation programs.

The Proposed Regulation further poses privacy and data implications, including potential violation of bankruptcy law and Fair Debt Collection Practices Act restrictions without a proper carve out for such disclosures. One particular area of concern includes 419.7(c), which would require servicers to include information on the nature and extent of the borrower's delinquency in a loss mitigation solicitation letter. NYBA strongly suggests that the Department consider exceptions for this provision.

6. Servicing Prohibitions and the Duty of Fair Dealing

Proposed Section 419.10 combines the servicer's duty of fair dealing (current Section 419.2), servicer prohibitions (current Section 419.14), and certain modification and foreclosure provisions (current Section 419.11) into new Section 419.10, and changes from a suggestion to an imposed duty on servicers regarding loan modifications.

While NYBA agrees that it is important to work with customers as much as possible throughout the modification and foreclosure process, the servicer prohibitions under proposed rule 419.10 may ultimately pose undue constraints on consumers. For example, in certain situations a consumer may not be able to meet applicable deadlines without wiring funds, and the Proposed Regulation would prohibit servicers from requiring customers to remit funds by a means more costly than a bank or certified check or attorney's check. As such, some exceptions may be warranted, for example in situations where funds have to be remitted by a particular date and time in order to protect the consumer.

NYBA also urges the department to reconsider proposed Section 419.10(a).4.ii, which would expand the scope of dual-tracking protection beyond Regulation X – and beyond that of most other states' mortgage servicing rules – to provide protection based on an incomplete loss mitigation application. Servicing rules and prohibitions that are already in place provide consumers with ample time to submit and complete an application for loss mitigation before a servicer can proceed to foreclosure. This rule would have significant impacts on servicing costs and regulatory risks, which – again – will directly impact cost and availability of consumer credit and may cause servicers to withdraw from offering some forms of loss mitigation.

7. Mortgage Servicing Transfers

Proposed Section 419.12 would require a transferee servicer to provide to the borrower a copy of its welcome packet and a Section 419.4-compliant payment history with the first monthly statement.[1] Because billing statements and welcome packets are sent using different processes, requiring that the welcome packet be sent with the billing statement will require complex system changes that will take significant time to implement, at significant cost – again impacting cost and availability of consumer credit. NYBA further notes that certain mortgage servicing transfer provisions may cause consumer confusion. Servicers currently have processes where welcome packets are sent prior to issuance of the first billing statement. Requiring the welcome packet to be sent with the billing statement may cause consumer confusion as this would be a duplicate communication. One potential solution includes placing in

[1] The Department may wish to note that additional servicing transfer disclosure requirements are preempted by Regulation X. *See* 12 C.F.R. § 1024.33(d).

a brief message in the billing statement referencing the welcome package which had been previously sent. Again, the inclusion of such a message will require system changes that will take time to implement.

Secondly, the provision would require a transferee servicer to allow the borrower to continue to make payments during a trial loan modification as well as after completion of the trial modification, if at the time of the transfer the borrower is complying with the terms of the trial loan modification. While NYBA understands the intent behind the proposed rule, our members honor all plans approved by a prior servicer, and after a transfer occurs a reconciliation is completed in order to ensure all loans were transferred accurately and set up correctly. We therefore do not believe this requirement is necessary.

We appreciate the opportunity to comment on the Proposed Regulation, and given the significant changes made to the promulgated emergency regulations on the same topic, we hope the Department will consider further comment periods and an appropriate amount of time for implementation of the new rules. We welcome the opportunity to meet with you to discuss this further. Thank you.

Sincerely,

Michael P. Smith