

June 13, 2018

VIA ELECTRONIC MAIL

Brian Montgomery
Assistant Secretary for Housing/FHA Commissioner
Federal Housing Administration
U.S. Department of Housing and Urban Development
451 7th St., S.W.
Washington, D.C. 20410

Dear Assistant Secretary Montgomery:

This letter is sent by the National Consumer Law Center, on behalf of its low-income clients, and the below-signed advocacy groups and direct services providers who represent low-income homeowners seeking to protect their homes. We write to urge HUD to address significant problems with the Home Equity Conversion Mortgage (HECM) program with the goal of preventing avoidable foreclosures on elderly borrowers and their non-borrowing spouses. If HUD is to best preserve the HECM program as a tool to allow older adults to age in place, with stable and affordable housing, it must undertake significant reforms with respect to reverse mortgage servicing. The recommendations below relate to problems with the Mortgagee Optional Election (MOE) assignment program, HUD's extremely limited loss mitigation options for HECM borrowers in default on property charges, ineffective communication in the servicing of HECM loans, and concerns about current origination rules including the Financial Assessment.

A. HUD must act to make the MOE assignment program reasonably available to eligible non-borrowing spouses.

1) Make the MOE Assignment Program Viable by Removing Unreasonable Deadlines. HUD created the MOE Assignment program to attempt to remedy the problems created by HUD's regulation that, for many years, required that the HECM loan become due and payable upon the death of the last borrower, regardless of any non-borrower spouse. This regulation violated the statutory mandate that HUD not insure any HECM that fails to protect homeowners and their spouses.¹ For HECMs originated prior to August 4, 2014, HUD created the MOE to allow servicers to elect to assign the loan to HUD when a qualifying non-borrowing spouse resides in the home, so that HUD can hold the loan and allow the spouse to remain in the home until his or her death or until some other triggering event occurs. However, in order for a loan to be assigned to HUD through the MOE, the spouse must be eligible and the servicer must make the election and initiate the assignment within very strict timelines.

¹ 12 U.S.C. § 1715z-20(j)

HUD's current requirement that an MOE election be made within 120 days of the borrower's death and that the assignment be made within 120 days after the election are arbitrary and capricious, unreasonable, and unworkable, and have resulted in a huge number of inappropriate denials for the MOE.

Instead of the current rules, when a borrower dies and leaves behind a non-borrowing spouse on a HECM originated prior to August 4, 2014, assignment of the HECM to HUD should be allowed up until a foreclosure sale has been completed. It is simply not realistic to require a recently widowed spouse, grieving and attempting to get his or her affairs in order, to obtain enough information from the mortgage servicer about the MOE and then provide the necessary information to the servicer within 120 days of the borrowing spouse's death.

HUD's strict enforcement of extremely tight deadlines for servicers to elect the MOE and initiate assignment has led to a significant number of non-borrowing spouses who are eligible in all other respects having the assignment of their loan denied and facing imminent foreclosure. The problems with strict, arbitrary deadlines are exacerbated by poor distribution of information about the MOE by both servicers and HUD, as well as mistaken implementation of the MOE requirements by both. NCLC has heard from numerous advocates representing spouses where the servicer made the MOE election, but either the servicer or HUD have incorrectly applied the MOE criteria, causing delays and leading to a later rejection of the MOE Assignment as untimely. Many of these improper denials relate to the requirement that a non-borrowing spouse have good and marketable title or a legal right to remain in the home within 90 days of the borrowing spouse's death. Many servicers, and even representatives of HUD's National Servicing Center have ignored the language "**or** a legal right to remain" and stated that the spouse who cannot obtain marketable title within the 90-day period is barred from the MOE.

For example, Ms. Betty Chandler of Atlanta, Georgia was recently told by Financial Freedom that HUD has rejected the assignment of her loan pursuant to the MOE program as untimely. Ms. Chandler informed Financial Freedom immediately of her husband's passing, and Financial Freedom was able to make the election a mere ten days after his death. However, Financial Freedom then imposed an improper requirement on Ms. Chandler, stating that she had to have a subordinate lien canceled. This requirement was justified as being necessary for "good and marketable title," although she was already on the deed to the property and had a legal right to remain for her life. As a result of this improper demand, Financial Freedom did not initiate the assignment to HUD within 120 days of making the election and has now informed her that HUD will not accept it at this time. Ms. Chandler is 78 years old and is scheduled for foreclosure on July 3, 2018.

Information obtained by the California Reinvestment Coalition under a Freedom of Information Act (FOIA) request shows that out of 591 spouses for whom the servicer had elected to assign the loan to HUD (based on a determination that they met all eligibility criteria), only about half have been approved by HUD. Roughly one fourth

have been denied, and roughly another fourth were still under review as of the date of the FOIA response. Many of those long-delayed reviews have now ended in denials based on a combination of incorrect interpretations of the MOE criteria and missing the applicable deadlines.² Moreover, the number one reason for denials, according to HUD, was an MOE election letter sent after the 120 day deadline; the number three reason was “deficient documentation,” which could also be a deadline issue; and the second most common denial reason was alleged to relate to net loan balance and principal limit, which are not relevant criteria under the current version of the MOE.³

HUD’s implementation of the MOE in such a way that roughly half of the spouses who meet all eligibility criteria (save for meeting unrealistic deadlines) are being denied for the program is arbitrary and capricious and violates the statutory mandate to protect homeowners, including spouses, from displacement. HUD provided no justification for the arbitrary deadlines in its issuance of Mortgagee Letter 2015-15. Indeed, in the original iteration of the MOE (issued in Mortgagee Letter 2015-03), HUD had discretion to allow additional time for an election to be made. No explanation was given for why HUD removed that discretion in Mortgagee Letter 2015-15, or indeed, how the deadlines were determined at all. The fact that HUD issued the Mortgagee Letter in response to litigation and upon a Court order directing it to create a solution to the invalid regulation does not impair its ability to issue future Mortgagee Letters amending or removing the harsh deadlines. In fact, HUD did issue a subsequent Mortgagee Letter giving a one-time extension of the second deadline at a point when servicers and homeowners were struggling to complete the documentation in time.⁴

The equivalent system for allowing a non-borrowing spouse to remain in the home subject to a HECM that was originated after August 4, 2014, does not require the servicer to take action within a limited time period after the borrower’s death. *See* 24 U.S.C. § 206.55. Therefore, the imposition of unnecessary deadlines by HUD for non-borrowing spouses of HECM loans predating August 2014 treats similarly situated spouses differently without justification. *See Plunkett v. Castro*, 67 F. Supp. 3d 1, 22 (D.D.C. 2014) (“an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so”). HUD should promptly remove these deadlines, and allow servicers to make the MOE election and assignment any time up until a foreclosure is carried out.

² Many advocates have reached out to NCLC within the past two months stating that loans for which they thought the MOE assignment was long ago approved and completed, based on communications from the servicer, have now resurfaced in looming foreclosures, with the servicer citing a refusal by HUD to accept the assignment.

³ It is possible this refers to denials that were made under the original version of the MOE, announced in Mortgagee Letter 2015-03. It makes no sense as a denial reason under Mortgagee Letter 2015-15. HUD should clarify that net principal limit has no bearing on eligibility for the MOE under Mortgagee Letter 2015-15.

⁴ Dept. Housing and Urban Dev’t, Mortgagee Letter 2016-05 (Feb. 12, 2016).

2) *Require Servicers to Communicate with Borrowers about the MOE Now, Prior to the Borrower's Death.* Many borrowers and their spouses could take steps now to plan for the borrowing spouse's death in order to make the MOE process go more smoothly. Among other options, the non-borrowing spouse could be added to title through a joint tenancy with right of survivorship deed, obviating the need for a lengthy and costly probate process after the borrower's death. Non-borrowing spouses could be given the option to declare themselves prior to the borrower's death and provide all documentation currently available related to proving their eligibility for the MOE. Moreover, non-borrowing spouses should be allowed to remain in the home via the MOE assignment when the borrower has had to move out of the home for health reasons. The fact that the borrower has not yet passed away should not be a barrier to keeping the spouse in the home.

3) *Clarify the MOE Rules, Especially with Respect to Good and Marketable Title.* HUD's current requirement is that the non-borrowing spouse must have good and marketable title or a legal right to remain in the home for the remainder of their life within 90 days of the borrower's death. However, servicers and even the staff of HUD's National Servicing Center sometimes claim that good and marketable title is required, meaning that probate must be completed or subordinate liens canceled. Completing the probate process within 90 days is not practicable in most situations. HUD should clarify that a spouse having a legal right to remain – which could include obtaining any interest in the home upon the borrower's death (even a partial interest, and even if not yet probated), or entering into a long-term lease with the borrower's estate – is sufficient to meet the MOE requirements.

B. HUD must expand available loss mitigation options to allow HECM borrowers to resolve property charge defaults.

1) *Expand Loss Mitigation Options.* HUD's current options for HECM loss mitigation are far too limited. HUD allows an extension of foreclosure timelines for borrowers with critical health circumstances, such as long-term illness, only if all borrowers are over the age of eighty. The borrower has the burden of reapplying annually to continue the extension. This "at-risk extension" option should be available to all borrowers with critical circumstances, regardless of age, and without the need for a burdensome annual recertification.

Further, HUD's repayment plan rules are too restrictive. Servicers are directed to offer repayment plans that extend no longer than sixty months (or less if the loan is nearing the Maximum Claim Amount) and to approve a plan only if the borrower can make the required payment with 25% of available surplus income.⁵ A borrower who defaults on a repayment plan and owes more than \$5,000 is not eligible for another repayment plan.⁶ HUD needs to make repayment plans more flexible and to offer options akin to a partial claim for borrowers who are unable to make a serious dent in the arrearage but can begin to pay property charges going forward.⁷

⁵ Mortgagee Letter 2015-11 (Apr. 23, 2015) at 6-7.

⁶ Mortgagee Letter 2015-11 (Apr. 23, 2015) at 8.

⁷ A partial claim is a loss mitigation option made available by HUD on forward mortgages, in which HUD advances the amount of the arrearage and takes a silent second mortgage for the amount advanced. This option allows borrowers to start fresh going forward, even if they are not able to repay the existing arrearage.

2) *Require Loss Mitigation.* HUD has the authority to require servicers to evaluate borrowers for loss mitigation prior to declaring a loan due and payable owing to a property charge default. In fact, until recently such evaluations were mandatory.⁸ Returning loss mitigation to mandatory status would help HECM borrowers while also protecting the insurance fund. Reasonable loss mitigation is likely to result in borrowers paying back the past-due property charges, rather than having those charges passed along to HUD through the insurance claim. Loss mitigation also furthers the central purpose of the HECM program, preventing displacement of elderly homeowners. Advocates working with homeowners report that many HECM borrowers who are eligible for loss mitigation are being denied the opportunity to obtain a repayment plan, leading to unnecessary foreclosures. In Puerto Rico, the top challenge faced by HECM borrowers is addressing property charge defaults. A change in policy would contribute to stability on the island.

3) *Accommodate Disabilities.* A significant number of older adults have disabilities, or develop disabilities as they reach a more advanced age. These disabilities may involve physical limitations, such as hearing loss or visual impairment, or may be cognitive in nature. Regardless, effective servicing of reverse mortgage loans must involve an awareness of disabilities and a sensitivity to the need for reasonable accommodations of those disabilities.

4) *Remove Unreasonable Loss Mitigation Deadlines.* Deadlines that are too strict are most problematic for disabled borrowers, but contribute to avoidable displacement of older borrowers across the board. HUD should make it clear that servicers are permitted, even encouraged, to extend loss mitigation after a foreclosure has been initiated. HUD should remove some of the pressure on servicers by lengthening foreclosure timelines and also making it clear that if a servicer is complying with HUD's requirements, loss mitigation efforts toll the running of any deadline to foreclose.

C. HUD should focus on effective and clear communication with HECM borrowers and evaluate whether current origination rules are blocking access to HECM loans for low-income borrowers.

1) *Clarify Servicer Communications with Borrowers.* Too often, the letters sent to HECM borrowers by loan servicers use opaque language and legal terms of art. Servicing letters should be written in plain English. Servicers should reach out to borrowers immediately after closing to establish a rapport and an expectation of dialogue. As much as possible, written communications should be accompanied by a phone call and, when possible, in-person communication.

2) *Increase Access to Post-Closing Housing Counseling.* Certain actions, such as helping a borrower apply for the senior homestead exemption or shop around for cheaper homeowner's insurance, are most suited for HUD-certified housing counselors. HUD should increase funding for HECM counseling after closing, including counselors who are available to assist with property charge defaults. If servicers begin a practice of referring borrowers to HUD-certified counselors early in the loan, borrowers may build a relationship of trust and gain financial tools that may prevent property charge defaults proactively. Among other things, HUD-certified

⁸ Dep't Housing and Urban Dev't, Mortgage Letter 2011-01 (Jan. 3, 2011).

counselors may be able to assist borrowers in identifying additional property tax homestead exemptions or relief that may be available from the taxing authority or from other sources, finding resources for free or low-cost home repairs, and dealing with unforeseen medical expenses or other budget issues. A recent report from a housing counseling network with a special project on post-default HECM counseling found that out of 162 HECM borrowers facing default or foreclosure, 70% were able to cure the default and remain in their homes with the help of experienced counselors.⁹

3) *Revisit the Financial Assessment to determine whether the rules are more stringent than necessary.* Early data suggest that a significant number of elderly homeowners who might otherwise benefit from a HECM loan are unable to move forward because the requirement for a Life Expectancy Set Aside makes the loan unfeasible. The LESA rules, combined with lower principal limits, are likely barring access to HECMs for the population most in need of the program and most at the heart of Congressional concern when the program was authorized—those struggling with increased expenses and decreased income upon retirement. HUD should undertake a careful review to determine whether the creditworthiness review that determines whether a LESA will be required, in particular, could be limited to a two-year period or ignore certain debts like medical collections.

4) *In Addition to a Property Charge Set-Aside, Allow Lenders to Offer the Alternative of a Monthly Escrow for Taxes and Insurance.* Borrowers who can afford to pay the property taxes and insurance on a monthly basis should have the option to do so. This option is especially important for low-income homeowners who might benefit from a HECM, but might be priced out of the loan if a LESA were required. Borrowers are significantly less likely to default on property charges if they are paying into a monthly escrow, rather than paying a large lump sum annually or semi-annually. Especially if the escrow option is combined with clear communication and access to post-closing housing counseling, it has the potential to work well for a significant number of low-income homeowners who might be boxed out by HUD's current financial assessment and LESA rules. Creating a prospective escrow option would help further Congress's intent in creating the HECM program with minimal risk to the insurance fund, since a payment default would be small in amount and noticed immediately, allowing plenty of time for loss mitigation or, if necessary, foreclosure. HUD could authorize a demonstration program, allowing a limited number of HECM borrowers with several different servicers to pay property charges through a monthly escrow.

⁹ Housing Options Provided for the Elderly, Grant Report to Retirement Research Foundation (Feb. 2018), on file with authors.

Thank you for your attention to these extremely important issues impacting the lives of older homeowners. We look forward to working with you and your staff to further discuss and make progress on these recommendations. Please direct any follow up discussions to Alys Cohen of the National Consumer Law Center at (202) 595-7852 or acohen@nclc.org.

Sincerely,

Americans for Financial Reform
Baltimore Neighborhoods, Inc.
California Advocates for Nursing Home Reform
California Reinvestment Coalition
California Elder Justice Coalition
Center for New York City Neighborhoods
Community Legal Services of Philadelphia (on behalf of its low-income clients)
Connecticut Fair Housing Center
Consumer Action
Consumer Advocates Against Reverse Mortgage Abuse
Consumers Union, advocacy division of Consumer Reports
Empire Justice Center
Greater Boston Legal Services
Housing and Economic Rights Advocates
Jacksonville Area Legal Aid, Inc.
JASA/Legal Services for the Elderly in Queens (NY)
Legal Aid Society of Southwest Ohio
Maryland Consumer Rights Coalition
Massachusetts Communities Action Network
National Consumer Law Center (on behalf of its low-income clients)
National Housing Law Project
National Housing Resource Center
North Carolina Justice Center
SeniorLAW Center, Philadelphia, PA
Woodstock Institute

cc:

Gisele Roget, Deputy Assistant Secretary, Single Family Housing

Ivery Himes, Director, Office of Single Family Asset Management