COMMENTS
to the
U.S. Department of Housing and Urban Development
on
Reducing the Regulatory Burden: Enforcing the Regulatory Reform Agenda Under Executive Order 13777

82 Fed. Reg. 22344 (May 15, 2017)

Docket No. FR-6030-N-01

By the
National Consumer Law Center
On behalf of its low-income clients

June 14, 2017

The National Consumer Law Center[1](NCLC) respectfully submits the following comment on behalf of its low-income clients in response to the notice and request for comment on *Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777* issued by the U.S. Department of Housing and Urban Development (HUD). In this comment we address regulation under the FHA's Home Equity Conversion Mortgage (HECM) program, including a final rule issued on January 19, 2017 that updated the program's regulations and codified important changes to the program.[2]

The Executive Order, and HUD's implementation of it provides an opportunity to request information and weigh the benefits of regulation, especially that designed to protect consumers against predatory marketplace practices. Well-drafted regulation creates an efficient, fair marketplace that not only protects consumers' hard-earned assets but also preserves government funds. In recent years federal agencies have stepped up efforts to review existing regulations to determine whether such regulations should be modified, streamlined, expanded, or repealed to

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[1] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises on consumer credit laws and unfair and deceptive practices. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting elders and low-income people, conducted trainings for tens of thousands of legal services and private attorneys on the law as applied to consumer problems facing elders, including debt collection, the electronic delivery of government benefits, predatory lending, and reverse mortgages, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC attorneys regularly testify in Congress and provide comprehensive comments to the federal agencies on the regulations under consumer laws that affect elders. These comments were written by NCLC attorneys Odette Williamson and Sarah Bolling Mancini.

[2] *See* 82 Fed. Reg. 7094 (Jan. 19, 2017). The final rule updates 24 CFR Parts 30 and 206.

make the regulatory process more effective or less burdensome.[3] Many agencies periodically review existing regulations as a matter of longstanding practice or to satisfy statutory obligations.

A. HUD engaged in over five years of robust regulatory review and reform of the HECM program capped by issuance of a final rule codifying significant programmatic and policy changes in January 2017.

In recent years HUD has taken steps to overhaul the HECM program through review of the program's regulatory structure, issuance of new guidelines and regulations, and pursuit of legislative authority to flexibly manage the program. The agency aimed to strengthen the program and reduce the risk to the Mutual Mortgage Insurance Fund.[4]

Towards these goals HUD sought and received authority to quickly amend the HECM program rules without notice or formal rulemaking. With passage of the Reverse Mortgage Stabilization Act of 2013 (RMSA), 12 U.S.C. § 1715z-20(h), HUD was given substantial authority to amend the rules of the program through the issuance of Mortgagee Letters. Within a month after passage of the RMSA the agency issued the first of several Mortgagee Letters which made substantial changes to the program. HUD has used its authority under the RMSA to add a financial assessment and property charge funding requirement; defer the due and payable status for eligible non-borrowing spouses; limit disbursements during the first 12 months of the HECM; and eliminate future draws on fixed interest rate HECMs.[5] A loss mitigation requirement was also added via a Mortgagee Letter to assist consumers who have fallen behind on property-related charges.

Unique among regulatory structures, the RMSA allows HUD to change the parameters of the program without a formal rulemaking. Mortgagee Letters (sent to approved lenders and servicers) can be issued and withdrawn by the agency at any time. Formal notice and comment rulemaking serves an important purpose, and HUD should still use this process for any significant program changes. Though comments are typically not required on Mortgagee Letters, NCLC and consumer advocates have submitted comments on certain key Letters, and HUD has been open to clarification or amendment of its policy through subsequent Mortgagee Letters or FAQs. The HECM final rule, effective September 19, 2017, codified many of the policies outlined in recent Mortgagee Letters.[6] We expect HUD to continue to exert its authority through this process in the future, even as new regulations come online. This will allow HUD to refine its regulations to meet its program goals.

Overall HUD has issued more than ten significant policy changes to the HECM program since 2011.[7] Rather than being "outdated, ineffective or excessively burdensome," the changes reflect

[3]As required by Executive Order 13563 (Jan. 18, 2011); and Executive Order 13610 (May 10, 2012) published in 77 Fed. Reg. 28469 (May 10, 2012).
[4] *See* 82 Fed. Reg. 7094 (Jan. 19, 2017).
[5] *Id*.
[6] *Id*. Stakeholders had an opportunity to weigh in on the proposed HECM rule. *See* 81 Fed. Reg. 31770 (May 19, 2016).
[7] Consumer Financial Protection Bureau, Office of Older Americans, *Snapshot of Reverse Mortgage Complaints*, at 15, Feb. 2015.

the latest thinking on how to make the program work better. Many of these changes are quite nuanced and go to origination as well as servicing of HECM loans. Mortgagees are just now applying the new HUD guidelines to their lending and servicing practices. Any attempt to broadly sweep away such guidelines would upend a carefully calibrated system of program rules that have been honed over the last few years with input from the industry, consumers, and consumer advocates.

Moreover the final rule, effective September 19, 2017, represents a long overdue updating of the HECM regulations. Aside from codifying policy made by Mortgagee Letters, the new rule implements statutory changes, adds new origination and servicing policies, and clarifies existing regulatory language. Given the volume of changes made by various Mortgagee Letters, such updating of the formal regulations is necessary for consistency and clarity.

B. Important changes or protections in the HECM program should be preserved to protect consumers and the insurance fund.

Several important changes have been made to the HECM program in recent years to advance HUD's central mission "to create strong, sustainable, inclusive communities and quality affordable homes for all."[8] These new HECM program rules do not meet HUD's stated criteria for regulations that should be repealed, replaced or modified. They do not eliminate jobs; they are not outdated; they do not impose costs that exceed benefits; nor do they rely on "data, information or methods that are not publicly available."[9] The policies described below replaced outdated and inefficient HUD policies. Most of the policy revisions also save taxpayers money and support elder homeowners.

Moreover, HUD's newly created Regulatory Task Force should be mindful of the central purpose of the HECM program, which is to ease the financial burden on elderly homeowners facing increased health, housing and subsistence costs at a time of reduced income.[10] Reverse mortgages are a financial lifeline for homeowners who are house rich but cash poor.

HUD's twin goals of reducing the risk to the insurance fund and increasing the sustainability of the program for seniors is best achieved by leaving important protections in place.[11] The final rule followed the publication of the May 19, 2016, proposed rule and took into account the public comments received on the proposed rule, including those from the industry, which has a substantial financial stake in the regulation and oversight of the program. The impact of some of the agency's most recent changes on the program and fund are hard to assess at this early point.

1. Existing protections for consumers should be preserved and strengthened.

HUD's existing regulations related to HECMs are narrowly tailored to address the program's purpose and to maintain a well-functioning market. The regulations are reasonable, protect elderly borrowers, and create clarity and predictability for lenders and the secondary market. In

[8] 82 FR 22345 (May 15, 2017).
[9] *See* 82 Fed. Reg. 22344 (May 15, 2017).
[10] *See* 12 U.S.C. § 1715z-20.
[11] *See* 82 Fed. Reg. 7094 (Jan. 19, 2017).

light of these facts, we highlight particular pieces of HUD's regulatory framework around HECMs that should be preserved.

Loss mitigation for borrowers in default on property charges

HUD's regulations and Mortgagee Letters authorize lenders to offer loss mitigation to HECM borrowers who have experienced a default on property taxes or homeowner's insurance.[12] This guidance is extremely important and must be maintained. By allowing servicers to enroll borrowers in repayment plans, HUD promotes one of the core purposes of the HECM program – preventing displacement of elderly borrowers from their homes. Similarly, HUD's alternative loss mitigation options--the At-Risk Extension, Mortgagee-Funded Cure, and Optional Delay for Low Balance Arrearages--allow borrowers to stay in their homes when possible without posing a risk to the insurance fund. Reverse mortgage lenders want to be able to offer these options, and elderly borrowers need them.

To be sure, HUD could improve its loss mitigation policies in ways that would benefit the MMI Fund, borrowers, and the reverse mortgage industry. Allowing servicers to offer **all** loss mitigation options after the foreclosure process has been initiated, expanding borrowers' access to repayment plans, and providing lenders with further guidance on clear communication with elderly borrowers about loss mitigation options would go a long way. These adjustments could be made by Mortgagee Letter, FAQ, or direct outreach to reverse mortgage servicers, without the need for new regulation.

Protections for non-borrowing spouses

HUD's regulatory changes to protect non-borrowing spouses from foreclosure and eviction must be preserved. Since 2014, HUD rules have required lenders to factor in the age of a non-borrowing spouse in calculating the principal limit for the HECM loan, thus enabling HUD to protect the MMI Fund while also providing for a deferral of due and payable status throughout a non-borrowing spouse's life.[13] Moreover, HUD's creation of the Mortgagee Optional Election (MOE) has enabled surviving spouses to stay in their homes for HECMs originated prior to August 2014. These changes protect grieving widows and widowers from experiencing an additional trauma, the loss of their homes. Moreover, these rules are necessary in order to keep HUD's regulations consistent with Congress's directive that any loans to be insured by HUD under the HECM program must protect borrowers and their spouses from the risk of foreclosure for the rest of their lives, provided they comply with the other requirements of the mortgage.[14] Before these changes were adopted HUD was faced the specter of a large number of elderly widows and widowers being forced from their homes because of a reverse mortgages taken out by one spouse. This was at a time when HUD failed to implement its statutory mandate to protect homeowners and their spouses from displacement. Not surprisingly, there was substantial concern from the public, elected officials, and the courts about the potential impact on

[12] *See* Mortgagee Letter 2015-11 (April 23, 2015); Mortgagee Letter 2016-07 (March 30, 2016). The final rule at § 206.205(e)(2)(ii) states that the mortgagee may provide any permissible loss mitigation made available by the Commissioner through notice. 82 Fed. Reg. 7094 (Jan. 19, 2017).
[13] 24 C.F.R. § 206.55 (effective September 19, 2017); Mortgagee Letter 2014-07 (April 25, 2014) (effective after August 4, 2014).
[14] 12 U.S.C. § 1715z-20(j) ("Safeguard to Prevent Displacement of Homeowner").

these grieving spouses if HUD did not offer a viable solution. HUD should preserve the MOE program as well as its origination rules related to the deferral period for non-borrowing spouses.

Origination rule changes to promote sustainable HECM borrowing

In response to high levels of up-front borrowing, HUD implemented a limit on the amount of HECM loan proceeds that could be withdrawn by the borrower at closing and within the first year of the loan.[15] Prior to revision of the policy a high percentage of borrowers were being sold loans in which the borrower was required to withdraw the full loan limit at closing, whether or not they needed the entire amount.

Putting in place initial disbursement limits on HECMs, and making other changes to the program, has done much to arrest this practice. Most consumers now choose loan options that better match their needs. The final rule adds additional flexibility for HUD to change the initial disbursement rule slightly to respond to market changes and other factors. Up-front initial disbursement limits balance the needs of consumers for access to proceeds with the potential for abuse brought on by the aggressive marketing and pricing practices that we saw in the past.

Financial Assessment and Property Charge Set-Asides

In light of the significant rate of default of HECM borrowers on property charges, HUD created new rules, effective April 2015, requiring lenders to conduct an assessment of borrowers' willingness and capacity to meet their financial obligations.[16] If a borrower does not demonstrate the willingness or ability to meet his or her obligations, the lender may require a fully or partially-funded set-aside for the payment of property charges during the borrower's expected lifetime. Early information suggests that these changes may be resulting in lower rates of default on property charges. However, the Financial Assessment may also restrict access to HECM loans for certain borrowers who could benefit from a loan and comply with its conditions, including payment of property charges, if provided with high-quality loan servicing. HUD should closely examine the impact of these changes, and should seek data from lenders to determine whether certain potential HECM applicants might be foregoing the opportunity to apply for a HECM loan, or applying unsuccessfully, due to the Financial Assessment or the requirement to include a property charge set-aside. HUD should review this significant change to HECM origination rules to determine how it impacts loan originations, and whether the specific contours of the Financial Assessment are meeting the goals for which it was created as well as the overarching goals of the HECM program. It may be that the Financial Assessment could work equally well to prevent property charge defaults, without significantly limiting access to HECM loans, if the assessment rules were scaled back or clarified. The protections adopted in 2015 should not be repealed, but we recommend that HUD continue to obtain data about how the rules are operating, and refine the rules so that this market operates as efficiently as possible and serves the homeowners it was designed to benefit.

In conversations with stakeholders from the lending, counseling, and consumer perspective, NCLC has heard that lenders' interpretations of the Financial Assessment rules vary

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[15] *See* Mortgagee Letter 2014-21 (Nov. 10, 2014). The funds advanced to the borrower at closing and during the first 12 month disbursement period cannot exceed the greater of 60 percent of the principal limit or mandatory obligations plus an additional 10 percent of the principal limit.

[16] Mortgagee Letter 14-21 (March 2, 2015); Mortgagee Letter 14-22 (March 2, 2015); 24 C.F.R. § 206.37.

broadly, with some confusion surrounding the calculation of residual income and the impact of a residual income shortfall. We recommend that HUD explore whether issuance of additional FAQs or other measures to clarify these regulations would simplify compliance for lenders. In addition, some stakeholders have questioned whether HUD could narrow the timeframe for the Financial Assessment, rather than requiring a review of the consumer's full credit history, and could disregard or place less weight on non-mortgage collection and charge-off accounts. We recommend that HUD evaluate this option as well. In considering these issues, HUD should seek comment from consumers and consumer advocates as well as from the lending industry.

Independent Counseling Requirement

To be eligible for an FHA-insured HECM reverse mortgage loan, borrowers must obtain adequate counseling from an independent third party that is neither directly or indirectly associated with the mortgage transaction.[17] Counseling is necessary to ensure that consumers are aware of all the risks posed by these loans. Even sophisticated consumers seeking reverse mortgages may not be sufficiently aware of the risks and obligations involved solely through the disclosures provided during the origination process. HUD has developed a detailed counseling protocol to insure the quality and integrity of the counseling network and the counseling process. HUD should continue robust oversight of the counseling process and provide funding and support to counselors and counseling organizations. A rollback of these rules regarding HECM counseling would substantially weaken the current federal counseling protocols, on which some states rely, and invite rogue operators into the reverse mortgage counseling industry.

2. The above-mentioned regulations do not inhibit job creation, create inconsistency, or impose costs that exceed their benefits.

(a) The above-mentioned HECM regulations do not result in the elimination of jobs or inhibit job creation. HECM lenders continue to originate HECM loans and have made the necessary adjustments to comply with the updated HECM rules over time. It may be that clarifying the Financial Assessment or increasing access to loss mitigation, as described above, could result in further job creation, as lenders might be able to originate more HECMs and servicers might hire additional staff if loss mitigation were expanded.

(b) The regulations discussed above are not outdated, unnecessary, or ineffective. To the contrary, HECM rules have been adjusted frequently in recent years, preventing them from becoming outdated. They are necessary to protect consumers and effective in promoting the program's goals.

(c) The HECM regulations, particularly those discussed above, do not impose costs that exceed their benefits. The benefits to consumers of the HECM program with its attendant regulatory protections is significant as adults are increasingly entering old age with significant debt and few resources. HECM loans allow older consumers to tap into the equity in their homes at a time of reduced income and increased expenses, without the risk of displacement.

(d) The HECM regulations do not create inconsistency or interfere with regulatory reform initiatives and policies.

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[17] 12 U.S.C. § 1715z-20(d)(2)(B); 24 C.F.R. § 206.41.

(e) The HECM regulations do not interfere with the agency's attempt to maximize the quality, objectivity, or integrity of information disseminated.

(f) The HECM regulations do not derive from or implement Executive Orders or other Presidential directives that have subsequently been rescinded or substantially modified.

3. HUD should consider the purposes of the HECM program when implementing the regulatory offsets required by Executive Order 13771 and prioritizing the program's rules.

HUD seeks comments on what factors it should use when considering how to prioritize its rules as it implements Executive Order 13771. The most important factor with regard to the HECM regulations must be whether a given regulation furthers the program's core mission as articulated by Congress: to allow seniors to tap into their accumulated equity at a time of economic hardship without increasing the risk of displacement from their homes. Congress authorized HUD to carry out a program to insure HECM loans "to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income."[18] Congress further required that any loans to be insured by HUD under this program must protect borrowers and their spouses from the risk of foreclosure for the rest of their lives, provided they complied with the other requirements of the mortgage.[19] The dual purposes of the HECM program, allowing seniors to use their home equity to deal with economic strain while protecting borrowers and spouses from displacement, must be the guideposts used to identify HUD's most important HECM regulations. HUD's regulations allowing for loss mitigation to prevent property charge foreclosures and protecting surviving spouses from displacement are among the most critical in consideration of this dual statutory purpose.

4. HECM rules have not been overtaken by technological advancements.

To our knowledge, no HECM rules have become irrelevant or outdated due to changes in technology. Although the technology used by lenders to comply with HUD's regulations has evolved over time, all of the existing regulations remain relevant and important.

5. The HECM regulations do not conflict with the requirements or regulations of other federal agencies.

HUD occupies the field with regard to issuing regulations and policies that impact the HECM program. The Consumer Financial Protection Bureau's mortgage servicing rules largely exempt reverse mortgages, but the few rules that do apply to reverse mortgage lenders and borrowers are consistent with, and complement, HUD's existing rules.

6. The costs of compliance with HUD's HECM regulations must be considered in light of the benefits of these regulations.

While HUD is seeking an assessment of the costs of the lending industry's compliance with its regulations, any assessment of regulatory costs must also factor in the benefits of these regulations. HUD's regulations of HECM loans significantly benefit the elderly borrowers who

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[18] 12 U.S.C. § 1715z-20(a)(1).

[19] 12 U.S.C. § 1715z-20(j) (this section is entitled, "Safeguard to Prevent Displacement of Homeowner").

are able to obtain a HECM loan with the program's attendant protections. Many of these elders are living with reduced income, after retiring or reducing their work hours, and also facing the challenge of increased medical expenses as they age. Allowing these seniors to age in place, in the home and community where they have established familiar patterns and connections, is beneficial to their physical and mental health, as well as to the health and vibrancy of these communities. This also avoids displacement to more expensive institutional care, possibly underwritten with government resources. The protections implemented by HUD's regulations, including the ones discussed in these comments, must be preserved for the benefit of these elderly borrowers as well as for the lending industry that has developed to support this important purpose.

Conclusion

NCLC appreciates the opportunity to respond to HUD's request for comments on reforming the regulatory system and reducing the regulatory burden on businesses. We support preserving and improving upon the important changes that have been made to the HECM program over the last few years. Those changes ensure the long-term stability of the program, protect taxpayer dollars, and aid vulnerable older adults. The HECM program ensures that older homeowners can tap their home equity with a safe, affordable, government-insured reverse mortgage that enhances their ability to age in place with dignity.