

October 22, 2018

Branch Chief  
Regulations and Paperwork Management Branch  
U.S. Department of Agriculture  
1400 Independence Ave. SW  
Washington, DC 20250

RE: Comments to 83 FR 42618, Single Family Housing Guaranteed Loan Program

On behalf of the low-income clients and communities that we represent, the undersigned thirty-nine national, state, and local organizations write to comment on your proposed rule to amend the loan servicing obligations for USDA-guaranteed loans. We appreciate the agency's efforts to reduce unnecessary barriers to loss mitigation and to expand the use of the Mortgage Recovery Advances. There are further steps the agency can take, however, to provide needed payment relief to borrowers facing foreclosure, and we ask the agency to consider these suggestions as it prepares to implement the final regulation.

**1. We support USDA's proposal to eliminate unnecessary limits on eligibility.**

We strongly support the USDA's decision to eliminate limits on Mortgage Recovery Advances, especially the unnecessary rule that limited advances to twelve monthly payments. The rule unnecessarily prevents loss mitigation options for homeowners who struggle through an often-lengthy process of evaluating eligibility, and, as noted in the USDA discussion of the proposal, HUD eliminated a similar rule from the FHA loss mitigation waterfall in 2012.

Elimination of the limit will also facilitate greater payment relief, which is critical for the success of modifications as explained in the USDA proposal. By not unduly limiting the relief to twelve months of arrears, Mortgage Recovery Advances will be more easily used to reduce the interest-bearing principal balance of a modification, and, thus, provide another means for reducing borrowers' monthly payment to the affordability target.

This type of reduction to the interest-bearing principal has been critically important for FHA modifications, and FHA's decision to remove the 12-month limitation on FHA partial claims, which work like USDA's Mortgage Recovery Advances, in connection with FHA-HAMP modifications has resulted in a more successful loss mitigation program. From the beginning of FHA-HAMP through 2012—a period in which there were around a million HAMP modifications<sup>1</sup>—there were only approximately 10,000 FHA-HAMP loan modifications. During that period, the FHA

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<sup>1</sup> U.S. Dep't of Treasury, Making Home Affordable Program Performance Report Through October 2012, *available at* [www.treasury.gov](http://www.treasury.gov).

loan modifications that did occur, which generally did not include partial claims due to the 12-month rule, performed relatively poorly, with significant redefault rates and limited possibilities for payment reduction.<sup>2</sup>

In connection with Mortgage Letter 2012-32, FHA eliminated the 12-month limitation. After HUD eliminated the 12-month limitation and implemented further revisions to the program, borrowers were more able to access partial claims in connection with modifications that led to deeper payment reductions. More borrowers received FHA-HAMP modifications, and the performance of FHA's modification program improved.<sup>3</sup>

**a. USDA should clarify that unpaid principal balance is not counted twice in the modification calculation.**

Given this experience with FHA-HAMP, we believe the USDA's decision to eliminate the 12 month limitation is based in strong evidence. With this change, however, the USDA should make it clear how the terms of modifications are calculated in order to avoid confusion. Specifically, the agency should clarify that unpaid principal is not included in capitalization of arrearages for modifications and mortgage recovery advances. § 3555.304(c)(1) refers to capitalizing a "portion of the arrearage (PITI)" as an element of loan modifications. This terminology could be construed incorrectly as suggesting that the portion of a borrower's missed payment attributable to repayment of the loan principal should be included in the arrearage capitalized for a loan modification. The Agency cannot be suggesting that loan modifications allow double payment of principal. This point needs clarification.

We suggest that the Agency add clarifying language similar to that used in other major modification programs. For example, the FHA Handbook states expressly that in capitalizing arrears for a loan modification the lender or servicer includes "arrearages for unpaid accrued interest." HUD Handbook 4000.1, p. 630. The HAMP guidelines were clear on this point. For the capitalization of arrears, the Treasury Department's instructions directed the borrower to begin with the current unpaid principal balance of the mortgage and add "accrued interest and additional expenses." The instruction then stated, "*Do not include overdue principal payments or late charges that you may owe.*" (emphasis added). See Making Home Affordable, HAMP CheckMyNPV online guidance; see also HAMP Handbook (U.S. Dept. of Treasury HAMP Handbook for Servicers of Non-GSE Mortgages Version 5.1 § 6.3.1.1 p. 109 (May 26, 2016) (servicers capitalize "accrued interest" in the first step of the HAMP waterfall). This type of clarifying directive should be included in § 3555.304(c)(1) and anywhere else where capitalization of arrears is discussed in the context of a loss mitigation option.

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<sup>2</sup> Office of the Comptroller of the Currency, OCC Mortgage Metrics Report 34 (Third Quarter 2013), available at [www.occ.gov](http://www.occ.gov).

<sup>3</sup> Office of the Comptroller of the Currency, OCC Mortgage Metrics Report 34 (Fourth Quarter 2014), available at [www.occ.gov](http://www.occ.gov).

**b. USDA should eliminate the requirement for agency approval of all loss mitigation decisions and instead establish a loss mitigation appeals process for disputed cases.**

We also greatly support the elimination of the requirement for USDA approval of loss mitigation options. Through the USDA waterfall, the agency has set out a standard program for servicers to apply. Servicers should simply apply the USDA's rules and not have the agency review each case for compliance. This adds unnecessary delay to a situation when such delay simply adds costs for the lender and borrower to bear.

Instead of having the USDA reviewing each case, the agency must instead divert those resources to an appeals process by which borrowers can address servicer mistakes. By implementing an appeals process rather than approving every special servicing request, the agency will still have an avenue for assessing servicer compliance with its loss mitigation program without having to expend resources to review every loss mitigation request. By providing an appeal right, the agency will review cases in which there is a potential issue between the lender and the borrower. The agency will get both sides of the story and will focus resources on only those cases where it matters. In addition to its practical benefit, we believe that the agency must implement an appeal right pursuant to 42 U.S.C. § 1480(g), which extends to instances in which private entities make decisions. The statute's scope is not limited to instances in which the agency itself makes decisions – the statute has, for example, applied to private landlords. USDA should implement the statute for guaranteed borrowers so that they can have adverse decisions reviewed.

**c. USDA should require servicers to provide servicing plans to borrowers.**

Moreover, USDA should require the lender to simultaneously provide the borrower with copies of all servicing plans submitted to the Agency regarding the borrower's loan. The lender must be required to submit the plan to the borrower and the Agency prior to a referral to foreclosure and again prior to scheduling a foreclosure sale or entry of a judgment in foreclosure to reflect updates to the loss mitigation process that may have occurred. The servicing plan transmittal to the borrower must include a description of all available loss mitigation options for guaranteed loans. The transmittal must also include information about procedures to appeal the lender's decisions related to loss mitigation. This will allow for better borrower input in the loss mitigation and appeals process and will ultimately lead to better loss mitigation.

**d. USDA should eliminate the debt-to-income cap and clarify that lenders must waive late fees in connection with successful loss mitigation.**

The USDA also should further update the program by eliminating the requirement that the borrower's post-modification "debt to income ratio . . . must not exceed 55 percent." 7 C.F.R. § 3555.304 (b)(1). At the same time HUD eliminated the 12-month rule, it also eliminated its 55% back-end DTI rule. The back-end DTI ratio limit is extremely challenging for lenders to apply given the difficulty in determining the scope and extent of a borrower's non-mortgage debt. The assessment takes a significant amount of paperwork and is challenging for lenders to determine. Moreover, the USDA already includes an affordability analysis through the target payment that is much easier to assess. FHA correctly assessed that the 55% back-end DTI ratio was not a valuable tool, and we ask the USDA to take the same approach.

With respect to 7 C.F.R. § 3555.04(b)(4), the USDA states that late charges and other lender fees cannot be added to the modification balance. The Agency should further clarify that lenders must waive those fees in connection with a successful loss mitigation option. While USDA's most recent Loss Mitigation Guide states that borrowers are not expected to make a contribution upfront for a modification, it leaves open the possibility that lenders will keep unpaid and unaddressed late fees on the borrowers account. This may keep a borrower from having a fully fresh start and may impede a successful modification. The USDA should directly state that late charges and lender fees that cannot be capitalized must be waived.

**e. USDA should eliminate the requirement for trial period plans.**

Abolishing trial payment plans also will improve borrower access to needed loss mitigation. Proposed § 3555.303(b)(3)(v) gives lenders and servicers the option to omit trial modification plans for traditional loan modifications. Trial plans add a second and unnecessary step to the modification process. Experience from the HAMP program showed that this step often produced long delays and further complications in the process of conversion from a trial modification to a permanent modification. Many homeowners lost out on viable options to save their homes because servicers mishandled the conversions. Rather than making the trial plan step optional for the traditional modification, we urge the Agency to remove the trial modification step entirely from both the traditional and special servicing modification options. This will produce more final modifications and less paperwork burdens for servicers.

**2. The standalone Mortgage Recovery Advance option will provide targeted relief to borrowers facing short term loss of income.**

We also strongly support USDA's implementation of Mortgage Recovery Advances for borrowers facing temporary hardship who do not need a change in their loan

terms. Under a standalone Mortgage Recovery Advance, the borrower would simply receive an advance to bring the loan current. Standalone mortgage recovery advances work very well for homeowners who face only a temporary job loss or wage reduction. In those cases, borrowers simply need an advance to catch up on payments. The FHA loss mitigation waterfall includes a variant of the standalone mortgage recovery advance, and it has been successful for borrowers.

**3. As outlined in the proposed regulation, servicers should consider liquidation options only after exhaustion of home retention options.**

We appreciate the Agency's addition of the proposed language to § 3555.305 stating that lenders "must have exhausted the servicing options outlined in §§ 3555.302 through 3555.304 to cure the delinquency before considering voluntary liquidation." Particularly when the Agency is streamlining the deed-in-lieu option, it is essential that the Agency not encourage liquidation option at the expense of viable home retention options. This requirement must be strictly monitored and enforced.

**4. The USDA should fully implement the FHA-HAMP waterfall in order to achieve further payment relief for borrowers facing foreclosure.**

As explained above, we applaud the USDA for adopting aspects of the FHA-HAMP waterfall that have worked well for FHA-insured borrowers, including the elimination of the 12-month limitation on arrears, the requirement for pre-modification agency approval, and the implementation of the standalone Mortgage Recovery Advance.

In fact, we believe that the USDA should fully incorporate the FHA-HAMP waterfall as it has proven to be an effective means of creating affordable income-based modifications. The current form of FHA-HAMP, which is found at pages 609-611 of HUD Handbook 4000.1, is particularly effective because its targets consider both borrower payment relief and affordability.<sup>4</sup> Rather than simply pinning a modification to 31% of a borrower's income, the FHA-HAMP target payment system also insures that payment relief is a factor for the lenders to consider. Lenders have consistently noted the importance of payment relief in the success of modifications.

Moreover, the current FHA-HAMP waterfall has folded the standard modification (with no partial claim) into the main waterfall rather than having separate evaluation tracks. This reduces complication and the chance of unnecessary mistakes in evaluation.

The USDA should also follow this lead and eliminate the two-step evaluation that separates traditional modifications from special servicing. By making them both

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<sup>4</sup> Issued December 30, 2016, available at: <https://www.hud.gov/sites/documents/40001HSGH.PDF>.

part of one system, like FHA has, it should also reduce the likelihood of mistake. Moreover, since the creation of the target payment and the current FHA waterfall, FHA redefaults have reduced and the modifications have become more sustainable.

**5. The USDA's proposal to confirm the need to comply with federal and other law will clarify lender obligations.**

We strongly support the proposed addition of language to § 3555.51 directing lenders and their servicers to “comply with all other applicable federal, state and local laws, rules and requirements,” including the federal RESPA and TILA obligations. While this is not a new policy, it must be emphasized. Over the past ten years regulation of servicers has grown dramatically at both the state and federal levels. The federal, state and local laws provide effective tools to ensure compliance with the Agency's loss mitigation guidelines.

**6. The USDA should add language in required notices and in the form documents to clearly identify the loan's status.**

As these comments make clear, USDA-guaranteed borrowers have options available to avoid unnecessary foreclosure through tailored loss mitigation. Unfortunately, in our experience, borrowers who have USDA-guaranteed loans rarely know that the USDA has a relationship to their loan. There is nothing currently in the loan documents that signifies the loan's status as USDA-guaranteed, and the loan's status is often not clearly stated on notices to borrowers.

To address this, the USDA must take steps to ensure that the loan's status as USDA-guaranteed is clearer to borrowers. This may include notices that clearly explain the loan's status and the specific USDA options available. Moreover, the USDA should clearly state in loan documents that the USDA regulations are incorporated into the parties' contracts. This would make the USDA consistent with the Veterans Affairs documents, with FHA documents that the agency had used for decades, and with documents that FHA has proposed for use.<sup>5</sup>

**7. The USDA should implement a payment moratorium option for guaranteed loan borrowers in default.**

The USDA has statutory authority to implement loss mitigation options in addition to its special servicing program that will help homeowners. This includes a moratorium on payments pursuant to 42 U.S.C. §1475(a), an assignment program pursuant to 42 U.S.C. § 1472(h)(15), and a refinance program under 42 U.S.C. § 1472(h)(17).

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<sup>5</sup> U.S. Department of Housing and Urban Development, 60-Day Notice of Proposed Information Collection: FHA Single Family Model Mortgage Documents, 81 FR 85997 (Nov. 29, 2016) (explaining the history of the FHA single family mortgage documents).

The USDA has successfully implemented a moratorium program for its direct loan borrowers, and the authorizing statute for the program also applies to guaranteed loans. In the direct loan program, a borrower's payment may be suspended for up to 24 months while the borrower works to re-establish stable income. By providing the availability of a moratorium on payments to guaranteed borrowers, the agency would assist borrowers who can be successful as long as they have some additional time to find income. The moratorium option works well for direct borrowers, and there is no reason to believe it would not help guaranteed borrowers.

An assignment program and a refinance program that assist borrowers in default may also provide tailored options for homeowners in default. The refinance program can provide a fresh start to homeowners who qualify and the assignment program would allow the USDA to take over a loan and directly provide assistance. The USDA should implement these programs to further develop the menu for borrowers.

**8. USDA must modernize its data collection systems and its quality control process in order to improve its evaluation of loss mitigation options.**

The USDA must ensure that it has systems in place for collecting and analyzing data related to loss mitigation. The Government Accountability Office (GAO) outlined this need in 2012 in releasing "Foreclosure Mitigation: Agencies Could Improve Effectiveness of Federal Efforts with Additional Data Collection and Analysis." GAO-12-296 (June 28, 2012). In the report, the GAO reported that the USDA had not analyzed data that it had regarding loss mitigation performance. Pg. 61. The report further noted that "USDA officials stated that their loss mitigation data collection systems were outdated and noted that the agency had plans to update them to allow the agency to more systematically capture data on their loss mitigation activities." Pg. 61. To ensure that loss mitigation is helping borrowers and is working for the agency, the USDA must develop data collection systems that analyze the loss mitigation data it has. We are unaware of efforts by the agency to improve these systems.

The Agency should also incorporate contact with borrowers into the Quality Control reviews. Without talking to borrowers, the agency will not have a fully accurate

picture of what occurs in the loss mitigation process. Servicer files simply provide one side of the story and do not include numerous resubmissions, lost documents, incorrect statements, and other issues that borrowers consistently face when dealing with loan servicers.

Thank you for your consideration.

Sincerely,

Allied Progress

Americans for Financial Reform

Business and Professional Women of Colorado

CASA of Oregon

CASH Campaign of Maryland

Catalyst Miami

Connecticut Fair Housing Center

Consumer Action

Consumer Federation of America

Cooperative Development Institute (Massachusetts)

Credit Builders Alliance

Denver Asset Building Coalition

Empire Justice Center (New York)

Federation of Manufactured Home Owners (Florida)

Financial Justice Coalition of Southeast Michigan

Florida Alliance of Community Development Corporations

Land of Lincoln Legal Assistance Foundation, Inc. (Illinois)

The Legal Aid Society of Cleveland

Legal Aid Society of Southwest Ohio

Mercy Housing and Human Development (Mississippi)

Mission Asset Fund

Montana Organizing Project

Mountain State Justice, Inc. (West Virginia)

National Consumer Law Center (on behalf of its low-income clients)

National Fair Housing Alliance

National Housing Law Project

National NeighborWorks Association

New Jersey Citizen Action

New Mexico Center on Law and Poverty

New Mexico Legal Aid

North Carolina Justice Center

Ohio Poverty Law Center

Opportunity Alliance Nevada

Our Lifeline, Inc. (Michigan)

Pine Tree Legal Assistance (Maine)

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