



## LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC

June 6, 2016

Secretary Julián Castro  
U.S. Department of Housing and Urban Development  
451 7th Street S.W.  
Washington, DC 20410

Dear Secretary Castro:

On behalf of our low income clients, we urgently renew our call for HUD to reverse its decision to remove homeowner-protective language from FHA's form single family note and mortgage. HUD's action harms the communities that the FHA program is intended to support while at the same time undermining enforcement of HUD's own rules and the health of the insurance fund.

Most recently on this matter, HUD officials met with housing advocates and civil rights leaders in November 2015. The agency appears not to have changed its position, and we have not received a meaningful response from HUD addressing our concerns since that meeting. If HUD does not promptly reinstate the mortgage language, we will be forced to consider legal action given the non-transparent and abrupt way the change was made.

The November meeting was not our first attempt to address this problem. We first raised this issue with HUD in March of 2015, and we sent a detailed letter regarding the removal of the language on April 9, 2015. After receiving a June 16, 2015 letter from the Principal Deputy Assistant Secretary on Housing, we sent a more detailed legal memo on September 2, 2015, challenging HUD's legal position on the removal of the language. Moreover, on August 20, 2015, fifty organizations, including national civil rights organizations, housing advocates, and legal aid organizations sent you a letter demanding reinstatement of the language. The November 4, 2015 meeting was at our request. Despite these efforts, we have not received a satisfactory answer regarding why HUD removed the language, and we have not received a response to many of the legal concerns we have raised.

As we have explained in depth, HUD's removal of language from the form note incorporating FHA's loss mitigation requirements undermines homeowners' ability to defend against unnecessary foreclosures, especially in states that lack a judicial foreclosure process. For around twenty-five years, the language, which was found in paragraph 6 of the model note and

paragraph 9 of the model mortgage, was a stable feature of the FHA program, and it limited a lender's ability to pursue foreclosure if the lender had not complied with HUD loss mitigation regulations.<sup>1</sup> In 1988, when HUD initially proposed the language at issue through the Federal Register, HUD recognized that it had already informed non-compliant lenders that they should not foreclose; however, the agency stated that adding the language to the contracts between the borrower and the lender promoted a "major policy" for HUD.<sup>2</sup> Since its inclusion, borrowers seeking to save their homes from foreclosure in instances of non-compliant mortgage servicers have pointed to the specific contract terms. Several court cases upholding homeowners' arguments have focused on the contract language.

Despite the importance of the language, HUD removed it from the forms without providing any notice to the communities it serves that such a change was under consideration and without any opportunity for stakeholders to comment. Although the form language was originally instituted in 1990 through a notice and comment procedure through the Federal Register, it was removed without warning from the forms in connection with the recent drafting of the Single Family Housing Policy handbook. HUD simply posted the revised forms on its website when the final handbook was released without explaining its decision. Even consumer advocates in regular contact with HUD about loss mitigation and other issues were never told that this change was under consideration.

HUD's decision to remove the homeowner-protective language reflects a major policy change that was made without an opportunity for notice and comment, and thus without input from stakeholders such as our clients. In fact, we have no clear information regarding when and how the decision was made. As a result, it is our position that HUD has violated the Administrative Procedure Act in its removal of the contract language.

While it is our understanding that a response to this issue that does not involve the form note and mortgage language may be under consideration, such an approach is, by definition, insufficient. As explained above, homeowners, especially borrowers in non-judicial foreclosure states, rely on the language in the contracts. Guidance outside of the contracts cannot replace language that is specifically included in the agreements between borrowers and their lenders.

This language is of utmost importance to families seeking to save their homes from foreclosure. Courts across the country have relied on this language to stop lenders from foreclosing without following HUD's rules. Simply put, HUD's decision will lead to an increase in unnecessary foreclosures and will damage the MMI fund without providing any significant benefit. As explained in our previous letter, we have conferred with Professor Alan White of CUNY School of Law who agreed with our analysis and concluded that the changes in the forms likely will seriously weaken homeowner defenses to foreclosure based on servicer non-compliance with FHA requirements.

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<sup>1</sup> According to Paragraph 9 of the form mortgage, which was removed, "[i]n many circumstances regulations issued by the Secretary [of HUD] will limit Lender's rights, in the case of payment defaults, to require immediate payment in full if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary." Lender's Guide to the Single Family Mortgage Insurance Process, HUD Handbook 4155.2, at 12-A-7. The promissory note included similar language.

<sup>2</sup> Requirements for Single Family Mortgage Instruments, 53 FR 25434-01 (July 6, 1988).

HUD has a statutory obligation to support and stabilize homeownership while maintaining a solvent insurance fund. HUD's removal of the contract language undermines both of those goals. We urge HUD to restore the original language so that homeowners, communities, and the market all benefit from FHA's significant foreclosure protections.

Sincerely,

Geoff Walsh  
Alys Cohen  
Staff Attorneys  
National Consumer Law Center

Steven Sharpe  
Senior Attorney  
Legal Aid Society of Southwest Ohio