

COMMENTS
to the Department of Housing and Urban Development
on Notice and Request for Comment
**Regarding the Alternative Option for Claim Payment
Announced in Mortgagee Letter 2015-03**

80 FR 6743 (February 3, 2015)
Docket No. FR-5735-N-04

By the
National Consumer Law Center,
on behalf of its low-income clients,
Consumers Union,
California Reinvestment Coalition,
Housing and Economic Rights Advocates,
Institute on Aging, and
The National Housing Law Project.

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The National Consumer Law Center (NCLC), Consumers Union, California Reinvestment Coalition, Housing and Economic Rights Advocates, Institute on Aging and the National Housing Law Project respectfully submit the following comments regarding HUD's alternative option for claim payment for non-borrowing surviving spouses of reverse mortgage borrowers. This new option was announced in Mortgagee Letter 2015-03 for the Home Equity Conversion Mortgage (HECM) program.¹ In this comment we urge the U.S. Department of Housing and Urban Development (HUD) to implement faithfully the federal reverse mortgage statute's mandate to protect non-borrowing surviving spouses from foreclosure and displacement.

Unfortunately, the Mortgagee Optional Election Assignment option outlined in Mortgagee Letter 2015-03 will not protect surviving spouses from displacement and will lead to more foreclosures. Too many surviving spouses of reverse mortgage borrowers have already lost their homes to foreclosure, while many more are currently facing eviction from homes they expected to live in for the rest of their lives. The threat of displacement undermines the specific language of the authorizing statute and the spirit and purpose of the HECM program. The

¹ The **National Consumer Law Center, Inc.** (NCLC) submits the following comments on behalf of its low-income clients. 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 twenty practice treatises and annual supplements 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. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications. Its advocacy division, **Consumers Union**, works for health reform, food and product safety, financial reform, and other consumer issues in Washington, D.C., the states, and in the marketplace. The **California Reinvestment Coalition (CRC)**, based in San Francisco, is a nonprofit membership organization of nonprofit organizations and public agencies across the state of California. We work with community-based organizations to promote the economic revitalization of California's low-income communities and communities of color through access to financial institutions. CRC promotes increased access to credit for affordable housing and community economic development, and to financial services for these communities. CRC and its members have advocated for household and neighborhood stabilization policies and practices designed to keep families in their homes. The **National Housing Law Project** ("NHLP") is a law and advocacy center established in 1968. For over 40 years, NHLP has been dedicated to advancing housing justice for the poor by using the power of the law to increase and preserve the supply of decent affordable housing, to improve existing housing conditions, including physical conditions and management practices, to expand and enforce low-income tenants' and homeowners' rights, and to increase opportunities for racial and ethnic minorities. **Housing and Economic Rights Advocates or HERA** is the only California statewide, 501(c)(3), not-for-profit legal service and advocacy organization with the economic justice mission of ensuring that all people are protected from economic abuses and discrimination that may play into those abuses. Since 1974, the Elder Abuse Prevention Program at the **Institute on Aging** has provided education, outreach, advocacy, and strategic partnerships to prevent and address the abuse of elders and dependent adults in the San Francisco Bay Area. Community members, legal services providers, and social services programs depend upon the Elder Abuse Prevention Program to learn about and understand elder abuse trends and resources available to victims. These comments were written by NCLC attorney Odette Williamson.

program was created to reduce economic hardship and provide elders with sufficient resources to successfully stay in their homes.

We urge HUD to comply with the authorizing statute's mandate to protect the spouses of homeowners. As we explain in these comments, HUD should:

- Disclose the information on which it based its determination of the fiscal impact of the options it has considered. This includes disclosing information about the number of spouses whose names were removed from their homes' titles, and who are a) currently facing foreclosure, or b) may face foreclosure in the future if their spouse dies first.
- Completely rewrite its procedures to provide a wider range of options to protect non-borrowing spouses from foreclosure and displacement.

In Section I of these comments, we describe the difficulties faced by non-borrowing spouses. Section II explains how HUD's regulations and forms augmented and exacerbated the problem. Section III describes why the Mortgagee Optional Election Assignment option outlined in Mortgagee Letter 2015-03 is not an effective solution and will do little to protect non-borrowing spouses from foreclosure and eviction or fulfill the statute's anti-displacement mandate. Finally in Section IV, we outline alternative proposals that HUD can adopt to prevent thousands of elderly spouses from losing their homes.

I. Non-borrowing spouses of HECM borrowers are at risk of foreclosure and eviction.

Potentially thousands of older married couples are at risk of foreclosure, either now or in the future, because only one spouse is listed as a borrower on a reverse mortgage. These couples obtained reverse mortgages on the assurance that the spouse who was not listed as a borrower on the loan could remain in the home after the borrower-spouse dies or moves from the home. When the borrower dies, however, the surviving spouse (typically the wife), is left widowed and facing foreclosure and eviction.²

The problem is grounded in fraud. It is generally the fault of brokers and lenders who deliberately misled elderly victims to sign away their ownership interest in their home at origination. The reasons were either to allow the older spouse to qualify for the reverse mortgage, or to maximize the proceeds from the loan. Borrowers reported to the Consumer Financial Protection Bureau (CFPB), for example, that brokers promised lower rates, additional funds, or a more favorable deal if their spouses' names were not included on the title or reverse mortgage.³ The stories are uniformly the same: the non-borrowing spouse is *always* told that her interests will be protected or her name will be added to the loan at a later date when she reaches

² Numerous distraught non-borrowing spouses have submitted complaints to the CFPB seeking relief from foreclosure. Other non-borrowing spouses tell the agency that they are worried about their ability to remain in their home should the older spouse die first. See Consumer Financial Protection Bureau, Office of Older Americans, *Snapshot of Reverse Mortgage Complaints: December 2011 – December 2014*, February 2015.

³ Consumer Financial Protection Bureau, *Reverse Mortgages, Report to Congress*, June 28, 2012.

the qualifying age.⁴ She belatedly learns the consequences of being removed from the title and loan when she receives a foreclosure notice after the death of her spouse.

Stories of heartache abound, including:

- An elderly California woman who was advised by a loan originator to remove her name from the title to the home she had shared with her husband for nearly 20 years. The originator assured her that her rights would be protected until she reached the qualifying age and her name would be automatically added back on to the title. Unfortunately the couple learned –too late - that this information was false and, now that the husband has passed away, the wife is facing foreclosure.⁵
- An 88-year old woman from Ohio who is facing foreclosure and eviction from her home of twenty years after the death of her 91-year old spouse. The loan officer assured the couple that the wife could remain in the home if the husband died, but that it was necessary to remove her name from the deed to receive more money from the loan.⁶
- A 72-year old woman who was devastated to learn after her husband’s death that her home was in foreclosure. She was never informed that her name was not on the deed or reverse mortgage.⁷

Reverse mortgages are aggressively marketed as safe, government insured loans the purpose of which is to allow older adults to stay in their homes until they die. Married couples rarely understand the consequence of taking the non-borrowing spouse off the loan. The couple does not understand that upon the borrower’s death, the newly widowed spouse must pay the loan in full or 95% of the home’s value, whichever is less, if she wishes to remain in the home. Neither does the couple comprehend that the surviving non-borrowing spouse will not have access to any of the loan proceeds in the form of future monthly payments or an unused line of credit. Most borrowers, especially those who have been married for a long time, would never have taken out a reverse mortgage in only one spouse’s name if they understood the true risk of the loan and that their spouses will end up penniless and facing foreclosure at one of the most difficult times in their lives.

⁴ See *id.* See also Testimony of Karen Hunziker, Federal Reserve Bank of Los Angeles, February 26, 2015; Consumer Financial Protection Bureau, Office of Older Americans, *Snapshot of Reverse Mortgage Complaints: December 2011 – December 2014*, February 2015, at 9, available at http://files.consumerfinance.gov/f/201502_cfpb_report_snapshot-reverse-mortgage-complaints-december-2011-2014.pdf. See also Jessica Silver-Greenberg, *A Risky Lifeline for Elderly is Costing Some Their Homes*, New York Times, Oct. 14, 2012 available at http://www.nytimes.com/2012/10/15/business/reverse-mortgages-costing-some-seniors-their-homes.html?pagewanted=all&_r=0.

⁵ Testimony of Karen Hunziker, Federal Reserve Bank of Los Angeles, February 26, 2015.

⁶ Response from a survey of elder advocates conducted by NCLC, February 2015. The survey was sent to elder advocates, reverse mortgage counselors, attorneys, consumers and others across the United States.

⁷ Jessica Silver-Greenberg, *A Risky Lifeline for Elderly is Costing Some Their Homes*, New York Times, Oct. 14, 2012 available at http://www.nytimes.com/2012/10/15/business/reverse-mortgages-costing-some-seniors-their-homes.html?pagewanted=all&_r=0.

II. HUD failed to protect non-borrowing surviving spouses from foreclosure and displacement when it imposed regulations and guidance in contravention of the plain meaning of the HECM authorizing statute.

The reverse mortgage statute, 12 U.S.C. § 1715z-20(j), specifically prohibits HUD from insuring home equity conversion mortgages unless the mortgage provides that the homeowner's obligation to satisfy the loan is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary. The protections against displacement in subsection (j) extend to the homeowner's spouse even if he or she was not named on the loan.⁸ That is, the death of a homeowner does not trigger the obligation to pay off the mortgage if there is a surviving non-borrowing spouse.

Despite the statute's mandate, for over two decades HUD has insured reverse mortgages which fail to protect the rights of non-borrowing surviving spouses. HUD's regulation, 24 C.F.R. § 206.27(c), states that the mortgage becomes due and payable in full when the mortgagor dies and the property is not the principal residence of at least one surviving mortgagor.⁹ A mortgagor is defined as "each original borrower under a mortgage," excluding the successors or assigns of the borrower.¹⁰ Thus, contrary to the statute, HUD's regulations protect only those spouses who are also borrowers.

The statutorily mandated protections were also missing from the standard mortgage or deed of trust forms written by HUD for use by approved lenders. The standard HECM form calls the loan due and payable upon the death of the borrower and certain other conditions, regardless of whether there is a surviving non-borrowing spouse.¹¹ HUD issued insurance certificates to lenders who provided loans in compliance with its regulations and guidance, all in derogation of the statute's mandate to include the homeowner's spouse in the protections against foreclosure.

Though the agency has long understood the risk that non-borrowing spouses face, until recently it has provided no substantive protection. In 2006 HUD recommended that non-borrowing spouses of prospective HECM borrowers receive counseling to understand the implications of the loan and risks posed by quitclaiming their interest in the home to their spouse.¹² Subsequently, in 2011 HUD updated its counseling requirements to require that non-borrowing spouses attend counseling and sign the counseling certificate, thereby tacitly blessing the dangerous and illegal practice of encouraging spouses to release title to their homes. As highlighted by the CFPB in its recent recitation of complaints received by the agency on reverse

⁸ 12 U.S.C. § 1715z-20(j) ("For the purposes of this subsection, the term "homeowner" includes the spouse of the homeowner.") See also *Bennett v. Donovan*, 4 F. Supp. 3d 5, 12 (D.D.C. 2013) ("Subsection (j) means what it says: the loan obligation is deferred until the homeowner's and the spouse's death.")

⁹ The regulations also add that the loan is "due and payable" if the home is not the principal residence of the mortgagor; and upon the mortgagor's failure to perform an obligation of the mortgage or occupy the property for more than 12 consecutive months. 24 C.F.R. § 206.27(c).

¹⁰ 24 C.F.R. § 206.3.

¹¹ Handbook 4235.1 Rev-1, Appendix 1, Model Mortgage Form (Paragraph 9: Grounds for Acceleration of Debt).

¹² U.S. Dep't Hous. & Urban Dev., Mortgagee Letter 2006-25 (Sept. 28, 2006); see also Mortgagee Letter 2011-31 (August 26, 2011).

mortgages, counseling has been inadequate to address the risk of displacement.¹³ Consumers submitted complaints saying that they were unaware that the younger non-borrowing spouse would likely lose the home if the older spouse dies first.¹⁴ Others worry about their ability to remain in the home should the older spouse die first. The Bureau's report noted in general that older consumers and their families are "confused and frustrated by the terms and conditions of reverse mortgages."¹⁵

HUD was pushed to address this long-neglected issue by several lawsuits alleging that HECM program regulations violated the Administrative Procedures Act, 5 U.S.C. §§ 551, et seq.¹⁶ The United States District Court, in *Bennett v. Donovan*, concluded that the HECM statute only permits HUD to insure reverse mortgages that come due after the death of the homeowner-mortgagor and the spouse of the homeowner, regardless of whether the spouse is a mortgagor.¹⁷ HUD's regulation, 24 C.F.R. § 206.27(c)(1), is contrary to plain meaning of the statute and invalid.¹⁸ Subsequently, in *Plunkett v. Castro*, the Court reaffirmed the holding and weighed the options outlined by the agency to comply with the statutory mandate to protect plaintiffs and similarly situated surviving spouses from displacement.¹⁹

While HUD attempts to protect its fiscal purse (the mortgage insurance fund), it has failed to take common sense steps to protect surviving non-borrowing spouses. Even as HUD figures out how to deal with these issues, it should have been informing current borrowers of the risk of spousal eviction, making available information on how many non-borrowing spouses are at risk of displacement, and providing workable options that will prevent displacement of surviving non-borrowing spouses.

A. HUD has not disclosed how many non-borrowing spouses are at risk of foreclosure and displacement or are currently facing foreclosure.

Though HUD stated that it would consider the cost, legality and practicality of its action with respect to non-borrowing spouses, the agency has not provided data or information to support its analysis, conclusions or recommendations.²⁰ Indeed, the agency has yet to provide information on the scope of the problem. Nor has HUD disclosed information regarding the actual number of outstanding loans with non-borrowing spouses.

In Mortgage Letter 2015-03, discussed further below, HUD noted that it considered the two options outlined in *Bennett* and *Plunkett* – the Hold Election and the Mortgagee Optional Election Assignment – to address the non-borrowing spouse issue. The agency dismissed the Hold Election option by declaring that the option "when applied to the universe of mortgages

¹³ See Consumer Financial Protection Bureau, Office of Older Americans, *Snapshot of Reverse Mortgage Complaints: December 2011 – December 2014*, Feb. 2015.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Bennett v. Donovan*, 797 F. Supp. 2d 69 (D.D.C. 2011); *Plunkett v. Castro*, 2014 WL 4243384 (D.D.C. Aug. 28, 2014).

¹⁷ *Bennett v. Donovan*, 4 F. Supp. 3d 5, 7 (D.D.C. 2013).

¹⁸ *Id.* at 8.

¹⁹ *Plunkett v. Castro*, 2014 WL 4243384 (D.D.C. Aug. 28, 2014).

²⁰ See U.S. Dep't Hous. & Urban Dev., Mortgage Letter 2015-03 (Jan. 29, 2015).

involving non-borrowing spouses of borrowers imposes a financial risk to the insurance funds that is simply too great.”²¹ Mortgagee Letter 2015-03, however, lacks any foundation for this conclusion. There is no discussion of the number of loans at issue; the number of surviving spouses potentially impacted; the cost of the proposed option as compared to its alternative; or a breakdown of the anticipated impact on the insurance fund. The agency did not provide or cite any data, information or independent analysis to back up its recommendation. Rather, in its Third Determination on Remand, HUD states that its risk analysis of pre-August 4, 2015 HECMs is based on estimates of the percent of married senior homeowners and age difference of the spouses culled from the 2010 Survey of Consumer Finances.²² Based on the Survey’s data the agency concluded that 20% of married seniors in the HECM program have non-borrowing spouses, but the agency did not disclose the actual number of HECMs represented by this percent or how it computed this figure.

Mortgagee Letter 2015-03 represents a substantial amendment to the HECM program regulations. HUD has the authority to amend its regulations under the Reverse Mortgage Stabilization Act (RMSA) of 2013, 12 U.S.C. § 1715z-20(h), but HUD’s actions must be “necessary to improve fiscal safety and soundness of program.” At a minimum, satisfaction of this standard requires the recitation of the basic information underpinning the summary conclusion that a particular action will improve the fiscal soundness of the program. Just as importantly, any proposed solution must be evaluated against the statute’s twin mandate to protect non-borrowing spouses from displacement and to preserve the fiscal soundness of the program.

The key information that HUD should disclose to enable the parties to assess its proposal and the impact of its proposal on borrowers, non-borrowing spouses, and the FHA insurance fund includes, but is not limited to the following:

For HECM loans with an FHA case number assigned prior to August 4, 2014:

- the total number of loans;
- the number of HECM loans with a single borrower;
- the number of HECM loans with a single borrower where documents or other information indicate that the borrower was married at the time of origination, and the borrower is currently married;
- the number of HECM loans with a single borrower that are in foreclosure where there is a spouse not listed on the mortgage who currently lives in the home;
- The age of the borrower, and the age of the non-borrowing spouse (if available) at origination; and
- The current principal balance and estimated appraised value of the homes securing a loan with a non-borrowing spouse.

Much of this information appears to be readily available in servicers’ loan files.²³ One servicer noted that a fairly small portion of the reverse mortgage portfolio that it services

²¹ *Id.*

²² Determination on Remand, *Plunkett v. Castro*, Civil Action No. 14-00326 (D.D.C. Feb. 5, 2015).

²³ Some of this information has been requested by the California Reinvestment Coalition as part of its November 19, 2014 Freedom of Information Act (FOIA) request to HUD. See Letter from Kevin Stein, Associate Director,

includes a spouse who was not included as a borrower on the loan at the time of origination.²⁴ In *Bennett v. Donovan*, the industry trade association, NRMLA, estimated that there are approximately 12,000 single spouse reverse mortgages of the approximately 450,000 loans serviced by its member organizations. This estimate may overstate the number of spouses subject to HUD's policy option outlined in Mortgagee Letter 2015-03, as it includes spouses acquired after the origination of the loan.²⁵

HUD should make information regarding HECMs with non-borrowing spouses available online so that advocates and others can truly assess the impact of its proposal to deal with this issue. We understand the constraints that various proposals may have on the fiscal purse, but HUD should make the real numbers available so that we can assist with ideas for proposals to resolve the problem.

B. HUD's attempt to prevent foreclosure and displacement of non-borrowing spouses on HECM loans originated prior to August 4, 2014 has been ineffective.

Non-borrowing spouses facing foreclosure of a HECM after the death of a spouse and those worried about foreclosure in the future have yet to be presented with a workable option that will ensure that they can remain in their homes. In its Second Determination on Remand, HUD introduced the Mortgagee Optional Election (MOE) as an alternative, voluntary remedy for the six named plaintiffs in *Bennett* and *Plunkett*.²⁶ With the MOE a lender may elect to assign the HECM mortgage to HUD if the plaintiff and loan meet certain conditions. The fact that none of the six named plaintiffs at the time of the remand was eligible for the MOE is an indication that it is an unworkable solution.

To be eligible to benefit from the MOE and save one's home from foreclosure, the MOE requires that five conditions be met. One condition, called the PLF, was noted by the Court to be "difficult, if not impossible, for the named plaintiffs and other surviving spouses to meet."

The PLF test requires that: "[t]he non-borrowing spouse must have had a Principal Limit Factor ("PLF") greater than or equal to the PLF of the HECM borrowing spouse at the date of origination or the non-borrowing spouse's current PLF is greater than the current unpaid principal balance." The PLF is an actuarial variable based in part on the age of the borrower. An older borrower will have a higher PLF than his non-borrowing spouse at the time the HECM is originated. This means that younger non-borrowing spouses will likely fail this first prong of the test. Indeed, in almost all situations, it was precisely because the non-borrowing spouse was

California Reinvestment Coalition to Janet Yellen, Chair, Federal Reserve Board of Governors (Nov. 25, 2014) available at

[http://calreinvest.org/system/resources/W1siZiIsIjIwMTQvMTIvMTYvMDdfNDVfNTJfMTMzX0NSQ19Db21tZW50X0ldHRlc19Ob3ZfMjVfMjAxNF8ucGRmI1d/CRC%20Comment%20Letter%20\(Nov%2025%202014\).pdf](http://calreinvest.org/system/resources/W1siZiIsIjIwMTQvMTIvMTYvMDdfNDVfNTJfMTMzX0NSQ19Db21tZW50X0ldHRlc19Ob3ZfMjVfMjAxNF8ucGRmI1d/CRC%20Comment%20Letter%20(Nov%2025%202014).pdf).

²⁴ Letter from Joseph M. Otting, President and CEO, OneWest Bank, N.A. to Western District Office, Office of the Comptroller of the Currency (January 23, 2015), available at <http://www.occ.treas.gov/topics/licensing/corporate-activities-weekly-bulletin/OneWest%20Response%20to%20Reverse%20Mortgage%20Servicing%20Comment.pdf>

²⁵ See Brief of Amicus Curiae National Reverse Mortgage Lenders Association's Opposition to Plaintiffs' Motion for Summary Judgment, *Bennett v. Donovan*, F. Supp. 3d 5, 7 (D.D.C. 2013).

²⁶ Determination on Remand, *Plunkett v. Castro*, Civil Action No. 14-00326 (D.D.C. June 24, 2014).

younger than she was removed from the title to her home – thereby allowing the PLF of the only borrower to be higher. It is difficult to conceive of a situation in which a dispossessed spouse, who was married to the mortgagor at the time the loan was first made, could ever meet HUD's PLF test.

To meet the alternative second prong of the PLF test, the non-borrowing spouse would have to pay down a part of the loan to achieve a current principal balance that is no higher than it would have been had the original PLF been calculated using the non-borrowing spouse's age. The requirement to come up with a large sum of money quickly to pay down the loan is impossible for many newly widowed non-borrowing spouses.

In FHA INFO #14-34, issued June 25, 2014, HUD offered lenders an indefinite extension of the foreclosure timeframe on loans with a surviving spouse if lenders elected a similar flawed option. This indefinite extension was conditioned on the satisfaction of six conditions. These conditions included a PLF test that would require, if the non-borrowing spouse is younger than the borrower, repayment of a portion of the principal. HUD did not provide guidance to servicers, however, on whether this repayment was allowed and how to calculate a non-borrowing spouse's Principal Limit Factor. This created confusion and concern among servicers that HUD would impose a financial penalty if it later determined that a foreclosure extension was improperly granted because of the lender's miscalculation of the PLF.²⁷ The offer to extend the foreclosure timeframe through this option was only temporary, while HUD reviewed its policies with respect to non-borrowing spouses. Furthermore, it is unclear whether any lender elected this option, evaluated its loan files for possible candidates, or even informed surviving spouses that this option existed.

The second option available to the six named plaintiffs in *Bennett* and *Plunkett* is the Trigger Inapplicability Decision (TID) or Hold Election. This option arose as an automatic result of the court's invalidation of 24 C.F.R. § 206.27(c)(1); the death of the borrower is no longer a triggering event for the foreclosure requirements in 24 C.F.R. § 206.125. Lenders may elect to hold the HECM mortgages at issue until the loan reaches 98% of the maximum claim amount, at which time the lender may assign the loan to HUD without a financial penalty. Though HUD brought this option to the attention of the court and actually trumpeted its availability, it refused to acknowledge that this option is available to all similarly situated surviving spouses. The Court remanded the issue to HUD to justify its overly narrow interpretation of the Court's decision. However, in its Third Determination on Remand and Mortgagee Letter 2015-03, HUD has still refused to take up the Court's invitation to justify why the Hold Election does not apply to all surviving spouses, and instead has recycled the failed MOE option.

²⁷ See Letter from Joseph M. Otting, President and CEO, OneWest Bank, N.A. to Western District Office, Office of the Comptroller of the Currency (January 23, 2015), available at <http://www.occ.treas.gov/topics/licensing/corporate-activities-weekly-bulletin/OneWest%20Response%20to%20Reverse%20Mortgage%20Servicing%20Comment.pdf>

III. The Mortgagee Optional Election Assignment option outlined in Mortgagee Letter 2015-03 is not a solution and it will neither protect non-borrowing spouses from foreclosure nor fulfill the statute’s anti-displacement mandate.

Mortgagee Letter 2015-03 contains a new, alternative method to address the problem, called the Mortgagee Optional Election Assignment. But, like its predecessors it too fails to protect non-borrowing spouses, and does not fulfill Subsection (j)’s anti-displacement mandate. The deficits that plagued previous iterations of the MOE remain. Few surviving spouses will meet this version’s stringent guidelines. Indeed, in reviewing this option, the CFPB concluded “[b]ecause of the complex limitations on eligibility and the amount of servicer discretion, it is unlikely that many non-borrowing spouses with pre-August 4, 2014, HECMs will receive a deferral.”²⁸

As with past MOEs a lender may elect to assign the mortgage to HUD if the loan and the non-borrowing spouse meet certain requirements. Early assignment of the mortgage to the agency would satisfy the claim of the lender, and defer the due and payable status of the loan until the death of the non-borrowing spouse, under certain conditions.²⁹ Like its predecessor, this MOE Assignment option contains an ill-defined PLF test that will disqualify most non-borrowing spouses. Other flaws, as discussed more fully below, will also limit its usefulness

HUD has again failed to provide lenders with clear guidance on how to make the key financial calculations necessary to elect the MOE Assignment. Under Mortgagee Letter 2015-03, a lender may not assign a loan to HUD unless the eligible non-borrowing spouse would have had a PLF greater than or equal to the PLF of the HECM borrower spouse (Factor Test), or the non-borrowing spouse’s PLF would have resulted in a current principal limit that is greater than or equal to the current unpaid principal balance (Principal Limit Test). Though the letter clarifies that a payment may be made to reduce the unpaid principal balance to meet the requirements of the Principal Limit Test; it does not provide guidance on how to calculate this payment. Nor, according to lenders, did the agency clarify the method servicers should use to calculate the principal limit for non-borrowing spouses.³⁰

The MOE Assignment is voluntary and exercised solely at the discretion of the lender. The lender must either elect the MOE Assignment or foreclose according to the contract.³¹ Lenders have declared, however, that “Mortgagee Letter 2015-03 does not adequately address the very issue at which it was aimed,” namely the calculation necessary to make a HECM eligible for assignment to HUD.³² Despite this lack of guidance, lenders are asked to certify that the information provided in connection with the assignment is true and correct, and indemnify

²⁸ Consumer Financial Protection Bureau, Office of Older Americans, *Snapshot of Reverse Mortgage Complaints: December 2011 – December 2014*, February 2015, available at http://files.consumerfinance.gov/f/201502_cfpb_report_snapshot-reverse-mortgage-complaints-december-2011-2014.pdf

²⁹ HUD regulations allow lenders to file an insurance claim if the lender forecloses on the property, the mortgage is assigned to HUD, or the borrower sells the property for less than the mortgage balance. 24 C.F.R. § 206.123. *See also* 24 C.F.R. §§ 206.127, 129.

³⁰ Mortgage Servicing News, *New HECM Rules for Surviving Spouses Fall Short* (Feb. 23, 2015).

³¹ U.S. Dep’t Hous. & Urban Dev., Mortgagee Letter 2015-03, at 4 (Jan. 29, 2015).

³² Mortgage Servicing News, *New HECM Rules for Surviving Spouses Fall Short* (Feb. 23, 2015).

HUD for any errors.³³ Lenders will continue to face uncertainty and risk regarding the MOE option and will foreclose on a loan rather than suffer a financial penalty. In other words, lenders are likely to choose the clear path of foreclosure rather than the legal risk involved in the MOE Assignment. The eviction of surviving spouses is the inevitable result.

In the unlikely event that the lender elects the MOE Assignment, the non-borrowing spouse will face other barriers to its effective implementation. Namely, the still-grieving spouse will immediately have to make a large, lump-sum payment to reduce the unpaid principal balance to meet the requirements of the Principal Limit Test. Given that many older adults turn to reverse mortgages to supplement meager incomes, a surviving spouse is not likely to have the resources to meet this obligation. The same hurdle applies if the couple fell behind on their taxes and insurance. Mortgagee Letter 2015-03 requires that these delinquent amounts, even when they are subject to a repayment plan, be brought current immediately to qualify for the MOE Assignment. A surviving spouse, saddled with funeral and other expenses, is unlikely to have the resources to meet either of these financial challenges, especially if he or she had entered into an affordable repayment plan just to deal with back-owed taxes and insurance.

In Mortgagee Letter 2015-03, HUD considered briefly – but rejected – the Hold Election option’s application to all non-borrowing surviving spouses. The agency has, however, offered the Hold Election to the surviving spouses in *Bennett*, *Plunkett* and *Harris* who sued HUD and obtained court orders invalidating HUD’s regulation.³⁴ This option does not require the surviving spouse to pass a PLF test. HUD has not clearly stated its rationale for treating other similarly situated spouses who are not plaintiffs in a federal court case against HUD differently. In noting HUD’s reluctance to extend the Hold Election to similarly situated non-borrowing spouses, the Court in *Bennett* states that it sees no reason why an “automatic” rule (the Hold Election) is only automatic at the moment an individual sues HUD.³⁵ Rather than focusing on the “automatic” nature of the Hold Election option, the agency declares that it is too costly to implement on a wide-scale basis. As discussed above, missing from Mortgagee Letter 2015-03 is any analysis of the costs of the Hold Election option and if such costs may be offset by rising home values or other factors.

IV. HUD should evaluate a wider range of options to protect non-borrowing spouses from foreclosure and displacement and engage in a transparent analysis of the problem and proposed solutions.

The Mortgagee Optional Election Assignment announced in Mortgagee Letter 2015-03 is an incomplete and inadequate response to the challenge of protecting newly widowed spouses of HECM borrowers from foreclosure and displacement. HUD must develop a comprehensive response to the issue that balances its duty to protect the rights of non-borrowing spouses equally with preserving the fiscal soundness of the HECM program. As an initial step we recommend that HUD take the following actions:

³³ U.S. Dep’t Hous. & Urban Dev., Mortgagee Letter 2015-03, at 14 (Jan. 29, 2015).

³⁴ See *Notice of Filing of FHA Mortgagee Letter 2015-03*, *Harris v. Castro*, No. 1:14-cv-03110 (N.D. Ga.); Letter from Kathleen A. Zadareky, Deputy Assistant Secretary for Single Family Housing, to Tony Ebers, One West Bank National Association (Jan. 20, 2105).

³⁵ *Plunkett v. Castro*, 2014 WL 4243384 (D.D.C. Aug. 28, 2014).

- Delay the implementation of Mortgagee Letter 2015-03. Serious concerns regarding the efficacy of the MOE Assignment option have been raised by advocates, the servicing industry, and the CFPB.
- Offer an indefinite extension of the reasonable diligence foreclosure timeframe for all HECM loans originated prior to August 4, 2014 where there is a non-borrowing spouse, until new guidance is issued.
- Provide notice and information to HECM borrowers and their spouses regarding the risk of displacement and their rights under the HECM statute. Inform non-borrowing spouses currently facing foreclosure of the moratorium on foreclosure and their rights under the HECM statute. The proposed notice and information should be made available for public comment before it is provided to HECM borrowers and their spouses.
- Make all non-confidential data and information publicly available regarding HECM loans originated prior to August 4, 2014, where there is a single borrower who was married at the time of origination or is currently married.

In addition, HUD needs to consider a wider range of options to fulfill the HECM statute's carefully-crafted mandate of keeping HECM borrowers and their spouses in their homes. While developing a true solution is difficult without data or information regarding the scope of the problem, we recommend that HUD consider the following options:

- Allow non-borrowing spouses to remain in the home and pay a portion of the interest accruing on the loan. HUD should accept early assignment of the loan and defer the due and payable status of the loan so long as the non-borrowing spouse pays a portion of the interest accruing on the loan and fulfills the obligations under the mortgage. The amount of interest that the non-borrowing spouse is required to pay should be based on his or her ability to pay.
- Allow surviving spouses to pay money to reduce the unpaid principal balance to meet the requirements of the Principal Limit Test over time, rather than as one large, lump-sum payment. HUD should accept early assignment of the loan and defer the due and payable status of the loan to allow the surviving spouse to pay the necessary amount over a period of years. This flexibility may eliminate a critical barrier for some elders who may have resources to pay down the principal but are unable to come up with a lump-sum payment on short notice.

V. Conclusion

The Mortgagee Optional Election Assignment option in Mortgagee Letter 2015-03 does not provide relief for surviving spouses of reverse mortgage borrowers. HUD should develop more effective solutions that will keep elders in their home and fulfill the true spirit and intent of the HECM authorizing statute.