

March 17, 2023

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7th Street SW  
Room 10276  
Washington, DC 20410-0500

RE: Comments in response to Strengthening the Section 184 Indian Home Loan Guarantee Program, 87 Fed. Reg. 78324, Docket No. FR-5593-P-01

Dear Regulations Division:

On behalf of our low-income clients, we appreciate the opportunity to comment on the proposed regulations for HUD's Section 184 Indian Home Loan Guarantee Program ("Section 184 Program"). Our comments will focus on the default servicing provisions of the proposed rule and will include suggestions aimed at protecting borrowers from foreclosure, which is a goal HUD identified in its proposal.

**We strongly support HUD's decision to promulgate regulations that establish the necessary framework for a successful default servicing program and that supplement the guidance established by the Real Estate Settlement Procedures Act (RESPA). However, we urge HUD to eliminate specific details of loss mitigation eligibility provisions from the regulation because flexibility is necessary to adapt to any volatility that the economy and the mortgage market may face. Instead, as with FHA's use of Mortgagee Letters,<sup>1</sup> HUD should use Public and Indian Housing (PIH) Notices to issue specific eligibility requirements for loss mitigation because issuing PIH Notice does not require a full regulatory process and gives the agency the ability to more quickly adapt its loss mitigation system to the mortgage market.**

FHA's success in avoiding foreclosure during the pandemic demonstrates the value of flexible loss mitigation policy. FHA's regulations do not dictate loss mitigation eligibility criteria.<sup>2</sup> Instead, the regulations identify the types of foreclosure alternatives that are available and give FHA the ability to amend the criteria through Mortgagee Letters and Handbooks.<sup>3</sup> According to 24 C.F.R. § 203.501, "HUD may prescribe conditions and requirements for the appropriate use of these loss mitigation actions, concerning such matters as owner-occupancy, extent of previous defaults, prior use of loss mitigation, and evaluation of the mortgagor's income, credit and property."

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<sup>1</sup> Throughout our comment, when we refer to FHA's program, we are referring to FHA's administration of the Section 203(b) insured loan program.

<sup>2</sup> See, e.g., 24 C.F.R. § 203.501.

<sup>3</sup> See, e.g., U.S. Dep't of Hous. & Urban Dev., 4000.1: FHA Single Family Housing Policy Handbook; Mortgagee Letter 2023-06.

This regulation allowed FHA to adjust policy multiple times during the pandemic in response to changes in the mortgage market (e.g., both decreases and increases in interest rates) without having to complete the full regulatory process. Fannie Mae and Freddie Mac also set their loss mitigation eligibility guidelines through guides that they can easily amend.<sup>4</sup>

Therefore, in order to help borrowers avoid unnecessary foreclosure, we urge HUD to take the following steps:

- Remove forbearance, loan modification, and pre-foreclosure sale eligibility criteria from the regulation and issue updated versions of the guidance in a PIH Notice that can be more easily amended;
- Ensure home retention options are available throughout the foreclosure process so that borrowers who did not reach out or who have a change in circumstances can avoid foreclosure.
- Eliminate loss mitigation timelines covered by RESPA;
- Increase any remaining timelines to factor in servicer use of third-party mailing contractors;
- Ensure that borrowers are protected from foreclosure if there is servicer non-compliance with the loss mitigation regulations.

In order to provide further detail on these recommendations, we make specific suggestions on each proposed regulation below. Our section-by-section comments below will focus on the proposed servicing regulations and will generally not address the remaining sections of the proposed rule. After discussing the servicing regulations, however, we also discuss our support of HUD's proposed regulation banning source of income discrimination.

### **Section-by-Section Comments**

- § 1005.729, Add to the end of the paragraph: "It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed."

Servicers should not proceed with foreclosure unless they have complied with the servicing framework that the regulations create and have fully evaluated borrowers for alternatives to foreclosure. In order to ensure compliance, we propose that HUD incorporate language from FHA's default servicing regulation 24 C.F.R. § 203.500. The language we propose has been in force for FHA-insured servicers since 1997 and has provided important clarity on servicer obligations.<sup>5</sup>

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<sup>4</sup> Fannie Mae's Servicing Guide can be found at <https://servicing-guide.fanniemae.com>. Freddie Mac's Seller/Servicer Guide can be found at <https://guide.freddie.com/app/guide/browse>.

<sup>5</sup> 62 Fed. Reg. 60124 (Nov. 6, 1997).

- §§ 1005.733(a) and (b), Eliminate the sections and rely on RESPA regulations to cover incomplete applications

We encourage HUD to delete proposed §§ 733(a) & (b) because RESPA already provides mandatory guidance to servicers on handling incomplete applications.<sup>6</sup> The proposed section does not provide any additional protections to the borrower and, in fact, imposes an overly-restrictive 14-day time window (from mailing) for the borrower to respond with documents. With servicers using third-party contractors to send mail, borrowers will receive demands for documents with expired deadlines.<sup>7</sup> Additionally, the 14-day evaluation period for servicers provides a significantly shorter window than allowed by RESPA and will lead to an increase in sloppy and faulty loss mitigation applications.<sup>8</sup>

Moreover, promulgating requirements that overlap with RESPA will make it more challenging for HUD to adapt to innovations in RESPA. In response to the CFPB's recent Request for Information on mortgage servicing, we have advocated for revisions to RESPA to allow for more streamlined loss mitigation requirements.<sup>9</sup> The mortgage servicing industry has also advocated for similar approaches. HUD should not bake in new requirements that may soon become outdated if RESPA changes.

- § 1005.733(c)(5), Delete “and that the primary alternative to foreclosure shall be a deed-in-lieu/lease-in-lieu of foreclosure” and replace with “but the servicer may still offer alternative loss mitigation options, subject to applicable Tribal, Federal, or State law or contractual requirements” in order to clarify that loss mitigation is not cut off after the first legal action.

HUD should follow the industry standard and ensure that borrowers may receive loss mitigation options even after foreclosure has been initiated. RESPA provides procedural protections to borrowers seeking relief through a loss mitigation application up to 37 days prior to a foreclosure sale, which is a point in time that is often well beyond the first legal action.<sup>10</sup> FHA allows borrowers to have access to loss mitigations even if the request is submitted less than 37 days before a scheduled sale, subject to servicers' discretion.<sup>11</sup> Fannie Mae and Freddie Mac

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<sup>6</sup> 12 C.F.R. § 1024.41(b)(2)(B).

<sup>7</sup> See NCLC, Comments to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment at 27 (July 10, 2017), <https://www.nclc.org/wp-content/uploads/2022/11/comments-to-cfpb-servicing-assessment-respa.pdf>.

<sup>8</sup> 12 C.F.R. § 1024.41(c)(1).

<sup>9</sup> Comments of the National Consumer Law Center, the Center for Responsible Lending, and the National Housing Law Project on the Request for Information Regarding Mortgage Refinances and Forbearances, 87 Fed. Reg. 58487, Docket No. CFPB-2022-0059 (Nov. 28, 2022), available at <https://www.nclc.org/resources/nclc-crl-nhlp-comment-to-cfpb-on-mortgage-refinances-forbearances/>.

<sup>10</sup> See, e.g., 12 C.F.R. §§ 1024.41(c) & (g)

<sup>11</sup> U.S. Dep't of Hous. & Urban Dev., 4000.1: FHA Single Family Housing Policy Handbook at III(A)(2)(t)(ii).

guidelines even contemplate the possibility of a loss mitigation review within 15 days of a foreclosure sale, again subject to the servicer's discretion.<sup>12</sup>

HUD should not give Section 184 borrowers worse access to home retention loss mitigation options than other borrowers and should allow loss mitigation after initiation of foreclosure. HUD should develop guidelines for proceeding with a loss mitigation review after the foreclosure process has started in line with guidance from FHA, Fannie Mae, and Freddie Mac, but it should provide that guidance in PIH notices and handbooks and not in a regulation.

- § 1005.733(d), Change from “The Borrower must submit its appeal no later than **14 days from the date of notification** of the Servicer's Loss Mitigation determination” to “**30 days from the date of notification**”

Borrowers need more than 14 days from the date of notification to appeal loss mitigation decisions. As discussed above, mortgage servicers generally hire third-party contractors to mail letters, and, as a result, we have seen significant gaps between the date of the notice and the borrowers' receipt of the notice.<sup>13</sup> Given these delays, borrowers with only 14 days to appeal will not have enough time to understand the decision and effectively appeal. This is especially true since the vast majority of borrowers do not have advocates available to help them understand a denial notice. Borrowers need 30 days from the date of the notification to effectively exercise their rights.

- § 1005.739(a), Delete comply with “12 CFR 1024.41” and replace with “1024.41, as it might be amended from time to time, or any additional or successor regulation that governs the same subject matter.”

Given the Consumer Financial Protection Bureau's recent Request for Information (RFI) on loss mitigation,<sup>14</sup> the Bureau may make changes to servicer obligations under a RESPA rulemaking. Therefore, we suggest that HUD expand its coverage beyond the particular regulation and incorporate changes, deletions, or expansions.

- § 1005.739(d), Eliminate the language: “Loss Mitigation review shall, to the greatest extent possible, be based on a full financial assessment of the Borrower at time of default”

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<sup>12</sup> [Freddie Mac Single-Family Seller/Servicer Guide](#) § 9301.28(b), Complete Borrower Response Packages Received After Referral to Foreclosure (eff. Sept. 27, 2021); [Fannie Mae Single-Family Servicing Guide](#), at E-3.4-01, Suspending Foreclosure Proceedings for Workout Negotiations (eff. July 14, 2021).

<sup>13</sup> See NCLC, Comments to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment at 27-28 (July 10, 2017), <https://www.nclc.org/wp-content/uploads/2022/11/comments-to-cfpb-servicing-assessment-respa.pdf>.

<sup>14</sup> See CFPB, Request for Information Regarding Mortgage Refinances and Forbearances, 87 Fed. Reg. 58487 (Sept. 27, 2022).

In response to the pandemic, federally-backed investors provided significant relief to borrowers through streamlined modification offers that did not rely on a full financial assessment of the borrower. Instead, the loss mitigation programs aimed to provide targeted payment reductions that considered only the borrower's monthly payment in determining the terms of the modification and not the borrower's income or debt. Fannie Mae,<sup>15</sup> Freddie Mac,<sup>16</sup> FHA,<sup>17</sup> VA,<sup>18</sup> and USDA<sup>19</sup> have employed modifications in response to the pandemic that used the target payment reduction model.

HUD's proposed § 1005.739(d), by requiring a full financial assessment, may hamper the agency's ability to provide streamlined payment relief modifications. Instead of imposing such an unnecessary limitation, the agency should develop modification criteria through PIH Notices and handbooks that can be changed without the full regulatory process if the agency decides to create a streamlined, target payment modification program.

- § 1005.739(f), Eliminate entire subsection

As discussed throughout the comment, HUD should address the subject matter of proposed regulation at § 1005.739(f) regarding failure of loss mitigation options in a PIH Notice or handbook. FHA addresses these issues in Handbook 4000.1.

If HUD chooses to retain § 1005.739(f), it must extend the extremely tight timelines provided in §§1005.739(f)(1) & (2). The agency should not require borrowers to take any action within 7 days given the complex nature of mortgage servicing and the use of third-party mailing services. We believe 30 days is an appropriate time window as discussed in proposed rule § 1005.733(d),

- § 1005.741(b), Add "and foreclosure process" after "notification process"

As discussed above in response to proposed §1005.733(c)(5), HUD should clarify that it follows the industry standard and allow borrowers to pursue loss mitigation options, including home retention options, even after the foreclosure process has been initiated.

- § 1005.745, Eliminate subsections (b) - (f) and move guidance to a PIH notice

While HUD should establish forbearance as a loss mitigation option, it should follow FHA's lead in 24 C.F.R. § 203.614 and save eligibility criteria for PIH notices and handbooks.

The proposed text of § 1005.745 demonstrates how including eligibility requirements in the regulation unnecessarily hampers agency efforts at creating an effective loss mitigation system.

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<sup>15</sup> Fannie Mae Lender Letter 2021-07 (updated May 4, 2022), available at <https://singlefamily.fanniemae.com>.

<sup>16</sup> Freddie Mac Bulletin 2020-15 (May 13, 2020), available at <https://guide.freddiemac.com>.

<sup>17</sup> See, e.g., FHA, Mortgagee Letter 2023-06 (March 28, 2023),

<sup>18</sup> VA Circular 26-21-13 (July 23, 2021).

<sup>19</sup> USDA, Rural Development, SFH Guaranteed Loan Program Technical Handbook HB-1-3555, § 18.15(B).

Both the formal forbearance and special forbearance sections of § 1005.745 require borrowers to submit supporting documentation in order to obtain forbearance. However, the response to the pandemic demonstrated that it may be valuable to streamline access to forbearance in particular situations and not require documents. The Urban Institute credited forbearance access as one of the key tools that helped avoid a larger pandemic-related foreclosure crisis.<sup>20</sup>

HUD should not close off the possibility of streamlined forbearance through its regulation text and should instead allow streamlined forbearance when necessary. Therefore, HUD should eliminate sections of the proposed rule and issue guidance through PIH notices and handbooks.

- §1005.749(a), Delete “A Section 184 Guaranteed Loan modification may not be used as a means to reinstate the Section 184 Guaranteed Loan prior to sale or assumption.”

Simultaneous modification and assumption is specifically allowed by FHA Handbook 4000.1, and HUD should follow this guidance for the Section 184 program.<sup>21</sup> Successors facing a sudden decrease in family income need access to loss mitigation. They must be able to apply for loan modifications and be evaluated for new loan terms. In addition, successors seeking a loan modification will need to assume the loan once a modification is approved. These assumptions, however, should be processed alongside a modification. Successors should not be required to assume a loan prior to modification, as they will not know whether they will be able to afford the payments. HUD should eliminate any provision not allow simultaneous modification and assumption. The CFPB’s regulations regarding successors recognize this reality and provide procedures for granting successors access to loss mitigation.<sup>22</sup>

- § 1005.749, Eliminate (b) - (e) from the proposed regulation and move guidance to a PIH notice and Replace (b) with language stating “The Servicer must offer the borrower any modification that the borrower is eligible to receive under relevant HUD guidance.

While HUD should establish forbearance as a loss mitigation option, it should follow FHA’s lead in 24 C.F.R. § 203.616 and save eligibility criteria for loan modifications PIH notices and handbooks.

As with the forbearance provisions, the proposed text includes detailed eligibility rules for loan modifications and many of those rules are borrowed from outdated FHA Handbook provisions. For example, FHA no longer requires an assessment of “surplus income,” signatures on trial payment plans, and a twelve months loan seasoning period prior to modification.<sup>23</sup> FHA has removed these requirements in order to minimize barriers to modifications, yet HUD’s proposed rule would make these rules difficult to amend even after, in FHA’s experience, they have weakened loss mitigation. HUD should remove all eligibility requirements from its regulation in

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<sup>20</sup> <https://www.urban.org/sites/default/files/2022-08/Normalizing%20Forbearance.pdf> at 5

<sup>21</sup> U.S. Dep’t of Hous. & Urban Dev., 4000.1: FHA Single Family Housing Policy Handbook at III(A)(2)(j)(A)(4).

<sup>22</sup> See, e.g. 12 C.F.R. § 1024.38(b)(1)(vi)(B).

<sup>23</sup> U.S. Dep’t of Hous. & Urban Dev., 4000.1: FHA Single Family Housing Policy Handbook.

order to avoid cementing outdated guidelines in its program. In order to ensure that servicers offer the proper loan modification offer pursuant to relevant HUD guidance, we have proposed replacement language that does not specify the guidance but incorporates guidance that HUD implements.

- § 1005.751, Eliminate (b) - (u) and move guidance to PIH notices

Consistent with our positions on §§ 1005.745 & .749, we urge HUD to eliminate the significant number of details for the pre-foreclosure sale section from the regulation and move them into a PIH notice. The proposed text for § 1005.751 provides far too many details about the pre-foreclosure sale program and will significantly limit HUD's ability to make any changes.

- § 1005.407(b), Support for source of income protection

In addition to our analysis of the servicing provisions, we support the addition of explicit language requiring that determination of the adequacy of a borrower's income must be made without regard to a borrower's source of income, among other protected characteristics.<sup>24</sup> This provision advances not just the statutory purpose of the program to provide access to sources of financing to Indian families, housing authorities and tribes, but it is also consistent with fair lending provisions which seek to root out discrimination in credit markets.

The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against an applicant on the basis of race, color, religion, national origin, sex, marital status, age, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act.<sup>25</sup> The ECOA also protects applicants if all or a part of an applicant's income is from a public assistance program.<sup>26</sup> Creditors' exclusion or refusal to consider income streams related to a borrower's tribal status has a disproportionately negative impact on indigenous consumers seeking home loans, potentially creating credit deserts for members of communities that rely on such payments.

Creditors should be prohibited from discriminating against such sources of income to the extent these payments represent a public benefit. The Consumer Financial Protection Bureau (CFPB), for example, reminded creditors that their obligation under the ECOA and Regulation B required that they provide non-discriminatory access to credit for mortgage applicants using income from the Section 8 Housing Choice Voucher Homeownership Program.<sup>27</sup> As with the tribal payments, some creditors excluded or refused to consider these vouchers as a source of income, or only accepted the vouchers for certain types of mortgage loans. Discrimination also extends to the benefit verification process, with creditors imposing onerous requirements on beneficiaries of Social Security Disability Insurance, and Supplemental Security Income

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<sup>24</sup> § 1005.407(b); 87 Fed. Reg. 78328, 78352.

<sup>25</sup> 15 U.S.C. § 1691 et seq.

<sup>26</sup> 15 U.S.C. § 1691(a)(2).

<sup>27</sup> CFPB Bulletin 2015-02 (May 11, 2015).

payments.<sup>28</sup> To ensure a robust Section 184 loan program HUD should closely monitor the program to ensure this barrier is truly removed and consumers can fully use any lawful payment or assistance they receive to apply for a loan.

## **Conclusion**

We appreciate the opportunity to comment on the Section 184 loan program, and we strongly support HUD's decision to issue regulations providing a needed framework for loss mitigation. We urge HUD to put itself in the best position for addressing future volatility in the mortgage market by removing specific eligibility requirements from the proposed rule and instead implementing them through PIH notices and handbooks. We also urge HUD to clarify that borrowers must have access to loss mitigation throughout the foreclosure process in line with policies from FHA, Fannie Mae, and Freddie Mac.

Sincerely,

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

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<sup>28</sup> See CFPB Bulletin 2014-03 (Nov. 18, 2014).