

**Comments**  
**of the**  
**National Consumer Law Center (on behalf of its low-income clients)**  
**on**  
**Modernization of Engagement With Mortgagors in Default**  
**88 Fed. Reg. 49392**  
**Docket No. FR-6353-P-01**  
**RIN: 2502-AJ66**  
**September 29, 2023**

On behalf of our low-income clients, we strongly support HUD’s proposal to retain the mandatory meeting that servicers must hold with FHA-insured borrowers early in the default process. Servicers who fail to make the required effort to hold the meeting should not have the right to proceed to foreclosure, and we support HUD’s decision to maintain this standard in its regulations. Moreover, we strongly support HUD’s proposal to eliminate the loophole that allows servicers to avoid the mandatory meeting if they do not have a branch office within 200 miles of the property. Because non-bank servicers without branch offices increasingly service FHA-insured loans, retaining the 200-mile loophole would effectively eliminate the opportunity for a meeting for many borrowers. With the removal of the 200-mile loophole, we recognize that not every mandatory meeting under the rule will be in person. However, HUD must take steps to ensure that the meeting is meaningful as detailed below. Our comments address both the proposed rule and considerations that the Secretary should take into account when determining the manner in which the meeting should be conducted.

**Summary of Comments**

**Mandatory meeting.** The mandatory meeting provides particular value for FHA-insured borrowers and for the Mutual Mortgage Insurance Fund (MMIF). It is FHA’s mission to stabilize and support homeownership for low- to moderate-income borrowers who need specialized assistance in times of need due to their relative lack of resources. Because FHA has developed its own waterfall with concepts like a Partial Claim, the meeting facilitates better borrower understanding of the assistance options available. The recent revisions to the waterfall, which no longer require a full submission of documents before providing relief, make the meeting even more valuable because the borrower and servicer can work together to identify a loss mitigation option during the meeting.

Reports from the HUD Office of Inspector General (OIG) clearly show that improved servicer performance is necessary. According to the reports, FHA-insured servicers persistently failed to

comply with the FHA loss mitigation waterfall.<sup>1</sup> HUD's proposal to retain the mandatory meeting and remove the 200-mile loophole provides a specific opportunity for servicers and borrowers to prepare and fully discuss the options that are available, which will promote compliance. However, we strongly believe that if HUD implements the proposed new rule without effective oversight, it will have the same failed impact as the old rule. HUD should not rely on the servicers' flawed data about homeowner participation in face-to-face meetings either in this rulemaking or when it revises the Handbook to add guidelines for the conduct of the mandatory meetings

**Meeting guidance.** We urge HUD to add guidance to ensure that servicers follow the spirit of 24 C.F.R. § 203.604 and to require a scheduled meeting conducted with at least certain minimal procedural standards. Servicers should not be allowed to simply resend the general outreach letter required under Regulation X. HUD should provide guidance regarding the letter and structure of the meeting in the following ways:

- The servicer must provide specific notice regarding scheduling of the meeting so that borrowers understand what options are offered for the meeting and its purpose;
- The servicer must give the borrowers options of when the meeting will be held so that it does not interfere with their schedules and so borrowers have time to prepare;
- The servicer should provide borrowers with options on how the meeting should be conducted, including an invitation to involve an advocate in the meeting and to hold the meeting in person if feasible;
- The servicer representative who is present must be trained in FHA loss mitigation and have authority to determine eligibility;
- The servicer must document the meeting and share the meeting summary with the borrower;
- The servicer must develop a written plan that describes the concrete steps it has taken to implement the meeting requirement and this plan must be integrated into HUD's Quality Control.

**Language access.** HUD should require servicers to communicate in writing about the revised meeting in the borrower's preferred language and to explicitly offer simultaneous oral or sign language interpretation at the borrower's request, at no additional cost to the borrower. In addition, as noted in recommendations we have made under separate cover,<sup>2</sup> HUD should add to its current regulations by requiring servicers to collect and maintain information on borrower language preference and provide vital loss mitigation information in-language.

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<sup>1</sup> Dept. of Housing and Urban Dev., Office of Inspector General, Servicers Generally Did Not Meet HUD Requirements When Providing Loss Mitigation Assistance to Borrowers With Delinquent FHA-Insured Loans, 2023-KC-0005 (June 13, 2023); U.S. Dep't of Hous. & Urban Dev., Office of Inspector General, Nationstar Generally Did Not Meet HUD Requirements When Providing Loss Mitigation to Borrowers of Delinquent FHA-Insured Loans, 2023-KC-1001 (June 13, 2023); U.S. Dep't of Hous. & Urban Dev., Office of Inspector General, HUD Did Not Have Adequate Controls To Ensure That Servicers Properly Engaged in Loss Mitigation, 2017-LA-0004 (Sept. 14, 2017).

<sup>2</sup> National Consumer Law Center, Group Letter to FHA on Language Access for Borrowers (Nov. 15, 2022), <https://www.nclc.org/resources/group-letter-to-fha-on-language-access-for-borrowers/>.

**Housing counseling referrals.** To improve accessibility, HUD should also continue to refer borrowers to available HUD-approved housing counselors in all communications. Many borrowers will be more comfortable and better able to understand and access their options when they have the assistance of housing counselors during the meetings, whether they are conducted in person, through video-conferencing, or over the phone. HUD should promote the use of housing counseling and ensure that for homeowners who need in-person interaction, the housing counseling agency can meet with the homeowner in person and help to coordinate the internet or phone call with the servicer.

**Homeowner engagement.** We strongly dispute the suggestion by members of industry based on the data HUD cited in its proposed rule that borrowers are not interested in having a meeting with their servicers.<sup>3</sup> These data ignore the frequent failure of mortgage servicers to comply with the current version of 24 C.F.R. § 203.604 as demonstrated by recent HUD OIG reports showing persistent failure of servicers to follow HUD’s waterfall and as supported through years of case law.<sup>4</sup> Even when servicers have complied, their actions often meet the letter, but not the spirit of the regulation and do not facilitate engagement with borrowers.

A few servicers have told HUD that under the current rule they delivered meeting invitations to tens of thousands of borrowers, but meetings eventually occurred with less than one-percent of the recipients. The industry suggests that these staggeringly low participation rates have been due to reliance on outdated “technology.” The implication is that participation will improve if everyone simply uses new technology. We do not share this view of why the current rule failed.

The success of state and local mediation and conference programs for borrowers in foreclosure demonstrates that borrowers want to engage with their servicers. Like the FHA rule, these programs set up face-to-face meetings between borrowers and mortgage servicers. Participation rates in the programs have ranged from twenty to eighty percent of eligible borrowers.<sup>5</sup> The programs have documented high rates of success in avoiding foreclosures. These programs succeed because they set standards and hold servicers accountable for complying with them.

**Quality control.** Regardless of the rule HUD implements, HUD must engage in comprehensive quality control to ensure that servicers follow the rule. Information on the lack of borrower engagement under the current meeting rule was available to HUD for years. If HUD had timely investigated to find the cause of the systemic issues, HUD could have demanded remedial actions from the servicers and followed up with rigorous oversight. If HUD fails to implement effective oversight in the future because it believes that the issues with the current rule result

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<sup>3</sup> See 88 Fed. Reg. at 49393.

<sup>4</sup> See National Consumer Law Center, Home Foreclosures at 6.2 (2d ed. 2023), *updated at* [www.nclc.org/library](http://www.nclc.org/library); Dept. of Housing and Urban Dev., Office of Inspector General, Servicers Generally Did Not Meet HUD Requirements When Providing Loss Mitigation Assistance to Borrowers With Delinquent FHA-Insured Loans, 2023-KC-0005 (June 13, 2023).

<sup>5</sup> See discussion of participation rates in Section 1.c).(i) below.

from technology problems, the revised rule will just as consistently fail to achieve HUD's goals as the current rule does.

We appreciate the opportunity to comment on this proposed regulation, and we look forward to working with you to further develop strategies to help borrowers avoid unnecessary foreclosures.

**1) We strongly support HUD's decision to retain the mandatory meeting for FHA-borrowers and to remove the 200-mile loophole as the mandatory meeting will facilitate foreclosure alternatives under FHA's unique loss mitigation waterfall.**

*a) Summary of the current rule and the proposal*

Under the current version of the mandatory meeting rule, the servicer must hold a "face-to-face" meeting with the borrower before three months on the loan are unpaid.<sup>6</sup> The servicer can satisfy the regulatory requirement without holding the meeting if it makes a "reasonable effort" to arrange the meeting, which is specifically defined in 24 C.F.R. § 203.604(d). To qualify as a reasonable effort, the servicer must offer a face-to-face meeting by mailing a certified letter to the borrower and by making a trip to the home. HUD's handbook allows the servicer to use a third-party vendor to make the trip to the home.<sup>7</sup>

The current rule includes an exemption from the face-to-face meeting requirement if "the mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either."<sup>8</sup> Because nonbank servicers have increasingly taken over the market on FHA servicing, many borrowers are shut out of the mandatory meeting.<sup>9</sup> The current rule does not provide alternative meeting opportunities for borrowers who are not within the 200-mile radius of their mortgage servicer. Those borrowers simply have no access to a mandatory meeting.

The mandatory meeting rule fits within a series of requirements that HUD imposes on servicers to address default early in the process. Servicers must satisfy these requirements before they move to foreclosure. HUD clearly states that "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."<sup>10</sup>

HUD's proposed rule maintains crucial aspects of the mandatory meeting rule while also expanding its scope.<sup>11</sup> The proposed rule maintains the general requirement that servicers must

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<sup>6</sup> 24 C.F.R. § 203.604(b).

<sup>7</sup> See U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, § III(A)(2)(h)(xii) (Aug. 9, 2023).

<sup>8</sup> 24 C.F.R. § 203.604(c)(2). There are additional exemptions from the face-to-face meeting rule; however, the additional exemptions have not been as prominent and are not changing under the proposed rule.

<sup>9</sup> See discussion below at Section 1).b).

<sup>10</sup> 24 C.F.R. § 203.500.

<sup>11</sup> 88 Fed. Reg. 49392 at 49396.

meet with the borrower before three months are past due. It also keeps the meeting requirement within the subpart of rules that servicers must follow as a precondition to foreclosure.

Importantly, HUD's proposal removes the exemption from the meeting requirement for borrowers who are not within 200 miles of their servicer, and it expands the means by which a mortgage servicer can hold the mandatory meeting. According to the proposed rule:

HUD proposes to make it more convenient for mortgagors in default to meet with their mortgagee by updating the requirement that mortgages must have a face-to-face meeting requirement with mortgagors to permit mortgagees to meet with mortgagors who are in default on their mortgage payments either through a face-to-face meeting or other communication methods as determined by the Secretary, including electronic or other remote communication methods such as telephone or video calls.<sup>12</sup>

Under the proposal, the Secretary is to determine the guidelines for how servicers conduct the meeting. The current handbook provides guidance on the steps servicers take to schedule the meeting and on the qualifications of the servicing representative at the meeting; however, it does not provide any options for conducting the meeting other than face-to-face.<sup>13</sup>

Finally, in addition to the requirement that the servicer hold the meeting before three months of payments are past due, the proposed rule states that the meeting should be held "at least 30 days before foreclosure is commenced."<sup>14</sup> Under the previous version of the mortgage servicers argued that the three-month time window was "aspirational" and that post-foreclosure servicing actions would satisfy the rule.<sup>15</sup> The language of the proposed rule further clarifies the obligation.

*b) We strongly support HUD's proposal to maintain the mandatory meeting.*

We strongly support HUD's decision to retain the mandatory meeting between FHA-insured borrowers and servicers early in the default process. The mandatory meeting facilitates effective communication that is necessary due to the nuanced and unique nature of FHA's loss mitigation system. Having the meeting scheduled in advance gives the borrower and the servicing representative the chance to prepare. Falling behind on a mortgage and facing the potential loss of their home will cause significant confusion and fear for borrowers. The mandatory meeting provides a specific opportunity for borrowers to seek clarity and a path forward to stability.

The mandatory meeting helps HUDF satisfy its multiple statutory obligations to stabilize homeownership for low- to moderate-income borrowers and borrowers of color. For all HUD's

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<sup>12</sup> Id at 49394.

<sup>13</sup> See U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, § III(A)(2)(h)(xii) (Aug. 9, 2023)

<sup>14</sup> 88 Fed. Reg. 49392 at 49396.

<sup>15</sup> See, e.g., Wells Fargo Bank v. Awadallah, 41 N.E.3d 481, 488 (Ohio Ct. App. 2015); PNC Mortg. v. Garland, 2014-Ohio-1173, 2014 WL 1325908 (Ohio Ct. App. 2014).

programs, the National Housing Act requires the agency to take actions that support the goal “of a decent home and a suitable living environment for every American family.”<sup>16</sup> With respect to its operation of the FHA-insured loan program, FHA must make decisions “to meet the housing needs of the borrowers that the single family mortgage insurance program under this subchapter is designed to serve.”<sup>17</sup>

Moreover, with respect to any program HUD designs, including its loss mitigation system, the agency has the obligation to affirmatively further fair housing. Under 42 U.S.C. § 3608(e)(5), HUD must “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act].” This obligation is particularly relevant to FHA’s insured loan program because Black and Latino borrowers rely heavily on it to purchase homes. According to HUD’s 2022 annual report to Congress,

Because of FHA’s flexible mortgage qualifications, it has traditionally been a vital source of mortgage credit for households of color. . . .FHA endorsements for mortgages made to Black borrowers comprise over 18 percent of FHA’s total endorsements, roughly three times that of the rest of the market. Similarly, Hispanic borrowers made up 23 percent of FHA’s total endorsements, more than two times the rest of the market, according to 2021 HMDA data.<sup>18</sup>

These statutory obligations require HUD to take into account the needs of their specific borrowers and design systems to promote their borrowers’ success. While the mandatory meeting and other obligations that HUD imposes create additional obligations on lenders, in exchange lenders receive a guarantee on loss and reimbursement of cost.

Intensive early intervention steps, like the mandatory meeting, facilitate HUD’s statutory goals because they improve outcomes for low- to moderate-income borrowers. These borrowers will generally have a smaller cushion to absorb financial hardships and a greater need to evaluate their options, so it is important that servicers have a comprehensive servicing strategy that includes effective outreach. A 2016 HUD’s Office of Policy Development and Research (PD&R) article “Increasing Access to Sustainable Mortgages for Low-Income Borrowers” highlights the benefits of early intervention meetings for sustaining low-income homeownership.<sup>19</sup> Specifically, the report discusses the benefits of high touch servicing employed by Self-Help, a respected

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<sup>16</sup> 42 U.S.C. § 1441a; see also 42 U.S.C. § 1441 (“The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established...”)

<sup>17</sup> 12 U.S.C. § 1708(a)(7).

<sup>18</sup> U.S. Department of Housing and Urban Development, Fiscal Year 2022 Annual Report to Congress on the Financial Status of the MMI Fund at 26 (Nov. 2022).

<sup>19</sup> HUD, Office of Policy Development and Research, “Increasing Access to Sustainable Mortgages for Low-Income Borrowers,” Evidence Matters (Spring 2016), <https://www.huduser.gov/portal/periodicals/em/spring16/highlight3.html>

Community Development Financial Institution, including early intervention steps that Self-Help takes for borrowers.

The mandatory meeting dovetails into HUD's current process under its loss mitigation waterfall. In Mortgagee Letter 2023-03, HUD provided all borrowers access to streamlined pandemic related assistance and suspended FHA-HAMP.<sup>20</sup> This decision changed the method by which servicers determine which option is appropriate. Prior to Mortgagee Letter 2023-03, the servicer had to collect full financial documentation to consider a borrower's eligibility for FHA-HAMP. This made it challenging for the servicer to assess eligibility during a meeting unless the borrower provided necessary documentation prior to the meeting.

However, under the streamlined loss mitigation system that Mortgagee Letter 2023-03 provides, the borrower and servicer determine what is affordable during a conversation without the need to reference documentation. If the borrower has fully recovered and can afford the arrears, the parties can discuss a payment plan, and because the conversation is held early in the process, the payment plan should not substantially increase the borrower's payment. Moreover, if the borrower has not recovered financially, the servicer and borrower can discuss the need for further forbearance. For borrowers who need a loss mitigation option, the servicer does not depend on a borrower's particular income information. Instead, the servicer asks the borrower if they can afford a standalone partial claim and, if not, the servicer moves to a targeted payment reduction modification. These decisions necessarily happen during a conversation and not over a period of time. As a result, having a scheduled meeting with the borrower to decide the appropriate option fits perfectly within the loss mitigation system HUD created. Servicers can let the borrower know in advance that decisions will be made during the meeting and can give the borrower a chance to prepare questions.

HUD's decision to remove the 200-mile loophole will ensure that more borrowers will have access to the meeting with their servicer. According to the Urban Institute, between 2013 and 2016, nonbanks doubled their share of FHA servicing to 70% of the market, and there is no indication that this share has reduced since that time.<sup>21</sup> Because these nonbank servicers have limited branch offices, a large share of FHA-insured borrowers no longer have the right to a mandatory meeting with the significant benefits described above. Removing the 200-mile loophole and allowing for expanded means of conducting the meeting will give all FHA-insured borrowers the same access to the mandatory meeting.

Recent reports show that expanded access to the mandatory meeting could not come at a better time since loss mitigation practice for FHA-insured is not currently providing borrowers with the correct loss mitigation option. In its June 2023 report, entitled "Servicers Generally Did Not Meet HUD Requirements When Providing Loss Mitigation Assistance to Borrowers With Delinquent FHA-Insured Loans," the HUD Office of Inspector General (OIG) found persistent

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<sup>20</sup> HUD Mortgagee Letter 2023-03 (Feb. 13, 2023).

<sup>21</sup> Urban Institute, Mortgage Servicing Collaborative webpage (accessed Sept. 27, 2023), <https://www.urban.org/policy-centers/housing-finance-policy-center/projects/mortgage-servicing-collaborative>

failures by mortgage servicers to give borrowers the correct loss mitigation option. According to the report, of the loans OIG sampled for their review,

**Nearly half of the borrowers did not receive the correct loss mitigation assistance.**

These borrowers did not receive the loss mitigation option for which they were eligible, had their loss mitigation option not calculated properly, or received a loss mitigation option that did not reinstate arrearages, which refers to any amount needed to bring the borrower current.<sup>22</sup>

The OIG's findings demonstrate a serious lack of compliance by mortgage servicers. This level of failure, as the OIG found, creates significant risk for both the HUD fund and for borrowers.<sup>23</sup> Even when borrowers can avoid foreclosure through an incorrect loss mitigation option, the failure of a servicer to provide the correct option means that the borrower did not get the tailored relief they were entitled to receive, which increases the risk of a subsequent default. Expanded access to mandatory meetings, if offered in earnest by trained staff, will improve servicer compliance. Improved servicer performance is sorely needed.<sup>24</sup>

Finally, we support HUD's further clarification that the servicer must conduct the meeting "prior to foreclosure." The mandatory meeting is designed to ensure that servicers consider loss mitigation options early in the process in order to avoid prolonged defaults by borrowers and to minimize risk to the MMI fund. Despite this clear purpose, servicers have frequently argued in court that their post-foreclosure actions satisfy the regulation in the absence of pre-foreclosure compliance. For example, in *Wells Fargo Bank v. Awadallah*, the lender claimed that it did not have to visit the home prior to filing foreclosure because it engaged in a mediation session scheduled by the court after a foreclosure case had been filed.<sup>25</sup> The court rejected this argument, reversing the trial court's issuance of a decree of foreclosure. Advocates continue to face this argument in court and thus, HUD's further clarification is warranted. Loss mitigation is important for borrowers at all stages of default and meditation is an important tool. However, later efforts to address default are not a substitute for the early intervention involved in the mandatory meeting.

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<sup>22</sup> Dept. of Housing and Urban Dev., Office of Inspector General, *Servicers Generally Did Not Meet HUD Requirements When Providing Loss Mitigation Assistance to Borrowers With Delinquent FHA-Insured Loans*, 2023-KC-0005 at 3 (June 13, 2023) (emphasis added). In addition to the analysis of the entire FHA portfolio, HUD OIG made similar findings with respect to a specific servicer. U.S. Dep't of Hous. & Urban Dev., Office of Inspector General, *Nationstar Generally Did Not Meet HUD Requirements When Providing Loss Mitigation to Borrowers of Delinquent FHA-Insured Loans*, 2023-KC-1001 (June 13, 2023)  
<sup>23</sup> *Id.*

<sup>24</sup> In addition to access to expanded meetings, we have advocated for improvements to HUD's Defect Taxonomy, which we believe will improve HUD oversight over servicers. Group Letter to HUD Regarding Defect Taxonomy (July 5, 2022), <https://www.nclc.org/resources/letter-to-hud-regarding-defect-taxonomy/>.

<sup>25</sup> *Wells Fargo Bank v. Awadallah*, 41 N.E.3d 481, 488 (Ohio Ct. App. 2015). See also *Wells Fargo Bank v. Burd*, 2016 WL 6680386 (Ohio Ct. App. Nov. 10, 2016).



By maintaining the mandatory meeting and removing a crucial loophole in the rule that prevented borrowers from accessing the meeting, HUD is taking a critical step to improve servicer performance at a time when HUD oversight representatives found significant non-compliance. The mandatory meeting helps HUD satisfy its statutory obligations to promote stable housing, especially for the communities of color it serves.

- c) *In this rulemaking and any revision of the Handbook, HUD should not rely on servicers' faulty claims that borrowers do not want to engage with their servicers, including in person.*

We support HUD's efforts with the proposed rule as described above, and we strongly agree with the proposal to broaden the methods by which meetings can occur to include options such as videoconferencing. However, we are concerned about the conclusions that HUD appears to be drawing from data about the number of borrowers who, under the former deeply flawed and underenforced rule, took the opportunity to participate in face-to-face meetings.

The data do not support the conclusion that borrowers are apathetic about in-person meetings or would not take advantage of the option to have the mandatory meeting be in person if a well-designed rule were properly enforced. HUD should not rely on that data in this rulemaking or when revising the Handbook to provide guidance about the manner in which the mandatory meeting must be conducted.

- i) Data from mediation conferences show that borrowers want to meet and engage with their servicers

In the Federal Register discussion of the proposed rule, HUD cites to reports from three of its servicers, who claim that virtually no borrowers respond to offers to meet.<sup>26</sup> One servicer informed HUD that in one year it hand-delivered over 50,000 letters inviting borrowers to face-to-face meetings, but in response conducted only fourteen meetings - an acceptance rate of 0.028 percent.<sup>27</sup> A second servicer told HUD that it mailed 53,000 letters and made 18,000 property visits to invite borrowers to face-to-face meetings, but not a single borrower accepted an offer.<sup>28</sup> A third servicer reported that it conducted 145,000 property visits to deliver face-to-face meeting invitations, with only 124 borrowers (0.085%) accepting the offers.<sup>29</sup> According to HUD, these were among the largest servicers of FHA-insured mortgages.

From these servicer reports HUD concluded that it needed to revise the rule because borrowers have demonstrated that they do not want face-to-face meetings with their servicers. Instead, according to HUD, "[m]ortgagors are demonstrating their preference for interacting with mortgagees through technology."<sup>30</sup> This conclusion is based on pure speculation. There is no

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<sup>26</sup> 88 Fed. Reg. at 49393.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

evidence supporting a conclusion that borrowers in default declined face-to-face meetings because they preferred to communicate with their servicers through some particular form of technology.

In fact, abundant data convincingly show that borrowers in default very much want to interact with their mortgage servicers, including through face-to-face meetings. The data also show that these face-to-face interactions produce favorable outcomes for a large number of borrowers, as well as for investors in mortgage loans. Scheduled meetings, including those held face-to-face, are effective tools to prevent unnecessary foreclosures.

- (1) Over the past fifteen years tens of thousands of borrowers in default requested face to face meetings with mortgage servicers and obtained favorable outcomes

Laws in effect in several jurisdictions since 2008 have required that mortgage servicers offer borrowers in default the opportunity for a face-to-face meeting before foreclosures can proceed. Under various state and local laws these meetings may be labeled as “conferences,” “foreclosure diversion,” or “mediation.”<sup>31</sup> Their purpose is to give the borrower an opportunity to meet directly with an individual who has authority to approve the borrower for loss mitigation options that apply to the borrower’s loan. These meeting options have been available in both judicial and non-judicial foreclosure states.

Under most of these programs, servicers must provide borrowers in default with notice of the opportunity to participate in a face-to-face meeting. The borrowers have a certain time to accept the offer. If the borrower accepts, a meeting directly with a servicer representative is scheduled.

The rate at which borrowers accept an offer for a meeting has varied by jurisdiction. However, over the past fifteen years trends have become clear. In jurisdictions at the lower end of the range, between twenty and thirty percent of the borrowers offered the opportunity to have face-to-face meetings choose to do so. This has been true, for example, in Maryland, where approximately 23% of borrowers participate.<sup>32</sup> In Illinois, the meeting option is available in a limited number of judicial circuits, with participation rates averaging around 28% for eligible borrowers.<sup>33</sup> Participation rates have been higher in other states. For example, in Maine rates have varied from year to year: from 2010 through 2019 between 26% and 56% of eligible Maine

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<sup>31</sup> For descriptions of the history and structure of foreclosure conference programs in various jurisdictions, see Alan M. White, Foreclosure Diversion and Mediation in the States, 33 Georgia State L. Rev. 411 (2017); National Consumer Law Center, Rebuilding America: How States Can Save Millions of Homes through Foreclosure Mediation (February 13, 2012), available at <https://www.nclc.org/resources/rebuilding-america-how-states-can-save-millions-of-homes-through-foreclosure-mediation/>

<sup>32</sup> Adam Bednar, Maryland Daily Record, Foreclosure Mediation Not Big Drag on Market (Feb. 12, 2105) referencing data from Maryland Department of Housing and Community Development for 2014-15, at <https://thedailyrecord.com/2015/02/12/data-foreclosure-mediation-not-big-drag-on-housing-market/>

<sup>33</sup> Illinois Resolution Systems Institute, Illinois Foreclosure Mediation Program, Participation and Outcomes, Dec. 31, 2017 <https://s3.amazonaws.com/aboutrsi/591e30fc6e181e166ffd2eb0/FM-Statistical-Report-December-2017.pdf>

borrowers elected to participate in meetings, with a rate of 35% in 2019.<sup>34</sup> In Connecticut, from 2008 through 2020 on average about 40% of borrowers facing foreclosure chose meetings.<sup>35</sup> The Connecticut program reports that twenty-one percent of the borrowers who elected to attend meetings had FHA loans.<sup>36</sup>

In a few localities face-to-face meetings between a borrower and a servicer are set up automatically when a foreclosure begins. Participation rates in these programs have been particularly high. These include the programs in Delaware (averaging above 54% participation for 2012-2022),<sup>37</sup> and in Philadelphia County (70%).<sup>38</sup> In New York, where conferences for borrowers in foreclosure have been set up automatically since 2010, up to eighty percent of eligible borrowers appear for conferences with their servicers.<sup>39</sup>

These percentages mean that a large number of borrowers chose to engage in face-to-face meetings with their servicers. From 2008 to mid-2023, over 33,000 homeowners completed meetings under Connecticut's mediation program.<sup>40</sup> New York's program held 38,753 conference meetings in 2019. In its busiest year of 2014, the New York conference program scheduled 118,394 meetings between borrowers and servicers.<sup>41</sup>

Scheduled meetings, including those held face-to-face, are effective in preventing foreclosures. They increase the likelihood that the servicer will follow the investor's loss mitigation guidelines. Unnecessary foreclosures decrease. For example, data provided by the Connecticut courts show that of the cases that have completed mediation, eighty-seven percent reached a settlement, with seventy-one percent resulting in settlements in which the borrower stayed in the

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<sup>34</sup> State of Maine Judicial Branch Foreclosure Diversion Program Report to Joint Standing Committee on Health Coverage, Insurance, and Financial Services and the Joint Standing Committee on the Judiciary at 3 (Feb. 14, 2020), available at <https://www.courts.maine.gov/about/reports/fdp-report-2020.pdf>.

<sup>35</sup> Office of the Chief Court Administrator, Report to the General Assembly, Connecticut Foreclosure Mediation Program at 7 (Mar. 1, 2021), available at <https://jud.ct.gov/statistics/fmp/>

<sup>36</sup> Id. p. 16.

<sup>37</sup> Attorney General of Delaware, Fraud and Consumer Protection Division, Delaware Automatic Residential Mortgage Foreclosure Mediation Program Quarterly Participation Overviews 2012-2022, available at <https://attorneygeneral.delaware.gov/fraud/cpu/automediation/>.

<sup>38</sup> The Reinvestment Fund, Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings at 9 (June 2011), available at <https://www.reinvestment.com/insights/philadelphia-residential-mortgage-foreclosure-diversion-program-initial-report-of-findings/>.

<sup>39</sup> State of New York. Unified Court System, 2010 Report of the Chief Administrator of the Courts at 8 (Nov. 2010), available at <https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/foreclosurereportnov2010.pdf>.

<sup>40</sup> State of Connecticut Judicial Branch, Results of the Foreclosure Mediation Program since its Inception, Outcomes July 1, 2008 – July 31, 2023, available at <https://jud.ct.gov/statistics/fmp/>

<sup>41</sup> State of New York Unified Court System, 2019 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases at 8, available at <https://ww2.nycourts.gov/sites/default/files/document/files/2019-12/ForeclosureAnnualReport2019.pdf> ; State of New York Unified Court System, 2015 Report of the Chief Administrator of the Courts at 4 (2015), available at <https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/2015ForeclosureReport.pdf>

home.<sup>42</sup> In Maine, 84% of the mediated cases concluded in a settlement that allowed the borrower to keep the home through a modification, reinstatement, or payment plan.<sup>43</sup> In Delaware 63.14% of the cases mediated from 2012 through 2022 had a favorable outcome, defined as one that avoided foreclosure.<sup>44</sup> A study of the Philadelphia foreclosure diversion program showed that one-third of the cases settled with a solution that allowed the borrower to retain homeownership for the long-term.<sup>45</sup> In New York, during the years 2014-15 when over 100,000 conference sessions were held annually, servicers approved loan modifications in 23% of the cases.<sup>46</sup> Modifications provide borrowers with the best chance to avoid foreclosure and remain in their home; therefore, even though the 23% figure is smaller than the percentages from other states, it represents significant success for the program.

While the data collected about the existing state and local laws that facilitate meetings is of great importance in determining the proper conclusions to draw from the servicers' data, it is essential to keep in mind that these laws are not a substitute for the requirements of 24 C.F.R. § 203.604. Fewer than a dozen states have enacted a legal requirement for servicers to offer a face-to-face meeting to borrowers in default. Typically, these state and local requirements are triggered by the servicer's taking a concrete step to begin foreclosure proceedings. The loan has invariably been accelerated and foreclosure documents have been filed or recorded. HUD's requirement provides the significant benefit to borrowers that the meeting occurs *before* acceleration and foreclosure. Substantial costs and fees have not been added to the arrearage. If servicers comply with HUD's rule, the arrearage at the time of a meeting is likely to be of short duration and therefore more manageable through timely application of FHA's loss mitigation waterfall.<sup>47</sup>

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<sup>42</sup> State of Connecticut Judicial Branch, Results of the Foreclosure Mediation Program Since its Inception, Outcomes July 1, 2008 – July 31, 2023, available at <https://jud.ct.gov/statistics/fmp/> .

<sup>43</sup> State of Maine Judicial Branch Foreclosure Diversion Program Report to Joint Standing Committee on Health Coverage, Insurance, and Financial Services and the Joint Standing Committee on the Judiciary at 5(Feb. 14, 2020), available at <https://www.courts.maine.gov/about/reports/fdp-report-2020.pdf> .

<sup>44</sup> Attorney General of Delaware, Fraud and Consumer Protection Division, Delaware Automatic Residential Mortgage Foreclosure Mediation Program Quarterly Participation Overviews 2012-2022, available at <https://attorneygeneral.delaware.gov/fraud/cpu/automediation/> .

<sup>45</sup> The Reinvestment Fund, Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings at 9-11 (June 2011), available at <https://www.reinvestment.com/insights/philadelphia-residential-mortgage-foreclosure-diversion-program-initial-report-of-findings/9-11> .

<sup>46</sup> State of New York Unified Court System, 2015 Report of the Chief Administrator of the Courts at 4 (2015), available at <https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/2015ForeclosureReport.pdf> .

<sup>47</sup> HUD recognized the importance of communications as early as possible in the default context when it announced its intent to consider revisions to § 203.604 in 2007: "However, the Department strongly believes that there must be a minimum standard for mortgagees to attempt to contact a delinquent mortgagor. The earlier the mortgagee reaches a delinquent mortgagor to discuss options for bringing the mortgage current, the greater are its chances in resolving the delinquency." Revisions to the Single Family Mortgage Insurance Program, 72 Fed. Reg. 56155, 56,159 (Oct. 2, 2007).

- (2) While technology may expand borrower opportunities for meetings, it is not the solution to any issue regarding a lack of borrower participation in mandatory meetings.

Given this data, it is difficult to understand how HUD came to the conclusion that borrowers in default do not want to meet directly with their servicers and instead have demonstrated a “preference” for some undefined technology in order to meet.

HUD notes that the use of automated processes to originate mortgages is growing, and posits that this is because of borrower preference and that borrowers therefore also prefer interacting with their servicers about foreclosure without face-to-face contact.<sup>48</sup> This logical leap is unjustified, given the fundamental differences between the two contexts. Borrowers who have fallen behind in payments often face barriers of shame and fear when a servicer contacts them. Almost invariably the servicer is an entity that the borrower did not choose. Establishing trust is a much greater concern in the default servicing context than is the case for loan origination. The attitude of servicer staff and the resources the servicer devotes to communication can make a critical difference for outcomes in default servicing.

Moreover, HUD’s conclusion is inconsistent with the data about borrower attendance at state and local mediation programs cited in the preceding section. If borrowers decline to attend face-to-face meetings that might save their homes because they prefer other technologies, one would expect that to be reflected in the participation data for those state and local programs. Note that the data from those programs runs from as early as 2008, when most borrowers probably did not have access to high-quality videoconferencing technology, to as late as 2022—well into the zoom era when videoconferencing is widely available in a variety of forms. That borrowers continued to show up for in-person mediation sessions in the 2020’s shows that the existence of new technologies does not mean that they no longer want or value in-person meetings.

Another reason that an analogy between online mortgage origination and foreclosure avoidance is unreliable is that borrowers facing foreclosure are in a starkly different economic situation than mortgage applicants. Borrowers facing foreclosure are in a financial crisis. Among borrowers, they are probably the most likely to have lost their home internet access. Their smartphones and computers may be broken, unreliable, or out-of-date. They may be able to afford a bus ticket to get downtown for a face-to-face meeting, but not the cost of restoring their internet service or to paying for a new computer or smartphone.

- ii) Widespread failure by servicers to comply with the HUD’s current rule undercut the data they provided.

Another reason that HUD should not rely on servicer data on borrower engagement with the face-to-face meeting in this rulemaking or subsequent development of guidance is that HUD

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<sup>48</sup> 88 Fed Reg. at 49394.

appears to have assumed that the mortgage servicers providing the data have properly complied with the face-to-face meeting regulation. This assumption is not warranted given significant and persistent evidence of servicer non-compliance with HUD loss mitigation guidelines, including the face-to-face meeting rule.

Oversight from the HUD Office of Inspector General has shown consistent problems with servicer compliance with HUD regulations and servicer reporting of their own compliance to HUD. In its October 2016 Report, HUD OIG reviewed a sample of FHA insurance claims paid out over a five-year period.<sup>49</sup> What was particularly disturbing about the OIG's findings was the frequency with which servicers misrepresented their actions when filing insurance claims with HUD. According to the OIG's survey sample, in approximately 45% of the cases in which the servicers should have reduced their claim amounts due to their non-compliance with HUD guidelines, they failed to do so. Instead, they asked for and received full insurance claims as if they had complied with the guidelines.<sup>50</sup>

HUD OIG's September 2017 report entitled "HUD Did Not Have Adequate Controls To Ensure That Servicers Properly Engaged in Loss Mitigation" found that that servicers frequently failed to properly engage in loss mitigation and that HUD failed to meet its oversight obligations.<sup>51</sup> The report found that almost 30% of claims that HUD OIG reviewed had "significant servicing deficiencies."<sup>52</sup> Specifically, with respect to the face-to-face meeting rule, the audit found that in 17% of cases, "there was no attempt for a face-to-face interview with delinquent borrowers or it was not attempted within the required timeframe. Regulations at 24 CFR 203.604(b) require servicers to attempt the interview before three unpaid payments."<sup>53</sup>

Significant issues with FHA-servicer compliance have continued. As described above, the June 13, 2023 HUD OIG report found that "nearly half of the borrowers did not receive the correct loss mitigation assistance."<sup>54</sup> While this report focuses on specific loss mitigation options and not outreach requirements such as the mandatory meeting rule, there is no reason to believe that servicers are better at complying with the face-to-face meeting rule than the waterfall provisions. Rather, the report suggests continued problems with FHA servicing as outlined in their 2016 and 2017 reports and calls into question HUD's reliance on servicer data on compliance.

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<sup>49</sup> U.S. Department of Housing and Urban Development, Office of Inspector General, Federal Housing Administration, Washington, DC, Single-Family Mortgage Insurance Claims (October 14, 2016), <https://www.hudoig.gov/sites/default/files/documents/2017-KC-0001.pdf>

<sup>50</sup> *Id.* at 7

<sup>51</sup> U.S. Dep't of Hous. & Urban Dev., Office of Inspector General, HUD Did Not Have Adequate Controls To Ensure That Servicers Properly Engaged in Loss Mitigation, 2017-LA-0004

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.* at 8.

<sup>54</sup> Dept. of Housing and Urban Dev., Office of Inspector General, Servicers Generally Did Not Meet HUD Requirements When Providing Loss Mitigation Assistance to Borrowers With Delinquent FHA-Insured Loans, 2023-KC-0005 at 3 (June 13, 2023) (emphasis added).

Case law regarding FHA-insured foreclosures further confirms servicer resistance to compliance with the mandatory meeting rule. Judicial decisions show servicers failing to provide notice by certified mail,<sup>55</sup> ignoring the obligation to visit the home to arrange a meeting,<sup>56</sup> seeking to use mediation or some other event as a substitute for a meeting,<sup>57</sup> failing to keep proper records of what they are doing,<sup>58</sup> and simply taking no action to properly arrange a mandatory meeting when they are required to do so.<sup>59</sup> While these cases involve individual borrowers, HUD should assume that servicing failures are not anomalous. Moreover, these cases are illustrative in light of multiple HUD OIG reports over a period of years that show servicers failing to comply with the mandatory meeting rule. Given all of this, HUD simply should not rely on servicer data in making policy decisions.

iii) HUD Must Learn the Right Lessons from the Failure of the Current Meeting Rule

We agree with HUD's characterization of the goal of the § 203.604 meeting:

The meeting requirement is the mortgagor's opportunity to meet directly with trained mortgagee staff who can provide information about FHA loss mitigation options to assist the mortgagor in curing the default episode and bringing the FHA-insured mortgage current or otherwise avoiding foreclosure.<sup>60</sup>

In order to comply with the proposed rule, a servicer needs to have in place a structure that allows a borrower to meet directly with trained servicer staff who are able to assess eligibility for all available FHA loss mitigation options, which we will describe below.

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<sup>55</sup> Bank of Am., N.A. v. Edwards, 2017-Ohio-4343, 93 N.E.3d 212 (Ohio Ct. App. 2017); RBS Citizens, NA v. Sharp, 47 N.E.3d 170, 176 (Ohio Ct. App. 2015); U.S. Bank, N.A. v. Detweiler, 191 Ohio App. 3d 464, 473, 946 N.E.2d 777, 784 (Ohio Ct. App. 2010); Washington Mut. Bank v. Mahaffey, 2003-Ohio-4422, 154 Ohio App. 3d 44, 50, 796 N.E.2d 39, 43 (Ohio Ct. App. 2003).

<sup>56</sup> HSBC Bank USA, N.A. v. Teed, 48 Misc. 3d 194, 197, 4 N.Y.S.3d 826, 828 (N.Y. Co. Ct. 2014); Wells Fargo Bank, N.A. v. Horn, 2016-Ohio-1573, at ¶¶ 14 (Ohio Ct. App. 2016).

<sup>57</sup> Wells Fargo Bank, N.A. v. Awadallah, 2015-Ohio-3753, ¶ 29, 41 N.E.3d 481, 488 (Ohio Ct. App. 2015); Wells Fargo Bank, N.A. v. Cook, 87 Mass. App. Ct. 382, 387, 31 N.E.3d 1125, 1130 (2015); HSBC Bank USA, Natl. Tr. Co. v. Teagarden, 2013-Ohio-5816, ¶ 62, 6 N.E.3d 678, 689 (Ohio Ct. App. 2013).

<sup>58</sup> PNC Mortg., a Div. of PNC Bank, Nat'l Ass'n v. Krynicki, 2017-Ohio-808, 85 N.E.3d 1024, 1031 (Ohio Ct. App. 2017).

<sup>59</sup> Bank of Am., N.A. v. Spencer, 166 A.D.3d 1514, 1515, 86 N.Y.S.3d 692, 694 (2018); Derouin v. Universal Am. Mortg. Co., LLC, 254 So. 3d 595, 602 (Fla. Dist. Ct. App. 2018); Chruszcz v. Wells Fargo Bank, N.A., 250 So. 3d 766, 768 (Fla. Dist. Ct. App. 2018); McIntosh v. Wells Fargo Bank, N.A., 226 So. 3d 377, 379 (Fla. Dist. Ct. App. 2017); EverBank v. Chacon, 92 Mass. App. Ct. 1101, 87 N.E.3d 116 (2017); Palma v. JPMorgan Chase Bank, 208 So. 3d 771, 775 (Fla. Dist. Ct. App. 2016); Green Planet Servicing, LLC v. Martin, 141 A.D.3d 892, 893, 34 N.Y.S.3d 911, 912 (2016); Jose v. Wells Fargo Bank, N.A., 89 Mass. App. Ct. 772, 774, 54 N.E.3d 1130, 1132 (2016); Covarrubias v. CitiMortgage, Inc., 623 F. App'x 592, 593 (4th Cir. 2015); Wells Fargo v. Phillabaum, 2011-Ohio-1311, ¶ 13, 192 Ohio App. 3d 712, 715, 950 N.E.2d 245, 247 (Ohio Ct. App. 2011); Wells Fargo Bank, N.A. v. Isaacs, 2010-Ohio-5811 (Ohio Ct. App. 2010); Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp., 937 N.E.2d 853, 866 (Ind. Ct. App. 2010). For a longer discussion of non-compliance with FHA regulations, see National Consumer Law Center, Home Foreclosures, Chapter 6 (2d ed. 2023).

<sup>60</sup> 88 Fed. Reg. at 49394.

While we appreciate HUD's acknowledgement of the important function these meetings perform, we have significant concerns about how a modified rule would be implemented. This concern stems from HUD's long-standing failure to ensure that servicers implement the existing rule. We are disappointed by HUD's unquestioned acceptance of the industry narrative that the meetings never took place because the current rule relies on outdated "technology." According to this narrative, borrowers simply did not want to participate in "face-to-face" meetings. We are asked to believe that rates of participation will go up if these same servicers invite borrowers to meetings conducted with technologies that are more "modern." We are not aware of any efforts to ask the thousands of affected borrowers why they did not participate in § 203.604 meetings.

When there is accountability and oversight, as in the state and local programs described above, meetings between borrowers and servicers take place with a robust frequency, and they produce good results. Meetings are not difficult to arrange when the servicers act intentionally to facilitate them. The problems with the servicers' implementation of § 203.604 have been systemic. Information that pointed to a glaring failure of implementation was available to HUD for decades. If HUD had timely investigated the cause of the systemic failure, HUD could have demanded remedial actions from the servicers and followed up with rigorous oversight. This never happened. If HUD continues to see the failure of the current rule as due solely a technology problem and fails to implement effective oversight in the future, the revised rule will just as consistently fail to achieve HUD's goals.

## **2) HUD must define and mandate specific structural requirements for the meeting.**

To ensure that the mandatory meeting helps borrowers understand their options early in the process and improves servicer compliance with HUD's loss mitigation program, HUD should develop clear guidance about the conduct of the mandatory meeting. HUD should not allow servicers to simply use their Regulation X notices to satisfy the requirements of the mandatory meeting rule. HUD must take steps to make sure the meeting required by proposed 24 C.F.R. § 203.604 is meaningful by prescribing key elements of notice, scheduling, conduct of meetings, and documentation. As noted below, we are struck by HUD's lack of scrutiny of servicers' claims regarding past non-participation in the meetings. We urge HUD to specify certain requirements for meetings in order to ensure this effective oversight.

- a) *HUD should not allow servicers to simply use their Regulation X efforts to comply with the mandatory meeting rule.*

HUD should make clear that § 203.604 sets out requirements that are in addition to those of RESPA's early intervention rule, 12 C.F.R. § 1024.39. Regulation X directs servicers to contact borrowers at an early stage of default and give them certain very limited information. Specifically, §1024.39(b) requires that servicers give borrowers who reach 45 days of delinquency a written notice containing basic information about loss mitigation and servicer contacts.<sup>61</sup> According to the CFPB, a servicer complies with this rule if the notice includes

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<sup>61</sup> 12 C.F.R. § 1024.39(b)(2).



minimal content.<sup>62</sup> The minimal content may consist of “a generic list of loss mitigation options that it offers to borrowers.”<sup>63</sup> Beyond this, the notice should direct the borrower to contact the servicer for more information about loss mitigation.<sup>64</sup> A servicer can satisfy this informational requirement by including in the letter a single sentence reading, “contact us for instructions on how to apply.”<sup>65</sup>

Regulation X allows servicers to combine the content of the early intervention notice with the text of other notices the servicer delivers to satisfy a different legal requirement.<sup>66</sup> This option may tempt some servicers to claim that a single notice sent during the second month of a delinquency satisfies both Regulation X and 24 C.F.R. § 203.604. For the reasons given below, if the notice does no more than include the bare-bones requirements of Regulation X, it does not comply with § 203.604, and HUD should make this clear in any revised version of its meeting rule.

The Regulation X notice given at 45 days of delinquency falls short of § 203.604’s goals in two important ways. First, a notice can pass muster under Regulation X if it refers the borrower to a generic list of loss mitigation options that the servicer offers to all borrowers in its portfolio. It need not alert the borrower to the availability of the specific FHA options or describe them. HUD’s loss mitigation program is based on the recognition that FHA-insured borrowers are often more vulnerable to financial crises than other borrowers, and HUD has developed loss mitigation options to address the particular needs of its borrowers. Second, the basic Regulation X notice does not inform the borrower about the benefits of the meeting structure available under § 203.604. Informing borrowers about the advantages of the direct meeting option makes it more likely that they will engage in the process. The “call us if you want more information” boilerplate in the Regulation X letter does not inform FHA-insured borrowers about the specific “opportunity to meet directly with trained mortgagee staff” that HUD intends with the proposed rule.<sup>67</sup> The Regulation X notice does not commit the servicer to treat FHA borrowers any differently from all other borrowers who are in default.

Finally, Regulation X and § 203.604 do not create conflicting obligations. Regulation X specifically allows servicers to give borrowers more information about early intervention and loss mitigation than Regulation X requires.<sup>68</sup>

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<sup>62</sup> Official Interpretation of Regulation X, § 1024.39(b)(2)(iii) and Official Form MS-4(A)-(C).

<sup>63</sup> Id.

<sup>64</sup> 12 C.F.R. § 1024.39(b)(2)(iv).

<sup>65</sup> Official Interpretation of Regulation X, § 1024.39(b)(2)(iv).1 and Official Form MS-4(A)-(C).

<sup>66</sup> Official Interpretation of Regulation X, § 1024.39(b)(2).3.

<sup>67</sup> 88 Fed. Reg. at 49394.

<sup>68</sup> “A servicer may provide additional information that the servicer determines would be helpful or which may be required by applicable law or the owner or assignee of the mortgage loan.” Official Interpretation of Regulation X § 1024.39(b)(2).1.

*b) HUD should include specific guidance to ensure the meetings are meaningful.*

We strongly urge HUD to develop specific guidelines for the mandatory meeting to ensure it meets HUD's goals and statutory obligations.

i) Content of notices to borrowers

Servicers must provide borrowers with timely notice of the opportunity to meet directly with servicer staff who have authority to review eligibility for all HUD loss mitigation options. Notices must clearly identify the borrower's loan as subject to HUD guidelines and not rely on generic content designed for all borrowers in the servicer's portfolio.

The notice should identify and briefly describe the major HUD home retention and home disposition loss mitigation options, including forbearance, partial claims, modifications, pre-foreclosure sales, and deeds in lieu. This is especially important given HUD's unique waterfall of options and the persistent failure of servicers to offer the proper option.<sup>69</sup> HUD should provide a model for servicers to use to describe these options.

Borrowers must be informed that they can schedule a meeting for a specific time, as discussed below. The notice should identify any financial or other information the borrower should have available for a meeting and should inform the borrower that they can participate with a housing counselor or other advocate. Borrowers must be asked whether they will need assistive technology or another reasonable accommodation to participate in the meeting. Servicers should also accommodate borrowers with Limited English Proficiency (LEP), as described below.<sup>70</sup>

ii) Method of service of notices

If HUD ends the requirement for the personal delivery of written notices of the opportunity for meetings, it must replace the requirement with a reliable alternative. The current rule requires certified mail, and this is extremely valuable to ensure that the notice was properly sent and received. In addition to certified mailing of the notice, it should also be sent by regular mail because it is generally faster than certified mail and many borrowers resist certified mail. Servicers must be informed that they cannot rely solely on electronic communications to notify borrowers of the meeting opportunity.<sup>71</sup>

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<sup>69</sup> See Section 1.c).ii) above.

<sup>70</sup> See Section 3 below

<sup>71</sup> So long as § 203.604 mandates service of a written notice of the meeting option, any "consent" by a borrower to accept an electronic record as a substitute for the written notice will be unenforceable. The Electronic Transactions in Global and National Commerce Act (E-sign) allows consumer consent to an electronic record that can override a legal requirement for a written notice if certain safeguards are implemented. 15 U.S.C. § 7001(c). However, E-Sign's general allowance for a waiver that permits reliance on electronic records does not apply to foreclosure-related notices. E-Sign preserves the obligation to adhere to requirements for written notice for "any notice of . . . default, acceleration,

### iii) Scheduling of the meeting

HUD must explicitly require the servicer to schedule the meeting with the borrower in advance so that the borrower is able to have the meeting at a time that does not conflict with work, child care obligations, or other significant life issues. The borrower must have reasonable time to prepare for the meeting, including to assemble documents, prepare questions, review the servicer's documents, and arrange for housing counselor or other advocacy assistance. Borrowers with a disability should be informed whether an assistive device or other reasonable accommodation will be provided at the meeting.

### iv) Methods of access to the meeting

It is important that the final rule specify that the borrower should determine the method of communication that best facilitates that borrower's participation. Moreover, servicers should provide multiple options for accessing the meeting, and we understand the proposed rule as continuing to allow borrowers the option to have the meeting conducted face-to-face as one of the options.<sup>72</sup> Of course, we recognize that certain borrowers may prefer video conferencing to an in-person meeting because it is more convenient.

On the other hand, HUD must prohibit servicers from limiting borrowers to a telephone meeting or a phone call. We note that HUD rejected such a proposal in 1976, when it first developed the meeting requirement.<sup>73</sup> At that time, a commentator proposed that HUD allow a telephonic interview to satisfy the meeting requirement. HUD rejected this proposal, noting that phone calls could play a role in the meetings, but if the calls "did not produce results," servicers must use other means that allow for a more direct interview.<sup>74</sup> If in 1976 HUD considered reliance solely on telephone calls for meetings to be inappropriate, the same concern should be heightened today. With the proliferation of offshore vendors, robocall platforms, and privacy concerns, telephone calls will not be the desired option for many borrowers. Borrowers, not the servicers, must have the final say on which form of communication will make the meeting most productive.

Moreover, servicers should pay special attention to the needs of borrowers with disabilities. Over one quarter of adults in the US have a disability, and the percentage of people living with disabilities increased during the pandemic.<sup>75</sup> Servicers are required to comply with the Fair Housing Act and provide meaningful access for people with disabilities to face-to-face

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repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual". 15 U.S.C. § 7003(b)(2)(B).

<sup>72</sup> 88 Fed. Reg. at 49395. ("acceptable communication methods" to be further defined by the Secretary are "in addition to a face-to-face meeting option").

<sup>73</sup> 41 Fed. Reg. 49730, 49732-33 (Nov. 16, 1976).

<sup>74</sup> *Id.*

<sup>75</sup> Centers for Disease Control and Prevention, Disability Impacts all of Us, available at <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>.

meetings.<sup>76</sup> This includes providing communication technology or devices to ease access to the meetings for the visually impaired and Deaf and hard-of-hearing communities, including an onsite interpreter if necessary. The agency should work with servicers to ensure that template notices of the meeting are provided in plain-language formats to make the information accessible to people with intellectual and developmental disabilities. Servicers should also be required to ask borrowers whether they have communication disabilities and record their needed auxiliary aid or service in the file so that borrowers consistently receive effective communication from the servicer.

v) Conduct of the meeting

HUD should maintain its current requirement that the servicer representative who is present must be trained in FHA-insured loss mitigation and have authority to determine eligibility.<sup>77</sup> At the meeting the servicer must assess the borrower for all available options and document that it did so. If an option is denied, the representative must explain and document the reason for the decision. HUD should require the servicer to provide the borrower with a written summary of the meeting, including the identity of all individuals present. This summary will promote borrower understanding and focus HUD's oversight of compliance.

To improve accessibility, HUD should also continue to refer borrowers to available HUD-approved housing counselors in all communications. Many borrowers will be more comfortable and better able to understand and access their options when they have the assistance of housing counselors during the meetings, whether they are conducted in person, through video-conferencing, or over the phone. HUD should promote the use of housing counseling and ensure that for homeowners who need in-person interaction, the housing counseling agency can meet with the homeowner in-person and help to coordinate the internet or phone call with the servicer.

vi) The servicer's plan for conducting meetings

HUD should require each servicer to submit a plan for how it will conduct mandatory meetings. A concrete plan for conduct of meetings is key to accountability and oversight. The absence of such a plan is a clear indication that the servicer does not take the meeting requirement seriously. Elements of a plan must include: (1) the allocation of designated staff to handle the meetings; (2) provision for training and supervision of the designated staff to process borrower requests and conduct meetings; (3); description of the content of notices to borrowers; (4) the protocol for conduct of meetings; (5) documentation of the application of the FHA loss mitigation waterfall at the meeting; (6) a document to summarize the outcome of a meeting for servicer records and to provide to the borrower; (7) a protocol for reporting data to HUD on numbers of meetings and outcomes.

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<sup>76</sup> 42 U.S.C. § 3605; U.S. Dep't of Hous. & Urban Dev., Federal Housing Administration Single Family Housing Policy Handbook 4000.1 § III.A.1.a.ii.(A)

<sup>77</sup> See U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, § III(A)(2)(h)(xii) (Aug. 9, 2023)

HUD should give its servicers a fixed deadline to submit the plan to HUD. Each FHA servicer's plan should be available to the public through the servicer's and HUD's website. HUD should provide model notice forms and model plans to minimize burden on servicers.

vii) Quality Control and oversight

The data describing limited uptake of meetings in the current rule leaves significant questions unanswered. It is not clear that a different way of offering meetings, through technology, on its own, would yield significantly different results. Truly engaging with borrowers and providing essential information about the process also have a profound effect on outcomes, as demonstrated by the mediation programs described above.

Unless the revised rule is carefully drafted to ensure effective oversight, the same widespread failure will certainly occur under the new rule. Servicers must be required to report regularly on the status of their meetings, with data on numbers of borrowers eligible, participation rates, and outcomes. HUD must actively investigate patterns of failure to conduct meetings and determine causes of non-participation. Servicers that report low participation must develop plans to improve their practices so that rates improve. Among other data points, HUD's Neighborhood Watch system should be adjusted to include data on each servicer's conduct of meetings.

**3) HUD should clarify that servicers must take reasonable steps to provide meaningful access to borrowers with Limited English Proficiency (LEP), both in the meetings and in communications about them.**

In developing guidance on the mandatory meeting requirement, it is absolutely crucial that servicers accommodate borrowers with Limited English Proficiency (LEP), especially when they communicate with borrowers in default about their right to a meeting under §203.604. LEP individuals collectively comprise roughly one in twelve Americans,<sup>78</sup> nearly two thirds of whom speak Spanish.<sup>79</sup> The challenges that LEP borrowers face in the mortgage market have been well studied, and the findings are all unanimous— LEP borrowers face barriers both understanding the terms of their mortgage loans, and in resolving problems when they face hardship.<sup>80</sup>

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<sup>78</sup> U.S. Census Bureau, 2017–2021 American Community Survey 5-Year Estimates, American Community Survey (Washington, DC: U.S. Census Bureau) Table DP02 (accessed August 8, 2023), <https://data.census.gov/table?tid=ACSDP5Y2021.DP02&hidePreview=true>; Why We Ask Questions About Language Spoken at Home, available at <https://www.census.gov/acs/www/about/why-we-ask-each-question/language/>.

<sup>79</sup> American Community Survey 5-Year Estimates, American Community Survey (Washington, DC: U.S. Census Bureau) Table DP02 (accessed August 8, 2023), <https://data.census.gov/table?tid=ACSDP5Y2021.DP02&hidePreview=true>.

<sup>80</sup> See e.g., Kleimann Communication Group for Fannie Mae and Freddie Mac, Language Access for Limited English Proficiency Borrowers: Final Report, (Apr. 2017), available at <https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-Access-Final-Report-June2017.pdf>; Consumer Fin. Prot. Bureau, Spotlight on serving limited English proficient

An “opportunity to meet directly with trained mortgagee staff” could make an enormous difference for an LEP borrower struggling to understand their options. It is important that LEP individuals have a meaningful chance to learn that they have this right, and that they get the most out of these meetings once they take place. This is especially relevant given HUD’s obligation to affirmatively further fair housing.<sup>81</sup>

According to the FHA Single Family Housing Policy Handbook, servicers already must take reasonable steps to provide meaningful access to persons with LEP, such as providing oral interpretation or written translation of vital documents.<sup>82</sup> While this requirement is clear, our sense from speaking to advocates representing homeowners in foreclosure is that English-only written communications remains the industry standard. This reality is troubling, but not surprising. Apart from this general mandate to provide meaningful access, there is little detail around how servicers can meet these obligations, and perhaps most importantly, what servicer conduct constitutes a failure to meet these obligations.

We recommend that HUD unambiguously impose language access requirements to the most vital communications between borrowers and servicers, beginning with notice of the opportunity to meet directly with servicer staff under §203.604. We recommend that HUD implement this requirement in two steps. First, notices of this right to a meeting should always be bilingual, in both English and Spanish, to enable servicers to reach the largest proportion of LEP borrowers. At a minimum, mandatory, yet brief, Spanish language disclosures should be added to predominantly English language notices explaining that borrowers have a right to meet with “trained mortgagee staff” to discuss loss mitigation, and that borrowers may request an interpreter for the meeting at no cost to the borrower. These brief tagline disclosures could also be provided at the bottom of English language notices in a range of languages, to reach a larger proportion of LEP mortgage borrowers.

Second, HUD should require servicers to provide a translated notice whenever the servicer is both aware of a consumer’s language preference and if HUD has provided a model translated notice in that language. This will ensure that the mandate reaches a broader proportion of language groups. To accompany these requirements, HUD should publish a model bilingual notice, model tagline disclosures in a range of languages, and additional fully translated notices in at least the top five most commonly spoken languages among U.S. individuals with LEP: Spanish, Chinese, Vietnamese, Korean, and Tagalog.

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consumers: Language access in the consumer financial marketplace, (Nov. 22, 2017), [https://files.consumerfinance.gov/f/documents/cfpb\\_spotlightserving-lep-consumers\\_112017.pdf](https://files.consumerfinance.gov/f/documents/cfpb_spotlightserving-lep-consumers_112017.pdf); Consumer Fin. Prot. Bureau, Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency, (Jan. 13, 2021), <https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/open-notices/statement-regarding-the-provision-of-financial-products-and-services-to-consumers-with-limited-english-proficiency/>.

<sup>81</sup> 42 USC 3608(e)(5); see also Section 1.b) above.

<sup>82</sup> U.S. Dep’t. Hous. & Urban Dev., Federal Housing Administration Single Family Housing Policy Handbook 4000.1 §III.A.2.iv.(A)

Finally, it is absolutely essential that borrowers with LEP or other language barriers be able to fully participate in these meetings when they take place. To this end, HUD should clarify that servicers must provide spoken and sign language services for these meetings without delay and without any cost to these borrowers. The language of the mandate in the Single Family Housing Policy Handbook to provide meaningful language access<sup>83</sup> is nearly identical to the mandate to provide meaningful language access under Executive Order 13166,<sup>84</sup> and implementing HUD guidance.<sup>85</sup> Thus, HUD's LEP guidance to recipients of federal financial assistance, including HUD-approved housing counseling agencies,<sup>86</sup> may be instructive here. While the HUD guidance offers narrow safe harbors when it comes to providing written assistance to individuals with LEP,<sup>87</sup> these exceptions do not exist for oral interpretation. Thus, all entities subject to the HUD Guidance should provide oral interpretation to all LEP individuals that would benefit from language assistance. We recommend that HUD implement a similar standard for the meeting requirement under §203.604. In addition, HUD should provide more detailed guidance on acceptable interpreter qualifications, when to use telephonic, virtual, or in-person interpretation services, and expressly prohibit the use of *ad hoc* interpreters provided by the borrower as a substitute for qualified interpretation services offered by servicers.<sup>88</sup>

#### **4) HUD should monitor the use of Artificial Intelligence and machine learning technology in default servicing and require human interactions.**

Given the rise of artificial intelligence, HUD should specifically require human interactions during the default process and monitor servicer use of Artificial Intelligence (AI). Mortgage companies

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<sup>83</sup> U.S. Dep't. Hous. & Urban Dev., Federal Housing Administration Single Family Housing Policy Handbook 4000.1 §III.A.2.iv.(A).

<sup>84</sup> Exec. Order No. 13166, Improving Access to Services for Persons With Limited English Proficiency, 65 Fed. Reg. 50121 (Aug. 11, 2000) (requiring that federal agencies “work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries”).

<sup>85</sup> U.S. Dep't of Hous. and Urban Dev., Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (January 22, 2007).

<sup>86</sup> U.S. Dep't of Hous. and Urban Dev., Office of Housing Counseling, Housing Counseling Limited English

Proficiency (LEP) Toolkit, 17 (Mar. 2021), <https://files.hudexchange.info/resources/documents/Housing-Counseling-Limited-English-Proficiency-Toolkit.pdf>.

<sup>87</sup> HUD-funded entities can demonstrate strong evidence of compliance with Title VI if they provide written translations of vital documents wherever the population of individuals with LEP in a service area constitutes 5% of the population served or 1,000 individuals—whichever is less. See, U.S. Dep't of Hous. and Urban Dev., Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732, 2745 (January 22, 2007).

<sup>88</sup> *Ad hoc* interpreters are self-reported bilingual people who lack formal training, including untrained staff and family members and friends of individuals with LEP. Research shows that ad hoc interpreters frequently misinterpret or omit questions, commit errors with profound consequences, and ignore potentially embarrassing information, especially in the case of child interpreters. See, e.g., Caraway L Timmins, The Impact of Language Barriers on the Health Care of Latinos in the United States: A Review of the Literature and Guidelines for Practice, 47 J. of Midwifery & Women's Health, Mar.–Apr. 2002, at 80-96; National Center for State Courts, The Provision of Court Interpreter Services in Civil Cases in California: An Exploratory Study, Final Report, 13, 23 (Jan. 31, 2008).

are using AI throughout the loan process, including in underwriting and servicing.<sup>89</sup> This technology can automate mechanical tasks including extracting and validating information from documents to determine whether the information satisfies an investor or guarantor's guidelines.<sup>90</sup> AI systems are used to detect fraud, predict the risk of default, and analyze data in support of servicing decisions. Companies use natural language processing systems, like ChatGPT, to provide customer service chat features, and respond to customer service requests.<sup>91</sup>

While streamlining and automating parts of the loan process can benefit consumers, the servicing of loans in default demands a human touch and individualized attention as described above. Borrowers facing foreclosure are often under intense financial pressure and need to quickly evaluate and access complicated loss mitigation options. Borrowers need to meet with a human who can assess their financial situation holistically based on a full view of their situation and offer workable options.<sup>92</sup> Such individualized assessments are necessary for sustainable outcomes that will permanently get borrowers back on track and avoid foreclosure. Indeed, by funding HUD-approved housing organizations to provide default and delinquency counseling, the agency shows that it understands the value of such human connections.

Given the popularity and availability of AI systems, servicers may be tempted to replace human personnel with AI generated content or chat features for all or a part of the meeting conducted by video or telephonically. Servicers may, for example, require that borrowers interact extensively with a chat feature at the start of a meeting before accessing human personnel. Such technological hurdles can prove a barrier to consumers who are anxious and afraid about losing their home and need the assurance fostered by interaction with a live person. As one industry official noted, the "human touch, rapport, trust and empathy that comes with face-to-face interactions are still considered critical in the mortgage industry and not fully replicable by AI- ever."<sup>93</sup>

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<sup>89</sup> Alec Hanson, "The Future of Mortgage Lending: How AI and Humans Can Coexist," *Forbes* (Mar. 9, 2023), <https://www.forbes.com/sites/forbesfinancecouncil/2023/03/09/the-future-of-mortgage-lending-how-ai-and-humans-can-coexist/?sh=139b0f904a62>; Sudhir Hulikunte Sundararam, Mr. Cooper is Improving the Home-Buyer Experience with AI and ML, *Google Cloud Blog* (Mar. 20, 2023), <https://cloud.google.com/blog/products/ai-machine-learning/mr-cooper-improving-home-buyer-experience-ai-ml>.

<sup>90</sup> "Guaranteed Rate Deploys Gateless' Smart Underwrite Solution," *HousingWire* (May 18, 2023), <https://www.housingwire.com/articles/guaranteed-rate-deploys-gateless-smart-underwrite-solution/>.

<sup>91</sup> Angelica Leicht, "Big Purple Dot Integrates with ChatGPT for AI-Powered Customer Support," *HousingWire* (Mar. 30, 2023), <https://www.housingwire.com/articles/big-purple-dot-integrates-with-chatgpt-for-ai-powered-customer-support/>; see also Sudhir Hulikunte Sundararam, Mr. Cooper is Improving the Home-Buyer Experience with AI and ML, *Google Cloud Blog* (Mar. 20, 2023), <https://cloud.google.com/blog/products/ai-machine-learning/mr-cooper-improving-home-buyer-experience-ai-ml>.

<sup>92</sup> Alec Hanson, "The Future of Mortgage Lending: How AI and Humans Can Coexist," *Forbes* (Mar. 9, 2023), <https://www.forbes.com/sites/forbesfinancecouncil/2023/03/09/the-future-of-mortgage-lending-how-ai-and-humans-can-coexist/?sh=139b0f904a62..>

<sup>93</sup> *Id.*



There is currently little publicly available information on how AI is deployed in the servicing of defaulted mortgages. There may be concerns that AI systems treat similarly situated borrowers differently in assessing risk, servicing defaulted loans, or offering loss mitigation options. At least one company, in assessing risk of default, uses data on unemployment rates in the borrower's location and job sector.<sup>94</sup> Use of this data may prove problematic if it persistently leads to negative outcomes, given well-documented occupational segregation that puts many workers of color in lower-wage jobs that are subject to layoffs.

Given the dearth of information, HUD should require that mortgage companies explain how AI is being deployed in default servicing, what types of data is collected and how it is used, and how AI supports default servicing decisions related to loss mitigation options.<sup>95</sup> Moreover, the agency should ensure that servicers are abiding by commonly accepted standards regarding the design, deployment and testing of these models, such as the standards outlined in the AI Bill of Rights.<sup>96</sup>

## 5) Conclusion

We strongly support HUD's decision to maintain the mandatory meeting for FHA-insured borrowers and to remove the 200-mile loophole. The mandatory meeting facilitates effective loss mitigation, which promotes HUD's goal of stabilizing homeownership and its statutory obligation to support low- to moderate-income homeowners and communities of color. For the meeting to work well, HUD must provide guidance on how servicers arrange and conduct the meeting. HUD must engage in significant oversight of the mandatory meeting to ensure that servicers are meeting their obligations.

We appreciate the opportunity to comment on this proposed regulation, and we look forward to working with you to further develop strategies to best communicate with borrowers to help them avoid unnecessary foreclosures. If you have any questions about this letter, please contact Steve Sharpe, Senior Attorney at National Consumer Law Center, at [ssharpe@nclc.org](mailto:ssharpe@nclc.org).

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<sup>94</sup> Infosys Mortgage Default Prediction System, Infosys, <https://www.infosys.com/industries/financial-services/industry-offerings/mortgage-default-prediction-system.html> (last visited September 21, 2023).

<sup>95</sup> Mr. Cooper uses AI to classify documents and extract information for customer service agents, and plans to have AI analyze call transcripts to identify primary reasons for calls and aid faster resolution of calls. Sudhir Hulikunte Sundararam, Mr. Cooper is Improving the Home-Buyer Experience with AI and ML, Google Cloud Blog (Mar. 20, 2023), <https://cloud.google.com/blog/products/ai-machine-learning/mr-cooper-improving-home-buyer-experience-ai-ml>; see also Compliance & Security, Brace, <https://brace.ai/why-brace/compliance-security/> (last visited June 13, 2023). Company offers AI-powered "streamline decisioning with our automated rules engine to help resolve delinquencies."

<sup>96</sup> The White House, Blueprint for an AI Bill of Rights, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/#safe>.