

COMMENTS

to the

**U.S. Department of Housing and Urban Development,
Office of the Assistant Secretary for Housing—Federal Housing Commissioner**

on

**Federal Housing Administration (FHA): Single-Family Loan Sale Program;
Proposed Rule**

**24 CFR Parts 203, 206, and 291; Docket No. FR-6051-P-02
89 Fed. Reg. 57798**

by

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

Americans for Financial Reform Education Fund

Atlanta Legal Aid Society, Inc. (GA)

Community Legal Services of Philadelphia (PA)

Housing and Economic Rights Advocates (CA)

Jacksonville Area Legal Aid, Inc. (FL)

Legal Aid Chicago (IL)

Legal Aid Society of Southwest Ohio, LLC

Mountain State Justice (WV)

National Housing Law Project

North Carolina Justice Center

September 16, 2024

On behalf of the low-income client homeowners and communities we represent,¹ we submit the following comments to the Federal Housing Administration’s (“FHA”) proposed rules for its Single-Family Loan Sale Program, 24 C.F.R. Parts 203, 206, and 291 (Docket No. FR-6051-P-02). Our comments focus on four of the ten questions posed by the United States Department of Housing and Urban Development (“HUD”) in the notice of proposed rule. These are: No. 4 (post-sale servicing requirements); No. 7 (pre-sale notice to borrowers); No. 8 (content of periodic reports on post-sale outcomes); and No. 9 (servicers’ documentation of compliance with pre-sale loss mitigation requirements). Following these responses, we address four additional issues that we consider significant to the effective implementation of the Single Family Loan Sale Program.

I. Introduction

HUD’s proposed rules for the Single-Family Loan Sale Program set the groundwork for effective borrower protections against unnecessary foreclosures and will protect HUD’s Mutual Mortgage Insurance Fund (MMIF) from payout of unnecessary claims

We appreciate that HUD has included new, critically important borrower protections in the proposed rules. These provisions address many concerns that we have raised since 2012, when HUD significantly expanded the loan sale program. We have reported many instances in which HUD’s loan sales cut borrowers off from ongoing FHA-insured loss mitigation reviews. Many borrowers discovered that their loans had been sold only after the sales had been finalized. Borrowers often found that the loss mitigation options available from the investors who bought the loans were opaque. Certain buyers claimed that they did not offer loss mitigation at all, and others demanded unaffordable lump-sum payments as a condition to loan modifications.²

Three provisions of the proposed rules will be particularly helpful in avoiding the problems we noted in the past.

- First, the proposed rules require a pre-sale notice to borrowers. Borrowers will be informed that their loans are being referred for sale to a new entity that will not be bound by FHA servicing guidelines. Borrowers will have the opportunity to dispute the referrals.

¹ These comments are submitted by the non-profit organizations listed on the cover page. The National Consumer Law Center was the primary drafter of these comments. Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. www.nclc.org. Questions about the comments can be directed to NCLC senior attorney Steve Sharpe at ssharpe@nclc.org.

² See National Consumer Law Center, Comments, Advanced Notice of Proposed Rulemaking, Docket No. FR-6051-A-1 July 5, 2019; National Consumer Law Center, *Opportunity Denied How HUD’s Note Sale Program Deprives Homeowners of Basic Benefits of Their Government-Insured Loans* (May 2016), available at <https://www.nclc.org/wp-content/uploads/2022/10/opportunity-denied-report.pdf>.

- Second, the proposed rules set a baseline standard for the loss mitigation options that buyers of loans must offer to borrowers.
- Third, the proposed rules require transparency by making key program documents and guidelines available to borrowers and the public.

These and other improvements are major steps forward, and we urge HUD to finalize these important protections. The details for implementation that HUD will set out in HUD’s servicing Handbook and in future notices to servicers will be critical to ensuring that these changes are effective. Our comments below address these important implementation details.

II. Responses to Specific HUD Questions

A. HUD Question No. 4 – base standards for post-sale loss mitigation options that loan buyers offer to borrowers

4. Should Single Family Sales post-sale servicing requirements include that a Purchaser offer loss mitigation options that are as or more generous than the FHA loss mitigation options for insured mortgage loans? If so, should all terms of a Purchaser’s loss mitigation option meet or be more generous than what FHA provides, or should there be a different standard for evaluating compliance with this requirement? Should HUD require a specific and separate waterfall of loss mitigation options for all Single Family Sales? What loss mitigation options have been successful for defaulted borrowers whose loans were sold through previous HUD single family mortgage loan sales? Please provide the rationale for your opinion, as well as available examples and data which support it.

Access to loss mitigation is a bedrock of the FHA-insured mortgage program and is consistent with the statutory structure of FHA-insured loans. For all of HUD’s 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.”³ With respect to its operation of the FHA-insured loan program, HUD 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.”⁴ 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

³ 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...”).

⁴ 12 U.S.C. § 1708(a)(7). *See also* 12 U.S.C § 1715u(a).

particularly relevant to FHA’s insured loan program because Black and Latino borrowers rely heavily on it to purchase homes.⁵

These statutory obligations require HUD to take into account the needs of their specific borrowers and design systems to promote their borrowers’ success. Moreover, consumers decide to participate in the FHA-insured loan program with the expectation that they will be afforded certain rights and protections consistent with HUD’s statutory goals and obligations.

Given this context, HUD has consistently directed its servicers to offer loss mitigation options that meet the needs of borrowers who face financial hardship and require flexible repayment options. There is a fundamental unfairness in a process that unilaterally strips away the benefits of the FHA servicing options at the moment the borrowers need them most – when they are facing a default.

HUD mitigates the harshness of the loan sale process when it requires that buyers offer borrowers loss mitigation options that are equivalent to or more generous than the FHA options that were available before the sales. It also ensures that HUD actions are not as likely to become the basis for investors purchasing notes with the purpose of foreclosing on borrowers who obtained FHA loans. HUD proposes to mandate that buyers of loans under the Single-Family Loan Sale Program adhere to such a requirement.⁶ We strongly support HUD’s proposal.

HUD’s current loss mitigation options are set out in its Single Family Housing Policy Handbook 4000.1.⁷ The servicer for any investor that acquires a loan through the Single-Family Loan Sale Program should have little difficulty implementing loss mitigation options that are as or more generous than those found in the HUD Handbook. The Handbook includes options that any servicer should be able to implement in substantially the same form as described in the Handbook, including forbearance, a standalone modification, a pre-foreclosure sale, and a deed-in-lieu of foreclosure. While FHA borrowers should have been offered applicable options prior to the sale (or the chance to obtain one), their circumstances may have changed and another opportunity to receive an affordable workout option is essential.

Two current HUD Handbook options involve the HUD Partial Claim. These are the standalone partial claim and the combined modification with Partial Claim. The Partial Claim is a loan from HUD to the borrower to cover the costs of curing arrears and otherwise lowering borrower payments.⁸ Private mortgagees who buy loans from HUD obviously cannot access the HUD Partial Claim. However, equivalent options are not difficult to implement.

The principle behind the HUD Partial Claim is similar to a loss mitigation option that has been widely used across the mortgage servicing industry for decades. The option involves taking amounts necessary to cure a default or otherwise reduce borrower payments, then converting the

⁵ 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).

⁶ See proposed 24 C.F.R. § 291.615(a) (buyers must offer “loss mitigation options that are as or more generous than the FHA loss mitigation options”).

⁷ FHA Single Family Housing Policy Handbook 4000.1, § III.A.2.j. & o. (May 20, 2024).

⁸ FHA Single Family Housing Policy Handbook 4000.1, § III.A.2.k.v.A. (May 20, 2024).

sum to a non-interest bearing lien. This lien, like a HUD Partial Claim, comes due as a lump sum when the primary mortgage obligation is paid off or upon the borrower’s transfer of the property. Under the Treasury Department’s HAMP program, this option was known as “Principal Forbearance.”⁹ The Government Sponsored Enterprises refer to the option as “Payment Deferral,” the deferral of a portion of the loan principal through a non-interest bearing lien.¹⁰ Any entity acquiring a loan from HUD through the Loan Sale Program could implement a similar option.

HUD should treat the “loss mitigation options that are as or more generous than the FHA loss mitigation options” referenced in proposed § 291.615(a) as a floor. Servicers for buyers can always implement waterfalls with specific options that offer greater payment relief for borrowers. For example, principal forgiveness is an important option not available for FHA loans, but one that buyers should be encouraged to consider.

During the COVID-19 pandemic mortgage servicers revised their loss mitigation protocols to minimize reliance on documentation from borrowers. Servicers streamlined the application process and offered options based on information available from their own files. The pandemic-era loss mitigation protocols generally worked well, and foreclosure rates during and after the pandemic remained low.¹¹ Since the pandemic, the mortgage servicing industry made many of these pandemic-era guidelines permanent features of their loss mitigation practices. HUD’s guidelines have moved in this direction as well. The CFPB is in the process of modifying the RESPA loss mitigation rules to provide better procedural protections for borrowers in streamlined loss mitigation reviews.¹² With this increased standardization across the mortgage servicing industry, the requirement that buyers offer loss mitigation options analogous to those available under HUD guidelines is feasible and does not place a significant burden on servicers.

As discussed in more depth in III(A) below, while the loss mitigation options offered by loan buyers need not be uniform, the options and content of the waterfalls must be available to the public, as are those for FHA and the GSEs. Under the DASP program, the lack of transparency surrounding the available post-sale loss mitigation options was a chronic problem borrowers faced in dealing with the servicers for loan buyers.

⁹ Making Home Affordable, Handbook for Servicers of Non-GSE Mortgages Version 5.1, §§ 6.3, 6.6 (May 26, 2016).

¹⁰ See e.g. Fannie Mae Servicing Guide D2-3.2-04 (Payment Deferral) (Oct. 11, 2023).

¹¹ Laurie Goodman, Jun Zhu, *Urban Institute Research Report: Improvements in the Loss Mitigation Toolkit Can Allow for Enhanced Access to Credit* (Apr. 10, 2024), <https://www.urban.org/research/publication/improvements-loss-mitigation-toolkit-can-allow-enhanced-access-credit>.

¹² 12 C.F.R. § 1024.41.

B. FHA Question No. 7 - Pre-sale notification to borrowers

7. Should all Single Family Sales of forward mortgage loans require a P-Servicer to send a Loan Sale Notifications to borrowers? What information should HUD include in this notification? How should the P-servicer or HUD respond if a borrower believes the loss mitigation evaluation or option was not completed in accordance with HUD requirements? Please provide the rationale for your opinion, as well as available examples and data which support it.

We strongly support a requirement for pre-sale notice to borrowers. The notice is an essential due process protection for borrowers. An effective notice will also enhance compliance with FHA's loss mitigation guidelines and protect the insurance fund from unnecessary losses. In exchange for these clear benefits, the pre-sale notice requirement imposes a minimal cost on servicers.

In the past, advocates have reported to NCLC many cases in which borrowers first learned that their loans had been sold months after the sales took place. Borrowers typically learned about the sale when they received a notice under RESPA that servicing rights for their loan had been transferred to a new servicer. In many instances this notice arrived while the borrower was waiting to hear back from an FHA-insured mortgagee about pending requests for FHA loss mitigation assistance. Borrowers were surprised to learn that, without any notice, their loans had been transferred to new mortgagees who did not participate in the FHA program. Their loans were no longer eligible for FHA loss mitigation options.

All servicers should provide a written notice (either a HUD model form or a HUD-approved form) to borrowers when they refer a loan to HUD for inclusion in a future loan sale. The notice should include certain basic information, including:

1. A description of the Single-Family Loan Sale Program;
2. A summary of the FHA loss mitigation options;
3. A chronology of the servicer's review of the borrower for the FHA loss mitigation options. This should include dates for waterfall reviews and outcomes. If the servicer did not conduct a waterfall review, an explanation of the reasons why it did not occur, including dates of outreach and reference to specific communications;
4. Notification that the borrower can still seek a loss mitigation review from the servicer under FHA guidelines if the borrowers' circumstances have changed since a prior review;
5. Information about how the borrower can dispute the servicer's representations about past loss mitigation reviews;
6. Notification that the loan will not be placed in a loan sale pool as long as a dispute over past loss mitigation conduct is pending or a new loss mitigation review based on changed circumstances is underway; and
7. Information about referrals to housing counselors and legal aid offices in the borrower's vicinity.

If the borrower contacts the servicer before the sale occurs and states that they have had a change in financial circumstances since the previous review of options, the servicer should

discuss the available options with the borrower and reconsider the borrower's eligibility under the HUD waterfall. Since the current waterfall generally does not require documentation for the evaluation, the servicer should immediately review the potential options with the borrower to see if options once considered but found inappropriate will now work. We believe the notice will prompt these discussions with borrowers who have improved their financial circumstances, and HUD should clearly state the expectation that servicers will re-review before sale.

We also maintain our position that HUD should provide a more comprehensive dispute resolution system through its National Servicing Center ("NSC"), and any notice should incorporate such enhancements. The NSC should have the capacity to directly address borrower disputes regarding loss mitigation. The NSC should maintain a written record of its review of the complaint. This record should include the date of receipt of the complaint, the dates of reviews, documents reviewed, and summaries of communications with the servicer and the borrower. The NSC should produce a written memorandum of its findings and conclusions. HUD should designate qualified staff at its national headquarters to conduct a final review, upon request of a borrower, of the CSC's determination. These HUD decisions should be subject to review under the Administrative Procedure Act ("APA").

The pre-sale notice should give details about a dispute resolution process for borrowers who believe that a review for loss mitigation was not completed in accordance with FHA requirements. HUD should play the key role in resolving these disputes. The pre-sale notice should direct the borrower (or the borrower's representative) to address the complaint to the NSC and to the servicer. The overall impact of the pre-sale notice should be to focus servicers on their record of compliance with FHA loss mitigation requirements before they consider referring a loan for a sale. This will greatly incentivize compliance with FHA servicing rules in the long run.

C. FHA Question No. 8 - Content of periodic reports

8. What information should HUD include in its periodic reports on Single Family Sales loan and property outcomes? Please provide the rationale for your opinion, as well as available examples and data which support it.

HUD should adopt comprehensive requirements for servicer reporting of the post-sale status of loans sold under the Single-Family Loan Sale Program. Such data is critically important for fully assessing the impact of the Loan Sale Program on communities and borrowers and for assessing whether the program affirmatively furthers fair housing. This data should be publicly available and updated at least on an annual basis. The data should include:

1. Post-sale loss mitigation activities, including approvals and denials of options. Data on approved options should indicate the levels and nature of payment changes, and (when available) old and new borrower debt-to-income ratios;
2. Demographic and geographic data about homeowners and loss mitigation;
3. Data on the long-term performance of loans after loss mitigation, including rates of redefault;
4. Data on subsequent sales and rentals involving the properties.

During and after the 2008 foreclosure crisis, various government entities produced regular reports that included the types of data described above. The reports detailed loss mitigation performance and included details such as the characteristics of loan modifications and re-default rates. For example, the Making Home Affordable Program from 2009 through 2016 issued regular Servicer Performance Reports with detailed breakdowns of modifications approved and changes in payment terms.¹³ The Office of Comptroller of the Currency/Office of Thrift Supervision produced Quarterly Mortgage Metrics Reports with similar data for national banks.¹⁴

In the proposed rules HUD appears to direct subsequent transferees from initial buyers to comply with post-sale reporting obligations.¹⁵ The language of this section should be edited to make this point clear. The post-sale reporting obligation would have little value if it did not apply to transferees from the initial buyers.

We have concerns about exclusive reliance on self-reporting to assess servicers' post-sale performance. HUD should structure loan purchase agreements to authorize some limited direct HUD oversight of servicers both before and after the four-year mandatory post-sale reporting period. This oversight would be particularly helpful in determining whether a property remains owner-occupied or was converted to a rental investment property. It would also allow assessment of the long-range efficacy of loss mitigation options offered by the post-sale servicers. Finally, HUD should assess meaningful sanctions, including disqualification from future sales and financial penalties, for substantial noncompliance with reporting requirements.

D. FHA Question No. 9 - P-Servicer's demonstration of compliance with HUD's loss mitigation requirements.

9. The eligibility criteria of forward mortgage loans is not defined in the proposed rule. This was done to allow the Secretary flexibility in determining the sale population based on mission and economic needs. Should the HUD eligibility criteria for a Single Family Sale of forward mortgage loans include satisfaction of HUD's loss mitigation requirements for insured mortgage loans? How can P-servicers demonstrate compliance with HUD's loss mitigation requirements? Please provide the rationale for your opinion, as well as available examples and data which support it.

Since the expansion of its loan sale program in 2012, HUD has represented that compliance with HUD's loss mitigation requirements was a condition to a loan's eligibility for a sale.¹⁶ This has been consistent with HUD's long-standing requirement that mortgagees certify

¹³ The servicer performance reports for this era are available at this U.S. Department of Treasury website: <https://home.treasury.gov/data/troubled-assets-relief-program/reports/making-home-affordable-program-performance-report>.

¹⁴ The detailed mortgage modification reports of the HAMP era are available from this Office of the Comptroller of the Currency website: <https://www.occ.gov/publications-and-resources/publications/mortgage-metrics-reports/index-mortgage-metrics-reports.html>.

¹⁵ See proposed 24 C.F.R. § 219.615(a).

¹⁶ HUD Public Affairs Press Release No. 12-116 July 18, 2012 HUD Accepting Applications for Entities to Purchase Troubled Mortgages, Offer Chance to Avoid Costly Foreclosures and Stabilize

compliance with HUD regulations as a condition to payment of an insurance claim. The proposed Single-Family Loan Sale Program rules build upon this same principle. As a condition to assignment of a loan for sale the proposed rules require that “the mortgagee must determine and certify the mortgage satisfies the Commissioner’s acceptability criteria for the Single Family Sale” and “[a]cceptability criteria includes satisfaction of the Single Family Sale loss mitigation eligibility requirements.”¹⁷

The “Participating Servicer Agreement” (PSA) appears to be the contractual mechanism that creates the requirement for servicers to exhaust FHA loss mitigation reviews as a condition referring a loan for a sale. The PSA is defined as “the agreement between HUD and a P-Servicer that governs the P-Servicers submission of Single Family Loans to be sold in a Single Family Sale on terms prescribed by the Secretary.”¹⁸

We strongly support the proposed regulatory text that requires satisfaction of HUD’s loss mitigation requirements as a condition for sale eligibility. Pursuant to its statutory obligations to stabilize homeownership and protect the MMIF fund, HUD has developed a comprehensive and detailed waterfall of loss mitigation tools to help borrowers who have fallen behind on their loans.¹⁹ Borrowers should not lose access to these options without first having had a full opportunity to be considered for them.

Given the importance of these completed evaluations, regulatory text should directly incorporate it, and HUD must then develop a system for ensuring compliance. A check-off box that a servicer marks to indicate that it complied with all FHA loss mitigation requirements is not an acceptable assurance of compliance. Advocates have reported numerous instances in which servicers checked off compliance boxes in order to “certify” a loan’s eligibility for DASP sales, and these certifications were plainly false. In our 2016 report on the DASP program we documented 23 Bank of America foreclosure cases that appeared in the Philadelphia courts for mediations on a single day in 2014.²⁰ In all 23 cases Bank of America had sold the loans through DASP sales months before the scheduled mediations. Before each sale, the Bank had checked off a certification that loss mitigation reviews had been completed. In all of these cases the borrowers had no notice of the sales and appeared for mediations where the loss mitigation reviews were obviously still underway.

Reports by HUD’s Office of the Inspector General have consistently cited problems with servicers’ routine certifications of compliance in connection with their claims for FHA insurance benefits. A 2017 OIG Report describing a review of 90 statistically sampled claims showed that

Neighborhoods. In describing how the proposed “DASP” loan sale program would function, HUD announced that an FHA mortgagee could file a claim for insurance benefits and assign the loan to HUD for sale if, inter alia, “the servicer has exhausted all steps in the FHA loss mitigation process.”

¹⁷ See proposed 24 C.F.R. § 203.413(b).

¹⁸ See proposed 24 C.F.R. § 291.601.

¹⁹ FHA Single Family Housing Policy Handbook 4000.1, § III.A.2.j. & o. (May 20, 2024).

²⁰ National Consumer Law Center, Opportunity Denied How HUD’s Note Sale Program Deprives Homeowners of Basic Benefits of Their Government-Insured Loans, pp. 13-16 (May 2016), available at <https://www.nclc.org/wp-content/uploads/2022/10/opportunity-denied-report.pdf>.

26 had significant servicing deficiencies.²¹ The Report recognized that these significant servicing deficiencies included failure to properly review borrowers for FHA loss mitigation. According to the Report, these failures resulted in an increased overall risk to the program of a projected \$120.9 million for losses where servicers did not properly engage in loss mitigation.²² A 2016 OIG Report found that servicers misrepresented claim amounts in 45% of the cases reviewed.²³ The OIG found that, when it was processing servicers' claims, HUD was not effectively monitoring their compliance with HUD regulations.²⁴

The problems with servicer compliance have persisted in the era of streamlined loss mitigation reviews. In its June 2023, entitled "Servicers Generally Did Not Meet HUD Requirements When Providing Loss Mitigation Assistance to Borrowers With Delinquent FHA-Insured Loans," the OIG found 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.²⁵

Given these issues, instead of a check-off box, HUD should require documentation of the servicer's loss mitigation review as a condition to a loan's eligibility for early claim payment and a sale of the loan. The loss mitigation waterfall incorporated into HUD's Handbook 4000.1 can serve as a useful template for the documentation of loss mitigation reviews.²⁶ A servicer that has conducted a loss mitigation review must have a record of how it applied the HUD waterfall. Instead, servicers that cannot produce this documentation must be required to establish their compliance with the HUD outreach requirements, also set out in FHA's Handbook.²⁷ The Handbook specifies indicia of good faith outreach appropriate for different stages of delinquency. A servicer that complied with the Handbook will have documentation of the prescribed actions readily available.

²¹ U.S. Department of Housing and Urban Development, Office of Inspector General, HUD Did Not Have Adequate Controls To Ensure That Servicers Properly Engaged in Loss Mitigation, 2017-LA-0004, p. 4 (Sept. 14, 2017), <https://www.hudoig.gov/sites/default/files/documents/2017-LA-0004.pdf>.

²² *Id.* at 4.

²³ U.S. Department of Housing and Urban Development, Office of Inspector General, FHA Paid Claims for an Estimated 239,000 Properties That Servicers Did Not Foreclose Upon or Convey on Time, 2017-KC-0001 (October 14, 2016), <https://www.hudoig.gov/sites/default/files/documents/2017-KC-0001.pdf>.

²⁴ *Id.* at 8.

²⁵ 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).

²⁶ FHA Single Family Housing Policy Handbook 4000.1, § III.A.2.j. & o. (May 20, 2024).

²⁷ FHA Single Family Housing Policy Handbook 4000.1, § III.A.2.h. (May 20, 2024).

III. Additional Comments

A. The basic Single-Family Loan Sale transactional documents and post-sale loss mitigation protocols must be accessible to the public.

The proposed rules refer to many form documents associated with the Single-Family Loan Sale Program. These include: the Participating Servicer Agreement (PSA), the Bidder Information Package (BIP), the Conveyance, Assignment and Assumption Agreement (CAA), the Interim Servicing Agreement (ISA), and the Desk Guide. The rules define each of these documents.²⁸ According to the rules, an “Addendum” to each of these documents will be published on HUD’s website for each Single-Family sale.²⁹ It is not clear what HUD means by an “addendum” to one of the form documents. If HUD means the form as adapted to the specific loan sale, we strongly support this provision. The rule should make clear that all key transactional documents described in § 291.601 and adapted for the specific sale will be accessible to the public on HUD’s website.

This transparency will be particularly important for borrowers who need to know the post-sale servicing obligations that are binding on a loan purchaser and its assignees. The proposed rules indicate that these obligations will be set out in the Conveyance, Assignment and Assumption Agreement and the Sale Notice.³⁰ It is essential that these documents be accessible to borrowers. Without easy access to these documents, borrowers and their advocates will not know the eligibility requirements for the loss mitigation options that post-sale servicers must offer. This will prevent borrowers from effectively challenging errors in servicing and, as a result, will lead to unnecessary foreclosures.

The proposed rules do not contain a provision requiring servicers for loan buyers to make their loss mitigation guidelines accessible to the public. This is a major omission. We urge HUD to make this obligation clear in the final rule and in the servicing Handbook. In past HUD loan sales, one of the most significant harms borrowers experienced was the loss of access to a known system of loss mitigation options. As participants in the FHA-insured loan program, borrowers had access to published guidelines applicable to a loan. Through sales the borrowers lost the ability to rely on any known standards or guidelines.

Borrower advocates have documented the impact of sending homeowners into a “black hole” where, after loans were sold, servicers thwarted borrowers’ efforts to find out what loss mitigation rules applied to their loans. For example, Philadelphia and New York homeowners involved in foreclosure mediations were told by loan buyers that only modifications requiring outrageously unaffordable lump sum payments were available.³¹ Several Philadelphia homeowners had experienced this, and with counsel and, with the help of a concerned judge,

²⁸ See proposed 24 C.F.R. § 291.601.

²⁹ See proposed 24 C.F.R. § 291.609(a).

³⁰ See proposed 24 C.F.R. § 291.615(a).

³¹ National Consumer Law Center, *Opportunity Denied: How HUD’s Note Sale Program Deprives Homeowners of Basic Benefits of Their Government-Insured Loans* (May 2016), pp. 13-16, available at nclc.org.

they were able to pursue more reasonable options from the post-sale servicers. These homeowners were unusual in having access to counsel and a sympathetic judge. In the vast majority of cases, unrepresented borrowers have no recourse against the loan buyer's arbitrary handling of loss mitigation. In the Single-Family Loan Sale Program HUD must require buyers to publish their loss mitigation guidelines, just as FHA does for its insured loans.

B. The regulations appropriately require that transferees of the Purchaser are bound by the terms of the CCA and Notice of Sale, but HUD must ensure that conveyance documents reflect these obligations.

We support HUD's decision to require "any subsequent transferee of or servicer" of the initial loan purchaser to comply with the terms of the CAA and Notice of Sale.³² The proposed rule specifies that subsequent transferees and their servicers must offer loss mitigation options that meet the same generous standards as those the original purchaser was required to offer.³³ According to the proposed rule, subsequent transferees will also be subject to the conditions on REO sales and restrictions on abusive financing techniques, such as contract for deeds and lease-purchase agreements.³⁴

The term "transferee" in § 291.615(a) is not defined in the regulations and could be open to interpretation. Further Handbook or Mortgagee Letter clarification would be appropriate. For example, it is not clear whether the term means transferees of the note, assignees of the mortgage, or transferees of title to the real property. The precise meaning is relevant because transferees of a promissory note may not have knowledge of the terms of the CAA and Sale Notice. If HUD relies on the initial purchaser to inform transferees of these terms, this creates an enforceable obligation for HUD against the purchaser. However, later enforcement problems could be avoided if HUD requires information about the CAA and Sale Notice obligations to be included in HUD's recorded assignment of the mortgage to the initial purchaser. Recording of the CAA in property records would also provide notice to subsequent purchasers.

It is less clear who must comply with the purchaser reporting requirements in 24 C.F.R. § 291.615(b). Subsection (b) of § 291.615 (describing the reporting requirements) refers only to an obligation of the "purchaser," while subsection (a) of the same section, defining other obligations of the purchaser, specifically extends the obligations to subsequent transferees and their servicers. The absence of a reference to transferees and their servicers in §291.615(b) may be an oversight. HUD should clarify this point by specifically designating the reporting obligations as applicable to transferees and their servicers. The value of post-sale reporting will be greatly diminished if a transfer cuts off future reporting of data about the status of the loan.

³² See proposed 24 C.F.R. § 291.615(a).

³³ *Id.*

³⁴ *Id.*

C. HUD should implement a protocol for repurchase of loans in cases where a participating servicer engaged in significant misconduct.

The rules provide that HUD can withdraw a loan from a sale for any reason, including noncompliance with the CAA, at any time prior to the settlement date.³⁵ In addition, the definitions of CAA and Sale Notice state that these documents will include certain “repurchase requirements.”³⁶ The comments to § 291.605, addressing the role of participating servicers, also mentions “repurchase criteria” applicable to servicers. It is not clear whether the “repurchase” mechanism is distinct from the “withdrawal” of a loan before the settlement.

HUD should not terminate repurchase obligations at the post-sale settlement date. The Sale Notice and CAA should inform purchasers that the loans are subject to repurchase as long as they are held by the initial purchaser. If it becomes apparent after a sale that the Participating Servicer misrepresented its compliance with FHA loss mitigation guidelines, the purchaser should not be permitted to foreclose. Instead, HUD should require the noncomplying Participating Servicer to repurchase the loan. HUD can then require its Participating Servicer to comply with FHA loss mitigation guidelines and provide other remedies available under FHA guidance. This will hold Participating Servicers accountable and deter routine misrepresentations of compliance with FHA guidelines.

D. HUD should encourage participation by community-based nonprofit buyers.

We support HUD’s efforts to enhance mechanisms that allow owner-occupants, nonprofit organizations, and government entities to acquire loans through the Single-Family Loan Sale Program. As under its prior Neighborhood Stabilization Program, HUD should offer loan pools for sale through auctions limited to nonprofit buyers. The Secretary may also target the direct sale of single family loans to achieve community-based goals.³⁷ In the post-sale context, the first look requirement for certain entities in the event of an REO sale promotes similar homeownership objectives.

At the same time that we highlight the benefits of an enhanced role for community-based and governmental partners, we believe it is important to keep in mind the capacity limits that these entities face. Community-based purchasers acquired no more than 2% of the 104,000 FHA loans sold under the DASP program through 2016.³⁸ The other 98% went to speculative buyers, primarily large private equity firms. Despite HUD’s and the nonprofit entities’ best efforts, this imbalance is unlikely to change substantially in the future; for-profit buyers will remain a major part of the program. There are a limited number of nonprofit and government entities working in this area, and their resources cannot compete with huge private equity firms. Even if the acquisitions by nonprofits and government entities double or triple, the majority of loans sold will still end up with for-profit investors. For these reasons, our primary concern is with the bulk of loans sold that will inevitably end up held by profit-motivated investors. HUD needs to do

³⁵ See proposed 24 C.F.R. § 291.609(g).

³⁶ See proposed 24 C.F.R. § 291.601.

³⁷ See proposed 24 C.F.R. § 291.619.

³⁸ U.S. Dept. of HUD, *Report to the Commissioner on Post-Sale Reporting FHA Single Family Loan Sale Program* (October 2016) p.7, Ex. 5.

everything it can to prevent the harm that these buyers could impose on FHA borrowers if they were left with largely unfettered discretion.

IV. Conclusion

We applaud HUD for including new, critically important borrower protections in the proposed rule, including the pre-sale notice to borrowers, the requirement for post-sale loss mitigation, and requirements for improved transparency. These and other improvements are major steps forward, and we urge HUD to finalize these important protections. We also urge HUD to address specific details that will be essential for effective implementation of the new rules. We look forward to working with the agency on these important implementation details. If you have any questions about this letter, please contact Steve Sharpe, Senior Attorney at National Consumer Law Center, at [ssharp@nclc.org](mailto:ssharpe@nclc.org).