

**CONSUMER MORTGAGE COALITION**  
**HOUSING POLICY COUNCIL of the FINANCIAL SERVICES ROUNDTABLE**  
**INDEPENDENT COMMUNITY BANKERS of AMERICA**  
**NATIONAL ASSOCIATION of FEDERAL CREDIT UNIONS**

September 4, 2015

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

Re: Federal Housing Administration Single-Family Mortgage Insurance  
Maximum Time Period for Filing Insurance Claims, Curtailment of  
Interest and Disallowance of Operating Expenses Incurred Beyond Certain  
Established Timeframes  
Docket No. FR-5742-P-01

Dear Sir or Madam:

The undersigned trade associations<sup>1</sup> appreciate this opportunity to submit comments on the proposal to amend certain Federal Housing Administration (“FHA”) single-family procedures for filing and calculating insurance claims. The proposal would create two new deadlines for filing insurance claims, and noncompliance with either would terminate insurance coverage entirely for the underlying loan. While we appreciate the

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<sup>1</sup> The Consumer Mortgage Coalition is a trade association of national mortgage lenders, servicers, and service providers. To learn more about the Consumer Mortgage Coalition, please visit [www.consumermortgagecoalition.org](http://www.consumermortgagecoalition.org)

The Housing Policy Council of The Financial Services Roundtable consists of thirty-four of the leading national mortgage finance companies. HPC members originate, service, and insure mortgages. We estimate that HPC member companies originate approximately 75% and service two-thirds of mortgages in the United States. HPC’s mission is to promote the mortgage and housing marketplace interests of member companies in legislative, regulatory, and judicial forums.

The Independent Community Bankers of America®, the nation’s voice for more than 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 52,000 locations nationwide, community banks employ 700,000 Americans, hold \$3.6 trillion in assets, \$2.9 trillion in deposits, and \$2.4 trillion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA’s website at [www.icba.org](http://www.icba.org).

The National Association of Federal Credit Unions focuses exclusively on federal issues affecting the nation’s federally insured credit unions and advocates them before the federal government. NAFCU represents nearly 800 federal credit unions, accounting for 63.9 percent of total FCU assets and 58 percent of all FCU member-owners. NAFCU represents many smaller credit unions with limited operations as well as many of the largest and most sophisticated credit unions in the nation, including 88 out of the 100 largest FCUs. Learn more at [www.nafcu.org](http://www.nafcu.org).

Department of Housing and Urban Development's ("HUD") goal—incentivizing quicker claim filing—this proposal would address the symptom rather than the cause of delayed filings. The proposal would not yield the intended result. We strongly urge HUD to withdraw the proposal to terminate insurance coverage, and modify the expense curtailment proposal to curtail only those expenses caused by a mortgagee's delay.

## **The Proposal**

HUD has proposed to amend FHA servicing regulations in response to mortgagees who submitted insurance claims in batches. While batch filing is permissible, HUD describes it as a strain on FHA's resources. In response, HUD proposes two deadlines within which claims would be due, one a year after the time for reasonable diligence in pursuing a foreclosure, and another for post-foreclosure filing. HUD proposes to terminate an insurance contract if a mortgagee misses either deadline. The proposal would also refine the process for curtailing interest and declining to reimburse certain expenses. According to the Supplementary Information, each of these changes would apply only prospectively to loans endorsed for insurance after the revised regulation takes effect.

The first deadline would terminate insurance if the mortgagee does not file a claim within a year of the reasonable diligence time limit for foreclosure completion established under § 203.356(b). Section 203.356(b) does not set out the actual timeframes; rather, they are established state-by-state, and FHA currently makes them available by Mortgagee Letter. Under the proposal, if a redemption period exceeds the timeframe, the timeframe would be extended by a period of time equal to the redemption period unless FHA permits a conveyance during the redemption period.

The second deadline would terminate insurance if the mortgagee does not file a claim within three months of a foreclosure sale, pre-foreclosure sale, or deed-in-lieu.

The proposal would also permit FHA to deny payment for expenses a mortgagee incurred during any period of delay or as a result of a delay in taking required actions. This part of the proposal, § 203.402(u), does not state that it would apply only prospectively.

Proposed § 203.402(k) would make a welcome change to the treatment of insurance claims that are reduced due to a failure to meet a required deadline. Currently, insurance is limited to the date a "particular required action should have been taken or to which it was extended."<sup>2</sup> The proposal would amend this to reduce the insurance coverage "by the amount determined, based on a pro rata calculation of interest by day, to have been incurred as a result of the failure of the mortgagee to comply with the specified time period."<sup>3</sup> This aspect of the proposal would apply only to mortgages indorsed for insurance after the new regulation becomes effective.

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<sup>2</sup> 24 C.F.R. § 203.402(k)(1)(i), (k)(2)(i)(B), (k)(2)(ii)(B), (k)(3)(i)(B), and (k)(3)(ii)(B).

<sup>3</sup> Proposed 24 C.F.R. § 203.402(k)(1)(ii)(A) and (B), (k)(2)(iii)(B), and (k)(3)(iii)(B).

## **The Information HUD Needs About Imminent Claims Is Available**

HUD describes its proposal as a needed response to batch filing:

“The uncertainty regarding the timing of the filing of claims and the high number of claims filed all at once strain FHA resources. This activity has the potential to negatively impact HUD’s ability to project the future state of the MMIF, and, consequently, FHA’s ability to fulfill the statutory obligation to safeguard the MMIF. . . . The ability to better project capitalization of the MMIF will lessen the likelihood of FHA needing to obtain a capital infusion to support the solvency of the MMIF.”<sup>4</sup>

HUD solicits comment on “any less burdensome alternatives” to the present proposal.<sup>5</sup> We suggest the following.

HUD has information and tools available from which it can predict the future state of the MMIF even before claims are filed. Mortgagees report delinquencies to HUD, and future claims after delinquencies follow predictable patterns. HUD has, or could require reporting of, information from which it can predict with precision how many claims it will receive. Data management and use would be a far less drastic way to resolve what HUD sees as a problem than terminating insurance coverage.

## **Insurance Termination Would Threaten FHA’s Single-Family Program**

In its Regulatory Flexibility Act discussion, HUD states:

“HUD believes that the relevant time periods to file a claim for insurance benefits are reasonable periods for all FHA-approved mortgagees, large and small, and will not adversely affect any mortgagee.”<sup>6</sup>

It is difficult to imagine how termination of mortgage insurance would not adversely affect all mortgagees participating in the FHA program. Terminating insurance on an FHA loan is a death penalty for the loan. It would occur after the loan is delinquent and foreclosed, so that any recovery outside of insurance would be small. To also terminate insurance would make the loss severity considerably higher.

The reason lenders extend FHA loans is that the program provides federal insurance against credit risk. Absent that insurance, FHA lending would not exist.

FHA supports housing finance to low- and moderate-income borrowers and to low-wealth borrowers who cannot make a large down payment. Without FHA, it is likely

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<sup>4</sup> 80 Fed. Reg. 38410, 38411 and 38414 (July 6, 2015).

<sup>5</sup> 80 Fed. Reg. 38410, 38414 (July 6, 2015).

<sup>6</sup> 80 Fed. Reg. 38410, 38414 (July 6, 2015).

these borrowers would not own homes at all unless they are able to meet the criteria established by the Veterans Administration or the Rural Housing Finance programs.

HUD publishes a table showing that the time between obtaining good and marketable title and filing a claim has increased since fiscal 2008.<sup>7</sup> From this fact, it does not follow that creating a filing deadline, enforceable by a death penalty, would result in filings as quickly as HUD proposes to require. As this letter discusses, most of the delayed claim filings occur because HUD's reasonable diligence and conveyance deadlines have not kept up with changes in the marketplace. Timely compliance with the reasonable diligence deadline is frequently impossible because of events outside of a mortgagee's control. In addition, over the years HUD has increased the property maintenance and preservation activities that mortgagees must complete prior to conveyance, but HUD has not extended the deadline for a mortgagee to convey the property. Mortgagees have always had a financial incentive to file claims and to recover their losses as soon as they can. This is why HUD has never needed an absolute, claim-filing deadline in the past, and is why Congress never specified that HUD can impose such a deadline. ***The reasonable diligence and conveyance deadlines are broken, not the incentive to file quickly.***

HUD's data show that in fiscal 2014 to date, mortgagees have filed claims within 30 days, plus any extensions, of obtaining good and marketable title, less than a third of the time. In fiscal 2008, the best year included in these data, 60.64 percent of claims were filed within 30 days plus extensions. Based on HUD's data, if HUD were to finalize its proposal to terminate insurance for late filings, something in the order of ***half of the claims could lose all insurance coverage.***

We question whether HUD has authority to terminate insurance based on filing procedures, especially based on deadlines that mortgagees are unable to meet. The National Housing Act does not expressly provide HUD with such authority, and in fact expressly provides that paying claims is required:

“Insurance benefits **shall be paid** in accordance with section 1735d of this title and shall be equal to the original principal obligation of the mortgage (with such additions and deductions as the Secretary determines are appropriate) which was unpaid **upon the date of—**

- (A) assignment of the mortgage to the Secretary;
- (B) the institution of foreclosure proceedings;
- (C) the acquisition of the property after default other than by foreclosure; or
- (D) sale of the mortgaged property by the mortgagor.”<sup>8</sup>

Once the triggering event occurs, insurance benefits are due. The National Housing Act also requires that a procedure for paying insurance benefits always be available:

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<sup>7</sup> 80 Fed. Reg. 38410, 38413 (July 6, 2015).

<sup>8</sup> 12 U.S.C. § 1710(a)(5).

“The Secretary shall publish guidelines for determining which of the procedures for payment of insurance under paragraph (1) are available to a mortgagee when it claims insurance benefits. **At least one of the procedures for payment of insurance benefits** specified in paragraph (1)(A) or (1)(B) **shall be available to a mortgagee** with respect to a mortgage, but the same procedure shall not be required to be available for all of the mortgages held by a mortgagee.”<sup>9</sup>

HUD’s proposal, however, would remove all procedures in some cases. Finally, FHA insurance benefits are “incontestable” absent fraud or misrepresentation. As Congress mandated in the National Housing Act:

“Any contract of insurance heretofore or hereafter executed by the Secretary under this subchapter shall be **conclusive evidence of the eligibility of the loan or mortgage for insurance**, and the validity of any contract of insurance so executed shall be **incontestable** in the hands of an approved financial institution or approved mortgagee from the date of the execution of such contract, except for fraud or misrepresentation on the part of such approved financial institution or approved mortgagee.”<sup>10</sup>

HUD proposes to contest the incontestable. HUD also has authority to terminate insurance “upon request by the borrower or mortgagor and the financial institution or mortgagee[,]” but it does not have authority to do so without such a request.<sup>11</sup>

This proposal threatens the very viability of the FHA program. Several lenders have pulled back from FHA lending recently because of losses. It is likely that, if this proposal were implemented, many more lenders would significantly decrease or exit FHA lending all together.

## **The Filing Deadlines**

### *The Deadlines Are Not Reasonable*

The proposal threatens reduced insurance or termination of all insurance coverage based on whether mortgagees meet both of two deadlines, one beginning on the date of default and based on reasonable diligence in pursuing a foreclosure, and another for filing claims after a foreclosure sale, short sale, or deed-in-lieu. The reason mortgagees miss these deadlines is that the established deadlines in most cases are already unrealistic.

The federal government, as well as state and local authorities, have been prolonging foreclosure timelines over the past few years, yet HUD has not updated its timeframes to

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<sup>9</sup> 12 U.S.C. § 1710(a)(3) (emphasis added).

<sup>10</sup> 12 U.S.C. § 1709(e).

<sup>11</sup> 12 U.S.C. § 1715t (emphasis added).

keep pace. HUD's reasonable diligence deadlines are especially unworkable in judicial foreclosure states. Numerous events beyond a mortgagee's control can cause a mortgagee to miss an applicable deadline.

More foreclosure delays may be on the horizon. The CFPB has pending a proposed rulemaking that would require mortgagees to withdraw a pending foreclosure in some cases.<sup>12</sup> In the same rulemaking, the CFPB has also proposed to treat certain "successors in interest" as borrowers for purposes of loss mitigation, and depending on how that rulemaking is finalized, it could be easy for such successors (or persons claiming to be successors) to delay a foreclosure, possibly repeatedly. When the CFPB finalizes this rulemaking, HUD will need to adjust its timeframes accordingly.

The proposed filing deadline would be measured beginning with the date of default, and would add a year plus the reasonable diligence time frame. The reasonable diligence deadline is measured from the date of the first legal action that a jurisdiction requires to commence foreclosure and ends when the mortgagee acquires marketable title to and possession of the property. Even if a mortgagee files a timely foreclosure action, it is not at all certain that the foreclosure will be complete by the proposed claim filing deadline, due to no fault of the mortgagee. Offering loss mitigation would make it more difficult to meet the proposed claim filing deadline, risking insurance coverage as a result. Court-appointed mediators may continue mediation for an extended period, dockets are overloaded, or there may be intervening litigation. A penalty as drastic as insurance termination for delays that diligent mortgagees cannot avoid would be wholly inappropriate.

The post-foreclosure filing deadline is three months after a foreclosure sale, the end of a redemption period, or after the mortgagee acquires possession. HUD requires mortgagees to pay property taxes, homeowners association fees, and certain utilities, and place the property in conveyance condition before conveying the property to HUD. It is not always possible for a mortgagee to complete these actions in three months, let alone by the 30-day conveyance deadline. Any filing deadline should accommodate the realities mortgagees face when preparing a property for conveyance to HUD.

HUD needs to update its reasonable diligence and conveyance deadlines to be realistic in today's economic environment and to accommodate loss mitigation and property preservation requirements. The proposal to punish mortgagees for inability to comply with the current deadlines should be withdrawn.

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<sup>12</sup> Proposed Regulation X comment 41(g)-1, 79 Fed. Reg. 74176, 74294 (December 15, 2014).

*Extended Deadlines Are Not Clear*

Proposed § 203.372(b) would set the filing deadline at 12 months after the reasonable diligence timeframes established in § 203.356(b) unless HUD approves an extension. For reasonable diligence deadlines under proposed § 203.372(b), HUD sets its timeframes in Mortgagee Letter 2013-38, in which HUD states:

“HUD reserves the right to alter these state-specific [reasonable diligence] timeframes to reflect changing foreclosure completion timeframes and local docket conditions.”

This letter provides that exceptions to the reasonable diligence timelines are available due to “circumstances beyond the mortgagee’s control,” required mediation, bankruptcy after foreclosure initiation, and when legal action is necessary for acquiring possession. These extensions need not be expressly requested and approved, as the Mortgagee Letter instructs mortgagees simply to maintain a detailed chronology supporting the extension.

It is not clear how any extensions would be treated for purposes of the proposal to terminate insurance. It is not clear whether an extension would need to be approved before the unextended deadline. Would any extensions be automatic, or must each be requested and approved individually?

If extensions must receive HUD approval before the filing deadline passes, what if a mortgagee timely requests a reasonable extension but does not receive a response before the deadline passes? Is FHA capable of responding to all extension requests before the deadlines? Would providing rapid responses to every extension request be a fruitful use of FHA’s resources?

If the unextended deadline were to pass, and the insurance contract is terminated under proposed § 203.317a, could the extension be added and the insurance contract restored? Proposed § 203.317a does not provide for restoration of insurance once terminated, nor does it address whether any insurance restoration would be retroactive or only prospective.

Moreover, if a CFPB regulation were to require the withdrawal of a foreclosure action then permit a refiling, it is not clear how HUD’s reasonable diligence deadline would be measured. For example, if the CFPB will require a pending foreclosure to be withdrawn while a successor in interest pursues loss mitigation, then the foreclosure is refiled, which foreclosure filing would HUD use to set its deadline? Would it depend on whether the original borrower remains obligated on the loan with the successor? Or would it always be the earliest filing, even if the mortgagee were required by federal law to wait 120 days to refile and even if the mortgagee were to miss the deadline as result of that 120-day delay?

It is critical that HUD provide substantial additional clarity as to what the deadlines are, and how they could be extended. Missing a filing deadline alone should not terminate insurance.

*The Post-Foreclosure Deadline Is Tied to Unreasonable Conveyance Requirements*

In addition to prohibiting claims filed more than one year after the reasonable diligence timeframe, the proposal would separately prohibit post-foreclosure claims more than three months after a foreclosure sale, the expiration of a redemption period, or the mortgagee's acquisition of the property. This would be in addition to the current requirement that mortgagees convey good and marketable title to HUD within 30 days,<sup>13</sup> with the property largely undamaged.<sup>14</sup>

HUD has changed its enforcement of its standards for the conveyable condition of properties. The standard is unclear, which has resulted in inconsistent interpretations of the standard among HUD's regional Homeownership Centers. In addition, many jurisdictions are increasing the duties of mortgagees for maintaining vacant properties. Conveying an undamaged property within 30 days is no longer reasonable or realistic.

Given that a conveyance within 30 days is not workable, a requirement that the mortgage file a claim within 3 months of a foreclosure is also unworkable because the claim will often not be known that soon.

HUD should implement clear, reasonable, and consistent standards for what constitutes acceptable conveyance condition. A minimum of 90 days should be allowed for a conveyance.

*Tolling Should Be Reasonable Under the Circumstances*

We are concerned about HUD's proposal that:

“the filing of a claim does not toll the time periods set forth in this section or guarantee an extension of time in which to file or refile a claim that has been withdrawn or denied for any reason, including claims resubmitted after the initial claim resulted in a repurchase of a loan or reconveyance of property.”<sup>15</sup>

There should be a reasonable time to file or refile when a delay is inconsequential, when the cause is beyond the mortgagee's control, or when the need to refile is minor in comparison to termination of all insurance coverage.

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<sup>13</sup> 24 C.F.R. § 203.359.

<sup>14</sup> 24 C.F.R. § 203.378 – § 203.380.

<sup>15</sup> Proposed 24 C.F.R. § 203.372(d).



At a minimum, if the filing deadline passes after filing but before HUD notifies the mortgagee of a reconveyance, filing the claim should toll the deadline immediately. If a mortgagee requests an extension of the deadline, that request should toll the deadline until HUD acts on the request. If a deadline is extended automatically, filing before the extended deadline should be permissible.

In any event, termination of insurance is disproportionate to late filing, to the strain on FHA resources, and to effects on the MMIF.

### **Expense Curtailment**

The proposal would curtail claim expenses when a mortgagee misses a deadline for taking a first legal action, the reasonable diligence timeframe, conveying or marketing a property, or filing a claim.<sup>16</sup> The curtailment would be prorated to curtail expenses incurred or paid during or as a result of the missed deadline.

This would be reasonable if the deadlines themselves were reasonable and if the curtailment were limited to expenses caused or increased because the delay. Unless the deadlines are substantially improved, mortgagees would be unable to recover expenses incurred as a result of events the mortgagees cannot control.

In addition, expenses that would be incurred *regardless of a delay* should not be curtailed. This would be more consistent with the intent of this aspect of the proposal. For example:

- Attorneys' fees, while not mentioned in proposed § 203.402(u), are mentioned in the examples of curtailment calculations. HUD caps attorneys' fees, so they are not increased due to a delay and should not be curtailed.
- If a mortgagee misses a deadline for filing a first legal, but completes the foreclosure within the reasonable diligence timeframe that would have applied with a timely first legal, there should be no curtailment. In this case, the expenses all would have been incurred *regardless of a delay* in filing the first legal.
- If a bill for property taxes happens to be due during a one-week period of delay, the proposed rule would require curtailment of this tax bill. The curtailment would result simply because of the timing of the tax bill and not because of any increase in the property taxes owed in connection with the property.

The proposed expense curtailment is another example of HUD's penalty not being commensurate with the harm caused to the FHA fund by the mortgagee's delay.

It is also not clear whether proposed § 203.402(u) would apply only prospectively, as the Supplemental Information indicates. There is no language in proposed § 203.402(u) to that effect as there is with the other proposed changes. Any final regulation should be

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<sup>16</sup> Proposed 24 C.F.R. § 203.402(u).

clear that it is prospective only for this section as well. In fact, 24 C.F.R. § 203.499 prohibits HUD from applying 203.402(u), if adopted, retroactively.

### **Interest Curtailment**

Proposed revisions to § 203.402(k) would amend interest curtailment. Currently the curtailment is as of the date a required action should have been taken, and a mortgagee cannot claim interest thereafter. This would be amended to curtail interest in the amount incurred as a result of the failure to comply, *pro rata*. We support this proposal because it would better reflect the impact on the MMIF of a mortgagee's delay in foreclosures.

We request clarification that the deadline in the curtailment calculation would include any extensions, whether automatic or approved specifically. For automatic extensions, mortgagees document them in the claim file, and should be able to rely on them.

### **Conclusion**

While we support the proposal to curtail interest so as to tie it to a mortgagee's delay, we cannot understate our concern regarding the prospect of insurance termination. We strongly urge HUD to consider how that possibility would force FHA lenders to consider leaving or substantially scaling back FHA lending, and how that would harm borrowers who need FHA the most. Finally, we encourage you to convene a meeting between industry stakeholders and HUD representatives to discuss these and other comments further.

Sincerely,

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