

September 22, 2021

The Honorable Marcia Fudge
Secretary
Department of Housing and Urban Development
451 7th St S.W.
Washington, D.C. 20410

RE: September 16, 2021 Note Sale Announcement

Dear Secretary Fudge:

On behalf of the clients and communities we represent, we write in response to the White House's September 1, 2021 announcement and HUD's September 16, 2021 notice of its intent to sell 1,730 mortgage loan notes in the fall. HUD should not resume any note sales without first implementing regulations for the program that promote stable homeownership. Establishing rules through a public process is essential, especially in light of the more than 12% of FHA-insured borrowers currently delinquent, a figure three times that for conventional loans.

According to HUD's Office of Inspector General (OIG), the Administrative Procedure Act (APA) requires HUD to promulgate regulations for the note sale program before selling loans.¹ The HUD OIG concluded that the agency had failed to create necessary regulations when it previously engaged in note sales. Given the requirement of the APA, HUD cannot simply announce its intention to restart the note sale program. After the OIG report, HUD issued an Advanced Notice of Proposed Rulemaking (ANPR) and accepted comments on it, but it has not taken the next step of issuing proposed rules. Until HUD follows the APA, it should not restart the sale of notes.

In addition to its sales of single family forward mortgage notes, HUD also sold certain reverse mortgage notes through what it termed as the Vacant HECM pools, which auctioned loans attached to properties that HUD identified as no longer occupied by reverse mortgage borrowers. The agency has continued to sell HECM loans even after the critical OIG report on its failure to comply with the APA, and HUD has stated that its upcoming sale is a Vacant HECM pool; nonetheless, the Vacant HECM pool sales have operated under the same statutory authority and also lack transparent rules and reporting. While truly empty homes do not affect homeowners, their sale affects what happens in the neighborhood. Moreover, procedures for ensuring properties are actually vacant would be part of any established set of rules. The guidelines for HECM loans sales must be published and available for comment just like those for the general loan sale program.

¹ HUD Office of Inspector General (OIG), HUD Did Not Conduct Rulemaking or Develop Formal Procedures for Its Single-Family Note Sales Program (July 14, 2017), <https://www.hudoig.gov/sites/default/files/documents/2017-KC-0006.pdf>.

Any regulation HUD approves should promote community stabilization and avoid furthering the harm that the note sale programs have caused.² Specifically, the regulation must:

- Allow HUD to employ note sales only when it can document an imminent threat of a negative balance to the Mutual Mortgage Insurance (MMI) fund.
- Require servicers to provide notice to homeowners prior to the inclusion of a note in any auction, informing them that the loan is being proposed for sale as a result of the exhaustion of loss mitigation options.
- Obligate servicers to document and certify compliance with each step of FHA's sequential loss mitigation review, including documentation of the grounds for denial of foreclosure alternatives, before HUD allows the loan to be sold in a note sale.
- Mandate that loan purchasers offer and make public comprehensive loss mitigation protocols that provide borrowers with equivalent or greater relief than the options available under FHA loss mitigation guidelines.
- Prohibit note purchasers from offering loss mitigation options that do not support long term affordability, including temporary interest-only modifications.
- Set aside the maximum number of notes for purchase by community groups and nonprofit organizations with a mission of preserving homeownership or affordable rental units.
- Include comprehensive and publicly accessible limits on the disposition of properties acquired through the program to entities other than owner-occupants, community groups, affordable rentals, or land banks.
- Prohibit entities that acquire properties through the program from disposition through note sales using land installment contracts or conversion to high-cost rental properties.

These recommendations are discussed in detail in comments submitted by some of the undersigned organizations.³

HUD also has an obligation under the Fair Housing Act to affirmatively further fair housing, which requires HUD to analyze how its programs, including the note sales program, will further fair housing. Unfortunately, HUD has not provided any public assessment of how its program will further fair housing, which is of particular concern given that FHA-insured loans now provide a significant means of financing purchases for African American and Latino

² Geoff Walsh, National Consumer Law Center, Opportunity Denied: How HUD's Note Sale Program Deprives Homeowners of the Basic Benefits of Their Government Insured Loans (May 2016), <https://www.nclc.org/images/pdf/pr-reports/opportunity-denied-report.pdf>.

³ Coalition Comments on Federal Housing Administration (FHA): Single-Family Loan Sale Program; Advance Notice of Proposed Rulemaking and Request for Public Comment, 84 Fed. Reg. 19748 (July 5, 2019), https://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/comments-to-hud-single-family-loan-sale-program-july2019.pdf.

homebuyers. As a result, policies will disproportionately impact those communities. Going forward, it is crucial that reporting requirements for the FHA note sale program include a fair lending analysis that reviews all aspects of the note sale program to ensure that there are no discriminatory impacts associated with the sale of these loans on any protected classes under the Fair Housing Act and Equal Credit Opportunity Act.

We appreciate that HUD is considering setting aside half of the notes for sale to non-profit and community organizations committed to rehabbing and selling homes to owner-occupants. Even if HUD adopted this limitation, however, it leaves half of the loans sold without restriction. Moreover, it does nothing to prevent borrowers from having their loans sold when loss mitigation was not exhausted. Comprehensive regulations are necessary to make the program work well for communities and to ensure the program is consistent with the goals of FHA.

FHA-insured mortgages play a crucial role in providing and maintaining access to affordable and sustainable homeownership for low to moderate income families and communities of color. If the note sale program continues in its current unregulated form, FHA-insured borrowers and their communities remain at risk of further harm from non-compliant servicers and private equity loan purchasers. It is crucial that HUD implement strong protections both before and after loans are sold to prevent needless borrower displacement and neighborhood instability and to ensure fulfillment of the FHA program goals. HUD must develop and enforce robust protections for FHA-insured borrowers and former borrowers affected by loan sales and mandate comprehensive data collection, including on fair housing issues, so that the impact of note sales can be properly evaluated and problems addressed.

Thank you for your consideration. Please contact Steve Sharpe, Staff Attorney at the National Consumer Law Center for further discussion at [ssharp@nclc.org](mailto:ssharpe@nclc.org).

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform Education Fund
Center for Community Progress
Community Legal Services of Philadelphia (PA)
Connecticut Fair Housing Center
Consumer Action
Consumer Advocates Against Reverse Mortgage Abuse (CAARMA)
Financial Protection Law Center (NC)
Jacksonville Area Legal Aid, Inc. (FL)
Legal Aid Society of Southwest Ohio, LLC
Legal Aid Society of the District of Columbia
MICAH- Metropolitan Interfaith Council on Affordable Housing (MN)
Mobilization for Justice, Inc. (NY)
Mountain State Justice, Inc. (WV)
National CAPACD
National Coalition for the Homeless
National Community Reinvestment Coalition (NCRC)

National Fair Housing Alliance
National Housing Law Project
National Housing Resource Center
NHS Brooklyn, CDC, Inc. (NY)
Western New York Law Center, Inc.