

April 21, 2020

Linda A. Lacewell  
Superintendent of Financial Institutions  
New York State Department of Financial Services  
One State Street Plaza  
New York, NY 10004

**Re: EMERGENCY AND PROPOSED REPEAL OF 3 NYCRR 79 AND NEW 3  
NYCRR 79**

The National Reverse Mortgage Lenders Association (“NRMLA”) is the national voice of the reverse mortgage industry. With over 300 member companies and over 2,000 member delegates, NRMLA serves as an educational resource, policy advocate and public affairs center for lenders and related professionals. NRMLA was established in 1997 to enhance the professionalism of the reverse mortgage industry. Our mission includes educating industry participants on best practices, regulatory requirements and market dynamics; providing helpful information to consumers about reverse mortgages; enforcing our Code of Ethics and Professional Responsibility;<sup>1</sup> and offering insight to policymakers working on reverse mortgage matters and related issues. NRMLA members make over 90% of the reverse mortgages originated today.

**Background**

Chapter 581 of the Laws of 2019 amended the Real Property Law by adding a new section 280-b. As of March 5, 2020, Real Property Law Section 280-b regulates reverse mortgages under the Federal Home Equity Conversion Mortgage (“HECM”) program. As a result, the previously existing version of Part 79 was replaced, pursuant to emergency regulations issued by the Superintendent on March 5, 2020, with a new comprehensive Part 79 that covers both loans done pursuant to Real Property Law Sections 280 and 280-a and HECM loans subject to Real Property Law Section 280-b. The new regulation was published on an emergency basis following the close of business on March 5, 2020, and pursuant to its terms, became effective on March 5, 2020.

**Comments**

**A. Compliance Transition Period**

We initially note the New York Department of Financial Services (the “Department” or “DFS”) adopted new Part 79 regulations on an emergency basis on March 5, 2020, becoming effective that same day. The adoption of new Part 79 in this manner placed a regulatory burden on New

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<sup>1</sup> Code of Ethics & Professional Responsibility, NRMLA, <http://www.nrmlaonline.org/nrmla/ethics/conduct.aspx>.

York reverse mortgage lenders, providing no time for analysis and transitioning of systems, processes, procedures and training to accommodate the significant changes mandated by new Part 79. Reverse mortgage lending came to a virtual stand-still on March 6<sup>th</sup> and remains disrupted. The timing of its publication unfortunately coincided with growing concern over the Coronavirus and an emerging world-wide pandemic. As a result, seniors in New York have largely been deprived from accessing a reverse mortgage, which can be a critical “lifeline” during this time of need. The adoption of new Part 79 without a transitional period has effectively limited the industry’s ability to provide this important lifeline to New York seniors when they may need it the most.

The Department’s Regulatory Impact Statement for new Part 79 states the Department will consider revisions of the regulation based upon comments it receives during a public comment period and that such revisions could include a transition period for compliance.<sup>2</sup> Given the significant changes mandated in the new Part 79 regulations, and for the reasons expressed above, we respectfully request the Department provide a compliance transition period by delaying new Part 79’s effective date for a period of one hundred twenty (120) days from and after its publication, or until July 3, 2020. Providing such a transitional period reasonably and appropriately recognizes the regulatory burdens imposed by new Part 79, while also permitting New York seniors continuing access to an important liquidity tool in this time of greater need.

### **B. Applicability**

Since new Part 79 was published on an emergency basis, a question arises concerning the applicability of new Part 79 to both reverse mortgages in process as of March 6, 2020, and reverse mortgages which closed prior to that date. Herein we request the Department clarify that new Part 79, in all respects, is applicable only to reverse mortgage loans where the related application was taken on or after March 6, 2020.

New Part 79 represents a substantial departure from pre-existing regulations governing both the origination and servicing of reverse mortgages. As a result, reverse mortgage which closed prior to March 6, 2020, may lack key provisions in the loan agreement or security instrument that are now required, or appropriate, to conform with the servicing practices now mandated under new Part 79. In addition, loans in process as of March 6, 2020, similarly may not conform to new origination processes and practices now required by new Part 79. For that reason, the Department should clarify that new part 79 becomes applicable only to reverse mortgages where the related application was taken on or after March 6, 2020.

### **C. Application of Parts 80 and 82 to HECMs**

With publication of new Part 79, the Department eliminated the former exemption for HECMs pursuant to *N.Y. Comp. Codes R. & Regs. Title 3, § 79.1(b)*. That provision specifically provided that Parts 38, 39, 80 and 82 of Title 3 do not apply to HECMs. New Part 79 provides no exemption for HECMs from other provisions within Title 3, notwithstanding that the terms of the HECM program in some instances, conflict with certain provisions of Parts 80 and 82. In particular, *N.Y. Comp. Codes R. & Regs. Title 3, § 82.4* limits negative amortization in a manner

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<sup>2</sup> See Regulatory Impact Statement for new Part 79 of the Superintendent’s Regulations, 3 NYCRR, Section 10.

that expressly conflicts with the terms of the HECM loan program. For this reason, we request the Department appropriately clarify which portions of the former exemption under Section 79.1(b) continue to apply to HECMs. Our view, given the substance of these provisions, is that minimally Parts 80 and 82 remain inapplicable to HECMs. The Department should make clear that HECMs are exempt from both and any other provisions of Parts 38 and 39 inconsistent with the terms with the FHA HECM program.

#### **D. Section 79.2(m)**

Section 79.2(m) defines “Mortgagor” as “a borrower or borrowers of a reverse mortgage loan.”<sup>3</sup> This definition is inconsistent with federal regulations applicable to the HECM program, which defines “Mortgagor” as “each original mortgagor under a HECM mortgage and his heirs, executors, administrators, and assigns.”<sup>4</sup> Mortgagors are typically those having an interest in the collateral property who subject their interest to the lien of the mortgage. As such, the borrowers under a reverse mortgage note or loan agreement may be different than the mortgagors.

Since Section 280-b(4)(a) mandates reverse mortgages secured by residential real property within New York are subject to the rules and regulations of the HECM program, we respectfully request that key terms under New Part 79 be defined consistently with their counterparts under federal regulations applicable to HECMs and therefore propose that the definition of “Mortgagor” under Section 79.2(m) be revised to state, “each original mortgagor under a reverse mortgage and his heirs, executors, administrators, and assigns.”

#### **E. Servicing**

New Part 79 imposes new comprehensive regulations applicable to the servicing of reverse mortgages in the State of New York. These regulations, in part, (i) irreconcilably conflict with HUD regulations applicable to the HECM program, such that mortgagees cannot possibly comply with both applicable federal and state law, (ii) further conflict with Real Property Law Section 280-b(4)(a), which mandates that reverse mortgages secured by residential real property within New York be subject to the rules and regulations of the HECM program<sup>5</sup>, and (iii) require further clarification to work in harmony with applicable federal regulations. In addition, certain regulations, as discussed below, represent a significant departure from the terms of Real Property Law Section 280-b, and therefore should be appropriately eliminated or revised to promote consistency both with applicable federal regulations and Real Property Law Section 280-b.

##### **(i) Section 79.6**

Section 79.6 provides that a Mortgagor is required to maintain the structural integrity of the real property securing the reverse mortgage loan in a reasonably similar condition as the property is in at the time of closing or after repairs have been made for which funds have been disbursed or set aside at closing.<sup>6</sup> The regulation further states that for purposes of Section 79.6, repairs

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<sup>3</sup> See NYCRR Section 79.2(m).

<sup>4</sup> See 24 CFR Section 206.3.

<sup>5</sup> See NYRPL Section 280-b(4)(a).

<sup>6</sup> See 3 NYCRR Section 79.6(a).

necessary to maintain *structural integrity* must be documented by a licensed professional engineer or architect and shall be limited to repairing *structural problems* that threaten to *materially damage* the property or its market value. (Emphasis added.) The terms “structural integrity,” “structural problems” and “material damage” are not defined within new Part 79.

FHA comprehensively regulates minimum collateral property acceptability criteria for FHA loans, including HECMs, by establishing Minimum Property Requirements (MPR) and Minimum Property Standards (MPS).<sup>7</sup> Such property acceptability criteria may or may not be related to a “structural problem,” however that term may ultimately be defined by the Department. In addition, pursuant to FHA guidelines, the appraiser, as a representative of the mortgagee, provides verification that the collateral property meets such MPR and MPS, not a licensed professional engineer or architect.

Secondly, Section 79.6(b) provides that “if the mortgagor fails to make a repair required to maintain the structural integrity of the real property in a timely manner, the mortgagee may arrange for such repair and pay for it in the following ways, upon providing reasonable notice to the homeowner and receiving consent to enter upon the premises, which is not to be unreasonably withheld by the mortgagor: (1) by deducting necessary amounts from a set aside account; (2) *by withholding from one or more monthly payments otherwise due to the mortgagor no more than 25 percent of each such monthly payment, until the repairs are paid for*; or (3) by adding the amount to the loan principal.”<sup>8</sup> (Emphasis added.)

Here again, the options provided under Section 79.6(b) are not addressed in Real Property Law 280-b, conflict with applicable federal requirements, and contradict Real Property Law 280-b(4)(a), which requires that reverse mortgages secured by residential real property within New York be subject to the rules and regulations of the HECM program. In particular, borrower funds available under an adjustable rate HECM can be structured in different ways. A borrower may have a line of credit on their account, or they may choose to receive term or tenure payments, or some combination of a term or tenure payment plan with a line of credit. The term or tenure payments are referred to as scheduled advances. Amounts disbursed from the line of credit are referred to as unscheduled advances. These scheduled and unscheduled advances are determined by the borrower’s choice of a payment plan at the inception of the loan, or following the origination of the loan if such payment plan is amended during the term of the loan. If a HECM borrower is receiving a stream of scheduled advances, does not have an applicable repair set aside on their account and has no line of credit funds, or an insufficient line of credit, HECM guidelines *require* the remaining scheduled advances in the payment plan be converted to a line of credit. (Emphasis added.) At this point, the mortgagee may make an unscheduled advance out of the newly available funds placed into the line of credit to pay the required repairs, or, as applicable, for taxes or insurance. After payment of such expense, the remaining funds in the line of credit are to be used to create a new term or tenure payment plan to enable the borrower to continue to receive some stream of scheduled advances. This new payment plan could result in payments that are greater or less than 25% of the original payment plan monthly amount. Accordingly, any requirement under Section 79.6(b) to limit withholding from monthly

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<sup>7</sup> See Handbook 4000.1, FHA Single Family Housing Policy Handbook, Section II(A)(3).

<sup>8</sup> See 3 NYCRR Section 79.6(b).

payments to no more than 25% of such monthly payment, or any other amount, is in direct conflict with HUD requirements.<sup>9</sup>

Thirdly, a set aside account is broadly defined in Section 79.2 to include “any account that a mortgagee establishes or controls to pay property charges on behalf of a mortgagor with respect to a reverse mortgage loan...*regardless of title given....*”<sup>10</sup> (Emphasis added.) Section 79.6(b) requires that any amounts paid by mortgagee to cover the structural integrity of the property first be paid from any “set aside account.” A set aside account required under the HECM regulations such as the Life Expectancy Set Aside or Repair Set Aside can only be used for the purposes for which they are established, and funds allocated to such set asides cannot be disbursed to cover other types of expenses.<sup>11</sup>

Moreover, and contrary to Section 79.6, Real Property Law Section 280-b does not address maintenance of the real property securing a reverse mortgage loan or the borrower’s obligation to maintain the collateral property, much less address the matter in a manner that conflicts with applicable federal regulations.

For all of the foregoing reasons, we respectfully request the Department withdraw Section 79.6 in its entirety. Section 79.6 appears to propose a solution, not addressed in its enabling statute and incompatible with applicable FHA regulations, in search of a problem.

**(ii) Section 79.12**

Section 79.12(b) poses similar issues to those discussed above. Section 79.12(b) provides that “[i]f there is no set aside account, then, notwithstanding applicable state or federal rule or law, the mortgagee may advance the funds necessary to pay for such coverage (property insurance) or to pay real estate taxes and to reimburse itself in any of following individual or combined ways: (1) by deducting necessary amounts from a line of credit; (2) *by withholding from one or more monthly payments otherwise due to the mortgagor no more than 25 percent of each such monthly payment, until such time as the amount paid is realized*; or (3) by adding the amount to the loan principal. If a set aside account has been established, then, to the extent possible, the mortgagee must reimburse itself from such fund before choosing option (2) or (3) (paragraph [2] or [3] of this subdivision).”<sup>12</sup> (Emphasis added.)

As noted above, when a HECM borrower is receiving a stream of scheduled advances, does not have a set aside account for property insurance and/or taxes associated with his/her account and has no line of credit funds, or an insufficient line of credit, HECM guidelines *require* the remaining scheduled advances in the payment plan be converted to a line of credit. At that point, the mortgagee may make an unscheduled advance out of the newly available funds placed into the line of credit to pay such property insurance or property tax. After payment of such expense, the remaining funds in the line of credit are to be used to create a new term or tenure payment

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<sup>9</sup> See HUD Handbook 4330.1, 13-10.B., 13-12.B.4., Model HECM Loan Agreement, Section 2.16.

<sup>10</sup> See 3 NYCRR Section 79.2(t).

<sup>11</sup> See 24 CFR 206.19(f), ML 2014-21 (concerning Life Expectancy Set Aside accounts) and 24 CFR 206.205(a)(2) (concerning expenses that may be paid from a Life Expectancy Set Aside).

<sup>12</sup> See 3 NYCRR Section 79.12(b).

plan for the borrower to enable the borrower to continue to receive some stream of scheduled advances. This new payment plan may result in payments that are greater or less than 25% of the original payment plan monthly amount. As a result, any requirement under Section 79.12(b) to limit withholding from monthly payments to no more than 25% of such monthly payment, or any other amount, is in direct conflict with HUD requirements.<sup>13</sup>

We note again Real Property Law Section 280-b makes no mention of the set aside or property charge payment protocol as specified in Section 79.12(b), but does specifically mandate that reverse mortgages secured by residential real property within New York be subject to the rules and regulations of the HECM program.<sup>14</sup> Thus, by promulgating regulations which conflict with federal regulations under the HECM program, the Department has proscribed rules that contradict Real Property Law Section 280-b.

In light of the foregoing, we request the Department clarify Section 79.12 to be fully consistent with applicable federal regulations.

**(iii) Section 79.2(n) and Section 79.2(t)**

Section 79.2(n) defines the term “property charge” as, “property taxes, hazard insurance premiums, any applicable flood insurance premiums, *ground rents, condominium fees, planned unit development fees, homeowners’ association fees*, and any other special assessments that may be levied by any municipality or pursuant to State law.”<sup>15</sup> (Emphasis added.)

Section 79.2(t) further defines the term “set aside account” as, “any account that a mortgagee establishes or controls to pay property charges on behalf of a mortgagor with respect to a reverse mortgage loan, including charges that the parties have voluntarily agreed that the mortgagee should collect and pay, and includes any arrangement by which the mortgagee reserves a portion of the mortgagor’s principal for subsequent payment of property charges or conditional repairs under a repair rider. The definition encompasses any account established for any of the above purposes, regardless of title given, including a “reserve account,” “reserve fund,” “repair set aside account” “life expectancy set aside account” or “escrow account.” For purposes of this section, the term “set aside account” excludes any account that is under the mortgagor’s total control such as a line of credit, as detailed in section 79.12(c) of this Part.”<sup>16</sup>

The definition of property charge under Section 79.2(n) includes ground rents, condominium fees, planned unit development fees, and homeowners’ association fees. To the contrary, applicable HECM regulations provide that the borrower shall be responsible for the payment of ground rents, condominium fees, planned unit development fees, and homeowners’ association fees and such fees are *not* to be included in the Life Expectancy Set Aside Account.<sup>17</sup> (Emphasis added.)

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<sup>13</sup> See 24 CFR 206.19(f), ML 2014-21 (concerning Life Expectancy Set Aside accounts) and 24 CFR 206.205(a)(2) (concerning expenses that may be paid from a Life Expectancy Set Aside).

<sup>14</sup> See NYRPL Section 280-b(4)(a).

<sup>15</sup> See 3 NYCRR Section 79.2(n).

<sup>16</sup> See 3 NYCRR Section 79.2(t).

<sup>17</sup> See 24 CFR Section 206.205(a)(i)

Real Property Law Section 280-b specifically mandates that reverse mortgages secured by residential real property within New York be subject to the rules and regulations of the HECM program.<sup>18</sup> Thus, by promulgating regulations which are inconsistent with federal regulations under the HECM program, the Department has proscribed rules that arguably run afoul of Real Property Law Section 280-b(4)(a).

In view of the foregoing, we request the Department make clear that a “set aside account” for property charges need not include all charges that are defined as a “property charge” pursuant to Section 79.2(n).

**(iv) Real Property Law Section 280-b(5)**

Section 280-b(5) provides, in relevant portions, “[n]o authorized lender shall make an advance payment for any obligation arising from mortgaged real property. Furthermore, in the event a mortgagor defaults upon the payment of mortgage insurance premium, homeowners' insurance premium or real property tax related to the mortgaged property, the authorized lender may only pay those premiums and/or taxes which are in arrears.”<sup>19</sup> (Emphasis added.)

To the contrary, HECM regulations provide that mortgagees *shall* make property charge payments pursuant to a Life Expectancy Set Aside *before* bills become delinquent and make early payments to take advantage of a discount whenever it is to the borrower's advantage.<sup>20</sup> (Emphasis added.) In addition, where loans have already been called due and payable, reverse mortgage servicers also typically pay tax advances prior to the tax due date in order to take advantage of discounts and to reduce penalties and fees.

In recognition of the foregoing, we request the Department make clear that Real Property Law Section 280-b(5) does not preclude mortgagees from making advance property charge payments where (i) the reverse mortgage has already been called due and payable and (ii) pursuant to a Life Expectancy Set Aside, in advance of such charges before becoming delinquent, and/or in order to take advantage of a discount whenever it is to the borrower's advantage.

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<sup>18</sup> See NYRPL Section 280-b(4)(a).

<sup>19</sup> See NYRPL Section 280-b(5)

<sup>20</sup> See 24 CFR Section 206.205(c)(A) & (B).

**(v) Section 79.7(c)**

Section 79.7 specifies the events permitting a reverse mortgage loan to be terminated under New York law.<sup>21</sup> New Part 79 does not define “termination,” although in context this term appears to relate to acceleration and calling the reverse mortgage due and payable, and not to foreclosure of the loan. To avoid confusion, we suggest the Department consider defining the term “termination” in new Part 79 to make this clear.

In addition, pursuant to Section 79.7, the sale, conveyance, transfer or assignment of any part of the real property securing the loan, and the death of the last living mortgagor are two the eight events specified in Section 79.7(a).<sup>22</sup> Although neither of the foregoing events are curable, Section 79.7(c) nonetheless requires the mortgagee to provide notice of opportunity to cure and a 45 calendar day cure period prior to terminating the loan based on such events.<sup>23</sup>

We respectfully request the Department revise Section 79.7(c) by clarifying that the sale, conveyance, transfer of the real property, pursuant to Section 79.7(a)(1), and the death of the last living mortgagor, pursuant to Section 79.7(a)(2), are both events of termination not subject to the notice of opportunity to cure and cure period, as currently provided in Section 79.7(c).

**(vi) Section 79.8(c)**

Section 79.8(c) regulates permitted costs and fees after closing of the reverse mortgage and during the life of the loan. Litigation fees and costs are noticeably absent from the list of permitted fees and costs.<sup>24</sup> Conversely, litigation fees and costs are recoverable under the model HECM loan documents and may be added to the principal balance of the loan.

In addition, Section 79(c)(4) permits the payment of real estate taxes and property insurance, but does not cover advances for ground rents, condominium fees, planned unit development fees, homeowners’ association fees, and any other advances made to protect the lender’s security interest in the Property.

We respectfully request the Department include litigation fees and costs as permitted payments after closing and during the life of the loan, as well as advances for ground rents, condominium fees, planned unit development fees, homeowners’ association fees, and any other advances made to protect the lender’s security interest in the Property. The inclusion of such fees and costs will provide consistency with applicable federal regulations and conform to generally accepted mortgage servicing practices in other jurisdictions within the United States.

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<sup>21</sup> See 3 NYCRR Section 79.7(a).

<sup>22</sup> See 3 NYCRR Section 79.7(a).

<sup>23</sup> See 3 NYCRR Section 79.7(c).

<sup>24</sup> See 3 NYCRR Section 79.8(c).

## F. Licensee Approval Process

New Part 79 imposes new licensing requirements on reverse mortgage lenders. Section 79.3 provides that any person or entity licensed pursuant to section 591 of the Banking Law must apply to the Department for authority to make reverse mortgages loans and demonstrate, to the satisfaction of the Superintendent, such lender satisfies certain financial responsibility requirements, maintains a minimum capital amount as published by the Department and provides the Department with certain required documentation.<sup>25</sup>

Unfortunately, the Department has not established a website that provides lenders with clarifying information with respect to the process for obtaining the Superintendent's approval, as mandated under Section 79.3(b). The Department should also clarify how a lender can submit a reverse mortgage program to the Department, whether it be a HECM program or a proprietary reverse mortgage program. For example, what specific documentation does the Department require? Does the Department require a program description, lender underwriting guidelines and consumer disclosures?

Moreover, calculation of the amount of the required irrevocable standby letter of credit pursuant to Section 79.3(c)(1)(i) is unclear. Pursuant to that subsection, the irrevocable standby letter of credit shall be the greater of (i) the amount necessary to fund all reverse mortgage loans anticipated to be made over the next 12 months or (ii) an amount to be determined by the Superintendent and published on the Department's website.<sup>26</sup> Under prior Section 79.3(a)(i), the second prong of the foregoing analysis was set at \$3,000,000.00. Is this the minimum amount determined by the Superintendent under new Part 79? We respectfully request the Department make clear the minimum irrevocable standby letter of credit amount. In addition, we request the Department clarify that the amount of the first prong in the foregoing analysis should be calculated based on closing and post-closing *scheduled* disbursements (any initial lump sum payment, post-closing pay plans, and set aside payments) and not unscheduled payments, such as protective advances.

Although Section 79.3(c)(1)(i) provides the irrevocable standby letter of credit shall have a 2-year term, we note that the amount of the irrevocable standby letter of credit is based on a 12 month projection.<sup>27</sup> The Department should clarify that the irrevocable standby line of credit, once determined as of a specific date, and based on the projections applicable as of that date, satisfies the irrevocable standby letter of credit requirement under Section 79.3(c)(1)(i) for a period of 2 years.

Finally, pursuant to Section 79.3(c)(1)(ii), at the time of application and for as long as the lender makes reverse mortgage loans, a lender must maintain a minimum capital amount as published on the Department's website.<sup>28</sup> Currently, no minimum capital amount has been published. Under former Section 79.3(c), the minimum capital amount was set at \$10,000,000. The

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<sup>25</sup> See 3 NYCRR Section 79.3(c).

<sup>26</sup> See 3 NYCRR Section 79.3(c)(1)(i).

<sup>27</sup> See 3 NYCRR Section 79.3(c)(1)(i).

<sup>28</sup> See 3 NYCRR Section 79.3(c)(1)(ii).

Department should clarify whether the minimum capital amount remains at \$10,000,000 or whether a lesser or greater amount will be required under new Part 79.

### G. Advertisements

Similar to Regulation Z, Section 1026.24(d), Section 79.4(c) requires additional disclosures in connection with any advertisement that references certain triggering material terms.<sup>29</sup> The material terms and additional disclosures under Section 79.4(c)(1) & (2) generally comport with Section 1026.24(d) with the exception that Section 79.4(c)(2) refers to terms of “payment,” rather than “repayment” as is the case under Section 1026.24(d)(2)(ii), when providing additional disclosures.<sup>30</sup> Does the Department intend the additional disclosures under Section 79.4(c)(2) disclose the borrower’s repayment obligations or alternatively the lender’s obligation to make scheduled payments? Section 79.4(c)(2) as drafted requires disclosure of the “terms of payment,” which would ostensibly require an elaboration of the lender’s obligation to make scheduled payments. Conversely, we assume the Department intends the borrower’s repayment obligations be disclosed when a triggering material term appears in an advertisement. In any event, clarifying revisions to Section 79.4(c) or alternatively a clear statement of the Department’s intention in this regard is in order.

Section 79.4(d)(5)(a) further prohibits the making any false or misleading statement about monthly payments or the overall cost of the reverse mortgage including, but not limited, to any statement that a mortgagor will “never make monthly payments” or not be required to repay a reverse mortgage loan “during your lifetime.”<sup>31</sup> Since the absence of a required monthly payment is a key feature of reverse mortgages, we request clarification that Section 79.4(d)(5)(a) does not prohibit the use of the phrase, “no monthly mortgage payments” or language to that effect, in reverse mortgage advertisements so long as such advertisement also includes a clear and conspicuous disclaimer stating the following (or similar language), “As with any mortgage, you must meet your loan obligations, keep current with property taxes, insurance and maintain your home in satisfactory condition.”

Finally, Section 79.4(d)(1)(b) prohibits any statement that a reverse mortgage has been endorsed by Federal Housing Administration or the United States Department of Housing and Urban Development.<sup>32</sup> Because FHA insurance for the HECM program insures borrowers from the risk of default in the payment of obligatory advances by their lender, FHA insurance provides a tangible benefit not only to the lender, but also to the borrower.<sup>33</sup> If the lender is unable to make payments to the borrower, HUD will assume responsibility for making payments until the lender is able to resume. If the lender will not be able to make any future payments, HUD will make payments for the remainder of the mortgage. For this reason, we request clarification that Section 79.4(d)(1)(b) does not prohibit reference in an advertisement that the HECM is an FHA insured loan.

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<sup>29</sup> See 3 NYCRR Section 79.4(c).

<sup>30</sup> See 3 NYCRR Section 79.4(c) and 24 CFR Section 1026.24(d).

<sup>31</sup> See 3 NYCRR Section 79.4(d)(5)(a).

<sup>32</sup> See 3 NYCRR Section 79.4(d)(1)(b).

<sup>33</sup> See HUD Handbook 4235.1 REV-1, Section 1-3(E).

## H. Application Cooling-Off Period

Section 79.5(1) states that mortgage loan applicants are required to wait 3 days after submitting an application before signing a commitment or in any way proceeding with a reverse mortgage loan.<sup>34</sup> We seek clarification from the Department that while Section 79.5(1) limits the applicant's ability to be bound during the 3 day period following submission of the initial application, it does not limit a lender's ability to process the reverse mortgage application during that same period so long as the applicant is both (i) not committed to proceed with the transaction and (ii) remains unobligated for any fees or costs incurred in connection therewith. Thus, during the application cooling-off period, lenders would be permitted to perform the following activities: (1) explain and discuss the reverse mortgage, eligibility requirements, fees/charges, process, and any other related information to the applicant (including providing written information and disclosures); (2) order a credit report and perform a preliminary credit review of the applicant's financing obligations; (3) order other services, such as a preliminary title search and automated appraisal valuation; (4) obtain the FHA Case Number; (5) obtain supporting, verifying information provided by the applicant either in the submitted application or verbally, including, but not limited to, income, asset, and liabilities information; and (6) provide the applicant with required disclosures including but not limited to disclosures based on changed circumstances required under ECOA (including a denial), RESPA, TILA, etc.

In addition, we seek clarification that during the 3 day cooling-off period, the applicant is permitted to obtain counseling and execute and/or submit the Counseling Certificate, the Applicant Counseling Statement, or Counseling Affidavit, as further discussed in Section K below.

## I. Permitted Fees.

Section 79.8(a)(2) limits the fees and costs that can be assessed against the borrower specifically providing that the cost of appraising and surveying the property may be charged only once.<sup>35</sup> The restriction to a single appraisal cost is not found in Section 280-b and poses a particular problem for HECM loans. Under the HECM program, a second appraisal of loan collateral is required where a collateral risk assessment conducted by FHA of the initial appraisal submitted for use in the HECM origination determines that additional support for the collateral value is required.<sup>36</sup> A lender has no control over FHA's determination of whether additional support will be required for FHA's collateral risk assessment. To further compound the problem, applicable regulations prohibit interested party contributions in HECM for purchase transactions, precluding the lender or seller from paying the cost of a second appraisal.<sup>37</sup> For the foregoing reasons, we request the Department provide for appraisal costs in Section 79.8(a)(2), but eliminate the current "single" appraisal cost restriction.

We also note that Section 79.8(b) limits the cost of mortgage brokerage services to no more than three points based on the value of the real property securing the reverse mortgage loan at the

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<sup>34</sup> See 3 NYCRR Section 79.5(1).

<sup>35</sup> See 3 NYCRR Section 79.8(a)(2).

<sup>36</sup> See ML 2018-06 and ML 2019-16.

<sup>37</sup> See 24 CFR 206.44(c).

time of loan closing.<sup>38</sup> Section 79.18(b)(14) makes no distinction between borrower and lender paid fees. The Department is requested to clarify this 3 point limit on fees for brokerage services is applicable to origination fees paid by the borrower to the broker and inapplicable to lender paid fees for brokerage services.

#### **J. Prohibited Conduct.**

Section 79.11(a)(7) prohibits a mortgagee or broker from accepting a telephone application without any clarifying guidance on what constitutes a “telephone” application or the rationale for treating telephonic communications differently from Internet submittals, email or in-person exchanges.<sup>39</sup> The Department is requested to clarify that under new Part 79 it is permissible for a lender or broker to take preliminary information from a consumer via telephone, which under the lender’s policy is considered a telephone inquiry and classified as such for Regulation B and Regulation C purposes, but not to accept a complete, signed application from the consumer via telephone. For an application to be complete, the Department should clarify that lender policies may provide that the applicant is required to sign the application via some other permissible means –such as ESIGN, mail, or in person. Similarly, the Department is requested to clarify that under Section 79.11(a)(7) it is permissible for the lender or broker take an application by video or other electronic-application processes and such applications are not considered a “telephone application” thereunder.

#### **K. Counseling Affidavit**

Section 79.5(e) provides that no reverse mortgage loan commitment or approval shall be issued by a lender until the applicant presents a counseling affidavit provided in accordance with 79.9(a)(4), which informs the applicant and further documents his/her right to choose either in-person counseling services or counseling services that are not in-person (telephonic or video conferencing).<sup>40</sup>

We initially note that Real Property Law Section 280-b makes no mention of a counseling affidavit, as mandated under Section 79.5(e). Additionally, the counseling provisions under new Part 79 depart significantly from federal regulations applicable to the HECM program. Under the FHA HECM program, both the borrower (and any Non-Borrowing Spouse, if applicable) and the counselor, must sign a counseling certificate and the lender must receive and obtain that counseling certificate prior to ordering an FHA case number, which starts the application process under FHA rules in earnest. Further, in some instances, a prospective applicant may attend counseling prior to consulting a lender, or may consult with a lender, attend counseling, and apply for a HECM with a different lender. The HECM regulations currently ensure HECM borrowers receive timely and comprehensive counseling.

Although both Section 79.5(e) and Section 79.9(a)(4) use the term “affidavit” in describing the required applicant statement, new Part 79 does not specifically indicate whether or not the applicant’s statement is required to be acknowledged by an authorized notary. Since this

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<sup>38</sup> See 3 NYCRR Section 79.8(b)(14).

<sup>39</sup> See 3 NYCRR Section 79.11(a)(7).

<sup>40</sup> See 3 NYCRR Section 79.5(e).

applicant statement is a condition precedent to issuance of the loan commitment or approval, which itself is a condition to incurring the application processing fees and costs under Section 79.8, any requirement that the applicant's election of counseling services would necessarily require the use of notary services on at least two occasions during the reverse mortgage transaction and would introduce further unnecessary cost, delay and complexity.

In view of the foregoing, we respectfully request the Department eliminate any requirement for the Counseling Affidavit in new Part 79 and substitute in its place the process, form and content of the counseling certificate, as required under federal regulations applicable to the HECM program. To the extent the Department deems otherwise, at a minimum, we request the Department revise and substitute references to "Counseling Affidavit" within Section 79.5(e), Section 79.9(a)(4), and otherwise in new Part 79, to "Applicant Counseling Statement" or otherwise clarify that the required applicant statement is not required to be acknowledged by an authorized notary. In addition, the Department is requested to also make clear that a lender may rely upon a copy of the Applicant Counseling Statement provided by the applicant(s) to a different broker or lender.

#### **L. Closing**

N.Y. Real Prop. Law § 280-b(7) provides that both the authorized lender and the mortgagor shall be represented by an attorney or attorneys at the time of the closing of the reverse mortgage, and each such party shall have at least one attorney present to conduct the closing.<sup>41</sup> A requirement that both the lender and mortgagor be represented by an attorney imposes material additional cost to the borrower in connection with the reverse mortgage transaction. New Part 79 provides no additional guidance on this subject. The expense of dual representation may be a prohibitive cost to the borrower and/or the borrower may be an attorney or otherwise sufficiently experienced and sophisticated in financial and legal matters, which would obviate any reasonable cause for independent representation. We respectfully request the Department clarify that a lender or broker may elect to provide the borrower with a disclosure advising him/her of (i) his/her right to be represented by counsel, and at the time of closing, (ii) that the cost of such representation will be borne by the borrower and (iii) the borrower may choose not to be represented by counsel or have his/her counsel attend the loan closing. In addition, the Department should make clear that the closing of a reverse mortgage by video conference, and otherwise by electronic means, with the borrower, lender, and their respective attorneys attending the closing remotely from separate locations is permitted under N.Y. Real Prop. Law § 280-b(7).

#### **M. Lender's Limited Waiver of Right of Foreclosure**

Section 79.7(d) requires lenders to maintain the original executed form of the "Lender's Limited Waiver of the Right of Foreclosure" on file for the life of the loan, and thereafter in accordance with applicable statutes.<sup>42</sup> It is unclear why the document retention requirements for the Lender's Limited Waiver of the Right of Foreclosure as mandated under Section 79.7(d) is different from all other documents memorializing the reverse mortgage transaction. In any event, we

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<sup>41</sup> See NYRPL Section 280b(7).

<sup>42</sup> See 3 NYCRR Section 79.7(d).

respectfully request the Department revise Section 79.7 to make clear that an electronic record which is a replica of the executed “Lender's Limited Waiver of the Right of Foreclosure” may be retained in the lender’s records for the life of the loan, and thereafter in accordance with applicable statutes, similar to the Department’s document retention requirements for other documents applicable to the reverse mortgage transaction.

#### **N. Policies and Procedures**

Section 79.13 provides that mortgage bankers, mortgage loan servicers and mortgage brokers engaging in the business of making, soliciting, processing or servicing reverse mortgage loans shall adopt policies and procedures as are necessary to safely conduct such business and to establish, monitor and periodically reevaluate appropriate limitations on the institution’s aggregate reverse mortgage loan portfolio.<sup>43</sup> Section 79.13 goes on to describe such policies and procedures stating the same, “shall be consistent with safe and sound *banking practices* and shall take into account the *banking institution’s* size and financial condition, local economic conditions, the availability of insurance for the portfolio or any portion thereof and any other factors that the institution deems relevant.”<sup>44</sup> (Emphasis added.) The references within Section 79.13 to safe and sound “banking practices” and the size of the “banking institution” in application to mortgage loan servicers and brokers creates some ambiguity. The Department is requested to further clarify the policies and procedures it deems necessary for conducting safe and sound mortgage servicing, brokering and lending operations for non-bank entities.

#### **Conclusion**

NRMLA appreciates the opportunity to comment on the proposed changes mandated under new Part 79.

We hope you will find our comments herein both helpful and informative. We would also welcome the opportunity to meet with representatives of the Department to discuss our proposed revisions to new Part 79, as well as the recommendations set forth in this letter, in more detail.

Very truly yours,



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<sup>43</sup> See 3 NYCRR Section 79.13.

<sup>44</sup> See 3 NYCRR Section 79.13

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