

Assessment of Public Comments for New Part 79 to 3 NYCRR

The New York State Department of Financial Services (the “Department”) received 2 comments on proposed new version of 3 NYCRR 79 (“Part 79”) from entities representing both consumers and reverse mortgage lenders. The comments acknowledge the need to update the rules, particularly in light of the new Real Property Law section 280-b (“RPL 280-b”) which provide federal home equity conversion mortgage (“HECM”) borrowers with additional consumer protections. This Assessment provides an overview of the revisions and clarifications the Department has made in response to comments, and, where applicable, the reasons for not making additional revisions or clarifications. In many instances, the Department did not make recommended revisions because it found them either unnecessary or inconsistent with the goals of the regulation.

DFS Authorizations for Reverse Mortgage Lenders

One industry commenter principally concerned with HECM loans complained that the Department had not yet posted application forms and clarifying information concerning the authorization process set forth in Part 79.3. Since receipt of that comment, the Department has prepared application materials and made them available to all who inquire and via the NMLS system.

A similar comment was made requesting clarification of the irrevocable standby letter of credit requirement in Part 79.3(c)(i). The Department has clarified such requirements as follows: First, this requirement only applies to loans done under RPL 280 or 280-a. Providers of these

proprietary non-HECM loans can also request exemption from this requirement if they have a history of strong credit ratings or plan to fully disburse all proceeds at the loan closing. Second, the Department clarified that the 12-month period upon which the amount of the letter of credit is dependent, is a rolling 12-month period. Lastly, the Department clarified that the strong credit rating exemption does not apply for any period where the lender does not maintain the required strong rating for three consecutive years.

This same commenter asked the Department to set a minimum capital amount of \$10,000,000 in Part 79.3(c)(1), because this dollar amount was used in the prior version of the regulation. The Department declines to do so. The Department believes an annual adjustment of this amount is necessary and plans to post periodic notices on its website providing this minimum capital amount.

Lenders' Fees and Costs

The industry commenter requested the inclusion of additional fees in Part 79.8(c), governing fees after the closing of a loan. Upon further reflection, the Department has decided to remove this section entirely and as it was redundant of the rules already in effect under Part 419, which the Department notes is generally applicable to reverse mortgage loans.

Property Maintenance Requirements

The industry commenter considered Part 97.6 highly problematic because it introduced the term “structural integrity” into the mortgagor’s obligation to maintain the property in good

condition. The commenter observed that the Department's intent was unclear, and this new requirement was inconsistent with the Federal Housing Administration's Minimum Property Requirements and Minimum Property Standards. They requested Part 79.6 be eliminated in its entirety. The Department has responded by re-writing Part 79.6 to eliminate the term "structural integrity." Now, the mortgagor must maintain the property in a "reasonably similar condition, state and repair as the property is in at the time of closing."

The Department also revised the provisions concerning when a lender can perform this maintenance itself, how the lender can recover the cost of such repairs, and the dispute resolution process.

Relationship to Other DFS Mortgage Regulations

The industry commenter asked the Department to restore certain exceptions found in the old version of Part 79. In particular, the commenter requested that Parts 38, 39, 80 and 82 not apply to HECMs. With respect to Parts 80 and 82, the Department included language exempting RPL 280-b loans from such parts to the extent that compliance would conflict with the HECM reverse mortgage loan program. On the other hand, the Department feels Parts 38 and 39 should apply to all reverse mortgages. This change was intentional and not inconsistent with HUD regulations.

Changes to Key Definitions

Both commenters criticized the use of the term “termination” in Part 79.7. The Department recognizes that this term is confusing. The Department used this term because it appears in the RPL. The Department resolved this problem by adding a definition to Part 79.2. The term “termination” shall mean acceleration of a reverse mortgage loan as a result of the mortgagor’s default. Acceleration is the common term of art.

The consumer advocate also pointed out that the term “Eligible Surviving Non-Mortgagor Spouse” is not consistent with the most recent guidance issued by HUD. HUD Mortgage Letter 2019-15 (September 2019). This is relevant because a non-borrowing spouse has 180 days to make an election to retain the property subject to a reverse mortgage. The Department rewrote its definition to conform to the HUD letter. The Department never intended to provide narrower rights to these non-borrowing spouses.

Other changes in definitions are discussed when evaluating specific topics in the Assessment.

Advertising Standards and Prohibited Conduct

One commenter principally concerned with consumer protection requested that restrictions on advertising not be limited to print or electronic media. They asserted that a limitation of this type is not consistent with the defined term “advertisement” in Part 79.2. The Department has responded by striking the qualifying phrase “placed in print or electronic media” in Part 79.4 (a). The qualifying phrase is not necessary to the meaning of Part 79.4 (a), and the deletion removes an unintended ambiguity. The definition of “advertising” was also changed in Part 79.2 to remove an illustrative list of items.

The same commenter also argued that advertising restrictions should be based on a different legal standard. The regulation should prohibit “unfair and deceptive practices,” as opposed to “false and misleading statements.” The Department is not convinced that a meaningful distinction exists between these two phrases. One phrase refers to standardized marketing media, while the other refers to a set of behaviors and actions by people. Nonetheless, the Department moved Part 79.4(d) to Part 79.11 on prohibited conduct. Part 79.11 lists a broad range of unfair practices in marketing loans. False and misleading advertising does count as an unfair and prohibited practice. Other coercive behaviors or actions enumerated in Part 79.11 can be prohibited even if they are not upon factual misrepresentations in standardized marketing communications.

Conversely, another commenter was particularly concerned that Part 79.4(d)(1), now relocated to Part 79.11, prohibited statements that a HECM loan is “endorsed by the Federal Housing Administration or Housing and Urban Development.” Please note that on April 3, 2020 the Legislature made a technical amendment to RPL 280-b that clarified the advertising standards for HECM loans. Chapter 55, Subpart Z, of the Laws of 2020. Like Part 79, this legislative amendment makes clear that only false and misleading claims about reverse mortgage loans are prohibited. Accurate claims about HECMs are not prohibited.

Finally, the industry commenter also claimed that Part 79.4 is inconsistent with the standards set forth in Regulation Z, 12 C.F.R 1026.24, promulgated pursuant to the federal Truth in Lending Act. In response, the Department did correct one discrepancy on its proposal. The term “payments” has been changed to “repayments” in Part 79. 4(c)(2)(ii), since this subsection requires a disclosure of the borrower’s obligations to make payments during the full term of the loan. This sub-section did not reference a lender’s obligations.

Consumer Disclosures and Notices

One commenter suggested that obligatory notices to seniors in Part 79.9 should not be printed in all capital letters, since that format makes it harder for seniors to read. The Department accepted that change.

This commenter also wanted all required notices to be translated into the top 6 languages spoken in New York State, as is done with notices under Real Property Actions and Proceedings Law section 1304. The Department did not accept this proposal. The requirements of federal Regulation Z, 12 C.F. R. 1026.24 (i)(7) are sufficient. Lenders cannot selectively communicate with customers in a foreign language and then revert to English language documentation for provisions they don't wish to emphasize. If a lender provides marketing materials and other notices in a foreign language, then it should also provide required notices in that same foreign language.

Counselling Requirements

One commenter requested clarification on the formal requirements for a counselling affidavit or certificate. They asked that DFS conform Part 79.5 and Part 79.9 to HUD standards. Conversely, the other requestor wanted the DFS to write specific language for that counselling affidavit.

The Department did not intend to deviate from HUD standards by adding additional formalities to the documentation. Thus, "counselling affidavit" has been changed to "counselling acknowledgement." A HUD Certificate of HECM Counselling, or a reasonable equivalent for non-HECM loans, is sufficient to meet this requirement. The acknowledgement need not be notarized.

One commenter requested that these counselling acknowledgements in Part 79.5(e) have an expiration term. Accordingly, the Department added a 6-month expiration for acknowledgements. We are confident that almost all reverse mortgages can proceed from counselling to commitment within 6 months. If a particular application languishes for a longer period, the prospective borrower should speak with a counsellor again.

The same commenter wanted to add an additional cooling off period between the commitment offering and commitment signing. The Department rejected that idea. A right of rescission already exists during this period, and a second cooling off period is not necessary.

Transition

The commenter mainly concerned with HECM loans asked for a 120-day transition period, starting on March 5, 2020, to come into compliance with the new version of Part 79 adopted on an emergency basis. The Department has granted this request. The Department promulgated this regulation on an emergency basis mainly to be sure Part 79 reflected changes made by RPL 280-b as of the effective date of the new statute. We understand that the immediate effectiveness of an emergency regulation can cause surprise and some hardship for the industry. The coronavirus crisis also made it far more difficult for the industry to engage in normal business activities or make necessary adjustments to comply with the emergency regulation.

Please note that the final version of the new Part 79 will be adopted after this transition period is over. The Department is confident that the final version of Part 79 will not burden HECM providers more than the earlier emergency adoptions did. In important respects, it should decrease

their burden and reduce their uncertainties. Accordingly, the Department did not provide for a longer transition than the one requested.

Finally, in response to comments for clarity, the new version of Part 79 is only applicable to reverse mortgage loan activity by a lender, broker or servicer after March 5, 2020. While the industry commenter asked the Department to write this explicitly into the regulation, the Department determined that this Assessment of Public Comment suffices to address any ambiguity.