

September 13, 2024

Honorable Julia Gordon
FHA Commissioner
Office of Housing / Federal Housing Administration
US Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

Re: Draft Mortgagee Letter, Modernization of Engagement of Borrowers in Default

Dear Commissioner Gordon,

The American Bankers Association, Housing Policy Council, Mortgage Bankers Association, and the National Mortgage Servicing Association (the Associations) appreciate the opportunity to submit comments on the Draft Mortgagee Letter (ML),¹ Modernization of Engagement of Borrowers in Default.

The industry has for many years urged HUD and FHA to end the outdated requirement for FHA-insured mortgage servicers to conduct in-person meetings (“face-to-face”) with borrowers who are in default on their mortgage payments (and, by extension, the onerous efforts necessary to schedule such meetings). We support the goal of providing greater flexibility for mortgage servicers to educate borrowers on available loss mitigation solutions utilizing modern communication technology in a manner that preserves important consumer protections. We believe that the adoption of newer technologies holds the potential to improve borrower outcomes and reduce costs for servicers.

We also commend FHA for utilizing its Drafting Table to receive feedback on the Modernization of Engagement of Borrower in Default. This best practice contributes meaningfully to more effective policy making.

However, after careful review, we are concerned that the proposed changes to the borrower engagement process would *increase* complexity and level of difficulty to execute, and they would increase the associated risk and cost for participants. Specifically, FHA’s new definition of a “Verifiable Attempt” as the lynchpin of its proposal is operationally impractical without providing clear guidance for servicers to document compliance. Thus, we have determined that the proposed ML is inconsistent with the stated purposes of FHA’s efforts to modernize outreach requirements. As such, it is imperative that FHA extend the regulatory waiver until June 1, 2025, which would allow time to reform the ML guidance and provide servicers with sufficient implementation time once the changes are finalized.

This letter outlines our most significant feedback with FHA’s recent draft of the Modernization of Engagement of Borrower in Default. As discussed below, the current Mortgagee Letter is vague and operationally infeasible. We believe that any policy changes should align with

¹ See Fed. Hous. Admin., FHA INFO 2024-58 (Aug. 14, 2024), https://www.hud.gov/sites/dfiles/SFH/documents/SFH_FHA_INFO_2024-58.pdf.

existing early intervention requirements while remaining operationally feasible. Additionally, we recommend greater clarity regarding the definition of a verifiable attempt and other technical issues.

I. The Current Mortgagee Letter is Vague and Operationally Infeasible.

In light of the recent regulatory changes that expanded the use of electronic communications for the Loss Mitigation Consultation, FHA published a ML to modernize the requirements for this meeting.² The Loss Mitigation Consultation provides the borrower with the opportunity to meet with trained mortgagee employees who can provide information about FHA's loss mitigation options and assist the borrower in bringing the FHA-insured mortgage current and avoiding foreclosure. However, the proposed requirements in the ML are vague, operationally impractical, and could significantly increase the cost of FHA servicing.

One notable issue is the ML's definition of a "Verifiable Attempt," which is described as a solicitation that provides evidence of delivery or attempted delivery and includes the information necessary for the borrower to arrange a Loss Mitigation Consultation. While this may appear straightforward, it is operationally infeasible for certain communication methods. For example, servicers would be unable to use text messaging due to the lack of a reliable mechanism to verify delivery and the extensive content requirements for each Verifiable Attempt.

Additionally, the ML does not clearly define what constitutes "evidence of delivery or attempted delivery." With no reliable way to verify the delivery of text messages or emails, which are widely used and preferred by many borrowers for their speed and accessibility, servicers would be forced to rely on more expensive and outdated communication methods, such as in-person visits and certified mail, both of which are also very slow and cumbersome. This not only adds unnecessary costs and delay, but also undermines the potential benefits of modern communication technologies.

To enhance the operational feasibility of the ML and satisfy the objective to inform borrowers of their loss mitigation options, the Associations recommend revising the requirements to incorporate more practical verification methods for electronic communications and reduce the reliance on costly traditional approaches. This would allow servicers to meet the needs of borrowers more efficiently without compromising on the quality of communication or increasing the cost of participation in the FHA program.

II. Modernization Should Align with Existing Early Intervention Requirements.

Rather than the complex and costly process outlined in the proposed ML, a better approach would be for FHA to align its engagement expectations with FHA's existing Early Intervention standards.³ Servicers conduct exhaustive outreach strategies to establish contact with delinquent borrowers and comply with the early intervention servicing requirements of Regulation X, FHA, and various state laws. HUD guidance should clearly state that compliance with FHA standards

² See 89 Fed. Reg. 63082 (Aug. 2, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-08-02/pdf/2024-16728.pdf>.

³ 4000.1,II,A,2,iii,B.

is sufficient to meet a servicer’s obligations under the updated rule. Specifically, we request that FHA amend the ML to provide guidance that clarifies that a telephone call where loss mitigation options are discussed with a borrower satisfies the required Loss Mitigation Consultation. We further seek clarification that telephone calls can be used to meet one of the required Verifiable Attempts for arranging a Loss Mitigation Consultation. Even with the expansion of other forms of electronic communication, a telephone call is still the most effective means to attempt contact with the borrower AND achieve quality right party contact resulting in discussion about loss mitigation options.⁴

By aligning the proposed changes with FHA’s existing Early Intervention standards, servicers would have discretion to offer borrowers a variety of communications methods. This flexibility would eliminate the need for servicers to send a separate letter to inform borrowers of a Loss Mitigation Consultation, which would not contain any materially new information about the loss mitigation process. Rather, the new notices would be redundant with the information about loss mitigation that servicers will already have provided in writing, as required under Regulation X and other FHA requirements, and thus just adds to borrower confusion. A better alternative would be for the policy to require that one of the already required FHA notices, such as the FHA Delinquency Notice Cover Letter (“DNCL”), encourage homeowners to participate in a Loss Mitigation Consultation. FHA could do this by simply adding the requirement generally to the guidance on its DNCL, or it could even require servicers to include a notice similar to the following:

Loss Mitigation Consultation for FHA Customers
Please contact us to participate in a Loss Mitigation Consultation about mortgage assistance options that could help you stay in your home or avoid foreclosure. You can reach out to us by:
[Servicer to insert contact instructions.]

III. Modernization Should Remain Operationally Feasible.

If FHA wishes to prioritize a process that offers borrowers additional opportunities for engagement while remaining operationally feasible, the process needs to be far more specific about FHA’s expectations. The previous face-to-face requirement provided adequate clarity by specifying the use of a certified letter followed by an in-person attempt to contact the borrower at the property. FHA continues to apply this approach to Section 248 loans. Therefore, it would be appropriate to adopt a similarly prescriptive yet practical model for borrower engagement that balances clear requirements with operational feasibility.

Below is an example of a prescriptive but operationally feasible model that could be included in

⁴ This was evidenced recently in CFPB’s report on borrower’s experience during the pandemic, which found that borrowers who engaged with their servicer were significantly more likely to receive various types offers, more likely to be satisfied with their servicer, and more likely to learn more about loss mitigation programs available during the COVID-19 pandemic. See Consumer Fin. Prot. Bureau, *Borrowers Experiences with Mortgage Servicing During the COVID-19 Pandemic* (Jun. 2024), https://files.consumerfinance.gov/f/documents/cfpb_borrower-experiences-with-mortgage-servicing_2024-06.pdf.

the Mortgagee Letter:

- **Step 1:** The servicer attempts to inform the borrower about the opportunity for a Loss Mitigation Consultation using a non-electronic method of communication (any method identified below in Table 1). If the non-electronic method (letter or in-person engagement) is successful – as evidenced by the borrower participating in a Loss Mitigation Consultation – the process is concluded, and the servicer has complied with the requirement. If the letter or in-person outreach is not successful at engaging the borrower, proceed to Step 2.
- **Step 2:** The servicer attempts to inform the borrower about the opportunity for a Loss Mitigation Consultation using an electronic method of communication (any method identified in Table 2) so long as the borrower has opted into such electronic communications. For example, the borrower has provided an email address or telephone number and has provided appropriate consent for email or text messaging. If the electronic method of communication is successful – as evidenced by the borrower participating in a Loss Mitigation Consultation – the process is concluded, and the servicer has complied with the requirement.

If the electronic method of communication outreach is not successful at engaging the borrower, the servicer has documented two Verifiable Attempts to arrange a Loss Mitigation Consultation and will continue outreach as part of normal default servicing, no additional outreach is necessary for the purpose of scheduling or conducting the Loss Mitigation Consultation.

IV. The Definition of Verifiable Attempt Must Be Clarified.

If FHA maintains a separate outreach process for the Loss Mitigation Consultation, which we maintain is unnecessary and confusing, the draft ML must be revised to achieve the goal of modernizing the outreach process. The most significant flaw of the proposal is the vague description of “acceptable methods of communication,” which has an undefined and unrealistic evidentiary standard of what is necessary to demonstrate “attempted delivery” or efforts to arrange a Loss Mitigation Consultation (“date or timestamp of delivery or attempted delivery”). Although the final regulation indicated that FHA would establish a “two verifiable attempts” standard through a Mortgagee Letter or an update to the FHA Handbook,⁵ the proposed descriptions of a Verifiable Attempt are complex, unwieldy, and inconsistent with the current early intervention process.

We note that the inadequate guidance on what qualifies a “Verifiable Attempt” will make certain electronic communication methods impractical. Since non-compliance with the “Verifiable Attempt” provisions can serve as a valid foreclosure defense (as demonstrated by litigation over the last decade), the proposed provision’s vagueness on how to demonstrate a “Verifiable Attempt” will likely be litigated in courts across the country. The risk that this legal uncertainty will present to the servicing community is unacceptable. Additionally, the lack of clarity will leave servicers open to compliance risks during audits and HUD open to criticism by the Office

⁵ See 89 Fed. Reg. at 63082.

of Inspector General, which could only increase the expenses associated with this guidance.

If FHA maintains that there must be two different Verifiable Attempts to arrange a Loss Mitigation Consultation, the policy **must** identify not only the acceptable methods of communication (non-electronic and electronic), but also **must** identify examples of what FHA would consider acceptable evidence for each corresponding method of communication. Without this clarity, servicers will be forced to utilize costly and outdated methods of communication like in-person visits and certified mail, which will significantly increase servicing costs (since it will now need to be done on all cases in light of the elimination of limiting principles like the 200-mile distance from a branch location), and fail to adequately modernize the outreach process – which was the stated goal of the policy.⁶

If FHA fails to undertake the constructive suggestions we make below, it is essential that FHA reimburse servicers for these new and exorbitant expenses.

For those reasons, we think it is critical that FHA develop a series of tables providing guidance in the final Mortgagee Letter on acceptable methods of communication **and** examples of what constitutes an acceptable form of evidence for each corresponding method of communication. This list is not exhaustive. Instead, these are simply approved examples of verifiable efforts.

Table 1: Non-Electronic Methods of Communication

The Mortgagee may use the following acceptable Methods of Communication	The Mortgagee may use any one of the following as Acceptable Evidence of Attempted Delivery/Efforts to Arrange a Loss Mitigation Consultation
In Person	Affidavit of Borrower Assistance Contact (similar to a service of process); timestamped photograph or video of attempt (if the borrower doesn't answer); servicer or vendor logs documenting attempt; document signed by the borrower acknowledging the in-person discussion.
Letter	Standard Mail with appropriate documentation; certified Mail; copy of letter showing the date it was sent and servicer logs confirming date.

⁶ FHA must also consider other, applicable limitations on communication methods (i.e., FDCPA/Regulation F) as well as practical problems when borrower contact information is limited. For example, a servicer is limited when a loan is subject to the FDCPA/Regulation F and can communicate electronically only in certain circumstances. Additionally, pursuant to FDCPA/Regulation F, a borrower can specifically request that a servicer not use a particular communication method. Further, a servicer may not have a good email address for a borrower. When these circumstances overlap, which is a distinct possibility, a servicer will be limited to the antiquated, expensive options of in-person attempts and certified letters that yield little response from or benefit to borrowers.

Table 2: Electronic Methods of Communication

The Mortgagee may use the following acceptable Methods of Communication	The Mortgagee may use any one of the following as Acceptable Evidence of Attempted Delivery/Efforts to Arrange a Loss Mitigation Consultation
Telephone/Voicemail	Recording of the telephone call (if the borrower is reached); voicemail that is FDCPA/Regulation F compliant (if the borrower is not reached and voice mail is available); servicer affidavit/certification of compliance that telephone outreach was attempted, but borrower was not reached and voicemail was unavailable.
Interactive Virtual Communication Methods	Timestamped copy of the attempt documented in the servicer’s system of record; servicer affidavit of compliance.
Email	Timestamped copy of the attempt documented in the servicer’s system of record (a printed-out version of the email would suffice); records or logs showing that an email was sent to a customer; servicer affidavit of compliance.
Text Messaging (only if the borrower has opted to receive text messages)	Timestamped version of text message sent; records or logs showing that a text was sent to a customer; servicer affidavit of compliance.
Secure Web Portals (such as online account management tools accessible by borrowers)	Timestamped copy of the attempt documented in the servicer’s system of record; servicer affidavit of compliance.

V. Documentation Requirements Should be Streamlined to Modernize Process

The proposed requirements for the specific information that must be included in a “Verifiable Attempt” are excessively technical and prescriptive and they are likely to both overwhelm borrowers and prevent servicers from using certain electronic communication methods. These unnecessary technical requirements would increase servicing cost and risk. Specifically, the long list of required contents needlessly creates the possibility that meritless foreclosure defenses will arise from technical servicing errors that do not actually impact a customer’s access to loss mitigation.

A simpler alternative approach would be to maintain the prescriptive set of elements that need to be part of a communication when a servicer is able to connect and engage with a borrower but permit a significantly streamlined set of elements when the servicer is simply attempting to establish engagement. We believe that the streamlined communication when making an “attempt” could be as simple as stating the purpose of the Loss Mitigation Consultation, and the contact information for the mortgagee’s loss mitigation and/or customer assistance personnel. This approach would simplify and eliminate risks for error in electronic communication attempts, such as text or e-mail.

However, if FHA retains the prescriptive set of elements that must be in each Verifiable Attempt, then FHA should eliminate the requirement to provide three specific times when Loss Mitigation Consultation can occur. This proposal is overly rigid and will cause significant expenditures of time and resources to accommodate both technological and staffing needs, while providing virtually no benefit to borrowers other than simply providing the broad hours of operation, and a consultation time that can be worked out between the two parties. Said differently, this requirement is not practical, and servicers cannot block out three different reserved times per customer for hypothetical reservations, when the vast majority of these meetings will not take place. In the end, this requirement would prevent agents from helping other customers while increasing the costs of default servicing. Lastly, this requirement could lead customers to believe that they can only call to discuss loss mitigation options on those particular times and dates—when in fact, agents are available to speak with them during all business hours.

VI. Other Technical Issues Should Be Addressed.

The Post Loss Mitigation Consultation Notice Should Be Eliminated Entirely. The Post Loss Mitigation Consultation Notice requirement that follows any Loss Mitigation Consultation is unnecessary and redundant. The notice will unnecessarily increase servicing cost, risk, and complexity without actually benefitting customers. It would constitute another set of highly technical requirements and timelines—and create another opportunity for non-material servicing errors to create meritless foreclosure defenses—while only providing redundant information to the customer.

The Policy Should Include an Exception for Uninterested Borrowers. The policy is currently silent on how to proceed with borrowers who have submitted a cease and desist request. We believe that the policy should make this a permitted exception to the Loss Mitigation Consultation requirements. We also believe that this is consistent with the regulatory text, that “a meeting with the mortgagor is not required if (i) The mortgagor has clearly indicated that they will not cooperate in the meeting.”⁷ We ask FHA to make clear that a letter/call to cease and desist is a clear indication that the borrower will not cooperate with the meeting.

The Mortgagee Letter Should Clarify the Specific Timeline Requirements. The proposal states the number of days when something must occur, such as “the Mortgagee must provide the following to the Borrower in writing no later than 5 Days from the date the Loss Mitigation Consultation is conducted.” It is unclear whether the policy is referencing business or calendar days. To ensure proper compliance, the final Mortgagee Letter should clearly specify the type of days being referenced throughout the policy.

VII. Additional Time is Needed for Implementation.

Given the critical concerns set forth in this letter, the Associations respectfully urge FHA to make appropriate corrections to the draft ML before finalizing it. Considering these needed

⁷ 89 Fed. Reg. at 63099.

corrections, we do not believe that the new regulation can become effective on January 1, 2025. Instead, we urge FHA to amend the ML and re-propose it on the Drafting Table.

A re-proposal is necessary to avoid significant harm to borrowers, servicers, and FHA, and there is currently very little time before the new regulation would be effective. We urge HUD to extend the temporary face-to-face contact waiver to minimize potential disruption that will arise before there is an adequate replacement policy available.

Finally, we recommend that HUD extend the temporary waiver through June 1, 2025, as this will provide FHA sufficient time to come up with a workable implementation plan for the new regulation.

Conclusion

As expressed previously, we share FHA's objectives for modernizing engagement of borrowers in default. This holds the potential to improve borrower outcomes and reduce servicer costs. Unfortunately, we are convinced that the proposal fails to achieve this objective and urge that FHA address the issues highlighted above.

Thank you for the opportunity to comment on the proposed changes to the Handbook.

Sincerely,

**American Bankers Association
Housing Policy Council
Mortgage Bankers Association
National Mortgage Servicing Association**