

## REVERSING COURSE: STRENGTHENING CONSUMER PROTECTIONS FOR REVERSE MORTGAGES

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*A failure by Congress and regulators to create effective regulation on reverse home mortgages has created disturbing risks of senior misinformation and abuse by aggressive lenders. Changing market forces have squeezed traditional retirement plans; the ensuing financial shortfall has forced seniors to turn to other financial options, including an increase in those seeking and receiving reverse home mortgages. These seniors lack a satisfactory understanding of their agreement's underlying risks. Lenders contribute to such deficiencies through misleading advertising, aggressive sales techniques, complex product structures, inadequate counseling, and poor non-borrower protections, among others. Taken together, the lack of regulation creates a borrowing environment ripe for abuse among seniors.*

*In order to create a more transparent and healthy lending environment, Congress and regulators must better tailor reverse mortgage safeguards for the product sold. Federal legislation can target improved disclosure requirements, increase recession times, and better punish fraud. Regulators should improve counseling. Such improvements should track the basic knowledge of borrowers and protect them from predatory lending practices. Without such improvements, seniors, their spouses, and their heirs will remain unduly exposed to the risks of reverse home mortgages.*

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## I. Introduction

Henry Winkler entices viewers to call One Reverse Mortgage to learn about a “government insured reverse mortgage” and to “take control of your retirement, today.”<sup>1</sup> While Winkler informs viewers that a reverse mortgage will “eliminate monthly mortgage payments,” small, nearly illegible print, toward the bottom of the screen, states the “[h]omeowner is still responsible for taxes, insurance, and maintenance.”<sup>2</sup>

Former Tennessee senator and actor Fred Thompson warmly apprises seniors that reverse mortgages are based on a notion that President Reagan signed into law over twenty-five years ago in order to help seniors remain in their homes.<sup>3</sup> Thompson continues by saying reverse mortgages are an effective way to get the cash needed to enjoy retirement.<sup>4</sup> The advertisement then instructs consumers to call a toll-free number to receive a free information packet,<sup>5</sup> further stating that “with a government insured tax free mortgage from AAG, you’ll always retain complete ownership of your home.”<sup>6</sup> Small print, however, advises viewers to “consult your financial advisor,”<sup>7</sup> and states the “[h]omeowner must continue to pay insurance, taxes, and basic home maintenance.”<sup>8</sup>

In June 2014, New York Attorney General Eric T. Schneiderman announced a settlement with New View Mortgage Corp.<sup>9</sup> “The solicitations, advertising reverse mortgages, were designed to look like official government notices from the Federal Housing Administration.”<sup>10</sup> The solicitations included a section titled “Facts you need to know” about Home Equity Conversion Mortgages, but the “facts” presented

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1. One Reverse Mortgage, *One Reverse Mortgage—Henry Winkler—Take Control 1:20*, YOUTUBE, (uploaded Sept. 27, 2011), <https://www.youtube.com/watch?v=vhhGparW6KQ>.

2. *Id.*

3. iSpot.tv, *American Advisors Group TV Commercial, ‘Too Good’ Featuring Fred Thompson 0:26-30*, (last visited Oct. 3, 2015), <http://www.ispot.tv/ad/7qHN/aag-reverse-mortgage-too-good-featuring-fred-thompson>.

4. *Id.* at 0:30-37.

5. *Id.* at 0:38.

6. *Id.* at 0:50-55.

7. *Id.* at 0:51.

8. *Id.* at 0:54.

9. Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces Settlement With Reverse Mortgage Provider Over Misleading Advertising Targeting Seniors (June 30, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-reverse-mortgage-provider-over-misleading>.

10. *Id.*

only the benefits and none of the risks.<sup>11</sup> New View was required to pay a penalty of \$12,500 and was directed not to misrepresent the features, benefits, and eligibility requirements in their future solicitations.<sup>12</sup>

Celebrity endorsements are not a new phenomenon.<sup>13</sup> Similarly, deceptive and misleading advertisements have been around for years.<sup>14</sup> Reverse mortgages are unique, however, because these products are available exclusively to seniors aged sixty-two and older.<sup>15</sup> Elders are “softened” for reverse mortgages by receiving a constant stream of positive messages, and celebrity spokespersons, including Winkler and Thompson, have appeared in ads touting these products.<sup>16</sup> Because consumers are more likely to perceive a product positively with a celebrity endorsement,<sup>17</sup> and because seniors are more likely to be victims of scams,<sup>18</sup> heightened scrutiny must be placed on products marketed directly to the elderly. As Americans become increasingly responsible for planning their own retirement,<sup>19</sup> the proba-

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11. *Id.*

12. *Id.*

13. See, e.g., Jack M. Silverstein, *The evolution of Michael Jordan's commercial character*, RED EYE (Feb. 15, 2013, 2:22 PM), <http://www.redeyechicago.com/sports/redeye-the-evolution-of-michael-jordans-commercial-character-20130215,0,7616608.htmlstory>. Throughout his career Michael Jordan has been a celebrity endorser for, among other companies, Nike, McDonald's, and Gatorade.

14. COUNCIL FOR ECON. EDUC., *Deceptive Advertising: Crossing the Line*, <http://www.econedlink.org/lessons/index.php?lid=663&type=student> (last visited Oct. 3, 2015).

15. U.S. DEP'T OF HOUS. AND URBAN DEV., *Frequently Asked Questions about HUD's Reverse Mortgages*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/sfh/hecm/rmtopten](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/rmtopten) (last visited Oct. 3, 2015).

16. Norma Paz Garcia, *Examining Faulty Foundations in Today's Reverse Mortgages*, CONSUMER UNION 17 (Dec. 7, 2010), <http://consumersunion.org/pdf/reverse-mortgage-report-2010.pdf>.

17. See, e.g., Bhaveshkumar J. Parmar & Rajnikant P. Patel, *A study on consumer perception for celebrity and non-celebrity endorsement in television commercials for fast moving consumer goods*, 3 GLOB. BUS. AND ECON. RES. J. 1, 9 (2014), <http://webcache.googleusercontent.com/search?q=cache:ebEvz0BMDDsJ:journal.globejournal.org/index.php/gberj/article/view/114/74+&cd=1&hl=en&ct=clnk&gl=us> (finding that there is a significant difference for all categories that have a celebrity endorser and those that do not).

18. Janice Lloyd, *Why are elderly more vulnerable to scams? Brain Changes*, USA TODAY (Dec. 8, 2012, 8:00 A.M.), <http://www.usatoday.com/story/news/nation/2012/12/07/elderly-financial-exploitation-holidays/1746911/> (highlighting research suggesting age-related changes in the brains of the elderly make it harder to detect suspicious body language and other warning signs that people may be untrustworthy).

19. Ryan Guina, *America's Dying Corporate Pension System*, US NEWS & WORLD REP. (Mar. 13, 2012, 10:34 A.M.), <http://money.usnews.com/money/blogs/on-retirement/2012/03/13/americas-dying-corporate-pension-system> (noting that

bility of deceptive practices by brokers dealing in reverse mortgages has increased. The issue is so serious that the Federal Housing Administration (FHA) has issued guidance to lenders to prevent deceptive marketing of reverse mortgages to seniors.<sup>20</sup>

Is this “guidance” sufficient to protect consumers from deceptive reverse-mortgage advertisements or aggressive sales tactics? The regulatory structure applicable to the reverse-mortgage industry is different from that of most other consumer financial products<sup>21</sup> because of the dominance of the FHA-insured product in the marketplace.<sup>22</sup> Federal banking regulators have been involved in the regulation of reverse mortgages through the implementation of federal consumer protection laws generally applicable to consumer credit.<sup>23</sup>

These broad federal protection statutes, however, are rarely tailored to the particular features of reverse mortgages.<sup>24</sup> This is partly because the Truth in Lending Act (TILA) applies provisions and regulations designed for traditional mortgages to reverse mortgages.<sup>25</sup> Thus, many of the documents required by TILA are not tailored specifically for reverse mortgages.<sup>26</sup>

Reverse mortgages are complex products that are difficult for consumers to understand.<sup>27</sup> False or misleading advertisements pose a serious risk to consumers who may misunderstand the features, risks and obligations of a reverse mortgage.<sup>28</sup> Additionally, given the size of the premiums available to reverse-mortgage loan originators, aggressive sales tactics are a cause for concern.<sup>29</sup> Consumers considering reverse mortgages struggle in two areas: first, they may have difficulty deciding between a reverse mortgage and an alternate course of ac-

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employers are shifting the burden of retirement from the company to the individual).

20. Amilda Dymi, *FHA Issues Guidance to Stop Deceptive Reverse-Mortgage Marketing*, ORIGINATION NEWS (June 19, 2014, 3:07 P.M.), <http://www.nationalmortgagenews.com/news/origination/fha-issues-guidance-to-stop-deceptive-reverse-mortgage-marketing-1042004-1.html>.

21. CONSUMER FIN. PROT. BUREAU, *Reverse Mortgages, Report to Congress* 100 (June 28, 2012), [http://files.consumerfinance.gov/a/assets/documents/201206\\_cfpb\\_Reverse\\_Mortgage\\_Report.pdf](http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf) [hereinafter *Report to Congress*].

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 102.

26. *Id.*

27. *Id.* at 111.

28. *Id.* at 114.

29. *Id.* at 79.

tion; and second, they may have difficulty assessing costs and making tradeoffs between the different types of reverse mortgage products and options in the marketplace.<sup>30</sup> Consequently, “[n]umerous state and federal agencies have expressed concerns about how reverse mortgages are advertised” or marketed.<sup>31</sup>

This Note will argue that the current consumer protections surrounding the advertising and originating of reverse mortgages are inadequate. While a significant portion of regulation is left to the states, no comprehensive federal program or regulatory scheme exists to address abusive practices related specifically to reverse mortgages. Several federal and state statutes prevent misleading or deceptive advertising generally, but because of the complexity of reverse mortgages and the audience to which these products are exclusively available, these protections fall short and should be strengthened. Additionally, because of the vulnerability of the elderly, this area is fertile ground for abuse.

In Part II, this Note will examine the shift in retirement planning from employer-sponsored pensions to employee-directed options, placing an increased reliance on financial planners and those who offer promises of quick cash to fund retirement.<sup>32</sup> Part II will also discuss the reverse mortgage and its evolution. Part III will examine issues surrounding deceptive advertisements and aggressive or questionable sales tactics, including court cases and consumer protection laws, relating to reverse mortgages. Part IV will offer proposals to strengthen existing laws and create new consumer protections, including a comprehensive federal program tailored specifically to reverse mortgages. Part V will conclude by recapping the issues surrounding reverse mortgages, including risks posed by these products, and explaining how consumers can better protect themselves from deceptive advertisements or aggressive sales tactics.

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30. *Id.* at 111.

31. *Id.* at 113.

32. *See, e.g.,* iSpot.tv, *supra* note 3.

## II. Background

### A. The Decline of Employer-sponsored Retirement Plans and the Retirement Crisis

Over the past twenty to thirty years, corporate pensions, a mainstay of retirement, have undergone massive changes.<sup>33</sup> Employers have largely shifted the burden of retirement planning from the company to the individual.<sup>34</sup> Instead of employer-sponsored pensions, employers are offering ever-popular 401(k) plans, placing the future of retirement in the individual's hands.<sup>35</sup>

The reason for this shift is simple: pensions are expensive.<sup>36</sup> In a pension, or defined-benefit plan, the employer does all the work, including making contributions and investment decisions.<sup>37</sup> Companies have been retreating from defined benefit plans because workers are living longer.<sup>38</sup> Coupled with declining investment returns,<sup>39</sup> employers have shifted toward defined-contribution plans where both employers and employees can make contributions.<sup>40</sup> Employers may match any contributions made by an employee, but they are not required to do so.<sup>41</sup>

This shift has resulted in a breakdown of the "three-legged stool" of retirement security, causing a crisis.<sup>42</sup> Social Security continues to provide families with a basic level of income security.<sup>43</sup> These benefits, however, may not provide enough income during retirement, nor may Social Security be a reliable source of income for future

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33. See Guina, *supra* note 19.

34. *Id.*

35. *Id.*

36. Buttonwood, *Why private pensions are disappearing*, *ECONOMIST* (June 15, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/06/economist-explains-8>.

37. CNN MONEY, *Ultimate guide to retirement*, CNN, [http://money.cnn.com/retirement/guide/pensions\\_basics.moneymag/index.htm?iid=EL](http://money.cnn.com/retirement/guide/pensions_basics.moneymag/index.htm?iid=EL) (last visited Oct. 3, 2015).

38. See Buttonwood, *supra* note 36 (explaining how men aged sixty-five can expect to live another 17.6 years compared with 12.7 years in 1960).

39. *Id.*

40. *Id.*

41. SEN. TOM HARKIN, U.S. SEN. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, *THE RETIREMENT CRISIS AND A PLAN TO SOLVE IT 2* (2012), [http://www.americanbenefitscouncil.org/documents2012/retirement-crisis-plan\\_harkin\\_072712.pdf](http://www.americanbenefitscouncil.org/documents2012/retirement-crisis-plan_harkin_072712.pdf) [hereinafter HARKIN].

42. *Id.* Harkin describes the "three-legged stool" as pension plans, personal savings and Social Security.

43. *Id.* at 3.

generations. The cost of Social Security benefits is projected to exceed sources of funding, and the program is projected to be unable to pay a portion of scheduled benefits by 2036.<sup>44</sup> In 2010, for the first time since 1983, Social Security trust funds paid out more in benefits than they received through payroll tax revenue.<sup>45</sup>

The decline of defined-benefit plans, coupled with the approaching Baby Boomers' retirement, is increasing the demand for financial advice.<sup>46</sup> Twenty-three percent of workers and 28% of retirees report that they have obtained investment advice from professional advisors.<sup>47</sup> Those who obtained investment advice, however, did not consistently follow it: 27% of workers who obtained advice say they followed all of it, but more disregarded some of the advice while following most of it.<sup>48</sup>

Americans are thus finding it more difficult to save for retirement: worker compensation has been flat or negative over the past four decades, and costs of living have been increasing.<sup>49</sup> With the significant economic challenges facing families, the middle class is finding it difficult to save: half of Americans have less than \$10,000 in savings, and 60% of the population has less than \$25,000.<sup>50</sup> The percentage of workers confident about having enough money for a comfortable retirement is dangerously low: half express some level of confidence, 13% are very confident, 38% are somewhat confident, and 28% are not at all confident.<sup>51</sup>

This breakdown of the "three-legged stool" of retirement security has had drastic results for the elderly: in 2012, over 3.9 million elderly persons were living in poverty, with another 2.4 million living

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44. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-400, RETIREMENT INCOME: ENSURING INCOME THROUGHOUT RETIREMENT REQUIRES DIFFICULT CHOICES 6 (2011), <http://www.gao.gov/new.items/d11400.pdf>.

45. *Id.*

46. Halah Touryalai, *One of the Fastest-Growing Careers Is In Desperate Need Of Young Talent*, FORBES (Aug. 8, 2012, 3:17 PM), <http://www.forbes.com/sites/halahtouryalai/2012/08/08/one-of-the-fastest-growing-careers-is-in-desperate-need-of-young-talent/>.

47. RUTH HELMAN ET AL., *The 2013 Retirement Confidence Survey: Perceived Savings Needs Outpace Reality for Many* 24 (EMP. BENEFIT RES. INST. Mar. 2013), [http://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_03-13.No384.RCS2.pdf](http://www.ebri.org/pdf/briefspdf/EBRI_IB_03-13.No384.RCS2.pdf) [hereinafter *Retirement Confidence Survey*].

48. *Id.* at 24.

49. HARKIN, *supra* note 41, at 3.

50. *Id.*

51. *Retirement Confidence Survey*, *supra* note 47, at 5.

near-poverty.<sup>52</sup> Older people without adequate retirement savings will have trouble making ends meet.<sup>53</sup> Without adequate retirement funding, seniors may find themselves forced to choose between putting food on the table and buying medication.<sup>54</sup> This cash shortfall may force seniors to look for quick sources of cash, and tapping the equity in their homes with a reverse mortgage is one way to do this.<sup>55</sup>

## B. The Rise of Reverse Mortgages

### 1. BIRTH OF THE PRODUCT

The first reverse mortgage in the United States was made in 1961 by a savings and loan company in Portland, Maine.<sup>56</sup> Throughout the next several decades, policymakers and mortgage companies explored ways for older homeowners to access their home equity.<sup>57</sup>

In 1988, President Ronald Reagan signed an act authorizing the FHA to insure reverse mortgages through the newly created Home Equity Conversion Mortgage (HECM) pilot program.<sup>58</sup> During the program's first decade, less than 40,000 HECM loans were made, but in 1998, the program was authorized permanently, and the FHA-product quickly came to dominate the market.<sup>59</sup> Most reverse mortgages originated through the HECM program: today, only a handful of loans are originated by proprietary lenders.<sup>60</sup>

The FHA insurance provides guarantees to both lenders and borrowers. Lenders are guaranteed they will be repaid in full when

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52. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *A Profile of Older Americans: 2013* 10 (2013), [http://www.aoa.gov/aging\\_statistics/Profile/2013/docs/2013\\_Profile.pdf](http://www.aoa.gov/aging_statistics/Profile/2013/docs/2013_Profile.pdf).

53. HARKIN, *supra* note 41, at 4.

54. *Id.*

55. See generally Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 197-98 (2007); Anthony DePalma, *Tapping Equity for Retirement Income*, N. Y. TIMES (Sept. 16, 1984), <http://www.nytimes.com/1984/09/16/realestate/tapping-equity-for-retirement-income.html?pagewanted=all>.

56. Peter Passell, *Tapping Home Equity to Cushion Old Age*, N. Y. TIMES (Jan. 30, 1994), <http://www.nytimes.com/1994/01/30/realestate/tapping-home-equity-to-cushion-old-age.html?pagewanted=all&src=pm>.

57. *Report to Congress*, *supra* note 21, at 17.

58. 12 U.S.C. § 1715z-20 (2014); *Report to Congress*, *supra* note 21, at 17.

59. *Report to Congress*, *supra* note 21, at 17.

60. *Id.*



the home is sold, and borrowers are guaranteed they will be able to access their authorized loan funds in the future.<sup>61</sup>

## 2. PROGRAM REQUIREMENTS

To qualify for an HECM reverse mortgage, a homeowner must meet the following criteria: 1) the homeowner (the youngest homeowner in the case of a jointly owned property) must be at least sixty-two; 2) the property must be a single family dwelling or other FHA approved unit; 3) the home must be the primary residence of, and be occupied by, the homeowner; and 4) no other existing liens or other legal obligation may encumber the property.<sup>62</sup> As a condition of the loan, borrowers are required to live in the home as their primary residence, pay property taxes and insurance, and maintain the property in good repair.<sup>63</sup>

The HECM loans include several consumer protections: 1) the borrower may live in the home indefinitely, regardless of how large the loan balance becomes, as long as the borrower complies with the loan conditions outlined in the previous paragraph; 2) only FHA-approved lenders may make HECM loans; 3) if the loan balance is greater than the home's value at the time of death, move-out, or foreclosure, the lender cannot seek the additional loan balance from the borrower's estate; 4) the borrower may repay any portion of the loan at any time without being charged a prepayment penalty; 5) the borrower must receive counseling from an FHA-approved, independent third party prior to origination; and 6) the FHA requires an array of disclosures.<sup>64</sup>

The HECM loans can be declared payable upon the happening of any of the following events: 1) death (of either the borrower or last co-borrower); 2) the borrower (or last co-borrower) moves out of the home permanently; 3) the borrower (or last co-borrower) does not physically reside in the property for more than twelve months due to illness or other reasons; 4) the borrower (or last co-borrower) sells or otherwise transfers title of the property to a third party; or 5) the borrower fails to pay taxes and insurance, or fails to keep the home in

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61. *Id.*

62. Mike Patton, *Under the Hood: Reverse Mortgages—What You Need to Know*, THINKADVISOR at \*1 (May 8, 2014), <http://www.thinkadvisor.com/2014/05/08/under-the-hood-reverse-mortgageswhat-you-need-to-k>.

63. *Report to Congress, supra* note 21, at 21.

64. *Id.* at 21-22.

good repair (the lender will give the borrower an opportunity to correct the problem prior to calling the loan).<sup>65</sup> Once the loan is declared due, the borrower (or borrower's estate) has six months to repay, which typically occurs by selling the home.<sup>66</sup> If the borrower fails to sell the property or otherwise pay the loan within that time, the lender is required to start foreclosure proceedings.<sup>67</sup>

The HECM loans also give the borrower a three-day right of rescission.<sup>68</sup> Essentially, if a borrower, upon further reflection, decides within three days after closing not to proceed, the borrower may cancel the loan.

### 3. PROGRAM OPTIONS

The first question any senior must ask is whether a reverse mortgage is the right product for their particular situation—that is, can an alternative product offer a cheaper way to achieve the financial goal? Other important questions include whether the senior is on a fixed income with no other assets, and whether the home will be left to children or other heirs.<sup>69</sup>

If a potential borrower answers these questions and decides a reverse mortgage is appropriate, the borrower has a number of additional choices. First, the borrower must choose between the HECM Standard loan and the HECM Saver loan.<sup>70</sup> The Standard loan offers higher loan proceeds with higher upfront costs, while the Saver loan offers lower loan proceeds, but with lower upfront costs.<sup>71</sup> The Saver loan was designed as a lower-cost option for borrowers who do not need access to as much money as the Standard loan would provide.<sup>72</sup> This tradeoff is more complex than a simple difference in upfront costs: the Saver reduces the upfront mortgage insurance premium from 2% to 0.01% of the home value, resulting in the Saver loan carry-

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65. *Id.* at 22.

66. *Id.*

67. *Id.* at 22-23.

68. U.S. DEP'T OF HOUS. AND URBAN DEV., *Frequently Asked Questions about HUD's Reverse Mortgages* (last visited Oct. 3, 2015), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/sfh/hecm/rmtopten](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/rmtopten).

69. CON. FIN. PROT. BUREAU, *How do I know if a reverse mortgage is a good idea for me? What should I consider before applying?* (updated July 7, 2014), <http://www.consumerfinance.gov/askcfpb/228/how-do-i-know-that-a-reverse-mortgage-is-a-good-idea-for-me.html>.

70. *Report to Congress, supra* note 21, at 23.

71. *Id.*

72. *Id.* at 26.

ing interest rates one-quarter to one-half of a percentage point higher than the Standard loan.<sup>73</sup> Depending on interest rates and the length of the loan, the increased interest rate could, in some cases, outweigh the reduced upfront cost.<sup>74</sup>

Second, borrowers have a choice between a fixed-rate and adjustable-rate product.<sup>75</sup> The fixed-rate option is available only with lump-sum disbursements,<sup>76</sup> but borrowers who choose the adjustable-rate product can choose from any of the six different options for receiving their loan proceeds.<sup>77</sup> Those disbursement options are: 1) line of credit; 2) fixed monthly disbursement for a fixed number of years; 3) fixed monthly disbursement for as long as the borrower lives in the home; 4) a combination of options one and two; 5) a combination of options one and three; and 6) lump sum (while this option does not formally exist as a separate option, all borrowers are permitted to receive a lump sum at closing).<sup>78</sup>

The options presented in the preceding paragraphs are not exhaustive.<sup>79</sup> Reverse mortgages are complex products, and under-informed borrowers—or those who have been taken advantage of by unscrupulous lenders of deceptive marketing—face considerable risks.<sup>80</sup> Prospective borrowers are generally motivated by a combination of a need (or desire) for additional cash and a desire to remain in their current home. Prospective borrowers are more likely to be in their sixties at origination than in the past, have more substantial existing mortgage debt than older borrowers, and take more cash up front.<sup>81</sup> As a result, borrowers are essentially devoting their existing home equity to servicing the debt on the property and losing the ability to use that equity as a cushion against other major expenses in retirement.<sup>82</sup>

The reverse mortgage market adds more complexity to the product. During the first decade of the HECM program, less than

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73. *Id.* at 26-27.

74. *Id.* at 27.

75. *Id.*

76. *Id.* at 29.

77. *Id.* at 27.

78. *Id.* at 28-29.

79. See, e.g., *Report to Congress, supra* note 21, at 31 (discussing special-purpose HECM loans).

80. Elliot Wong & Ingrid Evans, *Protecting Borrowers from the Pitfalls of Reverse Mortgages*, 24 NO. 2 EXPERIENCE 20, 22 (Summer 2014).

81. *Report to Congress, supra* note 21, at 67.

82. *Id.*

10,000 loans were made each year.<sup>83</sup> After the program was permanently authorized, loan volume began growing steadily, reaching 50,000 loans per year by 2005.<sup>84</sup> The market includes several types of companies fulfilling several roles, sometimes overlapping.<sup>85</sup> Reverse mortgages are originated through three channels: retail, wholesale, and correspondent.<sup>86</sup> In 2011, the two largest originators, Wells Fargo and Bank of America, exited the market; together, they had comprised 36% of the market.<sup>87</sup> The exit of Wells Fargo and Bank of America (and, to a lesser extent, MetLife in 2012), make originations more heavily dependent on small brokers and independent mortgage companies than it has been.<sup>88</sup>

The HECM program has dominated the market since its inception, but borrowers have alternatives.<sup>89</sup> Private financial institutions have also offered a variety of equity conversion products, including proprietary reverse mortgages.<sup>90</sup> Today, the marketplace is crowded with low overall volume of only about 70,000 loans per year.<sup>91</sup> Issuers need loans to fill their securitization pipelines, but with few borrowers, competition is intense.<sup>92</sup> Many brokers use lead-generation services that sell lists containing names of people supposedly interested in reverse mortgages, but these lead-generation companies do not always follow sound business practices.<sup>93</sup> These factors make the reverse-mortgage marketplace fertile ground for abuse. Today, almost all HECM loans are packaged into Ginnie Mae securities on the secondary market.<sup>94</sup> These securities have been the dominant secondary market vehicle for the past three years.<sup>95</sup>

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83. *Id.* at 71.

84. *Id.*

85. *Id.* at 73.

86. *Id.*

87. *Id.* at 76. Wells Fargo cited concerns over the reputational risks of foreclosing on seniors, and Bank of America cited a need to refocus on its core business lines in the aftermath of the financial crisis.

88. *Id.* at 78.

89. Tara Twomey & Rick Jurgens, *Subprime Revisited: How Reverse Mortgage Lenders Put Older Homeowners' Equity at Risk*, NAT'L CON. L. CTR. 4 (Oct. 2009), <http://www.nclc.org/images/pdf/pr-reports/report-reverse-mortgages-2009.pdf>.

90. *Id.* at 5.

91. *Report to Congress*, *supra* note 21, at 78.

92. *Id.*

93. *Id.* at 79.

94. *Id.*

95. *Id.* at 82.

### C. Current Regulatory Structure

Part III will discuss specific federal and state statutes and consumer protections in greater detail, but this Section will introduce them briefly to demonstrate the fragmented regulation within the marketplace.

The regulatory structure applicable to the reverse mortgage industry is different than for most other consumer financial products because of the dominance of FHA-insured products.<sup>96</sup> Like traditional mortgages, reverse mortgages are subject to federal laws governing mortgage lending.<sup>97</sup> Many reverse mortgage lenders are subject to enforcement under the unfair, deceptive, or abusive acts or practices provision of the Dodd-Frank Act.<sup>98</sup> Some lenders may also be subject to enforcement under the unfair and deceptive acts or practices provision of the Federal Trade Commission Act.<sup>99</sup> These are not the only federal regulations that may apply to reverse mortgage lenders.<sup>100</sup>

“State legislation has focused on deceptive marketing techniques, the adequacy of disclosures and counseling, and the dangers of cross-selling unsuitable financial or insurance products with a reverse mortgage” (*e.g.*, convincing a borrower to invest the proceeds of a reverse mortgage into an annuity, a practice which will be discussed in detail in Part III).<sup>101</sup> Some statutes require that the first page of any mortgage deed of trust securing a reverse mortgage state that the deed “secures a reverse mortgage loan;”<sup>102</sup> others require explicit descriptions of fees and costs;<sup>103</sup> while others require an originator to disclose in writing all costs being charged and clearly identify which charges are for items not required to obtain the loan.<sup>104</sup>

States have also acted to combat unfair and deceptive advertising and marketing centering not only on those who make unfair or deceptive statements, but also on those who misrepresent their ability and qualifications to offer reverse mortgages.<sup>105</sup>

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96. *Id.* at 100.

97. *Id.*

98. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376.

99. 15 U.S.C. § 45 (2014).

100. *See, e.g.*, Truth in Lending Act (Regulation Z), 12 C.F.R. § 226.1 (2014); Regulation Z applies to all consumer credit, including reverse mortgages. 12 C.F.R. § 1026.33 (2014).

101. *Report to Congress, supra* note 21, at 107.

102. ARK. CODE ANN. § 23-54-104 (2014).

103. *Id.*; *see also* CAL. CIV. CODE § 1923.2 (2014).

104. ARIZ. REV. STAT. ANN. § 6-1703 (2014).

105. *Report to Congress, supra* note 21, at 115.

### III. Analysis

Despite these protections, lenders and originators have taken advantage of seniors who are confused by the complexity of the product and feel pressured by aggressive lenders.<sup>106</sup> Additionally, seniors may suffer from diminished capacity, making them easy targets for unscrupulous or aggressive lenders.<sup>107</sup> Financial service professionals are often the first to notice that diminished decision-making capacity is a problem with seniors.<sup>108</sup>

The senior population in the United States is expected to grow rapidly, from 35 million in 2000 to 64 million by 2025,<sup>109</sup> and seniors are accounting for a growing share of the overall population: from 12% in 2000 to 18% in 2025.<sup>110</sup> Seniors also possess considerable wealth: although the median annual income of those sixty-five and older was only \$17,382 (just under \$1,500 per month), residential real estate has become the single largest asset class among that same population, being estimated between \$2.8 and \$4 trillion.<sup>111</sup> Lenders and financial institutions have taken notice of this potential source of wealth: Tara Twomey and Rick Jurgens, in their study, highlight a solicitation to attend a reverse mortgage workshop, stating, "*The potential origination fees for Reverse Mortgages today are in excess of \$42-Billion [sic]. How will you get your share?*"<sup>112</sup> Lenders are also aware of what they need to do to be successful in selling reverse mortgages to seniors: in her report, Norma Paz Garcia identifies a group telling lenders, "These Consumers Understand—Simply having a reverse mortgage offer mentioned on the AARP webpage and through most senior web links is an excellent way to gain trust from your candidates as most of the seniors that would respond to this ad have some contact or consideration with the AARP."<sup>113</sup> Seniors who have had little expe-

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106. See, e.g., *Walton v. Diamond*, No. 12-cv-4493, 2013 WL 1337334 (N.D. Ill. Mar. 29, 2013) (involving an elderly African-American woman who needed home repairs and was induced to sign documents, never received copies, and later realized she had taken a reverse mortgage).

107. See generally Naomi Karp & Ryan Wilson, *Protecting Older Investors: The Challenge of Diminished Capacity*, AARP PUB. POLICY INST., (Nov. 2011), [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/cons\\_prot/2011/rr2011-04.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf).

108. *Id.* at 17.

109. Twomey & Jurgens, *supra* note 89, at 5.

110. *Id.* at 6.

111. *Id.*

112. *Id.*

113. Paz Garcia, *supra* note 16, at 16.

rience with technology may not understand the difference between something on the AARP's webpage that is specifically endorsed by the organization or a paid advertisement.

This Part will discuss risks posed to consumers, including false or deceptive advertising, aggressive sales tactics, and product complexity, including costs associated with originating a reverse mortgage and inadequate counseling. Each of these risks individually makes consumers more likely to make poor decisions. These risks, however, may not appear individually but as a package (*e.g.*, a lender using false or deceptive advertising may also take advantage of a borrower's diminished capacity by using the product's complexity through aggressive sales tactics).<sup>114</sup> When these factors are combined, consumers are at a significantly greater risk of making catastrophic decisions. Additionally, this Part will also discuss emerging concerns to consumers identified by the Consumer Financial Protection Bureau (CFPB). These concerns underscore the need for strengthened protections for reverse mortgages.

## A. False or Deceptive Advertising

### 1. IMPLICATIONS OF GOVERNMENT BACKING

Between 2008 and 2010, regulators in several states brought allegations of deceptive marketing or consumer fraud against the American Advisors Group (AAG) centered on direct-mail solicitations marked "Notice of 2008 Government Benefits" or "2009 Economic Stimulus Plan—HECM Program,"<sup>115</sup> potentially giving the impression that these products were specifically endorsed by the federal govern-

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114. *See, e.g.*, *People v. Butler*, 212 Cal. App. 4th 404 (2012) (discussing supposed safe investments—including reverse-mortgages, annuities and living trusts—marketed by defendant to elderly, unsophisticated investors were extremely risky at best and Ponzi schemes at worst, providing outrageously unrealistic promises and withheld obviously material information that would have allowed investors to see they should not trust defendant by placing their assets at risk); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-606, *Reverse Mortgages: Product Complexity and Consumer Protection Issues Underscore Need for Improved Controls over Counseling Borrowers* 28 (2009), <http://www.gao.gov/new.items/d09606.pdf> [hereinafter *Reverse Mortgages: Product Complexity*]. In California, two insurance agents were accused of designing a seminar to teach licensed insurance and real estate agents how to sell reverse mortgages to seniors in conjunction with annuities. It was also alleged that they attempted to convince seniors that purchasing an annuity with reverse-mortgage funds was a condition of obtaining the loan. *Id.*

115. *Report to Congress, supra* note 21, at 115.

ment and not a loan offered by the AAG. These mailings also included the Equal Housing Opportunity logo, identified "Administrative Offices" as the sender and told consumers they had been pre-selected and would have to make "NO MONTHLY PAYMENTS" of any kind.<sup>116</sup>

To resolve the actions and allegations in the various states, AAG agreed, among other things, to revise its advertising practices, issue a written clarification to consumers stating it was not affiliated with any government agency, and was enjoined from making any representations that a reverse mortgage is a government benefit or that President Obama's stimulus plan created the HECM program.<sup>117</sup>

In a case similar to the one the New York Attorney General brought against the New View Mortgage Corporation, Illinois Attorney General Lisa Madigan filed lawsuits against two mortgage brokers (including the AAG suit from the previous paragraph) for unfair and deceptive marketing practices in connection with the solicitation of reverse mortgages.<sup>118</sup> Madigan alleged that the defendants used direct-mail solicitations making a series of claims falsely implying that seniors could be eligible for lifetime monthly income or a lump-sum payment as part of a government benefit available to all seniors, including claims such as: "President Obama's Economic Stimulus Plan helps Seniors. If you are 62 years of age or older, you may be eligible to take advantage of an important U.S. Government Insured Program;" and "The United States Congress has authorized a Reverse Lending program you do NOT have to pay back as long as you live in your home!"<sup>119</sup>

While HECM loans are insured by the government, the product is a loan that must be repaid.<sup>120</sup> Misrepresenting government affiliations by implying a government agency is implicitly backing the loan is potentially misleading.<sup>121</sup> This may give already vulnerable seniors a false sense of security, believing that the government is backing the loan or lender and that there is little risk, or that the product is

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116. *Id.*

117. *Id.*

118. Press Release, Ill. Attorney Gen., *Madigan Sues Two Reverse Mortgage Brokers for Using Deceptive Marketing to Target Seniors* (Feb. 8, 2010), [http://www.illinoisattorneygeneral.gov/pressroom/2010\\_02/20100208.html](http://www.illinoisattorneygeneral.gov/pressroom/2010_02/20100208.html).

119. *Id.*

120. Reverse Mortgages: Product Complexity, *supra* note 114, at 21.

121. See Reverse Mortgages: Product Complexity, *supra* note 114, at 23, Figure 3 for an example of this type of claim.



a government benefit and not a loan. If seniors are led astray by claims of “President Obama’s Stimulus Plan” or the “U.S. Congress Government Insured Program,” they may be less willing to consider the risks and costs associated with reverse mortgages, believing there actually is no risk or cost since the program is a “benefit” and not a “loan.”

## 2. CLAIMS THAT A BORROWER WILL NEVER LOSE THE HOME

One of the potentially misleading claims identified by the Government Accountability Office (GAO) is that borrowers may “*never lose [their] home.*”<sup>122</sup> In fact, former senator Thompson assures potential borrowers that they will “always retain complete ownership” of their home.<sup>123</sup> Massachusetts issued a cease directive to a lender for making potentially misleading claims on its webpage, including, “You won’t lose your home through a reverse mortgage. Your lender does not ever gain ownership.”<sup>124</sup>

This claim is potentially misleading because the lender can initiate foreclosure proceedings if the borrower fails to satisfy the conditions of paying property taxes and maintaining the property.<sup>125</sup> In fact, the Massachusetts cease directive highlighted this glaring omission from the lender’s website.<sup>126</sup> Because a reverse mortgage is a loan, it is repayable, and taking a reverse mortgage does not relieve a borrower from staying current on property taxes or homeowner’s insurance.<sup>127</sup> Although the lender will typically issue a notice to a borrower to correct this deficiency,<sup>128</sup> a borrower who is cash poor and has taken a reverse mortgage to fund certain retirement expenses (*e.g.*, medical expenses, vacations, or other luxury purchases) may not have the available cash to pay past-due property taxes or insurance or other-

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122. *Id.* at 22.

123. iSpot.tv, *supra* note 3.

124. David J. Cotney, In the Matter of Lender 411, LLC, Cease Directive (Aug. 23, 2011), <http://www.mass.gov/ocabr/banking-and-finance/laws-and-regulations/enforcement-actions/2011-dob-enforcement-actions/lender-411-llc-orange-ca-cease-directive.html>.

125. iSpot.tv, *supra* note 3. Even though former senator Thompson never explicitly states the requirements to stay current on property taxes and insurance and to maintain the home, this requirement appears in fine print at the bottom of the screen while the narrator is still speaking. A viewer who is paying close attention to the narrator may overlook this fine print and be unaware of this requirement at first glance.

126. Cotney, *supra* note 124.

127. *Report to Congress*, *supra* note 21, at 22.

128. *Id.*

wise repair major damage to property. If seniors are otherwise unable to generate sufficient cash by liquidating other investments or asking relatives, they will be at risk of losing their home.

### 3. EXAGGERATED CLAIMS OF EXPERTISE OR ABILITY

State regulators have also taken action against lenders that have misrepresented their ability to offer reverse mortgages.<sup>129</sup> Community groups have noticed an increase in the use of senior designations, including “Certified Senior Adviser,” in the marketing of reverse mortgages.<sup>130</sup> Massachusetts has issued additional cease directives to lenders misrepresenting themselves in the course of originating reverse mortgages to consumers: one lender offered a “Lender’s Pledge,” stating, “We at Reverse Mortgage Page are committed to bringing you together with the best, most reputable reverse mortgage lenders. Our reverse mortgage lenders pledge to: 1) be registered and in good standing with all appropriate government regulators . . . 7) completely follow all federal, state, and administrative laws . . . .”<sup>131</sup> Lenders listed on [www.reversemortgagepage.com](http://www.reversemortgagepage.com), however, were not licensed or approved to originate loans in Massachusetts.<sup>132</sup> Regulators in Massachusetts and New Hampshire have prohibited the practice of using senior-specific designations (*e.g.*, combining words such as “senior” and “elder” with “registered,” “chartered,” or “specialist”) unless those designations have been specifically recognized by the state regulator.<sup>133</sup>

A lender who exaggerates its expertise (or misrepresents itself as a government agency) could potentially lead consumers to believe that the lender is an expert or possesses an otherwise increased ability to offer these products. As some research suggests, seniors may suffer from diminished capacity related to changes in the brain that may make it more difficult for them to detect suspicious or untrustworthy behavior.<sup>134</sup> Thus, seniors dealing with lenders who misrepresent their

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129. *Report to Congress, supra* note 21, at 115.

130. *Id.* at 116.

131. In the Matter of Eldervantage, LLC and Reversemortgagepage.com, Cease Directive (Aug. 23, 2011), <http://www.mass.gov/ocabr/banking-and-finance/laws-and-regulations/enforcement-actions/2011-dob-enforcement-actions/eldervantage-llc-and-reversemortgagepagecom.html>.

132. *Id.*

133. See 950 MASS. CODE REGS. § 12.204(2)(i) (2014); 950 MASS. CODE REGS. § 12.205(9)(c)(15) (2014); N.H. REV. STAT. ANN. § 421-B:6 (VII-b) (2014).

134. Lloyd, *supra* note 18.

abilities or government affiliation (or lack thereof) may find it difficult to determine whether a particular lender is trustworthy, and they are at greater risk of making a poor financial decision.

#### 4. OTHER POTENTIALLY FALSE OR DECEPTIVE ADVERTISING CONCERNS

The GAO has identified additional concerns over potentially false or misleading advertising. One potential misleading claim is that a borrower will never owe more than the value of the home.<sup>135</sup> This claim can be misleading because a homeowner can be underwater (*i.e.*, the loan balance is greater than the value of the home). In that case, if the loan were to become payable, either by the borrower or the heir(s), due to death, sale, or foreclosure, the borrower or heir(s) would be responsible for the balance of the loan.<sup>136</sup> For cash poor borrowers who took a reverse mortgage or unsuspecting heirs, this could be a detrimental blow and affect future financial decisions.

Another potentially misleading claim is that the HECM program is limited by geography or time, including claims to “call within 72 hours” or that the consumer’s home is “located in a Federal Housing Authority qualifying area.”<sup>137</sup> The HECM program is a federal program, and while Congress could theoretically end it at any time, claims of an impending deadline could be misleading or even represent aggressive sales tactics. Further, the HECM program does not restrict reverse mortgages to a particular geographic area, but does require the unit to be FHA-approved according to the program guidelines.<sup>138</sup> Borrowers who are unaware of these false or misleading claims may feel pressured into acting quickly without considering alternatives.

#### B. Aggressive Sales Tactics

The fundamental purpose of a reverse mortgage—to generate cash flow—can lead reverse-mortgage borrowers to potentially unscrupulous or aggressive sales people seeking to push additional investments.<sup>139</sup> One particularly aggressive tactic is “cross-selling,”

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135. Reverse Mortgages, Product Complexity, *supra* note 114, at 21.

136. *Id.*

137. *Id.*

138. See Patton, *supra* note 62, at \*1.

139. Report to Congress, *supra* note 21, at 118.

which occurs when a lender requires the consumer to purchase financial insurance products with the proceeds from a reverse mortgage or convinces a consumer to purchase these additional products with the proceeds.<sup>140</sup> Because reverse mortgages allow borrowers to access a large amount of cash at once, they may be vulnerable to unscrupulous and aggressive financial advisers.<sup>141</sup> An AARP survey found that 4% of borrowers had used reverse mortgages to make investments or purchase other insurance products.<sup>142</sup> Congress has placed restrictions on cross-selling with regard to reverse mortgage products but, as in any industry, bad actors are willing to violate the law.<sup>143</sup> Some states have also addressed this concern.<sup>144</sup>

In the Housing and Economic Recovery Act of 2008 (HERA), Congress adopted rules restricting the sale of other products or services with an HECM mortgage.<sup>145</sup> Specifically, HERA prohibits a reverse-mortgage lender from requiring a borrower to purchase insurance, an annuity, or similar product as a condition of eligibility for a reverse mortgage.<sup>146</sup> HERA also generally prohibits an HECM mortgage originator, or any other party that participates in the origination of an HECM mortgage, from participating in, being associated with, or employing any party that participates in or is associated with any other financial or insurance activity.<sup>147</sup> HERA permits an exception to this general provision, however, if the originator establishes “firewalls and other safeguards” designed to ensure that individuals participating in originations of HECM products have no involvement with or incentive to provide the mortgagor with any other financial or insurance product; and the mortgagor shall not be required, directly or in-

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140. *Id.*

141. Reverse Mortgages: Product Complexity, *supra* note 114, at 24.

142. Donald L. Redfoot, Ken Scholen & S. Kathi Brown, *Reverse Mortgages: Niche Product or Mainstream Solution?*, REP. ON THE 2006 AARP NAT'L SURVEY OF REVERSE MORTG. SHOPPERS 34 (Dec. 2007), [https://assets.aarp.org/rgcenter/consume/2007\\_22\\_rev mortgage.pdf](https://assets.aarp.org/rgcenter/consume/2007_22_rev mortgage.pdf).

143. 12 U.S.C. § 1715z-20(n)(1) (2014). *But see* Butler, *supra* note 114.

144. CAL. CIV. CODE § 1923.2(i) (2015); MASS. DIV. OF BANKS, *Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks*, Regulatory Bulletin 5.1-106 (Dec. 15, 2010), <http://www.mass.gov/ocabr/banking-and-finance/laws-and-regulations/dob-regulatory-bulletins/licensees-only/regulatory-bulletin-51-106-reverse-mortgage.html>.

145. Housing and Economic Recovery Act, Pub. L. No. 110-289, 122 Stat. 2654, 2837 (codified at 12 U.S.C. § 4501 *et seq.*), <http://www.gpo.gov/fdsys/pkg/PLAW-110publ289/pdf/PLAW-110publ289.pdf> [hereinafter HERA].

146. § 2122(n)(1)(B)(ii), 122 Stat. at 2837.

147. § 2122(n)(1)(B)(i), 122 Stat. at 2837.

directly, to purchase any other financial or insurance product as a condition of obtaining a mortgage.<sup>148</sup> Certain other laws applicable to banks and other depository institutions contain anti-tying rules that would bar tying a reverse mortgage loan to the borrower's purchase of other financial or insurance products.<sup>149</sup>

"[T]he cross-selling provisions in HERA apply only to HECMs, and the anti-tying provisions apply only to reverse mortgages originated by depository institutions."<sup>150</sup> No express federal rules currently prohibit cross-selling of other financial and insurance products with proprietary reverse mortgages originated by non-banks.<sup>151</sup> Additionally, while these protections prohibit financial institutions from *conditioning* the origination of a reverse mortgage on the purchase of other financial or insurance products, they do not prevent these institutions from *using* other aggressive sales tactics to induce the purchase of additional financial or insurance products.<sup>152</sup>

The current combination of state and federal regulations do provide significant consumer protections against inappropriate cross-selling.<sup>153</sup> Proprietary reverse mortgages are the only reverse mortgages not subject to rules prohibiting cross-selling, but this segment constitutes only a handful of loans.<sup>154</sup> "[N]early all of the remaining large reverse-mortgage originators are non-banks, and the proprietary market could expand in the future."<sup>155</sup> Thus, regulators should consider strengthening protections in this area to prevent future abuse.

## C. Product Complexity

### 1. PRODUCT OPTIONS AND FEATURES

This Note has previously discussed the complex options available under the HECM program.<sup>156</sup> The United States Department of Housing and Urban Development (HUD) and industry officials have indicated that the complex nature of HECMs may make them difficult

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148. § 2122(n)(1)(B)(i)-(ii), 122 Stat. at 2837.

149. *See, e.g.*, Gramm-Leach Bliley Act, 12 U.S.C. § 1831x(b) (2014).

150. *Report to Congress, supra* note 21, at 121.

151. *Id.*

152. *See generally* Twomey & Jurgens, *supra* note 89, at 14.

153. *Report to Congress, supra* note 21, at 121.

154. *Id.*

155. *Id.*

156. *See* Part II(B)(3), *supra*.

for some borrowers to understand.<sup>157</sup> Industry officials reported to the GAO that some borrowers were unaware that they were borrowing money rather than drawing directly from the equity in their homes.<sup>158</sup> Another industry official provided another example of a borrower who did not understand why she owed more than the amount she borrowed, unaware that her loan was accumulating interest and fees.<sup>159</sup>

Still, other borrowers are unaware of basic principles of lending: reverse mortgages result in “rising debt and falling equity,” while standard forward mortgages result in “falling debt and rising equity.”<sup>160</sup> Further, GAO interviews with borrowers illustrate how some may not be aware of all the factors affecting how much equity they will have remaining after the loan is repaid; when asked if changes in home values could affect their remaining equity, several borrowers responded that the changes could not.<sup>161</sup> Part IV will discuss ways to effectively present potential borrowers with complete, accurate, and understandable information.

## 2. COSTS AND FEES

In addition to the various product options available, HECM products include several pricing structures. These costs and fees may be difficult for consumers to effectively evaluate and, in many cases, may be higher than alternative products.<sup>162</sup> Consumer groups and personal finance commentators have expressed concerns that reverse mortgages are high-cost products.<sup>163</sup> The fees and costs are added to the balance of the loan at the outset.<sup>164</sup> The borrower is also charged a 1.25% premium on the entire loan balance.<sup>165</sup> Third party fees, including those for appraisal, title search, insurance, surveys, inspections,

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157. Reverse Mortgages: Product Complexity, *supra* note 114, at 13.

158. *Id.* at 14.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Report to Congress, supra* note 21, at 127.

163. AARP, *Reverse Mortgage Loan: Borrowing Against Your Home* 1 (2010), [http://assets.aarp.org/www.aarp.org\\_/articles/money/financial\\_pdfs/hmm\\_hires\\_nocrops.pdf?ccm=RDRCT-REVSMTG\\_MAR12\\_013](http://assets.aarp.org/www.aarp.org_/articles/money/financial_pdfs/hmm_hires_nocrops.pdf?ccm=RDRCT-REVSMTG_MAR12_013); Paz Garcia, *supra* note 16, at 6-7; Jonathan Clements, *The Costly, Restrictive Mortgage That Could Save Your Retirement*, WALL ST. J. (updated Dec. 17, 2003 12:01 A.M.), <http://www.wsj.com/articles/SB107161346989436400> (“The fees are just exorbitant . . . [b]ut if you don’t have any other choice, you don’t have any other choice.”).

164. Paz Garcia, *supra* note 16, at 6.

165. *Id.*

recording, taxes, and credit checks are charged on the back-end and typically paid by loan proceeds, reducing the amount the borrower actually receives.<sup>166</sup>

Federal regulations and market conditions have sought to limit fees charged on HECM products. HERA capped origination fees at \$6,000.<sup>167</sup> Because the payout to the borrower is typically only 30% to 70% of the home value, the origination fee can still represent a large percentage of the loan amount.<sup>168</sup> Additionally, in 2010, both market pricing and FHA policies further reduced HECM costs; lenders began waiving origination fees on adjustable-rate products,<sup>169</sup> and the FHA released the HECM Saver option that charges a significantly lower up-front fee of 0.01% of the home's appraised value.<sup>170</sup>

While these developments have helped ease concerns that up-front costs and fees are too high, at least some of these fees have been converted into ongoing monthly fees in the form of higher mortgage insurance premiums and interest rates.<sup>171</sup> The FHA assesses an ongoing monthly mortgage insurance premium equal to 1.25% of the loan balance.<sup>172</sup> A servicing fee is also embedded in the interest rate: each month, servicers receive between 0.30% and 1.44% before the accrued interest is credited to the secondary-market investors.<sup>173</sup> Finally, interest accrues each month and is credited to the investors who own the loan.<sup>174</sup>

TILA sets forth rules regarding the disclosure of information, finance costs, and borrower rights in connection with mortgage transactions.<sup>175</sup> Only some of the disclosures are specific to reverse mortgages.<sup>176</sup> Additionally, reverse-mortgage borrowers receive different documents at the time the application is provided, and which documents the borrower receives depends on whether the product is an

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166. *Report to Congress, supra* note 21, at 34.

167. HERA, *supra* note 145, at 2838.

168. *Report to Congress, supra* note 21, at 33; *id.* at 34, Figure 7.

169. *Report to Congress, supra* note 21, at 128.

170. Press Release, U.S. Dep't of Hous. and Urban Dev., HUD No. 10-205, HUD Announces New Reverse Mortgage Option (Sept. 22, 2010), [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-205](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-205).

171. *Report to Congress, supra* note 21, at 128.

172. *Id.* at 34.

173. *Id.* at 35.

174. *Id.*

175. 15 U.S.C. § 1605 (2014).

176. *See* 15 U.S.C. § 1648.

open-end or closed-end product.<sup>177</sup> Because TILA applies provisions and regulations designed for traditional mortgages to reverse mortgages, many of the documents required by TILA are not tailored specifically for reverse mortgages.<sup>178</sup> Thus, borrowers may still believe they are taking a standard loan without understanding the specific features of a reverse mortgage: for example, the Home Equity Line of Credit (HELOC) brochure required for open-end reverse mortgages does not contain *any* information specific to reverse mortgages.<sup>179</sup>

TILA does establish additional requirements specifically applicable to reverse mortgage transactions. These requirements state borrowers shall receive disclosures substantially similar to the model included in the appendix to Regulation Z at least three business days before obtaining the reverse mortgage.<sup>180</sup> This disclosure, the Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions (TALC), must: 1) state the consumer is not obligated to complete a reverse mortgage transaction even though the consumer received disclosures or signed a reverse mortgage application; 2) include itemized loan terms, changes, age of the youngest borrower, and the appraised property value; 3) set forth a good-faith projection of the total cost of credit expressed as a table of TALC rates; and 4) provide an explanation of the TALC table.<sup>181</sup>

All reverse mortgage creditors must provide the TALC disclosure, which is designed to show consumers how the cost of the product varies over time.<sup>182</sup> The Federal Reserve Board of Governors (Board) tested the TALC disclosures with consumers before proposing new reverse mortgage disclosures.<sup>183</sup> Participants were shown a disclosure with the TALC table currently required by Regulation Z—according to the results, very few study participants understood the TALC table, and some could not even begin to explain what it was showing.<sup>184</sup> The Board also found most participants thought the TALC rates shown were interest rates and interpreted the tables as showing

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177. *Report to Congress, supra* note 21, at 101; *see also id.* at 102 (figure 41).

178. *Id.* at 102.

179. FED. RESERVE BD., *What you should know about Home Equity Lines of Credit* (2012), [http://files.consumerfinance.gov/f/201204\\_CFPB\\_HELOC-brochure.pdf](http://files.consumerfinance.gov/f/201204_CFPB_HELOC-brochure.pdf).

180. 12 C.F.R. § 1026, App. K (2015).

181. *Id.*; *see also* 12 C.F.R. § 1026.33(b); *Report to Congress, supra* note 21, at 102-03.

182. *Report to Congress, supra* note 21, at 103.

183. *Id.*

184. *Id.*



that their interest rate would decrease if they held their reverse mortgage for a longer period of time.<sup>185</sup>

The Board proposed revised disclosure forms to create a new unified disclosure system for all reverse mortgages, including both HECM and proprietary products.<sup>186</sup> The proposal would exempt reverse mortgages from existing TILA disclosure requirements and would require the following new disclosures: 1) a two-page disclosure entitled “Key Questions to Ask About Reverse Mortgage Loans,” provided before a consumer applies for a reverse mortgage; 2) for open-end reverse mortgages, an “early” open-end disclosure provided within three business days after application, and an account-opening disclosure provided at least three business days before account opening; and 3) for closed-end reverse mortgages, a closed-end reverse mortgage disclosure provided within three business days after application and again at least three business days before closing.<sup>187</sup> The proposed rule would have also replaced the TALC table with a table that illustrates how the loan balance grows over time expressed as a dollar amount,<sup>188</sup> which would demonstrate how a reverse mortgage *balance* will grow over time and eliminate confusion over TALC *rates* that may decline over time as the initial costs of a reverse mortgage are amortized over a longer period.<sup>189</sup>

While a proposal that seeks to clarify the costs and fees associated with reverse mortgages is assuredly a step in the right direction, it is not sufficient in and of itself. One fundamental problem with disclosure requirements is that they merely provide information but demand no further action.<sup>190</sup> Further, “[s]tacks of papers that must be signed or initialed to certify that information has been ‘disclosed’ are too often overlooked or misunderstood by consumers.”<sup>191</sup> Thus, a regulation requiring strict and thorough disclosure of costs and fees may be strong in theory, but if the borrowers to whom the disclosures

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185. Regulation Z; Truth in Lending, 75 Fed. Reg. 58,539, 58,544 (proposed Sept. 24, 2010).

186. See *Report to Congress*, *supra* note 21, App. II at 160-74 to see the Board’s proposed disclosures.

187. Regulation Z; Truth in Lending, 75 Fed. Reg. at 58,550.

188. *Id.* at 58,540.

189. *Report to Congress*, *supra* note 21, at 109.

190. Elisabeth Rosenthal, *I Disclose . . . Nothing*, N.Y. TIMES (Jan. 21, 2012), <http://www.nytimes.com/2012/01/22/sunday-review/hard-truths-about-disclosure.html> (discussing research that demonstrates more disclosure often delivers lackluster results).

191. Twomey & Jurgens, *supra* note 89, at 16.

are directed fail to read and understand the disclosures (or question the lender about exorbitant fees), it may be all for naught.

#### D. Inadequate Counseling

All eligible HECM borrowers must receive counseling prior to obtaining a reverse mortgage.<sup>192</sup> HUD lists a number of topics to be covered in the counseling session, including alternatives and options, eligibility, limits, rates, payment plans, and options and loan costs.<sup>193</sup> HUD recommends that potential reverse mortgage borrowers, particularly HECM borrowers, meet face-to-face with a counselor, but the Agency does allow counseling by telephone;<sup>194</sup> in fact, nearly 90% of HUD-approved mortgage counseling is conducted over the phone.<sup>195</sup>

Counseling is an important aspect of the reverse-mortgage process. This Note has previously discussed the product complexity, both in number of options available and associated costs.<sup>196</sup> Thus, counselors must take the time to thoroughly explain all information borrowers would reasonably require to make an informed decision.

HUD has a range of internal controls designed to ensure that HECM counselors comply with counseling requirements, including: 1) counseling standards as set forth in regulations, mortgagee letters, and a counseling protocol; 2) a counselor training and certification program; 3) a Certificate of HECM Counseling that, once signed by the counselor and borrower, should provide HUD with assurance that counselors complied with counseling standards and that prospective borrowers were prepared to make informed decisions; 4) a monitoring process in which staff oversee the performance of counseling agencies and HUD headquarters staff oversee grant agreements with HECM intermediaries; and 5) pre-insurance and post-insurance checks by contractors and HUD field staff of HECM loan files to ensure that a signed counseling certificate is present for each loan.<sup>197</sup>

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192. 26 C.F.R. § 206.41 (2015); U.S. DEP'T OF HOUS. AND URBAN DEV., HOUSING HANDBOOK 39 (May 2010), <http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/7610.1/76101HSGH.pdf> [hereinafter *Housing Handbook*].

193. *Housing Handbook*, *supra* note 192, at 33-36.

194. *Id.* at 30-31.

195. Reverse Mortgages: Product Complexity, *supra* note 114, at 56.

196. See Parts II(B)(3), Part III(C)(1)-(2), *supra*.

197. Reverse Mortgages: Product Complexity, *supra* note 114, at 30-31.

Mandatory counseling is intended to counter concerns about product complexity.<sup>198</sup> In 2009, however, the GAO published a study highlighting, among other concerns, inadequate counseling stating that HUD's internal controls did not provide reasonable assurance of compliance with HUD requirements.<sup>199</sup> Specifically, the GAO found that HUD counselors omitted at least some required information despite certifying on the counseling certificate that they had covered, in detail, all of the required information.<sup>200</sup> A signed counseling certificate, thus, may not be a reliable indicator that counselors are covering the required information or that prospective borrowers are receiving (or understanding) the information necessary to accurately assess the benefits and risks of a reverse mortgage.

HUD counselors are also required to record the length of each counseling session.<sup>201</sup> HUD does not prescribe how long a counseling session should last, but the Agency does use this factor to monitor the performance of counselors.<sup>202</sup> The GAO found a number of counselors overstated the length of the counseling sessions on the counseling certificates—some sessions lasting between twenty-two and thirty minutes were nonetheless recorded as having lasted between forty-five minutes to one hour, while others lasting forty-five minutes to fifty-seven minutes were both recorded as having lasted two hours.<sup>203</sup> The considerable variation in both the length of the sessions and how the counselors recorded the time on the certificates raises questions about the consistency and reliability of the information HUD uses to monitor counselors.<sup>204</sup> The GAO found counselors had also failed to comply with a number of other requirements.<sup>205</sup> These inadequacies are a cause for concern and underscore the need for strengthened consumer protections in this area.

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198. *Report to Congress, supra* note 21, at 110.

199. *See Reverse Mortgages: Product Complexity, supra* note 114, at 30. This survey was conducted by evaluating counseling sessions conducted via phone. *Id.* at 56.

200. *Id.* at 33-37.

201. *Housing Handbook, supra* note 192, at 120.

202. *Reverse Mortgages: Product Complexity, supra* note 114, at 38.

203. *Id.* at 39.

204. *Id.* at 39-40.

205. *Id.* at 40-45.

## E. Other Potential Concerns

This Section is intended to be illustrative, not exhaustive, of other potential concerns facing reverse-mortgage borrowers. While previous Sections have thoroughly discussed the most pressing concerns (in the Author's opinion), borrowers often face additional concerns.

### 1. NON-BORROWER PROTECTIONS

Occasionally, only one spouse may apply for a reverse mortgage with or without the consent of the other spouse.<sup>206</sup> This may happen because of age (*i.e.*, the younger spouse was under age sixty-two), credit quality concerns (one spouse has significantly worse credit), or the borrowers were married after the reverse mortgage was originated.<sup>207</sup> In these cases, the non-borrower spouse is at risk of needing to sell the home to pay off the reverse mortgage when the borrowing spouse dies or needs to move; thus, a reverse mortgage can jeopardize the living situation of any non-borrowing spouse living in the home.<sup>208</sup>

The CFPB reported several borrowers did not understand the consequences of leaving a spouse off of the deed and the loan, reporting brokers promised lower rates, additional funds, or a more favorable deal if the spouse's name was not included, but promised the borrower that he or she would be allowed to add the non-borrowing spouse at a later time.<sup>209</sup>

The HECM statute provides a safeguard to prevent the displacement of homeowners.<sup>210</sup> Consumer advocates and HUD are currently engaged in a legal dispute regarding whether non-borrowing spouses must be considered borrowers with regard to HECM reverse mortgages.<sup>211</sup>

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206. *Report to Congress, supra* note 21, at 134.

207. *Id.*

208. *Id.*

209. *Id.*

210. 12 U.S.C. § 1715z-20(j).

211. *See Bennett v. Donovan*, 797 F. Supp. 2d 69 (D.D.C. 2011), *rev'd* 703 F.3d 582 (D.C. Cir. 2013). Three widowed plaintiffs, all non-borrowers, became subject to foreclosure actions when their borrowing spouses died. The plaintiffs alleged that HUD regulations improperly implemented the anti-displacement section of the HECM statute. The court ruled against the plaintiffs, holding they did not have standing because the relief they sought would not redress their injuries because, as the terms of the mortgage stated, the loan would become due if the property were not "the principal residence of at least one surviving Borrower." *Id.* at 76

On August 26, 2011, HUD issued guidance stating all spouses of prospective borrowers and all co-owners of the property must also receive reverse mortgage counseling.<sup>212</sup> While HUD's guidance gives non-borrowing spouses notice of this HECM requirement, it does not address the protections non-borrowing spouses face if the borrowing spouse dies or defaults on the reverse mortgage.

## 2. TAX AND INSURANCE DEFAULTS

One requirement of reverse mortgages is that borrowers must pay property taxes and insurance.<sup>213</sup> A borrower who fails to pay property taxes or maintain adequate property insurance faces a potential default and foreclosure.<sup>214</sup> Because reverse mortgages require no monthly payments, borrowers may forget that tax and insurance payments are required, or they may fail to realize the consequences of not paying: some borrowers reported to the CFPB that they did not understand either the need to make payments or the consequences of failing to do so.<sup>215</sup>

Between 2007 and 2009, the FHA informally instructed servicers to defer foreclosure on borrowers with property charge defaults—servicers paid the property charges for these mortgages and continued to service the loans, but did not proceed with foreclosure unless some other event occurred that made the loan payable.<sup>216</sup> However, on May 20, 2009, the FHA informed HECM servicers that it would no longer accept foreclosure deferral requests for mortgages in default due to nonpayment of property charges.<sup>217</sup> Some servicers interpreted this guidance to mean the FHA was waiving the requirement to report

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(emphasis added). The appellate court, however, held that the plaintiffs did have standing—the issue on appeal was limited to standing, but the appellate court admitted to being “puzzled” as to how HUD could justify a regulation that was contrary to the governing statute. *Bennett*, 703 F.3d at 586; *Kerrigan v. Bank of America*, No. 09-02082, 2011 WL 3565121 (C.D. Cal. Aug. 12, 2011). The court stated it found “particularly significant that the statute which governs HECMs expressly requires that under the terms of the HECM, a ‘homeowner’s obligation to satisfy the loan obligation is deferred until the homeowner’s death’ and that the term ‘homeowner’ ‘includes the spouse of a homeowner.’” *Id.* at \*5 (emphasis in original); *Report to Congress*, *supra* note 21, at 134.

212. U.S. DEP’T OF HOUS. AND URBAN DEV., Mortgagee Letter 2011-31 2 (Aug. 26, 2011), <http://portal.hud.gov/hudportal/documents/huddoc?id=11-31ml.pdf>.

213. *Report to Congress*, *supra* note 21, at 21.

214. *Id.* at 129.

215. *Id.* at 130.

216. *Id.*

217. *Id.*

property charge defaults, and servicers continued to pay the property charges without notifying the FHA of the defaults.<sup>218</sup>

The HUD Office of the Inspector General conducted an internal audit of the HECM program in 2010 and discovered servicers were holding approximately 13,000 loans in default due to nonpayment of property charges.<sup>219</sup> Four servicers contacted in the audit had paid over \$35 million to cover unpaid property charges between May 2009 and March 2010.<sup>220</sup> The audit concluded foreclosure delays on these properties and the increasing number of mortgages in default due to unpaid property charges threatened the FHA's Mutual Mortgage Insurance Fund.<sup>221</sup>

HUD issued guidance on property charge defaults in 2011, clarifying the servicer's obligations to pay outstanding property charges, to use loss mitigation to help bring the loan out of default, and to pursue foreclosure only if loss mitigation proved unsuccessful.<sup>222</sup> These loss mitigation strategies include: establishing a repayment plan for the outstanding property charges; contacting a HUD-approved counseling agency; and refinancing the delinquent HECM loan into a new HECM loan if the property has sufficient equity.<sup>223</sup>

#### IV. Recommendations

Some states have already taken notice of abusive practices related to reverse mortgages,<sup>224</sup> and some federal agencies have offered proposals to strengthen consumer protections.<sup>225</sup> Because of the fragmented regulatory structure, however, provisions of general regulations are often applied specifically to reverse mortgages.<sup>226</sup> Many of these proposals can be strengthened to protect the elderly from abuses

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218. *Id.*

219. GERALD R. KIRKLAND, OFFICE OF INSPECTOR GEN., 2010-FW-0003, HUD WAS NOT TRACKING ALMOST 13,000 DEFAULTED HECM LOANS WITH MAXIMUM CLAIM AMOUNTS OF POTENTIALLY MORE THAN \$2.5 BILLION 7 (2010), <http://www.hud.gov/offices/oig/reports/files/ig1060003.pdf>.

220. *Id.*

221. *Id.* at 7-8.

222. U.S. DEP'T OF HOUS. AND URBAN DEV., MORTGAGEE LETTER 2011-01 (Jan. 3, 2011), <http://portal.hud.gov/hudportal/documents/huddoc?id=11-01ml.pdf>.

223. *Id.* at 2.

224. *See supra* notes 9, 118, 124, 126.

225. Regulation Z: Truth in Lending 75 Fed. Reg. 58,540 (proposed Sept. 24, 2010) (the Federal Reserve Board's proposal would prohibit cross-selling for reverse mortgages).

226. *See Report to Congress, supra* note 21, at 101.

in this area. Further, Congress can adopt or amend Regulation Z, clarify certain ambiguities in current regulations,<sup>227</sup> and extend these protections to the proprietary market.

**A. Create a Comprehensive Federal Regulatory Scheme Specifically for Reverse Mortgages**

The broad federal protections that apply to reverse mortgages are rarely tailored specifically to reverse mortgages—TILA applies provisions applicable to traditional mortgages to reverse mortgages.<sup>228</sup> Thus, some of these protections are of limited use to reverse-mortgage borrowers.<sup>229</sup> Proprietary products, however, though they only cover a small portion of the market, are not subject to these rules,<sup>230</sup> leaving a gap in the regulatory scheme. Some states have adopted laws and regulations extending HECM-type protection to proprietary products, with a few placing stronger regulations on both HECM and proprietary products.<sup>231</sup>

In 2010, the Federal Reserve Board issued a proposed rule that would have extended several HECM-type protections to the proprietary market and improved the usefulness and clarity of reverse-mortgage disclosures.<sup>232</sup> Because of the complexity of reverse mortgages and the consumers to which these products are exclusively available, a one-size-fits-all regulatory approach is imprudent. Congress would be wise to adopt the Board's proposed rules, but it should also go one step further and either amend or supplement Regulation Z (and other lending regulations, such as TILA) by tailoring the regulations specifically to reverse mortgages and extending those regulations to the proprietary market, including counseling requirements.

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227. See generally *Report to Congress*, *supra* note 21, at 134; Bennett, *supra* note 211; Kerrigan, *supra* note 211 for a discussion of one type of statutory ambiguity.

228. *Report to Congress*, *supra* note 21, at 100.

229. *Id.*

230. *Id.*

231. *Id.*

232. 75 Fed. Reg. 58,544 (improving disclosures), 58,550 (extending the mandatory counseling requirement to proprietary reverse mortgages).

**B. Increase Rescission Time to Thirty Days**<sup>233</sup>

Reverse mortgage borrowers currently have three days to rescind, or cancel, a loan after origination.<sup>234</sup> This time period may be acceptable for borrowers of traditional mortgages since many of these products have existed in the market for years. Because of the complexity of reverse mortgages, however, three days may be inadequate to allow seniors to fully understand the consequences of their decision.

Purchasers of an annuity have a “free look” period of ten or more days during which the purchaser may terminate the contract without paying surrender charges and receive a refund.<sup>235</sup> The “free look” period gives purchasers the opportunity to consult with family and friends to determine if the investment is the best course of action. California extends the “free look” period to thirty days.<sup>236</sup> Both purchasing an annuity and borrowing against one’s home with a reverse mortgage can be significant financial decisions involving hundreds of thousands of dollars. Both can have a significant impact on a senior’s long-term financial health, but one option provides a significantly longer timeframe to consider that decision. The Federal Bureau of Investigation (FBI) notes that an elderly victim may take weeks—or more likely months—after contact with a fraudster to discover that he or she has been the victim of a scam.<sup>237</sup>

While many lenders may not be fraudsters, the FBI report underscores the need to increase the period during which borrowers have to consider the financial commitment a reverse mortgage requires. During this time, borrowers can speak to family or friends or use this extended time period to seek additional, required counseling<sup>238</sup> to ensure they understand the financial ramifications of a reverse mortgage.

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233. Paz Garcia, *supra* note 16, at 32.

234. *Id.*

235. U.S. SEC. AND EXCH. COMM’N, VARIABLE ANNUITIES-FREE LOOK PERIOD, <http://www.sec.gov/answers/freelook.htm> (last visited Oct. 3, 2015).

236. CAL. INS. CODE § 10127.10(a) (2015).

237. FED. BUREAU OF INVESTIGATION, FRAUD TARGET: SENIOR CITIZENS <http://www.fbi.gov/scams-safety/fraud/seniors> (last visited Oct. 3, 2015).

238. *Infra*, Part IV(C)(2).



### C. Improve Counseling Requirements

#### 1. STRENGTHEN HUD STANDARDS AND OVERSIGHT OF HECM COUNSELORS

Counseling is an important aspect of the reverse-mortgage process: not only does counseling communicate the features, benefits and potential pitfalls of reverse mortgages, but it can also alert third parties to potential scams and unscrupulous lenders. The GAO uncovered a number of inadequacies in its report,<sup>239</sup> but there is still considerable room for improvement.

The GAO offered a number of recommendations to help strengthen the quality of HECM counseling, including: implementing methods to verify the content and length of counseling sessions; issuing detailed guidance for counseling providers about recording the length of counseling sessions on the certificate; issuing detailed procedures for counselors on assessing the payment ability of a prospective borrower; and implementing internal controls to ensure that HECM providers comply with counselor referral requirements.<sup>240</sup> HUD appears to be taking the recommendations seriously,<sup>241</sup> but time will tell whether the Agency has truly taken steps to strengthen counseling requirements.

Perhaps the most important recommendation in the previous paragraph is the third. Because reverse mortgages are complex products, they may be inappropriate, and sometimes disastrous, options for the elderly. Reputable lenders and financial planners will frequently assess the suitability of a product for a consumer in any particular situation.<sup>242</sup> Predatory or unscrupulous lenders, however, will not be so prudent. Currently, reverse-mortgage counselors can withhold a counseling certificate only if a borrower cannot answer five or more of the ten basic questions about reverse mortgages presented

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239. See generally Part III(D), *supra*.

240. Reverse Mortgages, Product Complexity, *supra* note 114, at 48.

241. DEPT OF HOUS. AND URBAN DEV., MORTGAGEE LETTER 2009-47 (Nov. 6, 2009), <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-47ml.pdf>; John Yedinak, *HUD Implements HECM Counseling Roster and Testing Standards*, REVERSE MORTG. DAILY (Nov. 29, 2009), <http://reversmortgage.com/2009/11/10/hud-implements-hecm-counseling-roster-and-testing-standards/>.

242. See, e.g., FINRA, Suitability: What Investors Need to Know, <http://www.finra.org/investors/suitability-what-investors-need-know> ("Did you ever wonder why investment professionals ask questions about your investment experience, risk tolerance and more?") (last visited Oct. 3, 2015).

during the counseling session, or if the counselor believes that the borrower did not understand basic information about reverse mortgages.<sup>243</sup> Adding a suitability requirement would ensure that prospective borrowers have realistically assessed their ability to repay and that an uninterested third party has done the same.

In-person counseling sessions would be ideal, but most likely impractical. Counseling sessions could be recorded,<sup>244</sup> whether in person or by phone, to help ensure accuracy and compliance. A record of counseling sessions would help resolve any ambiguities or discrepancies arising later in the loan process.

HUD's Housing Handbook also exempts several parties from the counseling requirement, including non-borrowing spouses, non-borrowing children, persons with a reversionary interest in the estate, and persons with an advocacy interest.<sup>245</sup> The exemption for non-borrowing spouses was most troublesome—HUD now requires non-borrowing spouses to receive counseling.<sup>246</sup> This makes sense because non-borrowing spouses can face disastrous consequences in the event of a primary borrower's death or incapacitation, including foreclosure.<sup>247</sup> HUD should also investigate whether to remove the exemption for non-borrowing children who could provide additional guidance to unsure borrowers.<sup>248</sup>

## 2. REQUIRE COUNSELING BEFORE AND AFTER LOAN ORIGINATION

Borrowers are only required to receive reverse mortgage counseling prior to origination.<sup>249</sup> Since HUD implemented stricter controls overseeing HECM counselors, these sessions have increased in length, sometimes approaching two hours.<sup>250</sup> Paz Garcia recommends break-

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243. Paz Garcia, *supra* note 16, at 33; *Housing Handbook*, *supra* note 192, at 43. In fact, HUD's Housing Handbook specifically states that a counseling agency's issuance of a certificate is *not* intended to recommend the client for a reverse mortgage, but instead attests *only* to the fact that the client attended and participated in the counseling sessions and that the required HECM counseling was provided. *Id.*

244. Paz Garcia, *supra* note 16, at 34.

245. *Housing Handbook*, *supra* note 192, at 40-42 (although the FHA "recommends" HECM non-borrowing spouses receive counseling). *Id.* at 40.

246. Mortgagee Letter 2011-31, *supra* note 212, at 2.

247. See generally *Bennett v. Donovan*, 797 F. Supp. 2d 69 (D.D.C. 2011), *rev'd* 703 F.3d 582 (D.C. Cir. 2013).

248. Paz Garcia, *supra* note 16, at 35.

249. 24 C.F.R. § 206.41(a) (2014).

250. REVERSE MORTG. DAILY, *Longer counseling sessions for reverse mortgages*, (Nov. 28, 2010), <http://reversemortgagedaily.com/2010/11/28/longer-counseling-sessions-for-reverse-mortgages/>.

ing the counseling session into two one-hour sessions: the first would complete the borrower's budget analysis, while the second would cover product complexity and suitability.<sup>251</sup>

This Author mostly agrees with that recommendation, but instead of two one-hour sessions *before* loan origination, counseling should be broken into two sessions, with one session occurring *before* loan origination that would cover product complexity and suitability, and one session occurring *after* loan origination that would review the particular product and any loan documents received by the borrower. This recommendation, coupled with a longer rescission period, would ensure that borrowers receive counseling tailored specifically to their situation and not simply general reverse mortgage counseling.

#### D. Increase Penalties for Lenders Who Violate Federal and State Statutes

The complexity of reverse mortgages makes this area fertile ground for abuse. While outlawing fraudulent and deceptive practices sounds strong in theory,<sup>252</sup> it is most likely impossible practically. Unscrupulous lenders will find creative ways to push, and often cross, the lines of fraud and deception. Congress and other federal and state regulatory agencies can increase penalties for violations and strictly enforce them, making such fraudulent and deceptive practices financially painful.

Fraud involving reverse mortgages may be prosecuted at the federal level under 18 U.S.C. § 2314.<sup>253</sup> Reverse mortgages may also qualify as federal bank fraud.<sup>254</sup> The federal government has several ongoing initiatives to centralize enforcement and monitoring of mortgage fraud: the Financial Crimes Enforcement Network (FinCEN), a department of the United States Treasury, collects information on suspicious mortgage activity by requiring mortgage lenders to submit Suspicious Activity Reports.<sup>255</sup> States have also enacted new laws regulating fraudulent mortgage lending activity.<sup>256</sup>

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251. Paz Garcia, *supra* note 16, at 33.

252. *Id.* at 31.

253. 18 U.S.C. § 2314 (2014); *Report to Congress, supra* note 21, at 138.

254. *Report to Congress, supra* note 21, at 138.

255. *Id.* at 139.

256. GA. CODE ANN., § 16-8-102 (2015); M.C.L.A. 750.219 (2015); WASH. REV. CODE § 43.320.140 (2015) (expires June 30, 2016).

Congress should pass legislation tailored specifically to fraud related to reverse mortgages, including both FHA and proprietary products; due to product complexity, these products require legislation that addresses concerns specifically related to reverse mortgages instead of mortgages generally. Congress should also impose harsh penalties, including monetary fines and possible licensure revocation, for individual and repeated violations.

## V. Conclusion

Reverse mortgages are complex products. Many potential borrowers struggle to understand not only the options available, but also whether an alternative product would be a wiser choice. Seniors, many of whom may lack experience with financial products generally, frequently depend on financial advisers and lenders for guidance and expertise.<sup>257</sup> While many lenders follow the rules, these lenders are undermined by the predatory lenders who look to take advantage of the elderly to make a quick profit. Seniors should share their plans with family and friends if they are unsure about a particular course of action: in many cases, the decisions they make will have life-altering consequences for others. Friends and family, somewhat removed from the lending process, may be able to spot an unscrupulous lender before the senior suffers a disastrous result.

Reverse mortgages can be advantageous to some borrowers,<sup>258</sup> but a one-size-fits-all approach rarely works with retirement planning: it is a comprehensive, complex, and often life-altering process. Seniors should be well informed about the risks and benefits of all available financial options, and a stronger regulatory framework will ensure they have the information necessary to make the best decision for themselves and for their families.

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257. Twomey & Jurgens, *supra* note 89, at 1.

258. See CON. FIN. PROT. BUREAU, *supra* note 69.