



Institute for Policy Integrity

new york university school of law

June 20, 2011

VIA ELECTRONIC COMMUNICATION

Ruth Roman, Director
Program Support Division
Department of Housing and Urban Development
Office of Housing
451 7th Street SW
Washington, DC 20410-0001

Re: Proposed Regulation for Homeownership Education, Counseling, and Foreclosure Intervention Standards, RIN 2502-AI86

Dear Ms. Roman,

The Institute for Policy Integrity at New York University School of Law respectfully submits this letter, recommending that the Department of Housing and Urban Development (HUD) reconsider aspects of its proposal to adopt the National Industry Standards for Homeownership Education Counseling as mandatory, industry-wide requirements. This proposal is currently in the pre-rule stage, and was most recently set forth in the Fall 2010 Unified Agenda.¹

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity") is a non-partisan think-tank dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Background

During the recent subprime mortgage crisis many borrowers secured complex loans for which they were financially unprepared and which they may not have fully understood.² This led to a renewed focus on the homeownership counseling industry for several reasons.³ First, the high rate of loan

¹ Proposed Regulation for Homeownership Education, Counseling, and Foreclosure Intervention Standards, RIN 2502-AI86, Fall 2010 Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=2502-AI86> [hereinafter RIN 2502-AI86].

² See Richard A. Oppel Jr. & Patrick McGeehan, *Lenders Try to Fend Off Laws on Subprime Loans*, N.Y. TIMES, APR. 4, 2001, <http://www.nytimes.com/2001/04/04/business/lenders-try-to-fend-off-laws-on-subprime-loans.html> (describing borrowers who secured loans or refinancing that they could not afford and with terms that they did not fully understand); Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 763 (2010) (arguing that many borrowers "took on loans that were inappropriate for their circumstances" and that some did not understand terms of their loans).

³ COLLIN O'ROURKE, CTR. FOR FIN. SEC., WEIGHING THE EVIDENCE OF THE EFFECTIVENESS OF COUNSELING AND EDUCATION FOR HOME OWNERS 1 (2010), http://cfs.wisc.edu/Publications-Briefs/Weighing_the_Evidence_of_the_Effectiveness_of_Counseling_and_Education_for_Home_Owners.pdf.

default and foreclosure associated with subprime loans may indicate that borrowers who could benefit from effective homeownership counseling services are not receiving them.⁴ In addition, the crisis drew attention to long-standing problems in the homeownership counseling industry, especially to the wide variation in the quality and types of services available, which has persisted since the field emerged in the 1960s.⁵ Several studies have concluded that certain types of counseling are effective, as measured by decreases in loan default and foreclosure rates among counseled borrowers.⁶ However, it is difficult to draw definitive conclusions about the effect of homeownership counseling because there is insufficient data available.⁷

The counseling industry, which is composed primarily of nonprofit organizations that provide a range of other housing-related services, recently took a significant step toward self-regulation. Led by the NeighborWorks Center for Homeownership Education and Counseling (NCHEC),⁸ representatives from the banking, mortgage, housing and counseling communities created the National Industry Standards for Homeownership Education Counseling (“the Standards”).⁹ The Standards seek to promote quality and consistency, by “[u]nifying the industry” around agreed-upon curricula, models for counselor training and service delivery, performance targets, and a code of ethics.¹⁰ The Standards are intended to provide a “baseline for what constitutes quality

⁴ Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, 88 FED. RES. BANK OF ST. LOUIS REV. 31, 31 (Jan./Feb. 2006)

<http://research.stlouisfed.org/publications/review/06/01/ChomPennCross.pdf> (finding the probability of default on nonprime loans to be six times higher than for prime); Shane Sherlund, Board of Governors of the Federal Reserve System, *Mortgage Defaults* 1 (Mar. 8, 2010),

http://www.chicagofed.org/digital_assets/others/in_focus/foreclosure_resource_center/more_mortgage_defaults.pdf (documenting a significant increase in the number of foreclosures stemming from increase in subprime loans).

⁵ STEVEN HORNBURG, STRENGTHENING THE CASE FOR HOMEOWNERSHIP COUNSELING: MOVING BEYOND “A LITTLE BIT OF KNOWLEDGE,” 4-5 (Aug. 2004).

<http://www.nw.org/network/training/homeownership/documents/StrengtheningCaseforHomeownershipCounseling.pdf>.

⁶ See e.g. Abdighani Hirad & Peter M. Zorn, *A Little Knowledge is a Good Thing: Empirical Evidence of the Effectiveness of Pre-Purchasing Homeownership Counseling* 2 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-01.4, Aug. 2001), <http://www.jchs.harvard.edu/publications/homeownership/liho01-4.pdf> (finding one-on-one counseling to be the most effective method and telephone counseling to be least effective); VALENTINA HARTARSKA, CLAUDIO GONZALEZ-VEGA & DAVID DOBOS, THE OHIO STATE UNIV. RURAL FIN. PROGRAM, CREDIT COUNSELING AND THE INCIDENCE OF DEFAULT ON HOUSING LOANS BY LOW-INCOME HOUSEHOLDS, 2 (Feb. 2002), available at

<http://aede.osu.edu/programs/ruralfinance/PDF%20Docs/Publications%20List/Papers/02P03.pdf> (finding credit counseling may reduce default rate among low-income mortgages); Valentina Hartarska & Claudio Gonzalez-Vega, *Credit Counseling and Mortgage Termination by Low-Income Households*, 30 J. OF REAL EST. FIN. & ECON. 227, 241 (2005) (finding slight increase in prepayment and small decrease in mortgage default among borrowers who received counseling); Sumit Agarwal et. al. *Do Financial Counseling Mandates Improve Mortgage Choice and Performance? Evidence from a Legislative Experiment* 3 (Federal Deposit Insurance Corporation Ctr. for Fin. Research, Working Paper No. 2009-04, Mar. 2009), available at http://www.frbatlanta.org/filelegacydocs/seminars/seminar_agarwal_041509.pdf (finding 30 percent decrease in default associated with counseling for high-risk borrowers) but see Roberto Quercia & Jonathan Spader, *Does Homeownership Counseling Affect the Prepayment and Default Behavior of Affordable Mortgage Borrowers?*, 27 J. OF POLICY ANALYSIS & MANAGEMENT 304, 305 (Apr. 2008) (finding no form of counseling affects borrowers likelihood of default).

⁷ See O’ROURKE, *supra* note 2, at 2 (citing selection bias and small sample sizes, as weaknesses of many of the studies of homeownership counseling conducted to date); HORNBURG, *supra* note 4, at 9 (describing reasons why data collection and analysis has been particularly problematic).

⁸ NCHEC is part of NeighborWorks America, a national network of independent, community-based nonprofit organizations dedicated to affordable housing and community development. See NEIGHBORWORKS AMERICA, <http://www.nw.org/network/aboutUs/aboutUs.asp> (last visited May 3, 2011).

⁹ HOMEOWNERSHIPSTANDARDS.ORG, <http://www.homeownershipstandards.org/about> (last visited May 3, 2011).

¹⁰ *Id.*

homeownership education and counseling”¹¹ in three different service areas: (i) pre-purchase and post-purchase homeownership education, (ii) homeownership counseling, and (iii) education and counseling in the context of foreclosure intervention services.¹² Almost 1,000 organizations have adopted the Standards since they were published in 2007, meaning that they committed to implement the Standards in their everyday business operations.¹³

HUD plays a significant role in the industry through its Housing Counseling Program, administered and overseen by the Office of Single Family Housing.¹⁴ HUD certifies public and private *agencies* as HUD-approved counseling agencies; the agencies are then eligible to apply for grants to support their housing counseling activities.¹⁵ HUD certification requires agencies to have certain characteristics (including nonprofit status and experience within the community they serve), to keep certain records, to employ staff that meet minimum criteria, and to comply with multiple program requirements.¹⁶ Notably, “approval of a counseling agency does not create or imply a warranty or endorsement by HUD of the listed agency, or their employees, including counselors, to a prospective client or to any other organization or individual. Approval means only that the agency has met the qualifications and conditions prescribed by HUD.”¹⁷ HUD’s proposed rulemaking would enhance this framework by, for the first time, using regulation to address *counselor* training and certification, as well as service delivery and curriculum design. The Standards are thus intended to improve the quality of counseling services and provide quality assurance to prospective customers.¹⁸

HUD is proposing to incorporate the Standards “by reference” in a rule that would make them mandatory for all homeownership education providers. Since the only likely consequence for noncompliance with the Standards will be ineligibility for HUD certification (and HUD funding), the rule would primarily function as a government-certified labeling program, comparable in some respects to the USDA’s National Organic Program or EPA’s Energy Star program.¹⁹

Incorporating the current Standards into a rulemaking may be a good way to improve and standardize homeownership education and counseling services. Starting with existing standards that were created by leaders in the homeownership education industry would have several advantages: the industry has considerable expertise as well as some incentives to foster consumer confidence through quality assurance standards. However, there are important differences between federal regulations and industry-generated, voluntary standards. Core principles of sound

¹¹ “Frequently Asked Questions,” HOMEOWNERSHIPSTANDARDS.ORG, <http://www.homeownershipstandards.org/faq> (last visited May 3, 2011).

¹² *National Industry Standards for Homeownership Education and Counseling*, HOMEOWNERSHIPSTANDARDS.ORG, available at <http://www.homeownershipstandards.org/documents/National%20Industry%20Standards%20Code%20of%20Ethics%20Guidelines.pdf> (last visited May 3, 2011) (hereinafter *Standards*).

¹³ “Frequently Asked Questions,” HOMEOWNERSHIPSTANDARDS.ORG, <http://www.homeownershipstandards.org/faq> (last visited May 3, 2011).

¹⁴ U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING COUNSELING PROGRAM HANDBOOK (7610.1), “Introduction,” available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/7610.1/76101intHSGH.pdf> (last visited May 3, 2011) (hereinafter *HANDBOOK*).

¹⁵ *Id.*

¹⁶ *Id. See also*, *HANDBOOK*, *supra* note 13, at 9-11.

¹⁷ *HANDBOOK*, *supra* note 13, at 8.

¹⁸ *Standards*, *supra* note 11, at 3-5.

¹⁹ See *Agricultural Marketing Service - National Organic Program*, USDA.Gov, <http://www.ams.usda.gov/AMSV1.0/nop> (last visited May 3, 2011). While the majority of counseling providers receive *some* HUD funding, it generally accounts for a very small part of the providers’ overall budgets. ABT ASSOCIATES INC., THE STATE OF THE HOUSING COUNSELING INDUSTRY 64, 75 (2008), <http://www.hud.gov/offices/hsg/sfh/hcc/hudhcprt121508.pdf>.

policymaking require that HUD independently and thoroughly analyze the content of each of the Standards. Such analysis will permit HUD to determine whether the Standards are the correct rules, and how to calibrate them if they are not. In addition, perfunctorily incorporating the Standards “by reference” without performing a rigorous independent analysis may be legally insufficient.²⁰

In the next phase of its proposed rulemaking, HUD should: (i) identify the specific problem or market failure it seeks to address, (ii) determine whether regulation is the best way to address it, and (iii) design a rule that maximizes net social benefits by evaluating a number of regulatory alternatives, including “incorporation by reference” of the Standards. To the extent feasible, HUD should assess the costs and benefits of its proposed rule, taking into consideration providers’ varying capacity to implement the Standards, and its own ability to monitor their implementation.

“Market Failures” in Homeownership Education

HUD should identify the specific problem or market failure it seeks to address in its proposed rule, and should explain why regulation is necessary in addition to the voluntary Standards. In the context of homeownership education, two different problems could justify a regulatory intervention mandating (and certifying compliance with) quality standards. First, potential clients might be unable to distinguish between counselors who provide appropriate and high-quality services and those who do not. Second, banks, which in some cases require certain borrowers to complete homeownership counseling, may not have adequate incentives to identify good counseling providers. A certification or licensing program could address either of these problems.

Potential borrowers may also systematically undervalue housing counseling services, and therefore request (or require) them at an inefficiently low rate, due to inadequate information or optimism bias. The proposed rule does not directly address the undervaluation scenario, although quality standards would be a necessary component of any mandate for counseling services.

There are reasons to think both problems (identification difficulties and undervaluation) exist. First, the extreme variability in the types and quality of services offered has made it difficult both to evaluate programs and to demonstrate the value of homeownership education. According to a 2008 report commissioned by HUD: “Despite the growing importance of housing counseling, there is little systematic information about the industry. The industry is known to be marked by significant diversity in a number of dimensions, including the types of organizations involved, their organizational capacity, the types of clients served, the types of services delivered, and the funding sources used.”²¹ As a result, consumers, banks, and mortgage originators may not know the value of high-quality homeownership education services or where to find them.

Furthermore, most people do not purchase a home more than a small number of times. Those who discover after-the-fact that they may have benefited from counseling services may not have the opportunity to correct previous mistakes or even apply their lessons learned in a subsequent transaction.

²⁰ Incorporation by reference may, for example, encourage enactment of a rule without the reasoned assessment required for Notice and Comment Rulemakings. Cf. Environmental Impact Statement, 40 C.F.R. § 1502.21 (2011) (With respect to Environmental Impact Statements, instructing agencies to incorporate material by reference “to cut down on bulk without impeding agency and public review of the action.”)

²¹ ABT ASSOCIATES INC., *supra* note 18, at 2

HUD's Role

Before making the Standards mandatory, HUD should consider whether government regulation is the most effective solution to the problem it wants to address. To the extent that consumers cannot identify good providers, government certification of providers who offer relevant and high-quality services may be an effective solution. HUD should assess whether the existing voluntary program—adoption of the Standards and certification by NeighborWorks America—is *already* a sufficient solution. If government certification is also necessary, HUD should explain why.²²

As HUD determines the contours of its role in improving industry standards, it should also assess how its rule would interact with other concurrent efforts to improve access and uptake of counseling services. If HUD determines that there is a problematic lack of access or an inefficiently low uptake rate of services, it should consider addressing this further problem in the current or future rulemakings.²³

If HUD concludes that government-certified labeling is needed, it should consider similar programs initiated in other contexts. For example, the United States Department of Agriculture (“USDA”), pursued a similar strategy to address a similar problem when it adopted labeling requirements for “organic” products. By creating National Standards, Congress and the USDA sought to “assure consumers that organically produced products meet a consistent standard.”²⁴ Through its National Organic Program, USDA grants certain private businesses, organizations and state agencies the power to certify, as organic, producers and handlers of agricultural products; these certifications are based on clearly established criteria.²⁵ The EPA’s Energy Star Program works in a similar fashion: through an accreditation process, the EPA grants third parties, which are often testing laboratories around the world, authority to certify individual models of home appliances as energy efficient.

Principles for Regulating

If government intervention is necessary, HUD should carefully assess the form and content of its rule. As with any agency regulation, HUD should seek to create a rule that maximizes net social benefits by conducting a thorough assessment of the costs and benefits of each substantive provision. HUD should consider feasible regulatory alternatives, the (varying) implementation capacity of service providers, and its own ability to monitor compliance.

The use of “incorporation by reference” to develop a mandatory regulation raises several significant issues. Standards drafted initially as an exercise of industry self-regulation may require recalibration, and potentially structural modifications, in order to become optimal regulatory

²² As OIRA recently noted in the context of disclosure requirements: “[i]nformational remedies make most sense when the market failure involves an absence of information, and even in such cases, informational remedies may not be either appropriate or sufficient (as, for example, where its costs do not justify its benefits ...) ... Here, as elsewhere, it is important to ‘match’ the regulatory failure with the tool that is best designed to remedy that failure.” OFFICE OF INFORMATION AND REGULATORY AFFAIRS, 2010 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 55., available at http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf.

²³ Until relatively recently, certain homebuyers were required to receive homeownership counseling services. See Quercia, *supra* note 5, at 304.

²⁴ Organic Foods Production Act, 7 U.S.C. § 6501(2) (2011).

²⁵ See *Agriculture and Marketing Service - Accreditation and Certification*, USDA.GOV, available at <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPAccreditationandCertification&description=Accreditation%20and%20Certification&acct=nopgeninfo> (last visited May 3, 2011).

policy. To be certain that it is promulgating an optimal rule, HUD should incorporate the following principles into its rulemaking:

Cost-Benefit Analysis

HUD should use cost-benefit analysis to craft a regulation that maximizes net social benefits and to determine the efficacy of key substantive requirements. Executive Orders 12,866 and 13,563 require cost-benefit analysis for “significant” regulatory actions.²⁶ Moreover, cost-benefit analysis is necessary to identifying a socially optimal rule.²⁷ Cost-benefit analysis is frequently used even in non-traditional rulemakings; for example, the Department of Justice is using elements of cost-benefit analysis in its rulemaking under the Prison Rape Elimination Act of 2003.²⁸

The *amount* of analysis should be roughly proportional to the projected impact of the rule on the economy. Assuming HUD projects a relatively modest impact for this rule, and discloses as much, it should limit its analysis to essential principles. HUD should account for the anticipated benefits and costs of each major requirement in the rule. It should know the marginal costs and benefits of the rule for each major class of service providers, and for potential recipients. As discussed below, HUD should also thoroughly consider regulatory alternatives.

HUD should take all major costs and benefits into account, even those that are difficult to quantify. Costs and benefits should be understood by agencies “to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”²⁹ Failing to account for either costs or benefits due to uncertainty would unduly distort HUD’s analysis; conversely, accounting for them enables HUD to make an informed decision.

HUD will likely face data limitations. The agency should explicitly identify those limits, and its methodology in valuing each cost and benefit category. It could, for example, estimate compliance costs by gathering information from providers who have voluntarily adopted the Standards. However, the benefits of homeownership education meeting these standards have likely not yet been demonstrated or quantified. As discussed below, HUD should use evidence-based decision-making to modify the Standards and should evaluate the program’s success on an on-going basis.

In the face of data limitations, HUD may use break-even analysis as a way to evaluate its rulemaking. In a breakeven analysis, an agency measures how high the unquantified or unmonetized benefits would have to be for the benefits to justify the costs (the breakeven point), and then use expert judgment to determine whether the unquantified or unmonetized benefits are likely to be higher or lower than this point. The Office of Management and Budget has endorsed breakeven analysis as “an important tool … that [] has analytical value when quantification is speculative or impossible.”³⁰ HUD could use breakeven analysis both to improve, modify, or

²⁶ Exec. Order No. 12,866 §§ 1(b)(6), 6(a)(3) 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring cost-benefit analysis unless precluded by statute); Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

²⁷ See, e.g., Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern, *Controversies Surrounding Regulatory Impact Analysis*, in REFORMING REGULATORY IMPACT ANALYSIS: RESOURCES FOR THE FUTURE REPORT 10, 14 (Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern eds., 2009).

²⁸ Advance Notice of Proposed Rulemaking for National Standards to Prevent, Detect, and Respond to Prison Rape, 75 Fed. Reg. 11077 (Mar. 10, 2010).

²⁹ Exec. Order No. 12,866, *supra* note 26, § 1(a) at 51,735; See also Exec. Order No. 13,563, *supra* note 26, § 1(a) at 3821. (“Our regulatory system must...take into account benefits and costs, both quantitative and qualitative...It must measure, and seek to improve the actual results of regulatory requirements.”; “This order is supplemental to and reaffirms the principles, structures and definitions governing contemporary regulatory review that was established in Executive Order 12,866 of September 30, 1993”).

³⁰ OFFICE OF INFORMATION AND REGULATORY AFFAIRS, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS

eliminate individual provisions of the Standards, and to compare its proposed rule with regulatory alternatives.

Evidence-Based Decisionmaking

HUD should use evidence-based decision-making to select the key components of its regulation for two reasons: (i) *qualitative* attributes of homeownership education may be the most important determinant of whether desired client outcomes are achieved, and (ii) there is a lack of research on the effectiveness of different types of counseling services, much less of the current Standards.

Evidence-based methods are methods that have been proven to achieve a desired outcome. For example, there are multiple possible methods for providing counseling services.³¹ Studies have found that the delivery method may significantly impact the program's success. One empirical study from 2001, by Abdighani Hirad and Peter Zorn, found individual counseling most effective at reducing delinquency (34 percent reduction); classroom programs reduced delinquencies by 26 percent, home study reduced delinquencies by 21 percent and telephone counseling had no impact.³² For all substantive provisions, HUD should collect evidence on what works in homeownership education or sufficiently analogous fields and should use that evidence to set standards.

Consider Alternative Regulatory Approaches

Executive Orders 12,866 and 13,563 require agencies to consider effective and feasible alternatives to their proposed regulations in their cost-benefit analysis.³³ Some experts consider the evaluation of alternatives to be the most important element of policy analysis.³⁴ While there may not be a minimum number of alternatives required, for the analysis to be meaningful, agencies should consider "the full set of options deemed to be technically feasible and legally defensible."³⁵

The Standards are highly specific design standards. HUD should evaluate whether a performance standard would be more net-beneficial. For example, HUD could require counselors to pass a stringent exam, rather than requiring agencies to implement a detailed protocol for in-house counselor training. Alternatively, HUD could consider certifying agencies and counselors who comply with the Standards, who comply with a subset of high-priority requirements that HUD draws from the Standards, or who produce evidence of achieving key performance benchmarks.

Related, HUD needs to assess the feasibility of implementing the standards it mandates. As noted in HUD's 2008 report, 75 percent of HUD-approved counseling agencies have 50 or fewer full-time employees and 25 percent have five or fewer.³⁶ HUD-approved agencies are the most common

AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 42,
http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf.

³¹ The standards recommend 3 different delivery methods: "face-to-face group homeownership education," and "face to face or telephone counseling." *Standards*, *supra* note 11, at 9, 24.

³² See Hornburg, *supra* note 4, at 11-12 (discussing and citing the study). Although some questions were raised about the study's findings by the Center for Financial Security, the authors still concluded that "the findings are supportive of the efficacy of classroom counseling" if not regarding the differing benefits between telephone and one-to-one counseling. See O'ROURKE, *supra* note 2, at 1.

³³ See Exec. Order No. 12,866, *supra* note 26, § 1(a) at 51,735; Exec. Order No. 13,563, *supra* note 16, § 1(a) at 3821.

³⁴ Wendy E. Wagner, *The CAIR RIA: Advocacy Dressed Up as Policy Analysis*, in REFORMING REGULATORY IMPACT ANALYSIS: RESOURCES FOR THE FUTURE REPORT, 56, 70 (Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern eds., 2009).

³⁵ Winston Harrington, Lisa Heinzerling, and Richard D. Morgenstern, *What We Learned*, in REFORMING REGULATORY IMPACT ANALYSIS: RESOURCES FOR THE FUTURE REPORT, *supra* note 34, at 222.

³⁶ ABT ASSOCIATES INC., *supra* note 18, at 35.

providers of counseling services in the country.³⁷ HUD should assess whether providers will vary in their ability to implement the Standards. Determining the marginal costs and benefits of the major substantive provisions of the rule, and whether those costs and benefits vary by geographic area or by provider type would enable HUD to calibrate its requirements accordingly, if it determined that doing so would produce a more net-beneficial rule.³⁸

Enforcement

HUD should consider its ability to monitor and enforce compliance with the rule it promulgates. Certain provisions of the Standards are vaguely worded and likely would be difficult to enforce. This would pose a significant problem if, as proposed, the Standards become a mandatory minimum standard for providers. For example, the “skills” Core Operating Standard requires counselors to “exhibit professional communication and organization skill set.”³⁹ HUD should look to other certification standards for models of how to minimize compliance and enforcement problems and should draft its homeownership counseling standards to balance compliance concerns with other social goals.

Flexibility and Ongoing Evaluation

The homeownership education industry should be responsive to changes in the mortgage industry and to the needs of prospective and current homeowners. Therefore, HUD should pay particular attention to the need for flexibility in this rulemaking, and should incorporate into the rule a plan for regular program evaluation. If HUD selects detailed design standards for significant portions of the rule, the need for regular evaluation will increase correspondingly.⁴⁰

Another key benefit of regular program evaluation is that it would build on HUD’s existing knowledge base about homeownership counseling. In addition to enabling the agency to update and revise its standards as needed, program evaluation would generate useful data that is current lacking about what works and what does not work in homeownership education and counseling.

Respectfully submitted,

Michael A. Livermore
Margo Hoppin
Lucy Joffe
Jennifer S. Rosenberg

INSTITUTE FOR POLICY INTEGRITY
NEW YORK UNIVERSITY SCHOOL OF LAW

³⁷ *Id.* at xi, 16.

³⁸ See e.g., Hartarska, *supra* note 5, at 40 (finding geographic differences in the impact of counseling on the default rates).

³⁹ *Standards*, *supra* note 11, at 16.

⁴⁰ Such flexibility should not be achieved by delegating responsibility for amending the content of the Standards to providers or industry associations, for example by automatically incorporating revisions made to the Standards by industry groups. Such delegation may run afoul of constitutional limits on delegation. Cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-530 (1935) (prohibiting Congress from delegating its legislative function to private industry).