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December 31, 2018

**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** VA Revises Cash-out Home Refinance Loan Regulations

On May 24, 2018, the “Protecting Veterans from Predatory Lending Act” (herein “VA Act”) was signed into law, effective as of that date, as section 309 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (Public Law 115-174). The VA Act, codified at 38 U.S.C. 3709, provides new statutory criteria for determining when, in general, the VA may guarantee a refinance loan. The VA Act also requires VA to promulgate regulations for cash-out refinance loans within 180 days after the date of the enactment of the Act, specifically for loans where the principal of the new loan to be VA-guaranteed or insured is larger than the payoff amount of the loan being refinanced.

Based on the way the VA Act structured new section 3709, VA-guaranteed or insured refinance loans are now effectively grouped into three categories: (i) interest rate reduction refinancing loans (herein “IRRRLs”), (ii) cash-outs in which the amount of the principal for the new loan is equal to or less than the payoff amount of the refinanced loan (herein “Type I Cash-Outs”), and (iii) cash-outs in which the amount of the principal for the new loan is larger than the payoff amount of the refinanced loan (herein “Type II Cash-Outs”).

In response to the VA Act, in the December 17, 2018, issue of the *Federal Register* (83 FR 64459) the VA issued an interim final rule (herein “Interim Rule”) revising VA’s cash-out refinance regulation at 38 CFR §36.4306 ([click here](#)). The Interim Rule’s revisions to §36.4306 outline the common characteristics required for the guaranty or insurance of Type I and Type II Cash-Outs and also sets apart Type I and Type II Cash-Outs to address their unique aspects. VA is not, however, addressing new section 3709’s impact on IRRRLs, but plans to do so in a separate rulemaking.

The Interim Rule is effective February 15, 2019; however, the VA is also requesting written comments on the Interim Rule. Written comments may be submitted by any of the following methods:

- *Email:* through <http://www.regulations.gov>;
- *Mail or Hand Delivery:* to Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1063B, Washington, DC 20420; or
- *Fax:* to (202) 273-9026 (not a toll-free number).

Comments are due on or before February 15, 2019, and should indicate that they are submitted in response to “RIN 2900-AQ42, Loan Guaranty: Revisions to VA-Guaranteed or Insured Cash-out Home Refinance Loans.”

The VA’s preamble published with the Interim Rule provides a through explanation of the VA Act’s new section 3709 and the reasons for the Interim Rule’s revisions to §36.4306 implementing these new statutory provisions. For those who do not wish to read the preamble, the following explanations and statements are taken from the VA’s preamble and modified, where necessary, for brevity or clarity.

### **Explanation of the VA Act (38 U.S.C. 3709)**

Subsections (a), (b), and (c) of new section 3709 set forth requirements for fee recoupment, net tangible benefits, and loan seasoning, respectively, related to the refinancing of loans guaranteed or insured by VA, except as provided in subsection (d). Subsection (d) states that subsections (a) through (c) do not apply to Type II Cash-Outs (*i.e.*, refinancing loans where the amount of the new loan is larger than the payoff amount of the loan being refinanced). The VA preamble states that the VA understands subsections (a) through (c) to apply to IRRRLs and Type I Cash-Outs and subsection (d) to apply to Type II Cash-Outs.

The Interim Rule substantially restates the statutory criteria in subsection (a), which imposes requirements related to recoupment of fees and expenses when refinancing a VA-guaranteed or insured loan into a Type I Cash-Out. Likewise, the Interim Rule substantially restates the statutory criteria in subsection (c), which imposes a seasoning period before a VA-guaranteed or insured loan may be refinanced into a Type I Cash-Out. The VA preamble also states that to the extent changes to the statutory criteria are made in the Interim Rule, they are solely for ease of reading and should not imply a substantive effect as the VA is required to follow the statute.

Paragraph (b)(1) requires the lender of an IRRRL or a Type I Cash-Out to provide a veteran with a net tangible benefit test to ensure that the refinance loan is in the financial interests of the veteran. Paragraph (b)(1) requires the test, but does not define its parameters. To clarify statutory ambiguity, the Interim Rule defines the parameters of the net tangible benefit test for Type I Cash-Outs. The Interim Rule also establishes a net tangible benefit test for Type II Cash-Outs to comply with subsection (d). The VA preamble states that VA will address the net tangible benefit test for IRRRLs in a future rulemaking.

Paragraph (b)(2) addresses the refinancing situation in which the loan being refinanced has a fixed interest rate and the IRRRL or Type I Cash-Out also will have a fixed interest rate, and requires the IRRRL's or Type I Cash-Out's interest rate to be not less than 50 basis points less than the loan being refinanced.

Paragraph (b)(3) addresses the refinancing situation in which the loan being refinanced has a fixed interest rate and the IRRRL or Type I Cash-Out will have an adjustable interest rate, and requires the IRRRL's or Type I Cash-Out's interest rate to be not less than 200 basis points less than the loan being refinanced.

Paragraph (b)(4) is dependent upon paragraph (b)(3) and addresses discount point requirements for IRRRLs and Type I Cash-Outs subject to paragraph (b)(3). The VA determined that the discount point requirements in paragraph (b)(4) apply only to paragraph (b)(3) due to the placement of the conjunction "and" between paragraphs (b)(3) and (b)(4) and the fact that paragraphs (b)(2) and (b)(3) are mutually exclusive.

Paragraphs (b)(2) through (b)(4) are separate and distinct from paragraph (b)(1) and, thus, are not part of (b)(1)'s net tangible benefit test.

### **Explanation of the Interim Rule (38 CFR §§36.4301 and 36.4306)**

*§36.4301 Definitions.* Revised §36.4306 uses the term “home equity.” Therefore, the Interim Rule adds a definition of this term to §36.4301: “Home equity is the difference between the home’s reasonable value and the outstanding balance of all liens on the property.”

*§36.4306 Refinancing of mortgage or other lien indebtedness.*

(1) Subsection 4306(a): The Interim Rule revises subsection (a) to address the criteria that will apply to Type I and Type II Cash-Outs (referred to as “new loan” in subsection (a)). It provides that a refinancing loan made pursuant to 38 U.S.C. 3710(a)(5) (*i.e.*, “to refinance existing mortgage loans or other liens which are secured of record on a dwelling or farm residence owned and occupied by the veteran as the veteran’s home”) qualifies for guaranty in an amount as computed under 38 U.S.C. 3703, provided the following five conditions are met.

Reasonable Value. Paragraph (a)(1) requires that the amount of the new loan must not exceed an amount equal to 100 percent of the reasonable value, as determined by the VA, of the dwelling or farm residence that will secure the loan. Currently, paragraph (a)(1) provides for a 90 percent reasonable value ratio notwithstanding the fact that in 2008 Congress enacted legislation to increase the ratio to 100 percent. While the VA has been applying this statutory 100 percent ratio pursuant to its policy and procedural guidance to lenders since the 2008 increase, it had not changed paragraph (a)(1) to reflect this increase. Thus, this regulatory change has no substantive impact.

Funding Fee. Paragraph (a)(2) provides that the funding fee may be included in the new loan amount, except that any portion of the funding fee that would cause the new loan amount to exceed 100 percent of the reasonable value of the property must be paid in cash at the loan closing.

Net Tangible Benefit Test. Paragraph (a)(3) requires that the new loan must provide a net tangible benefit to the borrower and defines it to mean that the new loan is in the financial interest of the borrower. Paragraph (a)(3) also requires the lender of the new loan to provide the borrower with a net tangible benefit test that the new loan must satisfy. The test is defined as follows:

- (i) The new loan first must meet one or more of the following criteria:
  - (A) the new loan eliminates monthly mortgage insurance, whether public or private, or monthly guaranty insurance;
  - (B) the term of the new loan is shorter than the term of the loan being refinanced;
  - (C) the interest rate on the new loan is lower than the interest rate on the loan being refinanced;
  - (D) the payment on the new loan is lower than the payment on the loan being refinanced;
  - (E) the new loan results in an increase in the borrower’s monthly residual income as explained by §36.4340(e);
  - (F) the new loan refinances an interim loan to construct, alter, or repair the primary home;
  - (G) the new loan amount is equal to or less than 90 percent of the reasonable value of the home; or

(H) the new loan refinances an adjustable rate loan to a fixed rate loan.

The VA preamble gives an example of a Type II Cash-Out in which the monthly payment is lowered but the overall cost of the new loan will increase (*e.g.*, borrower refinances an existing loan with five years' worth of payments remaining into a new 15-year loan, takes \$20,000 in cash out, and realizes a reduction of only 50 basis points). While it appears counterintuitive that such a loan would satisfy the net tangible benefit test, the VA preamble states that the refinance loan may still be in the borrower's financial interest, as the veteran might need access to cash for certain expenses (*e.g.*, home repair for livability, medical bills, or educational expenses).

(ii) The lender must provide a borrower with a comparison of the following:

(A) the loan payoff amount of the new loan compared to the loan payoff amount of the loan being refinanced;

(B) the type of the new loan compared to type of the loan being refinanced;

(C) the interest rate of the new loan compared to the interest rate of the loan being refinanced;

(D) the term of the new loan compared to the term remaining on the loan being refinanced;

(E) the total the borrower will have paid after making all payments of principal, interest, and mortgage or guaranty insurance (if applicable), as scheduled, for both the new loan and the loan being refinanced; and

(F) the loan to value ratio of the new loan compared to the loan to value ratio of the loan being refinanced.

(iii) The lender must provide the borrower with an estimate of the dollar amount of home equity that is being removed from the reasonable value of the home by refinancing into a new loan, and explain that removal of this home equity may affect the borrower's ability to sell the home at a later date.

(iv) The lender must provide the information in (i), (ii) and (iii) above in a standardized format (x) not later than 3 business days from the date of the loan application and (y) again at loan closing. The borrower must certify that the borrower received this information on both occasions.

Reasonable Discount Points. Paragraph (a)(4) requires that the dollar amount of discount, if any, to be paid by the borrower must be reasonable in amount as determined by the VA in accordance with §36.4313(d)(7)(i). This requirement is found in current §36.4306(a)(2) and is revised for clarity only.

Otherwise Eligible. Paragraph (a)(5) requires that the loan must otherwise be eligible for guaranty This requirement is found in current §36.4306(a)(3) and is revised for clarity only.

(2) Subsection 4306(b): The Interim Rule revises subsection (b) to address the additional criteria that will apply to the Type I Cash-Outs where the loan being refinanced is already guaranteed or insured by the VA.

New section 3709 sets out specific statutory criteria for recoupment and seasoning for these particular Type I Cash-Outs and paragraphs (b)(1) and (b)(2) adopt the criteria:

Recoupment. Under paragraph (b)(1), there are three criteria for recoupment. First, the lender of the Type I Cash-Out loan must provide the VA with a certification of the recoupment period for fees, closing costs, and any expenses (other than taxes, amounts held in escrow, and fees paid under 38 U.S.C. chapter 37) that would be incurred by the Type I Cash-Out loan borrower in the refinancing of the prior VA guaranteed or insured loan. Second, all the fees and incurred costs must be scheduled to be recouped on or before the date that is 36 months after the date of the Type I Cash-Out loan issuance. Third, the recoupment must be calculated through lower regular monthly payments (other than taxes, amounts held in escrow, and fees paid under 38 U.S.C. chapter 37) as a result of the Type I Cash-Out loan.

Seasoning. Under paragraph (b)(2), the Type I Cash-Out loan may not be guaranteed or insured until the date that is the later of 210 days from the date of the first monthly payment made by the borrower and the date on which the sixth monthly payment is made on the loan.

New section 3709 also prescribes net tangible benefit criteria for these Type I Cash-Outs, in addition to the net tangible benefit test implemented under paragraph (a)(3). Paragraphs (b)(3) and (b)(4) adopt these statutory criteria:

Net Tangible Benefit Criteria. Under paragraph (b)(3), when the loan being refinanced has a fixed interest rate and the Type I Cash-Out loan will also have a fixed interest rate, the interest rate on the Type I Cash-Out loan must not be less than 50 basis points less than the loan being refinanced. Under paragraph (b)(4), when the loan being refinanced has a fixed interest rate and the Type I Cash-Out loan will have an adjustable interest rate, the interest rate on the Type I Cash-Out loan must not be less than 200 basis points less than the loan being refinanced and this lower interest rate must not be produced solely from discount points, unless the points are paid at closing and are not added to the principal loan amount of the Type I Cash-Out loan. The points may be added to the principal loan amount of the Type I Cash-Out loan, however, when paid at closing and either of the following apply: (i) the discount point amount is less than or equal to one discount point, and the resulting loan balance after any fees and expenses allows the property securing the loan to maintain a loan to value ratio of 100 percent or less, or (ii) the discount point amounts are greater than one discount point, and the resulting loan balance after any fees and expenses allows the property securing loan to maintain a loan to value ratio of 90 percent or less.

(3) Subsection 4306(c): The Interim Rule redesignates current subsections (c) and (d) as subsections (d) and (e), respectively, and adds a new subsection (c) that addresses the criteria for Type II Cash-Outs.

Recoupment. Paragraph (c)(1) adopts a different recoupment requirement for Type II Cash-Outs by stating that the borrower is deemed to have recouped the refinancing costs by meeting the requirements of subsection (a). The VA preamble explains that this is because it is impossible to determine how to quantify recoupment for veterans who obtain Type II Cash-Outs, as the reasons veterans may choose to tap into their home equity are countless. Also, the VA is concerned that a recoupment period for this type of loan would put a veteran in a worse financial position than a non-veteran.

Seasoning. Paragraph (c)(2) adopts the same seasoning criteria found in paragraph (b)(2) for Type I Cash-Outs, just stated in a different way. The difference is in form only. Accordingly,

under paragraph (c)(2), the Type II Cash-Out loan may not be guaranteed or insured until the date that is the later of 210 days from the date of the first monthly payment made by the borrower and the date on which the sixth monthly payment is made on the loan; however, this requirement applies only when the loan being refinanced is a VA-guaranteed or insured loan. The VA preamble states that the VA is applying the same seasoning standards for Type II Cash-Outs that Congress explicitly set forth for IRRRLs and Type I Cash-Outs because the 210-day/6-monthly payment seasoning requirement is consistent with other federal seasoning requirements for cash-outs and is a viable standard in protecting veterans from predatory lending and safeguarding the financial interest of the United States.

(4) Subsection 4306(d): The Interim Rule revises subsection (d) [currently subsection (c)] to clarify its scope. The preamble states that the purpose of subsection (d) is to explain the calculation of entitlement for non-streamlined refinances, ensuring that a veteran is not precluded from refinancing solely because entitlement has already been used on the loan being refinanced. Where the current rule begins with “Nothing shall preclude guaranty . . .”, VA is concerned that it might be easily misunderstood as superseding other relevant provisions (*e.g.*, seasoning, recoupment, etc.). Therefore, the Interim Rule clarifies that subsection (d) is for the limited purpose of calculating entitlement by adding at the beginning of subsection (d), *For the limited purpose of calculating entitlement*, “nothing shall preclude guaranty . . .”. No substantive change is intended.

(5) Subsection 4306(e): As previously stated, the Interim Rule redesignates current subsection (d) (“A refinancing loan may include contractual prepayment penalties, if any, due the holder of the mortgage or other lien indebtedness to be refinanced.”) as subsection (e) without changes.

(6) Subsection 4306(f): The Interim Rule also revises subsection (f) to clarify its scope of application. Subsection (f) begins with the clause, “Nothing in this section shall preclude the refinancing . . .” of a land purchase related to new construction. The VA preamble states that the purpose of subsection (f) is to ensure veterans understand that, if a loan was originally made for a land purchase only, refinancing for the home construction is acceptable under 38 U.S.C. 3710. The VA preamble states that current subsection (f) is overly broad, in that it could easily be misunderstood as an attempt to supersede other provisions of §36.4306, including those subsections that, as a matter of statutory law, could not be superseded by VA regulation. Accordingly, the Interim Rule revises subsection (f) to state that nothing in §36.4306 “shall preclude the *determination that a loan is being made for a purpose authorized under 38 U.S.C. 3710, if the purpose of such loan is the refinancing of the balance due for the purchase of land on which new construction is to be financed through the proceeds of the loan, or the refinancing of the balance due on an existing land sale contract relating to a veteran’s dwelling or farm residence.*” This is a technical change only, and VA intends no substantive change.

(7) Subsection 4306(g): The VA preamble also states that, as with subsection (f), subsection (g) is overly broad and could be interpreted as the sole provision within §36.4306 related to manufactured homes. VA does not intend for subsection (g) to be deemed a standalone provision, rendering the remainder of §36.4306 inapplicable to manufactured homes. Instead, VA intends subsection (g) to be subject to the other relevant requirements (*e.g.*, seasoning, recoupment, etc.) set forth in §36.4306. Therefore, the Interim Rule revises subsection (g) by inserting a new paragraph (g)(6), as a catch-all, to ensure that it is understood “[a]ll other requirements of this

section are met . . .” before VA will guarantee or insure the refinance of a manufactured home loan. VA intends this revision as a clarifying amendment only, without substantive impact.

(8) Subsection 4306(h): New section 3709 mentions VA’s statutory authority to insure refinancing loans. The VA preamble states that VA’s cash-out refinance rule has not specified how insurance works for cash-out refinances. Although lenders almost always opt for guaranty, rather than insurance, the insurance of loans remains an option. Therefore, the Interim Rule adds subsection (h) explaining that any refinancing loan that might be guaranteed under §36.4306, when made or purchased by any financial institution subject to examination and supervision by any agency of the United States or of any State may, in lieu of such guaranty, be insured by the VA under an agreement whereby the VA will reimburse any such institution for losses incurred on such loan up to 15 percent of the aggregate of loans so made or purchased by it. This provision is a restatement of the law at 38 U.S.C. 3703(a)(2)(A).

For your information and use, the VA Act and the Interim Rule’s revisions are attached to this memorandum as Exhibits A and B, respectively.

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**Exhibit A**

**Public Law 115–174 (May 24, 2018)**

**SEC. 309. PROTECTING VETERANS FROM PREDATORY LENDING.**

(a) PROTECTING VETERANS FROM PREDATORY LENDING.—

(1) IN GENERAL.—Subchapter I of chapter 37 of title 38, United States Code, is amended by adding at the end the following new section:

<< 38 USCA § 3709 >>

**§ 3709. Refinancing of housing loans**

“(a) FEE RECOUPMENT.—Except as provided in subsection (d) and notwithstanding section 3703 of this title or any other provision of law, a loan to a veteran for a purpose specified in section 3710 of this title that is being refinanced may not be guaranteed or insured under this chapter unless—

“(1) the issuer of the refinanced loan provides the Secretary with a certification of the recoupment period for fees, closing costs, and any expenses (other than taxes, amounts held in escrow, and fees paid under this chapter) that would be incurred by the borrower in the refinancing of the loan;

“(2) all of the fees and incurred costs are scheduled to be recouped on or before the date that is 36 months after the date of loan issuance; and

“(3) the recoupment is calculated through lower regular monthly payments (other than taxes, amounts held in escrow, and fees paid under this chapter) as a result of the refinanced loan.

“(b) NET TANGIBLE BENEFIT TEST.—Except as provided in subsection (d) and notwithstanding section 3703 of this title or any other provision of law, a loan to a veteran for a purpose specified in section 3710 of this title that is refinanced may not be guaranteed or insured under this chapter unless—

“(1) the issuer of the refinanced loan provides the borrower with a net tangible benefit test;

“(2) in a case in which the original loan had a fixed rate mortgage interest rate and the refinanced loan will have a fixed rate mortgage interest rate, the refinanced loan has a mortgage interest rate that is not less than 50 basis points less than the previous loan;

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“(3) in a case in which the original loan had a fixed rate mortgage interest rate and the refinanced loan will have an adjustable rate mortgage interest rate, the refinanced loan has a mortgage interest rate that is not less than 200 basis points less than the previous loan; and

“(4) the lower interest rate is not produced solely from discount points, unless—

“(A) such points are paid at closing; and

“(B) such points are not added to the principal loan amount, unless—



“(i) for discount point amounts that are less than or equal to one discount point, the resulting loan balance after any fees and expenses allows the property with respect to which the loan was issued to maintain a loan to value ratio of 100 percent or less; and

“(ii) for discount point amounts that are greater than one discount point, the resulting loan balance after any fees and expenses allows the property with respect to which the loan was issued to maintain a loan to value ratio of 90 percent or less.

“(c) LOAN SEASONING.—Except as provided in subsection (d) and notwithstanding section 3703 of this title or any other provision of law, a loan to a veteran for a purpose specified in section 3710 of this title that is refinanced may not be guaranteed or insured under this chapter until the date that is the later of—

“(1) the date that is 210 days after the date on which the first monthly payment is made on the loan; and

“(2) the date on which the sixth monthly payment is made on the loan.

“(d) CASH-OUT REFINANCES.—(1) Subsections (a) through (c) shall not apply in a case of a loan refinancing in which the amount of the principal for the new loan to be guaranteed or insured under this chapter is larger than the payoff amount of the refinanced loan.

“(2) Not later than 180 days after the date of the enactment of this section, the Secretary shall promulgate such rules as the Secretary considers appropriate with respect to refinancing described in paragraph (1) to ensure that such refinancing is in the financial interest of the borrower, including rules relating to recoupment, seasoning, and net tangible benefits.”.

<< 38 USCA § 3709 NOTE >>

(2) REGULATIONS.—

(A) IN GENERAL.—In prescribing any regulation to carry out section 3709 of title 38, United States Code, as added by paragraph (1), the Secretary of Veterans Affairs may waive the requirements of sections 551 through 559 of title 5, United States Code, if—

(i) the Secretary determines that urgent or compelling circumstances make compliance with such requirements impracticable or contrary to the public interest;

(ii) the Secretary submits to the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives, and publishes in the Federal Register, notice of such waiver, including a description of the determination made under clause (i); and

(iii) a period of 10 days elapses following the notification under clause (ii).

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(B) PUBLIC NOTICE AND COMMENT.—If a regulation prescribed pursuant to a waiver made under subparagraph (A) is in effect for a period exceeding 1 year, the Secretary shall provide the public an opportunity for notice and comment regarding such regulation.

(C) EFFECTIVE DATE.—This paragraph shall take effect on the date of the enactment of this Act.

(D) TERMINATION DATE.—The authorities under this paragraph shall terminate on the date that is 1 year after the date of the enactment of this Act.

(3) REPORT ON CASH-OUT REFINANCES.—

(A) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall, in consultation with the President of the Ginnie Mae, submit to Congress a report on refinancing—

(i) of loans—

(I) made to veterans for purposes specified in section 3710 of title 38, United States Code; and

(II) that were guaranteed or insured under chapter 37 of such title; and

(ii) in which the amount of the principal for the new loan to be guaranteed or insured under such chapter is larger than the payoff amount of the refinanced loan.

(B) CONTENTS.—The report required by subparagraph (A) shall include the following:

(i) An assessment of whether additional requirements, including a net tangible benefit test, fee recoupment period, and loan seasoning requirement, are necessary to ensure that the refinancing described in subparagraph (A) is in the financial interest of the borrower.

(ii) Such recommendations as the Secretary may have for additional legislative or administrative action to ensure that refinancing described in subparagraph (A) is carried out in the financial interest of the borrower.

<< 38 USCA T. 38 pt. III ch. 37 subch. I prec. § 3701 >>

(4) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 37 of title 38, United States Code, is amended by inserting after the item relating to section 3709 the following new item:

“3709. Refinancing of housing loans.”.

<< 12 USCA § 1721 >>

(b) LOAN SEASONING FOR GINNIE MAE MORTGAGE-BACKED SECURITIES.—Section 306(g)(1) of the National Housing Act (12 U.S.C. 1721(g)(1)) is amended by inserting “The Association may not guarantee the timely payment of principal and interest on a security that is backed by a mortgage insured or guaranteed under chapter 37 of title 38, United States Code, and that was refinanced until the later of the date that is 210 days after the date on which the first monthly payment is made on the mortgage being refinanced and the date on which 6 full monthly payments have been made on the mortgage being refinanced.” after “Act of 1992.”.

(c) REPORT ON LIQUIDITY OF THE DEPARTMENT OF VETERANS AFFAIRS HOUSING LOAN PROGRAM.—

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(1) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary of Housing and Urban Development and the President of the Ginnie Mae shall submit to the appropriate committees of Congress a report on the liquidity of the housing loan program under chapter 37 of title 38, United States Code, in the secondary mortgage market, which shall—

(A) assess the loans provided under that chapter that collateralize mortgage-backed securities that are guaranteed by Ginnie Mae; and

(B) include recommendations for actions that Ginnie Mae should take to ensure that the liquidity of that housing loan program is maintained.

(2) DEFINITIONS.—In this subsection:

(A) APPROPRIATE COMMITTEES OF CONGRESS.—The term “appropriate committees of Congress” means—

(i) the Committee on Veterans' Affairs and the Committee on Banking, Housing, and Urban Affairs of the Senate; and

(ii) the Committee on Veterans' Affairs and the Committee on Financial Services of the House of Representatives.

(B) GINNIE MAE.—The term “Ginnie Mae” means the Government National Mortgage Association.

<< 38 USCA § 3707 NOTE >>

(d) ANNUAL REPORT ON DOCUMENT DISCLOSURE AND CONSUMER EDUCATION.—Not less frequently than once each year, the Secretary of Veterans Affairs shall issue a publicly available report that—

(1) examines, with respect to loans provided to veterans under chapter 37 of title 38, United States Code—

(A) the refinancing of fixed-rate mortgage loans to adjustable rate mortgage loans;

(B) whether veterans are informed of the risks and disclosures associated with that refinancing; and

(C) whether advertising materials for that refinancing are clear and do not contain misleading statements or assertions; and

(2) includes findings based on any complaints received by veterans and on an ongoing assessment of the refinancing market by the Secretary.

**[End of Exhibit A]**

## Exhibit B

### VA-Guaranteed or Insured Cash-out Home Refinance Loans Interim Rule

(83 FR 64459, December 17, 2018)

#### PART 36—LOAN GUARANTY

■ 1. The authority citation for part 36 continues to read as follows:

**Authority:** 38 U.S.C. 501 and 3720.

#### Subpart B—Guaranty or Insurance of Loans to Veterans With Electronic Reporting

■ 2. Amend § 36.4301 by adding a definition of *home equity* in alphabetical order to read as follows:

##### § 36.4301 Definitions.

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*Home equity.* Home equity is the difference between the home's reasonable value and the outstanding balance of all liens on the property.

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■ 3. Amend § 36.4306 by:

■ a. Revising paragraphs (a) and (b).

■ b. Redesignating paragraphs (c) and (d) as new paragraphs (d) and (e).

■ c. Adding new paragraph (c).

■ d. Revising newly redesignated paragraph (d) and paragraphs (f) and (g)(4) and (5).

■ e. Adding paragraphs (g)(6) and (h).

■ f. Revising the authority citation at the end of the section.

The revisions and addition read as follows:

##### § 36.4306 Refinancing of mortgage or other lien indebtedness.

(a) A refinancing loan made pursuant to 38 U.S.C. 3710(a)(5) qualifies for guaranty in an amount as computed under 38 U.S.C. 3703, provided—

(1) The amount of the new loan must not exceed an amount equal to 100 percent of the reasonable value, as determined by the Secretary, of the dwelling or farm residence which will secure the loan.

(2) The funding fee as prescribed by 38 U.S.C. 3729 may be included in the new loan amount, except that any portion of the funding fee that would cause the new loan amount to exceed

100 percent of the reasonable value of the property must be paid in cash at the loan closing.

(3) The new loan must provide a net tangible benefit to the borrower. For the purposes of this section, net tangible benefit means that the new loan is in the financial interest of the borrower. The lender of the new loan must provide the borrower with a net tangible benefit test.

The net tangible benefit test must be satisfied. The net tangible benefit test is defined as follows:

(i) The new loan must meet one or more of the following:

(A) The new loan eliminates monthly mortgage insurance, whether public or private, or monthly guaranty insurance;

(B) The term of the new loan is shorter than the term of the loan being refinanced;

(C) The interest rate on the new loan is lower than the interest rate on the loan being refinanced;

(D) The payment on the new loan is lower than the payment on the loan being refinanced;

(E) The new loan results in an increase in the borrower's monthly residual income as explained by § 36.4340(e);

(F) The new loan refinances an interim loan to construct, alter, or repair the primary home;

(G) The new loan amount is equal to or less than 90 percent of the reasonable value of the home; or

(H) The new loan refinances an adjustable rate mortgage to a fixed rate loan.

(ii) The lender must provide a

borrower with a comparison of the following:

(A) The loan payoff amount of the new loan, with a comparison to the loan payoff amount of the loan being refinanced;

(B) The new type of loan, with a comparison to the type of the loan being refinanced;

(C) The interest rate of the new loan, with a comparison to the interest rate of the loan being refinanced;

(D) The term of the new loan, with a comparison to the term remaining on the loan being refinanced;

(E) The total the borrower will have paid after making all payments of principal, interest, and mortgage or guaranty insurance (if applicable), as scheduled, for both the loan being refinanced and the new loan; and

(F) The loan to value ratio of the loan being refinanced compared to the loan to value ratio under the new loan.

(iii) The lender must provide the borrower with an estimate of the dollar amount of home equity that, by refinancing into a new loan, is being removed from the reasonable value of the home, and explain that removal of this home equity may affect the borrower's ability to sell the home at a later date.

(iv) The lender must provide the information required under paragraphs

(a)(3)(i) through (iii) of this section in a standardized format and on two separate occasions: Not later than 3 business days from the date of the loan application and again at loan closing.

The borrower must certify that the borrower received the information required under paragraphs (a)(3)(i) through (iii) on both occasions.

(4) The dollar amount of discount, if

any, to be paid by the borrower must be reasonable in amount as determined by the Secretary in accordance with § 36.4313(d)(7)(i).

(5) The loan must otherwise be eligible for guaranty.

(b) If the loan being refinanced is a VA-guaranteed or insured loan, and the new loan amount is equal to or less than the payoff amount of the loan being refinanced, the following requirements must also be met—

(1)(i) The lender of the refinanced loan must provide the Secretary with a certification of the recoupment period for fees, closing costs, and any expenses (other than taxes, amounts held in escrow, and fees paid under 38 U.S.C. chapter 37) that would be incurred by the borrower in the refinancing of the loan;

(ii) All of the fees and incurred costs must be scheduled to be recouped on or before the date that is 36 months after the date of loan issuance; and

(iii) The recoupment must be calculated through lower regular monthly payments (other than taxes, amounts held in escrow, and fees paid under 38 U.S.C. chapter 37) as a result of the refinanced loan.

(2) The new loan may not be guaranteed or insured until the date that is the later of 210 days from the date of the first monthly payment made by the borrower and the date on which the sixth monthly payment is made on the loan.

(3) In a case in which the loan being refinanced has a fixed interest rate and the new loan will also have a fixed interest rate, the interest rate on the new loan must not be less than 50 basis points less than the loan being refinanced.

(4) In a case in which the loan being

refinanced has a fixed interest rate and the new loan will have an adjustable rate, the interest rate on the new loan must not be less than 200 basis points less than the previous loan. In addition—

(i) The lower interest rate must not be produced solely from discount points, unless such points are paid at closing; and

(ii) Such points are not added to the principal loan amount, unless—

(A) For discount point amounts that are less than or equal to one discount point, the resulting loan balance after any fees and expenses allows the property with respect to which the loan was issued to maintain a loan to value ratio of 100 percent or less; and

(B) For discount point amounts that are greater than one discount point, the resulting loan balance after any fees and expenses allows the property with respect to which the loan was issued to maintain a loan to value ratio of 90 percent or less.

(c) If the new loan amount exceeds the payoff amount of the loan being refinanced—

(1) The borrower is deemed to have recouped the costs of the refinancing if the requirements prescribed in paragraph (a) are met.

(2) The new loan may not be guaranteed or insured until the date that is the later of 210 days from the date of the first monthly payment made by the borrower and the date on which the sixth monthly payment is made on the loan; however, this requirement applies only when the loan being refinanced is a VA-guaranteed or insured loan.

(d) For the limited purpose of calculating entitlement, nothing shall preclude guaranty of a loan to an eligible veteran having home loan guaranty entitlement to refinance under the provisions of 38 U.S.C. 3710(a)(5) a

VA-guaranteed or insured (or direct) mortgage loan made to him or her which is outstanding on the dwelling or farm residence owned and occupied or to be reoccupied after the completion of major alterations, repairs, or improvements to the property, by the veteran as a home, or in the case of an eligible veteran unable to occupy the property because of active duty status in the Armed Forces, occupied or to be reoccupied by the veteran's spouse as the spouse's home.

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(f) Nothing in this section shall preclude the determination that a loan is being made for a purpose authorized under 38 U.S.C. 3710, if the purpose of such loan is the refinancing of the balance due for the purchase of land on which new construction is to be financed through the proceeds of the loan, or the refinancing of the balance due on an existing land sale contract relating to a borrower's dwelling or farm residence.

(g) \*\*\*

(4) The amount of the loan may not exceed an amount equal to the sum of the balance of the loan being refinanced; the purchase price, not to exceed the reasonable value of the lot; the costs of the necessary site preparation of the lot as determined by the Secretary; a reasonable discount as authorized in § 36.4313(d)(6) with respect to that portion of the loan used to refinance the existing purchase money lien on the manufactured home, and closing costs as authorized in §36.4313.

(5) If the loan being refinanced was guaranteed by VA, the portion of the loan made for the purpose of refinancing an existing purchase money manufactured home loan may be, guaranteed without regard to the outstanding guaranty entitlement available for use by the veteran, and the veteran's guaranty entitlement shall not be charged as a result of any guaranty provided for the refinancing portion of

the loan. For the purposes enumerated in 38 U.S.C. 3702(b), the refinancing portion of the loan shall be considered to have been obtained with the guaranty entitlement used to obtain VA-guaranteed loan being refinanced. The total guaranty for the new loan shall be the sum of the guaranty entitlement used to obtain VA-guaranteed loan being refinanced and any additional guaranty entitlement available to the veteran. However, the total guaranty may not exceed the guaranty amount as

calculated under § 36.4302(a); and

(6) All other requirements of this section are met.

(h) Any refinancing loan that might be guaranteed under this section, when made or purchased by any financial institution subject to examination and supervision by any agency of the United States or of any State may, in lieu of such guaranty, be insured by the Secretary under an agreement whereby the Secretary will reimburse any such institution for losses incurred on such loan up to 15 percent of the aggregate of loans so made or purchased by it.

(Authority: 38 U.S.C. 3703, 3709, 3710)

**[End of Exhibit B]**