

NOTES

REVERSE MORTGAGES AND ELDERLY AMERICANS: PROTECTING THE GREATEST ASSET FROM POTENTIALLY MISLEADING ADVERTISING PRACTICES

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I. INTRODUCTION

In theory, “[a] reverse mortgage is a little like a car airbag. It’s nice to know it’s there. But if it ever has to be used, the driver’s already in trouble.”¹ Unfortunately, the elderly can be sitting ducks for being taken advantage of financially.² While there are current laws in place, on the state and federal level,³ they appear to be inadequate to address the misleading and deceptive advertising techniques of some reverse mortgage lenders and brokers, especially in New York. Predatory lending statutes do not provide enough emphasis on protecting the elderly in the reverse mortgage realm from misleading advertisements. At the time of this writing, the statutes lack the specificity and attention to the distinct class of Americans applying for reverse mortgages, as compared to traditional forward mortgages. Many seniors in America are faced with a large amount of debt, low incomes, and a lack of sufficient retirement savings.⁴ The federal

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¹ Ben Steverman, *Why Financial Advisers Still Hate Reverse Mortgages*, BLOOMBERG (Sept. 29, 2014), <http://www.bloomberg.com/news/2014-09-29/why-financial-advisers-still-hate-reverse-mortgages.html>.

² See Carolyn Rosenblatt, *Are Our Aging Parents Sitting Ducks?*, FORBES (Nov. 8, 2012), <http://www.forbes.com/sites/carolynrosenblatt/2012/11/08/are-our-aging-parents-sitting-ducks/#1d2360985345> (“Elders are truly sitting ducks, easy prey. Isolation, confusion, forgetfulness, and fears about running out of money can all drive the susceptibility to entering into a ‘deal’ . . .”).

³ See *infra* Parts III, V.

⁴ See Tara Twomey, *Crossing Paths: The Intersection of Reverse Mortgages and Bankruptcy*, 89 AM. BANKR. L.J. 363, 363 (2015).

laws “are not tailored to the unique needs of reverse mortgage[s]”⁵ and are generally weak restraints on the ability of lenders to put forth potentially misleading advertisements and New York’s laws are often inadequate to fill the gap. New York, the financial capital of the world,⁶ should follow the lead of other states in America that have already tightened their restrictions on advertising to address lenders who do not follow the rules.

This Note is broken up into seven sections. Part I provides an introduction and explanation of basic reverse mortgage concepts, as well as examples of elderly individuals who suffered negative consequences from their reverse mortgages. Part II discusses misleading advertisements, provides examples of tactics such as government affiliation and the use of celebrity endorsements, and demonstrates the inadequate safeguards in place to counteract the advertisements. Part III describes the current regulatory structure on the federal and state levels and provides examples of regulatory actions taken against lenders. Part IV gives an in-depth analysis of other states’ laws that have sought to address the misleading advertisements, and speaks of a current case that shows the issues are still prevalent in society. Part V uses recent government reports to demonstrate how the issues described in this Note are still occurring and continue to increase. Part VI offers a detailed recommendation for New York to follow in efforts of alleviating the current problem. The recommendation provides for standard font sizes, a clear and conspicuous summary of material terms, and a good faith duty for sales staff who are communicating with an elderly individual about their greatest asset—the home. Part VII offers concluding remarks and urges New York State to offer greater protection to its elderly citizens from the misleading advertisements that can threaten their financial well-being.

A. Reverse Mortgages: The Basics

A reverse mortgage is a loan available to homeowners age sixty-two or over that allows the owner to borrow without an income requirement because the loan is secured by the equity in a primary

⁵ CONSUMER FIN. PROT. BUREAU, REVERSE MORTGAGES: REPORT TO CONGRESS 101 (2012), http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf.

⁶ See Mark McSherry, *New York Replaces London as Financial Capital of the World*, INDEPENDENT (Mar. 17, 2014), <http://www.independent.co.uk/news/business/news/new-york-replaces-london-as-financial-capital-of-the-world-9198274.html>.

residence.⁷ After obtaining a reverse mortgage, the borrower is still responsible for property taxes, insurance, and other upkeep or housing related expenses.⁸ The obligations of the loan are not repaid until the borrower(s) are no longer using the property as their primary residence, or they breach a term of the loan agreement.⁹ Once the last borrower moves out of the home, anyone else living in the home is required to vacate the premises (so it is often suggested that spouses be listed as co-borrowers).¹⁰

A reverse mortgage is a nonrecourse loan; if the balance of a loan exceeds the market value of the property, then the lender can only recover the value of the home upon sale.¹¹ Of the three types of reverse mortgages, only Home Equity Conversion Mortgages (“HECM”) are insured by the federal government and supported by the United States Department of Housing and Urban Development.¹² The two other types are single-purpose reverse mortgages and proprietary reverse mortgages.¹³ This Note will focus on HECMs since they account for the vast majority of reverse mortgages in the lending market.¹⁴

Generally, a person looking to use an HECM will have a lower income but a more valuable piece of property or residence compared

⁷ See *Frequently Asked Questions about HUD’s Reverse Mortgages*, U.S. DEP’T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/rmtopten (last visited Feb. 20, 2017) [hereinafter *Frequently Asked Questions*].

⁸ See REVERSE MORTGAGES: A LAWYER’S GUIDE TO HOUSING AND INCOME ALTERNATIVES 5 (David A. Bridewell & Charles Nauts eds., 1997) [hereinafter A LAWYER’S GUIDE]; *Frequently Asked Questions*, *supra* note 7.

⁹ See *Frequently Asked Questions*, *supra* note 7.

¹⁰ See CONSUMER FIN. PROT. BUREAU, CONSIDERING A REVERSE MORTGAGE? 2, http://files.consumerfinance.gov/f/201409_cfpb_guide_reverse_mortgage.pdf (last visited Feb. 20, 2017). As an example, Robert Bennett from Annapolis, Maryland, took out a reverse mortgage for \$300,000 on a home that he lived in for forty years with his wife. See Diana Olick, *Reverse Mortgages Backfire on Some Seniors*, USA TODAY (June 9, 2013), <http://www.usatoday.com/story/money/personalfinance/2013/06/09/cnbc-reverse-mortgages-backfire/2393431/>. Per the advice of the lender, only his wife’s name was placed on the loan. See *id.* She soon passed away, leaving him forced to either immediately pay off the loan or face foreclosure. See *id.*

¹¹ See A LAWYER’S GUIDE, *supra* note 8, at 5.

¹² See *Consumer Information: Reverse Mortgages*, FED. TRADE COMMISSION, <http://www.consumer.ftc.gov/articles/0192-reverse-mortgages> (last visited Feb. 20, 2017).

¹³ See *id.* Single-purpose reverse mortgages are offered on the state or local government level, and the lender specifies for what purpose the loan can be used, for instance, only for home repairs or property taxes. See *id.* The other type, proprietary reverse mortgages, are not affiliated with any level of government protection, but rather are backed by private companies. See *id.*

¹⁴ See Ben Jakubowicz, Note, *What the HECM is a Reverse Mortgage: The Importance of the Home Equity Conversion Mortgage in an Aging America*, 54 U. LOUISVILLE L. REV. 183, 183 (2016) (“The most popular type of reverse mortgage is the Home Equity Conversion Mortgage (“HECM”), which accounts for 90% of the reverse mortgage loans originated in the United States.”).

to the average elderly American.¹⁵ Since reverse mortgages are only available to those Americans who are sixty-two or over, that creates a very specific pool of potential applicants that are being targeted. Further, the size of the pool of those sixty-five and older is projected to increase dramatically in the upcoming decades, more specifically, increasing from 40,229,000 people to 88,547,000 people between 2010 and 2050.¹⁶ Baby boomers began turning sixty-two years old in 2008, and constitute a population of approximately seventy-nine million people.¹⁷ In this class, twenty-nine percent have attained a bachelor's degree or higher.¹⁸ With the rise in the number of elderly, it is anticipated that there will be a corresponding increase in the prevalence of reverse mortgages, as historically only two to three percent of eligible homeowners have reverse mortgages as a source of funding for their retirement.¹⁹ In 2013 alone, there was a twenty percent increase in reverse mortgage loans.²⁰ Often, an elderly person's greatest asset is his or her home, so as reverse mortgages increase, Americans will be inheriting property from elderly individuals "with a bill attached—the balance due on these equity loans."²¹ The lender will receive the first proceeds once the home is sold, leaving the remainder (if any) to a borrower's heirs.²² Objectively, by design, a reverse mortgage can threaten to take away an elderly person's greatest asset, the individual's home.²³

¹⁵ See Carolyn H. Sawyer, *Reverse Mortgages: An Innovative Tool for Elder Law Attorneys*, 26 STETSON L. REV. 617, 627 (1996).

¹⁶ GRAYSON K. VINCENT & VICTORIA A. VELKOFF, U.S. CENSUS BUREAU, THE NEXT FOUR DECADES: THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050, at 11 (2010), <https://www.census.gov/prod/2010pubs/p25-1138.pdf>.

¹⁷ Sandra Block, *Boomers' Eagerness to Retire Could Cost Them*, USA TODAY (Jan. 23, 2008), http://usatoday30.usatoday.com/money/perfi/retirement/2008-01-13-turning-62-cover_n.htm (defining a baby boomer as someone who was born between 1946 and 1964).

¹⁸ POPULATION DIV., U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS OF BABY BOOMERS 42 TO 60 YEARS OLD IN 2006, at 33 (2006), <https://www.census.gov/population/age/publications/files/2006babyboomers.pdf>.

¹⁹ See JAMES H. BACKMAN, REAL ESTATE FINANCING § 3I.07 (Sandra R. Bullington ed., LexisNexis 2015).

²⁰ Peter Rudegeair & Michelle Conlin, *U.S. Retirees Return to Reverse Mortgages, Big Banks Stay Away*, REUTERS (Mar. 17, 2014), <http://www.reuters.com/article/2014/03/17/us-banking-reversemortgages-idUSBREA2G05T20140317#zvdjujuxGgwcTxx0.97>.

²¹ Lisa Prevost, *Retiring on the House: Reverse Mortgages for Baby Boomers*, N.Y. TIMES (Feb. 13, 2014), http://www.nytimes.com/2014/02/16/realestate/reverse-mortgages-for-baby-boomers.html?_r=0.

²² See *id.*

²³ See Donna Rosato, *Reforms Come to Reverse Mortgages*, CONSUMER REPORTS, <http://www.consumerreports.org/personal-finance/reverse-mortgage-reforms/> (last updated Apr. 4, 2016).

B. The Possible Consequences

While reverse mortgages can help some individuals, the potentially negative effects of reverse mortgages are widespread throughout the United States;²⁴ the following instances are a small sampling of the common hardships faced by the elderly who enter into reverse mortgages after viewing a misleading advertisement that may lack full disclosure of material terms. A recent story from November 26, 2015, captures the hardships of one elderly couple in Florida. Willie and Rose Leland had been married for over fifty years and took out a reverse mortgage in 2008.²⁵ They had an obligation to pay taxes and insurance on the home while receiving monthly payments from the lender.²⁶ The Lelands defaulted on just one payment in 2013 and tried to work with the lender; however, the lender immediately sought to foreclose the home.²⁷ After working for forty-seven years, Willie Leland received a notice of eviction from his home.²⁸ Willie's interview with a local news station captured his frustration and feeling of being intentionally misled by reverse mortgage advertisements:

[T]hink about it, don't sign anything until you are sure. This is something that's being advertised and it is really not the truth, not the way they are advertising it. . . . [What happened to us] gives a bad name to reverse mortgages, despite all those nice commercials they seem to promote on TV[.]²⁹

Similarly in 2008, Mr. and Mrs. Smith, senior homeowners, signed a reverse mortgage on their home in Florida.³⁰ The following year, Mr. Smith passed away and the reverse mortgage lender filed for foreclosure on the property, asserting that Mrs. Smith was not a borrower under the note and mortgage and accelerated payments were thus due.³¹ Without any intent or fault of her own, Mrs. Smith

²⁴ See Alyssa Gerace, *Five of Top 10 Reverse Mortgage States See Double-Digit Growth in 2011*, REVERSE MORTGAGE DAILY (June 22, 2011), <http://reversemortgagedaily.com/2011/06/22/five-of-top-10-reverse-mortgage-states-see-double-digit-growth-in-2011> (noting the growth of reverse mortgages throughout several states in the U.S.).

²⁵ See Christina Vazquez, *Elderly Couple Facing Eviction after Taking out Reverse Mortgage: Retired South Florida Teacher, Husband Fighting to Stay in Home*, LOCAL 10 NEWS (Nov. 26, 2015), <http://www.local10.com/news/elderly-couple-facing-eviction-after-taking-out-reverse-mortgage>.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ *Id.*

³⁰ See *Smith v. Reverse Mortg. Sols., Inc.*, 40 Fla. L. Weekly D1624 (Fla. Dist. Ct. App. 2015).

³¹ See *id.*

had executed the mortgage but did not sign the necessary promissory note for the loan.³² Mrs. Smith was ordered to immediately pay the \$229,475 due plus interest, and a foreclosure sale date was scheduled for the home.³³

Mr. and Mrs. Black entered into a reverse mortgage for their home valued over one million dollars.³⁴ Through various investments offered by the lender, vague advertisements, and incorrect reporting of the home value, the Black family lost almost all of their ownership interest in the home.³⁵ It is important to note that in this instance, “[t]he complaint [filed against the lender] generally allege[d] that [the lender] used ‘deceptive advertising [and] misleading transactional documents’ and that the reverse mortgage was ‘written in a manner which was designed to disorient, confuse, and upset the average homeowner’”³⁶

Mr. and Mrs. Otis were married for twenty-three years and owned their home as joint tenants.³⁷ After viewing an advertisement on television, they consulted with a mortgage broker and obtained a loan.³⁸ However, Mrs. Otis could not be added since she was not sixty-two yet; as such, she signed a “‘Waiver of Homestead Rights’ . . . waiv[ing] ‘any and all homestead rights that [she] ha[d] as to the real property’”³⁹ Her husband passed away a year later, before she could be added to the loan, and upon his death, the lender required full payment of the \$84,395.58 loan.⁴⁰ A foreclosure sale of the home was scheduled soon thereafter.⁴¹

Courts and the media are constantly dealing with “horror stories” involving elderly individuals who were allegedly misled by advertisements concerning reverse mortgages.⁴² Consumer Reports offered “an anecdotal story of an eighty-year-old woman who wanted to borrow some money ‘to fix her porch’ but ended up getting a reverse mortgage for \$209,000”⁴³ Another consumer couple used the

³² *See id.*

³³ *See id.*

³⁴ *See Black v. Fin. Freedom Senior Funding Corp.*, 112 Cal. Rptr. 2d 445, 449 (Cal. Ct. App. 2001).

³⁵ *See id.* at 450–51.

³⁶ *Id.* at 451.

³⁷ *See Larsen v. OneWest Bank, FSB*, No. 14-14-00485-CV, 2015 Tex. App. LEXIS 11474, at *1–2 (Tex. App. Nov. 5, 2015).

³⁸ *See id.* at *2, *3.

³⁹ *Id.* at *2.

⁴⁰ *See id.* at *4–5.

⁴¹ *See id.* at *5.

⁴² *See Annie E. Nelson, Note, Reverse Mortgages: Changes Brought About by the Housing and Economic Recovery Act*, 13 N.C. BANKING INST. 337, 337 (2009).

⁴³ *Id.*

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reverse mortgage—presumably because they did not understand that it was ultimately a loan—and took an unnecessary trip to Cancun only to return to find threats of losing ownership of their home as a result of the newly added reverse mortgage.⁴⁴ One lender in New York State even tried to foreclose on a reverse mortgage (for a home valued at over \$600,000), because the homeowner defaulted on the municipal water bill.⁴⁵

C. Elderly Decision Making

It is easy to see why individuals find reverse mortgages attractive, and even a fantastic opportunity in some circumstances. A reverse mortgage can be presented to the elderly as a way to “cash in,” for example, to receive money for a dream vacation or just have extra cash on-hand.⁴⁶ Advertisements and sales pitches such as: “Your Home Pays You Cash!”⁴⁷ can cause elders to act impulsively.⁴⁸ AARP urges that anyone on the brink of taking out a reverse mortgage to first ask questions such as: “Do I really need a reverse mortgage?” or: “Do I fully understand how these loans work?”⁴⁹

The U.S. Department of Justice classifies the elderly as “uniquely vulnerable to a broad range of exploitation and abuse. Financial crimes in particular are targeted at seniors with alarming frequency, and are all too often successful.”⁵⁰ The elderly are a particularly vulnerable population as they may suffer from financial illiteracy; more specifically, neuroscience researchers have concluded “that as people age, they have reduced responsiveness to anticipated monetary losses, impacting older people’s ability to make sound

⁴⁴ See *id.* at 338, 355–56, 359.

⁴⁵ See *Metlife Home Loans v. Vereen*, 984 N.Y.S.2d 816, 817 (N.Y. Sup. Ct. 2014).

⁴⁶ See *Reverse-Mortgage Cash Flows to Seniors*, WASH. TIMES (Mar. 7, 2008), <http://www.washingtontimes.com/news/2008/mar/7/cover-story-reverse-mortgage-cash-flows-to-seniors/>.

⁴⁷ See, e.g., Charles Duhigg, *Tapping into Homes Can Be Pitfall for the Elderly*, N.Y. TIMES (Mar. 2, 2008), <http://www.nytimes.com/2008/03/02/business/02reverse.html> (discussing the story of a sixty-seven-year-old woman who took out a \$200,000 reverse mortgage only after seeing advertisements, being pressured by a salesman, and fearing that she would lose her job and need cash quickly; a former salesman of the company that sold this mortgage claims that he was told by his supervisors to pressure homeowners into these potentially unwise financial decisions).

⁴⁸ See *id.*

⁴⁹ 5 *Questions to Ask Yourself before Considering a Reverse Mortgage*, AARP, http://www.aarp.org/money/credit-loans-debt/info-2007/5_questions_to_ask_before_considering_a_reverse_mo.html (last visited Feb. 21, 2017).

⁵⁰ *Financial Crimes against the Elderly*, COMMUNITY ORIENTED POLICING SERVS., U.S. DEPT OF JUST., <http://www.cops.usdoj.gov/default.asp?Item=1047> (last visited Feb. 22, 2017).

financial decisions.”⁵¹ Furthermore, it has been scientifically proven that many elderly will avoid making a concrete decision if they can “defer to [an] authority figure[.]”⁵² According to some scholars, only four percent of society (many of which are elderly) has the appropriate level of financial literacy to understand how interest is calculated from a home equity loan advertisement.⁵³ According to studies, southern states have the lowest financial literacy in America,⁵⁴ and make up a significant portion of reverse mortgages in the country.⁵⁵

Dementia and Alzheimer’s also impact the rational decision making of elderly individuals.⁵⁶ This problem is prevalent in American society and poses a great threat to the potential pool of individuals considering whether or not to obtain a reverse mortgage.⁵⁷

There are more than sixty causes of dementia, but the most common is Alzheimer’s disease. More than four million Americans have Alzheimer’s disease and, due to the aging of the baby boomers and increased life expectancy in general, this number is projected to increase to fourteen million by 2050. Dementia results in a progressive decline in cognitive functioning. Individuals with dementia have impaired memories and often also suffer from communication difficulties and the inability to think abstractly or plan activities. As a result of these deficits, demented patients are significantly limited in their ability to make well-informed, rational, decisions and “to advocate for [their] interests and ideals.”⁵⁸

⁵¹ Jeffrey Kimball Paulsen, Note, *Credit Card Disclosures and the Elderly: Will the Proposed Amendments to Regulation Z Help the Elderly Understand Credit Card Documents?*, 17 ELDER L.J. 125, 133 (2009) (describing how in terms of credit cards, the elderly often have extreme difficulty making financial decisions in challenging circumstances).

⁵² Debra Pogrud Stark et al., *Complex Decision-Making and Cognitive Aging Call for Enhanced Protection of Seniors Contemplating Reverse Mortgages*, 46 ARIZ. ST. L.J. 299, 344 (2014).

⁵³ See Karen Gross, *Financial Literacy Education: Panacea, Palliative, or Something Worse?*, 24 ST. LOUIS U. PUB. L. REV. 307, 308 (2005).

⁵⁴ See *id.*

⁵⁵ See generally Gerace, *supra* note 24 (explaining how Southern states such as Virginia, Maryland, Florida, and North Carolina are on the top ten reverse mortgage states).

⁵⁶ See Evelyn M. Tenenbaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 IND. L. REV. 675, 677–78 (2009).

⁵⁷ See Stark et al., *supra* note 52, at 334; Tenenbaum, *supra* note 56, at 677–78.

⁵⁸ Tenenbaum, *supra* note 56, at 677–78 (providing an in-depth discussion of the decrease of elderly individuals’ cognitive abilities).

Memories become faded for the elderly, and usually a family will not be aware that an elderly relative suffers from these diseases, making an elderly person “especially vulnerable to financial abuse.”⁵⁹ Life expectancies are increasing and a slow progression of deteriorating cognitive ability is predicted to occur with the elderly.⁶⁰ As a whole, “the elderly are members of a more trusting generation . . . they are more likely to rely on the representations made by the telemarketer, making it difficult for seniors to recognize when they are being swindled.”⁶¹ Many elderly suffer from “reduced mental faculties and loneliness, . . . [and are] at risk for losing money, credit, and ultimately independence to those who would exploit them.”⁶²

II. POTENTIALLY MISLEADING ADVERTISEMENTS

Reverse mortgage advertisements can entice the elderly into believing that the loans are “risk-free,” and they do not “tell the whole story.”⁶³ The Consumer Finance Protection Bureau (“CFPB”) recently concluded that “the TV, print, radio, online, and mailing advertisements that are selling [reverse mortgages] . . . leave consumers with misimpressions about how a reverse mortgage loan works.”⁶⁴ In November and December of 2014, the CFPB interviewed homeowners about their views on ninety-seven different reverse mortgage advertisements that had been distributed to consumers and issued a report on these findings.⁶⁵ Within the report were very specific complaints that elderly consumers had regarding the

⁵⁹ Matthea Ross, Note, *Why Are You Calling Me?: The Importance of the Do-Not-Call Registry in Protecting the Elderly From Financial Abuse*, 6 ALB. GOV'T L. REV. 663, 667, 668 (2013).

⁶⁰ *See id.* at 668.

⁶¹ Jeffrey L. Bratkiewicz, “Here’s a Quarter, Call Someone Who Cares”; *Who is Answering the Elderly’s Call for Protection from Telemarketing Fraud?*, 45 S.D. L. REV. 586, 590 (2000).

⁶² Nathalie Martin, *Consumer Scams and the Elderly: Preserving Independence Through Shifting Default Rules*, 17 ELDER L.J. 1, 1 (2009).

⁶³ Catherine Fredman, *Don’t Be Suckered Into Buying a Reverse Mortgage*, CONSUMER REPORTS (July 15, 2015), <http://www.consumerreports.org/cro/news/2015/07/don-t-be-suckered-into-buying-a-reverse-mortgage/index.htm>.

⁶⁴ Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray on the Reverse Mortgage Advertising Press Call*, CONSUMER FIN. PROTECTION BUREAU (June 4, 2015), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-on-the-reverse-mortgage-advertising-press-call/>.

⁶⁵ CONSUMER FIN. PROT. BUREAU, A CLOSER LOOK AT REVERSE MORTGAGE ADVERTISEMENTS AND CONSUMER RISKS 5 (2015) [hereinafter A CLOSER LOOK AT REVERSE MORTGAGE ADVERTISEMENTS], http://files.consumerfinance.gov/f/201506_cfpb_a-closer-look-at-reverse-mortgage-advertising.pdf. “The Consumer Financial Protection Bureau (CFPB) reviewed advertisements from a variety of lenders that appeared in five large urban U.S. markets between March 2013 and March 2014.” *Id.* at 3.

advertisements.⁶⁶

First, consumers often did not understand that the reverse mortgage would be structured as a loan.⁶⁷ More specifically, the advertisements did not focus on traditional loan features such as interest rates or fees, so consumers often concluded that a reverse mortgage did not have compounding interest or fees.⁶⁸ Second, many advertisements stated that consumers could “remain in their homes ‘as long as they want’” even though there is in fact a lien placed on the property like in a traditional mortgage.⁶⁹ Third, the fine print in half of the advertisements was unreadable to most participants⁷⁰ and not one participant could read the fine print that was used in the television advertisements.⁷¹ Most notable, the fine print usually included pertinent information such as “tax and insurance requirements, property maintenance and residency requirements, [and] repayment terms”⁷² These terms are arguably the most important and consequential in a reverse mortgage. Fourth, the role of the government in a reverse mortgage is often misrepresented; the most common and easiest to notice is the use of text and images that invoke a sense of affiliation with patriotism or the federal government.⁷³ Bald eagles, government seals, “tax free” incentives, and references to the U.S. Department of Housing and Urban Development (“HUD”) or the Federal Housing Authority (“FHA”) invoked a strong sense of government affiliation in many of the advertisements.⁷⁴ Fifth, consumers were led to believe that a majority of the proceeds from a reverse mortgage could be allocated towards enhancing the homeowner’s lifestyle at a younger age, without the risk of outliving the loan.⁷⁵ These problems still exist even though there have been efforts to prevent confusing advertising.⁷⁶

⁶⁶ *See id.* at 7, 8, 11.

⁶⁷ *See id.* at 11.

⁶⁸ *See id.*

⁶⁹ *See id.* at 7.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *Id.*

⁷³ *See id.* at 8.

⁷⁴ *See id.* Perhaps most tragically, many consumers stated that they felt an automatic sense of trust when viewing the advertisements. *See id.* at 9. They saw all reverse mortgages as a “program [being] directly administered by the federal government (similar to Medicare).” *Id.* at 8. The elderly are susceptible to being misled as they often conclude that if there is a governmental affiliation, then “people are not going to get taken advantage of.” *Id.* at 9.

⁷⁵ *See id.* at 9–10.

⁷⁶ *See* Ann Carrns, *Reverse Mortgage Ads May Sidestep Potential Pitfalls*, N.Y. TIMES (June 9, 2015), <http://www.nytimes.com/2015/06/10/your-money/reverse-mortgage-ads-may-sidestep->

While the advertisements themselves can be misleading, often reverse mortgage advertisements on television compound the problem by featuring celebrities vouching for the value of reverse mortgages.⁷⁷ As some scholars put it: “When viewers see celebrities they’ve known for years endorsing a product that might seem a bit marginal . . . [consumers conclude that] ‘[t]hey don’t need the money, so this must be something they really believe in.’”⁷⁸

There are four main celebrities that continuously appear in reverse mortgage advertising.⁷⁹ First, Robert Wagner’s enchanting voice has been used to recite phrases such as: “[R]everse mortgage loans [are] an ‘easy first step toward enjoying life more fully.’”⁸⁰ This statement may be true in some, but certainly not all, circumstances.⁸¹ Pat Boone also appears in advertisements, stating phrases such as: “Hello friend . . . are you dreaming of an ideal retirement,” and if so “there is a smart and easy way, [by using reverse mortgages].”⁸² Former Senator Fred Thompson also has appeared in advertisements, featuring American flags and referring to himself in his former prestigious role as a senator, as he states: “You ought to call my friends [at the reverse mortgage company]” because it is a “safe [and] effective financial tool.”⁸³ Last, most people can relate to “the Fonz,” from the iconic television series *Happy Days*. The show’s star, Henry Winkler, has continuously appeared in reverse mortgage advertisements, often in less than twenty seconds explaining the specifics of the product, and declaring that if you listen you will be able to “take control of your retirement today.”⁸⁴ Perhaps the true irony is that Winkler states in his advertisement that those who “call now,” receive a free magnifier with LED light, as the surrounding

potential-pitfalls.html?_r=0.

⁷⁷ See J. Peder Zane, *Aging Stars in a New Role: TV Pitchman*, N.Y. TIMES (Mar. 7, 2012), http://www.nytimes.com/2012/03/08/business/retirementspecial/new-career-for-aging-celebrities-tv-pitchman.html?_r=0.

⁷⁸ *Id.* (explaining how consumers are not overly concerned if Michael Jordan drinks Gatorade when they see him on a commercial, but consumers are much more likely to believe that celebrities endorsing loans, gold, or medicine are being truthful about their feelings for the product).

⁷⁹ See *id.*; *infra* notes 80–85 and accompanying text.

⁸⁰ Jane Bryant Quinn, *Are Reverse Mortgages Risky?*, AARP (Mar. 5, 2012), <http://www.aarp.org/money/estate-planning/info-03-2012/risks-of-taking-reverse-mortgage-early.html>.

⁸¹ See *id.*

⁸² See *Pat Boone for Security One Lending Reverse Mortgages*, YOUTUBE (Oct. 5, 2011), <https://www.youtube.com/watch?v=mvUCtEL7kAA>.

⁸³ See *Fred Thompson American Advisors Group (AAG) Commercial for Reverse Mortgage*, YOUTUBE (Jan. 28, 2014), <https://www.youtube.com/watch?v=-5Bw3gB7o9E>.

⁸⁴ See *One Reverse Mortgage—Henry Winkler—Take Control*, YOUTUBE (Sept. 27, 2011), <https://www.youtube.com/watch?v=vhhGparW6KQ>.

scenes and text of the advertisement contain fine print that even perhaps the keenest eyes could not decipher.⁸⁵ Accordingly, it is possible that any senior who is apprehensive about a reverse mortgage will have those fears erroneously diminished by the voice of a trusted celebrity (who perhaps does sincerely and truly believe in the product) they remember seeing on television in earlier, perhaps happier days.

Celebrity endorsements often fail to prominently state that the celebrity is acting as a paid spokesperson for the product, rather than providing his own personal testimonial statements about the product.⁸⁶ Advertisements are generally run on television or in print form without any mention of the great risks and the conclusions are often incomplete.⁸⁷ Most notably, they proclaim that you can “[r]emain in your home as long as you live.”⁸⁸ This statement appears to be incomplete. Moving to a residential care facility, failure to pay insurance or taxes, or failure to adequately maintain the home can all cause seniors to lose their homes to foreclosure.⁸⁹ Next, advertisements state that “[y]ou continue to own your home.”⁹⁰ On its face this may be true, but equity from the home is being lost as the loan continues.⁹¹ As equity is lost, the ownership interest or value effectively decreases.⁹² Additionally, advertisements conclude that “[y]our Social Security or Medicare benefits are not affected,” which is also untrue in certain circumstances.⁹³

Viewing or reading an advertisement is possibly the first exposure that an elderly individual will have to reverse mortgages.⁹⁴ Essentially, “advertising certainly can victimize people who do not understand how reverse mortgages work.”⁹⁵ Even though there are

⁸⁵ See One Reverse Mortgage, “*One Reverse Mortgage*” *Just the Facts 2013*, YOUTUBE (Sept. 10, 2013), https://www.youtube.com/watch?v=P_yUg0IT4uo.

⁸⁶ See CONSUMERS UNION OF THE U.S., INC. & CAL. ADVOCATES FOR NURSING HOME REFORM, COMMENTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU ON REQUEST FOR INFORMATION REGARDING CONSUMER USE OF REVERSE MORTGAGES 14 (2012), http://consumersunion.org/pdf/Comments_CFPB_8-31-12.pdf.

⁸⁷ See *id.* at 14–15.

⁸⁸ *Id.* at 15.

⁸⁹ See *id.*

⁹⁰ *Id.* at 16.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See generally Joshua C.P. Reams, *Twenty-First Century Advertising and the Plight of the Elderly Consumer*, 52 WILLAMETTE L. REV. 325, 351 (2016) (noting that the elderly are increasingly consuming more media and are a targeted population for advertisements on reverse mortgages).

⁹⁵ Liz Weston, *Reverse Mortgages Worth a Look, If Approached with Caution*, REUTERS (June 5, 2015), <http://www.reuters.com/article/column-weston-idUSL1N0YQ2AT20150605>.

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resources to educate or counteract misconceptions that advertisements pose, these “safeguards” can be increased. The changes in the counseling process demonstrate the apparent faults that continue to plague the reverse mortgage system. In 2008, Congress amended the National Housing Act, “requir[ing] that the HECM counseling be done by an independent third party that is not ‘directly or indirectly[] associated with or compensated by a party’ involved in . . . [sales, marketing, or funding the mortgage].”⁹⁶ Most counselors state that they need sixty to ninety minutes to adequately explain what a reverse mortgage is, while “[s]ome elderly borrowers . . . said their [counseling] sessions lasted only 10 minutes,” and the elderly often leave just as confused as they were prior to the meeting.⁹⁷

As one mortgage counselor admitted: “The point of counseling is to make people consider other options. That’s difficult if you feel like your next paycheck relies on convincing someone to get the loan.”⁹⁸

III. CURRENT REGULATIONS

A. Federal Regulatory Structure

Reverse mortgages are also subject to the same laws that affect conventional mortgages. First, Regulation Z⁹⁹ affects nearly every credit transaction through the implementation of the Truth in Lending Act or Home Ownership and Equity Protection Act (“HOEPA”).¹⁰⁰ However, “[t]he Federal Trade Commission asserts that reverse mortgages are still exempt from most of HOEPA’s broader requirements”¹⁰¹ Moreover, there are no specific rules within these statutes that directly address advertising of reverse mortgages.¹⁰² HUD is the primary agency responsible for regulating reverse mortgages.¹⁰³ The Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁰⁴ was intended to create vast reform, but

⁹⁶ Stark et al., *supra* note 52, at 312.

⁹⁷ Duhigg, *supra* note 47.

⁹⁸ *Id.*

⁹⁹ 12 C.F.R. § 1026.1(a) (2016). This regulation is rather broad and applies to all credit products rather than narrowly tailored to address the present needs of specific products marketed to the elderly. *See id.* § 1026.1(c).

¹⁰⁰ *See* Paul V. Black, *Reverse Mortgages and the Current Financial Crisis*, 8 NAELA J. 87, 108 (2012).

¹⁰¹ *Id.*

¹⁰² *See, e.g.*, 12 C.F.R. § 1026.33 (2016).

¹⁰³ *See* Black, *supra* note 100, at 109.

¹⁰⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124

its provisions do not go far enough in addressing the issues present in reverse mortgage advertising. While this Act specifically addresses unfair, deceptive, and abusive practices of lenders, there is only one section that directly speaks to reverse mortgages.¹⁰⁵

The Consumer Financial Protection Bureau can also regulate reverse mortgage advertisements through the enactment of the Dodd-Frank Act.¹⁰⁶ The CFPB's response has impacted lenders a bit more than HUD, but its response still remains partially inadequate. For example, a letter sent by the CFPB to a party that was knowingly distributing advertisements with misrepresentations would merely note that the party "may have advertised . . . in a misleading manner," and that the CFPB would "urge [the party] to review" and comply with the laws.¹⁰⁷ For many lenders, this may be the only correspondence they will receive; as long as formal complaints do not continue, their misleading advertisements may not stop. The problems occur on a recurring basis, and continually are noted by federal agencies,¹⁰⁸ but there is not a rigorous response to address the problem. For example, in 2009, the Government Accountability Office noted "inaccurate . . . sales tactics;"¹⁰⁹ in 2012, the CFPB sent letters to over a dozen lenders warning of misleading advertisements;¹¹⁰ and in June 2015, the CFPB released a report noting an increase in the severity and reoccurring pattern of problems with reverse mortgage advertisements.¹¹¹

Stat. 1376 (2010) (codified as amended at 12 U.S.C. §§ 5301–5641 (2012)).

¹⁰⁵ See 12 U.S.C. § 5602; see also *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform> (last visited Feb. 23, 2017) ("The most far reaching Wall Street reform in history, Dodd-Frank will prevent the excessive risk-taking that led to the financial crisis. The law also provides common-sense protections for American families, creating [a] new consumer watchdog to prevent mortgage companies and pay-day lenders from exploiting consumers.").

¹⁰⁶ See 12 U.S.C. § 5602(b).

¹⁰⁷ *Generic Warning Letter*, CONSUMER FIN. PROTECTION BUREAU, http://files.consumerfinance.gov/f/201211_cfpb_generic_warning_letter_older_Americans.pdf (last visited Feb. 23, 2017).

¹⁰⁸ See Black, *supra* note 100, at 109.

¹⁰⁹ *Discussion on GAO Report Number GAO-09-812T: Hearing before the U.S. Senate Special Comm. on Aging*, 111th Cong. (2009) (testimony of Mathew J. Scire').

¹¹⁰ See *Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements*, CONSUMER FIN. PROT. BUREAU (Nov. 19, 2012), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-warns-companies-against-misleading-consumers-with-false-mortgage-advertisements/>.

¹¹¹ See A CLOSER LOOK AT REVERSE MORTGAGE ADVERTISEMENTS, *supra* note 65, at 5–11.

B. New York Regulations

Even though reverse mortgages continue to gain momentum, New York seems to lack specific rules and regulations that are narrowly tailored to address the advertisement issues that can threaten the elderly in the reverse mortgage market. Yes, countless regulations ensure that parties are protected once the mortgage is in place;¹¹² but there are few state or federal laws that directly address the initial advertising.

For example, New York's Consolidated Laws provide two sections that discuss reverse mortgage loans: sections 280 and 280-a.¹¹³ Section 280 applies to all people sixty years of age or older,¹¹⁴ while section 280-a provides more stringent lending practices to those who are over the age of seventy.¹¹⁵ Neither of these laws mention restrictions for selling tactics or commercial advertising by lenders.¹¹⁶ In 2009, former Governor Paterson signed the Reverse Mortgage Fairness Act, which amended state banking and lending laws.¹¹⁷ The act did not deal with misleading advertising, but rather provided for other changes such as income tax relief.¹¹⁸

With the available laws, it is also potentially difficult for an elderly plaintiff to bring a successful lawsuit against a reverse mortgage lender for misleading advertising. Recent cases have shown that under New York's General Business Law section 349, "an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising' . . . [can successfully sue if] defendant engaged 'in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.'"¹¹⁹ However, some courts that have allowed recovery have based their decision on the presence of "misrepresentations, threats, and various retaliatory measures" ¹²⁰

¹¹² See, e.g., N.Y. REAL PROP. LAW §§ 280, 280-a (McKinney 2016) (exemplifying two regulations that afford protections to parties once the reverse mortgage is in place).

¹¹³ *Id.* §§ 280, 280-a.

¹¹⁴ *Id.* § 280(1)(e).

¹¹⁵ *Id.* § 280-a(1)(e).

¹¹⁶ See generally *id.* §§ 280, 280-a (exemplifying the lack of any restriction for selling tactics or commercial advertising by lenders).

¹¹⁷ See Assemb. B. 8305, 232nd Reg. Sess. (N.Y. 2009) (enacted).

¹¹⁸ See *id.* (stating that proceeds from a reverse mortgage will not be considered income for tax purposes).

¹¹⁹ *Richstone v. Everbank Reverse Mortg. LLC*, 910 N.Y.S.2d 408 (Sup. Ct. 2009) (quoting *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 897 (N.Y. 1999)).

¹²⁰ *Richstone*, 910 N.Y.S.2d (quoting *Scavo v. Allstate Ins. Co.*, 657 N.Y.S.2d 193, 195 (App.

New York has laws in place that attach additional civil penalties for consumer frauds against the elderly.¹²¹ New York General Business Law section 349-c includes “deceptive practices and false advertising” as a consumer fraud.¹²² Further, provision 2(b) of this statute weighs whether “defendant’s conduct caused an elderly person or persons to suffer severe loss or encumbrance of a primary residence”¹²³ However, under these provisions, an elderly person is defined as “a person who is sixty-five years of age or older.”¹²⁴ As mentioned earlier, a reverse mortgage is available to those over the age of sixty-two,¹²⁵ thereby appearing to create a three-year gap of certain people vulnerable to lenders who are not subject to increased liability. Also, while this general statute is in place, it is not tailored to thoroughly protect the elderly from misleading advertisements.

In June 2014, New York Attorney General Eric Schneiderman reached a settlement with a Long Island mortgage company after the company mailed ten thousand advertisements to New York seniors to convince them to take out reverse mortgages.¹²⁶ The company, New View Mortgage, claimed that there were never any fees, and that “[y]our [h]eirs [will] inherit all remaining equity,” without saying that heirs are responsible for paying off the mortgage.¹²⁷ Additionally, the envelopes used by New View Mortgage contained messages inferring that their company was a “Government Lending Division,” and the sender of the advertisement was falsely represented as the government’s HECM program.¹²⁸ These were misrepresentations, yet the company was only fined \$12,500.¹²⁹ Such a low fine would amount to only about \$1.25 per mailer, and is so low that it is unlikely to deter future misconduct by companies who wish to employ similar misleading advertising tactics. Although at the time of this writing, New York does not have specific laws that directly address misleading advertising of reverse mortgages, other states have begun to tackle this issue.

Div. 1997)).

¹²¹ See, e.g., N.Y. GEN. BUS. LAW § 349-c (McKinney 2016).

¹²² *Id.* § 349-c(2)(a).

¹²³ *Id.* § 349-c(2)(b)(2).

¹²⁴ *Id.* § 349-c(1).

¹²⁵ *Frequently Asked Questions, supra* note 7.

¹²⁶ See Press Release, N.Y.S. 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>.

¹²⁷ *Id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

IV. OTHER STATES' RESPONSES

Other states have more specific laws related to reverse mortgages than New York.¹³⁰ On January 1, 2016, the Illinois Reverse Mortgage Act took effect,¹³¹ which requires a “cooling-off period” of three business days after a person enters into a reverse mortgage agreement.¹³² During this time, potential borrowers are encouraged to consider their decision and seek additional information from a reverse mortgage counselor.¹³³ This three-day period cannot be waived¹³⁴ and is an important step in the right direction. It allows the elderly person time to adequately consider the material terms of a reverse mortgage agreement, and even provides that written correspondence related to the agreement must be made in “at least 12-point font.”¹³⁵ The new Illinois law was passed due to misunderstandings caused by reverse mortgage advertisements.¹³⁶ As one official noted: “We particularly want to make sure seniors understand all the things they need to do to avoid defaulting on the loan, such as keeping current on their property taxes and homeowner insurance.”¹³⁷ Missouri also promulgated strict reverse mortgage advertising laws.¹³⁸ In pertinent part, the statute states that “[a]dvertising . . . may not be false, misleading or deceptive. No person . . . may advertise in any manner so as to indicate or imply that the person’s interest rates or charges for loans are in any way recommended, approved, set or established by the state or federal government”¹³⁹

New Jersey has passed prohibitions on the advertising of financial incentives or discounts for those who fund or finance funeral arrangements ahead of time through reverse mortgages.¹⁴⁰ This law puts a limit on the sales tactics and advertisements that can mislead an elderly person into believing that a reverse mortgage is urgent

¹³⁰ See, e.g., 765 ILL. COMP. STAT. 945/20 (2016); MO. REV. STAT. § 443.855 (2016); N.J. STAT. ANN. § 45:7-90 (West 2016).

¹³¹ 765 ILL. COMP. STAT. 945/20.

¹³² See *id.* § 945/20(c).

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ *Id.*

¹³⁶ See Bob Palmer, *Reverse Mortgage Consumer Protections Signed into Law*, HOUSING ACTION ILL. (Aug. 11, 2015), <http://housingactionil.org/2015/08/11/reverse-mortgage-consumer-protections-signed-into-law/>.

¹³⁷ *Id.*

¹³⁸ See MO. REV. STAT. § 443.855 (2016).

¹³⁹ *Id.* § 443.855(1).

¹⁴⁰ See N.J. STAT. ANN. § 45:7-90(c) (West 2016).

and absolutely necessary at the instant moment.¹⁴¹ In Arkansas, the Reverse Mortgage Protection Act requires that advertisers use 16-point font or larger on advertising and application materials that caution an elderly person to obtain counseling before proceeding past the initial phases of obtaining a reverse mortgage.¹⁴²

Oregon has enacted clear and thorough requirements for reverse mortgage advertising. First, any “advertisement, solicitation or communication that a lender or an agent or affiliate of the lender intends as an inducement for a person to apply for or enter into a contract for a reverse mortgage, . . . shall include a clear and conspicuous summary of the terms of the reverse mortgage.”¹⁴³ Within this statute, “clear and conspicuous” is defined as:

In larger type than the surrounding text or in a type, color or font that contrasts with surrounding text of the same size or set off from surrounding text by symbols or other marks in a manner that draws attention; or . . . [s]poken in a volume and cadence that is sufficient to enable a reasonable person to hear and understand.¹⁴⁴

Interestingly, Puerto Rico established a “good faith,” relationship between the applicant and a person who is recommending or selling reverse mortgages.¹⁴⁵ The law sets up an obligation to advertise or sell “in good faith, and provide fair treatment . . .”¹⁴⁶ The law forbids any false or deceptive representation of products that would financially exploit an elderly person.¹⁴⁷ This good faith relationship brings into question the television advertisements discussed earlier in this article: are celebrity spokespersons acting in good faith for the interests of all viewers, or are they selling a product and receiving compensation for their efforts? Admittedly, reverse mortgages will help many individuals, but not all.

In 2015, the CFPB initiated suit in U.S. District Court for the District of Maryland against All Financial Services, LLC for misleading advertisements in violation of Regulation N.¹⁴⁸ The complaint alleges that the defendant disseminated at least four types of commercial mailers, with the total copies distributed amounting to

¹⁴¹ See *id.* § 45:7-90(a).

¹⁴² See ARK. CODE ANN. § 23-54-106(a) (2016).

¹⁴³ See OR. REV. STAT. § 86A.196(2)(a) (2016).

¹⁴⁴ *Id.* § 86A.196(2)(b)(A).

¹⁴⁵ See P.R. LAWS ANN. tit. 7, § 3062 (2013).

¹⁴⁶ *Id.*

¹⁴⁷ See *id.* § 3062(d).

¹⁴⁸ See Complaint at 1, *Consumer Fin. Prot. Bureau v. All Fin. Servs., LLC*, No. 1:15-cv-00420-JFM (D. Md. Feb. 12, 2015).

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more than 420,000.¹⁴⁹ The advertisements featured an “eagle clutching what appears to be arrows . . . closely resembl[ing] the eagle incorporated into the Great Seal of the United States.”¹⁵⁰ Further, each document was mailed in an envelope labeled: “Important Document Enclosed,” and contained citations to the U.S. Code provisions relating to mail tampering.¹⁵¹ The documents inside the envelopes were printed on headings entitled: “Government Lending Division,” and contained misleading information about payment structures and fees.¹⁵² Hopefully, this case will bring further attention to the continuing problems with reverse mortgage advertising.

V. PREVALENCE AND SERIOUSNESS OF DECEPTIVE ADVERTISING

There are multiple government agencies that are charged with providing consumer protection for seniors obtaining an HECM loan.¹⁵³ With banks such as Wells Fargo, Bank of America, and MetLife exiting the reverse mortgage market, federal banking oversight in the industry was greatly reduced, as these companies held much of the market share.¹⁵⁴ The Department of Housing and Urban Development also plays a regulatory role in how HECM loans are advertised.¹⁵⁵ After repeated complaints about misleading advertisements, the agency responded by distributing a five-page letter to all mortgagees.¹⁵⁶ Without changing any policies or requiring immediate compliance, the letter reminds all mortgagees of the policies that have already been in place.¹⁵⁷ Unlike other reverse mortgage regulations included in the letter, the section on misleading advertisements and marketing techniques lacked any specific reference to laws or regulations that can be referenced to ensure compliance.¹⁵⁸

¹⁴⁹ *See id.* at 5, 6.

¹⁵⁰ *Id.* at 7.

¹⁵¹ *See id.*

¹⁵² *See id.* at 8, 9, 10.

¹⁵³ *See* CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 108.

¹⁵⁴ *Id.*

¹⁵⁵ *See* Black, *supra* note 100, at 109.

¹⁵⁶ *See* Mortgagee Letter 2014-10 from Carol J. Galante, Assistant Sec’y for Hous., Fed. Hous. Comm’r, Dep’t of Hous. & Urban Dev., to All Approved Mortgagees 2 (June 18, 2014), <https://portal.hud.gov/hudportal/documents/huddoc?id=14-10ml.pdf>. A “mortgagee” is defined as the lender in a mortgage loan. *See Mortgagee*, BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁵⁷ *See* Galante, *supra* note 156, at 1, 2–4.

¹⁵⁸ *See id.* at 4.

Arguably, when current policies are not working or being ignored, a tightening of such policies should be made by the government agency. Such changes have been made in other areas concerning reverse mortgages,¹⁵⁹ so there is no reason why changes cannot be extended into the realm of marketing and advertising. Most recently, effective March 2, 2015, apparent changes were made to benefit the program itself without a focus on consumers themselves; the changes “are necessary to improve fiscal soundness and protect the viability of the HECM program.”¹⁶⁰

Recently, in 2015, the CFPB found a California lender was actively making misrepresentations in advertisements by using seals and logos of the U.S. Department of Veteran Affairs and the FHA.¹⁶¹ The relevant advertisements were printed mailers sent to over one hundred thousand consumers in California.¹⁶² The mailers also contained wording regarding “threatening fines and imprisonment for tampering with the letter,” encouraging consumers to believe that the mailers were from the U.S. government.¹⁶³ Such actions created “net impressions . . . [that] were likely to mislead reasonable consumers about whether the mortgages . . . offered were related to a government benefit or were endorsed or sponsored by a government program. A goal of the . . . mail[ers] . . . was to persuade consumers to call . . . [the lender] about the advertised mortgage products.”¹⁶⁴ Additionally, the advertisements made false statements of interest rates, payment schedules, taxes, insurance, and risk.¹⁶⁵

Government has long been involved in regulating the way in which products are advertised and marketed to consumers. For example, most recently, the Family Smoking Prevention and Tobacco Control Act tightened restrictions on the marketing and advertising of tobacco products.¹⁶⁶ State and local authorities can now limit impulse

¹⁵⁹ See, e.g., *Wall Street Reform: The Dodd-Frank Act*, *supra* note 105.

¹⁶⁰ Mortgagee Letter 2014-21 from Biniam Gebre, Acting Assistant Sec’y for Hous., Fed. Hous. Comm’r, Dep’t of Hous. & Urban Dev., to All Approved Mortgagees 2 (Nov. 10, 2014), <https://portal.hud.gov/hudportal/documents/huddoc?id=14-21ml.pdf>.

¹⁶¹ See Consent Order at 1, *In re* RMK Financial Corp., No. 2015-CFPB-0007 (Apr. 9, 2015).

¹⁶² See *id.* at 4.

¹⁶³ *Id.* at 6.

¹⁶⁴ *Id.* The described actions are in violation of “Regulation N, 12 C.F.R. § 1014.3, [which] prohibits any person from making ‘any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product.’” *Id.* at 7.

¹⁶⁵ See *id.* at 9.

¹⁶⁶ See, e.g., *Tobacco Control Act*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm246129.htm> (last visited Sept. 24, 2016). It is important to note, before this legislation, “advertising and promotion of cigarettes was largely exempt from regulation due to preemptive provisions in the Federal Cigarette

cigarette-buying decisions by regulating the displays of cigarettes near cash registers, as well as the number of print advertisements that are placed within a retail store.¹⁶⁷ They can also require only black and white text in advertisements except at adult-only stores.¹⁶⁸ As the tobacco industry has revolutionized the restrictions have adapted, so much that smokeless tobacco and electronic cigarette advertisements are now required to display a warning of cancer and other hazardous effects.¹⁶⁹

The food industry has also been subject to much regulation aimed at protecting vulnerable youth from making impulse decisions about their choices for school lunches.¹⁷⁰ For example, former first lady Michelle Obama pioneered reform in schools and the advertisement of sugary and fattening foods geared toward children.¹⁷¹ The guidelines affect television, print, and online advertisements that promote products without stating all of the related health side effects.¹⁷²

On its face, the reverse mortgage market is not similar to these industries; however, the advertising effects are similar as they result in a loss to individuals.¹⁷³ Additionally, food and tobacco advertising laws also aim to protect children, who are a vulnerable group.¹⁷⁴ The elderly are also extremely vulnerable, and there have been other areas in which lawmakers have sought to protect the elderly from misleading practices.¹⁷⁵

One common advertising ploy that has long plagued seniors is “free lunch seminars.”¹⁷⁶ States such as Arkansas were fed up with financial firms targeting the elderly, and legislators passed a law

Labeling and Advertising Act (FCLAA).” TOBACCO CONTROL LEGAL CONSORTIUM, TOBACCO PRODUCT MARKETING RESTRICTIONS 1 (2009), <http://publichealthlawcenter.org/sites/default/files/fda-5.pdf>.

¹⁶⁷ See TOBACCO CONTROL LEGAL CONSORTIUM, *supra* note 166, at 3.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 1.

¹⁷⁰ See William Neuman, *U.S. Seeks New Limits on Food Ads for Children*, N.Y. TIMES (Apr. 28, 2011), http://www.nytimes.com/2011/04/29/business/29label.html?_r=0.

¹⁷¹ See Helena Bottemiller Evich & Darren Samuelsohn, *The Great FLOTUS Food Fight*, POLITICO (Mar. 17, 2016), <http://www.politico.com/agenda/story/2016/03/michelle-obama-healthy-eating-school-lunch-food-policy-000066>.

¹⁷² See Neuman, *supra* note 170.

¹⁷³ See, e.g., Jennifer L. Harris & Samantha K. Graff, *Protecting Young People from Junk Food Advertising: Implications of Psychological Research for First Amendment Law*, 102 AM. J. PUB. HEALTH 214, 216, 218, 219–20 (describing the negative effects that misleading advertising can have on consumers).

¹⁷⁴ See Neuman, *supra* note 170.

¹⁷⁵ See, e.g., Jennifer Levitz, *Laws Take on Financial Scams against Seniors*, WALL STREET J. (May 19, 2009), <http://www.wsj.com/articles/SB124269210323932723/>.

¹⁷⁶ See *id.*

that “doubles the civil penalties for financial securities violations when the victim is 65 or older.”¹⁷⁷ Other measures have been taken, such as establishing:

“[S]uitability” standards, meaning they can’t sell a product that doesn’t make sense given a person’s age, income, or liquidity needs. They can’t misrepresent products. Sales materials and oral presentations must show a balanced picture, with both the risks and benefits of investing in the product. Any statements to . . . [consumers regarding] no market or credit risk “would raise serious questions under [the Financial Industry Regulatory Authority’s] advertising rules[.]”¹⁷⁸

There is no overwhelming reason why reverse mortgage advertisements cannot be subject to stiffer regulations or increased penalties for intentional violations of law. Often, “[e]xisting laws are incapable of effectively addressing the sheer volume and staggeringly sophisticated methodologies employed by [sellers],” who target the elderly with sales tactics.¹⁷⁹ Such a reform, occurred in the telemarketing industry, where advances such as do not call lists and stiff penalties for violators increased protection.¹⁸⁰

VI. RECOMMENDATION

While existing law is mostly sufficient as a whole, New York State should implement strict, narrowly tailored regulations that directly address the threats posed by any deceptive advertising of reverse mortgages. As discussed previously, other states have already taken significant steps to address this problem to protect the potential elderly pool of reverse mortgage applicants.¹⁸¹ If deceptive advertising is eliminated then many of the downfalls or later issues

¹⁷⁷ *Id.* Other states have also taken action against those who commit financial crimes against the elderly. *See id.* For example: “If you target an older person in Michigan, we’re going to target you,” sa[id] Ken Ross, commissioner of the Office of Financial and Insurance Regulation for the state, which also has passed legislation protecting the elderly.” *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Martin, *supra* note 62, at 3. This article continues on to state that:

Because current regulations are too seldom enforced and inadequately matched to the volume and complexity of the problem, they provide little or no deterrence for a malevolently pervasive and flourishing industry. Current default rules also fail to protect the elderly, who lose their assets, along with their independence, before legal remedies become available.

Id.

¹⁸⁰ *See id.* at 4.

¹⁸¹ *See supra* Part IV.

that arise with reverse mortgages will not be present, as elderly individuals who correctly identify that the product is not ideal for them will not move forward with the loan agreements.

Additionally, New York should create tougher civil penalties for those who target the elderly population through deceptive advertisements. It is saddening to think that private companies doing business in New York pay a relatively small fine after sending mailers to thousands of elderly individuals portraying themselves as offering reverse mortgages on behalf of the United States government.¹⁸² Convincing an elderly person to commit to a reverse mortgage loan through deceptive practices is arguably a deprivation of property because through no fault of their own, they may eventually default on payments and lose their home. The legislature should create mandatory minimum fines and possible criminal penalties for constant repeat offenders who incorrectly market reverse mortgage products. Other jurisdictions have already created these laws.¹⁸³

Decisions from courts in New York show the need for reform, and the legislature needs to enact laws that address these issues. For instance, an elderly homeowner in a recent New York case was sold a reverse mortgage using deceptive tactics and then received a default notice that listed no reasons for the default.¹⁸⁴ In fact, the default was based on the elderly individual's lack of payment on her municipal water bill.¹⁸⁵ The court urged reform, stating that current practices being allowed are "unconscionable."¹⁸⁶

¹⁸² See Press Release, *supra* note 126 (providing examples of the low and toothless penalties imposed on lenders in New York). It is important to note that society is often faced with this problem, as 2016 presidential candidate Ted Cruz was accused of sending mailers to voters in Iowa that appeared to be official correspondence from the state government; a tactic that businessman, and now President, Donald Trump immediately argued was deceptive and illegal. See Ryan Lizza, *Ted Cruz's Iowa Mailers are More Fraudulent than Everyone Thinks*, NEW YORKER (Jan. 31, 2016), <http://www.newyorker.com/news/news-desk/ted-cruzs-iowa-mailers-are-more-fraudulent-than-everyone-thinks>. Iowa's secretary of state, Paul Pate, chimed in on how inappropriate such a representation is:

Today I was shown a piece of literature from the Cruz for President campaign that misrepresents the role of my office, and worse, misrepresents Iowa election law. Accusing citizens of Iowa of a "voting violation" based on Iowa Caucus participation, or lack thereof, is false representation of an official act. There is no such thing as an election violation related to frequency of voting.

Id.

¹⁸³ See e.g., GA. CODE ANN. § 16-8-102 (2016); MASS. GEN. LAWS ch. 266, § 35A(b) (2016); NEV. REV. STAT. § 205.372(1) (2015).

¹⁸⁴ See *Metlife Home Loans v. Vereen*, 984 N.Y.S.2d 816, 817–19 (Sup. Ct. 2014).

¹⁸⁵ *Id.* at 817.

¹⁸⁶ See *id.* at 819 ("As such, plaintiff cannot foreclose on defendant's reverse mortgage because of her default in paying the New York City water bill. Furthermore, serving a senior

Using other states as a guide, there are essential terms that should be included in new state regulations. In pertinent part, New York should provide:

- A standard font size for all material terms in an advertisement;
- A clear and conspicuous summary of the terms of the reverse mortgage;
- An increased good faith duty for sales staff who are communicating with an elderly individual; and
- A prohibition on stating that a person's interest rates or charges for loans are in any way recommended, approved, set, or established by state or federal governments.

Additionally, those who have committed previous acts of deceptive advertising should lose the privilege of selling reverse mortgages in New York State, or be subject to a probationary period in which their sales tactics are closely monitored.

VII. CONCLUSION

Most elderly individuals work hard their entire lives to support their family and purchase a home in which they plan to retire. Many elderly individuals suffer from financial hardships that force them to decide whether or not to pursue a reverse mortgage. This Note in no way implies that a reverse mortgage is never appropriate, but rather emphasizes that advertising of reverse mortgages is often unfairly depriving elderly individuals of the ability to make a detailed and thoughtful decision before potentially jeopardizing financial security in their home.

The majority of “lenders follow the rules, [but] these lenders are undermined by the predatory lenders who look to take advantage of the elderly to make a quick profit.”¹⁸⁷ Society needs to notice the financial threats the elderly face as similar to the notion that “[f]rom a young age, your parents taught you to be aware of stranger-danger. If you have elderly parents, you may have noticed the irony. Now you're telling your parents to be wary of people out to do them harm.”¹⁸⁸ New York can supplement existing laws to protect the

citizen holding a reverse mortgage with a complaint that fails to specify what the default is can only be described as unconscionable.”).

¹⁸⁷ Dan Latona, Note, *Reversing Course: Strengthening Consumer Protections for Reverse Mortgages*, 23 *Elder L.J.* 417, 452 (2016).

¹⁸⁸ Geoff Williams, *How to Protect Your Elderly Parents from Being Scammed*, U.S. NEWS: MONEY (Apr. 10, 2013), <http://money.usnews.com/money/personal-finance/articles/2013/04/10/how-to-protect-your-elderly-parents-from-being-scammed>.

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elderly from deceptive reverse mortgage advertising, and can add additional deterrents to end such advertising tactics.