



April 14, 2016

HUD Desk Officer
Office of Management and Budget
New Executive Office Building
Washington D.C. 20503

RE: Docket No. FR-5909-N-13

Dear HUD Desk Officer:

The Mortgage Bankers Association (MBA)¹ thanks the U.S. Department of Housing and Urban Development (HUD) for the opportunity to comment on the revised changes to the Federal Housing Administration's (FHA) proposed annual lender-level certification form.

HUD's current evaluation process is key to furthering its objectives of ensuring lenders are accountable for the quality of their loans, protecting consumers from lender noncompliance with FHA regulations, and assisting FHA in managing its financial risks. MBA appreciates FHA's consideration of industry concerns throughout its revision process to the loan-level and annual lender-level certifications. Multiple revisions and re-proposals of both certification forms reflect FHA's interest in developing a workable process for both lenders and FHA to serve underserved markets while maintaining a viable and sustainable program. MBA recognizes the extensive work FHA has done to incorporate the spirit of industry concerns in its final loan-level certification and appreciates FHA's attention to our recommendations to safeguard lenders from excessive False Claims Act liability for minor mistakes. By determining loan defects through an "insurability standard" in both the loan-level and annual lender-level certification, FHA demonstrates its intent to provide greater certainty and clarity regarding the types of errors that can expose lenders to False Claims Act risk. It is also a recognition of the current regulatory environment that contributes to a lack of access to credit for its consumers.

Despite these efforts, the certifications still fall short of providing the necessary safeguards for responsible FHA lenders with high-performing and low-defect programs. Though significant progress has been made, both certifications continue to lack meaningful changes to positively influence the current lending environment. The certifications are only a portion of a larger process and full implementation of the intent of the certifications requires additional changes. In order to truly improve and expand access to credit, HUD needs to take the necessary steps to circumscribe the Department of Justice's (DOJ) ability to use subjective judgments of what constitutes a "material" false claim under the False Claims Act by:

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage-lending field. For additional information, visit MBA's Web site: www.mba.org.

- Completing full implementation of the Single Family Loan Quality Assessment Methodology (Defect Taxonomy); and
- Adopting a meaningful Quality Control (QC) program that is comprehensive, transparent, and predictable.

On the same day FHA released its final loan-level certification, DOJ published a statement on its website defending its previous investigations of FHA lenders and the pursuit of certain lenders under the False Claims Act. In this statement, DOJ reaffirmed its current position, stating that “[t]he department will continue [its] enforcement efforts by using the False Claims Act, and will *continue* to be guided by the language of the act that prohibits the submission of knowing and material false claims.”² Despite DOJ’s affirmation that “the False Claims Act requires more than mere negligence or a simple mistake to hold a person liable,”³ the industry finds little comfort in this premise due to the lack of a defined metric to classify varying levels of loan defects. This mixed messaging illuminates the complicated enforcement relationship that still exists between HUD and DOJ. In the absence of a resolution through a clear and unambiguous metric for measuring different variations of loan defects and a mechanism for validating the effectiveness of lenders’ programs, participating FHA lenders will continue using cautious, “defensive” underwriting to mitigate the risk of excessive enforcement actions for minor mistakes.

DOJ enforcement actions continue to overshadow HUD’s certification process. MBA urges HUD to complete and operationalize its Defect Taxonomy. The Defect Taxonomy is critical to establishing a regulatory declaration of the meaning of “material” when applied under the False Claims Act. The creation of a known standard is vital to achieve a concrete definition to which lenders can point if DOJ asserts a False Claims action. As MBA stated in a letter on October 14, 2014, MBA advocates the assignment of specific remedial actions for different types of underwriting errors within the Defect Taxonomy’s framework. Only a clear statement from HUD on whether a tier includes potential indemnifiable defects will remove current ambiguity and better ensure that lenders have clear expectations of the consequences associated with specific defects. Absent additional clarity, enumerating certain defect classifications, implementation of the Defect Taxonomy will not contribute to meaningful progress on the clarity still required in both certifications and will continue to allow DOJ to make subjective judgments regarding lender liability under the False Claims Act.

While HUD is reluctant to use the term “material,” instead using proxies for the concept, the False Claims Act explicitly uses this term as a statutory standard. Unless HUD’s new initiatives can be directly synchronized with the statute that DOJ uses to prosecute the lending industry, HUD’s laudable initiatives are not likely to offer meaningful relief. Consequently, even perfected certification language would leave HUD vulnerable to a misinterpretation of its regulatory intentions across Agencies.

MBA also encourages HUD to create a comprehensive, transparent, and predictable QC program. HUD already has a solid initial framework to support a more holistic approach to ensure the quality of FHA loans through the development and implementation of a robust upfront QC program. This program would provide timely and meaningful feedback to lenders on HUD’s interpretation of its underwriting guidelines and lenders’ adherence to those guidelines.

² Department of Justice, Justice Blogs, The False Claims Act & Federal Housing Administration Lending, March 15, 2016, at <https://www.justice.gov/opa/blog/false-claims-act-federal-housing-administration-lending>

³ *Id.*

These reviews are necessary to provide the certainty that is currently missing from the process and will ensure that HUD can consistently apply and enforce its standards.

MBA recognizes that the above-mentioned concerns only address the programmatic and process challenges within single-family origination, while significant servicing challenges remain. Though MBA appreciates that these issues are being addressed through a different process, MBA welcomes the opportunity to work with HUD to address these outstanding servicing issues and urges HUD to provide additional clarity and guidance as quickly as possible.

Annual Lender-Level Certification

Due to differences in the way the revised annual lender-level certification language affects single-family and potentially multifamily issues, our comments will address each separately.

I. Single-Family Comments

As previously stated, MBA commends FHA for its improvements to the language in the revised annual lender-level certification and appreciates the opportunity for an additional 30-day comment period. A notable improvement to the proposed certification's language in Section 7 narrows the certification's scope by requiring lenders to certify only to those requirements necessary to maintain HUD-FHA approval. This improvement removes the requirement that lenders certify to compliance with all FHA requirements, which essentially requires certification to loan-level compliance at the institutional level.

However, MBA has concerns that the most recently proposed language does not make HUD's intended objective in Section 7 patently clear. Specifically, given lenders' acute attention to the importance of compliance and the risk of substantial legal penalties, MBA is concerned that Section 7 of the proposed version of the annual certification does not specify which provisions are "necessary to maintain the Mortgagee's FHA approval." Rather, the Department's intent that this certification language covers only the requirements set forth in certain sections of HUD Handbook 4000.1 regarding doing business with HUD and Quality Control is set forth in a memorandum issued by HUD. Without a concrete reference to the governing regulation in the certification or through the publication of guidance by Mortgagee Letter, HUD's expressed intent in its *Summary of Public Comments* will be vulnerable to misinterpretation when reviewed across Agencies and may expose lenders to loan-level compliance liability.

As MBA stated in its November 2, 2015, letter, the industry believes that consistency and clarity in the certification language is key to the creation of a more focused compliance review that acknowledges the good faith compliance objectives of a vast majority of lenders. To this end, MBA strongly encourages HUD to cite specific concrete references to the applicable regulations and requirements that are "necessary to maintain the Mortgagee's FHA approval." MBA suggests that HUD make specific reference to the governing regulation for general FHA approval standards at 24 CFR § 202.5 or clarify its intent by Mortgagee letter to assert that lenders only need to certify to qualifications under Section I "Doing Business with FHA" and Section V "Quality Control, Oversight, and Compliance" of HUD Handbook 4000.1. MBA also suggests that the certification language state that the mortgagee "understands the certification does not address or encompass form HUD-92900-A loan level certifications." Additional clarification will ensure that all implementing Agencies adhere to HUD's intent that "the lender-level certification [does not] duplicate form HUD-92900-A with respect to loan-level

compliance.”⁴ Such clarity will benefit both lenders and HUD to ensure that the original purpose and intended benefit of this provision is maintained when interpreted by the DOJ and other Agencies.

For consistency, MBA requests an additional revision to Section 1 of the certification to read:

I certify that I am a Corporate Officer of the abovementioned Mortgagee (hereinafter referred to as “the Mortgagee”); that I am authorized to execute these certifications and acknowledgements on behalf of the Mortgagee; and that through the Certification Period I have known, or been in the position to know, whether the operations of the Mortgagee conformed to all applicable HUD regulations necessary to maintain the Mortgagee’s FHA approval as identified in HUD handbooks, guidebooks, Mortgagee letters, Title I Letters, and policies.

This change in language will reflect consistency with HUD’s intent in Section 7.

MBA also appreciates HUD’s attention to process and operational improvements related to the annual certification. However, MBA maintains its position that HUD streamline its certification clearance process through reliance on the lender’s certification statement, or on lender information disclosed through normal reporting. This will alleviate burdens for both HUD and FHA lenders throughout the certification process.

II. Multifamily Comments

Based on correspondence with HUD, MBA understands that the proposed changes to the Certification described in the subject Federal Register Notice are applicable to FHA Single Family Lenders only, and thus are inapplicable to FHA Multifamily and Healthcare (Multifamily) Lenders. This understanding is consistent with the reference in the Notice and throughout the proposed Certification language to the Single Family Housing Policy Handbook, HUD 4000.1 and the fact that the documents pertaining to these changes were posted on HUD’s Single Family Housing Policy Drafting Table (only) and not on the Multifamily or Healthcare Finance Drafting Tables.

However, MBA notes that a Comparison Document of the proposed revisions to the FHA Lender-Level Certifications (posted on the Single Family Drafting Table on March 15, 2016) explains that addition of the words “guidebooks” into the proposed revised Certification is intended “to cover policy issued by FHA’s offices of Multifamily Housing Programs and Healthcare Programs.” This reference creates confusion. MBA strongly recommends clarification specifying that the revisions apply to FHA Single Family programs.

There has nonetheless been some confusion regarding the applicability of these Single Family-specific requirements. Third-party auditors of FHA Multifamily lenders – as part of preparing multifamily lenders’ HUD-required 2015 financial statements (due March 31, 2016) – have found issues with Multifamily Quality Control plans in light of the requirements in the Single Family Handbook 4000.1. In addition, recent FHA Mortgagee Letters have been issued “To All Mortgagees” (Mortgagee Letters 2016-03 and 2016-06) -- when upon review, the substance is

⁴ U.S. Department of Housing and Urban Development, Summary of Public Comments, Office of Lender Activities and Program Compliance: FHA Lender Approval, Annual Renewal, Periodic Updates and Required Reports by FHA-Approved Lenders Solicitation of Comment (FR-5835-N-12), March 15, 2016 at: http://portal.hud.gov/hudportal/documents/huddoc?id=SFH_LenderCertSummary.pdf

clearly Single Family in nature. These Mortgagee Letters and similar guidance should be reissued, or a blanket waiver or clarification issued by HUD, to confirm the inapplicability of the above Single Family guidance to Multifamily lenders – from both a retroactive and prospective standpoint.

MBA also requests that HUD to determine, prior to the clearance and public comment process, whether a particular policy change applies to FHA Single Family, Multifamily and/or Healthcare Lenders/Mortgagees. This will help avoid confusion and unintended consequences.

Additional Comments on the Loan-Level Certification

MBA commends FHA's efforts to release the annual lender-level certification for additional comment and its publication of the final loan-level certification that determines loan defects through the insurability standard.

Recognizing the finality of the revised loan-level certification, MBA firmly supports HUD's intent to only hold lenders liable for mistakes that would have altered the decision to approve the loan. This policy will provide greater certainty and clarity regarding the types of errors that can expose lenders to False Claims Act risk. However, MBA requests that HUD issue a technical correction on Page four of the loan-level certification in Section (h) to read:

*The Mortgagee has exercised due diligence in processing this mortgage in reviewing the file documents listed at HUD Handbook 4000.1, II.A.7.b. In addition, the documents contain no defect that should have changed the processing or documentation **such that** the mortgage should not have been approved in accordance with FHA requirements.*

MBA believes that official clarification of HUD's original intent as well as further clarity of the certification's undefined terms such as "defect" and "due diligence" are vital to the future use and interpretation of this legal certification.

Conclusion

MBA urges FHA to consider the concerns above. FHA plays a critical role in creating access to affordable mortgage credit for many homebuyers with limited financial options and the Association values the importance of the FHA program and the reputation of its participating lenders. MBA recognizes FHA's commitment and obligation to serve underserved markets, hold lenders accountable for the quality of their loans, and maintain a financially stable and viable program. However, delivering on these objectives requires a partnership among stakeholders to ensure balanced standards.

MBA is committed to working with HUD to create a more sustainable and successful FHA program that is beneficial for HUD and the customers and communities FHA was designed to serve. We also welcome the opportunity to work with FHA to further improve its program by creating an evaluation process that is workable and effective for both FHA and its lenders. MBA is able to draw from a diverse membership representing different business models of FHA lenders. These members can bring further insight to the development of a process that ensures loan quality and fairly holds lenders accountable without jeopardizing the financial stability and viability of the FHA program.

Should you have questions or wish to discuss single-family comments, please contact me at 202-557-2878 or Tamara King, Vice President of Residential Policy and Member Engagement,

at (202) 557-2758 or TKing@mba.org. If you wish to discuss multifamily comments, please contact Eileen Grey, Associate Vice President of Multifamily, (202) 557-2747 or EGrey@mba.org.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pete Mills".

Pete Mills
Senior Vice President
Residential Policy and Member Engagement