



MORTGAGE BANKERS ASSOCIATION

July 12, 2018

J. Paul Compton, Jr.  
General Counsel  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street, SW  
Washington, DC 20410

**Re: Government National Mortgage Association: Loan Seasoning for Ginnie Mae Mortgage-Backed Securities – Interpretive Rule [Docket No. FR-6112-IA-01]**

Dear Mr. Compton:

On behalf of the Mortgage Bankers Association (MBA),<sup>1</sup> I am writing to share our views regarding the interpretive rule published by the U.S. Department of Housing and Urban Development (HUD) with respect to section 309 of the Economic Growth, Regulatory Relief and Consumer Protection Act (Act).<sup>2</sup> MBA appreciates the opportunity for public comment provided by HUD, particularly in light of the exemption granted to interpretive rules under the Administrative Procedure Act.

Based upon our assessment of the statutory provisions, we thoroughly agree with and support HUD's determination that mortgage-backed securities (MBS) guaranteed by the Government National Mortgage Association (Ginnie Mae) prior to enactment of the Act are unaffected by the Act, and further that Ginnie Mae is not prohibited from guaranteeing Multiclass Securities for which the trust assets consist of interests in prior-issued Ginnie Mae-guaranteed certificates with underlying mortgage loans that may not comply with the new seasoning requirements contained in the Act.

However, we disagree with HUD's determination that mortgage loans already in process or closed at the time of the Act, but which do not meet the new seasoning

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<sup>1</sup> 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, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to 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 2,300 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 website: [www.mba.org](http://www.mba.org).

<sup>2</sup> 83 FR 31042. Available at: <https://www.federalregister.gov/documents/2018/07/03/2018-14354/government-national-mortgage-association-loan-seasoning-for-ginnie-mae-mortgage-backed>.

requirements contained in the Act, are ineligible to serve as collateral for Ginnie Mae MBS. This determination is not supported by congressional intent, practical application in the mortgage market, or the considerations that led to HUD's determination regarding Multiclass Securities.

### ***The Problem of Loan Churning***

MBA appreciates the urgent need to address the problem of mortgage loan churning, particularly with respect to refinances guaranteed by the U.S. Department of Veterans Affairs (VA). As was noted by MBA Chairman Dave Motley in recent testimony before a House of Representatives subcommittee, "MBA fully supports supervisory efforts to improve the policing of the market, as well as appropriate regulatory and legislative efforts to remove the ability or incentive for lenders to engage in churning."<sup>3</sup> Such efforts would better protect individual veteran borrowers who are the target of churning, as well as lower mortgage rates for all borrowers in the government housing programs that are supported by the Ginnie Mae MBS guaranty.

### ***Ginnie Mae Multiclass Securities***

In the interpretive rule, HUD argues that the specific statutory language in section 309 of the Act should be construed to apply only to MBS—not Multiclass Securities. This argument is largely predicated on the narrow reference to a security that is "backed by a mortgage" rather than the broader reference in the Ginnie Mae Charter to securities that are "backed by a trust or pool composed of mortgages." Further, as is also noted in the interpretive rule, the Ginnie Mae Charter itself makes a distinction between securities "backed by mortgages" and securities "backed by a trust or pool of securities or notes guaranteed by [Ginnie Mae]."

This distinction is indeed critical, as it is well understood to represent the difference between MBS and Multiclass Securities. Because the statutory language uses nearly identical phrasing to the description of MBS found in the Ginnie Mae Charter, it is natural and appropriate to conclude that the relevant statutory provision is intended to apply only to MBS. Additionally, HUD argues that the use of "MBS" rather than "Multiclass Securities" in other portions of section 309 of the Act provides evidence that the relevant statutory provision is meant to solely reference MBS. This argument is compelling and further supports the determination made by HUD that Ginnie Mae is not prohibited from guaranteeing Multiclass Securities, even if the underlying

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<sup>3</sup> Motley, J. David, "Home Loan Churning Practices and How Veteran Homebuyers are Being Affected." Testimony before the U.S. House Committee on Veterans' Affairs, Subcommittee on Economic Opportunity. January 10, 2018. Available at: [https://www.mba.org/Documents/1%202018%20MBA\\_Testimony\\_Motley.pdf](https://www.mba.org/Documents/1%202018%20MBA_Testimony_Motley.pdf).

securities are backed by mortgage loans that may not comply with the new seasoning requirements contained in the Act.

### ***VA-Guaranteed Refinances***

#### Failure to Advance the Legislative Aim of the Statute

While the Act should be interpreted to apply these seasoning requirements only to MBS, it is far from apparent that “any refinanced VA mortgage loan that does not meet [these] requirements is ineligible to serve as collateral for Ginnie Mae MBS,” as HUD argues in the interpretive rule. As noted by HUD:

1. the purpose of the statute is “to protect both veterans and investors by discouraging the unfair lending practice of ‘churning’”;
2. prohibiting Ginnie Mae from guaranteeing Multiclass Securities containing MBS guaranteed prior to the Act would not further this purpose because doing so “can have no impact on lender behavior”; and
3. therefore, applying the statute to prohibit inclusion of prior-issued MBS in Multiclass securities “does not advance the legislative aim” of the statute.

MBA strongly believes the same rationale can and should be applied to individual loans that were in process, closed, or funded prior to the Act. While these loans may not have been sold into the secondary market via Ginnie Mae MBS by the time of the Act, the relevant action—the processing of the loan—had taken place prior to the Act. These loans maintain a valid VA guaranty, and prohibiting their inclusion in Ginnie Mae MBS does not help the veteran, as the refinance transaction has already been consummated, nor does it help the investor, as the original loan has already been paid off due to the refinance. And with respect to these loans, lender behavior cannot be influenced because the behavior being targeted by the statute has already taken place. Therefore, based on the arguments made in the interpretive rule, HUD’s determination results in an outcome that does not advance the legislative aim of the statute.

#### Frustration of the Purpose of the Statute

Not only does the outcome of HUD’s determination fail to advance the legislative aim of the statute, it also directly frustrates the purpose of the statute. By prohibiting a subset of VA-guaranteed refinances from serving as collateral for Ginnie Mae MBS, HUD’s determination effectively “orphans” these loans, reducing their liquidity and lowering their market value. As such, the lenders that originated these loans in accordance with the VA and Ginnie Mae requirements in place at the time will likely take losses, which in some cases may be substantial.

The interpretive rule correctly notes that precluding the guarantee of Multiclass Securities collateralized by securities with existing Ginnie Mae guarantees “would ‘orphan’ billions of dollars worth of outstanding Ginnie Mae securities,” which would in turn “frustrate the reasonable expectations of Ginnie Mae investors who purchased Ginnie Mae MBS at prices that explicitly contemplated their ultimate inclusion in Multiclass Securities.” The interpretive rule, however, ignores the similar orphaning of VA-guaranteed refinances, which frustrates the reasonable expectations of lenders who originated the loans in a manner that explicitly contemplated their ultimate inclusion in Ginnie Mae MBS.

In arriving at its determination regarding Multiclass Securities, HUD notes the potential for adverse effects on veterans, as prohibiting the Ginnie Mae guaranty of certain Multiclass Securities would “have a negative impact on the liquidity of the Multiclass Securities market, driving up VA mortgage rates and restricting the availability of the VA mortgage loans to the very veterans that the statute was intended to protect.” The orphaning of VA-guaranteed refinances, however, has already threatened lender confidence in the VA mortgage loan program and the Ginnie Mae execution, and could result in some lenders choosing to exit their VA business lines. It is possible that some lenders with substantial exposure to the orphaned loans could potentially be forced out of business entirely. This outcome would likely result in fewer choices and higher mortgage rates for veterans, frustrating the purpose of the statute in much the same way as HUD posits would be the case with respect to a prohibition on the guaranty of certain Multiclass Securities.

And HUD correctly notes that, with respect to Multiclass Securities, because such a prohibition “would harm, rather than help, veterans, it is difficult to imagine that Congress intended to cause significant disruption to the Multiclass Securities program beyond what was needed to stop the undesirable lending practices *on a prospective basis* [emphasis added].” Again, this logic can and should be applied to the orphaned VA-guaranteed refinances. Because a prohibition on any in-process or closed loans serving as collateral for Ginnie Mae MBS cannot change lender behavior with respect to these loans, the market disruption that has resulted goes well beyond what is needed to stop the undesirable lending practices on a prospective basis. Indeed, the two sponsors of this section of the legislation in the Senate confirmed in a June 2018 letter to HUD that “it was not our intention to ‘orphan’ those loans.”<sup>4</sup>

#### Disturbance of the Relationship between VA and Ginnie Mae

In the interpretive rule, HUD also argues that a “holistic reading of section 309” is a necessary component of its analysis. The interpretive rule, however, does not reflect

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<sup>4</sup> U.S. Senators Thom Tillis and Elizabeth Warren, “Letter to J. Paul Compton, Jr.” June 11, 2018.

consideration of the important similarities in the loan seasoning requirements placed on VA in section 309(a) of the statute and those placed on Ginnie Mae in section 309(b) of the statute. The required loan seasoning period is defined in the same manner in each of these instances—no less than 210 days following the date that the first monthly payment is made, as well as no less than six monthly payments made by the borrower.

The use of the same loan seasoning requirements for VA and Ginnie Mae likely reflects the historical relationship between these agencies, in that all VA-guaranteed loans have previously been eligible for Ginnie Mae pooling. By explicitly defining the loan seasoning period in the same way in sections 309(a) and 309(b), it appears Congress intended to preserve this relationship and ensure that all VA-guaranteed loans retain their Ginnie Mae pooling eligibility. However, the HUD determination has led to an entirely different outcome, by which a subset of otherwise valid VA-guaranteed loans cannot serve as collateral for Ginnie Mae MBS. This interpretation of the statute is incongruent with the most reasonable understanding of congressional intent, based on both the specific language used in the statute and the historical relationship between VA and Ginnie Mae.

#### VA Implementation of the Statute

As a practical matter, there is also precedent for a more reasonable interpretation of the statute. To implement the new requirements of section 309(a), VA issued a circular on May 25, 2018 that included provisions pertaining to fee recoupment, net tangible benefit, and loan seasoning.<sup>5</sup> With respect to loan seasoning, the statute states that “a loan to a veteran...that is refinanced may not be guaranteed or insured” until it satisfies the seasoning requirements. Because no effective date is provided in the statute, the requirements are understood to take effect immediately. VA confirms this interpretation, noting in the circular that “program participants must be aware of important program changes that go into effect immediately.”

However, in applying the requirements of the statute, the circular specifies that “*loan applications taken on or after May 25, 2018* that do not meet the...requirements will not be eligible for guaranty by VA [emphasis added].” Therefore, VA refinances already applied for and in process, but that had not closed by May 25, 2018, were still eligible for the VA guaranty. By limiting the implementation of the requirements to loan applications taken on or after the date of the circular, VA was more faithfully adhering to congressional intent and successfully ensured only prospective application of the statute. As a result, there was no market disruption with respect to

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<sup>5</sup> VA Circular 26-18-13, “Policy Guidance Update: VA Refinance Loans and the Economic Growth, Regulatory Relief and Consumer Protection Act.” May 25, 2018. Available at: [https://www.benefits.va.gov/HOMELOANS/documents/circulars/26\\_18\\_13.pdf](https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_18_13.pdf).

the eligibility of loans for VA guarantees, and VA did not produce negative impacts to market participants beyond what is needed to stop the undesirable lending practices on a prospective basis.

**Recommendation**

To limit this market disruption, better adhere to the reasonable understanding of congressional intent, and more consistently apply the arguments made with respect to Multiclass Securities in the interpretive rule, we urge HUD to reconsider its determination regarding the eligibility of VA-guaranteed refinances that were in process or closed at the time of the Act to serve as collateral for Ginnie Mae MBS. HUD should follow the precedent set by VA in implementing section 309 of the Act, which would apply the loan seasoning requirements of section 309(b) as a necessary condition to obtain the Ginnie Mae guaranty for MBS backed by VA refinances with applications taken on or after May 25, 2018. Such an interpretation would allow Ginnie Mae to more sensibly protect veterans and investors in accordance with the purpose of the statute.

Thank you in advance for your consideration of these comments. Should you have questions or wish to discuss these comments, please contact Dan Fichtler, Director of Housing Finance Policy, at (202) 557-2780 or [dfichtler@mba.org](mailto:dfichtler@mba.org).

Sincerely,



Pete Mills  
Senior Vice President  
Residential Policy and Member Engagement

cc: Regulations Division, Office of the General Counsel

cc: Michael R. Bright  
Executive Vice President and Chief Operating Officer  
Ginnie Mae