



July 14, 2015

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Reports Management Officer, QDAM  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW., Room 4176  
Washington, DC

**RE: Docket No. FR-5835-N-06**

The Mortgage Bankers Association (MBA)<sup>1</sup> thanks the U.S. Department of Housing and Urban Development (HUD) for this opportunity to comment on the proposed changes to its loan-level certification form, HUD 92900-A, *HUD/VA Addendum to Uniform Residential Loan Application*. The goal of this revision to the certification is to clarify the scope of liability associated with errors that can occur in the origination of Federal Housing Administration (FHA)-insured mortgages, and to foster a strong culture of quality control in the program.

MBA agrees with this goal because it is in the best interests of lenders, FHA, and consumers, to ensure that the FHA can operate safely while continuing to serve as a gateway for affordable mortgage credit. MBA also believes it is in the best interest of all stakeholders to have a loan-level certification that acknowledges the commitment to high-quality, good faith underwriting exhibited by the vast majority of lenders.

**The Importance of Loan-Level Certifications**

When a lender makes a loan and seeks to have it guaranteed by FHA, the underwriter is required to sign a certification, specific to that loan, affirming that the lender has complied with FHA's underwriting requirements and guidelines. FHA must manage the amount of risk it assumes and, when FHA insures a loan, it is assuming the risk of that loan. When a lender signs a loan-level certification, that lender is certifying that the loan is of an acceptable risk level to the FHA. If that loan defaults, the lender will most likely file a claim with the FHA. If it is determined, however, that the loan file contains a mistake of virtually any type or magnitude, the lender may be required to reimburse or indemnify FHA for the cost of the claim.

Lenders must make loan-level certifications in addition to annual certifications attesting to compliance with program requirements, including, among others, net worth and quality control requirements. Lenders take signing these legal documents very seriously. Failure to comply

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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, 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](http://www.mba.org).

with these requirements has serious ramifications including steep fines, reputational damage, loss of FHA-approval, and possibly additional legal liability. It is, without question, the goal of mortgage lenders to underwrite loans that are compliant with all necessary requirements and that will be sustainable for the borrower.

### **HUD's Certifications and Their Impact on Access to Credit**

For many years, lenders could operate with some confidence that they could make reasonable underwriting decisions based on the information available to them, and that they would be liable only if they had made a significant underwriting error that would have caused the loan to be ineligible for FHA insurance or would significantly increase the risk of loss to the FHA if the mortgage were to default. In recent years, however, the broad language in the loan-level certifications opened the door for lenders to be held financially liable for even very minor errors, including those that had no impact on the loan's insurability or potential loss severity. As a result there has been a surge of enforcement actions—by both HUD and the Department of Justice—imposing double and treble damages using the False Claims Act, the Program Fraud Civil Remedies Act and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).<sup>2</sup>

This surge in high-cost and unpredictable enforcement actions incentivizes lenders to do whatever is necessary to minimize risk. What risk lenders cannot minimize through tighter underwriting standards, many have minimized by shrinking the volume of FHA originations, resulting in a tighter credit market. Indeed, the average FHA borrower credit score rose to 680 in FY 2014, up from 640 in FY2007.<sup>3</sup> Many creditworthy borrowers with credit profiles that place them near the limits of FHA's minimum credit guidelines are unable to get loans.

Loan-level certifications will best effectuate the goals of quality and access when it is clear that lenders are certifying not that the loan is entirely free from error, but that they have made reasonable underwriting determinations in good faith. The purpose and effectiveness of these certifications is minimized, however, when so many enforcement actions emerge from errors that do not bear any relationship to the seriousness of the defect.

### **MBA's Certification Principles**

MBA believes that a properly scoped loan-level certification can and should be used by HUD to hold lenders accountable for the quality of loans they originate through the FHA program. To accomplish this objective, however, we believe that the language in the loan-level certification should reflect a few key principles:

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<sup>2</sup> The False Claims Act is a federal statute imposing liability on any person who knowingly presents a false or fraudulent claim for payment or approval to the government. There have been a growing number of enforcement actions in which the government alleged that the presence of underwriting deficiencies rendered the loan-level certifications false, and that as a result of these false certifications, HUD accepted loans ineligible for FHA insurance, which ultimately defaulted and resulted in significant losses to the FHA. FIRREA prohibits making false statements to HUD with the intent to defraud or deceive HUD or knowingly make false statements for the purpose of influencing HUD's actions, and penalties are typically several million dollars per violation.

<sup>3</sup> Annual Report to Congress: Regarding the Financial Status of the FHA Mutual Mortgage Insurance Fund, Fiscal Year 2014 (November 17, 2014) available at [http://portal.hud.gov/hudportal/documents/huddoc?id=FY2014FHAAnnRep11\\_17\\_14.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=FY2014FHAAnnRep11_17_14.pdf)

- Loan-level underwriting certifications should recognize that underwriting entails subjective judgments.
- Liability should only arise in the event of a) knowing or reckless reliance on false statements, or b) significant underwriting errors, defined as errors that cannot be cured and would render a mortgage uninsurable.
- Lenders should be given the opportunity to cure significant errors that impact a loan's insurability or severity of loss to FHA, or HUD should be reimbursed or indemnified, in accordance with administrative procedures that will be published by FHA. If such cures are undertaken and the mortgagee 1) submitted the certification in the good faith belief that the loan was free of such significant errors and 2) maintains a Quality Control plan that meets published FHA standards, the mortgagee will be in compliance with FHA program requirements..
- HUD should evaluate loans based on the evidence available to the lender at the time of origination. This policy is key to HUD ensuring that lenders are held to a fair and reasonable standard. A loan should not be subject to indemnification or false claims risk when the lender underwrites a loan based on supported and verified income documentation in the original loan file, but new information becomes available after the closing that may contradict that verified data.

### **MBA's Concerns with HUD's Proposal**

MBA appreciates HUD's efforts to modify the loan-level certifications, but the proposal will not adequately address the issues, or reflect the principles discussed in this comment. Specifically, MBA has identified the following key concerns:

- It is not clear from the proposed language that lenders will be allowed to make reasonable underwriting decisions in good faith without risk of liability and penalties.
- The proposed language still appears to expose lenders to false claims risk for minor, unintentional errors, even those that would not have had an impact on a loan's insurability.
- The proposed language mandates compliance with guidance that goes beyond relevant underwriting criteria that impact risk.
- The proposed language does not acknowledge current remediation processes that FHA has in place for lenders to address underwriting issues that arise prior to or after FHA endorsement.

### **MBA's Recommendations**

Given the issues introduced by the loan-level certifications, the proposed language, and the principles that MBA believes should guide the drafting of the new loan-level certifications, MBA offers the attached alternative to HUD's proposed certification which incorporates the above principles. In brief, the proposed language would:

- Certify that underwriters have reviewed the TOTAL Mortgage Scorecard findings and have determined, based on reasonable underwriting diligence and judgment, and to the best of their knowledge that the loan complies with the written credit guidelines currently established by FHA, as published in the Handbook and/or applicable Mortgagee Letters.
- Certify that the mortgagee did not knowingly or recklessly rely on false statements in the loan application or its addendum.
- Certify the underwriter's understanding of FHA's process to remediate a significant error(s) in a loan. Specifically, if the loan contains a significant underwriting defect(s) that would render the loan uninsurable, the mortgagee will be in compliance with program requirements if the mortgagee and the loan meet certain conditions.

MBA believes that the proposed certification will effectively target the government's most powerful enforcement tools on the types of activities and bad actors that expose the taxpayer to excessive risk. At the same time, it provides strong incentives for FHA lenders to maintain robust QC systems without exposing them to harsh penalties for errors that can occur despite the maintenance of such systems.

#### **Other Considerations- Defect Taxonomy, the Annual Certification, and the SF Handbook**

The loan-level certifications do not exist in isolation and should not be considered the single cure for providing lenders comfort to fully expanding access to credit. There are several other related factors that impact the scope of the loan-level certifications including FHA's Single Family Housing Loan Quality Assessment Methodology (Defect Taxonomy), the annual certification, and the FHA Single Family Handbook. The recently released Defect Taxonomy, if refined and implemented, could provide additional needed clarity about the types of errors that will be implicated by the loan-level certifications as well as the remedies that would be available to lenders. However, the Defect Taxonomy as currently proposed will have little to no impact on lender behavior or access to credit because it does not make clear what remedies can be enforced for defects in the various enumerated tiers. The purpose of the Defect Taxonomy is negated if FHA does not define for lenders the outcomes that result from the various defect types. If the consequences of a minor Tier 4 documentation defect are the same as Tier 1 criminal fraud, the taxonomy has no meaning; the risk to lenders is the same regardless of defect tier.

It is equally critical that FHA make revisions to the annual lender certification in order to provide needed clarity to the market. Each of the principles enumerated above concerning the loan-level certification apply with equal force to the annual certification. The recent revisions to the annual certification provide none of this clarity. In fact, many responsible lenders with high performing, low defect FHA programs continue to refuse to certify and provide extensive clarifications that are animated by the same principles described in this letter. Once the revisions to the loan-level certification are complete, MBA urges FHA to revisit the annual certification.

HUD is also in the process of finalizing its Single Family Handbook which, when complete, will be a comprehensive resource for FHA rules and guidance. While this Handbook will be a highly valuable tool, the many structural and policy changes in the Handbook cause concern for many lenders as they are unsure how these changes will actually be enforced. In particular, there are

many outstanding servicing-related issues that may cause serious concerns for many lenders. Until these projects are complete and fully implemented, it is not entirely clear what lenders are certifying to or how those errors will be resolved. MBA offers its assistance with all of these efforts to ensure outcomes that effectuate meaningful change to expanding access to credit.

## **Conclusion**

FHA plays a critical role in creating access to affordable mortgage credit for many homebuyers. This proposal to revise the loan level certification is an opportunity for HUD to create a that document fosters sound, responsible, and high-quality underwriting even while minimizing one of the barriers to accessible and affordable mortgage credit. The MBA encourages FHA to consider the above principals and recommendations and adopt the revised language.

Should you have questions or wish to discuss any aspect of these comments further, please contact me at (202) 557-2878 or [pmills@mba.org](mailto:pmills@mba.org) or Tamara King at 202-557-2758 or [tking@mba.org](mailto:tking@mba.org). We look forward to working with you on this very important effort.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is written in a cursive, flowing style.

Pete Mills  
Senior Vice President, Residential Policy and Membership Engagement

## Attachment

### “ACCEPT” OR “APPROVE” LANGUAGE:

This mortgage was rated as an “accept” or “approve” by FHA’s TOTAL Mortgage Scorecard. As such, as the undersigned representative of the mortgagee I certify that I have reviewed the TOTAL Mortgage Scorecard findings and have determined, based on reasonable underwriting diligence and judgment, and to the best of my knowledge, the loan complies with the written credit guidelines currently established by FHA, as published in the Single Family Housing Policy Handbook (Handbook) and/or applicable Mortgagee Letters, and the mortgagee did not knowingly or recklessly rely on false statements in the loan application or its addendum.

If the loan contains a significant underwriting defect(s) that would render the loan uninsurable, the mortgagee will be in compliance with program requirements if the mortgagee and the loan meet all three of the following: (1) the mortgagee submitted the certification in the good faith belief that the loan was free of such defect(s) and it did not knowingly or recklessly rely on false statements in the loan application or its addendum; (2) the mortgagee has a Quality Control plan that meets the standards set out in the Handbook and/or any applicable Mortgagee Letters in effect at the time the loan was originated; and (3) the mortgagee undertakes remedies of such defects(s) as provided in this paragraph. If any significant underwriting defect(s) that would render the loan uninsurable is found before the loan has been endorsed for insurance and such defect(s) is corrected, then the loan will be treated as remedied in compliance with this certification. If any such defect(s) is discovered after the loans is endorsed for insurance, and if the mortgagee or its agent thereafter remedies that defect, withdraws a claim or reimburses a claim payment, or indemnifies FHA (each, whether before or after a claim for insurance is submitted) in accordance with FHA’s administrative rules and procedures in effect at the time the loan was endorsed then the loan will be treated as remedied in compliance with this certification, it being understood that nothing in this certification shall expand the quality control requirements set out in the Handbook and/or applicable Mortgagee Letters. As the undersigned representative of the mortgagee I certify that it is the mortgagee’s understanding that, with respect to loans that contain a significant underwriting defect(s) that would render the loan uninsurable, the loan will be in compliance with program requirements if (a) the above conditions in this paragraph are met and (b) the conditions (1) and (2) above are true as of the date of this certification.

### “REFER” LANGUAGE

This loan was rated as a “refer” by a FHA’s TOTAL Mortgage Scorecard, or was manually underwritten by the undersigned. As such, as the undersigned Direct Endorsement underwriter and representative of the mortgagee, I certify that I have personally reviewed the appraisal report (if applicable), credit application, and all associated documents used in underwriting this loan and have determined, based on reasonable underwriting diligence and judgment, and to the best of my knowledge, the loan complies with the written credit guidelines currently established by FHA, as published in the Single Family Housing Policy Handbook (Handbook)

and/or Mortgagee Letters, and the mortgagee did not knowingly or recklessly rely on false statements in the loan application or its addendum.

I further certify that to the best of my knowledge:

- I have performed all specific responsibilities for underwriters and my underwriting of the loan is within the program parameters established by FHA in the Handbook(s) and/or Mortgagee Letters, and
- I have verified the Mortgage Insurance Premium and Mortgage Amount are true and correct and this loan is in an amount that is permitted by FHA for this loan type, property type, and geographic area.

If the loan contains a significant underwriting defect(s) that would render the loan uninsurable, the mortgagee will be in compliance with program requirements if the mortgagee and the loan meet all of the following: (1) the mortgagee submitted the certification in the good faith belief that the loan was free of such defect(s) and the mortgagee did not knowingly or recklessly rely on false statements in the loan application or its addendum; (2) the mortgagee has a Quality Control plan that meets the standards set out in the Handbook and/or any applicable Mortgagee Letters in effect at the time the loan was originated; and (3) the mortgagee undertakes remedies of such defects(s) as provided in this paragraph. If any significant underwriting defect(s) that would render the loan uninsurable is found before the loan has been endorsed for insurance and such defect(s) is corrected, then the loan will be treated as remedied in compliance with this certification. If any such defect(s) is discovered after the loans is endorsed for insurance, and if the mortgagee or its agent thereafter remedies that defect, withdraws a claim or reimburses a claim payment, or indemnifies FHA (each, whether before or after a claim for insurance is submitted) in accordance with FHA's administrative rules and procedures in effect at the time the loan was endorsed then the loan will be treated as remedied in compliance with this certification, it being understood that nothing in this certification shall expand the quality control requirements set out in the Handbook and/or applicable Mortgagee Letters. As the undersigned representative of the mortgagee I certify that, with respect to loans that contain a significant underwriting defect(s) that would render the loan uninsurable, it is the mortgagee's understanding that the loan will be in compliance with program requirements if (a) the above conditions in this paragraph are met and (b) the conditions (1) and (2) above are true as of the date of this certification.