

October 1, 2015
Comment Submitted by:

Center for Responsible Lending
Empire Justice Center
Leadership Conference on Civil and Human Rights
NAACP
National Community Reinvestment Coalition (NCRC)
National Council of La Raza (NCLR)
National Housing Resource Center (NHRC)
National Urban League (NUL)

To the Department of Housing and Urban Development

RE: 30-Day Notice of Proposed Information Collection: Application for FHA Insured Mortgages
(Form HUD-92900-A)

Docket No. FR-5831-N-39
Document Number: 2015-21515

Thank you for providing the opportunity to comment on the Department of Housing and Urban Development's revised proposal to change the loan-level certification requirements that lenders must make to secure Federal Housing Administration insurance on a mortgage loan.

We continue to believe that getting the loan-level certification requirements right will make it possible for consumers to be protected from risky mortgage products, for FHA to operate a safe and sustainable mortgage insurance program and for lenders to have the clarity and certainty they need about enforcement standards to expand access to FHA-insured mortgage credit. To do that, FHA will have to make further revisions.

Our earlier comment outlined in some detail the importance of FHA-insured mortgage credit to providing access to homeownership for first-time homebuyers, and particularly to borrowers of color. New Home Mortgage Disclosure Act Data released on September 22 reaffirm this. In 2014, African-American home buyers relied on FHA-insured mortgage loans for 44% of their purchase mortgages and 45% of Latino buyers received FHA-insured mortgages.

In our earlier comments, we argued that FHA's current loan certification requirements do not adequately distinguish between serious defects in the manufacturing process of the loans that would materially impair qualification for FHA insurance and less serious defects that would have no material bearing on FHA insurance eligibility. However, under both the original proposal and the revised proposal, it appears that any manufacturing defects in the loan production process -- regardless of materiality or severity -- create potential certification violations and make the lender subject to a full range of consequences, including potential liability under the False Claims Act. FHA's own proposed taxonomy of defects acknowledges the importance of having different types of consequences for different types of defects.

Our earlier comments included specific proposals for an enhanced loan level certification requirement that would require lenders to meet all three of the following:

- Exercise due diligence and good faith in underwriting the mortgage and submitting the application for insurance;
- Establish, operate and monitor a Quality Control program that complies with all FHA requirements; AND
- For any defects that occur notwithstanding compliance with the first two lender duties, lender would be required to timely remediate or indemnify FHA for any defects that affect the insurability of the loan.

We believe these proposals would have provided better protections for consumers, ensure the fiscal strength of the FHA, and provide all FHA lenders with a greater sense of clarity of their liability that would continue and expand their provision of access to credit for FHA borrowers, including first-time home buyers and borrowers of color who heavily rely on FHA for access to mortgage credit. Importantly, our proposals would maintain a strong enforcement regime for FHA.

FHA did not adopt the proposed package of recommendations. In response to establishing a due diligence and good faith standard, FHA argues that such terms are insufficiently defined and understood and would fail to provide adequate clarity to stakeholders participating in the FHA's Single Family programs. However, "due diligence and good faith" are common legal terms that been utilized and implemented and fully understood in a number of other legal settings (add examples of rules?).

FHA also rejected our proposals for including Quality Control certifications and for having lenders remediate discovered defects or indemnifying HUD for such defects post-endorsements. HUD rejected the Quality Control proposals as inappropriate for a loan-level certification and rejected our remediation/indemnification proposals post FHA endorsement on the grounds that such actions would violate FHA's requirements that all loans be defect-free prior to endorsement.

In its proposed revisions to the loan level certifications published September 1, 2015, HUD has made attempts to clarify that the certification is focusing on serious defects that would affect the insurability of the loan. In FHA's response to our earlier comment, they point to this new proposal on page four of the certification, section (h), requiring lenders to certify:

"A Pre-Endorsement Review has been completed and revealed no deficiencies and defects in the documents listed at HUD Handbook 400.1,II.A.7.b that would render the loan ineligible for FHA insurance endorsement. "

Unfortunately, this proposal would not achieve its desired intent of distinguishing between deficiencies and defects that would render the loan ineligible for FHA insurance, since other sections of the certification (page three Direct Endorsement Approval for HUD/FHA mortgage) appear to override the newly created limitations. Specifically, lenders are required to certify that "this mortgage meets the Final Underwriting Decision (Total) requirements for approval" with no qualifications or limitations with respect to the findings of the Pre-Endorsement Review.

We appreciate FHA for acknowledging the need to distinguish between those defects which impact the insurability of their loans and those that do not. Achieving this through a workable certification process that does not subject lenders to liability under the False Claims Act's treble damages for those defects which do not materially affect the insurability of the loan is a goal that we all share. One way to achieve this goal was through our prior proposed recommendations, along with those principles proposed by the Consumer Federation of America, the Center for American Progress and the National Consumer Law Center, which we also endorse.¹

Alternatively, more surgical and precise amendments to the existing revised proposal would ensure that liability is limited only to "material" defects of the loan. It would certainly be helpful to provide a definition to all stakeholders to provide a working definition of *material*. One possible definition of *material* for consideration would be whether a defect would make a difference to a reasonable person.

Ultimately, a workable clarification of the certification requirements is critically important to keeping and attracting lenders of all sizes and types to offer the broadest possible range of consumers access to FHA-insured mortgages. Several lenders have indicated intentions to re-introduce new credit overlays into their FHA offerings. It is in the best interests of underserved borrowers and communities of colors to have the most expansive range of lenders offering FHA products and competing for their mortgage business.

We thank you again for the opportunity to comment on these proposed revisions and look forward to working to establish further reforms to the certification process that will better protect

¹ https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments_FHA_loan_Jul2015.pdf

consumers, better ensure the fiscal strength of the FHA and the MMI Fund and better provide lenders with the necessary clarity to maintain and expand access to mortgage credit for the broadest possible range of consumers of FHA mortgage products.

Sincerely,

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