

Legal Update

HUD Beckons Lenders Back to FHA:

Revised Lender Certifications, Enhanced Defect Taxonomy and MOU Aim to Reduce Risk of False Claims Act Litigation

On October 28, 2019, the US Department of Housing and Urban Development (HUD) issued a press release announcing four landmark achievements: (1) proposed revisions to lenders' loan-level lender certifications in Federal Housing Administration (FHA) insured mortgage transactions; (2) issuance of a revised Defect Taxonomy; (3) execution of a Memorandum of Understanding (MOU) with the US Department of Justice (DOJ) regarding False Claims Act (FCA) actions against lenders for alleged violations of FHA requirements; and (4) approval of a new FHA annual lender certification.¹ These four actions together reflect HUD's ongoing effort to clarify the types of penalties and remedies that lenders should expect to face in connection with particular deficiencies in FHA loans and ensure that potential penalties align with the severity of the deficiencies. They demonstrate HUD's attempt to draw back to FHA programs depository institutions and other lenders that have retreated from FHA in recent years in response to FCA actions resulting in treble damages against lenders based on alleged defects in FHA loans.

Proposed Changes to Loan-Level Certifications

As part of its effort to reduce uncertainty regarding the risks an FHA lender takes on when it originates an FHA loan, on October 25, 2019, HUD published proposed changes to the loan-level certifications required of lenders in FHA transactions.² The proposed changes would reduce significantly the number of statements a lender makes in connection with each file and generally limit the lender's certifications to those involving material deficiencies.

HUD requires specific forms and related documents to determine borrower and property eligibility for FHA insurance. In every FHA loan transaction, the lender and borrower use a Uniform Residential Loan Application and form HUD-92900-A, *HUD/VA Addendum to Uniform Residential Loan Application* (92900-A), to make application. The current 92900-A contains three lender certification sections.³ Part II on page 1 contains five certifications regarding loan terms and file documentation. Page 3 contains the underwriter's certification, requiring the underwriter to certify to, among other things,

the borrower's specific qualifications for the mortgage. Page 4 contains eight certifications regarding satisfaction of approval conditions, escrows and disbursements, security instruments, fees and other matters.

HUD's proposed revisions would simplify the loan-level certifications. Instead of having to certify to a variety of statements regarding the lender's adherence to broad references to FHA guidelines, the lender would certify generally to the loan's compliance with FHA requirements pertaining to the final underwriting decision and post-closing and endorsement, acknowledge that its certifications are materially correct and indicate an understanding that HUD will interpret the severity of any inaccuracies in accordance with the Defect Taxonomy. To this end, HUD's revisions would delete Part II on page 1 in its entirety and revise the underwriter and mortgagee certifications on pages 3 and 4.

Specifically, HUD has proposed revising Part IV on page 3 of the 92900-A to require the underwriter to certify as follows:

"For mortgages rated as an 'accept' or 'approve' by FHA's TOTAL Mortgage Scorecard:

- The information submitted to TOTAL was documented in accordance with Single Family Housing Policy Handbook 4000.1 (SF Handbook) and accurately represents the final information obtained by the mortgagee; and
- This mortgage complies with SF Handbook 4000.1 Section II.A.4.e Final Underwriting Decision (TOTAL) to the extent that no defect exists in connection with the underwriting of this mortgage such that it should not have been approved in accordance with FHA requirements.

I certify that the statements above are materially correct, with the understanding that, in the event HUD elects to pursue a claim arising out of or relating to any inaccuracy of this certification, HUD will interpret the severity of such inaccuracy in a manner that is consistent with the HUD Defect Taxonomy in effect as of the date this mortgage is endorsed for insurance."

The underwriter certifications are the same for mortgages rated as a "refer" by FHA's TOTAL Mortgage Scorecard and for mortgages manually underwritten, except that the first bullet above refers to information used to underwrite the borrower (as opposed to information submitted to TOTAL), and the underwriter also must certify that he or she has "personally reviewed and underwritten the borrower's credit application." Regardless of whether the loan was submitted to TOTAL or manually underwritten, the underwriter also must certify that "[f]or all mortgages where FHA requires an appraisal, I have personally reviewed and underwritten the appraisal according to FHA requirements."

HUD also has proposed revising part V on page 4 of the 92900-A to require the mortgagee to certify as follows:

- "I have personally reviewed the mortgage documents and the application or insurance endorsement;
- This mortgage complies with SF Handbook 4000.1 Section II.A.7 Post-Closing and Endorsement to the extent that no defect exists that would have changed the decision to endorse or submit the mortgage for insurance.

I certify that the statements above are materially correct, with the understanding that in the event HUD elects to pursue a claim arising out of or relating to any inaccuracy of this certification, HUD will interpret the severity of such inaccuracy in a manner that is consistent with the HUD

Defect Taxonomy in effect as of the date this mortgage is endorsed for insurance.”

HUD published the proposed changes as a Notice of Proposed Information Collection in the Federal Register and will accept public comments on the proposed changes to the loan-level certifications until December 24, 2019.

Defect Taxonomy

On October 24, 2019, in conjunction with its proposed revisions to the loan-level certifications, HUD issued a new version of its Defect Taxonomy that includes the types of penalties lenders may expect to face for loan-level violations of FHA requirements. HUD initially implemented the Defect Taxonomy (version 1)⁴ through its Loan Review System (LRS)⁵ in 2017. The Defect Taxonomy created a method of identifying loan-level defects, categorizing those defects and identifying their sources, causes, and severities. Over the past couple of years, HUD has revised the Defect Taxonomy in an effort to achieve more predictable review outcomes and identify penalties that align with the severity tiers listed in each defect area. While the original version remains in effect for loan reviews through December 31, 2019, HUD’s revised Defect Taxonomy (version 2)⁶ will be effective for loan reviews beginning January 1, 2020.

The new version of the Defect Taxonomy incorporates a number of changes intended to clarify defect categories and how HUD weighs the severity of each perceived violation. HUD clarified the severity tier definitions, added potential mitigating documents and penalties to align better with each tier, revised the sources and causes in certain defect areas, deleted the servicing section that HUD had proposed earlier this year and added HUD policy references.

The revised Defect Taxonomy includes nine defect areas for underwriting – borrower

income, borrower credit, loan-to-value and maximum mortgage amount, borrower assets, property eligibility, property appraisal, borrower eligibility, mortgage eligibility and lender operations. There are four potential severity tiers for each finding, depending on the size and nature of the deviation from FHA’s requirements. HUD’s revisions list potential remedies in each defect area. Tier 1 and 2 violations reflect unacceptable deficiencies to which the lender must respond in the LRS. Tier 3 and 4 violations reflect immaterial deficiencies to which a lender response is not required. HUD’s revisions to the Defect Taxonomy clarify that Tier 3 and 4 violations do not impact loan eligibility and that, while lenders are not required to respond to them, optional responses from lenders will be accepted.

Importantly, Tier 1 is reserved for instances of fraud or material misrepresentation about which the lender knew or should have known, violations of which generally result in life-of-loan indemnification. The Defect Taxonomy provides that HUD will refer all findings of fraud and material misrepresentation, whether or not the lender knew or could have known of the matter, to the Office of the Inspector General. Tier 2 violations generally trigger different remedies depending on the defect area, program type and degree of impact. If sufficient mitigating documentation is not presented to remediate a finding, Tier 2 violations may result in principal reductions, refunds or either life-of-loan or 5-year indemnification. For example, the Defect Taxonomy provides that, where FHA is unable to substantiate the income necessary to support loan approval due to missing documentation or borrower income was not supported based on documentation obtained, a Tier 2 violation will exist. Specifically, a Tier 2 violation will exist: (1) for loans underwritten with TOTAL if, when corrected, the TOTAL risk assessment is a “Refer” and the loan does not

meet manual underwriting guidelines; (2) for manually underwritten loans if, when corrected, the debt ratios exceed the maximum allowed for manually underwritten loans or the increase is not supported by sufficient compensating factors; and (3) for Home Equity Conversion Mortgages (HECMs), when there are issues with the financial assessment or residual income, compensating factors are not documented, the minimum life expectancy set-aside was not applied as required or HECM approval is not supported based on documentation. The Defect Taxonomy indicates that, where such a Tier 2 violation is identified, the lender either must provide mitigating documentation to cure the deficiency or sign a five-year indemnification for forward mortgages or life-of-loan indemnification for reverse mortgages. The Defect Taxonomy offers similar detail for each potential deficiency identified across all nine defect areas.

HUD's revisions to the Defect Taxonomy provide greater clarity and transparency to HUD's Quality Assurance Process. The addition of HUD policy references and potentially mitigating documents should help lenders formulate defenses to alleged violations. The addition of potential penalties should help lenders prepare for the potential repercussions of noncompliance with specific requirements. Perhaps most importantly, assuming HUD ultimately adopts the proposed loan-level certification language discussed above, the Department will hold itself to the Defect Taxonomy in force at the time the loan-level certifications are signed. This reference will provide lenders with the information HUD will use to evaluate the underwriting requirements included in the loan level certifications, which will add an additional layer of certainty to the FHA origination process. As HUD has indicated, however, the Defect Taxonomy does not address how HUD may respond to patterns of

loan-level defects, regardless of severity, and it does not preclude HUD from referring violations of any severity to the Mortgagee Review Board (MRB), the Departmental Enforcement Center, or other HUD offices.

The MOU Between HUD and DOJ

In addition to proposing revisions to the loan-level certifications and modifying the Defect Taxonomy, HUD has sought to clarify when lenders will be at risk of FCA litigation for FHA violations. On October 21, 2019, HUD and DOJ entered into an MOU⁷ setting forth rules of engagement for initiating FCA actions against lenders accused of violating FHA requirements. The MOU does not restrict DOJ's ability to investigate and litigate any alleged violations of law. It likewise does not restrict HUD's ability to take administrative action or seek indemnification or civil money penalties against lenders, or to refer matters to DOJ for litigation under the FCA, penalties under the Program Fraud Civil Remedies Act or otherwise. Instead, the MOU delineates a process to determine whether HUD should enforce FHA rules against a lender through administrative proceedings or other remedies, or should refer a matter to DOJ for FCA action, as well as how HUD and DOJ will collaborate when DOJ receives a referral under the FCA from a third party.

First, the MOU emphasizes that HUD will attempt to handle FHA enforcement through administrative means whenever possible. The MOU states HUD's expectation "that violations will be enforced primarily through HUD's administrative proceedings, except when action beyond HUD's administrative capabilities is warranted."

Second, the MOU sets forth HUD's procedure for determining whether to refer a matter to DOJ for FCA litigation. Specifically, when HUD identifies violations of FHA requirements under the Defect Taxonomy that may meet

HUD's "FCA Evaluation Standards," it will refer the matter to the MRB.⁸ The FCA Evaluation Standards are:

- "Tier 1 or equivalent violations exist in at least 15 loans, or Tier 1 or equivalent violations exist in loans with total unpaid principal balance (UPB) or claims of at least \$2.0 million," and
- there are "aggravating factors warranting pursuit of FCA litigation such as evidence that the violations are systemic or widespread."

The FCA Evaluation Standards suggest that HUD will refer lenders to DOJ only when Tier 1 "or equivalent" violations meeting the loan origination volume or UPB threshold are present and aggravating factors warrant FCA litigation. While the MOU does not define the term "equivalent violations," Tier 1 violations in the Defect Taxonomy are reserved for instances of fraud or material misrepresentation about which the lender knew or should have known. Presumably, "equivalent violations" would need to meet that same level of severity to trigger a referral to DOJ pursuant to the MOU. If the MRB determines that the FCA Evaluation Standards are met, it will refer the matter to DOJ. Although the MOU does not expressly preclude HUD from simultaneously taking enforcement action against a mortgagee that it refers to DOJ for FCA litigation, the MOU notes that, "if the MRB decides to decline referral or recommend against filing suit under the FCA, the MRB may still exercise its discretion under the applicable statutes and regulations to seek administrative action, indemnification, or civil money penalties for any violation of FHA policy." This language suggests that HUD would not both refer a matter to DOJ for FCA litigation and separately initiate administrative action.

Lastly, the MOU sets forth DOJ's procedure for determining whether to initiate FCA litigation

when it receives the FCA referral from a party other than HUD (e.g., the HUD Office of the Inspector General or a *qui tam* relator) or identifies potential FCA liability itself.

Specifically, the MOU indicates that, under those circumstances, DOJ will confer with HUD to obtain HUD's views, including whether HUD supports or opposes FCA litigation, whether the matter meets HUD's FCA Evaluation Standards and whether the alleged defects or violations are material.

Notably, DOJ already has a policy in place that directs it to solicit the views of an agency with respect to any significant enforcement action. The applicable regulation, which is referenced in the MOU, provides that DOJ's authority to handle cases may not be exercised and a matter must be submitted to the Assistant Attorney General, Civil Division for resolution when, among other things, "[t]he agency or agencies involved are opposed to the proposed action. The views of an agency must be solicited with respect to any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies."⁹ The MOU further provides that, in connection with any case filed by a *qui tam* relator, HUD may recommend that DOJ seek dismissal of the case if it does not support FCA litigation (e.g., if the alleged conduct fails to meet the FCA Evaluation Standards or does not represent a material violation of FHA requirements, or where litigation may interfere with HUD's policies or administration of its FHA lending program).

The stated purpose of the MOU is "to further the effective and efficient enforcement of the [FCA] with respect to participants in all [FHA] single family mortgage insurance programs." However, the MOU is not a legally binding contract and specifically states that it "does not confer any rights or benefits enforceable at law by any third party against the United

States." A lender is not an express beneficiary under the MOU and has no power to enforce it independently. That being said, the MOU does reflect the common will of the agencies and their intended line of action in connection with FCA litigation. The MOU effectively creates a system of checks and balances whereby HUD and DOJ will work together to address alleged FHA violations in a manner consistent with HUD's Defect Taxonomy. As noted above, while the Defect Taxonomy is limited to how HUD will address loan-level defects, the MOU addresses how HUD, in collaboration with DOJ, will pursue penalties for fraud and patterns of violations of FHA requirements. HUD appears to expect the new process to result in fewer FCA claims in the future. In an interview with HousingWire, HUD Secretary Ben Carson stated his expectation that "relatively few things" will result in FCA litigation, noting that, "if it's an obvious case of fraud, that's one thing, . . . But if this is not a pattern and it's a mistake that's correctable, we're not going to make a big deal of that."¹⁰

The Revised Annual Certification

Finally, HUD has simplified lenders' annual FHA certification. To maintain HUD/FHA approval, a lender must complete an annual recertification package within 90 days of its fiscal year end. The recertification package includes an annual certification. On October 25, 2019, HUD published notice in the Federal Register that a new annual certification is about to take effect.¹¹ In a Single Family Housing News update, HUD stated that its goal in revising the annual certification is to "better align the certification statements with HUD's statutes and regulations while continuing to hold lenders accountable for compliance with FHA's eligibility and approval requirements."¹²

The current annual certification, which has been in place since August 1, 2016, includes nine certification statements for supervised

and non-supervised mortgagees and four certification statements for investing and government mortgagees.¹³ The new annual certification, which becomes effective January 1, 2020, for the certification period ending December 31, 2019, applies to all mortgagees and contains only four statements.¹⁴

Specifically, the new annual certification deletes six of the current certification statements for supervised and non-supervised mortgagees in their entirety,¹⁵ replacing them with a general certification that neither the lender nor any Corporate Officer (as defined by HUD) was subject to a suspension, debarment or Limited Denial of Participation, or was refused or had revoked any license necessary to conduct mortgage business. The new certification also deletes the portions of certification statement number 3 that address indictments or convictions for criminal offenses reflecting adversely on the lender, unresolved findings, and violations of the SAFE Act. The new certification retains the portion of statement number 3 certifying that the lender was not sanctioned by any state in which it originates FHA loans, and it includes a general statement that all of the other statements in the certification are materially correct to the best of the signatory's knowledge. Specifically, the new certification contains the following statements:

- "1. I acknowledge that I am a Corporate Officer of the abovementioned Mortgagee (hereinafter referred to as "the Mortgagee") authorized to execute these certifications and acknowledgements on behalf of the Mortgagee.
2. I certify that, during the Certification Period, the Mortgagee, or any Corporate Officer (as defined at HUD Handbook 4000.1 I.A.3.c.iv.(B)) was not:
 - a) Subject to a suspension, debarment, or under a Limited Denial of Participation (LDP); or

- b) Refused or had revoked, any license necessary to conduct normal operations in the mortgage loan industry by any State(s) (as defined at 12 U.S.C. § 1707(d)) in which the Mortgagee will originate insured mortgages or Title I loans; except for those occurrences, if any, that the Mortgagee reported to HUD and for which the Mortgagee received explicit clearance from HUD to continue with the certification process.
- 3. I certify that during the Certification Period the Mortgagee was not Sanctioned by any State(s) (as defined at 12 U.S.C. § 1707(d)) in which the Mortgagee will originate insured mortgages or Title I loans, except for those Sanctions, if any, that the Mortgagee reported to HUD and for which the Mortgagee received explicit clearance from HUD to continue with the certification process.
- 4. I certify that the preceding statements are materially correct to the best of my knowledge.”

While HUD has revised the annual certification substantially, it is important to remember that neither HUD’s underlying requirements for maintaining FHA approval nor a lender’s obligation for reporting non-compliance to HUD have changed. For example, while the new annual certification does not include any statement regarding unresolved findings, HUD’s FHA Single Family Housing Policy Handbook still requires a lender to submit a Notice of Material Event to FHA through the Lender Electronic Assessment Portal (LEAP) within 10 business days, and provide relevant documentation, if either the lender or any officer, partner, director, principal, manager, supervisor, originator, processor or underwriter of the lender is subject to any unresolved findings or sanctions, including when there is any change of status in any unresolved finding or sanction previously

reported.¹⁶ Similarly, while the new annual certification no longer requires a lender to acknowledge responsibility for the actions of its vendors, the FHA Single Family Housing Policy Handbook still imposes responsibility on a lender for ensuring that its contractors fully comply with all applicable laws and FHA requirements.¹⁷ While the new annual certification contains fewer statements than in the past, underlying FHA requirements remain intact and HUD still may bring administrative action or seek civil money penalties against a lender that fails to comply with the applicable rules. Thus, FHA lenders still should maintain robust policies and procedures to ensure that their personnel and vendors comply with HUD’s eligibility criteria and that the lender reports all applicable business changes in accordance with FHA guidelines.

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HUD’s revisions to the annual and loan-level certifications, modification of the Defect Taxonomy and establishment of FCA Enforcement Standards and processes in the MOU for initiating FCA litigation together offer greater clarity to lenders as to how to respond to alleged defects in FHA loans and what penalties may be expected. These developments ultimately may reduce the risk of FCA liability for immaterial deficiencies or for items that signatories to the annual and loan-level certifications could not have known about at the time of signature. We note, however, that HUD’s basic eligibility requirements and loan-level guidelines, including reporting requirements, remain the same, and lenders remain subject to administrative enforcement action for violations of FHA requirements. Thus, while HUD’s recent achievements may provide much-needed guidance to lenders as they navigate FHA matters, FHA lenders should remain vigilant in their compliance efforts.

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Endnotes

¹ HUD Press Release, HUD No. 19-159, *HUD and Justice Department Sign Interagency Memorandum on the Application of False Claims Act – Agreement Fulfills Key component of HUD Housing Finance Reform Plan*, October 28, 2019, available at https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_159.

² 84 Fed. Reg. 207, 57464 (Oct. 25, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-10-25/pdf/2019-23240.pdf>.

³ Form HUD-92900-A (08/01/2016)/VA Form 26-1802a (06/2014), available at <https://www.hud.gov/sites/documents/16-06MLATCH.PDF>.

⁴ FHA's Single Family Housing Loan Quality Assessment Methodology (Defect Taxonomy), June 18, 2015, available at https://www.hud.gov/sites/documents/SFH_LQA_METHODOLOGY.PDF.

⁵ HUD FHA LRS Lender User Manual (7/11/18), available at <https://www.hud.gov/sites/dfiles/SFH/documents/LRSUserManual.pdf>.

⁶ FHA's Single Family Housing Loan Quality Assessment Methodology (Defect Taxonomy), effective January 1, 2020, available at https://www.hud.gov/sites/dfiles/SFH/documents/sfh_defect_taxonomy_v2_01_01_20.pdf.

⁷ *Memorandum of Understanding Between the Department of Housing and Urban Development and the Department of Justice, Inter-Agency Coordination of Civil Actions Under the False Claims Act Against Participants in FHA Single Family Mortgage Insurance Programs*, October 21, 2019, available at https://www.hud.gov/sites/dfiles/SFH/documents/sfh_HUD_DOJ_MOU_10_28_19.pdf.

⁸ The MRB consists of: the Assistant Secretary for Housing – Federal Housing Commissioner; the President of Ginnie Mae; HUD's General Counsel; the Assistant Secretary for Administration; HUD's Chief Financial Officer; the Assistant Secretary for Fair Housing and Equal Opportunity; and several non-voting advisors (i.e., HUD's Inspector General,

the Director of Lender Activities and Program Compliance, HUD's Chief Risk Officer, and the Office of Program Enforcement).

⁹ 28 C.F.R. Part 0, Appendix to Subpart Y, available at https://www.ecfr.gov/cgi-bin/text-idx?SID=068d82094fc7a898eed2b63b280774f3&mc=true&node=pt28.1.0&rqn=div5#ap28.1.0_1172.1.

¹⁰ HousingWire, *Exclusive: HUD's Carson on False Claims Act – "The monster has been slayed," HUD wants banks to return to FHA lending*, by Ben Lane, October 28, 2019, available at <https://www.housingwire.com/articles/exclusive-huds-carson-on-false-claims-act-the-monster-has-been-slayed/>.

¹¹ 84 Fed. Reg. 207, 57461 (Oct. 25, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-10-25/pdf/2019-23241.pdf>.

¹² FHA Info #19-55, *HUD Provides Greater Transparency and Assurances for Lenders through its new Memorandum of Understanding for Application of False Claims Act Remedies in Conjunction with FHA's Revised Certifications and Defect Taxonomy*, October 28, 2019, available at https://www.hud.gov/sites/dfiles/SFH/documents/SFH_FHA_INFO_19-55.pdf.

¹³ FHA Lender Annual Certifications, active as of August 1, 2016, available at https://www.hud.gov/sites/documents/SFH_RECERT_CERTS.PDF.

¹⁴ FHA Lender Annual Certification Statements, active as of January 1, 2020, available at https://www.hud.gov/sites/dfiles/SFH/documents/SFH_AnnualLenderCert0120.pdf.

¹⁵ The new annual certification deletes certification statements (i) number 2, acknowledging responsibility for the actions of principals, managers, supervisors, originators, processors, underwriters, other employees and vendors; (ii) number 4, certifying that neither the lender nor any of its principals, managers, supervisors, originators, processors or underwriters were convicted of or pled nolo contendere to a felony related to participation in the real estate or mortgage loan industry; (iii) number 5, certifying that neither the lender nor any of its principals, managers,

supervisors, originators, processors or underwriters had any public transactions terminated for cause or default or were indicted, convicted or civilly or criminally charged in a matter involving fraud, public transactions, antitrust statutes, embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements or receiving stolen property; (iv) number 7, certifying compliance with all HUD regulations and requirements; (v) number 8, certifying that all of the certification statements are true and accurate; and (vi) number 9, acknowledging subjection to all FHA rules, regulations and guidelines.

¹⁶ FHA Single Family Housing Policy Handbook 4000.1 I.A.7, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsg.pdf>.

¹⁷ FHA Single Family Housing Policy Handbook 4000.1 I.A.6, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsg.pdf>.

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