

July 14, 2015

Ms. Colette Pollard  
Reports Management Officer, QDAM  
Department of Housing and Urban Development  
451 7th Street SW., Room 4176  
Washington, DC 20410

*RE: Revisions to Application for FHA Insured Mortgage, OMB Approval Number 2502-0059*

Dear Ms. Pollard:

The Center for American Progress,<sup>1</sup> Consumer Federation of America,<sup>2</sup> and the National Consumer Law Center<sup>3</sup> appreciate the opportunity to comment on the proposed changes to the Federal Housing Administration (FHA) loan-level lender certification. The lender certification form is important to us because of the critical role that FHA lending plays to facilitate homeownership for the many creditworthy borrowers who find themselves locked out of the conventional market. It is especially important for those families who cannot afford a 20 percent down payment, many of whom are first-time homebuyers and homebuyers of color.

However, at present, many FHA lenders have imposed credit overlays that exclude borrowers who fit the lending criteria established by FHA itself. Other lenders, including some banks that have been top FHA lenders for decades, have pulled out of FHA lending entirely. FHA has concluded that the loan-level lender certificate is a significant driver of this problem.

The form in question currently requires a lender to certify that all the information it has submitted to FHA is “true, accurate and complete.” Lenders are concerned that, when a lender submits a claim to FHA after a default, this standard could result in FHA requesting that the lender indemnify FHA even for small, inadvertent errors. Lenders have also expressed concern that any defect-- no matter how small or non-material -- can serve as a basis for a False Claims Act suit against the lender.

If FHA concludes that it is necessary to modify the loan-level certification to address these concerns, we suggest several principles to keep in mind to ensure that the changes to the

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<sup>1</sup> The Center for American Progress is a nonpartisan think tank dedicated to improving the lives of Americans through progressive ideas and action.

<sup>2</sup> Consumer Federation of America is a national organization representing more than 300 organizations at the state, local and national level that conducts public education and policy analysis on behalf of consumers, with a particular focus on low and moderate income consumers.

<sup>3</sup> The National Consumer Law Center® (NCLC®) works for economic justice for low-income and other disadvantaged people in the U.S. through policy analysis and advocacy, publications, litigation, and training. NCLC submits these comments on behalf of its low-income clients.

certification achieve the desired results while still permitting adequate oversight and protection to both the FHA insurance fund and to borrowers:

- **Fraud/recklessness:** The certificate should specify that any kind of fraud or intentional or reckless behavior will result in a denial of FHA coverage and could lead to other consequences as well, and that curing fraud after the fact is not sufficient.
- **Standard of care:** A standard of good faith and due diligence may be helpful in addressing lender concerns. Additionally, the certificate should specify that negligent, as well as intentional or reckless, conduct is excluded from the protections provided by the certification. Widespread non-compliance due to negligence can create significant harms to borrowers and the FHA program.
- **Pattern or practice:** If the strict liability standard is changed, it is important to include the concept of pattern or practice to ensure that FHA can appropriately manage lenders who regularly engage in sloppy lending. It is not sufficient to require a particular kind of quality control process and assume that a pattern or practice of defects will demonstrate that the QC is insufficient. The document should state clearly that a pattern or practice, or a finding of systemic non-compliance, is, by definition, a demonstration of an insufficient QC program. FHA already has a number of metrics through which it can gauge this factor, which the certification should reference.
- **Cures:** While lenders should cure inadvertent errors, a cure should not simply become part of the cost of doing business. A cure should not be sufficient to overcome a pattern or practice of defects.
- **Remediating borrower harm:** When a lender is permitted to cure a defect, it should be clear that a cure should extend beyond making FHA whole. If a borrower has been harmed, it should be explicit that the lender must bear any costs to restore the borrower to the position s/he would have otherwise been in absent the defect, such as by paying the borrower any excess charges plus interest.
- **Oversight capacity and resources:** It is likely that changing the strict liability standard will shift some of the burden for oversight from the lenders themselves to FHA. Given the current resource constraints at FHA, we believe lenders interested in this change should be prepared to bear some of the costs through a modest fee.

While we do not have specific language to suggest, we have reviewed the proposed language submitted by the Center for Responsible Lending and others and believe it largely embodies the principles described above. However, it should be strengthened to exclude negligence as well as knowing and reckless behavior, to specify that a pattern and practice of inadequate or faulty underwriting -- regardless of the QC regime lenders have in place -- would violate the

certification, and to require that any cures also include remediation of borrower harm by the lender in instances where a defect caused such harm.

We note also that the proposal would alter other provisions in the current loan-level certification relating to debarment and criminal and civil convictions applying to firms doing business with FHA. These proposals have stirred significant concerns over the lack of transparency in their development, justification for the specific changes, and comprehensive opportunity to review and discuss the rationale behind them. We share these concerns and urge FHA to more plainly and clearly address these questions so that their merits can be more fully discussed and understood before they are adopted and put into effect.

Thank you again for the opportunity to comment on your proposed changes to the loan-level certification. We look forward to continued discussions with you if you move forward.

Sincerely,

Julia Gordon  
Senior Director, Housing and Consumer Finance  
Center for American Progress

Barry Zigas  
Director of Housing Policy  
Consumer Federation of America

Alys Cohen  
Staff Attorney  
National Consumer Law Center