

SUMMARY OF PUBLIC COMMENTS

Office of Lender Activities and Program Compliance: FHA Lender Approval, Annual Renewal, Periodic Updates and Required Reports by FHA-Approved Lenders Solicitation of Comment (FR-5835-N-12)

I. Background

On September 1, 2015, HUD published a Notice in the Federal Register at 80 FR 52781 requesting public comment on proposed revisions to the certification statements included in the Online Application for Lender Approval (previously HUD-92001-A) and the Annual Certification for FHA-approved lenders (collectively, “lender-level certifications”).

The proposed revisions are intended to:

- bring lender-level certifications up to date with HUD Handbook 4000.1;
- improve clarity of HUD policy related to lender-level certifications;
- reinforce HUD’s lender enforcement capabilities; and
- address comments received by HUD in response to the 60-Day Notice of Proposed Information Collection: Application for FHA Insured Mortgages (FR-5835-N-06) published on May 15, 2015, which described revisions to form HUD-92900-A.

II. About this Summary

This summary of public comments presents the main questions and concerns raised by the commenters. The underlined headings present the comments, each of which is followed by a brief substantive description and HUD’s response.

III. Comments, Generally

The public comment period for the proposed revisions to the lender-level certifications opened on September 1, 2015 and closed on November 2, 2015. HUD received comments from one FHA-approved lender and one industry association for a total of two submissions in response to the notice.

In general, the comments were supportive of HUD’s intent and of the most significant proposed revision, which moved the certification statement regarding knowledge of fraud or criminal offense in connection with public transactions (among other violations) from the loan-level to the lender-level certification. Other comments were critical of certain certification statements and qualifiers, and the commenters offered identical recommendations for additional revisions to certification language. One submission also included an analysis of the statutory and regulatory basis for lender-level certifications, as well as comments on operational issues related to the annual certification process.

Some comments focused on HUD’s loan-level certifications. These duplicated several of the comments received in direct response to proposed revisions to form HUD-92900-A, which are addressed in a separate document.

IV. The Public Comments

A. Recommended Changes to Lender-Level Certification Language

Comment: Annual lender-level certification language should mirror the self-reporting standards as set forth in HUD Handbook 4000.1. Otherwise, the annual certification should include an explicit materiality standard.

Both commenters state concerns about the following lender-level certification statement:

I certify that, to the best of my knowledge and after conducting a reasonable investigation, the Mortgagee does now, and did at all times throughout the Certification Period, comply with all HUD-FHA regulations and requirements applicable to the Mortgagee's continued approval and operations, including those contained in HUD handbooks, guidebooks, Mortgagee Letters, Title I Letters, policies, and any agreements entered into between the Mortgagee and HUD, except for those instances of non-compliance, if any, that the Mortgagee reported to HUD during the Certification Period and for which the Mortgagee received explicit clearance from HUD to continue with the certification process.

The commenters interpret this statement as requiring lenders to certify to perfect compliance on every FHA loan. The commenters state that this requirement exposes lenders to potential liability under the False Claims Act and results in a large number of lenders going through the "unable to certify" process so that they may file supporting qualifiers before completing the certification process.

The commenters provide two alternative revisions to the certification statement above. Both alternatives include a general materiality standard, allowing lenders to certify to compliance "in all material respects and taken as a whole" with HUD regulations and requirements.

In addition to the materiality standard, the first alternative ties the certification language to lender self-reporting of "fraud, material misrepresentation, and Material Findings of non-compliance... pursuant to HUD Quality Control requirements set forth in HUD Handbook 4000.1." The second alternative includes language that would allow lenders to certify that they maintain "policies, procedures, and internal controls that are reasonably designed to assure compliance" with HUD regulations and requirements rather than certifying to compliance directly.

HUD's Response: It is not HUD's intent for the lender-level certifications to duplicate form HUD-92900-A with respect to loan-level compliance. The intent of the certification statement cited above is to ensure that each lender complies with the regulations and requirements necessary to maintain its HUD-FHA approval. In terms of HUD Handbook 4000.1, these requirements are set forth in Section I. DOING BUSINESS WITH FHA and Section V. QUALITY CONTROL, OVERSIGHT AND COMPLIANCE.

In order to clarify this intent, HUD proposes the following additional revisions to the annual certification statement. (Similar revisions are proposed for the corresponding certification statement included in HUD's Online Application for Lender Approval.)

I certify that, to the best of my knowledge and after conducting a reasonable investigation, the Mortgagee does now, and did at all times throughout the Certification Period, comply with all HUD regulations and requirements ~~applicable to the Mortgagee's continued approval and operations, including those contained~~ necessary to maintain the Mortgagee's FHA approval as identified in HUD handbooks, guidebooks, Mortgagee Letters, Title I Letters, policies, and any agreements entered into between the Mortgagee and HUD, except for those instances of non-compliance, if any, that the Mortgagee reported to HUD... [See below for proposed revisions to the certification qualifier.]

Comment: Remove references to HUD's explicit clearance of reporting regarding unresolved findings and findings of non-compliance with the Department's eligibility criteria.

Both commenters highlight the qualifier at the end of most lender-level certification statements, pointing out that it creates a requirement that all reported findings be reviewed and cleared by HUD as part of the certification process. The commenters assert that this clearance requirement creates unnecessary operational complexities as it prevents lenders from completing the annual certification process until HUD has reviewed the reported issues and provided explicit clearance to proceed. They also note specific issues with the method of reporting through the Lender Electronic Assessment Portal (LEAP).

Both commenters propose additional revisions that would eliminate the language requiring explicit clearance from all applicable certification statements. These revisions would allow lenders to proceed with the annual certification process without explicit clearance as long as they have already reported any instances of non-compliance to HUD.

HUD's Response: HUD acknowledges the operational issues described by the commenters and is committed to ongoing process improvements in order to minimize the burden on all parties. However, the explicit clearance requirement is an important safeguard that allows HUD to determine whether reported instances of lender non-compliance warrant additional corrective action or enforcement measures. HUD will take all LEAP-related comments into consideration as opportunities for system enhancements present themselves in the future, but changes to the basic recertification workflow are not possible at this time. Therefore, references to explicit clearance will remain in the applicable certification statements.

With regard to operational improvements, HUD is focused on both the Unable to Certify process and its process of reviewing and responding to Notices of Material Events, which lenders are required to submit throughout the year. For cases in which HUD determines that a material event does not impact a lender's approval standing or warrant further action, HUD will ensure that its response to the lender's Notice includes explicit clearance with respect to the specific issue, thus allowing the lender to timely certify. This should help to eliminate the need for duplicate reporting during the certification process.

HUD also recognizes that a lender's independent compliance audit may identify issues that prevent the lender from completing the annual certification. These audits typically occur after the Certification Period, which HUD Handbook 4000.1 defines as "the one-year period beginning on the first day of the Mortgagee's prior fiscal year and ending on the last calendar day thereof." A lender that reports these issues through the Unable to Certify process and receives explicit clearance from HUD to proceed may still be reluctant to certify to a statement that it reported the issue to HUD "during the Certification Period."

In order to address this potential gap, HUD proposes the following additional revision to the qualifier found at the end of several annual certification statements:

...except for those [occurrences / sanctions / instances of non-compliance], if any, that the Mortgagee reported to HUD ~~during the Certification Period~~ and for which the Mortgagee received explicit clearance from HUD to continue with the certification process.

HUD reserves the right to take enforcement action if its review of a particular issue reveals that a lender knowingly failed to report a material event within the required timeframe.

B. Other Concerns or Suggestions

Comment: The LEAP system should not require additional certifications for final submission of the recertification package to HUD.

One commenter stated that lenders incur additional potential risks as a result of the final certification required in LEAP before submitting a recertification package to HUD. This risk relates to the Unable to Certify process, which currently requires lenders to answer "yes" to certification statements after receiving explicit clearance from HUD even though the statements may not be technically true.

HUD's Response: HUD acknowledges the potential risks associated with the current Unable to Certify process and the final certification in LEAP. The final certification is intended to hold lenders accountable for financial and audit-related information entered into LEAP after the certification step is completed. The proposed revision to the qualifier described above and the addition of that qualifier to all applicable statements should mitigate most or all of the potential risks described in the comment.

C. Additional Changes

HUD made additional technical changes to the proposed revisions based on internal review after the 60-day comment period. These changes are intended to more closely align the format of certification statements with relevant HUD regulations. Details will be submitted to OMB and will be available for public review and additional comment.