Congress of the United States
Washington, DC 20515

July 14, 2015

The Honorable Julian Castro
Secretary
Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410

The Honorable Shaun Donovan
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: Docket Number FR-5835-N-06, OMB Approval Number 2502-0059

Dear Secretary Castro and Director Donovan:

We write regarding the notice the Department of Housing and Urban Development ("HUD" or the "Department") issued under the Paperwork Reduction Act ("PRA") in the Federal Register on May 15, 2015. The notice proposes changes to the loan-level certifications that lenders must make in order to obtain insurance from the Federal Housing Administration ("FHA").[1]

We are concerned that the proposed changes, the most significant of which were not described in the notice, would make it easier for lenders who have engaged in illegal behavior to obtain FHA insurance – insurance that is ultimately provided by American taxpayers. These changes are significant and result in a change of policy rather than a simplification of an outdated form. Accordingly, we respectfully request that HUD withdraw the PRA notice; issue a new notice under the Administrative Procedure Act ("APA") that provides a rationale for its proposed changes; and give the public 60 days to submit comments.

One proposal would remove the requirement that FHA-approved lenders certify on each loan application that they are not, or have not recently been, subject to certain charges or penalties. We are particularly troubled by the timing of this proposed change and the lack of transparency around it. Shortly before HUD issued the notice, there were public reports that five big banks were preparing to agree to plead guilty to criminal antitrust violations for rigging foreign exchange rates.[2] The Department of Justice subsequently announced the agreement on May 20.[3] Under our reading of the current loan-level certification requirements, those big banks – including two major FHA lenders, JPMorgan Chase and Citigroup – would be prohibited from obtaining FHA insurance once their criminal plea agreements take effect. However, under the revised form that HUD has proposed, those banks would remain eligible for FHA insurance despite their criminal convictions. Thus, HUD's proposed changes appear to effectively waive a contractual obligation for obtaining FHA insurance for a mortgage and allow HUD to turn a

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[1] 60-Day Notice of Proposed Information Collection: Application for FHA Insured Mortgages, 80 FR 27998 (May 15, 2015), Docket No. FR-5835-N-06, *at* https://www.federalregister.gov/articles/2015/05/15/2015-11807/60-day-notice-of-proposed-information-collection-application-for-fha-insured-mortgages.

[2] Ben Protess and Michael Corkery, *5 Big Banks Expected to Plead Guilty to Felony Charges, but Punishments May Be Tempered*, N.Y. Times (May 13, 2015), at http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html.

[3] Department of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas, at* http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas (May 20, 2015).

blind eye to these and other criminal violations – putting homebuyers and taxpayers at additional risk.

HUD may have good reasons for proposing these changes at this time, but its Federal Register notice fails to even describe the changes to the certifications on illegal conduct – let alone offer a rationale for them. Instead, HUD's notice, as reviewed and approved by the Office of Management and Budget, only seeks public comment under the PRA on the burden certain other changes to the certification form might impose on lenders.

We believe this failure to provide adequate notice is inappropriate given the substantial policy impact of the changes HUD is proposing. At a time when FHA is taking steps to restore confidence in the housing market, the public deserves an opportunity to review and comment on HUD's reasons for proposing these significant changes.

I. The Proposed Changes

HUD's May 15, 2015 PRA notice proposes changes to FHA's loan-level certification form, otherwise known as form HUD-92900-A. Lenders complete, sign, and submit this form when they submit a loan to FHA for insurance. If the information certified in the form is accurate, and certain other conditions are met, then FHA agrees to reimburse the lender for the full outstanding principal balance on the loan should the borrower go into foreclosure. Losses to FHA are borne by the Mutual Mortgage Insurance Fund, which in turn has the backing of the full faith and credit of the U.S. government. If lenders do not sign the form, the loan does not go through.

HUD has proposed significant changes to the HUD-92900-A form. In particular, HUD is removing from the form certain requirements contained in Part II, certification 21, statements (G)(2)-(G)(4), which require that the lender, to the best of its knowledge and belief, certify that it, its "firm," and its "principals":

> (2) have not, within a three-year period preceding this proposal, been convicted of or had a civil judgment rendered against them for (a) commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; (b) violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; (3) are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (G)(2) of this certification; and (4) have not, within a three-year period preceding its application/proposal, had one or more public transactions (Federal, State or local) terminated for cause of default.

The Department's Federal Register notice does not mention the deletion of statements (G)(2)-(G)(4), although it does describes other changes to the form.

II. Effect of the Proposed Changes

In discussions between HUD staff and our staffs, HUD has indicated that it is their belief that the proposed deletions of statements (G)(2)-(G)(4) do not represent a change in policy and that the omission of this change from the description was deliberate and reviewed by OMB. HUD staff indicated that the changes to the loan-level certification are not consequential because the separate, *lender-level* certification form already requires lenders to confirm compliance with FHA requirements for initial and on-going eligibility to participate in the single-family mortgage insurance program.

However, the two forms require different certifications and these differences will have a material impact. The existing loan-level form requires a lender to certify that it, its firm, or its principals have not been indicted for, convicted of, or had a civil judgment rendered against them for a variety of specific offenses – including a "violation of Federal or State antitrust statutes" – regardless of whether those offenses were related to real estate or mortgage transactions. By contrast, the lender-level form requires the lender to certify that neither it nor "any officer, partner, director, principal, manager, supervisor, loan processor, loan underwriter, or loan originator" that it employs:

> had been convicted of or pled guilty or nolo contendere to a felony *related to participation in the real estate or mortgage loan industry* during the seven-year period preceding the first day of the Certification Period; or who had ever been convicted of or pled guilty or nolo contendere to a felony *related to participation in the real estate or mortgage loan industry* that involved an act of fraud, dishonesty, a breach of trust, or money laundering. (emphasis added).

The lender-level form also includes a general fitness certification, which requires the lender to certify that it has not been indicted for or convicted of "an offense that reflects adversely upon the Mortgagee's integrity, competence, or fitness to meet the responsibilities of an FHA-approved Mortgagee." But that standard ultimately leaves it to HUD's discretion to determine whether a particular criminal conviction or civil judgment constitutes a violation.

In summary, it appears that deleting statements (G)(2)-(G)(4) from the loan-level certification form and relying solely on the certifications in the lender-level form will narrow the certification requirements in three ways:

- First, the lender-level form only covers felonies, while the existing loan-level form covers both criminal and civil violations;

- Second, the lender-level form only covers felonies related to participation in the real estate or mortgage loan industry, while the existing loan-level form covers criminal and civil violations regardless of whether they were related to that industry; and

- Third, the lender-level form only requests representations about the lender and certain of its employees, while the existing loan-level form covers the lender, its "firm," and its "principals" – terms that appear to apply to an entity's parent company and affiliates.[4]

Narrowing the certifications in this way will have important implications that HUD has failed to discuss in its Federal Register notice. Specifically, why should taxpayers fund insurance for loan originators, firms, or principals that have been convicted of certain violations, and how does this protect the Mutual Mortgage Insurance Fund?

One immediate implication concerns the continued availability of FHA insurance for four of world's largest banks. This May, Citicorp, JPMorgan Chase & Co., Barclays PLC, and the Royal Bank of Scotland agreed "to plead guilty to a one-count felony charge of conspiring to fix prices and rig bids for U.S. dollars and euros exchanged in FX spot market in the United States and elsewhere."[5] Once those pleas become effective, it appears that these banks – which include two major FHA lenders[6] – would not have been able to sign the existing loan-level certification form because they would have been convicted of a "violation of Federal or State antitrust statutes." But the banks would be able to sign the proposed new loan-level form because this certification would be deleted, and they would be able to sign the lender-level form because these crimes were not directly related to the real estate or mortgage loan industry.

III. Requests

We believe these changes merit further explanation from HUD because the PRA notice did not adequately discuss the changes and their implications. While we appreciate your staff's willingness to provide us with additional information about the rationale for the proposed changes, that information is not likely to be provided before the comment period closes, and, in any event, it will not be made publicly available so that others may comment on it. To allow for complete public consideration of these changes, we request that you issue a new notice under the APA process that addresses the points below.

We believe the new notice should discuss several key issues. For example, the Department should describe why the stipulations in statements (G)(2)-(G)(4) are no longer needed. The Department should also describe why it is appropriate for loan-level certifications to deviate from the certifications made by federal contractors under Federal Acquisition Regulation at 48 CFR 52.209-5. Finally, the Department should describe the impact that these loan-level certification form changes will have on the four global banks that recently pled guilty to criminal antitrust violations in connection to their rigging of foreign currency prices, and on any other lenders that plead guilty to future crimes.

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[4] 2 C.F.R. Part 2424 (noting that HUD adopts as its policies, procedures, and requirements for non-procurement debarment and suspension, the OMB guidance in subparts A through I of 2 CFR part 180); 2 C.F.R. 180.955 (OMB guidance that a "principal" includes a "person, whether or not employed by the participant . . . who (1) is in a position to handle Federal funds [or]; (2) is in a position to influence or control the use of those funds").

[5] Department of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas, at* http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas (May 20, 2015).

[6] According to data from Inside Mortgage Finance (collected by the Congressional Research Service at the request of Rep. Waters' office), JPMorgan Chase Bank NA was the sixth-largest FHA lender in 2014, with $1.67 billion in FHA loans, and Citmortgage Inc. was the 62nd largest FHA lender in 2014, with $342 million in FHA loans .

Since 1934, the FHA has helped millions of Americans affordably and sustainably achieve homeownership. And in the aftermath of the 2008 financial crisis, the FHA stepped in to fill the gap left by a retreating private sector. We are strongly committed to ensuring the long-term health of the FHA, which includes a deep commitment to the integrity of the lenders approved to participate in the single-family mortgage insurance program. But we are concerned that with its recent notice in the Federal Register, HUD is proposing substantial policy changes related to that program without adequate public notice or discussion – changes that could make it easier for companies that have engaged in fraud or other misconduct to obtain taxpayer-backed insurance. We believe that HUD should provide a thorough explanation for these changes and that the public should have an opportunity to comment on whether these changes are appropriate.

Sincerely,