



MORTGAGE BANKERS ASSOCIATION

December 3, 2024

The Honorable Damon Smith
General Counsel
Office of General Counsel
Department of Housing and Urban Development (HUD)
451 7th Street SW
Washington, DC 20410

RE: Mortgagee Review Board Enforcement Against Convenience Fees

Dear Mr. Smith,

The Mortgage Bankers Association¹ (MBA) understands that numerous mortgage servicers have received notices of violation (NOV) from the Department of Housing and Urban Development's (HUD) Mortgagee Review Board (MRB) alleging that they violated HUD requirements by charging borrowers convenience fees for the borrowers' use of optional expedited payment services. Specifically, HUD, through the NOVs, contends that accepting and processing borrowers' mortgage payments online, over the phone through a customer service representative, or through interactive voice recognition is "part of a prudent Mortgagee's servicing activity" and, therefore, charging a fee for such activity is prohibited.² We disagree with HUD's conclusions and express concern with HUD's administrative enforcement efforts. Accordingly, we urge HUD to rescind the pending NOVs and cease further MRB action on convenience fees.

We are concerned with HUD's retroactive administrative enforcement of a new, unpublished policy for which mortgage servicers had no advance notice — a policy that is contradicted by HUD's long-held knowledge of and acceptance of these fees. We understand that HUD's Office of Program Enforcement delivered NOVs to approximately twenty (20) mortgage

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 275,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,000 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² HUD contends that HUD rules prohibit mortgagees from charging borrowers' fees for making their monthly mortgage payments to their mortgage servicers. Handbook 4000.1, Section III.A.1.f.ii(B); 24 C.F.R. § 203.552(a)(12)(i).

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servicers following initial outreach through requests for information. These NOV's inform the servicers that HUD is considering taking administrative action and/or seeking civil money penalties for violations of the National Housing Act, HUD's regulations, and its implementing administrative guidance concerning convenience fees. However, HUD's authorities do not expressly prohibit convenience fees, and HUD has never issued any guidance this long-standing and common industry practice. Indeed, we understand that HUD's National Servicing Center has provided informal past guidance indicating servicers may charge convenience fees, and the Federal Housing Administration (FHA) has been well aware of servicers charging these fees through servicing audits conducted regularly over the years.³ As a result, we believe retroactive administrative enforcement of HUD's apparent new policy—which HUD has announced to mortgage servicers solely through the issuance of the NOV's—is inappropriate and misguided.

The NOV's purport to create a new policy prohibiting convenience fees and designating expedited payment processing as normal servicing activity. On the contrary, our members understand convenience fees are not "costs associated with the servicing of the Mortgage," and, thus, outside the scope of HUD's limitations on servicing fees. Servicers charge convenience fees when they offer optional, expedited payment mechanisms, and their standard, free payment mechanisms. Whether borrowers incur convenience fees is entirely up to them, as borrowers may use other free payment options. Servicers' provision of the expedited payment mechanisms that underlie convenience fees is not mandatory under HUD's or any other mortgage-related agency's rules or guidelines and should not be considered part of their normal servicing activity.

Even if convenience fees are "costs associated with the servicing of the Mortgage," HUD has not, to our knowledge, taken past administrative enforcement action against any servicers on the grounds that their convenience fees were not reasonable and customary, based on actual cost of the work (or out of pocket expenses), or within the maximum amount permitted by HUD, despite the prevalence of servicers charging convenience fees for their provision of expedited payment mechanisms. Moreover, HUD has not included convenience fees in its list of "Prohibited Fees and Charges," and while Appendix 3.0 to the Handbook includes a list of maximum fees, neither the Handbook nor Appendix 3.0 states that this is an exhaustive list of permissible post-endorsement fees.⁴ HUD's new position

³ Prior to August 2021, the Single-Family Handbook stated with respect to forward mortgages: "The Mortgagee may request approval from the National Servicing Center (NSC) for any fee, charge, or unusual service not specifically mentioned in this *SF Handbook*. The Homeownership Center (HOC) will determine the maximum amount of any fee based on what is reasonable and customary in the area."

⁴ The position that Appendix 3.0 constitutes an exhaustive list of permitted fees is also undermined by the fact that it expressly prohibits two fee types in all jurisdictions ("Incorporating a Borrower's name change into the Servicer's loan system" and "Re-analyzing escrow accounts and providing new coupon books"), and that various post-endorsement fees are authorized outside of Appendix 3.0 (e.g., late fees in III.A.2.d; satisfaction fees in III.A.1.e.v.D-E; and various property preservation fees in Appendix 7.0). A more logical interpretation of Appendix 3.0 is that it merely constitutes a record of certain fee types for which the HUD HOC's have expressly opined on the range of fee amounts that are considered "reasonable and customary" and "based on actual cost" in the local jurisdiction, as opposed to an exhaustive list of permitted fees. This interpretation is also consistent with the language of 24 CFR § 203.552(b), which reads: "Reasonable and customary fees must be predicated upon the actual cost of the work performed including out-of-pocket expenses. Directors of HUD Area and Insuring Offices are authorized to establish maximum fees and charges which are reasonable and customary in their areas."

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purporting to prohibit convenience fees is recent, not based on a plain language reading of HUD's current regulations or Handbook, and articulated solely in the administrative enforcement context through the issuance of the pending NOV's.

For these reasons, HUD must rescind the NOV's. Though many servicers no longer charge convenience fees, the practice has consistently been an industry standard and broadly used by mortgage servicers, in good faith and following appropriate disclosure, for offering optional expedited payment mechanisms to help borrowers avoid late payments and late fees. Notably, the Consumer Financial Protection Bureau ("CFPB") published compliance guidance to regulate the charging of convenience fees in 2017; such guidance did not indicate that convenience fees were impermissible, but rather focused on the need to appropriately disclose to borrowers the existence of the fees and the range of available payment options.⁵

In alignment with the CFPB's guidance, servicers have provided borrowers with ample awareness—through their monthly billing statements, servicer websites, and telephone agent scripting—of the amount of such fees and alternative payment methods that allow borrowers to submit payments without incurring a fee. Pursuing administrative enforcement of a new and unannounced interpretation of authority risks further deterring program participation by punishing responsible mortgagees who have acted in good faith and in conformance. To that end, if HUD has decided that convenience fees are not permitted to be charged in connection with FHA-insured mortgage loans, we encourage FHA to issue clear guidance creating such a prohibition for servicers to implement prospectively, and to cease applying retroactively the new interpretation described in the pending NOV's.

Thank you for considering these comments. To discuss this matter further, please contact Brendan Kelleher at Bkelleher@mba.org.

Sincerely,



Pete Mills
Senior Vice President
Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association

CC: The Honorable Julia Gordon, Assistant Secretary for Housing and Federal Housing Commissioner
Sarah Edelman, Deputy Assistant Secretary for Single-Family Housing, Federal Housing Administration

⁵ CFPB, Compliance Bulletin 2017-01 (July 27, 2017).