April 3, 2024

The Honorable Julia Gordon
Commissioner, Federal Housing Administration
Department of Housing and Urban Development
451 7th Street SW
Washington, DC. 20410-8000

Dear Commissioner Gordon:

We wrote a **Letter** to you in December to express our concerns about the impact of the Sitzer/Burnett v. NAR ruling on mortgage lending to minority, veteran, and other underserved homebuyers. With the recent proposed settlement of this lawsuit, some shifting in the payment of buyer agent fees from home seller to home buyer is - as we predicted - now likely to occur.

Last Thursday FHA released a **Frequently Asked Question on Seller-Paid Commissions Related to the National Association of Realtors Settlement** - confirming that FHA will continue its existing policy that seller paid, buyer-side real estate agent commission and fees as a matter of state and local law or custom that are reasonable in amount will not be treated as a seller concession ("interested party contribution"). CHLA appreciates that FHA is not changing this policy.

We write today to request comparable FHA treatment for the financing of buyer paid real estate commissions for loans where the home seller is not willing to pay the buyer's agent commission. One option would be to allow a (reasonable) buyer agent commission to be financeable on top of the 96.5% LTV cap. We would also support other solutions that address this disparate treatment.

Our concerns for FHA borrowers where the seller does not fund the buyer's commission include:

(1) Significant numbers of 1st time homebuyers using FHA loans will not be able to meet the higher down payment levels necessary to pay the buyer's agent commission,
(2) Existing (and well documented) home seller biases against buyers with FHA loans will be exacerbated, because of concerns over the buyer's ability to make higher down payments, and
(3) Sellers may use their leverage over the higher down payment levels to extract a higher sales price in exchange for agreeing to pay the buyer agent commission.

This letter provides prototype loans to explain why we believe our request poses no substantive additional risk to FHA - and in some cases may even pose less risk.

Analysis of the Impact of Realtor Settlement on FHA Loans

Customary industry practice has been a real estate sales listing agreement, in which the selling broker shares a portion of the real estate commission with the agent representing the buyer after the sales contract is signed and the sale is closed. At closing the seller pays the full commission from the proceeds of the sale. Below is Example A, where the full commission amount is 6%:

EXAMPLE A: Home sales price of $300,000. Seller A pays the listing broker $18,000 (6%) and the listing agent then shares half of that amount with the buyer's agent. Seller nets $282,000. **FHA will finance a $289,500 mortgage loan and the buyer's cash down payment is $10,500.**

[NOTE: for this and subsequent examples, the buyer may also pay some closing costs, which could be covered by a seller concession. However, this does not change underlying analysis].

In the aftermath of the NAR settlement, we expect it will be common for the buyer to negotiate the buyer's agent commission – and also be financially responsible for paying this commission.

It is reasonable to assume that some home sellers will voluntarily agree to pay the buyer agent commission. Whether done as a part of the sales negotiation or as a seller concession ("interested party contribution"), the impact is the same. See Example B just below.

EXAMPLE B: Same home sales price of $300,000. Seller pays the seller's broker 3% - and also agrees to pay the buyer's realtor the 3% fee that the buyer is financially responsible for. **FHA will finance a $289,500 mortgage loan and the buyer's cash down payment is $10,500.**

CHLA hopes that over time this becomes standard industry practice - that <u>every</u> home seller will be willing to pay the buyer agent commission, as a courtesy and without extracting a higher price in exchange for doing so. However, we do not have confidence that this will be the case.

EXAMPLE C: Same terms - except the seller is **<u>not</u>** willing to pay the 3% buyer agent commission. In a competitive market, we assume the seller would be willing to sell the home for $291,000 (97% of $300,000) because the seller is no longer paying a buyer's agent fee of 3%. **FHA will finance a $280,815 mortgage loan and the buyer's cash down payment is now $8,730 higher – the amount of the buyer's agent commission.**

[Note: In this comparison, these variables may vary slightly due to use of a different sale price, but we leave this unchanged to make the comparison easier].

We believe that FHA borrowers should not have to make a much higher down payment merely because the seller is (arbitrarily) unwilling to fund the buyer agent commission**.**

While we appreciate that some may question our lower sale price in Example C, is critical to keep in mind that sellers do not consider concessions (such as paying the broker commission) a gift, out of the goodness of their heart. Sellers are economically rational; when they agree to pay a broker's commission, it can reasonably be assumed that it is incorporated into the sales price.

[NOTE: the analyses above are not changed if the buyer's agent commission is a lower amount – e.g., 1.5%. The problem is the same: if the buyer is responsible for paying the buyer's agent commission and the seller refuses to do so, this will mean a higher down payment is needed - unless FHA policies provide comparable treatment regardless of whether the seller pays the fee].

<u>Protecting FHA Borrowers from Home Sellers Leveraging a Higher Home Sale Price</u>

Finally, we believe it is important to consider the real-world impact of the fact that it will be up to the seller to decide whether to finance the buyer's broker commission.

A borrower with significant cash resources – such as a homeowner selling their existing home at a significant profit and then buying a replacement home – will be relatively indifferent as to whether the seller is willing to pay the buyer's agent commission or not.

However, for a 1st time homebuyer using an FHA loan because of the low down payment/higher LTV features, paying cash for their agent's commission may not be economically feasible. Having spent several years building up cash reserves for the down payment, the homebuyer will thus have to wait a few years longer to accumulate the cash necessary to fund this amount.

Knowing this, the home seller may reasonably demand some monetary concession in return for agreeing to fund the buyer's agent. Moreover, a buyer in such a situation would rationally agree to this - for example, would be willing to negotiate a price that is 1.5% higher than if the buyer had cash available. This decision is rational for the buyer, because 96.5% of this price hike will be financed by the FHA loan, assuming as is likely, that this is supported by the appraisal.

Example D below shows the impact.

EXAMPLE D: Same terms as Example B - except the FHA borrower homebuyer agrees to pay $4,500 more (1.5%) in exchange for seller agreeing to pay the buyer agent commission.
FHA will finance a $293,842 loan. Note that this is higher than the $289,545 loan CHLA is asking FHA to finance in Example C.

Thus, the irony is that it may be <u>less risky</u> for FHA to finance the buyer's agent commission at a lower price than to create this dynamic where FHA finances a higher amount when the seller offers to pay the buyer broker agent in exchange for the buyer agreeing to a higher sale price.

In closing, CHLA appreciates the complexity of these issues, the difficulty of making changes as realtor commission practices and levels may be about to enter a prolonged period of fundamental change, the importance of maintaining FHA's financial soundness, and considerations of risk.

However, we believe the risk of failing to debate and address these concerns regarding 1st time homebuyers using FHA loans is even greater.

Our members stand ready to work with FHA to provide real world examples of how changes in realtor commission practices are affecting down payment requirements and creating challenges for our borrowers – and to work through effective, risk-conscious solutions to these challenges.

Sincerely,

COMMUNITY HOME LENDERS OF AMERICA