

## **SECTION I: INITIAL STATEMENT BY BANK OF AMERICA PURSUANT TO SECTION E.1.b OF THE BUREAU’S POLICY ON NO-ACTION LETTERS**

Bank of America, N.A. hereby submits this Application for a No-Action Letter (“NAL”) based on an existing No-Action Letter Template approved by the Consumer Financial Protection Bureau (“Bureau”). On September 10, 2019, the Bureau granted an application for a No-Action Letter Template (the “HUD NAL Template”) submitted by the United States Department of Housing and Urban Development (“HUD”). HUD sought a No-Action Letter Template that could serve as the basis for No-Action Letter applications by mortgage lenders that enter into certain types of funding arrangements with housing counseling agencies that participate in HUD’s Housing Counseling Program.<sup>1</sup> Bank of America, N.A., in its capacity as a mortgage lender (“Bank of America”), hereby applies for such a No-Action Letter.

## **SECTION II: BANK OF AMERICA’S APPLICATION FOR A NO-ACTION LETTER PURSUANT TO SECTIONS A AND E.1.b OF THE BUREAU’S POLICY ON NO-ACTION LETTERS**

### **1. The identity of the entity or entities applying for the No-Action Letter**

Bank of America submits this application for a NAL under sections A and E.1.b of the Bureau’s Policy on No-Action Letters. Bank of America submits this application based on the HUD NAL Template that has been issued by the Bureau. Bank of America submits this application, in part, because it strongly agrees with the Bureau and HUD on the critical importance of housing counseling services.

In particular, Bank of America operates a “Connect to Own” program in which it enters into Housing Counseling Funding Agreements<sup>2</sup> with Participating Counseling Agencies<sup>3</sup> that govern the provision of housing counseling.<sup>4</sup> All such Participating Counseling Agencies are

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<sup>1</sup> More specifically, Part II of HUD’s application was an application for a NAL Template. Part I of HUD’s application sought a NAL on behalf of housing counseling agencies. The entire application is referred to herein as the “HUD Application.”

<sup>2</sup> This term is defined in section I.1 of the HUD Application as arrangements between counseling agencies and mortgage lenders for funding housing counseling services provided to consumers.

<sup>3</sup> This term is defined in section I.1 of the HUD Application as housing counseling agencies that currently or subsequently participate in HUD’s Housing Counseling Program.

<sup>4</sup> See [https://www.bankofamerica.com/content/pdf/NL\\_Connect\\_to\\_Own\\_flyer.pdf](https://www.bankofamerica.com/content/pdf/NL_Connect_to_Own_flyer.pdf); [https://www.bankofamerica.com/content/pdf/NL\\_HBE\\_Assessment\\_form.pdf](https://www.bankofamerica.com/content/pdf/NL_HBE_Assessment_form.pdf).

required to have been approved by HUD and are required to be in compliance with HUD's Housing Counseling Program requirements, including those detailed at 24 CFR Part 214.

Consistent with the applicable HUD requirements (referenced in the HUD NAL Template) that: (1) the terms of any Housing Counseling Funding Agreement be formalized in a Memorandum of Understanding ("MOU") between the parties,<sup>5</sup> and (2) any such MOU be compliant with certain HUD requirements, Bank of America confirms that (1) the terms of its existing Housing Counseling Funding Agreements are formalized in MOUs between Bank of America and the Participating Counseling Agencies ("Existing Bank of America MOUs"), and (2) these MOUs, and Bank of America's related practices, are compliant with the applicable HUD requirements. Similarly, Bank of America represents that (1) any future Housing Counseling Funding Agreements will be formalized in MOUs between Bank of America and the Participating Counseling Agencies ("Future Bank of America MOUs"), and (2) those MOUs, and Bank of America's related practices, will be compliant with the applicable HUD requirements.

Consistent with the HUD NAL Template, Bank of America seeks a NAL that would address certain aspects of both Existing Bank of America MOUs and Future Bank of America MOUs between itself and Participating Counseling Agencies that comply with 24 CFR Part 214, HUD Handbook 7610.1 REV-5 (Handbook), and section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x).

Specifically, as described in the HUD Application, and in Section II.5 below, Bank of America seeks a NAL that would cover Bank of America to the extent it includes and adheres to a provision in an Existing Bank of America MOU or a Future Bank of America MOU that conditions Bank of America's payment for the housing counseling services on the consumer applying for a loan from Bank of America with respect to which Bank of America has received proof of completion of such counseling services ("HBE Proof of Completion") from the Participating Counseling Agency.

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<sup>5</sup> See Handbook section 7-5 ("Once a housing counseling agency has decided to enter into a relationship with a particular lender, HUD requires that you enter into a Memorandum of Understanding, signed by both parties, to formalize your relationship.").

Bank of America also requests confirmation that, if this application is granted, the HUD-approved housing counseling agencies listed on the HUD website, including those housing counseling agencies added subsequent to this application, will be recognized as eligible Participating Counseling Agencies covered under the NAL.

**2. A description of the consumer financial product or service in question, including (a) how the product or service functions, (b) the terms on which it will be offered, and (c) the manner in which it is offered or provided, including any consumer disclosures**

Bank of America notes that the consumer financial product or service in question for purposes of this application is substantially identical to the consumer financial product or service described in the HUD Application. Bank of America hereby incorporates that description by reference.

Under the Existing Bank of America MOUs, Participating Counseling Agencies provide pre-purchase homebuyer education and/or counseling to consumers. The types of counseling vary by the Participating Counseling Agency and include one-on-one counseling appointments, group homebuyer education, and online or telephonic solutions. Regardless of the format, all Participating Counseling Agencies must perform all counseling in a manner that is compliant with the applicable HUD requirements.

In general, and as described in the Existing Bank of America MOUs, the counseling includes topics such as budgeting, credit improvement, saving, the home buying process, evaluating loan options, shopping for a home, qualifying for a mortgage, understanding insurance requirements (e.g., homeowners, mortgage, title), and being a homeowner. In addition, the Participating Counseling Agencies provide customized assistance to individual consumers such as affordability guidance, preparation for the home application (compiling the necessary documents to submit a mortgage application), analysis of the consumer's income and debt and credit history, conducting a credit review (educating the consumer in understanding and clearing credit problems), and providing post-closing services.

Under the Existing Bank of America MOUs, prior to performing any of the counseling services, the Participating Counseling Agency must confirm that its education and counseling content complies with the applicable HUD requirements.

**3. An explanation of the potential consumer benefits of the product or service**

Bank of America notes that an explanation of the potential consumer benefits of the product or service in question for purposes of this application is substantially identical to the explanation provided on this issue in the HUD Application. Bank of America hereby incorporates that explanation by reference.

Since the inception of the Connect to Own program in 2004, Bank of America has witnessed the numerous benefits of homebuyer education provided by Participating Counseling Agencies, including the ability for consumers to (1) assess their readiness for the responsibility of homeownership, (2) establish a budget to include the costs of homeownership, (3) meet the product and affordable housing program requirements, and (4) build confidence and knowledge in the home buying process.

As HUD highlighted in the HUD Application, Bank of America recognizes that federal grant funds cannot fully support the costs of Participating Counseling Agencies to provide housing counseling services to consumers. In order to address this gap, under its Existing Bank of America MOUs, Bank of America provides a homebuyer counseling fee to Participating Counseling Agencies to compensate these agencies for performing counseling services for each consumer who (1) applies for a mortgage loan with Bank of America and (2) with respect to which Bank of America has received the HBE Proof of Completion from the Participating Counseling Agency.

**4. An explanation of the potential consumer risks posed by the product or service, and how the applicant intends to mitigate such risks**

Bank of America notes that an explanation of the potential consumer risks posed by the product or service in question for purposes of this application, and how those risks are managed and minimized, is substantially identical to the explanation provided on this issue in the HUD Application. Bank of America hereby incorporates that explanation by reference.

As HUD noted in the HUD Application, funding relationships between mortgage lenders and housing counseling agencies where mortgage lender payments are conditioned on a consumer's contact or closing a loan with the lender could create a steering risk for consumers. These types of agreements could, in theory, incentivize the housing counseling agencies to refer consumers only to mortgage lenders with whom the housing counseling agencies have a funding relationship, or to mortgage lenders in such a funding relationship that pay the highest counseling fee or are most likely to close a transaction with the consumer—rather than to mortgage lenders that would offer the most suitable product given the consumer's circumstances.

Bank of America does not believe this is true of any of its Existing Bank of America MOUs, and Bank of America already has in place practices to mitigate such risks. For example, Bank of America notes that, under Existing Bank of America MOUs, the homebuyer counseling fee is payable to the Participating Counseling Agency for performing counseling services for each consumer who (1) applies for a mortgage loan with Bank of America and (2) with respect to which Bank of America has received the HBE Proof of Completion from the Participating Counseling Agency. Once the HBE Proof of Completion has been submitted to Bank of America, the homebuyer counseling fee will be paid by Bank of America regardless of whether the consumer closes a loan with Bank of America. In addition, if the Participating Counseling Agency issues a HBE Proof of Completion and that consumer applies for mortgage loans with multiple lenders, the Existing Bank of America MOUs provide that Bank of America will still pay the homebuyer counseling fee regardless of the consumer's ultimate lender selection as long as the Participating Counseling Agency does not seek reimbursement of any part of the homebuyer counseling fee from another lender. The Existing Bank of America MOUs also include a representation or warranty from the Participating Counseling Agency that it will not receive total fees in excess of the fair market value for any services covered by the MOU.<sup>6</sup> Bank of America intends to retain the preceding provisions in Future Bank of America MOUs.

**5. An identification of the statutory and/or regulatory provisions under which the applicant seeks a No-Action Letter and an explanation of why a No-Action Letter is needed, such as uncertainty or ambiguity regarding the application of**

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<sup>6</sup> The total fees for services include: (1) any fee charged by the Participating Counseling Agency to the consumer for the counseling services performed under the Existing Bank of America MOU and (2) the homebuyer education fee paid by Bank of America under the Existing Bank of America MOU.

**the identified statutory and/or regulatory provisions to the product or service in question.**

Bank of America notes that an identification of the statutory and/or regulatory provisions under which Bank of America submits this application and an explanation of why a No-Action Letter is needed, such as uncertainty or ambiguity regarding the application of the identified statutory and/or regulatory provisions to the product or service in question, is provided in the HUD Application. Bank of America hereby incorporates that identification and explanation by reference.

Consistent with the HUD NAL Template, Bank of America is seeking a NAL stating that: unless or until terminated by the Bureau as described in the NAL, the Bureau will not make supervisory findings or bring a supervisory or enforcement action against Bank of America under

- (a) its authority to prevent unfair, deceptive, or abusive acts or practices,<sup>7</sup> or
- (b) section 8 of the Real Estate Settlement Procedures Act<sup>8</sup> (RESPA) and section 1024.14 of Regulation X<sup>9</sup>

for including and adhering to a provision in Existing Bank of America MOUs and Future Bank of America MOUs that conditions Bank of America's payment for the housing counseling services on the consumer applying for a mortgage loan with Bank of America with respect to which Bank of America has received the HBE Proof of Completion from the Participating Counseling Agency, even if that provision or the parties' adherence thereto could be construed as a referral (as such term is used in RESPA section 8(a) and defined in Regulation X, § 1024.14(f)); provided that, the level of payment for the housing counseling services does not exceed a level that is commensurate with the services provided and is reasonable and customary for the area.

**6. If an applicant wishes to request confidential treatment under the Freedom of Information Act, the Bureau's rule on Disclosure of Records and Information, or**

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<sup>7</sup> 12 U.S.C. 5531, 5536. Implicit in the statement under clause (a) is that the Bureau has not determined that the acts or practices in question are unfair, deceptive, or abusive.

<sup>8</sup> 12 U.S.C. 2607.

<sup>9</sup> 12 CFR § 1024.14.

**other applicable law, this request and the basis therefor should be included in a separate letter and submitted with the application. An applicant should specifically identify the information for which confidential treatment is requested, and may reference the Bureau's intentions regarding confidentiality under Section G.**

- See separate letter.
7. **If an applicant wishes the Bureau to coordinate with other regulators, the applicant should identify those regulators, including but not limited, to those that have been contacted about offering or providing the product or service in question.**
- n/a

### **SECTION III: CERTIFICATIONS PURSUANT TO THE HUD NAL TEMPLATE**

Bank of America hereby certifies in support of its application for a No-Action Letter that:

1. For certification #1, please see below:
  - a. Existing Bank of America MOUs include, and Future Bank of America MOUs will include, the term that the client will choose between comparable products from at least three (3) different lenders, or substantially similar language to the same effect;
  - b. Existing Bank of America MOUs include, and Future Bank of America MOUs will include, the term that the funding derived from this agreement is based on the services rendered, not on the amount, terms, or conditions of any mortgage loan or related transaction, or substantially similar language to the same effect; and
  - c. Existing Bank of America MOUs do not include, and Future Bank of America MOUs will not include, any term creating an obligation for the Participating Counseling Agency to recommend Bank of America's products to the client.<sup>10</sup>

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<sup>10</sup> Relatedly, Existing Bank of America MOUs include, and Future Bank of America MOUs will include, the term that during the course of performing its counseling responsibilities, the Participating Counseling Agency shall not represent to consumers that a loan from Bank of America is required, is pre-approved, or is in any way conditioned on any relationship the consumer may have with the Participating Counseling Agency or is necessary to receive homebuyer counseling.

2. Existing Bank of America MOUs include, and Future Bank of America MOUs will include, the term that the payment(s) provided by Bank of America to a Participating Counseling Agency pursuant to the MOU will not exceed a level that is commensurate with the services actually provided, or substantially similar language to the same effect.
3. Existing Bank of America MOUs include, and Future Bank of America MOUs will include, the term that the payment provided by Bank of America to a Participating Counseling Agency pursuant to the MOU will be reasonable and customary for the area, or substantially similar language to the same effect.
4. For certification #4, please see below:
  - a. Existing Bank of America MOUs include, and future Bank of America MOUs will include, a certification from the counseling agency that the counseling agency is a Participating Counseling Agency, or substantially similar language to the same effect.<sup>11</sup>
5. Bank of America has provided the Existing Bank of America MOU template to the Bureau and will provide a copy of any Existing Bank of America MOU, Future Bank of America MOU, or revised Bank of America MOU template to the Bureau if requested by the Bureau.

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<sup>11</sup> Relatedly, under its current practices, Bank of America confirms the active status of the Participating Counseling Agency's HUD certification prior to executing the Bank of America MOU ("Certification Confirmation"). In addition, Bank of America will amend its practices to require Certification Confirmation prior to remitting payment for counseling services to the Participating Counseling Agency.