UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF APPEALS
Washington, D.C.

In the Matter of:	HUDOA No. 10-M-002-D2
	OGC Case No. 10-3617-DB
LISA BURNS,	
Respondent.	

Appearances

Scott D. Burke, Esq. and Bruce E. Alexander, Esq., Washington, D.C.
Counsel for Respondent

Stanley E. Field, Esq. and Ana I. Fabregas, Esq., Washington, D.C.
Counsel for the Government

BEFORE: H. Alexander Manuel, Administrative Judge

INITIAL DECISION

Statement of the Case

By letter dated October 20, 2009 ("Notice of Proposed Debarment"), Henry S. Czauski, Acting Director for the Office of General Counsel Departmental Enforcement Center for the U.S. Department of Housing and Urban Development ("HUD" or "Government"), notified Lisa Burns ("Burns" or "Respondent") that, in order to protect the public interest, HUD was proposing Respondent's debarment from future participation in procurement and nonprocurement transactions as either a participant or principal, with HUD and throughout the Executive Branch of the Federal Government for a period of five years from the notice date. In addition, pending final determination of the debarment, Respondent was immediately suspended from further participation in such transactions. The suspension and proposed debarment was based upon Respondent's actions as a loan underwriter, and her commission of alleged violations of HUD underwriting requirements, which constitute cause for debarment under 2 C.F.R. § 180.800(b) and 2 C.F.R. § 180.800(d).

Respondent appealed the proposed debarment and requested a hearing before a debarring official. Upon a Joint Motion for Referral by both parties, the Debarring Official referred the matter to this Court pursuant to 2 C.F.R. § 180.845(c) on February 26, 2010. On September 20-24, 2010, this Court conducted a hearing in accordance with 2 C.F.R. Part 180 and 24 C.F.R. Part 26, Subpart A in order to make findings of fact. The following witnesses testified at the hearing: Patricia Peiffer, Acting Branch Chief of the Quality Assurance Division of the Philadelphia Homeownership Center (PHC); Joyce Tate-Cech, a HUD employee with the PHC; and Respondent. The parties filed Post-Hearing Briefs on November 2, 2010. Accordingly, this case is ripe for decision.

For the reasons stated below, this Court finds that notwithstanding Respondent's violations of HUD guidelines, Respondent is "presently responsible" to serve as a direct endorsement underwriter for HUD or other federal contractors. The Court further finds that no period of debarment is warranted in this case, and that a 28-month suspension running from the date of the Notice of Proposed Debarment is adequate to protect the public interest in ensuring the soundness of HUD lending programs.

Findings of Fact

1. Respondent became an underwriter of conventional and FHA-insured loans in December of 1995. (Tr. 426:11-16.) In March of 2009, Respondent became a supervisor at Lend America. (Tr. 436:21-23.)

2. In the beginning of Respondent's career as an underwriter, Respondent underwrote approximately two to three loans a day. (Tr. 434:6-7.) By 2008 and 2009, Respondent estimates that she underwrote approximately four or five loans a day. (Tr. 434:8-10.)

3. Respondent's responsibility as an underwriter of an FHA-insured mortgage loan was to analyze the credit, capacity to pay, the cash to close, and the collateral to ensure that HUD guidelines were met and that the borrower was qualified. (Tr. 430:9-12.) The HUD guidelines that Respondent was required to follow in qualifying the loans at issue in this case, are set forth in HUD Handbook 4155.1 REV-5 and related mortgagee letters and guidebooks. (Tr. 430:13-17.)

4. HUD directed its Quality Assurance Division ("QAD") within its Philadelphia Homeownership Center to conduct a review of loans originated by Lend America, an FHA approved lender. (Tr. 7:10-15; 15:12-13.) The purpose of the review was to examine the Lend America loans for compliance with the standards contained in applicable HUD handbooks and mortgagee letters. (Tr. 15:18-19, 18:18-22.) The QAD conducted its review from December of 2008 to February of 2009. (Tr. 144:1-9.)

5. On October 20, 2009, Respondent received the Notice of Proposed Debarment that formed the basis for this debarment proceeding. (Tr. 437:2-6; Notice of Proposed Debarment 1.) Lend America received its mortgagee review board letter on the same date and HUD sought an injunction against Lend America in a separate proceeding. (Tr. 437:4-6.) Prior to

receiving the Notice of Proposed Debarment, Respondent had never been notified by HUD that any of her loans failed to comply with HUD guidelines for FHA-insured loans. (Tr. 436.)

6. The Notice of Debarment was based upon alleged irregularities in the following loans underwritten by Respondent: FHA No. 352-5629373 ("Askew Loan"); FHA No. 352-5606909 ("Basurco Loan"); FHA No. 241-7918399 ("Dimsoy-O'Brien Loan"); FHA No. 351-4873214 ("Gasser Loan"); FHA No. 351-4834568 ("Greco Loan"); FHA No. 061-3055021 ("Delith Jackson Loan"); FHA No. 351-5006202 ("Eric Jackson Loan"); FHA No. 381-8104138 ("Lowe Loan"); FHA No. 441-8150347 ("Mosser Loan"); FHA No. 374-4609869 ("Patterson Loan"); FHA No. 352-5557469 ("Powell Loan"); FHA No. 271-9372461 ("Richter Loan"); FHA No. 061-2994917 ("Torres Loan"); FHA No. 263-4058480 ("Speigl Loan"); and FHA No. 381-8202674 ("Terry Loan").

A. The Askew Loan

7. Respondent signed pages 1 and 3 of the HUD/VA Addendum to Uniform Residential Loan Application ("URLA Addendum") with regard to the Askew loan but testified that someone else signed her name on page 4. (Tr. 699:17-21; Gov't Ex. 63.)

8. The Askew Loan was a cash-out refinance that paid off two of the borrower's accounts, one of which involved an automobile loan payment of $529 per month. (Tr. 449:9-17; Resp't Ex. 2.)

9. The credit report for the Askew Loan disclosed collection accounts with Allied Interstate, Verizon, and Palisades. (Gov't Ex. 27.)

10. The credit report also showed several charge-off accounts, some of which were paid, a paid collection account, and a paid judgment, all of which were dated between 2006 and 2007. (Gov't Ex. 27; Tr. 92:16-22.)

11. The credit report also showed a Five Card Bank account that was 30 days late in July, August, and September of 2002. (Tr. 93:2-9; Gov't Ex. 27.)

12. Respondent made no mention of negative credit on the Mortgage Credit Analysis Worksheet ("MCAW"). (Tr. 94:20-21; Gov't Ex. 28.)

13. The case file for this loan contained a copy of the borrower's letter of explanation. (Resp't Ex. 1). In the letter of explanation, the borrower stated:

> The reason for my derogatory credit was because my father passed away, unfortunately, in August of 2004. I had a great relationship with my father and when he passed away I felt that a part of me died with him and it took me a while to really put everything together and move on with my life. As well, I was stuck with a lot of funeral expenses and had to pay all of them since I was the only child and was responsible for him. Since then I have been able to

catch up with all those bills and I have paid my mortgage on time. I hope this takes care of this matter and if any questions, please feel free to contact me at your earliest convenience.

14. The credit report for the Askew Loan reviewed the borrower's mortgage history for 71 months, without any late payments. (Tr. 451:4-8; Gov't Ex. 27.)

B. The Basurco Loan

15. Respondent signed her name on pages 1 and 3 of the URLA Addendum for this loan, but did not sign her name on page 4. (Tr. 706:9-14; Gov't Ex. 72.)

16. The Basurco Loan exceeded maximum acceptable mortgage-to-income and debt-to-income ratios. (Tr. 456:20-24; Resp't Ex. 3.)

17. The Notice of Proposed Debarment states that Respondent approved the Basurco Loan with mortgage-to-income and debt-to-income ratios of 53.5% and 59.4%. (Notice of Proposed Debarment 5.)

18. Respondent testified that the ratios cited by the Notice of Proposed Debarment came from the MCAW and were "handwritten changed" on the MCAW by someone other than Respondent and that the actual ratios used by Respondent were 44.92 for mortgage payment to income, and 59.36 for debt to income. (Tr. 457:6-16; Resp't Ex. 3.)

19. The "Remarks" section of the MCAW (Resp't Ex. 3) listed the following information:

Fhs 30Yr Fixed Fi/Fa Cash Out Refi
B: 437,493, 483
Good Mtge. History, Assets
Job Stability, 20 years with same employer
11b= monthly overtime earnings
GOOD LTV & EARNINGS POTENTIAL
Monthly payment is decreasing

20. Respondent testified that overtime was not meant as a mitigating factor, but for informational purposes only. (Tr. 457:12-16.)

21. Respondent relied on the borrower's assets-reserves after closing, job stability, good LTV, earnings potential, and decreasing mortgage payment as compensating factors for exceeding acceptable mortgage payment-to-income and debt-to-income ratios. (Tr. 457-462; Resp't Ex. 3.)

22. The case file for this loan included the borrower's AT&T Long Term Savings Plan; employment verification; earnings statement for the period of June 16, 2007 to June 30, 2007; 2006 W-2; and 2005 W-2. (Resp't Exs. 4, 5, 6, 7, 8.)

23. Respondent testified that after the refinance, the borrower's new mortgage payment would be "in line" with his previous mortgage payment and would not decrease significantly. (Tr. 461:3-11.)

C. The Dimsoy-O'Brien Loan

24. Respondent testified that someone else signed her name on pages 1, 3 and 4 of the URLA Addendum for this loan. (Tr. 693:14-25, 694:1-5; Gov't Ex. 60.)

25. The borrower's Verification of Employment ("VOE") for the Dimsoy-O'Brien Loan stated that the borrower had been working for his current employer since May of 2005. (Gov't Ex. 12; Resp't Ex. 9.)

26. The case file for this loan also included a print-out from the Maryland Department of Assessment and Taxation that reported that Nevaeh Properties, LLC was either formed or registered with the state on April 26, 2007. (Gov't Ex. 13; Resp't Ex. 10.)

27. The case file for this loan also included a gross pay letter and cancelled checks from the borrower's employer. (Tr. 467:17-22; Resp't Exs. 12, 13.)

28. Respondent approved this loan with mortgage-to-income and debt-to-income ratios that exceeded the maximum acceptable ratios established by HUD. The ratios for this loan were 38.346 percent and 45.364 percent respectively. (Gov't Ex. 16.) However, Respondent maintains that there were compensating factors to justify approval of the loan.

29. The "Remarks" section of the MCAW listed the following information: FHA 30 YEAR FIXED CASH OUT REFI, B: 645, 629, 653. (Gov't Ex. 16.)

30. A copy of the borrower's credit report was included in the case file for this loan. The credit report showed that the current mortgage reflected perfect payment on the credit report for 20 months and other mortgage trade lines on other properties had been paid perfectly for the past 10 years. (Tr. 469:14-15; Resp't Ex. 14.)

31. A copy of the HUD-1 Settlement Statement from the loan closing was also included in the case file for the loan and showed that the borrower's new loan would pay off two existing obligations. (Resp't Ex. 15.) Respondent testified that paying off those obligations would decrease the borrower's monthly expenses by over $400. (Tr. 470:25, 471:1-4.)

32. After refinancing, the borrower's mortgage payment would increase from $1,851.86 to $2,022.65. (Resp't Exs. 16, 17.)

33. Respondent testified that, "[w]hile I agree that the compensating factors were not typed on the MCAW, as they should have been, an experienced person that looked at the file . . . could see that there were compensating factors within the file documented." (Tr. 469:4-8.)

34. Respondent testified that aside from omitting the compensating factors for this loan, she complied with HUD requirements. (Tr. 694-695.)

D. The Gasser Loan

35. Respondent signed her name on pages 1 and 3 of the URLA Addendum for this loan but did not sign her name on page 4. (Tr. 706:9-14; Gov't Ex. 71.)

36. Respondent approved the Gasser Loan with a total income of $6,333.43, including the borrower's base income of $5,780. (Tr. 473:19-22; Gov't Ex. 55.)

37. The borrower's income included monthly overtime of approximately $1,300. (Tr. 473:22-23; Gov't Ex. 55.)

38. A VOE dated December 17, 2006 was obtained from an automated system called "Work Number for Everyone" and reported that the borrower was employed at Nestle USA, Inc. and earned $21,585.56 in overtime in 2006. (Gov't Ex. 54; Resp't Ex. 20.)

39. The case file for this loan included three bi-weekly pay statements that bore the pay dates of December 29, 2006, January 5, 2007, and January 19, 2007. (Resp't Exs. 21, 22, 23.)

40. Respondent testified that she calculated the borrower's base pay to total $47,860. (Tr. 475:5.)

41. To calculate the borrower's overtime pay, Respondent calculated the borrower's base pay as totaling $47,860 based on the borrower's hourly wage and subtracted the borrower's base pay from the borrower's total earnings listed on the VOE (Resp't Ex. 20), 2005 W-2 (Resp't Ex. 24), and 2004 W-2 (Resp't Ex. 25). (Tr. 474-75.)

42. Respondent's calculations showed that the borrower earned at least $13,000 in overtime pay for 2004, 2005, and 2006. (Tr. 475:10-11.)

43. Respondent testified that HUD guidelines do not require her to explain her determination on the MCAW if overtime is established over two years. (Tr. 477:4-11.)

E. The Greco Loan

44. Respondent signed pages 1, 3, and 4 of the URLA Addendum for the Greco Loan. (Tr. 701:13-18; Gov't Ex. 65.)

45. This loan was a cash-out refinance. (Resp't Post-Hr'g Br. 14.)

46. The borrower's credit report listed 18 accounts under the heading "derogatory credit." (Gov't Ex. 35.)

47. The borrower's credit report also showed three late mortgage payments since 1994, two of which were 30-day delinquent mortgage payments occurring in June and July of 2006. (Tr. 488:16-18; Gov't Ex. 35.)

48. The case file for this loan included a letter from the borrower explaining that his derogatory credit was the result of his wife developing cervical cancer and being unable to work, but that she may have been able to return to work in a few months. (Resp't Ex. 26.)

49. The explanation letter was supported by verification from the co-borrower's doctor. (Resp't Ex. 27.)

50. The borrower's base pay of $5,879.82 included commission income. (Gov't Ex. 36; Resp't Ex. 33.)

51. The case file for this loan included a VOE from Pine Belt Chevrolet, dated August 25, 2006; a VOE from DCH Montclair Acura, dated August 25, 2006; and a VOE from Gateway Toyota, dated August 31, 2006. (Resp't Exs. 28, 29, 30.)

52. The VOE from Pine Belt Chevrolet showed that since the borrower became employed with the company on July 31, 2006, the borrower had earned $1,090.38 in base pay and $1,511.49 in commission. (Resp't Ex. 28.)

53. The VOE from DCH Montclair Acura showed that the borrower was employed with the company from December 11, 1993 through July 18, 2006 and earned $1,400 bi-weekly in base pay and $3,760 monthly in commission. The VOE also showed that the borrower earned $9,262.00 from June through July of 2006. (Resp't Ex. 29.)

54. A Processor Certification stated that the borrower worked on and off during his employment at DCH Montclair Acura and that in 2006, the borrower only worked from June through July. (Resp't Ex. 29.)

55. The VOE from Gateway Toyota showed that the borrower was employed with the company from October 3, 2005 through May 19, 2006, and had 2006 year-to-date earnings of $31,615.00 with $10,300.00 attributed to base pay and $21,315.00 attributed to commission income. (Resp't Ex. 30.)

56. The borrower's base pay was listed as totaling $5,879.82. (Gov't Ex. 36.)

57. Respondent testified that she calculated the borrower's earnings by adding everything the borrower earned in 2005 and 2006 and averaging it. (Tr. 492:13-17.)

58. Respondent also testified that the HUD guidelines favor income stability, and the underwriter may consider commission income so long as she verifies two years of employment in the same line of work and pay. (Tr. 489:14-19; Resp't Post Hr'g Br. 28.)

59. The loan was approved with debt to income ratios of 38% and 46%, exceeding HUD guidelines. (Gov't Ex. 36.)

60. The "Remarks" section of the MCAW included the following notations:

> FHA 30 YR FIXED REFI FI/FA
> FICO SCORES: 450, 468, 511
> ADJUSTABLE TO FIXED
> Income avg 2005 + 2006 – all income
> Housing payments changing minimally
> *2006 YTD earnings of $44,587.75

(Gov't Ex. 36.)

61. Respondent testified that the notation relating to the borrower's 2006 YTD earnings was there for informational purposes only and was not meant to be a compensating factor. (Tr. 498:23-24.)

62. Respondent testified that the remarks concerning the borrower conversion from an adjustable rate mortgage to a fixed rate mortgage and the borrower's housing payments changing minimally were compensating factors. (Tr. 498:23-25, 499:1-6.)

63. Respondent also testified that she "should have typed additional compensating factors on the MCAW, but . . . that's a technical thing and it doesn't affect the risk to the file because documents are in the file to support the reasons for approval." (Tr. 499:2-6.)

64. Other compensating factors that Respondent considered but did not list on the MCAW include: long term homeownership; and good earnings potential. (Resp't Post-Hr'g Br. 35.)

65. Respondent approved the loan and signed the MCAW on September 7, 2006. (Gov't Ex. 36.)

F. The Delith Jackson Loan

66. Respondent testified that someone else signed her name on pages 1, 3, and 4 of URLA Addendum for the Delith Jackson Loan. (Tr. 703:7-24; Gov't Ex. 68.)

67. The credit report for this loan stated that the borrowers were at least 30 days late with their auto loan payment on eight occasions in the preceding year. (Gov't Ex. 41.)

68. Respondent testified that she inferred from the credit report that the eight late payments were the result of one missed payment that carried over each month when the next month's payment was applied to the previous month's missed payment, causing another 30-day late payment. (Tr. 508:5-9, 509:15-22.)

69. The FHA binder did not include the explanation from Respondent that she believed, at the time she approved the loan, that the eight late payments were the result of one missed payment that rolled over month after month.

70. The FHA binder included borrower's explanation, but the explanation did not state that the eight late payments resulted from one late payment being rolled over to successive months. (Resp't Ex. 36.)

71. Instead, the borrower's explanation was that her late auto payments were the result of the vehicle's broken transmission, which needed to be replaced. (Resp't Ex. 36.)

72. An invoice for the transmission repairs, dated June 14, 2007, was included in the FHA binder. (Resp't Ex. 37.)

73. The explanation letter and invoice supplied by the borrower was not consistent with the information on the credit report, because the late payments on the auto loan began well before June 14, 2007. (Gov't Ex. 41.)

74. In addition, the credit report disclosed several collection accounts with Avalon Valley, Americredit, Applied Card Bank, AT&T Services and Palisades, some of which were settled for less than the amount owed. (Gov't Ex. 41.)

75. Respondent testified that the collection accounts with Americredit, Applied Card Bank, AT&T Services and Palisades were not recent, and that it is not uncommon for creditors to offer settlements on collection accounts, and FHA has no prohibition against borrowers reaching payoff settlements with creditors. (Tr. 514:7-17; Resp't Post Hr'g Br. 18-19.)

76. The case file included two nontraditional credit references from Liberty Mutual and Black Gold Oil, Inc., neither of which directly explained the derogatory references in the borrower's credit report. (Resp't Post-Hr'g Br. 19; Resp't Exs. 38, 39.)

77. Respondent testified that she obtained the two letters from creditors with whom the borrowers had positive credit history to show a "more recent measure of how [the borrowers] had been handling their credit issues." (Tr. 516:22-24; Resp't Exs. 38, 39.)

78. The FHA binder included a second explanation letter from the borrowers stating that, during a difficult time in their relationship, the borrowers separated which resulted in the derogatory credit. (Resp't Ex. 40.)

79. The FHA binder also included copies of the borrowers' 2005 tax returns confirming that they were actually separated. (Tr. 516:13-16; Resp't Ex. 41.)

80. The case file for this loan also included a bank printout that disclosed two lump sum deposits of $10,000 and $5,000 made on May 30, 2007 and June 11, 2007, respectively. (Gov't. Ex. 42.)

81. The loan file included a letter from the borrower stating the deposits were gifts from her parents; however, the file did not include the donor's withdrawal slip or cancelled check. (Resp't Ex. 44.)

82. Funds from the deposits were used to satisfy collection accounts outside of escrow and were not used to close the loan. (Tr. 523:7-21; Resp't Ex. 43.)

83. Respondent testified that this was a Gift of Equity transaction: a sale of the subject property between the borrowers and their parents, and the equity in the home was used for the down payment and fees associated with this transaction. (Tr. 523:7-21.)

84. The collection account for Avalon Valley indicated an outstanding debt of $13,740 but the actual debt was in dispute. (Gov't Ex. 41.)

85. The case file included a letter from the law firm representing Avalon Valley indicating an agreement to settle the debt for $7,500 by check made payable to "Doran & Chinitz, LLC." (Resp't Ex. 46.)

86. Respondent listed "HUD ONE TO SHOW $7,500 COLL ACCT. (SEE SETTLEMENT LETTER) FUND TO PAY ARE A GIFT OF EQUITY" as a closing condition. (Tr. 529:6-8; Resp't Ex. 45.)

87. The closing agent closed the loan without including the $7,500 payment for the Avalon Valley collection account on the HUD-1, and instead accepted a $7,500 personal check from the borrowers. (Tr. 784-785; Resp't Ex. 43, 47.)

88. This loan was approved using rental income of $1,105 from the larger of two dwelling units. (Tr. 533:16-25, 534:1-2; Gov't Ex. 44.)

89. Copies of the Small Residential Appraisal Report and Operating Income Statement for the property were included in the case file for this loan. (Resp't Ex. 42.)

90. Respondent testified that an IRS Schedule E was not required as this was a purchase transaction. (Tr. 533:1-6.)

91. Respondent testified that she calculated the borrowers' rental income by using the "more conservative actual rent of $1,300 less the 15 percent vacancy allowance" rather than using the $1,400 market rent listed on the appraisal. (Tr. 534:20-25; 535:1-8.)

92. Respondent also testified that although she underwrote the loan, she did not sign the MCAW. (Tr. 535:9-10.)

G. The Eric Jackson Loan

93. Respondent signed pages 1 and 3 of the URLA Addendum for the Eric Jackson Loan but did not sign her name on page 4. (Tr. 701:13-18; Gov't Ex. 66.)

94. A credit report for the co-borrower dated December 13, 2007 disclosed an education loan that was in collection in the amount of $5,225.00. (Tr. 110:22-25, 111:1; Gov't Ex. 37.)

95. The case file sent to HUD did not include an explanation from the co-borrower regarding the delinquent education loan. However, at the hearing, Respondent produced a computer-generated condition sheet regarding the delinquent education loan. (Tr. 541:1-12; Resp't Ex. 48.)

96. A credit supplement obtained by Respondent prior to the expiration of the rescission period of the loan but after the loan was approved, showed that the collection account was in repayment and not past due. (Resp't Ex. 49; Tr. 541-43.)

H. The Lowe Loan

97. Respondent signed pages 1, 3, and 4 of the URLA Addendum for the Lowe Loan. (Gov't Ex. 67; Tr. 702:22-25, 703:1-4.)

98. The FHA binder included two explanation letters furnished by the borrower, medical bills and a letter from the social security administration. (Resp't Exs. 50, 51, 52, 53.)

99. The explanation letters, however, only discussed the borrowers' late mortgage payments and did not explain all of the derogatory credit in the credit report. (Resp't Exs. 50, 51.)

100. The housing payment did not increase as alleged in the Notice of Proposed Debarment, but actually decreased by approximately $15 per month. (Tr. 260:12-13; Tr. 558; Resp't Exs. 55, 56.)

101. The borrower opened a new credit trade line in April of 2007 that was reflected on the loan application and credit report. (Tr. 561; Resp't Exs. 54, 57.)

I. The Mosser Loan

102. Respondent testified that she signed her name on pages 1 and 3 of the URLA Addendum for this loan and that someone else signed her name on page 4. (Tr. 697:15-25, 698:1-3; Gov't Ex. 61.)

103. The Mosser Loan was a cash-out refinance that was used to pay off delinquent debt. (Resp't Post-Hr'g Br. 8.)

104. The credit report reflected numerous late payments and collection accounts beginning as early as May 2005. (Gov't Ex. 19; Resp't Ex. 60.)

105. The credit report also showed that the borrower was 30 days late paying her mortgage on three recent occasions: July 2007, August 2007, and September 2007. (Gov't Ex. 19; Resp't Ex. 60.)

106. The case file contained an explanation letter from the borrower, dated November 29, 2007, explaining that the derogatory credit was a result of the borrower's traumatic divorce. (Resp't Ex. 58.)

107. The FHA binder contained a letter from the borrower's attorney, dated March 14, 2007, that discusses the borrower's divorce. (Resp't Ex. 59.)

108. Although the Notice of Proposed Debarment claims that the borrower's housing payments would increase from $596 to $862.15, the lower original payment did not include taxes and insurance. (Tr. 571:14-16.)

109. The new loan would have only minimally increased the borrower's housing payments from $774 to $862.15. (Tr. 571:19-21, 572:11-12.)

J. The Patterson Loan

110. Respondent testified that she signed her name on pages 1 and 3 of the URLA Addendum for this loan and that someone else signed her name on page 4. (Tr. 699:17-21; Gov't Ex. 62.)

111. The credit report for this loan, dated August 8, 2007, disclosed a history of late payments and collection accounts, including past due accounts totaling $3,095. (Gov't Ex. 20.)

112. The FHA binder included three explanation letters from the borrower explaining that her derogatory credit was a result of her inability to balance work and nursing school, and a service fee that she was unaware was being charged to her account that had no balance. (Tr. 580; Resp't Exs. 69, 70, 71.)

113. Respondent testified that she found the borrower's explanations to be reasonable and that Respondent had proof that the borrower had graduated in June 2006 from nursing school, where she had been a student since 2005. (Tr. 584:4-9, 585:22-25.)

114. Respondent also testified that the borrower's collection accounts totaling $3,095 were not paid off in the refinance of her loan, because HUD does not require the satisfaction of collection accounts. (Tr. 586:21-25; Gov't Ex. 23; Resp't Ex. 68.)

115. In approving the borrower for the loan, Respondent used a total income of $10,351.58, which included a base employment income of $5,127.25, self employment income of $4,204.33, and net rental income of $1,020. (Tr. 588.)

116. An employment letter, dated May 4, 2007 was included in the FHA binder and indicated the borrower began working for Jacobi Medical Center on December 11, 2006—eight months prior to the loan closing. (Tr. 588:15-17.)

117. Respondent testified that the borrower was self-employed from June 2006 through August 2007. (Tr. 589:8-12.)

118. The borrower earned her nursing degree from Holy Name Hospital on June 24, 2006. (Resp't Ex. 72.)

119. The borrower received her license in "Registered Professional Nursing" on November 8, 2006. (Gov't Ex. 21.)

120. The borrower's 2006 tax returns reflected a loss of -$21,345 on her rental unit. (Tr. 589:20-23; Resp't Ex. 74.)

121. The case file included a letter from the borrower stating that she "claimed less money on [her] taxes for rental purposes . . . because [she] had some tenant problems in September 2006" and that she "found better tenants and will not have this problem again." (Resp't Ex. 79.)

122. A copy of a lease dated January 2007 was included in the case file and showed that the borrower had new tenants. (Resp't Ex. 77.)

123. A copy of the property appraisal was included in the case file and stated that the additional unit was rented for $1,200. (Resp't Ex. 78.)

124. Respondent calculated the net rental income as totaling $1,020 by using 85 percent of the $1,200 rent pursuant to HUD vacancy allowance guidelines. (Tr. 592:14-18.)

K. The Powell Loan

125. Respondent signed her name on pages 1, 3, and 4 of the URLA Addendum for the Powell Loan. (Tr. 705:16-22; Gov't Ex. 70.)

126. In approving this loan, Respondent used a total income of $7,775.95 including overtime income of $1,493.92, and co-borrower income of $1,267.50. (Tr. 599:10-12.)

127. The VOE from Bergen Regional Medical Center indicated an employment date of January 9, 2006, which was fourteen months prior to closing. (Tr. 599:12-14; Resp't Ex. 80.)

128. Respondent testified that she applied HUD guidelines when calculating overtime income. (Tr. 602:22-24.)

129. The case file included a W-2 from the borrower's previous employer, O'Grady Peyton International, that showed that the borrower earned $64.936.50 in 2005. (Resp't Ex. 84.)

130. The borrower earned $17,927 in overtime income in 2006 from Bergen Regional Medical Center. (Tr. 601:1-4; Resp't Exs. 80, 83.)

131. The borrower was on maternity leave from January 13, 2007 through March 29, 2007. (Tr. 601:11-13; Resp't Ex. 82.)

132. As of March 30, 2007, the date Respondent completed the MCAW, the borrower had not earned any overtime income in 2007. (Tr. 601:13-15; Gov't. Ex. 48.)

133. Respondent testified that based on her "experience through the years of underwriting that . . . . it's common industry practice for nurses to earn earnings that aren't straight pay Monday through Friday, nine to five. They work overnights, they earn extra money." (Tr. 601:23-25, 602:1-4.)

134. Respondent also testified that she believed that, "[t]he fact that [the borrower] was on maternity leave, she didn't have a full two years at this job, less than two years was acceptable because of the industry." (Tr. 602:6-9.)

135. After receiving the Notice of Proposed Debarment, Respondent had the loan processor call the borrower's former employer, O'Grady Peyton International, to confirm that the borrower had received overtime income before leaving to work at Bergen Regional Medical Center. (Tr. 602:17-19, 603:1-4.)

136. According to a Processors Certification, dated November 13, 2009, the loan processor confirmed that the borrower received overtime while employed with O'Grady Peyton International, but did not state the amount of overtime income the borrower received. (Tr. 603:1-11; Resp't Ex. 86.)

137. Respondent testified that, "in actuality if [the borrower] did receive overtime at the prior job it was a technicality that it wasn't in the file." (Tr. 603:1-6.)

138. A VOE for the co-borrower, who also worked for O'Grady Peyton International, indicated employment dates of January 29, 2004 to January 26, 2006. (Tr. 606:12-18; Gov't Ex. 52.)

139. The VOE from Advanced Auto Parts for the co-borrower indicated an employment date of March 2006, while the co-borrower's paystub indicated a hire date of September 11, 2006. (Tr. 604:20-22; Gov't Exs. 50, 51; Resp't Ex. 87.)

140. The co-borrower provided an explanation letter stating that there was a gap in his employment because he "wanted to find another job that was a little better financially so [he] left O'Grady and found another job at Advanced Auto Parts about 5-6 weeks later." (Resp't Ex. 89.)

141. Respondent testified that the VOE from Advanced Auto Parts verified the co-borrower's explanation and that the earnings on the VOE were consistent with a start date of March 2006. (Tr. 607:13-21.)

142. Respondent also testified that she "missed in [her] underwriting analysis that [the pay stub] says, original hire date of 9/11/06. . . . [w]hich is six months later than the employment verification verifies." (Tr. 607:15-18.)

143. After receiving the Notice of Proposed Debarment, Respondent had the loan processor call the employer to explain the discrepancy. (Tr. 607:21-24.)

144. According to a Processor Certification, dated October 29, 2009, the store manager explained that the co-borrower had been working at Advanced Auto Parts since March 2006 as a temporary worker and became a permanent employee in September of 2006. (Tr. 608:1-6; Resp't Ex. 88.)

145. Respondent testified that the co-borrower should have expanded his gap of employment letter to include information regarding his transition from a temporary employee to a permanent employee and that Respondent "should have clarified the 9/11 date on [the co-borrower's] paystub." (Tr. 608:22-25, 609:1-6.)

L. The Richter Loan

146. Respondent signed her name on pages 1, 3, and 4 of the URLA Addendum for this loan. (Tr. 692:14-25, 693:1-10; Gov't Ex. 59.)

147. Respondent credited the borrower with monthly rental income totaling $658.75. (Tr. 615:12-14; Resp't Ex. 93.)

148. A copy of the Residential Rental Agreement stated that the borrower was to receive $850 per month for rent. (Tr. 613:6-7; Resp't Ex. 92.)

149. The appraisal for the rental property stated that market rent for the unit was $775. (Tr. 613:9-11; Resp't Ex. 91.)

150. Respondent calculated the borrower's monthly rental income of $658.75 by applying an 85 percent vacancy factor according to HUD guidelines to the appraised market rent of $775. (Tr. 615:9-11.)

151. Respondent testified that it is not a HUD requirement for her to include evidence of rental payments and/or deposits reflecting the terms of the lease. (Tr. 614:21-25.)

152. Respondent also testified that a lease is acceptable to prove rental income in lieu of a Schedule E when a property does not have prior rental history. (Tr. 618:10-14.)

M. The Torres Loan

153. Respondent signed her name on pages 1, 3, and 4 of the URLA Addendum for this loan. (Gov't Ex. 58b.)

154. The borrower did not have a second job at the Xtra Supermarket as alleged in the Notice of Proposed Debarment. The co-borrower, however, did hold a second job with Xtra Supermarket. (Tr. 630:21-25, 631:1-2.)

155. The FHA binder contained an employment letter indicating that Xtra Supermarket did not use computerized paystubs. (Tr. 622:9-12; Gov't Ex. 1.)

156. The employment letter reflected a Medicare deduction of $8.08, which was $0.83 higher than what the deduction should have been for the indicated weekly gross earnings of $500. (Tr. 622:19-23.)

157. Also included in the FHA binder was a VOE completed by Angel Aponte, Meat Manager for Xtra Supermarket. (Resp't Ex. 97.)

158. The co-borrower's VOE contained inconsistencies in that the co-borrower's stated 2005 earnings, not including his bonus, is inconsistent with his projected 2006 salary. (Tr. 624:5-10; Resp't Ex. 97.)

159. Respondent recognized these inconsistencies and had the loan processor call the employer to verify the information contained in the VOE. (Tr. 625:6-12.) The processor was advised that there was a calculation error in the VOE and that he also made a mistake when entering in the co-borrower's year-to-date earnings. (Tr. 626:2-11.) This information was memorialized in a "processor certification" which was included in the FHA binder. (Resp't Ex. 98.)

160. The credit report also showed that the co-borrower had been employed as a delivery boy with Xtra Supermarket for two and a half years. (Tr. 627:5-6; Resp't Ex. 99.)

N. The Speigl Loan

161. Respondent signed her name on pages 1, 3, and 4 of the URLA Addendum for this loan. (Tr. 705:5-12; Gov't Ex. 69.)

162. The borrower's credit report indicated that the borrower was over 30 days late within 12 months preceding closing on a mortgage with First Tennessee Bank, two auto loans with Bay Winds Credit Union, and Fifth Third Bank, and two revolving accounts with Discover and JC Penney. (Notice of Proposed Debarment 4; Gov't Ex. 47.)

163. The case file included a letter from the borrowers, dated August 30, 2007, explaining that their derogatory credit was the result of financial hardships the family faced when the borrowers' youngest daughter became pregnant and the costs associated with feeding and caring for an additional member of the family who was not covered by the borrowers' Medicaid plan. (Resp't Ex. 103.)

164. The August 30, 2007 letter also explained that the borrowers' daughter and child had moved out, which "alleviated a huge responsibility for us and I no longer am paying for her health insurance. We would love to get back on track and would be extremely greatful [sic] for the second chance." (Resp't Ex. 103.)

165. Also included in the case file was a copy of an Affidavit of Parentage from the State of Michigan, Department of Community Health, which supported the borrowers' explanation that their daughter had given birth in 2006. (Resp't Ex. 104.)

166. Respondent testified that, "it appeared to me that the financial difficulty had been resolved and they were just trying to catch up and move out of their adjustable rate mortgage into a fixed rate." (Tr. 645:22-25.)

167. The vast majority of the borrowers' credit accounts were paid timely prior to the period during which the borrowers claimed they had financial difficulties. (Tr. 647:20-22.)

168. The loan was closed and approved as a rate and term refinance. (Tr. 648:23-25; Gov't Ex. 46.)

169. The loan proceeds were used to pay settlement charges and to pay off the borrowers' mortgage with St. Francis Credit Union and a home equity line of credit with First Tennessee Bank. (Tr. 646:11-15, 649:1-11; Gov't Ex. 45.)

170. The borrowers were disbursed $153.45 from the loan proceeds at the loan closing. (Tr. 649:8-9; Gov't Ex. 45; Resp't Ex. 108.)

171. The appraised value of the property was $156,000. (Gov't Ex. 46.)

172. The loan amount at closing was $151,235. (Gov't Ex. 45.)

O. The Terry Loan

173. Respondent signed pages 1 and 3 of the URLA Addendum for this loan and testified that someone else signed page 4. (Tr. 700:15-16; Gov't Ex. 64.)

174. The FHA binder included a credit report and a credit supplement for Carella Terry, the co-borrower. (Gov't Exs. 29, 30.)

175. The credit report, dated September 17, 2007, showed three accounts that reflected late payments—two of which had been paid, and one for HFC having a balance of $478. (Gov't Ex. 30.)

176. The credit supplement, dated October 1, 2007, showed that the HFC account had been brought current. (Gov't Ex. 29.)

177. The HUD-1 settlement statement for the loan closing indicated a settlement date of October 16, 2007 and a funding date of October 22, 2007. (Tr. 659:22-24; Gov't Ex. 33.)

178. The FHA binder included an explanation letter from the borrowers stating that the older late payments on the HFC account were the result of financial difficulties the borrowers faced when one of the borrowers "was only working limited days" due to budget cuts. (Resp't Ex.

112.) The borrowers also explained that the more recent late payments on the HFC account were caused by their "carelessness" and that the accounts were now current. (*Id.*)

179. Although the borrower's credit report, dated September 12, 2007, contained a history of late payments on numerous accounts, this allegation was not specifically stated on the Notice of Proposed Debarment.

180. The Court finds the testimony of all three witnesses at the hearing, Joyce Tate-Cech, Patricia Pieffer, for the Government, and Respondent, Lisa Burns, to have been highly credible.

Discussion

Every agency of the United States Government is mandated to do business only with "responsible persons," a term of art designed to describe persons and entities who abide by the law and applicable government regulations in the performance of their assigned duties. 2 C.F.R. § 180.125(a) (2011). It is the Government's duty to protect the public interest by ensuring the integrity of federal programs. *Id.* The term "responsible persons," as used in the context of administrative sanctions such as limited denials of participation (LDP), debarments and suspensions, includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant[1] as well. *William D. Muir and Metro Cmty. Dev. Corp.*, 00-2 BCA ¶ 31,140, HUDBCA No. 97-A-121-D15, at 14 (Nov. 6, 1997) (citing 48 Comp. Gen. 769 (1969)). However, LDPs, debarments, and suspensions are serious sanctions that should only be utilized for the purpose of protecting the public interest and may not be used as punishment. 2 C.F.R. § 180.125(c) (2011). The test for determining whether a proposed sanction is warranted is "present responsibility," which may be inferred from past acts. *Muir*, 00-2 BCA ¶ 31,140, HUDBCA No. 97-A-121-D15, at 14 (citing *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957) and *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980)).

Bases for Debarment

In this debarment proceeding, the Department has the burden of proving that a cause for Respondent's debarment exists by a preponderance of the evidence. 2 C.F.R. §§ 180.850(a), 180.855(a) (2011). HUD claims that "Respondent's acts and omissions as a Direct Endorsement underwriter are cause for debarment under 2 C.F.R. §§ 180.800(b) and 180.800(d)." (Gov't Post-Hr'g Br. 41.) Under 2 C.F.R. § 180.800(b), HUD may debar Respondent for:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—
>
> (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

[1] It is uncontested that Respondent was, at all times relevant, a participant in a HUD program as defined by 2 C.F.R. § 180.980.

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

2 C.F.R. § 180.800(b) (2010). Direct endorsement underwriters are required to comply with the guidelines set forth by HUD as "the minimum standard of due diligence in underwriting mortgages." 24 C.F.R. § 203.5(c) (2010). Accordingly, a willful failure to comply with HUD underwriting guidelines constitutes a willful violation for purposes of the debarment regulations.

Respondent may also be debarred under 2 C.F.R. § 180.800(d) for "[a]ny other cause so serious or compelling in nature that it affects [Respondent's] present responsibility." 2 C.F.R. § 180.800(d) (2010). Serious sanctions such as debarment, LDP, and suspension have been found to be warranted in cases where: 1) a participant, who had previously been issued an LDP, did nothing to correct the deficiency and admitted to misusing funds to the detriment of HUD which then became liable for the money, *Otis Stewart Jr.*, HUDALJ 98-8054-DB (Nov. 8, 2001); 2) an executive director of a HUD participant had a duty to discourage the participant's board members from taking actions that violated HUD regulations, but failed to do so, *McKinley v. Copeland*, HUDBCA No. 00-C-113-D14 (Nov. 29, 2001); 3) a participant's false certification was a material misrepresentation even when there was a lack of intent to mislead HUD, *Gabe Brooks*, HUDBCA No. 99-A-104-D3 (Sept. 15, 2000); 4) a loan officer falsified loan documents, forged signatures on loan documents, and made false statements for the purpose of influencing loan underwriting decisions in which HUD insured the loans, *Marcus Payne*, HUDBCA No. 99-9014-DB (May 17, 1999); 5) a respondent made a misrepresentation that, even if it was an "honest mistake, [was], nevertheless, a very serious mistake because HUD must rely upon the truthfulness of the representations made by those who participate in its program and who certify to the accuracy of their representations," *William D. Muir and Metro Cmty. Dev. Corp.*, 00-2 BCA ¶ 31,140, HUDBCA No. 97-A-121-D15 (Nov. 6, 1997); and, 6) respondents were found to have "failed, repeatedly, to meet their contractual and programmatic obligations to HUD" when they entered into four sales contracts with HUD that never went to closing, *M. Brett Young and Allied Hous. Grp., Ltd.*, HUDALJ 96-0036-DB (Sept. 13, 1996).

On the other hand, participants were not sanctioned in cases where: 1) a respondent made good-faith efforts to remedy a difficult and disorganized situation and bring her office into compliance with HUD regulations, but was unable to do so because she lacked the staff and resources necessary, *Marilee Jackson*, HUDBCA No. 05-K-112-D7 (Oct. 13, 2005); and, 2) a lender's remedial measures demonstrated that they were acting as responsible contractors and in good faith as they attempted to correct the deficiencies caused by their subcontractors, *First Capital Home Improvements*, HUDBCA No. 99-D-108-D7 (Nov. 24, 1999).

HUD Handbook 4000.4 REV-1 CHG-2[2] lists three classes of underwriting deficiencies and "parameters to consider the seriousness of noncompliance actions." HUD, HANDBOOK 4000.4 REV-1CHG ch. 5-3. Level One deficiencies are generally minor and do not "change the

[2] Although HUD Handbook 4000.4, REV-1, CHG-2 was incorporated into HUD Handbook 4155.1 and therefore did not govern Respondent's underwriting obligations to HUD at all relevant times, it serves as a helpful guide for determining the severity of Respondent's acts and omissions.

eligibility determination of the property, the mortgagor, the mortgage amount or the term" and may also include "more serious deficiencies which the mortgagee is able and willing to correct." *Id.* ¶ 5-3(A)(1)-(2). A Level Two deficiency is one that "results in a significant increase in mortgage risk, through either greater credit risk or a decrease in property security." *Id.* ¶ 5-3(B)(1). Level Three deficiencies are the most serious and involve "an action by the mortgagee to misrepresent either the financial capacity of the applicant-mortgagor or the condition of the property offered as security for the mortgage." *Id.* ¶ 5-3(C)(1). As discussed below, Respondent produced evidence at the hearing demonstrating that many of the alleged violations were minor and do not warrant debarment. However, where Respondent's acts or omissions may have increased the risk of default to HUD, I find that sanctions may be appropriate.

Loans Involving "Discrepancies/Inconsistencies"

For the Torres, Richter, and Dimsoy-O'Brien Loans, the Government claims that:

> [D]ocumentation used to qualify the borrowers contained discrepancies and/or inconsistencies [Respondent] failed to question and/or resolve. [Respondent's] failure to question and/or resolve these discrepancies/inconsistencies prior to approving the mortgage is a violation of HUD requirements.

(Notice of Proposed Debarment 2.) The HUD Handbook states that, "[t]he lender is responsible for asking sufficient questions to elicit a complete picture of the borrower's financial situation, source of funds for the transaction, and the intended use of the property." HUD, MORTGAGE CREDIT ANALYSIS FOR MORTGAGE INSURANCE, HANDBOOK 4155.1 REV-5 ch. 3, sec.1, at 3-1 (2003) [hereinafter HUD, HANDBOOK 4155.1 REV-5]. The HUD Handbook goes on to state that "[w]hen standard documentation does not provide enough information to support this decision, the lender must provide additional explanatory statements, consistent with other information in the application, to clarify or supplement the documentation submitted by the borrower." *Id.*

For the Torres Loan, the Government alleges that Respondent failed to resolve discrepancies contained in the co-borrower's employment documents.[3] Respondent acknowledged that the employment letter incorrectly calculated the amount for Medicare withholding by approximately 83 cents extra per week. (Tr. 622:19-23.) However, Respondent stated that "it was such a small amount that it was uneventful. It really didn't affect Mr. Torres' earnings. . . . it seemed like everything was in line with what it should be, so it didn't stand out to me." (Tr. 623:16-23.) Respondent did, however, notice the inconsistencies between the co-borrower's 2005 earnings and 2006 salary projections indicated on the VOE. (Tr. 624:19-21.) To resolve the inconsistencies, Respondent had the loan processor call the employer for clarification. (Tr. 625:6-12.) The processor memorialized her conversation with the co-borrower's employer on a processor certification, which was included in the FHA case file. (Tr. 626:2-11; Resp't Ex. 98.) The processor certification indicated that the employer failed to include the co-borrower's bonus for 2005 and incorrectly input the co-borrower's projected total

[3] The Notice of Proposed Debarment refers to the "borrower's second job with Xtra Supermarket." However, testimony at trial revealed that it was actually the co-borrower who had a second job with Xtra Supermarket. (Tr. 630:21-25, 631:1-2.)

earnings for 2006 instead of his year-to-date earnings for 2006. (Resp't. Ex. 98.) The FHA case file also included a copy of the co-borrower's credit report which disclosed that one of the borrowers was employed at Xtra Supermarkets as a delivery boy for two years. (Resp't Ex. 99.) Although Respondent included adequate documentation in the case file to resolve the discrepancy regarding the co-borrower's 2005 and 2006 earnings, I find that Respondent's failure to question or resolve the discrepancy with the co-borrower's Medicare withholding to be a violation of HUD guidelines. However, given the fact that Respondent's failure to address the Medicare withholding discrepancy was an oversight and not willful, and the fact that the $0.83 withheld was a *de minimus* amount that actually would have increased the co-borrower's earnings if correctly calculated, I find that debarment is not warranted for this technical violation.

In the Richter Loan, the Government claims that the residential rental agreement included in the FHA case file was inconsistent with the monthly rental income set forth on the property appraisal and that the file did not contain evidence of rental payments and/or deposits reflecting the terms of the lease. (Notice of Proposed Debarment 2.) The HUD Handbook states that all rental income must be verified by the Schedule E of the IRS Form 1040 or a current lease if the property was acquired since the last income tax filing and is not shown on the Schedule E. HUD HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-7(M), at 2-17. Respondent included a copy of the current lease, which stated that rent for the unit was $850. (Tr. 613:6-7; Resp't Ex. 92.) Respondent testified that the current lease was included *in lieu* of the borrower's Schedule E because the unit was recently renovated and the borrower had not previously claimed rental income. (Tr. 617:24-25, 618:1-6.) The file also contained an appraisal listing market rent for the same unit at $775. (Resp't Ex. 91.) Respondent testified that she calculated the borrower's monthly rental income of $658.75 by applying an 85 percent vacancy factor, as required by HUD guidelines, to the market rent of $775. (Tr. 615:9-14.) However, Respondent did not explain her decision to use the lesser appraised value instead of the rent listed on the lease, nor did Respondent explain how she addressed the discrepancy on any document in the FHA case file. And although HUD Guidelines do not require Respondent to include evidence of rental payments and/or deposits when a current lease is available, Respondent's request for, and inclusion of such evidence in the FHA case file would have satisfied her obligation to "ask sufficient questions" and provide adequate documentation to cure the inconsistency. Accordingly, I find that Respondent's failure to provide explanatory statements explaining or clarifying the discrepancy between the rent values listed on the lease and rental agreement to be a technical violation of HUD guidelines that did not result in increased risk to the FHA insurance fund. In addition, the omitted explanation or analysis of the borrower's rental income did not change the eligibility of the borrower or any material terms of the loan. I find that Respondent's failure to document her explanation of her treatment of the rental income on this loan does not provide a basis for debarment.

In the Dimsoy-O'Brien Loan, the Government claims that the co-borrower's employment documents included inconsistencies. (Notice of Proposed Debarment 2.) Namely, the VOE from Nevaeh Properties, LLC indicated a start date of May 2005, while a printout from the Maryland Department of Assessments and Taxation indicated that Nevaeh Properties, LLC was registered as of April 26, 2007. (Gov't Exs. 12, 13.) The HUD guidelines state that, "[HUD does] not impose a minimum length of time a borrower must have held a position of employment to be eligible. However, the lender must verify the borrower's employment for the most recent

two full years." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-6, at 2-13. Respondent testified that:

> it was my reasoning at the time when [Nevaeh Properties, LLC] registered for the license and the Maryland Department of Assessment knew that those dates would always coincide. They would always—every year he would have to do the same thing. So the following year it would say April '08, as far as I reasoned.

(Tr. 467:7-13.) Respondent added that the employer provided cancelled paychecks and a gross pay letter to support the information contained in the VOE. (Tr. 467:17-22.; Resp't Exs. 12-13.) Based on this information, Respondent did not perceive an inconsistency in the co-borrower's employment documents. (Tr. 467:23-25, 486:1-5.) Although Respondent's explanation at the hearing was credible, and the paychecks and gross pay letter indicate that the co-borrower actually received income from the company, none of the documentation within the FHA binder verified the co-borrower's employment history for the most recent two full years. The paychecks were dated in 2007 and the only date on the gross pay letter is September 25, 2007. Absent actual documentation to cure the discrepancy between the Maryland Department of Assessments and Taxation printout and the VOE, Respondent should have provided her reasoning in writing to clarify or support her decision to approve this loan despite the inconsistencies. Respondent's failure to include such written explanation is a violation of HUD guidelines. However, since Respondent did obtain the VOE showing a May 2005 employment start date, she clearly provided some documentation for the file. Her mistake was in not providing a written explanation of the discrepancy between the VOE and the printout. I find that this omission does not provide a basis for debarment because it did not affect the eligibility of the borrower or the material terms of the loan.

Loans Involving Derogatory Credit

For the Mosser, Patterson, Askew, Terry, Greco, Eric Jackson, Lowe, Delith Jackson, and Speigl Loans, the Government claims that Respondent:

> approved loans with credit histories that reflected continuous slow payments, and delinquent accounts without strong offsetting (compensating) factors and supporting documentation in violation of HUD requirements. . . . In addition, [Respondent] failed to document [her] analysis of how the previous derogatory credit did not represent a risk of mortgage default to justify approval of the mortgage in violation of HUD requirements.

(Notice of Proposed Debarment 2-3.) The HUD Handbook states that, "[p]ast credit performance serves as the most useful guide in determining a borrower's attitude toward credit obligations and predicting a borrower's future actions." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3, at 2-5. Underwriters are instructed to "examine the overall pattern of credit behavior, rather than isolated occurrences of unsatisfactory or slow payments." *Id.* A borrower with a credit history that reflects a period of financial difficulty may still be approved if the

borrower has "maintained a good payment record for a considerable time period since the difficulty." *Id.* Underwriters are required to "document their analysis as to whether the late payments were based on a disregard for financial obligations, an inability to manage debt, or factors beyond the control of the borrower." *Id.* "[M]ajor indications of derogatory credit—including judgments, collection, and any other recent credit problems—require sufficient written explanation from the borrower. . . . [and] the borrower's explanation must make sense and be consistent with other credit information in the file." *Id.*

Respondent approved the Mosser Loan despite the borrower's derogatory credit. Although the late payments and collection accounts disclosed on the borrower's credit report coincided with the borrower's explanation that her "bad credit was due to a very traumatic divorce," (Resp't Ex. 58), Respondent failed to document evidence that the borrower had maintained a good payment record for a considerable time period since the difficulty, which would justify approval of the loan. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3, at 2-5. In fact, the borrower's credit report, dated November 20, 2007, indicated that the borrower's mortgage payment was over 30 days late in July, August, and September of 2007. (Resp't Ex. 60.) Although Respondent approved the loan on January 18, 2008, there is no evidence that Respondent attempted to verify that the borrower had improved her payment record since the November credit report was prepared.

More important is the fact that, when asked if there was a violation of HUD guidelines to approve this loan as a cash-out refinance, Respondent answered, "Not that I can find." (Tr. 569:23.) Mortgagee Letter 05-43 states that FHA "will insure a cash-out refinance of up to 95% of the appraiser's estimate of value." HUD Mortgagee Letter 05-43, at 1 (Oct. 31, 2005) (emphasis omitted). Mortgagee Letter 05-43 goes on to state that in order for a loan to be eligible for FHA insurance, all of a borrower's mortgage payments must be made "within the month due for the previous 12 months, i.e., no payment may have been more than 30 days late and is current for the month due." *Id.* At the hearing, Respondent acknowledged that HUD guidelines can be found in HUD Handbook 4155.1, and in "numerous mortgagee letters, [and] guidebooks." (Tr. 430:16-17.) However, Respondent also stated that, "there are hundreds of mortgagee letters, if not more than that. And if they're incorporated into the guidebook, then you wouldn't go back to it because it would be in the guidebook. There are just too many. There's way too many." (Tr. 433:15-19.) Even if Respondent's testimony that there are "too many" mortgagee letters to consult when approving a loan is accepted, her testimony that she could not find a violation demonstrates a lack of fundamental knowledge of the underwriting guidelines. One of Respondent's own exhibits, which was marked for identification but not admitted into evidence, states the same eligibility requirements listed in Mortgagee Letter 05-43. (Resp't Ex. 107.) Accordingly, I find that Respondent's decision to approve this loan as a cash-out refinance without verifying whether the borrower had demonstrated "a good payment record for a considerable time period since the difficulty, which would justify approval of the loan," constituted a violation of HUD guidelines. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3, at 2-5. No adequate explanation or documentation was provided to justify the loan approval, and the borrower clearly did not meet eligibility requirements under Mortgagee Letter 05-43. I find that Respondent's decision to approve this loan provides a basis for debarment.

Respondent also approved the Patterson Loan despite the borrower's derogatory credit report. Respondent documented her analysis of the borrower's derogatory credit by obtaining letters of explanation from the borrower, as required by HUD guidelines. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3, at 2-5. The borrower's explanation that she had financial difficulties stemming from her inability to balance nursing school and her job coincided with the time period of the derogatory credit on her credit report. However, the borrower's explanation did not cite factors beyond the control of the borrower, but rather showed a disregard for financial obligations or, at the very least, an inability to manage debt. And, although Respondent testified at the hearing that she believed the borrower's letter "explains a scenario that was very reasonable for why her credit had the lates that it did." (Resp't Ex. 69.), Respondent failed to include documentation demonstrating why the circumstances surrounding the borrower's school and life demands rendered her unable to meet her financial obligations, or were otherwise beyond her control, as required by the regulation. Accordingly, I find Respondent's decision to approve this loan without adequate documentation from the borrower to be a violation of HUD guidelines that provides a basis for debarment.

Similarly, Respondent approved the Askew Loan despite derogatory credit that included three collection accounts that were not adequately explained. Respondent obtained a letter of explanation from the borrower, who claimed that her derogatory credit was the result of her father passing away in 2004. (Resp't Ex. 1.) However, the majority of the derogatory credit on the borrower's credit report was reported in 2006 and 2007. (Tr. 91-92; Gov't Ex. 27.) *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3, at 2-5. Respondent testified at the hearing that it was her experience that, "with collection accounts they usually stem from an original creditor that then sells the loan to someone else to try and collect the debt. So collection accounts are the vast majority of the time opened much later than the original default occurred." (Tr. 452:13-15). However, respondent did not include this explanation to clarify or supplement the documentation submitted by the borrower. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 3, sec. 1, subsec. 3-1, at 3-1. As such, I find Respondent's failure to provide written explanation of her analysis on the MCAW or in the case file to be a violation of HUD guidelines. However, I also find that Respondent's explanation at the hearing was reasonable and that her failure to include her written explanation in the case file does not provide a basis for debarment.

For the Terry Loan, the Government claims that the credit report for this loan "disclosed a history of late payments on an HFC account that was past due at the time of closing. The file did not contain an adequate explanation for the derogatory credit." (Notice of Proposed Debarment 3.) The Government's claim that an HFC account was past due at the time of closing is unsupported. The HUD-1 settlement statement for this loan closing indicated a settlement date of October 16, 2007 and a funding date of October 22, 2007. (Gov't Ex. 33.) The case file included a credit supplement dated October 1, 2007 showing that the HFC account on Carella Terry's credit report that was previously past due, had been brought current. (Gov't Ex. 29.) Therefore, I find that the HFC account was not past due at the time of closing, and a cause for debarment does not exist on this allegation. However, I find that the file did not contain an adequate explanation for the late payments made on the account prior to being brought current. The borrowers did not demonstrate that the prior late payments were due to factors beyond their control. Instead, the borrowers admitted that the more recent late payments were a result of their "carelessness." (Tr. 662:14-15; Resp't Ex. 112.) Failing to provide an adequate explanation for

the derogatory credit was a violation of HUD guidelines but does not provide a basis for debarment, since significant measures were taken to document the file, and the consumer account was brought current prior to closing.

On the Greco Loan, the Government alleges that Respondent approved this loan as a cash-out refinance despite the fact that the current mortgage was over 30 days late twice within the year preceding the loan closing. (Tr. 480:1-6; Gov't Ex. 35.) While this is true, Respondent also provided ample documentation in the file showing that the borrowers had had a sterling record of making their mortgage payments on time for some 12 years preceding the approval of this loan by Respondent. (Gov't Ex. 35.) The record also shows that the two recent late payments reflected during this period occurred while borrower's wife was undergoing serious medical treatments incident to being diagnosed for cancer and other serious medical conditions. (Resp't Exs. 26, 27.) These documents provide a clear demonstration of "circumstances beyond the control" of the borrower that could justify making late payments for purposes of evaluating the FHA loan eligibility requirements. There are other consumer accounts with late payments, however, where Respondent fails to provide documentation that could justify their consideration as a "compensating factor." (Govt's Ex. 35). Upon this record, I find that Respondent provided documentation of "strong offsetting (compensating) factors," for some of the delinquent accounts, but not others. Accordingly, I find that, while the imposition of sanctions may be warranted for the aspect of the Greco allegations that pertain to Respondent's analysis of derogatory credit, there is no basis for debarment.

On the Eric Jackson Loan, the Government alleges that Respondent approved this loan without obtaining an explanation for a past due education loan in the amount of $5,225 that was disclosed on the co-borrower's credit report. (Notice of Proposed Debarment 3; Tr. 110-111; Gov't Ex. 37.) The case file sent to HUD for this loan did not include the co-borrower's explanation. (Tr. 541:4-7.) However, Respondent produced a computer generated condition sheet for this loan that tends to suggest that Respondent did in fact obtain the co-borrower's explanation. (Resp't Ex. 48.) In addition, a credit supplement obtained by Respondent after the loan was approved but prior to the expiration of the rescission period for the loan, showed that the collection account was in the process of being repaid and was not past due. (Tr. 541-43; Resp't Ex. 49.) Accordingly, I find no violation of HUD guidelines for this loan.

The Government alleges that Respondent approved the Lowe Loan without documenting the borrower's ability to manage an increase in housing payments and without documenting whether additional non-disclosed debt had been incurred as a result of a new credit card. (Notice of Proposed Debarment 3.) At the hearing, the Government's witness acknowledged that the housing payment would not increase with the new loan. (Tr. 260:9-11.) Respondent testified that the borrowers' housing payment would actually be decreased by $15 per month and that the new credit line was reflected on the loan application and credit report. (Tr. 557:25, 558:1, 561:4-9; Resp't Exs. 54-57.) Therefore, I find that Respondent produced sufficient evidence to disprove the Government's allegation that she violated HUD guidelines on this point.

The Government further alleges, however, that Respondent approved the Lowe Loan despite a history of late payments and collection accounts that were not satisfactorily explained. (Notice of Proposed Debarment 3.) Although the FHA binder for this loan included two

explanation letters from the borrowers, and supporting documentation in the form of medical bills and a letter from the social security administration, the letters only explain the late payments on the borrowers' current mortgage. (Resp't Exs. 50-53.) The borrowers' credit report also disclosed numerous collection accounts that were either in collection at the time of closing or settled for less than the full balance. (Resp't Ex. 54.) Although HUD guidelines do not require collection accounts to be paid in full as a condition of mortgage approval, borrowers must at least explain all collection accounts in writing. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3(C), at 2-6.

Respondent also failed to obtain the borrowers' explanations for the other recent late payments on their credit report account, which include eight late payments on a mortgage with Ocwen Loan Servicing, and five late payments on a home equity line of credit with Wachovia Bank, N.A. (Resp't Ex. 54.) HUD considers a borrower's previous rental or mortgage history to be a top consideration when evaluating credit. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3, at 2-6. Accordingly, I find that Respondent's failure to obtain explanations from the borrowers that sufficiently explain their derogatory credit to be a violation of HUD guidelines. Respondent violated HUD guidelines by failing to obtain explanations from the borrowers for the collections accounts and late mortgage payments listed on the borrowers' credit report. I find that Respondent's omissions provide a basis for debarment and resulted in an increased risk to HUD.

The Delith Jackson Loan was also approved by Respondent without adequate explanations for the derogatory credit reflected on the borrowers' credit report, including an automobile loan account that was paid over 30 days late fourteen times between January 2006 and June 2007. (Gov't Ex. 41.) The borrowers' explanation that the derogatory credit for the auto loan with Capital 1 FA is not consistent with the information on the credit report. As explained by the borrowers, the transmission on the vehicle was "no longer working" and "[n]eeded to be replaced ASAP due to needing vehicle [sic] to go to work. Also needed to rent vehicle while at mechanic [sic]." (Resp't Ex. 36.) Although the borrowers' explanation is supported by an invoice, dated June 14, 2007, from Friendship Automotive, LLC for transmission repairs, the credit report indicates that the late payments for the auto loan began as early as January 2006. (Gov't Ex. 41; Resp't Ex. 37.) Respondent testified that she inferred from the credit report that the eight late payments within the preceding year were the result of one missed payment that carried over each month when the next month's payment was applied to the previous month's missed payment, causing another 30-day late payment. (Tr. 509:15-22.) However, the case file for this loan did not include any explanatory statements from Respondent regarding this explanation. Therefore, I find that the borrowers' explanation for their late automobile payments was inadequate on its own and that Respondent's decision to approve this loan without including her own explanatory statements to clarify or supplement the documentation submitted by the borrowers is a violation of HUD guidelines.

I further find that Respondent improperly relied on the borrower's explanation for their other derogatory credit, apart from their delinquent automobile loan, when approving this loan. The borrower explained that she and her husband, the co-borrower, separated for a period of time, which caused them to "fall behind on a lot of [their] bills until just recently when we got back together with both our families' help." (Tr. 515:20-22; Resp't Ex. 40.) This explanation

does not demonstrate factors beyond the control of the borrower, but rather a disregard for financial obligations or an inability to manage debt. Respondent inappropriately accepted the borrowers' explanation as sufficient by including two nontraditional credit references from Liberty Mutual and Black Gold Oil, Inc. (Resp't Exs. 38, 39.) Nontraditional credit reporting can be used either as a substitute for, or supplement to, a traditional credit report having an insufficient number of trade items reported. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-4(B), at 2-9. HUD guidelines specifically state that "[a non-traditional mortgage credit report] may not, however, be used to enhance the credit history of a borrower . . . . It also may not be used to offset derogatory references found in the borrower's traditional credit, such as collections and judgments." *Id.* Respondent testified that she obtained the two letters from creditors with whom the borrowers had positive credit history to show a "more recent measure of how [the borrowers] had been handling their credit issues." (Tr. 516:22-24.) However, I find that it was unnecessary to obtain such nontraditional credit references since the traditional credit report included numerous trade lines, many of which had report dates of August 2007—the same month that the loan closed. Accordingly, I find that Respondent's inclusion of the two nontraditional credit references did not offset her duty to obtain adequate explanations from the borrowers and that her failure to obtain such explanations constitutes a violation of HUD guidelines. For this loan, however, I find that debarment is not warranted since there were good-faith efforts to provide explanatory documents for the file.

With respect to the Government's allegation that Respondent approved the Speigl Loan despite the fact that the borrower's "credit report indicated the borrower was over thirty days late within twelve months preceding closing with the mortgage with First TN Bank, two auto loans with Bay Winds Credit Union and Fifth Third Bank, and two revolving accounts with Discover and JC Penney" (Notice of Proposed Debarment 4), I find that a cause for debarment does not exist. The case file included a letter from the borrowers explaining that their dependant daughter's unexpected pregnancy resulted in financial hardship for the family because they had an additional person to support and because they had to pay for the child's health insurance as the child was ineligible for coverage under the borrower's Medicaid plan. (Resp't Ex. 103.) The borrowers also stated that their daughter and grandchild have since moved out, which "has alleviated a huge responsibility for us . . . . We would love to get back on track and would be extremely grateful for the second chance." (*Id.*) Also included in the case file was a copy of an Affidavit of Parentage from the State of Michigan, Department of Community Health, proving that their daughter had given birth to a child in 2006. (Resp't Ex. 104.) The borrowers' explanation was generally consistent with the period of derogatory credit reflected on their credit report. Their explanation also demonstrated that their financial problems were the result of factors beyond their control. Further, HUD guidelines require Respondent to "examine the overall pattern of credit behavior, rather than isolated occurrences of unsatisfactory or slow payments." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec.1, subsec. 2-3, at 2-5. The vast majority of the borrowers' credit accounts were paid timely prior to the period during which the borrowers claimed they had financial difficulties. Therefore, I find that Respondent did not violate HUD guidelines because she adequately documented her analysis when addressing the borrowers' derogatory credit and approving this loan.

Loans Involving Income Stability

With regards to the Patterson, Powell, Gasser, Greco, and Delith Jackson Loans, the Government alleges that Respondent "did not obtain adequate documentation of the borrower's income and/or stability of income in violation of HUD requirements." (Notice of Proposed Debarment 4.)

The HUD Handbook requires that:

> The anticipated amount of income, and the likelihood of its continuance, must be established to determine a borrower's capacity to repay mortgage debt. Income may not be used in calculating the borrower's income ratios if it comes from any source that cannot be verified, is not stable, or will not continue.

HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, at 2-13 (emphasis omitted). Underwriters should analyze a borrower's income "to determine whether it can reasonably be expected to continue through at least the *first three years* of the mortgage loan." *Id.* The HUD Handbook also notes that, "[i]n most cases, the borrower's income will be limited to salaries or wages. Income from other sources can be included as effective income with proper verification by the lender." *Id.* at 2-14.

On the Patterson Loan, the Government alleges that Respondent failed to document the stability of the borrower's income. (Notice of Proposed Debarment 4.) Respondent used a total income of $10,351.58, which included a base employment income of $5,127.25, self employment income of $4,204.33, and net rental income of $1,020. (Tr. 588:11-15.) The HUD Handbook requires lenders to verify the borrower's employment for the most recent two full years. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-3, at 2-13. The HUD Handbook also states that "[i]f a borrower indicates he or she was in school or in the military during any of this time, the borrower must provide evidence supporting this claim, such as college transcripts or discharge papers." *Id.* In addition, HUD guidelines require that "[t]he borrower must explain any gaps in employment spanning one month or more." *Id.*

The case file for this loan included a VOE from Jacobi Medical Center indicating the borrower had been employed since December 11, 2006—eight months prior to the loan closing. (Tr. 588:15-17; Resp't Ex. 73.) The case file also included a copy of the borrower's diploma, awarded on June 24, 2006, that she earned upon completing two years of nursing school. (Resp't Ex. 72.) Respondent also testified that the borrower provided proof that she was self-employed from June 2006 through August 2007 based on her 2006 IRS Form 1040 (Resp't Ex. 74) and 2007 Profit Loss Statement (Resp't Ex. 75). However, the borrower's 2006 IRS Form 1040 does not clearly state that the borrower was self-employed as of June 2006 and an online verification of the borrower's license information performed by the Government indicates the borrower did not become licensed as a registered professional nurse until November 8, 2006. (Gov't Ex. 21.) Respondent did not address this discrepancy which indicates a gap in employment between June 2006, when the borrower graduated from nursing school, and November 2006, when the borrower became licensed as a registered nurse. Pursuant to HUD guidelines, Respondent

should have either obtained an explanation from the borrower for the gap in employment, or, at the very least, included additional explanatory statements to clarify the apparent discrepancy. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-6, at 2-13; *id.* ch. 3, sec 1, subsec. 3-1, at 3-1. Accordingly, I find that Respondent's failure to address the apparent gap in the borrower's employment to be a violation of HUD guidelines that provides a basis for debarment.

The Government also claims Respondent should not have considered the borrower's self-employment income to be effective because the borrower in the Patterson Loan was self-employed for less than one year. (Notice of Proposed Debarment 4.) Income from self-employment is considered stable and effective if the borrower has been self-employed for two or more years. HUD, HANDBOOK 4155.1 REV-5 ch.2, sec. 2, subsec. 2-9(A), at 2-19. An individual self-employed between one and two years must have at least two years of documented previous successful employment (or a combination of one year of employment and formal education or training) in the line of work in which the borrower is self-employed or in a related occupation to be eligible. *Id.* at 2-20. Income from a borrower self-employed less than one year may not be considered effective income. *Id.* As stated above, Respondent presented documentation of the borrower's status as self-employed for the one-year period from November 2006 through August 2007, which is insufficient under the HUD guidelines. Including the borrower's self-employment income as effective income without properly verifying at least one full year of additional qualifying regular employment or training history constitutes a violation of HUD guidelines that provides a basis for debarment.

The Government also claims that Respondent inappropriately qualified the borrower for the Patterson Loan using rental income because a copy of the borrower's 2006 schedule E showed a rental property loss of -$21,345. (Notice of Proposed Debarment 4.) The case file for the Patterson Loan included a copy of the current lease dated January 2007. The property appraisal showed that rent for the unit was $1,200, and the Schedule E from the borrower's 2006 tax return. (Gov't Ex. 25; Resp't Exs. 77, 78.) The amount received under the Schedule E was inconsistent with the property appraisal and current lease. To solve this discrepancy, Respondent obtained an explanation letter from the borrower stating that she "claimed less money on [her] taxes for rental purpose is because [sic] [she] had some tenant problems in September 2006. [She has] currently found better tenants and will not have this problem again." (Resp't Ex. 79.) Respondent also acknowledged that the borrower's 2006 Schedule E reflected a loss of about -$21,000, but testified that the loss "is not an accurate number to use . . . because it takes into account the taxes, the insurance, [and] the mortgage[] interest that is paid on that property." (Tr. 591:7-10.) Had Respondent included the -$21,000 loss, the borrower would have been debited twice for the taxes, insurance, and mortgage interest since Respondent already listed those items when calculating the borrower's future monthly payments on the MCAW. (Tr. 592:1-8; Gov't Ex. 26.) Accordingly, I find that Respondent adequately documented the stability of the borrower's rental income under the HUD guidelines.

In the Delith Jackson Loan, the Government alleges that the case file for this loan contained neither a copy of the borrowers' Schedule E nor a copy of a lease supporting the $1,105 in rental income Respondent used to approve the borrowers. (Notice of Proposed Debarment 6.) The HUD Handbook requires lenders to document stable rental income if rent received for properties owned by the borrower is to be used as income. HUD, HANDBOOK

4155.1 REV-5 ch. 2, sec. 2, subsec. 2-7(M), at 2-17. Stability of rental income may be determined by a current lease, an agreement to lease, a rental history over the previous 24 months that is free of unexplained gaps greater than three months, or tax returns. *Id.* In addition,

> If the borrower resides in one or more units of a multiple-unit property and charges rent to tenants of other units, that rent may be used for qualifying purposes. However, projected rent of additional units only and not the owner-occupied unit(s) may be considered gross income only after deducting the HOC's vacancy and maintenance factor.

Id. All rental income must be verified by the Schedule E of the IRS Form 1040 or a current lease if the property was acquired since the last income tax filing and is not shown on the Schedule E. *Id.*

Respondent acknowledged the fact that a Schedule E was not obtained, but argues that a Schedule E was not required because this loan was a purchase transaction and rental income would not have been reflected on the borrowers' Schedule E. (Tr. 533:1-6.) Indeed, HUD guidelines state that a current lease may be used to document rental income if the property was acquired since the last income tax filing. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-7(M)(2), at 2-17. However, Respondent also failed to include a current lease in the file because she claimed that, "[the borrowers] couldn't have a valid lease on a property they did not own." (Tr. 535:6-7.) Instead, Respondent included a copy of the Small Resident Appraisal Report and Operating Income Statement ("Appraisal") for the property. (Resp't Ex. 42.) The Appraisal noted that the sellers had a month-to-month tenant who was paying $1,300 in rent and that market rent was $1,400. (Gov't Ex. 42.) Respondent used the actual rent amount of $1,300 less the 15 percent vacancy allowance to calculate the borrowers' rental income of $1,105. (Tr. 534:20-25, 535:1-4.) Although the Appraisal was a good estimate of the amount of rental income the borrowers could anticipate receiving if they were to rent out the property, the Appraisal is by no means sufficient to verify that the borrowers would actually receive such income let alone verify its stability or likelihood of continuing as required by HUD guidelines. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, subsec. 2-6, at 2-13. Accordingly, I find Respondent's failure to obtain any documentation indicating that the borrowers were expected to receive stable, continuous income to be a violation of HUD guidelines. By crediting the borrowers with over $1,000 of effective rental income without proper verification, Respondent seriously miscalculated the borrowers' income which increased the financial risk to HUD. I find that this violation provides a basis for debarment.

For the Delith Jackson Loan, the Government also alleges that Respondent, "failed to document the source of funds used to close the loan." Specifically, the Government questions the source of two lump sum deposits of $10,000 and $5,000. (Notice of Proposed Debarment 5.) The HUD Handbook requires that "[a]ll funds for the borrower's investment in the property must be verified and documented." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 3, subsec. 2-10, at 2-24 (emphasis omitted). HUD recognizes savings and checking accounts, and gift funds as acceptable sources of funds a borrower needs to close the loan. Id. For savings and checking accounts, the HUD guidelines state that, "[i]f there is a large increase in an account, or the

account was opened recently, the lender must obtain a credible explanation of the source of those funds." Id.

Respondent testified that funds from the deposits were used to satisfy collection accounts outside of escrow and were not used to close the loan. (Tr. 523:8-21.) The HUD guidelines state that "FHA deems the payment of consumer debt by third parties to be an inducement to purchase." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 3, subsec. 2-10(C), at 2-25. However, the HUD guidelines make an exception for family members to pay off debts. Id. at 2-24 to 2-25. Therefore, the two deposits to satisfy the borrower's collection accounts were allowable under the HUD guidelines provided Respondent adequately documented them.

Outright gifts from a relative of the borrower must be documented "by obtaining a gift letter, signed by the donor and borrower, that specifies the dollar amount of the gift . . . . In addition, the lender must document the transfer of funds from the donor to the borrower." Id. at 2-25. The borrower must list the name, address, telephone number, relationship to the homebuyer, and the dollar amount of the gift on the loan application or in a gift letter for each cash gift received. HUD Mortgagee Letter 04-01, at 15 (January 6, 2004). Respondent did not obtain the requisite documentation as required under the HUD guidelines. Instead, Respondent merely obtained a letter from the borrower stating that the deposits were gifts from her parents. (Resp't Ex. 44.) I find that Respondent violated HUD guidelines by not adequately documenting the source of the two lump sum deposits. However, the Government did not prove that the gifted funds were from any improper source or that the monies transferred were not a bona fide gift from relatives. I find that the technical violations regarding this aspect of the loan do not warrant debarment.

Also for the Delith Jackson Loan, the Government alleges that Respondent "omitted liabilities from the underwriting analysis without documentation to support the omission." (Notice of Proposed Debarment 5.) Specifically, the Government claims that the FHA binder for this loan failed to include documentation that payment for an outstanding debt to Avalon Valley was made. (Id.) The collection account for Avalon Valley indicated an outstanding debt of $13,740. (Gov't Ex. 41.) A letter from the law firm representing Avalon Valley indicated an agreement to settle the debt for $7,500 by check made payable to "'Doran & Chinitz, LLC, as trustees.'" (Resp't Ex. 46.) Respondent included, as a closing condition, that the $7,500 settlement amount be listed on the HUD-1 and paid with the gift of equity funds from the borrower's parents. (Tr. 530:19-21; Resp't Ex. 45.) The closing agent did not include the payment to Avalon Valley on the HUD-1, but instead accepted a personal check from the borrower for $7,500. A copy of the check was included in the case file. (Resp't Ex. 47.) Accordingly, I find that Respondent did not violate HUD guidelines because the case file for this loan included documentation showing that payment was made on the Avalon Valley collection account.

For the Powell Loan, the Government alleges that Respondent did not obtain documentation to verify the borrower's overtime income and did not satisfactorily explain a gap in the co-borrower's income, both of which were used to qualify the borrowers for this loan. (Notice of Proposed Debarment 4.) The HUD Handbook allows overtime income to be used in qualifying a borrower "if the borrower has received such income for the past two years and it is

likely to continue." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-7(A), at 2-14. The HUD Handbook also requires the lender to average the overtime income for the past two years, but states that "[p]eriods of less than two years may be acceptable provided the lender *justifies and documents in writing* the reason for using the income for qualifying purposes." *Id.* (emphasis added). The FHA binder for this loan included the borrower's VOE from Bergen Regional Medical Center indicating the borrower had been employed since January 9, 2006—fourteen months prior to closing, and earned $17,927 in overtime income in 2006. (Tr. 601:1-4; Resp't Ex. 80.) The VOE also indicated that as of February 16, 2007, the borrower had not earned any overtime income in 2007. (Resp't Ex. 80.) A VOE from O'Grady Peyton International, the borrower's previous employer, showed that the borrower earned $64,936.50 in 2005 but did not specify the amount of that income that was overtime income. (Resp't Ex. 84.)

Respondent testified that the borrower was on maternity leave from January 13, 2007 through March 29, 2007 and she believed that, "[t]he fact that [the borrower] was on maternity leave, she didn't have a full two years at this job, less than two years was acceptable because of the industry." (Tr. 601:10-13, 602:6-9; Resp't Ex. 82.) Respondent also added that based on her "experience through the years of underwriting that . . . . it's common industry practice for nurses to earn earnings that aren't straight pay, Monday through Friday, nine to five. They work overnights, they earn extra money." (Tr. 601:23-25, 602:1-4.) Although Respondent relied on this reasoning and analysis when underwriting the Powell Loan, she did not "justif[y] and document in writing" her reason for including overtime income that had not been documented for the past two years as required by the HUD guidelines. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-7(A), at 2-14. I find that Respondent's failure to justify and document in writing her decision to include the borrower's overtime income as "effective" income constitutes a violation of HUD guidelines. However, I find that Respondent's omission did not increase HUD's risk and does not warrant debarment.

The other allegation by the Government on the Powell Loan is that Respondent failed to address a gap in the co-borrower's employment history. As previously noted, Respondent must verify the borrower's employment for the most recent two full years. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-6, at 2-13. HUD guidelines also require that "the borrower must explain any gaps in employment spanning one month or more." *Id.* Although Respondent obtained the co-borrower's explanation for the gap in his employment between January 26, 2006 and March 2006, Respondent failed to address the fact that the co-borrower's paystub indicated a hire date of September 11, 2006, which conflicted with the March 2006 start date indicated on the co-borrower's VOE. Respondent testified that she "missed in [her] underwriting analysis that [the paystub said], original hire date of 9/11/06. Which is six months later than the employment verification verifies." (Tr. 607:16-18.) After receiving the Notice of Proposed Debarment, Respondent instructed the loan processor for this loan to call the co-borrower's employer to explain the discrepancy. (Tr. 706:22-24.) On October 29, 2009, the loan processor certified that she spoke with the store manager, who explained that the co-borrower was hired as a temporary employee in March 2006 and became a permanent employee in September 2006. (Tr. 608:3-5; Resp't Ex. 88.) Respondent's failure to resolve this discrepancy prior to underwriting this loan is a violation of HUD guidelines that does not warrant debarment.

In the Gasser Loan, Respondent approved the borrower with a base pay of $5,780, which included approximately $1,300 in overtime income. (Gov't Ex. 55.) The Government alleges that there was "no adequate documentation to show that overtime income had been earned for the past two years as required." (Notice of Proposed Debarment 4.) The borrower's VOE reported that the borrower earned $21,585.56 in overtime income in 2006, but did not include any information on the borrower's 2004 or 2005 earnings. (Gov't Ex. 54.) Respondent testified that she determined the borrower's overtime income for 2004 and 2005 by calculating the borrower's base pay based on the hourly wage listed on the VOE and subtracted that amount from the borrower's 2004 and 2005 W-2s. (Tr. 474-75; Resp't Exs. 24, 25.) Respondent, however, failed to include this analysis in the case file. Since the borrower's 2004 and 2005 W-2s do not show how much overtime, if any, was earned either year, Respondent should have supplemented the documentation in the file with a written explanation clarifying how she established that two years of overtime income was earned by the borrower. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 1, subsec. 2-3, at 3-1; *see also id.* ch. 2, sec. 2, subsec. 2-7(A), at 2-14 (stating that less than two years of documented overtime income is acceptable as long as the lender justifies and documents in writing the decision to include the income). Respondent violated HUD guidelines by not including her written justification for including the borrower's overtime income as effective income. However, I find that this violation does not warrant debarment.

For the Greco Loan, the Government alleges that the borrower's commission income was not properly documented because the borrower had only been employed with his current job for one month. (Notice of Proposed Debarment 4.) The HUD guidelines state that "[c]ommission income must be averaged over the previous two years. The borrower must provide copies of signed tax returns for the last two years, along with the most recent pay stub." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-7(D), at 2-15. Commissions earned for less than one year are not considered effective income except if the borrower's compensation was changed from salary to commission within the same position and employer. *Id.* The FHA binder for this loan included three VOEs from the borrower's current and previous employers. (Resp't Exs. 28, 29, 30.) The VOEs covered an employment period from December 1993 through August 25, 2006—the date the VOE from the borrower's current employer was prepared. (Resp't Exs. 28, 29, 30.) Each VOE indicated that the borrower had received commission income while employed. (Resp't Exs. 28, 29, 30.) Respondent testified that she calculated the borrower's earnings by averaging the borrower's income from 2005 and 2006. (Tr. 492:15-17.) Respondent also testified that the HUD guidelines favor income stability, and the underwriter may consider commission income as long as she verifies two years of employment in the same line of work and pay. (Tr. 489:14-20.) Indeed, the HUD guidelines do not require a borrower to receive two years of commission income from the same employer in order for such income to be considered effective. Rather, it appears that the "same position and employer" requirement only applies when the borrower has earned commission income for less than one year. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 2, subsec. 2-7(D), at 2-15. Accordingly, as Respondent has documented well over two years of commission income for the borrower, I find that Respondent complied with HUD guidelines in calculating the borrower's effective commission income.

Loans Alleging Violations of Debt-to-Income Ratios

For the Basurco, Dimsoy-O'Brien, and Greco Loans, the Government claims that Respondent "approved loans with debt to income ratios that exceeded HUD guidelines without significant compensating factors." (Notice of Proposed Debarment 5.) Ratios are used to determine whether the borrower can reasonably be expected to meet the expenses involved in homeownership, and otherwise provide for the family. The lender must compute two debt-to-income ratios: "mortgage payment to effective income," and "total fixed payment to effective income." HUD, HANDBOOK 4155.1 REV-5, at 2-33. The maximum mortgage-to-income allowable by HUD is 31 percent while the maximum acceptable debt-to-income ratio is 43 percent. Mortgagee Letter 05-16, at 1 (April 13, 2005) (amending Handbook 4155.1 REV-5).

The HUD Handbook allows for the use of "compensating factors" to justify approval of mortgage loans when debt-to-income ratios exceed the benchmark guidelines set by HUD. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 5, subsec. 2-13, at 2-33 to 2-34. The HUD Handbook requires that underwriters "must record on the 'remarks' section of the [MCAW] the compensating factor(s) used to support loan approval. Any compensating factor used to justify mortgage approval must be supported by documentation." *Id.* The compensating factors listed by HUD are as follows:

> **A.** The borrower has successfully demonstrated the ability to pay housing expenses equal to or greater than the proposed monthly housing expense for the new mortgage over the past 12-24 months.
>
> **B.** The borrower makes a large down payment (ten percent or more) toward the purchase of the property.
>
> **C.** The borrower has demonstrated an ability to accumulate savings and a conservative attitude toward the use of credit.
>
> **D.** Previous credit history shows that the borrower has the ability to devote a greater portion of income to housing expenses.
>
> **E.** The borrower receives documented compensation or income not reflected in effective income, but directly affecting the ability to pay the mortgage, including food stamps and similar public benefits.
>
> **F.** There is only a minimal increase in the borrower's housing expense.
>
> **G.** The borrower has substantial documented cash reserves (at least three months' worth) after closing. In determining if an asset can be included as cash reserves or cash to close, the lender must judge whether or not the asset is liquid or readily convertible to cash and can be done so absent retirement or job termination. Also see paragraph 2-10K.

> Funds borrowed against these accounts may be used for loan closing, but are not to be considered as cash reserves. "Assets" such as equity in other properties and the proceeds from a cash-out refinance are not to be considered as cash reserves. Similarly, funds from gifts from any source are not to be included as cash reserves.
>
> **H.** The borrower has substantial non-taxable income (if no adjustment was made previously in the ratio computations).
>
> **I.** The borrower has a potential for increased earnings, as indicated by job training or education in the borrower's profession.
>
> **J.** The home is being purchased as a result of relocation of the primary wage-earner, and the secondary wage-earner has an established history of employment, is expected to return to work, and reasonable prospects exist for securing employment in a similar occupation in the new area. The underwriter must document the availability of such possible employment.

Id. at 2-34.

On the Basurco Loan, Respondent approved the loan with debt-to-income ratios that exceeded HUD guidelines. Although the Notice of Proposed Debarment states that Respondent used debt-to-income ratios of 53.5 percent and 59.4 percent, Respondent testified that those figures were hand-written onto the MCAW by someone else and that 44.92 percent and 59.36 percent were the actual ratios she used. (Tr. 457:6-12; Resp't Ex. 3.) Nevertheless, the ratios calculated by Respondent required the documentation of significant compensating factors because they exceeded the qualifying ratios set by HUD.

Respondent included a copy of the borrower's 401(k) account with his employer to demonstrate that the borrower had substantial cash reserves. HUD guidelines require at least three months' worth of cash reserves to demonstrate substantial documented cash reserves. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 5, subsec. 2-13(G), at 2-34. Respondent testified that the borrower's 401(k) "showed he has $12,848 in it. HUD required that you only use 60 percent of that to count . . . for if they cash it in. . . . [S]o he had at least two month's reserves." (Tr. 458:15-19.) As Respondent did not document at least three months' worth of cash reserves, as required by HUD guidelines, I find that Respondent failed to support this compensating factor with adequate documentation.

Respondent also noted the borrower's earnings potential as a compensating factor. The HUD guidelines state that a borrower's potential for increased earnings should be indicated by job training or education in the borrower's profession. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 5, subsec. 2-13(I), at 2-34. Although Respondent did not present evidence of any training or education the borrower may have received to enhance his earning potential, Respondent noted

that the borrower had worked with his current employer for 20 years and his pay had increased from $64,000 in 2005 to $75,000 in 2006. (Tr. 458:20-21, 460:19-20; Resp't Ex. 5.)

Respondent also noted "Good Mtge. History" in the remarks section of the MCAW as a compensating factor and testified that, "[the borrower] owned the home for a long time, to the best of my knowledge, so he also showed . . . experience in dealing with housing payments." (Tr. 462:5-7; Resp't Ex. 3.) The HUD guidelines allow an underwriter to consider as a compensating factor, whether a borrower "has successfully demonstrated the ability to pay housing expenses equal to or greater than the proposed monthly housing expense for the new mortgage over the past 12-24 months." HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 5, subsec. 2-13(A), at 2-34. Although the MCAW includes a note stating that "monthly payment is decreasing," Respondent testified that the borrower's housing payment "was remaining stable." (Tr. 461:5; Resp't Ex. 3.) The borrower's credit report revealed that within 12 months of the loan closing the borrower's mortgage was over 30 days late twice, and over 60 days late once. (Gov't Ex. 56.)

Although Respondent also noted that the borrower's overall monthly expenses were being drastically reduced, and that the loan-to-value ratio was "excellent" for an FHA loan, such factors are not considered compensating factors under the HUD guidelines. (Tr. 458:24-25, 461:7-9.) Accordingly, I find that Respondent's decision to approve this loan despite debt-to-income ratios that exceed HUD guidelines to be a violation of HUD guidelines because two of the three compensating factors cited by Respondent on the MCAW were either unsupported or contradicted by the documentation within the case file. I recognize that HUD Handbook 4000.4 REV-1 CHG-2 states that insufficient documentation of compensating factors is a minor underwriting deficiency, however, I find that there was more than just a mere failure to document the Basurco Loan. Respondent approved this loan in clear violation of the HUD debt-to-income ratios without the existence of adequate compensating factors. HUD, HANDBOOK 4000.4 REV-1 CHG-2 ch. 5, sec. 5-3(A). I find that these violations provide a basis for debarment.

The Government also alleges that Respondent approved the Dimsoy-O'Brien Loan with debt-to-income ratios that exceed HUD guidelines. (Notice of Proposed Debarment 5.) Respondent approved this loan with debt-to-income ratios of 38.346 percent and 45.364 percent. (Gov't Ex. 16.) The "Remarks" section of the MCAW did not list any compensating factors. (*Id.*) Respondent testified that,

> [w]hile I agree that the compensating factors were not typed on the MCAW, as they should have been, an experienced person that looked at the file . . . could see that there were compensating factors within the file documented and strong mitigating factors for approving the loan. So the fact that I didn't type them on the MCAW was a technical, marginal error at best.

(Tr. 469:4-11.) The compensating factors and "strong mitigating factors" for approving the loan were the borrower's "impeccable mortgage history going back over ten years," the minimal increase in the borrower's housing expenses, and the fact that the loan would put the borrower

"in a better financial situation." (Tr. 469:8-9, 469:14-15, 470:23-24, 471:2-3.) Of these three factors, only the first two are considered compensating factors under the HUD guidelines.

The borrower's credit history clearly shows that the borrower had a good mortgage history. (Resp't Ex. 14.) This fact would be a compensating factor under the HUD Handbook, except that the borrower must demonstrate "the ability to pay housing expenses *equal to or greater than* the proposed monthly housing expense for the new mortgage." HUD, HANDBOOK 4155.1 REV-5, at 2-34 (emphasis added). In this loan, the borrower's housing payments would actually be increasing from $1,851.86 to $2,022.65 with the new mortgage. Although the increase would make subsection (A) inapplicable, the fact that this increase was minor constitutes a compensating factor under subsection (F) of chapter 2-12. *Id.* Still, Respondent's failure to note any compensating factors on the MCAW is a violation of HUD guidelines. However, I find that a cause for debarment does not exist for this minor violation because the minimal increase in the borrower's housing payments was a compensating factor that was supported by documentation in the file.

Respondent also approved the Greco Loan with debt-to-income ratios that exceeded HUD guidelines. (Gov't Ex. 36.) Respondent testified that she entered the following compensating factors in the "Remarks" section of the MCAW: "adjustable to fixed" and "housing payments changing minimally." (Tr. 498:17, 498:25-25, 499:1-2.) However, the fact that the borrowers' loan would be changing from an adjustable rate loan to a fixed rate loan is not a compensating factor under HUD guidelines. In addition, although Respondent testified that the borrowers' housing payment would be changing minimally, which is a compensating factor under the HUD guidelines, Respondent failed to produce any evidence demonstrating that the increase in the borrower's housing payment was in fact, minimal.

During the hearing, Respondent also stated, "I should have typed additional compensating factors on the MCAW, but, as I said before, that's a technical thing and it doesn't affect the risk to the file because documents are in the file to support the reasons for approval." (Tr. 499:2-6.) Such factors include, potential for increased earnings and a high regard for mortgage payments. Both factors can be considered compensating factors as long as they are supported by documentation. HUD, HANDBOOK 4155.1 REV-5 ch. 2, sec. 5, subsec. 2-13, at 2-34. However, documentation used to support the borrower's potential for increased earnings came in the form of a letter from the borrower's service manager. The letter stated that the borrower's potential earnings were based on commission income and not a raise in salary or any education or training the borrower was expected to receive. (Resp't Ex. 32.)

In addition the borrowers' previous mortgage payment history was questionable as a compensating factor because the borrowers' mortgage payments would actually be increasing with the new loan and the borrowers' credit report indicated that two recent mortgage payments had been paid late. (Gov't Ex. 35.) I find that Respondent's decision to approve this loan with debt-to-income ratios in excess of HUD guidelines without adequate documentation of compensating factors, violated HUD guidelines. Documentation of compensating factors was produced, albeit minimally. However, debarment is not warranted since Respondent did produce documentation regarding the presence of compensating factors for this loan.

Loan Involving Maximum Insurable Mortgage

Lastly, in the Speigl Loan the Government also claims that Respondent "approved [the] loan with a maximum insurable mortgage in excess of HUD requirements." (Notice of Proposed Debarment 5.) Specifically, the Government contends Respondent failed to satisfy maximum financing and eligibility conditions for this cash-out refinance. (*Id.* at 5-6.) Respondent testified that the loan was not approved as a cash-out refinance, but as a "rate and term" or no cash-out refinance. (Tr. 648:23-25.) Loan proceeds were used to pay off the borrowers' two loans on the property and the closing costs. (Tr. 649:2-11; Gov't Ex. 45.) Although the borrower was disbursed $153.45 from the loan proceeds at the loan closing, that amount is permissible under HUD guidelines governing no-cash out refinances. *See* Mortgagee Letter 05-43, at 1-2 (Oct. 31, 2005). Therefore, I find that Respondent approved this loan as a no cash-out refinance. In addition, the maximum financing allowed for a no cash-out refinance like this loan is 97.75 percent of the appraised value. *See* HUD, HANDBOOK 4155.1 REV-5 ch. 1, sec. 4, subsec. 1-11, at 1-20. The loan-to-value ratio for the Speigl loan was 95.513 percent. (Gov't Ex. 46.) Accordingly, I find that Respondent did not violate HUD guidelines on the Speigl loan.

Determination of Debarment Period

In deciding the length of a debarment, the debarring official must consider the length of any preceding suspension. 2 C.F.R § 180.865(b). Indeed, a debarring official may choose not to impose a debarment even if cause for the debarment exists. 2 C.F.R. § 180.845(a). In making the decision the official may consider mitigating or aggravating factors, pursuant to 2 C.F.R. § 180.860. The existence or nonexistence of any single factor is not determinative. *Id.*

After HUD has established that a cause for debarment exists, the burden is shifted to Respondent, who thereafter must demonstrate "to the satisfaction of the debarring official that [Respondent is] presently responsible and that debarment is not necessary." 2 C.F.R. § 180.855(b).

Mitigating/Aggravating Factors

Sec. 180.860 is set forth in its entirety below:

> This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:
>
> (a) The actual or potential harm or impact that results or may result from the wrongdoing.
>
> (b) The frequency of incidents and/or duration of the wrongdoing.
>
> (c) Whether there is a pattern or prior history of wrongdoing. For

example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

All of the above factors were fully considered from both the perspective of the Government and Respondent. The decision to debar Respondent is within the discretion of the debarring official. 2 C.F.R. §180.845(a) (2011). In determining whether debarment is an appropriate sanction, "[t]he debarring official bases the decision on all information contained in the official record. The record includes…[a]ny further information and argument presented in support of, or in opposition to, the proposed debarment…." 2 C.F.R. 180.845 (2011). The Government argues that a number of aggravating factors exist in this case, namely, subsections (a), (g), and (k) of 2 C.F.R. § 180.860. Subsection (a) of 2 C.F.R. § 180.860 states that the debarring official may consider "the actual or potential harm or impact that results or may result from the wrongdoing." 2 C.F.R. § 180.860(a). Indeed, each of the specified loans may have had the potential for being defaulted on from the onset which could have resulted in HUD having to indemnify Lend America for loan losses. However, the fact that the Government did not present evidence at the hearing of any actual harm (i.e., actual defaulted loans or money paid by HUD to indemnify lenders for the loans) is also taken into account by the Court. Accordingly, I find the lack of actual harm to HUD to be a mitigating factor under the regulation. 2 C.F.R. § 180.860(a).

The Government also contends, as an aggravating factor under 2 C.F.R. § 180.860(g), that Respondent has failed to accept responsibility for the wrongdoing and, instead has provided excuses for approving loans to borrowers who simply were not credit worthy. The Court disagrees with this assessment of Respondent's actions and of Respondent's testimony at the hearing. I find that Respondent provided very credible testimony at the hearing and even admitted that she "should have typed additional compensating factors on the MCAW, but as [she] said before, that's a technical thing and it doesn't affect the risk to the file because documents are in the file to support the reasons for approval." (Tr. 499:2-6.)

Respondent contends that she,

> …has shown, by a preponderance of the evidence, that none of the allegations in the [Notice of Proposed Debarment] are reasonably relevant to her present responsibility, because all of the allegations concern underwriting actions that took place more than 2 ½ years ago, and most of the underwriting actions took place more than 3 years ago."

(Resp't Post-Hr'g Br. 39.) It has been held that the "passage of time diminishes the probative value of acts showing lack of present responsibility." *Gary M. Wasson*, HUDALJ 04-030-DB, 2004 WL 5347414 (H.U.D.A.L.J. Aug. 5, 2004) (citing, Lynne Borrell and Lynne Borrell and Associates, HUDBCA No. 91-5907-D52, 1991 HUDBCA LEXIS 22 (H.U.D.B.C.A. Sept. 20, 1991)). In *Gary M. Wasson*, the administrative law judge stated that, "to be sure, a respondent may be found to lack present responsibility based on past acts; but the staler the evidence, the

weaker the proof" and held that "HUD's delay in bringing a case against Respondent undermined the cause for debarment to the point that he cannot now be found to lack 'present responsibility' on the basis of events that occurred from six years, 10 months to nearly eight years ago." *Gary M. Wasson*, HUDALJ 04-030-DB, 2004 WL 5347414. However, this debarment action differs from *Gary M. Wasson* because in *Gary M. Wasson*, the Government knew of the respondent's violation within days of the violation occurring but did not take action against the respondent for six and a half years. *Id.* In the present case, HUD's decision to wait nine months after auditing Respondent's loans before issuing the Notice of Proposed Debarment cannot be equated to the six and a half year period in *Wasson*.

In *Uzelmeier v. U.S. Dep't of Health and Human Services*, 541 F.Supp.2d 241 (D.D.C. 2008), the district court upheld an administrative law judge's decision to debar a participant even though the Department of Health and Human Services waited seven years before initiating debarment proceedings. *Uzelmeier v. U.S. Dep't of Health and Human Services*, 541 F.Supp.2d 241 (D.D.C. 2008). The court in *Uzelmeier*, cited another district court case where "the length of time between the underlying events and the debarment...was just one factor that the court considered, but there was no indication that it was the dispositive factor or even the primary one." *Uzelmeier*, 541 F.Supp.2d at 249 (discussing *Roemer v. Hoffmann*, 419 F.Supp.130 (D.D.C. 1976)). The court in *Uzelmeier* distinguished the case from *Roemer v. Hoffmann* by noting that, "in this case plaintiff has admitted no past wrongdoing and has not demonstrated that her present responsibility has changed or improved since the underlying incidents...." *Uzelmeier*, 541 F.Supp.2d at 248.

Respondent also argues that "the debarment proceeding against her is motivated in large measure, if not entirely, by a desire to punish her." (Resp't Post Hr'g Br. at p. 39.) In order to demonstrate that the present proceeding was impermissibly brought for punitive purposes, Respondent must show that her suspension and proposed debarment under the circumstances of this case does not reflect the Government's desire to protect the public interest pursuant to 24 C.F.R. §24.115(a) or that its imposition reflects an abuse of agency discretion. *See William Johnson and Linear Non-Profit Housing Corporation*, 06-1 BCA P 33132, HUDBCA No. 03-D-104-D5, 2004 WL 3560946 (H.U.D.B.C.A. 2004).

Specifically, Respondent states that the punitive nature of the Government's decision to bring this action is evidenced by the fact that (1) the case file for each loan included documentation showing that the allegations in the Notice of Proposed debarment were not supportable; (2) the Government waited nine months after the Lend America review to issue the Notice of Proposed Debarment; (3) the Government's failure to give Respondent an opportunity to show why the perceived deficiencies were incorrect; (4) the timing of the Notice of Proposed Debarment was issued on the same day that Lend America received a similar notice and an injunction was filed against Lend America; and (5) "the animus disclosed in an e-mail by HUD OIG Special Agent Martin Sullivan to Patricia Peiffer." (Resp't Post Hr'g Br. at p. 40.)

The Government enjoys a legal presumption that it is acting in good faith when carrying out its duties. Spezzaferro v. Fed. Aviation Admin., 807 F.2d. 169, 173 (Fed.Cir. 1986). Accordingly, Petitioner must show "clear and convincing evidence of improper motive on the part of the government" to overcome this presumption. Am-Pro Protective Agency, Inc. v.

United States, 281 F.3d 1234, 1239 (Fed.Cir. 2002). In order to carry this burden of proof, Petitioner must show that HUD acted with a "specific intent to injure" or show that HUD was "motivated by animus" towards the Petitioner. Keeter Trading Co., 85 Fed.Cl. at 618 (citing North Star Alaska Hous. Corp. v. United States, 76 Fed.Cl. 158, 188 (Fed.Cl. 2007)). I find that Respondent has not carried this burden of proof and that the Government has not demonstrated any improper motive or sought to "punish" Respondent in pursuing this debarment action against her.

Respondent claims that no cause for debarment exists under 2 C.F.R. § 180.800(b) and (d). (Tr. 675.) Specifically, Respondent claims that: (A) she did not willfully disregard any HUD guidelines, (B) she is unaware of any history of failing to perform in accordance with HUD guidelines, (C) she did not willfully violate any federal or state statute or regulation dealing with the underwriting of any loan, and (D) none of the violations were of so serious or compelling a nature that it would affect her present responsibility. (Tr. 675-77.) Where Respondent's violations of HUD guidelines lie simply with her failure to include explanations of her analysis to support and/or clarify her decision to approve the loans, I do not find Respondent's debarment to be warranted because such deficiencies would not have changed the eligibility determination of the borrower for many of the loans at issue.

The guiding principles under the regulation, bear repeating. In determining whether debarment is an appropriate sanction, the debarring official may consider the seriousness of Respondent's acts or omissions and the mitigating and aggravating factors set forth in 2 C.F.R. § 180.860 (2011). Pursuant to the regulations, the period of debarment shall be based upon the seriousness of the causes for debarment. 2 C.F.R. §180.865(a) (2011) (emphasis added). When determining the period of debarment, the debarring official may consider the factors set forth in 2 C.F.R. §180.860, as well as the period of time during which Respondent has already been suspended. 2 C.F.R. §180.865(b) (2011). In addition, HUD Handbook 4000.4 REV-1 CHG-2 states that insufficient documentation of compensating factors is a minor underwriting deficiency.

Conclusion

Respondent's actions in approving or failing to document certain aspects of her loan underwriting analysis, as set forth above, were violative of the applicable underwriting guidelines and her responsibilities as a supervisor and direct endorsement underwriter for HUD programs. Upon consideration of all of the mitigating factors set forth at 2 C.F.R. § 180.860 (2011) and applicable case law, however, I find that the Respondent is presently responsible.

Of the fifteen loans alleged to have been improperly underwritten by Respondent, and after a complete examination of all the evidence presented upon this record, only five of those loans were found to have involved errors or omissions substantial enough to warrant debarment.

Moreover, after considering the entire record in this case, and all of the mitigating and aggravating factors set forth at 2 C.F.R. § 180.860, I did not find purposeful or willful misconduct by Respondent in approving the loans in question. Prior to receiving the Notice of Proposed Debarment in this case, Respondent had a solid 14-year employment history as a

mortgage underwriter, where, according to the evidence of record, she was never informed of any problems or deficiencies in the manner in which she had underwritten HUD loans. She was therefore never afforded an opportunity to correct any deficient underwriting processes she may have employed. *See* 2 C.F.R. § 180.860(c), (l). This, together with the facts that Respondent has already served a period of suspension since October 20, 2009, the Government did not introduce evidence of any actual loss or significant risk on the loans in question, as well as Respondent's demonstration of willingness to follow HUD guidelines in good faith, constitute significant mitigating considerations under the regulations.

Accordingly, I recommend that no period of debarment be imposed in this case and that the debarring official impose a period of suspension not longer than 28 months from the date of the Notice of Proposed Debarment in this case.

H. Alexander Manuel
Administrative Judge

December 29, 2011