

multifamily housing properties, and an acceptable Quality Control Plan. Qualified lenders can then take advantage of a mortgage application-

processing plan that will take substantially less processing time than traditional processing.

*Frequency of Submission:* On-occasion, Annually.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden .....	90	11.61		401.69		419,775

*Total Estimated Burden Hours:* 419,775.

*Status:* Revision of a currently approved collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 17, 2010.

**Colette Pollard,**

*Departmental Reports Management Officer, Office of the Chief Information Officer.*

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**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

[Docket No. FR-5354-N-02]

**HUD Multifamily Rental Project Closing Documents—Revisions and Updates Notice of Information Collection; 30-Day Notice**

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** On January 21, 2010, and consistent with the Paperwork Reduction Act of 1995, HUD published for public comment, for a period of 60 days, a notice advising that HUD was updating and revising a set of closing documents used in Federal Housing Administration (FHA) multifamily rental projects. The 60-day notice published on January 21, 2010, started anew the process for updating the multifamily rental project closing documents, and obtaining approval of these documents under the Paperwork Reduction Act, a process that had originally commenced on August 2, 2004.

This 30-day notice published today will complete the public comment process required by the Paperwork Reduction Act of 1995. With the issuance of this notice, HUD will submit the information collection for the closing documents to the Office of Management and Budget (OMB) for review and approval, and assignment of OMB control numbers. In accordance with the Paperwork Reduction Act, the closing documents will undergo the

public comment process every three years to retain OMB approval.

While complying with the Paperwork Reduction Act of 1995, this 30-day notice, as was the case with the 60-day notice, provides information beyond that normally provided in such notices. The 60-day notice published on January 21, 2010, responded to the public comments submitted on the proposed closing documents issued for comment on August 2, 2004, and summarized and responded to the public comments. Similarly, this notice issued today identifies substantive changes that HUD has made to the closing documents in response to public comment submitted on the January 21, 2010, notice, and responds to significant issues raised by commenters on the closing documents.

The multifamily closing documents that HUD is submitting to OMB are posted on HUD's Web site at <http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm>.

**DATES:** *Comment Due Date:* January 21, 2011.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables

HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the Notice.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** John J. Daly, Associate General Counsel for Insured Housing, Office of the General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 9226, Washington, DC 20410-0500; telephone number 202-708-1274 (this is not a toll-free number). Persons with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On June 1, 2009, HUD announced, on its Web site, that it would commence review of the multifamily rental project closing documents, for which review had started but was not completed

under the prior Administration. HUD posted the documents on its Web site and welcomed the public to review these documents as HUD began its internal review prior to commencement of formal review and solicitation of public comment under the Paperwork Reduction Act of 1995 (PRA). (See <http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm>.)

Under the prior Administration, HUD published a notice in the **Federal Register** on August 2, 2004 (69 FR 46214) that advised that, consistent with the PRA, it was publishing for public comment a comprehensive set of revised closing forms and documents (closing documents) for use in the FHA multifamily rental project and health care facility (excluding hospitals) programs. In the notice, HUD advised that, in addition to seeking public comment on burden hours, which is the primary focus of the PRA, HUD welcomed input from the lending industry and other interested parties on whether the documents offer the requisite protection to all parties in these FHA-insured mortgage programs, while being consistent with modern real estate practice and mortgage lending laws and procedures. The August 2, 2004, notice, in turn, followed an earlier informal solicitation of public comment on proposed revisions to the closing documents that were posted on HUD's Web site in March 2000. In response to the comments received from the 2000 solicitation of public comment, significant revisions were made to the proposed closing documents, and these revised documents were published in the **Federal Register** on August 2, 2004, for review and public comment. Although HUD reviewed the public comments and advised of initial policy decisions in response to certain comments (see HUD's notice published on August 31, 2006, at 71 FR 51842), HUD was unable to complete the updating of the closing documents during the prior Administration.

Consistent with its announcement on June 1, 2009 that HUD would start anew the updating of the closing documents, HUD published a notice in the **Federal Register** on January 21, 2010 (75 FR 3544), which solicited public comment for a period of 60 days on the closing documents. The January 21, 2010, notice commenced the formal review and public input required by the PRA. However, consistent with the approach to updating the documents that HUD took in 2004, the January 21, 2010, notice went beyond the information generally provided in PRA notices. The notice identified changes HUD made to the closing documents since they were

last published for comment in August 2004. That January 21, 2010 notice also summarized the significant issues that commenters raised in response to both the 2004 publications and to HUD's posting of documents on its Web site in 2009. In addition to the summary, the January 2010 Notice also provided responses to the significant issues raised by the commenters.

As noted in the Summary portion of this notice, this 30-day notice published today will complete the public comment process required by the PRA for the closing documents. Related to the closing documents is a proposed rule that HUD published on November 12, 2010 (See 75 FR 6393, HUD Multifamily Rental Projects: Regulatory Revisions.) The November 12, 2010 proposed rule proposes to amend certain FHA regulations to update regulations to reflect current HUD policy in the area of multifamily rental projects. Similar to HUD's updating of the closing documents, HUD seeks to have its regulations reflect current terminology, lending laws, and practices with respect to multifamily projects.

## II. The January 21, 2010 Notice (The 60-Day Notice)

### A. The 60-Day Public Comment Process, Generally

While this 30-day notice addresses significant issues raised by the public commenters on the 60-day notice, HUD is not providing the detailed comment and response section as HUD did in the 60-day notice. At the time of the first issuance of proposed updated closing documents in 2004, HUD was not accepting comments electronically through a publicly available Web site, and consequently, the public did not have a readily and easily available mechanism to review public comments on the August 2, 2004, notice. Therefore to compensate for the lack of publicly available Web site where all public comments could be viewed, HUD provided a detailed summary of the comments and HUD's responses to these comments. For the January 21, 2010, notice, however, all the public comments submitted on the proposed updated closing documents can be viewed at <http://www.regulations.gov>, which included proposed mark-ups of several of the closing documents.

### B. The Public Comments, Generally

At the close of the public comment period on March 22, 2010, HUD received 47 public comments. The commenters included lenders, home builders, construction companies, attorneys, real estate agencies, and

organizations such as the Mortgage Bankers Association and the American Bar Association. Several of the commenters, as noted earlier, submitted with their comments HUD's updated closing documents revised as certain commenters preferred to see the documents structured. HUD also held three public roundtables to obtain input from affected parties; on February 19 and 23, 2010 and March 9, 2010. (See <http://170.97.167.13/offices/hsg/mfh/mfhcd/roundtableinvitation.pdf>.) HUD carefully reviewed all of the comments and appreciates the thorough review provided by the majority of the commenters as well as the time taken by several commenters to draft and submit for HUD's consideration revised or alternative language. While HUD is not providing a detailed summary of the comments as it did in the January 2010 notice, the following highlights some of the significant issues raised by the commenters.

### General Comments

General concerns identified by commenters about the closing documents were as follows: The documents impose greater burdens and legal consequences on HUD borrowers (Borrowers) and lenders (Lenders), thereby potentially discouraging participation in HUD's multifamily programs, especially for nonprofit organizations; the documents would result in fundamental changes in the nature of the mortgage insurance contract and shift additional risk to Lenders and Borrowers alike; the increased burdens on HUD call into question whether HUD staff, because of decreasing HUD personnel resources, can timely perform under the requirements of the new documents; and certain provisions in the documents appear to conflict with existing statutes regulations, and HUD handbooks.

HUD acknowledges that with the updating of the closing documents, the majority of which have not been updated in over 20 years, the changes appear to impose greater burdens on HUD Lenders and Borrowers. However, HUD submits that the changes result in no greater burden than that involved in non-FHA private sector multifamily rental project closings. Further, although Lenders and Borrowers will need some time to become familiar with the updated closing documents, the existing closing documents, which these updated closing documents will replace, often necessitated the development of individual and additional documents for a transaction. Developing unique documents for a transaction frequently caused delays in the processing of the

documents and completion of the closing. The updated closing documents are designed to eliminate much of the need for individual document development, and reduce the time to process and close HUD multifamily rental project transactions.

Multifamily rental project transactions have changed significantly over the last 20 years, and, in certain aspects, are more complex than they were over 20 years ago. HUD has strived to make these closing documents consistent, to the extent feasible, with non-FHA documents in order to minimize differences in transactions, and therefore minimize burden often caused by variations between FHA multifamily rental project closings and non-FHA multifamily rental closings.

The changes to the closing documents appropriately reflect the responsibilities and risk that are to be borne by HUD and the responsibilities and risk that are to be borne by Lenders and Borrowers. The changes in responsibilities and risks to all parties, as provided in these documents, correspond to changes in multifamily rental transactions that have taken place over the last two decades. As noted earlier, these transactions are not the same as they were 20 years ago. There have been significant changes, and not only must the documents change to reflect the changes in the transactions, the parties to the transactions must accept the risks and responsibilities that are part of these transactions as these parties do in non-FHA multifamily rental transactions.

HUD appreciates the concerns about whether HUD staffing levels will be sufficient to fulfill HUD's obligations when updated closing documents are approved and ready to be used. HUD assures the industry and the public that sufficient staff will be available and thoroughly familiar with the documents to perform necessary tasks.

Finally, with respect to concerns about the closing documents possibly conflicting with statutes and regulations, HUD notes that the review of these documents, including significant review by industry, has been thorough, with review commencing as early as 2000, continuing through 2004, and 2006, June 2009, and January 2010. (Please see preamble discussion in the January 22, 2010, notice at 75 FR 3545, first column.) Given this process, and with the aid of industry review, HUD believes that any conflicts with existing statutes and regulations that may have been in the documents have been addressed.

In essence, HUD has sought to balance updated legal definitions and terms, and

transfers of responsibilities to and between program participants with the government's interest in managing risk. Further, the efficiencies achieved in standardizing and streamlining documents will achieve legal certainty and save time in closings which will benefit all participants.

Comments directed at specific closing documents are addressed in the next section in the context of changes that were made to the closing documents as a result of public comments, and/or further consideration of issues by HUD. However, other overarching issues raised by the commenters follow.

*Disclosure of Gains From Trading Ginnie Mae Securities.* Commenters noted that the proposed requirement in the loan documents that Lenders disclose gains from trading the Ginnie Mae security would create a substantial, significant and notable new policy. Commenters submitted that such disclosure does not belong in the closing documents nor should it be part of the process for changing loan documents. HUD agrees with this concern and has removed this requirement.

*Lender's Determination of Interest Rate.* Commenters expressed concern that through the process of rewriting their multifamily loan documents, FHA was attempting to create policy that altered Lender's ability to determine the interest rate. HUD assures that there is no restriction on the Lender's ability to determine the interest rate.

*Ability To Charge Origination and Servicing Fees for Increased Obligations Imposed by New Documents.* Commenters expressed concerns that the proposed documents impose augmented obligations and liabilities on Lenders with little or no opportunity for Lenders to recoup what are sure to be increased origination and servicing costs. In some instances, commenters say that there is a significant shift of risks and responsibilities from HUD and Borrower's counsel to Lender.

HUD recognizes that the Lender and Borrower will be undertaking new responsibilities and anticipates that there will be negotiations between the parties which will result in a corresponding recognition and adjustment in fees. For example, HUD had included authority in the proposed documents for the Lender to charge the Borrower a fee, in accordance with Program Obligations, for the Lender's increased responsibilities in reviewing a proposed transfer of physical assets. That provision was retained in this document publication. HUD's current guidance recognizes that "reasonable and necessary expenses" can be

recovered and anticipates that the Lender and Borrower will negotiate applicable fees which, while they can be expenses of the project, cannot be insured debt. The issue of costs and fees is further discussed later in this preamble.

*Emulating Fannie Mae and Freddie Mac Standards for Multifamily Loan Documents.* Commenters contended that HUD was seeking to emulate Fannie Mae and Freddie Mac as setting modern standards for multifamily loan documents, yet also contended that HUD's emulation is more selective than rational distinctions justify. They further contended that at the same time other Fannie Mae/Freddie Mac loan documents provisions proposed for adoption by HUD might be problematic.

HUD has not attempted to develop documents that emulate Fannie Mae and Freddie Mac, but has, in contrast, developed documents that are updated for current commercial legal standards, balanced with the public policy role that HUD programs serve. To some extent, HUD's documents may therefore include provisions similar to Fannie Mae's and Freddie Mac's documents, but they do not replicate those documents. While HUD acknowledges that certain features of the FHA programs are unique, such as the payment of the mortgage insurance premium (MIP), execution of the Regulatory Agreement, and surplus cash requirements, these elements are essential to protecting the government's financial interest and limiting unnecessary risk. Inclusion of such provisions is therefore a necessary tradeoff which protects the government's financial interest and minimizes risk while providing the benefit of federally insured real estate financing.

*Proposed Changes to Section 232 Health Care Processes Should Be Incorporated.* Commenters stated that several potential health care program closing documents innovations were equally appropriate for the rental documents, and urged HUD to examine these potential changes.

HUD is already closely reviewing the current health care program documents in the context of developing a separate rule and updated documents that will be published for public comment.

### C. Status of Changes to Documents

#### 1. Documents Not Revised

Of the closing documents published in January 2010, the Surveyor's Report,

and HUD Survey Instructions and Report were not revised.<sup>1</sup>

## 2. Documents Revised

The remaining documents listed below were revised.

1. Security Instrument
2. Note
3. Multifamily Regulatory Agreement
4. Lender's Certificate
5. Building Loan Agreement
6. Supplement to Building Loan Agreement
7. Construction Contract
8. Supplementary Conditions of the Contract for Construction
9. Guide for Opinion of Borrower's Counsel
10. Instructions to Guide for Opinion of Borrower's Counsel
11. Exhibit A to Opinion of Borrower's Counsel
12. Residual Receipts Note (Non-Profit Borrowers)
13. Residual Receipts Note (Limited Dividend Borrowers)
14. Escrow Agreement for Incomplete Construction
15. Request for Final Endorsement of Credit Instrument
16. Lease Addendum
17. Surplus Cash Note
18. Completion Assurance Agreement
19. Payment Bond
20. Performance Bond
21. Request for Approval of Advance of Escrow Funds
22. Escrow Agreement for Noncritical Deferred Repairs
23. Agreement of Sponsor to Furnish Additional Funds
24. Escrow Agreement for Operating Deficit
25. Bond Guaranteeing Sponsor's Performance
26. Off Site Bond—Dual Oblige
27. Escrow Agreement for Latent Defects
28. Escrow Agreement for Working Capital
29. Agreement and Certification
30. Request for Endorsement of Credit Instrument
31. Borrower's Oath
32. Subordination Agreement<sup>2</sup>

All changes made to the multifamily closing documents are provided in redline/strikeout format on HUD's Web site at <http://www.hud.gov/offices/hsg/>

<sup>1</sup> HUD published proposed amendments to American Institute of Architects (AIA) Document B-181 in January 2010 and received comments on that document. However, the AIA is replacing this document with AIA Document B-108 effective May 31, 2011. Given the timing of that document change, HUD will complete the notice and comment requirements of the Paperwork Reduction Act under separate notice.

<sup>2</sup> This document, which was included in the January 21, 2010, notice has not yet been assigned a form number.

*mfh/mfhclosingdocuments.cfm*. These changes capture both editorial changes and more substantive changes. The following sections of this preamble address some of the significant issues raised by the commenters in response to the January 2010 notice. Some commenters, however, proposed changes or raised issues that were the same as those proposed or raised in response to publication of the proposed revised closing documents issued in 2004 and to which HUD has already provided responses in the January 2010 notice. In this notice issued today, HUD is not repeating responses to proposed changes or issues that were addressed in the January 2010 notice.

## 3. Across-the-Board Changes and Significant Policy Determinations

HUD adopted many changes submitted by commenters including the following:

*Two-tier default.* In 2004, HUD developed a new two-tiered default scheme as part of the revision to the Security Instrument. Regulatory language reflecting these proposed changes were also included in the proposed regulations published in 2004. Specifically, HUD proposed that there should be one class for financial defaults, which would give the lender an immediate right to an insurance fund claim. All other bases for default were grouped into a second class. HUD would require the lender to obtain HUD's prior written approval for a claim in this second category before the lender would be able to make an insurance fund claim. This proposal for a two tier default system was also included in both the revisions to the Security Instrument published in January 2010 and in the proposed changes to the multifamily regulations published November 12, 2010.

Commenters on the changes proposed in 2004 and 2010 suggested that HUD update the foreclosure process for current legal terminology. HUD has adopted commenters' recommendations to provide more details on the two tier default criteria in both the documents and the proposed rule, and accepted several of the commenters' suggestions for technical language changes.

*Lender/Owner/Attorney Responsibilities.* Several commenters submitted that HUD has placed new and inappropriate responsibilities on them in their respective roles. As an example Borrowers' attorneys stated that they should not have to certify that flood insurance was in place, as the Lender typically undertook that responsibility. With respect to these statements, HUD notes that it has modified certifications

to require the Lender to certify that there is flood insurance on a property, and has adopted similar provisions in other documents. The redlined versions of these documents on the web page highlight these changes.

*Recourse Liability and Definition of Principals.* In the January 2010 notice, HUD noted that the 2004 proposed revisions to the closing documents included certain limited recourse liability for "Key Principals" which was opposed by several public commenters. While HUD's August 31, 2006, notice advising of preliminary decisions on proposed revisions did not include provisions for recourse liability of Principals, the revised closing documents posted on HUD's Web site on June 1, 2009, retained some of the provisions that were questioned. Some of the informal comments submitted in response to HUD's posting in 2009 of proposed changes to the closing documents again opposed inclusion of any recourse liability provisions, arguing that inclusion would dissuade some individuals from participating in HUD insured multifamily housing transactions.

In the January 2010 notice, HUD highlighted its current position that, in light of the consequences that certain insufficiently regulated actions have had on the housing finance markets in recent years, and given that public funds are put at risk in HUD multifamily housing transactions, it is appropriate for principals to be responsible for paying damages for certain "bad boy" acts. Accordingly, these provisions were included in the revised closing documents circulated for public comment, and HUD has determined to retain these provisions.

Commenters on the January proposal expressed concerns that HUD had broadened liability in the proposed documents for principals, for example, for "bad boy" acts. HUD does not agree with this characterization. These documents retain the historic non-recourse nature of FHA-insured financing. Individual principals are not personally liable for payment of the Note as a result of default. However, acts of fraud and misconduct that put the FHA insurance fund at risk will be pursued through contract rights made explicit in these documents and other remedies available to the federal government. As a result, HUD believes that the "bad boy" provisions referred to by commentators merely provide more certain legal mechanisms for enforcing HUD's statutory, regulatory, and program requirements without overburdening those that work hard and play by the rules.

In addition, signers generally are attesting only "to the best of their knowledge," and primarily to their own statements and representations. In several instances, principals' liability is limited by the materiality of the certification to the issue in question.

HUD has also referenced a definition of principals in the documents which is included in 24 CFR 200.215 of HUD's regulations. Consequently, any changes to the definition of principals will require regulatory change.

*State Specific Provisions.* Several commenters suggested that HUD develop and include state specific riders to the documents and publish them for review. HUD recognizes that publication of state specific provisions that are discretionary but not mandatory may be helpful, but believes that it is important to await adoption of this set of documents and allow some time following implementation to see if conflicts of law questions and other state law issues arise in order to determine the timing and substance of the next steps.

Nevertheless, in the meantime, HUD will develop and use those limited state specific riders necessary to meet state law mandates. These latter provisions are recognized as necessary to complete closings and comply with state law requirements. HUD has no authority to modify the required language which fulfills those state law obligations.

*Program Obligations/Directives.* One of the more significant changes made in revising this set of closing documents was to replace the term "Directives" with the term "Program Obligations." Commenters raised concerns about the use of the term "Directives" in light of its historic meaning. HUD's view is that the term "Program Obligations" better captures what was intended by use of the term "Directives," namely, to advise parties to the closing documents of the program requirements embodied in statute and regulation and other documents issued in accordance with law, and not repeated in the closing documents, to which the parties must adhere. The language now used in the closing documents defines "Program Obligations," as follows:

Program Obligations means all applicable statutes and regulations, including all amendments to such statutes and regulations, as they become effective; and all applicable requirements in HUD handbooks, HUD guides, notices, and mortgagee letters that apply to the Project, including all updates and changes to such handbooks, guides, notices, and mortgagee letters that apply to the Project, except that updates and changes subject to notice and comment rulemaking shall become effective upon completion of

the rulemaking process. Handbooks, guides, notices, and mortgagee letters are available on HUD's official Web site (<http://www.hudclips.org> or a successor location to that site).

This language better identifies what HUD intended in its original use of the term "Directives." The definition of Program Obligations identifies the specific, longstanding, and familiar types of requirements (those in statutes, regulations, handbooks, guides, notices, and mortgagee letters) to which the parties must adhere.

In response to commenters' concerns that HUD has unfettered discretion to make material changes that will have an economic effect on the viability of the project, the definition of "Program Obligations" explicitly recognizes that notice and comment rulemaking will be followed for significant substantive requirements. In fact, HUD has currently proposed rules accompanying these documents which can serve as an example of the type of changes that are made in rulemaking.

Borrowers will be subject, as they are in any other government program, to prospective programmatic changes. Further, Lenders should recognize that they are, to a great extent, protected by and subject to the FHA Contract of Insurance. As described previously, HUD has referenced HUD rules in several places. The revised Security Instrument specifically references the applicable sections of the Code of Federal Regulations to address these concerns. For example, because concerns have been expressed about the potential liability of principals, Section 1(bb) of the new Security Instrument explicitly links to the definition of principal in 24 CFR 200.15, and to the definition of "contract of insurance" in 24 CFR part 207, subpart B.

Additionally, it is important to note that the imposition of new or revised information collection requirements (that is, generally new or revised forms) must undergo the notice and comment processes, including **Federal Register** publication, required by the Paperwork Reduction Act of 1995. From time to time, HUD also uses mortgagee letters or other types of direct notices to announce new binding requirements. These types of documents are used, for example, when new statutes impose requirements that are effective upon enactment and HUD has no discretion in implementation. In such situations, mortgagee letters or other types of direct notices are the best vehicles to advise the industry on implementation dates and provide implementation guidance that may be helpful. HUD may also issue mortgagee letters or direct notices

to announce clarifications, interpretations, or certain procedural requirements, such as to which HUD offices or HUD officials certain types of executed documents must be submitted. In brief, HUD will follow the applicable procedures, as directed by statute or regulation that govern issuance of a document, which may announce additional policies, processes, forms, or standards to which parties to the closing documents must comply.

*Liability and New Responsibilities.*

The proposed closing documents reflected a series of changes directed to Lenders assuming a greater role in reviewing documents for the transaction. While commenters expressed concerns about this expanded role and potential liabilities, they also expressed concerns that the proposed closing documents significantly increased burdens on HUD staff at a time of shrinking HUD personnel resources and looming retirements.

Commenters further submitted that the requirement for HUD to review and approve minor modifications to commercial leases, review additional financial statements, additional diligence with regard to the closing documents, and many other requirements all cause significant increases to the cost of doing business for which there is no additional compensation vehicle.

HUD has addressed these comments in several ways. Lender liability is limited by warranty restrictions. For example, while the Borrower grants the Lender a security interest in their Uniform Commercial Code (UCC) collateral, the Borrower also warrants to the Lender that no UCC filings have been made against the Borrower, the Project, or the Project assets. The Borrower makes these warranties to the Lender prior to the initial/final endorsement of the Note by HUD. In further attempting to address these competing concerns, namely the increased due diligence, and transaction specific issues, HUD has provided for modification of Lender fees.

In addition, HUD continues to allow Lenders to recover costs through the interest rate and servicing fees, and recover certain "reasonable and customary" fees as noted in the Lender's Certificate. The Lender may impose reasonable and customary administrative fees and charges (including but not limited to, reimbursements for out-of-pocket expenses) for handling and investing the cash held in the Reserve for Replacement, the Residual Receipts account, if applicable, and any other interest-bearing escrows related to the

Project and for processing, reviewing and approving other matters (Administrative Fees). Further, while Lenders are required to pass on interest earned on escrows to the Borrower, the Lender is allowed to negotiate a reasonable fee with the Borrower based on the particular responsibilities taken on in each transaction by the respective parties in other respects. For example, HUD has allowed Lenders to recoup costs in fees for due diligence related to Transfer of Physical Assets.

*Waste.* Commenters expressed concerns that HUD was including a definition of “waste” that was broad and exceeded industry standards. Namely, commenters objected to inclusion of standards related to the physical condition of the property, along with the financial condition of the property and the potential for fraud. Commenters suggested as an alternative, to limit the definition of “waste” used in the closing documents to fraud and financial issues such as tax delinquency, unauthorized retention of funds, and actions reducing the value of the property. Commenters also suggested limiting the definition of waste to “Program Obligations” in effect as of the date of HUD’s firm commitment to insure the loan.

HUD has the responsibility to ensure that HUD-insured properties are decent, safe, sanitary, and in good repair, and to provide sufficient information regarding the specific items that HUD will review in making its determination that waste has been committed. Accordingly, HUD has retained language defining waste that includes the general goal of maintaining decent, safe, and sanitary housing, and a list of specific items that provide direction to the Borrower. Within the list of specifics that constitute waste, HUD has modified the proposed language to include “failure to maintain and repair” the property in accordance with Program Obligations. (See the preamble section labeled *Program Obligations/Directives* for a discussion of HUD requirements under program obligations).

*Transition.* Commenters expressed a desire for HUD to coordinate the effective date for these documents with training and updated program guidance. HUD agrees with these comments and carefully considered them in determining an effective date. Updated guidance and a training schedule will be published well in advance of any closings that require use of the new closing documents. Notwithstanding the many opportunities for public comment and input that HUD has provided on revisions to the closing documents, which commenced even before the formal proposal issued in 2004,

commenters requested that Lenders be given the option of using current or revised documents for up to three years and suggested different mandated effective dates depending on the program. HUD disagrees with these comments due to the many opportunities already made available to review the proposed documents. HUD recognizes that when these documents are issued in final form and are ready for use in multifamily rental transactions, that time will be needed for parties to adjust practices to use the new documents. As a result, these revised closing documents shall be mandatory with respect to all (i) mortgage insurance applications for refinancing, or (ii) potential applicants that receive a letter of invitation for the submission of an application for new construction or substantial rehabilitation, on or after May 1, 2011.

#### *D. Changes To Highlight Specific Documents*

##### *Subordination Agreement*

The creation of a new Subordination Agreement is one example of HUD’s updates to correspond to current real estate industry practices. The new Subordination Agreement incorporates many of the concepts in a rider that is currently used by HUD and it is more in line with current industry practices for governmental subordinate lenders. The new Subordination Agreement also improves upon notification to the public, including potential purchasers and lenders, of the government’s interest as it incorporates, in one recordable document, the specific conditions that will protect the government’s first lien security interest in the property.

##### *Security Agreement/Instrument (HUD 9400M)*

HUD has adopted several changes to specify Lender responsibilities under the security instrument while allowing entities to legally own properties as single asset entities and limit liability of principals regarding “bad boy” acts. Some of the key changes, some of which have been previously discussed are as follows:

- Provides a contractual definition of waste to provide certainty and national standardization for program participants;
- Clarifies the treatment of interest rates, recovery of costs, and allowance of administrative fees, such as for Transfers of Physical Assets;
- Establishes standards for maintenance of books and records consistent with current HUD guidance;

- Adopts technical recommendations from commenters to clarify categories of defaults;

- Moderates environmental requirements;

- Defers development of specific state law provisions for implementation experience with the current documents, while requiring those riders mandated by state law;

- Updates and modernizes the documents to allow Lenders to pay advances for certain items related to completion and preservation of the property that are added to indebtedness in accordance with statutory authority, the regulations, and current practices.

##### *Note (HUD 949001)*

Many of the changes to the Note are the same as those changes made to the Security Instrument. Additional changes to the Note are as follows:

- Provides alternative clauses for construction and refinancing situations;
- Modernizes language to address securitization and bonding requirements that have been adopted since the documents were last revised; and
- Nonrecourse to the Borrower.

##### *Regulatory Agreement (Form 2466M)*

The Regulatory Agreement is designed to ensure that Borrowers participating in these programs comply with HUD rules. Several of the definitions of terms used in the Regulatory Agreement were modified in both the Regulatory Agreement and the Security Instrument. Some of the key changes made to the Regulatory Agreement follow:

- Modification of the definitions of Mortgaged Property, Personalty, and Project Assets to address the distinction between project assets and non-project entity assets;

- Limitation of the definition of mortgaged property and allowing owners more flexibility;

- Including revised definitions to provide for receipt and use of financing and revenue sources from for-profit, nonprofit, and charitable sources; and

- Adopting a contractual definition of waste in order to provide certainty and national standardization for program participants.

In addition, the Regulatory Agreement:

- Provides automatic termination provisions if the loan has been repaid and HUD is no longer involved in the property, while maintaining HUD’s ability to protect the government’s interest to enforce violations of the agreement prior to termination;
- Clarifies the term “construction funds”;

- Qualifies owner construction responsibilities;
- Includes a conflicts provision providing that if there is any conflict between the Regulatory Agreement and any other HUD agreement executed by Borrower, the agreement which imposes the more restrictive requirements on Borrower controls;
- Removes Article IX which referenced Section 8 Housing Assistance Payments Contracts;
- Retains restrictions on affiliates;
- Alleviates some restrictions on project management, for example contracts with third party vendors;
- Limits requirements to notify HUD of changes in Borrower organizational structure to only those which have a material effect;
- Continues liability for payment of damages only for certain “bad boy acts”;
- Maintains UCC references in order to protect HUD’s security interests;
- Includes a new provision in which Borrower agrees that it is not a third-party beneficiary to the Contract of Insurance between HUD and Lender; and
- Provides for limited signatories.

**Lender’s Certificate (HUD 9243M)**

The Lender is required to certify that specific actions have been taken before financing is finalized. Lenders are required to certify to HUD that certain due diligence has been performed and accordingly, will be compensated for these new responsibilities. A key change by HUD in response to public comment is modification of the certification requirement standards to provide that the Lender will be certifying “to the best of the Lender’s knowledge” that the statements in the certification are true, accurate and complete.”(paragraph 40). Some of the key changes made to the Lender’s Certificate are as follows:

- Modifies several provisions regarding fees including:
- Shifting closing fees to a separate attachment in order to allow the parties to the transaction to develop a more comprehensive and transaction specific list of charges;

- Eliminating the declaration to the Borrower of the trading premium earned by Mortgagee upon Sale of Ginnie Mae Securities to allow Lenders and Borrowers to negotiate appropriate compensation;
- Allowing negotiation of reasonable and customary administrative fees for reimbursement for out of pocket expenses, and handling and investing the cash held in reserve for replacement, residual receipts, and other interest bearing accounts;
- Removing the term prepayment penalty and substituting the term prepayment premium;
- Requiring Lenders to notify HUD if payments are not received by the tenth day of the month in which it is due and thus imposing a late charge.

Additional modifications include:

- Adopting limitations on disclosure of future identities of interest, as defined in “Program Obligations,” during the construction period or prior to final endorsement;
- Changing the term “off-site components” to “off-site materials” to be more consistent with modern day terminology; and
- Updating and modernizing the documents, consistent with change to the Security Instrument to allow Lenders to pay advances for certain items related to completion and preservation of the property that are added to indebtedness in accordance with statutory authority, the regulations, and current practices.

**Opinion (HUD–91725M)**

Some of the key changes made to the Opinion are as follows:

- Removes the requirement that attorneys certify that the Borrower has made UCC filings, in response to the comment that financing statements are filed by other parties, such as the title company; in accordance with HUD’s decision, announced in the January 21, 2010 notice, to shift UCC responsibilities to Lenders;
- Removes the requirement for certification of flood insurance as that responsibility now rests with the Lender;

- Qualifies with a knowledge standard the conflicts of interest statement e that Borrower’s counsel does not represent the Lender or other lenders, investors or other parties involved with the transaction; and
- Limits certification of knowledge of side deals to those that, based upon the certification of the Borrower, and to the best of their knowledge, amend or are inconsistent with the terms of the HUD Form closing document or commitment between Borrower and any other party to the transaction.

**E. Miscellaneous Documents**

In addition to the foregoing documents HUD has a number of additional closing documents which are used in specific situations, such as escrows for incomplete construction, escrows for latent defects, and a completion assurance agreement. In response to suggestions made by commenters, HUD has adopted several concurring changes across these forms to ensure that there is consistency in all forms. In addition, HUD is seeking to ensure that practices are consistent in all field offices with respect to releases of escrowed funds in order to encourage program participation while providing financing and servicing certainty. As noted earlier in this notice published today, changes to these documents are displayed in redline/strikeout format posted on HUD’s Web page.

**III. Findings and Certifications**

*Paperwork Reduction Act*

The proposed new information collection requirements contained in this notice have been submitted to OMB for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The public reporting burden for this new collection of information is estimated to include:

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost	Total annual cost
HUD–91710M .....	600	1	600	0.5	300	\$26	\$7,800
HUD–91712M .....	600	1	600	0.5	300	26	7,800
HUD–92023M .....	600	1	600	1	600	26	15,600
HUD–92070M .....	600	1	600	0.5	300	26	7,800
HUD–92223M .....	600	1	600	0.5	300	26	7,800
HUD–92412M .....	600	1	600	0.5	300	26	7,800
HUD–92414M .....	600	1	600	0.5	300	26	7,800
HUD–92450M .....	600	1	600	0.5	300	26	7,800
HUD–92452A–M .....	600	1	600	0.5	300	26	7,800
HUD–92452M .....	600	1	600	0.5	300	26	7,800

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost	Total annual cost
HUD-92455M .....	600	1	600	1	600	26	15,600
HUD-92456M .....	600	1	600	0.5	300	26	7,800
HUD-92457A-M .....	600	1	600	0.5	300	26	7,800
HUD-92457M .....	600	1	600	0.5	300	26	7,800
HUD-92464M .....	600	1	600	1	600	46	27,600
HUD-92476.1M .....	600	1	600	0.5	300	26	7,800
HUD-92476a-M .....	600	1	600	0.5	300	26	7,800
HUD-92477M .....	600	1	600	0.5	300	26	7,800
HUD-92478M .....	600	1	600	0.5	300	26	7,800
HUD-92479M .....	600	1	600	0.5	300	26	7,800
HUD-91725M .....	600	1	600	1	600	125	75,000
HUD-91725M-CERT .....	600	1	600	1	600	46	27,600
HUD-91725M-INST .....	0	0	0	0	0	0	0
HUD-92434M .....	600	1	600	1	600	26	7,800
HUD-92441M-SUPP .....	600	1	600	0.75	450	26	11,700
HUD-92441M .....	600	1	600	0.75	450	26	11,700
HUD-92442M .....	600	1	600	1	600	58	34,800
HUD-92466M .....	600	1	600	1	600	58	34,800
HUD-92554M .....	600	1	600	0.5	300	26	7,800
HUD-94000M .....	600	1	600	0.75	450	26	11,700
HUD-94001M .....	600	1	600	1	600	26	15,600
HUD-93305M .....	600	1	600	0.5	300	26	7,800
HUD-92476M .....	600	1	600	0.5	300	26	12,300
HUD-92420M .....	600	1	600	0.5	300	26	7,800
Totals .....	600	.....	19,800	.....	13,050.00	.....	457,800.00

The hourly rate is an estimate based on an average annual salary of \$62,000 for developers and mortgagees.

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received by *January 21, 2011*. Comments must refer to the proposal by name and docket number (FR-5354-N-02) and must be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, *Fax number:* (202) 395-6947; and Paperwork Reduction Act Program Manager, Office

of the Chief Information Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410.

Dated: December 17, 2010.

**David H. Stevens,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

[FR Doc. 2010-32185 Filed 12-21-10; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS-R4-R-2010-N159; 40136-1265-0000-S3]**

#### Watercress Darter National Wildlife Refuge, Jefferson County, AL

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability: Final comprehensive conservation plan and finding of no significant impact.

**SUMMARY:** We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for the environmental assessment for Watercress Darter National Wildlife Refuge (NWR). In the final CCP, we describe how we will manage this refuge for the next 15 years.

**ADDRESSES:** You may obtain a copy of the CCP by writing to: Mr. Stephen A. Miller, Refuge Manager, Mountain

Longleaf NWR, P.O. Box 54087, Anniston, AL 36205. The CCP may also be accessed and downloaded from the Service's Web site: <http://southeast.fws.gov/planning/> under "Final Documents."

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Dawson, Refuge Planner, Jackson, MS; *telephone:* 601/965-4903, ext. 20; *fax:* 601/965-4010; *e-mail:* [mike\\_dawson@fws.gov](mailto:mike_dawson@fws.gov).

#### SUPPLEMENTARY INFORMATION:

##### Introduction

With this notice, we finalize the CCP process for Watercress Darter NWR. We started this process through a notice in the **Federal Register** on March 12, 2007 (72 FR 11048).

Watercress Darter NWR, near the city of Bessemer, Jefferson County, Alabama, was established by the Service in 1980, to provide protection for the endangered watercress darter. The refuge is only about 24 acres of ponds, mixed pine-hardwood forest, and a residence, and contains Thomas Spring. A second pond was constructed on the refuge in 1983, to provide additional watercress darter habitat. The refuge is unstaffed and administered by Mountain Longleaf NWR.

We announce our decision and the availability of the final CCP and FONSI for Watercress Darter NWR in accordance with the National Environmental Policy Act (NEPA) [40 CFR 1506.6(b)] requirements. We completed a thorough analysis of