



OFFICE OF HOUSING

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

January 11, 2022

RE: TRIBAL CONSULTATION ON HUD'S PROPOSED RULE ON MORTGAGE INSURANCE FOR TRANSACTIONS INVOLVING DOWNPAYMENT ASSISTANCE PROGRAMS

Dear Tribal Leader:

An important priority for the President's Administration is that Federal agencies conduct regular, meaningful, and robust consultation with Tribal nations that is consistent with the requirements of Executive Order 13175¹ (Consultation and Coordination with Indian Tribal Governments), and Presidential Memorandum on Tribal Consultation dated November 5, 2009, and as recently reaffirmed on January 26, 2021 by President Biden's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships."² Accordingly, this letter informs Tribal leaders of HUD's intent to conduct Tribal consultation on a Proposed Rule that would establish underwriting criteria for Single Family Federal Housing Administration (FHA) insured financing where in conjunction with the FHA-insured mortgage, downpayment assistance (DPA) is provided by a State, local government, or Indian tribe or an agency or instrumentality thereof. HUD will host a webinar and is also requesting written comments and recommendations on HUD's efforts to develop this Proposed Rule.

This letter builds upon HUD's February 14, 2020 letter to Tribal leaders regarding this proposed rulemaking. To provide Tribes a more meaningful opportunity to engage in commenting on prospective policies that may impact their interests, HUD will hold a webinar outlining the general principles guiding this proposed rulemaking and solicit comments and recommendations from Tribal leaders. HUD will consider all comments and recommendations in developing its Proposed Rule and will announce to Tribal leaders when the Department publishes a Proposed Rule in the *Federal Register*. At that time, Tribal leaders will have another opportunity to comment through the public comment process.

Background:

The National Housing Act (NHA) establishes criteria for single-family mortgages that are eligible for mortgage insurance provided by FHA.³ One of the longstanding eligibility criteria is

¹ Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.

² See <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president>; and <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

³ 12 USC 1701, *et seq.*

that the borrower must provide a minimum cash investment in the property, sometimes referred to as a downpayment or Minimum Required Investment (MRI). Specifically, section 203(b)(9)(A) of the NHA (12 U.S.C. 1709(b)(9)(A)) requires that for a mortgage to be eligible for FHA insurance, the borrower must have provided a minimum cash investment of 3.5 percent of the value of the property.

Current FHA requirements provide that a borrower's MRI may be provided from the borrower's pre-existing funds, or secondary financing or a gift from an eligible source. In addition, pursuant to section 1709(b)(9)(B) a family member may lend the borrower all or a portion of the MRI. (12 U.S.C. 1709(b)(9)(B)).

In 2008, the Housing and Economic Recovery Act (HERA) amended NHA section 203(b)(9) to restrict the permissible sources of the borrower's MRI. Specifically, the NHA was amended to add a new section 203(b)(9)(C)(12 U.S.C. 1709(b)(9)(C)), which provides that no portion of a borrower's MRI may be provided by "(i) The seller or any other person or entity that financially benefits from the transaction[.]" or "(ii) Any third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause i."

HUD has previously clarified the MRI DPA requirements in accordance with the requirements of NHA section 203(b)(9). In 2008, FHA issued a Mortgagee Letter providing notice of HERA's MRI restrictions.⁴ In 2012, HUD issued an Interpretive Rule, which interprets section 203(b)(9)(C) as not prohibiting FHA from insuring mortgages originated as part of the homeownership programs of federal, state, or local governments or their agencies or instrumentalities when such entities are also providing assistance for the borrower's MRI.⁵ In 2013, FHA published a Mortgagee Letter to provide documentation requirements for such DPA.⁶ The 2013 Mortgagee Letter noted that "[a]ll other requirements applicable to secondary financing transactions remain in full effect, including the requirement that such financing comply with the prohibited source provisions if such financing will be providing the borrower's required Minimum Cash Investment." However, FHA continues to have concerns that lenders may be originating mortgages for FHA insurance with DPA that are inconsistent with the NHA.

Proposed Rulemaking; Guiding Principles:

As described in its Unified Agenda of Regulatory and Deregulatory Actions,⁷ HUD plans to propose revisions to its regulations which would establish the scope of section 203(b)(9)(C) of the NHA and establish criteria under which providers of DPA would be authorized to provide such assistance in conjunction with any insured mortgage transaction. HUD's proposal would be guided by the following principles:

⁴ HUD Mortgagee Letter 2008-23 superseded as incorporated into HUD Handbook 4000.1.

⁵ See Interpretive Rule, 77 FR 72219.

⁶ HUD Mortgagee Letter 2013-14 superseded as incorporated into HUD Handbook 4000.1.

⁷ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2502-AJ50>.

1. Ensuring that DPA providers comply with section 203(b)(9) of the NHA in its entirety by (i) including the provisions prohibiting funds provided by a person or entity that financially benefits from the transaction; and (ii) confirming that DPA providers are not receiving a financial benefit that would render such assistance prohibited under section 203(b)(9)(C) of the NHA.

2. Providing that a De Minimis Administrative Cost over the amount of the assistance would not constitute a financial benefit prohibited under section 203(b)(9)(C) of the NHA.

3. Leaving undisturbed FHA's historical requirement that only funds provided by persons and entities providing cash or its equivalent (*i.e.*, bona fide gifts, as that term would be described in the rule) for which they receive no compensation or fee will be eligible to provide DPA for a borrower's MRI absent a specifically identified statutory basis, as described above, for the donor's expectation of repayment or recoupment of such funds.

4. Clarifying that federally recognized Tribes are considered qualified to provide secondary financing under section 203.32(b).

5. Codifying the statutory provisions permitting DPA made by family members consistent with the provisions of section 203(b)(9)(B) of the NHA.

Tribal Feedback:

As noted above, HUD's policy is to engage in meaningful consultation with Tribal nations on matters that have Tribal implications. As part of this consultation, HUD will host a **webinar on January 25, 2022, at 2pm EST** to provide interested Tribal leaders with the 1) opportunity to comment on the five guiding principles discussed above directing this rulemaking and 2) the following specific questions:

1. What is a reasonable amount per transaction for De Minimis Administrative costs over the amount of the assistance that would not constitute a financial benefit prohibited under section 203(b)(9)(C) of the NHA? How should HUD establish the amount of administrative costs? How often should HUD establish such costs?

2. How can HUD effectively ensure that DPA providers comply with section 203(b)(9)(C) of the NHA? Is requiring DPA providers to certify compliance regarding Financial Benefits and De Minimis Administrative Costs an effective option?

3. To what extent would HUD's rulemaking potentially impact access to, and availability of, DPA and, by extension, homeownership for potential FHA borrowers? To what extent would Tribal entities that provide DPA and tribal borrowers be affected by the Proposed Rule?

4. How can HUD ensure compliance with section 203(b)(9)(C) of the NHA while not unnecessarily restricting or reducing available resources for potential homeowners, including first-time and low-income individuals?

The webinar will provide an opportunity for Tribal leaders to provide their concerns, interests, and recommendations regarding the five guiding principles and the above five questions. This webinar is not a forum for HUD to engage in negotiations regarding HUD's proposed rule to clarify the scope of the prohibition provided by section 203(b)(9)(C) of the NHA. The webinar will provide HUD the opportunity to broaden its perspective regarding this proposed rulemaking.

The webinar begins at **2:00 PM Eastern Time on January 25, 2022**; you may join the webinar 10 minutes prior.

To join, click: <https://ems8.intellor.com/login/841989>

Join the Webex event and follow the prompts to connect audio by computer or telephone.

Need to join via phone only?

888-251-2949 or 215-861-0694 - Need an international number?

Access Code: 8287711#

Webex Support: 888-793-6118

We welcome your views as a Tribal leader on items that should be included as we develop these policy proposals. You may submit your comments to HUD within 60 days of the date of this letter by e-mail to HUDRegsTribalConsult@hud.gov.

Thank you for your continued interest and support of the Department's programs.

Sincerely,

Lopa P. Kolluri
Principal Deputy Assistant Secretary for
Housing

cc: Executive Director, Tribally Designated Housing Entity