



## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7027-N-13]

### **60-Day Notice of Proposed Information Collection: HUD Multifamily Rental Project**

**Closing Documents; OMB Control No.: 2502-0598**

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

**ACTION:** Notice.

**SUMMARY:** HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below in accordance with the Paperwork Reduction Act (PRA). The purpose of this notice is to allow for 60 days of public comment.

**DATES:** Comments Due Date: **[INSERT DATE THAT IS 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

**ADDRESSES:** Interested persons are invited to submit comments regarding this information collection. Comments should refer to the collection by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW, Room 4176, Washington, DC 20410-5000; telephone 202-402-3400 (this is not a toll-free number) or email at [Colette.Pollard@hud.gov](mailto:Colette.Pollard@hud.gov) for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877-8339.

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410; e-mail Colette Pollard at [Colette.Pollard@hud.gov](mailto:Colette.Pollard@hud.gov) or telephone 202-

402-3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877-8339.

Copies of the documents to be submitted to OMB may be provided by Ken Doresky.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

#### **A. Overview of Information Collection**

Title of Information Collection: HUD Multifamily Rental Project Closing Documents.

OMB Approval Number: 2502-0598.

OMB Expiration Date: 09/30/2021.

Type of Request: Revision of currently approved collection.

Form Number Being Revised: HUD-92420M.

Description of the need for the information and proposed use: The form, Subordination Agreement, HUD-92420M, is used in FHA-insured multifamily rental project loan closings with secured, publicly financed secondary debt, often to promote affordable housing. The document is used to subordinate such secured, secondary financing to the lien of the FHA-insured mortgage, which must be in a first lien position as required by the National Housing Act (12 U.S.C. 1701 et. seq.), on terms and conditions that are legally and administratively acceptable to HUD.

The Subordination Agreement is part of a larger information collection (OMB Control No. 2502-0598) that consists of numerous other closing forms (Closing Documents) used in FHA-insured multifamily transactions. The Closing Documents, including the Subordination Agreement, were last updated pursuant to the Paperwork Reduction Act (PRA) in 2018.

However, HUD was not able to complete its review of public comments received in connection with the 30-day Federal Register notice (83 FR 29815; 30-day notice) published for the previous PRA renewal for the Closing Documents prior to the OMB deadline. Therefore, when HUD initiates a new PRA process for the Closing Documents later this year, it will include, as a starting point, changes HUD anticipated making in response to the public comments received with the 30-day notice.

Notwithstanding, due to concerns that state and local housing finance agencies (HFAs) have expressed concerning certain terms and conditions in the 2018 Subordination Agreement, HUD is initiating this separate PRA renewal effort in order to allow HFAs and other interested members of the public an opportunity to comment on the form and HUD to make agreed upon changes on a more immediate timeline. It is HUD's goal that the PRA process for the Subordination Agreement will result in a form that is widely accepted by HFAs to promote greater efficiency and consistency in the FHA multifamily closing process, while also allowing flexibility for HFA requested changes necessary for state or local law, as discussed immediately below.

Revisions to the Subordination Agreement:

HUD added the following instruction at the request of OMB given HUD's policy of considering requested Subordination Agreement changes to accommodate state or local law: "HUD will consider requested changes to this form that are necessary to comply with state or local law. All such requests must be accompanied by a substantive explanation prepared by counsel to the Subordinate Lender. HUD's written acceptance of any changes for state or local law will result in a template Subordination Agreement- Public, for a given jurisdiction and program. Consistent with the PRA, permission to use any such HUD-approved template will expire upon implementation of the next OMB-approved version of this form. When a new OMB

form is issued, public lenders may request HUD consideration of changes to the new form in accordance with the level of flexibility the new form provides.” HUD notes that the underlying PRA burden estimate for the Subordination Agreement now accounts for any legal opinions that may be required to justify state or local law changes.

Similarly, HUD added an instruction in section 3(b) to ensure the Subordination Agreement is consistent with existing HUD policy allowing an exception (on a case-by-case basis) to the requirement that the subordinate loan mature no earlier than the FHA-insured senior loan for deal-specific situations where the resulting risk is appropriately underwritten. Outside of this allowance to permit maturity of the subordinate loan before the FHA-insured senior loan and other existing instructions allowing flexibility for certain other terms (e.g., section 3(c)(4) exception to prohibition against compounding interest for LIHTC transactions), HUD does not anticipate accommodating deal-specific requests for additional changes to the form. HFAs and other interested parties are encouraged to request, and provide a rationale for, any changes deemed necessary during this PRA process.

In response to the 30-day notice, one commenter objected to section 3(c) that requires HUD language be inserted into the subordinate note because many subordinate lenders use pre-approved template documents. HUD rejects this comment because FHA-insured multifamily financing is a national program that requires uniformity to ensure fairness and efficiency in closings. Thus, it is critical that every subordinate loan contain the HUD required language in order to accomplish this goal. HUD is, however, sympathetic to the fact that various HFAs have templates that must go through an approval process; therefore, HUD will permit the HUD-required subordinate note language to be incorporated by reference into the subordinate note.

HUD also rejects a comment objecting to section 3(c)(3) that restricts a transfer of the subordinate note without HUD consent. Section 3(c)(3) reflects HUD's longstanding policy that Surplus Cash Notes are not negotiable instruments or transferable without HUD consent. This policy has been in existence since at least 2011, and since 2002 with the then applicable Secondary Financing Rider that was included in the 2002 MAP Guide. The rationale behind this policy is that HUD needs to be able to assess whether such transfers will cause unacceptable risk to the project.

A commenter objected to the language in section 3(c)(6) that the terms and provisions of the subordinate lender's note are enforceable by HUD and cannot be amended without HUD's consent. HUD rejects this comment. This is standard language in several of the Closing Documents. Changing the terms of the subordinate loan without HUD consent could negatively impact HUD.

In response to an informal comment received from an outside party concerning the policy change previously made in section 6(b) to allow subordinate lenders to exercise their remedies for subordinate loan defaults after a 180-day standstill, HUD proposes to explicitly clarify that such exercise of remedies is only available for covenant events of default, and not monetary events of default. This clarification is consistent with the rationale discussed in the 60-day Federal Register notice published on September 5, 2017 (82 FR 41977).

One commenter took issue with the section 7(b) prohibition against a cross-default provision in the subordinate loan documents. HUD rejects this comment as a cross-default prohibition has been in the form since its adoption in 2011. Numerous transactions with public secondary debt have closed without any objection to the prohibition, which can also be found in the MAP Guide. The FHA lender and HUD must control what happens to the property in the

event of a default under the FHA-insured loan and whether to remove the borrower through a foreclosure, not the subordinate lender.

One commenter objected to the requirement in section 10(c) that the maturity on the subordinate loan automatically be extended if the FHA loan is extended due to a deferment of amortization or forbearance. HUD rejects this comment as the language in question reflects current MAP Guide policy to reserve this protection as insurer of the first mortgage loan to allow maximum flexibility in distressed project situations.

HUD agrees with an HFA's request to remove language in section 10(e) that would force a subordinate lender to allow an ownership change and assumption of its loan upon HUD approval. Further, HUD also agrees with an HFA's request to remove the requirement in section 10(f) that limits the funds the subordinate lender can receive upon transfer or sale of the property to 75% of net proceeds; HUD will be making a corresponding change to remove this requirement from the MAP Guide.

Respondents (i.e., affected public): FHA lenders, borrowers, housing finance agencies and other government agencies that support affordable housing, and HFA counsel.

Estimated Number of Respondents: 17,468.

Estimated Number of Responses: 17,468.

Frequency of Response: Once per annum.

Average Hours per Response: 1.5 hours.

Total Estimated Burden: 14,286.85.

## **B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

- (1) 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) The accuracy of the agency's estimate of the burden of the proposed collection of information.
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected.
- (4) Ways to 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.

HUD requests that commenters provide comments and proposed changes in narrative and/or bulleted form, accompanied by a detailed explanation and rationale for each requested change. Commenters may include in their detailed explanation and rationale the relevant excerpt(s) from the Subordination Agreement with redlines/strikeouts.

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

Dated: May 12, 2020.

**Nacheshia Foxx,**

*Federal Register Liaison*

*for the Department for Housing and Urban Development.*

**Billing Code: 4210-67**

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