

215 SW Washington Street, Suite 200
Portland, OR 97204


T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

January 25, 2022

TO: TRIBAL HOUSING CLIENTS

FROM:  Ed Clay Goodman and Cari Baermann
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***HUD Tribal Consultation on Proposed Rule on Mortgage Insurance for Transactions Involving Downpayment Assistance Programs***

On January 25, 2022, the U.S. Department of Housing and Urban Development (HUD) Office of Housing conducted a virtual tribal consultation on a proposed rule (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 (Downpayment Assistance) is provided by a state, local government, or Indian Tribe or an agency or instrumentality thereof. HUD is also requesting written comments and recommendations on HUD's efforts to develop this Proposed Rule. This memorandum provides a synthesis of information presented during the call.

HUD provided information and solicited feedback from Indian tribes and Tribally Designated Housing Entities (TDHEs) regarding the Proposed Rule. 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. The call has been recorded and will be posted in the next couple of days on HUD's Consultation page located [here](#).

I. Mortgage Insurance Proposed Rule

Kevin Stevens, Acting Director of the Office of Single-Family Development, and Lopa Kolluri, Principal Deputy Assistant Secretary for the Office of Housing and the FHA gave opening remarks. HUD Office of Native American Programs (ONAP) Specialist Iris Friday also joined the call.

The National Housing Act (NHA) establishes the eligibility criteria for single-family mortgages for mortgage insurance provided by FHA. One longstanding eligibility criterion is that the borrower must provide a minimum cash investment in the property, also known 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 in order for a mortgage to be eligible for FHA insurance, the borrower must provide a downpayment of 3.5 percent of the value of the property.

Current FHA regulations provide that a borrower's downpayment may come from the borrower's pre-existing funds, from secondary financing, or from a gift from an eligible source. In addition, a family member may lend the borrower all or a portion of the downpayment. (12 U.S.C. 1709(b)(9)(B), aka section 203(b)(9)(B)). However, in 2008, the Housing and Economic Recovery Act (HERA) amended the NHA to restrict the permissible sources of the borrower's downpayment. Specifically, the NHA was amended to provide that no portion of a borrower's MRI may be provided by "(i) [t]he seller or any other person or entity that financially benefits from the transaction[.]" or "(ii) [a]ny third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause i." (12 U.S.C. 1709(b)(9)(C) aka section 203(b)(9)(C)).

In 2012, HUD issued an Interpretive Rule that 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 downpayment. In 2013, FHA published a Mortgagee Letter that 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."

HUD intends 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 Downpayment Assistance, including tribes and TDHEs, would be authorized to provide such assistance in conjunction with any insured mortgage transaction. HUD has indicated that its proposal would be guided by the following principles:

1. Ensuring that Downpayment Assistance 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 Downpayment Assistance 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 Downpayment Assistance 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 (and their TDHEs) are considered qualified to provide secondary financing under section 203.32(b).
5. Codifying the statutory provisions permitting Downpayment Assistance made by family members consistent with the provisions of section 203(b)(9)(B) of the NHA.

HUD is seeking tribal feedback specifically on the following 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 Downpayment Assistance providers comply with section 203(b)(9)(C) of the NHA? Is requiring Downpayment Assistance 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, Downpayment Assistance and, by extension, homeownership for potential FHA borrowers? To what extent would Tribal entities that provide Downpayment Assistance 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?

Tribes and TDHEs may submit comments in response to the above questions or regarding anything else about the proposed rule to HUD by e-mail to HUDRegsTribalConsult@hud.gov. The deadline for comments is **March 13, 2022**.

II. Tribal Feedback

HUD then opened up the call to participants to ask questions and provide feedback on the proposed rule. The questions and comments provided by participants are noted below, with HUD's responses provided underneath the question or comment.

A. *Questions and Comments:*

- Because HUD has yet to share any text of the Proposed Rule, it is difficult for tribes to provide any feedback and for HUD to engage in actual meaningful consultation with tribes.

- HUD response: This is the initial step in the process of putting together any draft Proposed Rule. There will be opportunities for tribal feedback after the Proposed Rule language has been published.
- Tribal Downpayment Assistance programs are consistent with the FHA programs. When does HUD anticipate issuing the Proposed Rule? Once issued, the Tribe asks that HUD provide a 90-day comment period for tribes to respond, given the significant burdens and staffing shortages that tribes are experiencing during the pandemic. For Downpayment Assistance program providers to adequately implement any changes required by the HUD rule, the Tribe asks for a one-year minimum period between the date the rule is published and the date that any compliance is required.
 - HUD did not provide a response to this question.
- The Tribe wants to make sure there will be other tribal consultations after this one regarding the Proposed Rule, particularly since the tribes have not seen any language on the Proposed Rule. Tribes and TDHEs were given little time to prepare for this consultation and have not been provided with enough information to understand what the Proposed Rule will entail.
 - HUD did not provide a response to this question.
- The participant recommends that HUD consider how tribes and TDHEs create tribal housing programs that provide downpayment assistance in order to make sure that HUD's new rule does not make it more difficult to provide assistance to tribal members. Downpayment Assistance and other housing assistance is very different in Indian country compared to other areas, and this should be taken into consideration. HUD needs to provide tribes with the flexibility to continue to meet the unique needs of tribal members seeking homeownership. It is also critical that HUD does not over-regulate tribes in such a way as to create unnecessary burdens.
 - HUD did not provide a response to this question.
- Lending on trust land is often different from lending on non-tribal land and this must be taken into consideration. Developing and constructing trust land homes is often much more difficult and much more expensive. Tribes often combine multiple sources of funding in order to meet these higher burdens. HUD should make sure not to make the homeownership programs difficult.
 - The Proposed Rule is being established under the NHA. Section 184 loans are outside of the rulemaking, so those loans will not be affected by the Proposed Rule.
- Regarding HUD's question on De Minimis Administrative costs, is that a fee to cover the cost of delivering the Downpayment Assistance? It should be a significant amount to cover the costs of running Downpayment Assistance programs. Tribal homeownership programs are often expensive to run, as many low-income tribal members need significant help to be ready to enter into a mortgage. As much as \$1,000 per homeowner may be needed as a De Minimis Administrative cost.

- Yes, HUD is asking what amount above the Downpayment Assistance provided would be considered reasonable to cover administrative costs without being considered a benefit.

Conclusion

If you have any questions, please do not hesitate to contact Ed Clay Goodman at EGoodman@hobbsstrauss.com or by phone at (503) 242-1745.