Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410-0500

March 22, 2010

Re: HUD Multifamily Rental Project Closing Documents;
Proposed Revisions and Updates and Notice of Information Collection
Notice
Docket No. FR-5354-N-01
RIN 2502-A180

Dear Sir or Madam:

Our organizations are jointly submitting the following comments on the above-referenced Notice related to the HUD Multifamily Rental Project Closing Documents. We have focused on several policy issues that we believe have not been adequately addressed by HUD. Some of our organizations are also submitting individual comment letters that cover other areas open to comment.

Recourse Liability

Although a previous revision of the draft documents eliminated the concept of recourse liability for "Key Principals," HUD now says it is retaining some limited recourse liability for principals that commit certain "bad boy" acts. The FHA multifamily mortgage insurance programs have never included identifying certain principals that would be held personally liable for committing such acts. HUD's reason for instituting the new requirement is that there have been consequences as a result of "insufficiently regulated actions" on the housing finance markets in recent years, and given that public funds are put at risk in HUD multifamily transactions, it is now appropriate for principals to have recourse liability for certain "bad boy" acts.

However, the FHA multifamily mortgage insurance programs are heavily regulated, with numerous remedies available to HUD to pursue in the event of the commission of unlawful acts on the part of the Borrower or any individual that commits such acts. Further, HUD does not identify which individuals are required to sign the Regulatory Agreement. We cannot imagine that any individual will step up and offer to take on recourse liability and risk their personal homes, retirement funds or college funds for their children. Such a requirement will dissuade individuals from participating in the FHA multifamily mortgage insurance programs. Our organizations oppose the inclusion of recourse liability for individuals in these revised documents.

HUD has also added new provisions to the Note, Section 8, Limits on Personal Liability, that would hold the Borrower personally liable for the repayment of all or a portion of the Indebtedness for certain acts. We question why HUD would impose personal liability on the Borrower, which as a single asset entity in most cases, will not have assets beyond the mortgaged

property, and because HUD already has extensive remedies included in the documents in the event such acts are committed.

Expansion of Definition of Project Funds

HUD's draft documents seem not to recognize any distinction between the concept of project funds (properly under control of HUD) and other funds that may be in the possession of the borrower. The various financial management provisions of the Regulatory Agreement and other documents appear to define as part of the collateral for the insured loan, and to sweep into HUD's regulatory control, funds derived from a wide variety of sources not directly related to or essential to the protection of HUD's interest. Owners can accept that fact that HUD regulates the owner's use of proceeds of the insured loan, the HUD-required equity contributions to meet program Loan-to-Cost ratios, and the HUD-required reserve accounts and residual receipts accounts. The HUD-insured loan has already been sized to be adequately protected by the value of the real property collateral and the anticipated rental income, without making claims to other funds of the borrower.

Frequently, notably in tax credit transactions, the HUD-insured loan does not even provide the majority of the required capital for the project. Nonetheless, in numerous provisions scattered through the proposed loan documents, HUD asserts control over all funds associated in any way with the project, including funds contributed by third party sources. This would make it impossible to use FHA financing for projects that receive charitable donations or some local government grants, and will severely impair the ability of both for-profit and nonprofit developers to obtain grants and donations in the future. It also makes it more difficult to combine FHA financing with Low Income Housing Tax Credits (LIHTCs).

For example, the definition of "Personalty," (which is part of the defined "Mortgaged Property" for the insured loan) in Section 1.v. of the Regulatory Agreement includes the following: "Generally, intangibles shall also include all cash and cash escrow funds, such as but not limited to: depreciation reserve fund accounts, mortgage reserve fund accounts, Reserve for Replacement accounts, <u>bank accounts</u>, Residual Receipt accounts, investments, <u>all contributions, donations, gifts, grants, bequests and endowment funds by donors and all other revenues and accounts receivable from whatever source paid or payable</u>." [Emphasis added]

As another example, the term "Rents," which is also defined as part of the Collateral, is not given its common sense definition of revenue derived from the occupancy of the mortgaged property, but also includes "pledges, gifts, grants, bequests, contributions and endowments" and "other assistance available for Project operation."

Definitions like these sweep into the ambit of HUD control, for instance, public and private grants and soft loans for special facilities and tenant services, as well as additional equity raised over and

above HUD requirements to cover tenant benefits and/or development and syndication fees that compensate participants for bringing the project to fruition. State and local governments, charitable donors and investors will be reluctant to provide funds for these purposes (which do not in any way add to HUD's risk) if the funds are to be swept up as HUD collateral and cannot be expended for their planned purposes without HUD's explicit consent.

In a step in the right direction, in the current draft of Section 13a of the Regulatory Agreement, HUD seems to be giving limited recognition to the multiple sources and uses of funds in complex, multi-party transactions. This draft acknowledges that the Equity or capital contributions subject to HUD regulation “shall not include certain syndication proceeds, such as proceeds from Low Income Housing Tax Credit transactions used to repay bridge loans from members/partners of Borrower, all as more fully set forth in Program Obligations." However, the ability to freely utilize syndication proceeds and other non-HUD funds needs to be made much clearer. Perhaps a solution to the problem under discussion is to incorporate into the insured loan closing documents a detailed listing of anticipated funds from various non-HUD sources that HUD agrees will not be treated as Mortgaged Property and that will not be subject to HUD monitoring of their application.

Program Obligations

Program Obligations is an inclusive concept that is addressed in both the Regulatory Agreement and the Security Instrument. It may be an improvement over its predecessor term “HUD Directives,” but it comes with broader powers that FHA and HUD can use to change the rules of the game out in the future. Borrowers and Lenders are entitled to know the terms of their rights and obligations, and just as importantly that these rights and obligations won’t be adversely affected by changes to regulations and statues, whether the impact is adverse, material or not. Unless the process for changing documents is going to occur frequently – and we are not advocating that – this is open ended authority and that impact on Borrowers and Lenders should have reasonable limits. Unless the modifications to the rules and regulations under which a property operates have no adverse affect on the owner of the property, including increased operating or capital costs, FHA should allow properties to be operated under the rules and regulations that are in effect at the time the contract of insurance is issued. Further, it needs to be clear that "applicable statutes and regulations" are statutes and regulations of HUD concerning FHA mortgage insurance, not HUD more generally and certainly not other government agencies. Because the term is confusing and because the concept will apply only while FHA insures the loan, Program Obligations should only apply in the Regulatory Agreement.

The discussion of new obligations is a common theme in the proposed documents. There are many places where both the Borrower will take on new responsibilities and deeper liabilities, and the Lender will take on more responsibility plus the risk of greater liability. We urge FHA to carefully review the changes to avoid confusion on these critical issues. Vague language leaves

critical issues to interpretation which can have both practical and dire consequences for Borrowers and Lenders.

Effective Date and Implementation

An effective date target of January 2011 following publication of a proposed rule in July 2010 should be carefully considered in terms of proper communication, documentation and training associated with the contemplated revisions to the closing documents. Establishing an effective date must take into consideration appropriate guidance and revisions to the MAP guidebook and to appropriate references to the Handbook.

Without associated documentation and updates, effective communication and training, the Department will have failed in its goal to improve the loan closing process and improve the FHA multifamily loan insurance program. The Department has stated its intention to update documents associated with the legal documents, including but not limited to MAP guidebook and HUD Handbooks, and to provide guidance and information associated with the revised closing documents and the loan funding and securities issuance process. It is critical that FHA legal and loan administration personnel receive proper training to make an effective transition from the current closing/legal documents to updated documents.

We strongly encourage the Department to take a careful and deliberate approach to both revisions and to the implementation of revised legal documents. Taking such an approach to implementation will benefit the entire loan application and closing process and transition period between the existing and revised documents. Training and education should be comprehensive and include all impacted field personnel, mortgagees and borrowers and not limited to field legal personnel. The implementation must include thoughtful communication and training to the FHA lender community to ensure they can effectively and efficiently process transactions and represent the borrower before FHA.

We thank you for the opportunity to comment on the HUD Multifamily Rental Loan Closing Document revisions.

Submitted by:

National Affordable Housing Management Association (NAHMA)
National Apartment Association (NAA)
National Association of Home Builders (NAHB)
National Leased Housing Association (NLHA)
National Multi Housing Council (NMHC)
Stewards of Affordable Housing for the Future (SAHF)