

This interpretive rule is pending publication in the Federal Register. Publication in the Federal Register will determine the start of the public comment process and the public comment deadline. No public comments are solicited or will be accepted in advance of publication of this rule in the Federal Register.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 203

[Docket No. FR-5679-N-01]

Federal Housing Administration: Prohibited Sources of Minimum Cash Investment under the National Housing Act – Interpretive Rule

AGENCY: Office of the General Counsel, HUD.

ACTION: Interpretive rule.

SUMMARY: HUD is issuing this interpretive rule to clarify the scope of the provision in the National Housing Act that prohibits certain sources of a homebuyer's funds for the required minimum cash investment for single family mortgages to be insured by the Federal Housing Administration (FHA). Uncertainty has arisen as to the effect of this provision on State and local governments and their agencies' and instrumentalities' homeownership programs that provide funds for the minimum cash investment. This rule provides HUD's interpretation that this statutory provision does not remove the availability of FHA insurance for use in conjunction with State and local government programs that provide funds toward the required minimum cash investment. Although interpretive rules are exempt from public comment under the Administrative Procedure Act, HUD nevertheless invites public comment on the interpretation provided in this rule.

DATES: Effective Date: November 29, 2012.

Comment Due Date: **[Insert 30 days from the date of publication in the Federal Register]**

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule 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 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 www.regulations.gov website 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 rule.

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 appointment to review the public comments must be scheduled in advance 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 Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Millicent Potts, Associate General Counsel for Insured Housing, Office of General Counsel, U.S. Department of Housing and Urban Development Room 9226, 202-708-2212. Hearing or speech impaired individuals may access these numbers via TTY by calling the toll free Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. The National Housing Act Prohibition on Certain Sources of Cash Investment

To qualify a mortgage for FHA mortgage insurance, section 203(b)(9)(A) of the National Housing Act (12 U.S.C. 1709(b)(9)) requires the homebuyer to pay “in cash or equivalent on account of the property an amount equal to not less than 3.5 percent of the appraised value of the property.” Some homebuyers obtain this minimum amount from sources other than their own earnings or savings; for example, a relative may give or loan them this money or some part of it. However, section 203(b)(9)(C) of the National Housing Act provides that no part of this required minimum investment may consist of funds provided by the seller of the property or any other person or entity who benefits financially from the sale of the property, or any person who is reimbursed by any such person or entity.

B. Federally Funded Homeownership Programs

Governments—Federal, State, and local—and their agencies and instrumentalities have provided assistance toward the minimum cash investment as part of homeownership programs from various public funds, including appropriated funds, operating tax revenues, taxable and tax-exempt general obligation bonds, and surplus revenues (for example, excess reserves). Federal

homeownership assistance programs that have a cash investment component include HUD's Neighborhood Stabilization Program, Community Development Block Grant (CDBG) program, and HOME Investment Partnerships program, as well as the Department of Veterans Affairs Home Loan Guaranty Service and U.S. Department of Agriculture's Rural Development Housing and Community Facilities program. These Federal homeownership assistance programs have specified public purposes, such as revitalizing communities affected by foreclosures and vacancy, increasing the homeownership rate in particular geographies, making homeownership affordable to underserved populations and in high-cost markets.

For these Federal assistance programs, Congress has authorized funds to be distributed from the Treasury, often through State and local governments or their instrumentalities, for purposes of supporting homeownership programs. At the same time, section 203(b)(9)(C) of the National Housing Act raises the question whether the distribution of these same Federal funds would cause the mortgages originated on the basis of support from such funds not to qualify for FHA insurance. Reading the prohibition in section 203(b)(9)(C) to include other Federal agencies, State and local governments, or their instrumentalities disbursing government funds in accordance with the requirements of government assistance programs would place these governments and instrumentalities in an untenable position of having governmental authority to provide assistance toward the minimum cash investment on the one hand, but being unable to use FHA-insured mortgage financing on the other. To do so would also frustrate the statutory purpose of these programs and of the FHA to encourage and support homeownership.¹

¹ In providing an overview of the Housing and Economic Recovery Act of 2008 (HERA), the Congressional Research Service in an August 19, 2008 report for Congress on HERA [RL34623] notes that HERA authorizes \$4 billion for state and local governments to purchase and rehabilitate abandoned and foreclosed housing and that this housing would be sold or rented to low- and moderate-income individuals and families. *See* http://assets.opencrs.com/rpts/RL34623_20080819.pdf.

C. Other Government Funded Homeownership Assistance Programs

Another key source of homeownership assistance programs, such as assistance with closing costs, or rehabilitation, is provided by State and local governments, primarily through housing finance agencies (HFAs). According to the National Council of State Housing Finance Agencies, HFAs are generally State-chartered authorities established by State governments to help meet the affordable housing needs of State residents.² Although HFAs vary widely in characteristics such as their relationship to State government, most are independent entities that operate under the direction of a board of directors appointed by their respective State governors. They administer a wide range of affordable housing and community development programs.³ Using housing bonds, low-income housing tax credits, HOME program funds, and other Federal and State resources, HFAs have crafted hundreds of housing programs, including homeownership, rental, and all types of special-needs housing. HFAs have provided affordable mortgages to 2.6 million families to buy their first homes through mortgage revenue bond programs.⁴

A recent study of HFAs found that 100 percent of the 51 HFAs surveyed said that part of their mission is “to assist low- and moderate-income residents to purchase homes and be successful homeowners.”⁵ A majority of those programs—in 2011, 88 percent (45 of 51) of State HFAs—include minimum cash investment as a part of advancing their mission.⁶ Federally backed mortgage insurance is also a critical part of the HFAs’ strategy. Of HFA loan production

² See http://answers.usa.gov/system/selfservice.controller?CONFIGURATION=1000&PARTITION_ID=1&CMD=VIEW_ARTICLE&USERTYPE=1&LANGUAGE=en&COUNTRY=US&ARTICLE_ID=10182.

³ See <http://www.ncsha.org/about-hfas/hfa-programs>.

⁴ See <http://www.ncsha.org/about-hfas>.

⁵ See http://www.chfainfo.com/documents/HFA_HEC_Report_March2012.pdf at 1.

⁶ *Id* at 1.

in 2011, 86 percent involved FHA, Veterans Administration (VA), or Rural Housing Service loan or loan insurance programs.

Many HFAs administer other State and Federal housing assistance programs such as homeless assistance, CDBG, and State housing trust funds. Local housing finance agencies operate similarly but at the county, city, or other municipal-entity level. In many cases, a local agency may be the local government itself. HFAs provide various services to assist citizens within their jurisdictions in attaining affordable housing options. These services include providing access to affordable mortgage loans for purchasing a home, counseling, money and other resources for closing costs, and assistance for any required investment in the mortgaged property. Such funds come from numerous sources. Program beneficiaries are usually low- and moderate-income individuals and families who have gone through homeownership counseling through which they receive training on money management, use of credit, and home maintenance.

D. FHA and Minimum Cash Investment Requirements

Since its enactment, the National Housing Act (NHA) has required the mortgagor to have a minimum investment in the property being purchased. For many years, the required minimum investment was 3 percent of the cost of acquisition, and is currently 3.5 percent of the home's appraised value. Prior to 2008, the statute and regulations regarding the required investment were silent, with minor exceptions, as to permissible sources of the mortgagor's required investment. However, FHA's single family mortgage credit handbook, Handbook 4155.1,⁷ provided administrative guidance to approved mortgagees as to permissible sources of the funds that a homebuyer could use for the required minimum investment. HUD's policy under the handbook provisions was to permit the minimum cash investment to be financed by sources including a

⁷ See <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4155.1/41551HSGH.pdf>.

family member, the borrower's employer or labor union, a governmental entity, a charitable organization, or a close friend with a clearly defined and documented interest in the borrower. HUD's policies have always expressly prohibited the seller from financing or providing a gift of the required investment.

In the 1990s, several nonprofit entities developed an approach to funding homebuyers' cash investments that circumvented the handbook prohibition. These entities obtained charitable status from the Internal Revenue Service, and then encouraged home sellers to use their services and provided homebuyers with all or part of the required cash investment amount. After the funds were provided by the nonprofit entity to the homebuyer, the seller made a donation to the nonprofit entity of the amount of the assistance plus a fee. The donated funds were directed to subsequent homebuyers for the cash investment on their homes. The nonprofit does not conduct broad-based fundraising but instead relies on sellers and other businesses in real estate for financial support. In effect, sellers and other donors were indirectly funding the homebuyer's required minimum investment by reimbursing the nonprofit entity for each transaction.⁸

As the prevalence of channeling funds from sellers through nonprofit entities increased, FHA became concerned that this practice as applied to homebuyers with FHA-insured mortgages could result in FHA insuring riskier loans. In response, FHA published a proposed rule in 1999 to prohibit this source of the minimum cash investment.⁹ Under the proposed rule, a gift of the buyer's required minimum cash investment would disqualify the loan from FHA insurance if the entity providing the gift received funds directly or indirectly from the seller of the property. However, the proposed rule expressly included funds provided by a "State or local government agency or instrumentality" in the category of permissible sources of funds that the homebuyer

⁸ See IRS Ruling 2006-27, available at <http://www.irs.gov/pub/irs-drop/rr-06-27.pdf>.

⁹ See Sources of Homeowner Downpayment, 64 FR 49956 (proposed Sept. 14, 1999).

can apply toward the minimum investment requirement.¹⁰ HUD withdrew the rule in January 2001 in light of widespread opposition to the rule as proposed.¹¹

The direct and indirect financing of homebuyers' minimum cash investment by sellers continued to be a source of concern following the withdrawal of the proposed rule. In 2005, the Government Accountability Office (GAO) published a report on the risks raised by the reimbursement of nonprofit entities by sellers.¹² The GAO findings noted that sales prices were increased commensurately to cover the cost incurred by the seller, and thus resulted in homeowners having less actual equity in the newly acquired home.¹³ The GAO report also found that the default and claim rate for homes purchased with charitable gifts where the nonprofit entity was reimbursed by the seller was much higher than in those cases where the homebuyer provided his or her own money for the required investment.¹⁴

Moreover, the IRS found that organizations claiming to be charities were being used to funnel money from sellers to buyers through self-serving, circular-financing arrangements, and that in a typical scheme, there is a direct correlation between the amount of the funds provided to the buyer and the payment received from the seller.¹⁵ On May 4, 2006, the IRS issued Revenue Ruling 2006-27, which determined that organizations that indirectly provide cash investments funded by sellers to homebuyers do not qualify as tax-exempt charities.¹⁶ In the press announcement accompanying the ruling, the IRS stated that the ruling makes clear that

¹⁰ See *id.* at 49958.

¹¹ See Withdrawal of Proposed Rule on Sources of Homeowner Downpayment Pursuant to Section 203 of the National Housing Act, 66 FR 2851 (January 12, 2001).

¹² See United States Government Accountability Office, "Mortgage Finance—Additional Action Needed to Manage Risk of FHA-Insured Loans with Down Payment Assistance," (Nov. 2005) available at <http://www.gao.gov/new.items/d0624.pdf>.

¹³ See *id.* at 25.

¹⁴ See *id.* at 3-4.

¹⁵ See <http://www.irs.gov/Charities-&-Non-Profits/Seller-Funded-Down-Payment-Assistance-Programs-Are-Not-Tax-Exempt>.

¹⁶ See <http://www.irs.gov/pub/irs-drop/rr-06-27.pdf>.

organizations operating seller-funded programs are not charities because they do not meet the requirements of section 501(c)(3) of the Internal Revenue Code.¹⁷ The IRS also found that the seller pays the organization only if the sale closes, and the organization usually charges an additional fee for its services.¹⁸

On May 11, 2007, HUD again published a proposed rule that prohibited funds provided by the seller as a source for the minimum cash investment.¹⁹ This provision, entitled “Restrictions on Seller Funding,” proposed to prohibit cash investment amounts that consists, in whole or in part, of funds provided by any of the following parties before, during or after closing of the property sale: “(1) the seller, or any other person or entity that financially benefits from the transaction; or (2) any third party or entity . . . that is reimbursed directly or indirectly by any of the parties listed in clause (1).”²⁰ Once again, the May 2007 proposed rule expressly exempted funds from “a federal, state, or local government agency or instrumentality” from the category of prohibited sources for funds toward the required minimum investment.²¹ HUD published its final rule on October 1, 2007.²² On the effective date of the rule, a lawsuit challenging the rule was filed against HUD in the U.S. district court for the Eastern District of California, and in February 2008 the court set aside the final rule.²³

The 2005 GAO report, the 2006 IRS Ruling, and the judicial invalidation of HUD’s final rule eventually led to congressional action on the issue in 2008. Section 2113 of the Housing and Economic Recovery Act of 2008 (HERA), signed into law on July 30, 2008, amended the NHA with language that is identical in relevant part to the language in HUD’s 2007 final rule. Section

¹⁷ See <http://www.irs.gov/uac/IRS-Targets-Down-Payment-Assistance-Scams;-Seller-Funded-Programs-Do-Not-Qualify-As-Tax-Exempt>.

¹⁸ *Id.*

¹⁹ See Standards for Mortgagor’s Investment in Mortgaged Property, 72 FR. 27048 (proposed May 11, 2007)..

²⁰ See *id.* at 27049.

²¹ See *id.* at 27051.

²² See Standards for Mortgagor’s Investment in Mortgaged Property, 72 FR 56002 (final Oct. 1, 2007).

²³ See *Nehemiah Corp. of America v. Jackson*, 546 F. Supp. 2d 830, 848 (E.D. Cal. 2008).

2113 of HERA amended section 203(b)(9) of the NHA to provide that mortgages eligible for FHA insurance must “[b]e executed by a mortgagor who shall have paid in cash or its equivalent, on account of the property an amount equal to not less than 3.5 percent of the appraised value of the property or such larger amount as the Secretary may determine.” Section 203(b)(9) was also amended to include a new subparagraph (9)(C), which specifies prohibited sources for a mortgagor’s minimum investment. Section 203(b)(9)(C) of the NHA states:

PROHIBITED SOURCES.— In no case shall the funds required by subparagraph (A) consist, in whole or in part, of funds provided by any of the following parties before, during, or after closing of the property sale:

- (i) The seller or any other person or entity that financially benefits from the transaction.
- (ii) Any third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause (i).

Since HERA’s enactment, FHA has not replaced the regulation that was vacated by the district court in February 2008. However, Mortgage Letter 2008-23 provides notification of the statutory revisions to the cash investment requirements imposed by HERA.²⁴ Instead of 3 percent of the cost of acquisition, the required investment was changed by HERA to 3.5 percent of the appraised value of the property. Aside from the statement that closing costs (*i.e.*, the present allowed seller incentive of 6 percent) could not be used to meet the 3.5 percent appraised value minimum investment requirement, the Mortgage Letter is silent regarding the source of the required cash investment by the mortgagor.

II. This Interpretive Issue

A. Conjunction of Government Housing Assistance Programs and FHA-Insured Mortgages

²⁴ See Mortgage Letter 2008-23, available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_19737.pdf.

It is HUD's interpretation that section 203(b)(9)(C) of the NHA does not prohibit FHA from insuring mortgages originated as part of the homeownership programs of Federal, State, or local governments or their agencies or instrumentalities when such agencies or instrumentalities also directly provide funds toward the required minimum cash investment.²⁵ The addition of a statutory provision on prohibited sources of cash investment funds, as part of the amendments to section 203(b)(9) of the NHA enacted in HERA, was intended to preclude the abuse of the program where a seller (or other interested or related party) funded the homebuyer's cash investment after the closing by reimbursing third-party entities and added the cost of this reimbursement to the sales price of the home, thus inflating the price of the home beyond its market value. It is HUD's interpretation that the amended section 203(b)(9) does not exclude as a permissible source of cash investment, funds provided directly by Federal, State, or local governments, or their agencies or instrumentalities as part of their respective homeownership programs.

HUD finds support for this interpretation in the surrounding provisions in HERA and in the legislative history of the amendment to section 203(b)(9). First, HERA itself authorized governmental homeownership programs that include a cash investment component, and interpreting section 203(b)(9)(C) to deny FHA insurance to mortgages resulting from such programs would frustrate their statutory purpose. In section 2301 of HERA, Congress authorized the first increment of funding for the Neighborhood Stabilization Program (NSP). NSP provides funds to low- and moderate-income homebuyers for the cash investment on purchasing lender-

²⁵ In Mortgagee Letter 94-2, FHA defined a government agency or instrumentality for purposes of section 528 of the NHA. See http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_16755.txt. This definition applies here. That definition provides that the entity must have been established by a governmental body or with governmental approval or under special law to serve a particular public purpose or designated as an instrumentality by law (statute or court opinion) and the majority of governing board and/or principal officers named or approved by governmental body/officials, or the government body approves all major decisions and/or expenditures, or the government body provides funds through direct appropriations/grants/loans, with related controls applicable to all activities of entity.

foreclosed single family properties when the property will be the buyer's primary residence and is located in an eligible target area. NSP funds are distributed through State and local government agencies and instrumentalities. NSP funds are also used to purchase vacant or distressed properties, which may then be resold by the purchasing agency or instrumentality to low- or moderate-income buyers with funds toward the minimum cash investment. Access to FHA mortgage insurance is often essential to making such programs work.²⁶ Thus, an interpretation of section 203(b)(9)(C) that precludes governments and their agencies and instrumentalities government agencies from providing funding toward the minimum cash investment for an FHA-insured mortgage would undercut a central purpose of NSP and similar Federal, State, and local government programs.²⁷

Second, the legislative history of the amendment to section 203(b)(9)(C) also supports HUD's interpretation that it does not exclude State and local government home ownership programs from FHA insurance eligibility. In a statement supporting the amendment to section 203(b)(9)(C), Senator Dodd explained that "this bill eliminates the seller-funded downpayment assistance program."²⁸ There is no indication that State and local governments or their agencies or instrumentalities were to be within the scope of the amendment. The Senate Committee Report accompanying a 2007 bill containing statutory language²⁹ identical to what was

²⁶ HERA was enacted in 2008. FHA data shows that in that year, there was a dramatic increase in FHA's market share. From 2005 through 2007, FHA's market share ranged from 2.6 to 3.9% of the national mortgage market. In 2008, it rose to almost 20% of the market share. See "FHA-Insured Single Family Mortgage Originations and Market Share Report, 2009-Q4, http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_16681.pdf (last visited 7-3-2012). See also FHA's Annual Report to Congress on the Fiscal Year 2012 Financial Status of the FHA Mutual Mortgage Insurance Fund, issued November 16, 2012, which has updated information on FHA's market share, at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-171.

²⁷ See *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (statutory provisions should be interpreted to avoid interpreting inconsistencies between provisions); see also *Babitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Gade v. Nat'l Solid Waste Management Ass'n*, 505 U.S. 88, 100-01 (1992).

²⁸ See 154 Cong. Rec. S6354-S6356 (July 7, 2008) available at <http://www.gpo.gov/fdsys/pkg/CREC-2008-07-07/html/CREC-2008-07-07-pt1-PgS6354-2.htm>.

²⁹ See FHA Modernization Act of 2007, S. 2338, (2007) § 103.

eventually enacted in HERA further support this interpretation. The report explained that the “section also prohibits seller-funded downpayment entities from providing any of this required cash investment.”³⁰ It noted that “[s]ince this legislation was passed by the Committee, HUD has promulgated a regulation that also prohibits *these entities* from providing downpayment assistance funds.”³¹ As discussed above, the 2007 HUD rule to which the Senate Report refers expressly excluded State and local government agencies and instrumentalities from the category prohibited sources for the minimum cash investment. The report’s identification of “seller-funded downpayment entities” as the targets of both HUD’s proposed rule *and* of the bill indicates that the provision, which is identical to what was enacted in HERA, does not include State and local governments or their agencies or instrumentalities.

B. Scope of Interpretive Rule

Under section 203(b)(9)(A) of the NHA, the homebuyer’s investment in the property must be at least 3.5 percent of its appraised value. So long as the homebuyer makes this minimum required investment from his or her own (or other approved) funds, any person, even one associated with the transaction, may contribute additional funds towards the borrower’s costs without violating section 203(b)(9)(C). This interpretive rule only applies to funds that constitute all or part of the 3.5 percent minimum investment requirement.

D. Conclusion

Accordingly, HUD interprets NHA section 203(b)(9)’s “prohibited sources” provision in subsection (C) as not including funds provided directly by Federal, State, or local governments, or their agencies and instrumentalities in connection with their respective homeownership programs.

³⁰ S. Rep. No. 110-227, at 6 (Nov.13, 2007), available at <http://www.gpo.gov/fdsys/pkg/CRPT-110srpt227/pdf/CRPT-110srpt227.pdf>

³¹ *Id.* (emphasis added).

E. Solicitation of Comment

This interpretive rule represents HUD's interpretation of section 203(b)(9)(C) and is exempt from the notice and comment requirements of the Administrative Procedure Act. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, HUD is interested in receiving feedback from the public on this interpretation, specifically with respect to clarity and scope.

Dated: November 29, 2012

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Helen R. Kanovsky, General Counsel

[FR-5679-N-01]