

**Defining “Independence” For
Tenant Endorsed Community Based Independent Nonprofit Purchasers
 (“Qualified Purchasers”)
9/13/00 Draft**

Qualified Purchasers

OMHAR has implemented significant initiatives to encourage Qualified Purchasers to acquire properties (many of which are expected to be at risk of not being preserved) and preserve them through M2M debt restructuring transactions.

Qualified Purchasers, in turn, will make significant long-term affordability commitments, beyond those required of other M2M program participants.

OMHAR intends that Qualified Purchasers will have a mission and history of providing and preserving affordable housing, with genuine community level involvement.

In order to be eligible for the Qualified Purchaser benefits, a nonprofit purchaser must not be dependent upon any for-profit entity (including, but not limited to, the seller of the property and any affiliates of the seller).

The Safe Harbor Standard

The following is a safe harbor standard, through which nonprofits can establish their independence without the need for any transaction-specific review by the PAE or OMHAR. For definitions of “control”, “owner” and “affiliate of the owner”, see the discussion at the end of this paper.

To take advantage of the safe harbor “independence” standard, the purchasing nonprofit (“Purchaser”) will certify that:

1. No for-profit entity has control of the Purchaser.
2. Neither the owner of the property nor any affiliate of the owner (collectively, “Seller”) has control of the Purchaser.
3. Within the previous three years, the Seller has not provided (a) any financial support (including in-kind support) to the Purchaser or any affiliate of the Purchaser; or (b) any goods or services to the Purchaser or any affiliate of the Purchaser.
4. The Purchaser has provided the complete purchase and sale agreement to the PAE. The purchase and sale agreement describes all compensation of any sort to be paid to the Seller. There are no additional agreements of any sort between the Purchaser and Seller.

5. After the proposed purchase, the Seller will not (a) retain any financial interest (as defined below) in the property being purchased (“Property”); or (b) provide any goods or services to the Property.

OMHAR will develop a standard form of certification, incorporating the appropriate definitions. This certification will be given to the PAE, in writing, by the Purchaser’s Board of Directors. The certification will be given at the time of the purchase and sale agreement, and again at the M2M closing.

Transactions involving more than one property (under one or more purchase and sale agreements) may be addressed in a single certification.

Purchasers with multi-layered organizational structures should note that the determination of “independence” encompasses the entity that will purchase and own the property, all parent entities, and all affiliates.

Process For Purchasers That Are Not Safe-Harbored

A potential Qualified Purchaser that does not fall within the safe harbor definition may request that OMHAR determine it to be “independent”. The purchaser will submit to the PAE:

- A safe harbor certification by the purchaser’s Board of Directors as described above, but amended where appropriate to show any aspects of the proposed transaction that fall outside the safe harbor standard.
- All relevant information concerning any aspects of the proposed transaction that fall outside the safe harbor standard.
- The purchaser’s proposal for eliminating the potential that such features could compromise (or appear to compromise) the purchaser’s independence.
- The reasons that (taking into account the proposed countermeasures) the purchaser is in fact independent.

Transactions involving more than one property (under one or more purchase and sale agreements) may be addressed in a single submission.

In consultation with the PAE, OMHAR will issue a transaction-specific determination. Factors that OMHAR will consider will include:

- The mission and history of the Purchaser and its Board members, relative to the objectives of OMHAR’s Qualified Purchaser program.
- Whether its Board members are affiliated with for-profit organizations that have financial ties to the Purchaser or Seller.
- Whether it shares staff, or office space, with for-profit organizations that have financial ties to the Purchaser or Seller.
- Transactions in which the seller or affiliate will act as property management agent after the purchase will generally be acceptable if (a) the Purchaser demonstrates to the reasonable

satisfaction of the PAE and OMHAR that the terms of the property management contract are arms-length, and (b) the contract is for a period not longer than three years.

- Transactions in which the seller (or affiliate) retains any other ongoing financial interest in the property generally will not be acceptable, unless the purchaser can demonstrate that the financial interest is structured so as to preclude the seller (or affiliate) from exercising control at any point during the term of the M2M Use Agreement.
- Purchasers who have current financial involvement with the seller (or affiliate) will generally not be acceptable.

OMHAR will also consider non-transaction-specific determinations, for example for potential purchasers that are ‘independent’ but whose organizational structure does not fall within the safe harbor standard.

“Owner”, “Affiliate of the Owner”, “Control” and “Financial Interest”

OMHAR refers potential purchasers to §516(a) of MAHRA that reads in part:

“The term “owner” as used in this subsection, in addition to it having the same meaning as in section 8(f) of the United States Housing Act of 1937, also means an affiliate of the owner....”

“The terms “affiliate of the owner” and “affiliate of the purchaser” means any person or entity (including, but not limited to, a general partner or managing member, or an officer of either) that controls an owner or purchaser, is controlled by an owner or purchaser, or is under common control with the owner or purchaser.”

“The term “control” means the direct or indirect power (under contract, equity ownership, the right to vote or determine a vote, or otherwise) to direct the financial legal, beneficial or other interests of the owner or purchaser.”

OMHAR also refers potential purchasers to the M2M program regulations at 24 CFR 401.310 (a) that read in part:

“(2) Control means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company (or other entity's) directors or trustees; or the ability to exercise a controlling influence over the company or entity's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.”

For Purchasers and/or Sellers that have multi-layered organizational structures, “control” refers to the level at which control is actually held and/or exercised, without regard to structure. (i.e., the

determination of “control” is not limited to a specific number of layers above the entity that will purchase and own the property).

“Financial Interest” includes:

- Any equity interest in the purchaser or an affiliate of the purchaser.
- Any debt that is secured by the property.
- Any debt that is otherwise associated with the property, for example:
 - Debt that is secured by a pledge of ownership interests in the property.
 - Debt whose repayment is materially dependent on the cash flow and/or future value of the property.

OMHAR and potential purchasers will use these definitions for purposes of determining compliance with the safe harbor standard.

Other Clarifications

Nothing in this policy prohibits otherwise acceptable purchase and sale transactions between nonprofit parent entities and their subsidiaries.

OMHAR does not prohibit mortgage lending institutions affiliated with Purchasers from providing financing in M2M transactions; however, like all other financing in M2M, all such financing must be on commercially reasonable and competitive terms and acceptable to the PAE. OMHAR generally will not approve transactions in which the mortgage lending institution is an affiliate of the seller.