

Chapter 19 of HUD's New MAP Guide – Initial Takeaways for Lenders and Borrowers

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For those of us in the HUD-insured multifamily finance space who make our living trying to shrink the time period between firm commitment and closing, Chapter 19 of the new Multifamily Accelerated Processing (MAP) Guide was a must-read when it was published at the end of 2020. A revamped version of what used to be a standalone Closing Guide, Chapter 19 will be the Bible for FHA-insured multifamily closings for the foreseeable future, providing critical instructions on how to navigate the sometimes labyrinthine HUD closing process. The new MAP Guide applies to deals for which firm commitment applications are submitted on or after March 18, 2021. Here are some initial takeaways from Chapter 19:

Chapter 19 Beefs up Closing Protocols

For many years, HUD has heard a common refrain from lenders and borrowers who participate in the agency's loan programs: "We want more consistency from HUD Office to HUD Office." Chapter 19 responds to that refrain by tightly prescribing the sequence of events that leads to the closing table, such that parties closing deals in San Francisco, Boston and every place in between have more or less the same experience. The document is replete with time frames such as the following:

- "To maintain a Tentative Closing Date, Lender or Lender's Counsel must submit a draft closing package to the Closing Coordinator at least 30 business days prior to any Tentative Closing Date."
- "The HUD Closing Attorney will contact Lender's Counsel within two business days following the Closing Coordinator's approval to start review."
- "Lender's Counsel must submit all remaining documents not yet reviewed or approved by HUD, at least four business days prior to the confirmed closing date for closings-by-mail."

Of course, consistency won't be achieved by the publication of Chapter 19 alone, but rather through Multifamily Satellite and Regional Offices faithfully implementing the printed word. HUD employees will likely strive to adhere to the new protocols as closely as possible, at least initially. Program participants who don't follow the new rules of the road can expect a slow and bumpy ride to closing.

Tentative Closing Dates Should Help Keep Deals Moving Forward

When submitting first drafts of closing documents to HUD, lender's counsel often informs the department that the parties are aiming to close by a certain date. Under the old Closing Guide, HUD was not required to acknowledge that target date, much less strive to accommodate it. By contrast, Section 19.1.2.3.B.2 of Chapter 19 provides the following: "If Lender requests a preferred closing date ... OGC and the RC Director will review the information provided and mutually agree upon a Tentative Closing Date." The advent of the Tentative Closing Date, which is established shortly after the firm commitment comes out, is important in that it gets all parties (including HUD) on the same page regarding the speed at which the deal must move. And while the Tentative Closing Date is not a guaranteed date, it should be helpful in terms of managing the parties' expectations (especially those of the borrower, who typically has less experience with HUD closings than the lender).

HUD's Willingness to Sign Regulatory Agreements in Counterpart Will Be Advantageous When Timing Is Tight

When talking to borrowers, their attorneys, title agents and others who only dabble in FHA-insured multifamily financing, lender's counsel like to talk about the "long runway" needed to get HUD deals closed. Part of that long runway consists of circulating the Regulatory Agreement from the borrower to lender's counsel to HUD and finally to the title agent handling recording. Recognizing that the Regulatory Agreement's "signature circuit" is time consuming and vulnerable to shipping mishaps, Chapter 19 provides the following at Section 19.1.3.4:

"HUD will sign original recordable closing documents in counterpart when allowed under state and local law. If a recordable document is not signed in counterpart, Lender's Counsel must obtain the non-HUD signatures first, and then submit the original to the RC Director for HUD signature. HUD may permit the designated escrow officer (e.g., title agent) to hold HUD-signed documents in escrow."

This provision allows the borrower and HUD to sign their counterpart signature pages simultaneously and send them to the title agent, where the pages can be combined to create a fully executed Regulatory Agreement. When timing is tight and delaying the closing by even a single day can cost the borrower thousands of dollars in extension fees, using counterpart signatures could end up being a godsend.

The major caveat is that signing in counterpart must be "allowed under state and local law." Lender's counsel will be well advised to ask borrower's counsel to confirm early on that the counterpart option is on the table. If state or local law prohibits that practice, the parties will have to stick to the pre-Chapter 19 Regulatory Agreement circuit and build their timelines accordingly.

Relaxed Timelines on Searches and Surveys Are a Positive Development

We at Dinsmore were pleased to see that Chapter 19 grants program participants increased flexibility regarding the age of certain closing deliverables. For example, under the old Closing Guide, ordering UCC searches, which had to be dated within 30 days of closing, was always a bit of a gamble. If you ordered too soon, the searches could end up not being dated within 30 days of closing. If you ordered too late, you may not have had the searches when all other parts of the supplemental package to HUD were ready to go. Section 19.4.13.5 of Chapter 19 provides that UCC searches must be dated within 60 days of closing, which will allow parties to order their searches earlier in the document review process with less concern as to whether they'll be too old by the time closing is scheduled.

Similarly, with regard to surveys, the old Closing Guide dictated that the surveyor's field work had to occur within 120 days of closing. Under Section 19.4.7.6.A.2 of Chapter 19, that field work must now occur within 180 days of closing. This extra breathing room should make the dates on the survey a non-issue for most closings, granting program participants extra bandwidth to focus on other aspects of the deal.

Will the Five-Day Rule Result in More Piecemeal Submissions to HUD?

Section 19.1.2.4.I.1 of Chapter 19 provides the following: "To maintain a Tentative Closing Date, Lender and Lender's Counsel must respond to HUD comments within five business days after the date comments were distributed." For lender's counsel who did adequate quality control before submitting the draft closing package, responding to minimal HUD comments in this time frame should be manageable. In those cases, it will be useful for the parties to feel the pressure of the five-day rule as a means of keeping the deal driving towards closing.

However, depending on the complexity of the deal and the amount of coordination needed with third parties (surveyors, title agents, general contractors, etc.), it's not hard to imagine scenarios where consolidating documents that respond to all of HUD's comments within five business days of receiving them is not feasible. Will lender's counsel be inclined to make supplemental submissions that are only 75 percent complete, just to stay within the five-day period and keep their Tentative Closing Date? Or will they opt to gather 100 percent of responsive documents before pushing send on the email to HUD, even if that means missing the five-day window?

As a former HUD Chief Counsel who reviewed supplemental packages on a regular basis, I know those 75-percent-complete packages lead to a lot inefficient processing. Will an increased occurrence of piecemeal supplemental packages be an unintended byproduct of the five-day rule, making HUD's review process less efficient and increasing the interval between commitment and closing, contrary to the rule's intent? Time will tell.

The Bottom Line

Overall, there's a lot to like about Chapter 19 of the new MAP Guide. The authors clearly appreciated the public's comments about needing to add speed and consistency to the closing process and implemented changes to that process that should have tangible results. But only parties who closely study the new rules will reap the benefits and avoid the pitfalls.

Think of it this way: If you've been driving a sedan for years and suddenly get behind the wheel of a sports car without reading the owner's manual, you shouldn't be surprised if you end up in a ditch.