



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

MEMORANDUM FOR: All Regional Directors, Operations Officers, Production Division Directors, Asset Management Division Directors, and Satellite Office Asset Management Division Directors/Satellite Office Coordinators

FROM: Thomas R. Davis, Director, Office of Recapitalization, HTC

SUBJECT: General Guidance Memorandum - Post Mark-to-Market ("PM2M") transactions on a property ("M2M Property") restructured under the Mark-to-Market program ("M2M") when no HUD-held M2M Debt will remain after closing

Purpose and Scope

This Memorandum, with the attached Table provides guidance to facilitate the review, consideration, and execution of the documents associated with:

- (a) PM2M transaction requests when the M2M originated debt is no longer held by the Secretary, either because the debt has been paid in full or because the debt is held by another party;
- (b) PM2M transaction requests when, upon conclusion of such transaction, all remaining Secretary-held M2M debt will be paid in full;
- (c) Modification of the M2M Use Agreement ("M2M UA") to extend its term when HUD has approved a request by a Purchaser or Owner for the early termination and subsequent renewal of the Full Mark-to-Market Renewal Contract ("HAP Contract"); and
- (d) Release of an Accommodation Agreement upon the expiration of the transfer restriction period established in the Accommodation Agreement and documentation of such release in the public land records.

To date, in the instances referenced above, the Office of Recapitalization has provided project-specific guidance to permit the Account Executive in the Multifamily field office to review the proposed transaction in conjunction with the Account Executive's asset management review and to allow for Field Office Directors to execute the assumptions and modifications of the M2M U A.

The purpose of this Memorandum is to standardize this guidance, allowing the Account Executive to complete their asset management review and for the Regional Director to sign documents at the field office level without the need for project-specific guidance.

The transactions referenced above may include a sale, transfer, and/or refinancing of a M2M Property. **This guidance does not apply if there is or will be M2M Secretary-held debt on the M2M Property after the sale, transfer, or refinance.** For these cases, please refer to [Notice H 2021-02](#) (“PM2M Notice”) or a successor notice or guidance for instructions.

Background

For a M2M rent and debt restructuring (“M2M Debt Restructuring”), the Owner must commit in a recorded M2M UA to maintain certain affordability and use restrictions on the M2M Property for a minimum term of thirty (30) years. This commitment is required by both statute and the M2M regulations.¹ If the M2M Property is later sold, the new Owner (“Purchaser”) must expressly assume all obligations and duties under the M2M UA, including the obligation and duty to maintain the affordability and use restrictions for its remaining term. All new and existing financing for such sale, transfer and/or a refinancing must be or remain subordinate to the M2M UA. To facilitate the sale, transfer, and/or refinancing of the M2M Property, the Purchaser or Owner may request the early termination and subsequent renewal of the HAP Contract with a term of up to twenty (20) years. If HUD grants the request, the Purchaser or Owner must agree to a Preservation Exhibit, which must be attached to the renewal contract, that provides for the automatic renewal of the HAP contract, upon expiration, with a term equal to at least the number of years that remained on the terminated HAP Contract at termination. For projects that received market rents at closing, HUD further requires an extension to the term of the M2M UA to make it coterminous with the subsequent renewal of the HAP Contract. If the term of the M2M UA is extended, all new and existing financing must be or remain subordinate to the M2M UA, as extended. Regardless of the nature of the PM2M transaction, all parties must ensure that the M2M UA remains in first priority position on title and in full force and effect for the duration of its term.

Legal Review Required

Please note that HUD Office of General Counsel (OGC) field counsel must review the PM2M documents that will be used to assume and/or modify a M2M UA and other documents that may be required for the PM2M transaction, in addition to the non-PM2M transactional documents (e.g., to effectuate a Transfer of Physical Assets (TPA) and/or assignment and assumption of the HAP Contract). The OGC field counsel review will ensure legal sufficiency of the documents and compliance with this guidance.

Required Documents and Considerations for Each Transaction Type

This Memorandum addresses key PM2M considerations and requirements for transactions that are not covered by the PM2M Notice². It complements other program requirements that must be satisfied by an Owner or Purchaser in such transactions. All documents for transactions covered by this Memorandum are subject to the review and approval of the Multifamily field office with jurisdiction over the M2M Property.

Considerations for Maintaining the Priority of the M2M UA by PM2M Transaction Type

At the closing of a M2M Debt Restructuring, the M2M UA is always recorded among the land records prior to the documents that secure the new and restructured M2M financing. To

¹ Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) § 514(e)(6); 24 C.F.R. 401.408.

² Housing Notice 2021-02 (<https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-02hsgn.pdf>).

maintain this priority and thus avoid being vulnerable to a foreclosure, the M2M UA must never be subordinated or become subordinate to any financing, new or old, or other liens that may encumber the M2M Property. For any PM2M transaction covered by this Memorandum, HUD field counsel should review the title to the M2M Property (*e.g.*, a title abstract, commitment, pro-forma policy, etc.) to confirm the M2M UA will continue to remain superior on title to all mortgages and liens. Additional guidance for the specific types of PM2M transactions contemplated under this Memorandum is outlined below.

A. *Sale/Transfer/TPA without new financing.*

Upon the sale or transfer of the M2M Property during the term of the M2M UA, the Purchaser must assume the M2M UA. For such assumption, the form Assignment and Assumption of Mark-to-Market Use Agreement is attached as Exhibit 1. The Assignment and Assumption of Mark-to-Market Use Agreement must be recorded among the appropriate land records immediately after the Purchaser obtains title to the M2M Property, without any intervening mortgage or lien, unless a legal determination is made by HUD that such mortgage or lien does not change the original priority of the M2M UA after it is assumed by the Purchaser.

B. *Sale/Transfer/TPA with new financing.*

Upon the sale or transfer of the M2M Property during the term of the M2M UA, the Purchaser must assume the M2M UA. However, when new financing is part of the transaction, additional due diligence is required to ensure the M2M UA will maintain its original priority over all mortgages and liens. Additionally, either (i) the Assignment and Assumption of Mark-to-Market Use Agreement must be recorded among the appropriate land records immediately after the Purchaser obtains title to the M2M Property, prior to all new financing, or (ii) the Purchaser must obtain from each mortgagee a subordination agreement satisfactory to HUD that subordinates such mortgage(s) to the M2M Use Agreement. A form Subordination Agreement is attached as Exhibit 2.

C. *Assignment/Renewal of HAP Contract.*³

In some PM2M transactions, the Owner or Purchaser may request the early termination and subsequent renewal of the HAP Contract with a term of up to twenty (20) years, typically to facilitate a refinancing. As a policy matter, HUD treats such a request from the Owner or Purchaser of a project that closed with market rents differently from one that closed with exception rents. For market rent projects, HUD may grant the request only if the Owner agrees to an extension of the term of the M2M UA if an extension is necessary to make it coterminous with the subsequent renewal of the HAP Contract. HUD further requires a Preservation Exhibit for a term equal to at least the number of years that remained on the HAP contract at the time it was terminated.⁴ (See Exhibits 3A. and 3B., respectively, for sample forms for the Modification of M2M Use Agreement

³ The appropriate form of the Full Mark-to-Market Renewal Contract is form HUD-9642 (REV 03-15-2012) (or successor revision or form).

⁴ See Table: “HAP Assignment/Renewal with no M2M Debt & Modification of the M2M Use Agreement” for M2M Use Agreement requirements when a M2M project was originally restructured with Exception Rents vs. Non-Exception Rents. The Table also details when and how a Preservation Exhibit may be used to satisfy lender requirements in Exception Rent scenarios.

for an Owner and the Assumption and Modification of M2M Use Agreement for a Purchaser, with provisions to extend the term.) To prevent the unnecessary payment of exception rents beyond the statutorily required minimum 30-year term of the M2M UA, HUD limits the term of the subsequent renewal of the HAP Contract for exception rent projects to the number of years remaining on the 30-year M2M UA. The Owner or Purchaser must also agree to a Preservation Exhibit for a term equal to at least the number of years that remained on the HAP Contract at the time it was terminated. In cases in which an overall twenty (20) year term is a condition of financing for an exception rent project, the Preservation Exhibit may be completed to require a term equal to the number of years needed, when added to the renewal term of the HAP Contract, to comprise a 20-year commitment.

At the sale or transfer of the M2M Property, the Assumption and Modification of M2M Use Agreement must be recorded among the appropriate land records immediately after the Purchaser obtains title to the M2M Property and must be recorded prior to the recording of any new mortgages and liens (“New Mortgage(s)”). If any existing mortgages or liens (“Existing Mortgages”) will remain as an encumbrance on the M2M Property and/or if any of the New Mortgages will be recorded prior to the recording of the Assumption and Modification of M2M UA, then the Purchaser must obtain from the mortgagee(s)/lienholder(s) of each Existing Mortgages and New Mortgage(s), a subordination agreement satisfactory to HUD that subordinates such Existing Mortgages and New Mortgage(s) to the Assumption and Modification of M2M UA. A form Subordination Agreement is attached as Exhibit 2.

D. Release of an Accommodation Agreement.

Certain PM2M transactions involve the assignment of the M2M originated and Secretary-held loans⁵ to a Purchaser in exchange for a twenty-year extension to the term of the M2M UA and an agreement (the “Accommodation Agreement”) made by the Purchaser to forgo selling the M2M Property for a period of time (the “Lockout Period”), which is fifteen (15) years under the PM2M Notice and was ten (10) years under prior HUD notices. Upon the expiration of the Lockout Period under an Accommodation Agreement, the Accommodation Agreement may be released utilizing the form Release from Land Records of Accommodation Agreement attached as Exhibit 4.

For questions regarding this Memorandum, please contact Kara Williams-Kief, Housing Senior Advisor in the Office of Recapitalization’s Affordable Housing Transaction Division at (202) 402-5454 or kara.s.williams-kief@hud.gov.

⁵ MAHRA § 517(a)(5) provides that: “The Secretary may modify the terms of the second mortgage, assign the second mortgage to the acquiring organization or agency, or forgive all or part of the second mortgage ... if the project is acquired ... by a tenant organization or tenant-endorsed community-based nonprofit or public agency.”

Attachments:

Table: HAP Assignment/Renewal with no M2M Debt & Modification of the M2M Use Agreement

Exhibit 1 Assignment and Assumption of Mark-to-Market Use Agreement

Exhibit 2 Subordination Agreement – Mortgage/Deed of Trust Loan to Mark-to-Market Use Agreement

Exhibit 3 A. Modification of Mark-to-Market Use Agreement

Exhibit 3 B. Assignment, Assumption, and Modification of Mark-to-Market Use Agreement

Exhibit 4 Release from Land Records of Accommodation Agreement