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January 22, 2019

FEDERAL EXPRESS
CERTIFIED MAIL

Ms. Nacheshia Foxx
Reports Liaison Officer
U.S. Department of Housing and
Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-7000-N-02: 60-Day Notice of Proposed Information Collection (the
"Notice"): Legal Instructions Concerning Applications for Full Insurance Benefits –
Assignment of Multifamily Mortgages to the Secretary (the "Legal Instructions")

Dear Ms. Foxx:

Thank you for the opportunity to comment on ways to improve the Legal Instructions. For more than 30 years, my legal assistant and I have represented lenders assigning insured project loans to HUD under the Legal Instructions, as interpreted by the Office of General Counsel ("OGC").

We received an e-mail link to the Notice from OGC. I also noticed that we received a link to marked changes to the Legal Instructions on a HUD server that I have not been able to access. So the comments in this letter are our own independent responses, without any knowledge about OGC's thinking about proposed changes to the Legal Instructions. Hopefully there will be common ground that will allow for a number of immediate improvements to the Legal Instructions.

Summary

I've attempted to group our comments by topic areas. I have started with needed updates to the Legal Instructions, including updates to reflect an electronic recording and filing environment. The remaining topics relate to documentation and processes that have a source in the Legal Instructions. These bigger picture issues include title, title company searches and endorsements, legal opinions and indemnities, and review procedures under the Legal Instructions. We identify a total of 12 issues.

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Before starting our comments, I will point out that the Notice quotes “26 Burden Hours” as an estimate of time to complete work for an assignment under the Legal Instructions. In our experience, 26 Burden Hours had been a reasonable estimate of time to complete an assignment to HUD under the Legal Instructions for years. But not now.

For each of our two most recent stand-alone assignments to HUD completed in 2018 – each with no special Section 232 documentation, and each for a different client – the hours spent by me and my legal assistant aggregated between 90-100 hours in our legal billing. In other words, the time spent to complete the legal work for a simple assignment under the Legal Instructions has nearly quadrupled from the number of hours stated in the Notice.

We think that the recommendations we make in response to our comments will stop the ominous trend of ever-increasing burden hours under the Legal Instructions, without impairing HUD’s ability to liquidate or otherwise manage a project loan post-assignment. After delivering our comments, we will take a closer look at the recent expansion in burden hours arising from many of the issues that we identify.

Updates for an Electronic Environment

1. Naming HUD as Assignee

The Legal Instructions currently provide for the assignment of mortgage, UCC assignments and other assignments to HUD to name as assignee:

*Secretary of Housing and Urban Development of Washington,
D.C., his/her successors and/or assigns as their interests may
appear*

According to my word processing program, this name for HUD uses 127 spaces. Just about any e-filing or other electronic registration process is not set up to provide 127 spaces for a name. As a result, the name of HUD often does not fit the space provided. Eliminating the periods is one way to find more space, but the current position of OGC is that this is a fatal error.

We recommend that the Legal Instructions prescribe a shorter name for HUD as assignee. For example, for USDA/RHS loan assignments under the Section 538 program, the USDA accepts *United States Department of Agriculture, Rural Housing Service*. This occupies less than half of the 127 characters required by HUD for its assignments. Other Federal agencies may have developed even shorter identifiers that work, so OGC probably does not need to re-invent the wheel in researching this issue. It should not take 127 spaces to legally identify the head of a Federal executive department.

2. UCC Filing with a Secretary of State

At the closing of most HUD project loans, at least one UCC-1 Financing Statement is filed with the applicable Office of the Secretary of State (“SOS”). Most SOS offices now have a presence on the internet and allow for online filings (sometimes called “e-filings”) and certifications, and provide access to its database for free or payment of a fee. Some SOS offices have eliminated paper filings and certified copies entirely.

- a. UCC Filings, including UCC Assignments. In the days of paper filing, a UCC form with carbon copies attached was filed. The SOS retained the original form, with the carbon copies showing a filing stamp returned to the filer. OGC accepted a stamped carbon copy as evidence of filing. We recommend that, now that the same filing can be performed online (and for some SOS offices, must be performed online), OGC needs to accept the equivalent to the carbon acknowledgment copy – i.e., the filed PDF with filing number that is e-mailed by the SOS to the filer. OGC should not invent additional requirements that are needed to make the e-filed PDF acceptable, such as an “e-filing” mark on the PDF.
- b. Certified UCC Chain, including SOS Certified Copies. Also during the days when paper reigned, the filer would complete a UCC-11 search if a certified search and/or a certified copy of a filed UCC was needed from SOS. At the present, depending upon the office, a SOS will continue to issue paper Certificates in response to a UCC-11; or require an online filing of a UCC-11 search and issue only an online certification; or re-direct any UCC-11 searches by a filer to a commercial search service. One trend that is clear is that the days of raised gold seals from SOS officials are numbered as open access databases become more common. We recommend that OGC accept searches certified from commercial sources and the UCC copies it produces if OGC doesn’t want to rely upon the results of an open access database search available from an online SOS office.

3. Local Mortgage Recording

For most HUD project loans, a mortgage and at least one UCC-1 Financing Statement is recorded at closing and assigned to HUD under the Legal Instructions. Like SOS offices, many local recording offices now have an online presence and others exclusively rely upon “e-recording.”

In the days of paper recording – before the internet – an original mortgage and other related documents were delivered for recording. The recorded original was returned to the filer; if a title

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company was involved, the recorded original typically was returned to it. Just about all local recording offices provided a recorder-certified copy of a recorded document upon request and the payment of a fee.

Once the internet became available, recording offices began to offer the ability to search an online database. Like SOS offices, most local recording offices offer some internet search capability and information for free, with more detailed information or a copy of the recorded document accessible through a subscription or payment. Typically local recording offices continue to provide certified copies of documents on paper upon request and payment of the required fee.

Another post-internet concept is "e-recording," which provides for the recording of a document transmitted through the internet. Unlike e-filing with a SOS, e-recording tends to be performed by a limited number of entities approved by the local recording office to participate in the process and its licensees, such as a title company. As a result, a lender can arrange for e-recording only through a title company or similar settlement entity. Some recording offices have managed to leapfrog an outdated recording system by requiring all documents to be e-recorded. Others permit only certain documents to be e-recorded.

For most local recording offices, UCC Financing Statements have tended to fall through the cracks in the conversion to e-recording because fewer UCC Financing Statements have been recorded locally after enactment of Revised Article 9 of the Uniform Commercial Code ("Revised Article 9").

Given the present mixed universe of recording practices in local recording offices, we recommend the following.

- a. Mortgage Documents and UCC Financing Statements, including Assignments. OGC should continue to accept original recorded and recorder-certified copies of recorded documents in assignment submissions.
- b. E-Recorded Original, including Assignments. OGC needs to accept the equivalent to the original recorded document – i.e., the e-recorded document submitted by the title company for recording together with evidence of recording from the recording office. OGC should not invent additional requirements that are needed to make the e-recorded original acceptable.
- c. Certified UCC Chain. OGC should not assume, as it has done in Section 8 of the Legal Instructions, that local mortgage recording offices can search a UCC chain. With the enactment of Revised Article 9, local UCCs are now recorded only in the

real estate records where UCC chain searches typically are not performed. The cross-indexing procedure in a local recording office that allowed for a UCC chain search was shut down when Revised Article 9 became operational. The loss of UCC chain searches at the local level is yet another reason why we stress the need for title company searches, discussed under Section 9 below.

Other Updates

4. Secured Party under Revised Article 9

Years before the adoption of Revised Article 9, OGC changed its closing requirements to add the name of HUD to each UCC-1 Financing Statement. OGC never revisited its requirement for a dual-name secured party after the adoption of Revised Article 9. As a result, OGC has never considered the flexible standards put in place for identifying a “secured party of record” under Revised Article 9 or a “representative” of a secured party of record. The latter concept of a “representative” can consist of one named secured party of record, without naming a multiple number of secured parties. Even a filing service can serve as a representative for one or more secured parties under Revised Article 9.

The standards currently applied by OGC in its review of the name of the secured party for UCC filings do not reflect the changes made under Revised Article 9. OGC continues to spend an outsized amount of time reviewing UCC secured party names and assignments, and the timing of such secured party names and assignments, as if the Uniform Commercial Code in place for debtors circa 1979 now applies to secured parties.

OGC has made it a priority for HUD to be named on the UCC Financing Statement. This can easily happen under Revised Article 9, without going through the filing gymnastics of dual secured parties. Consistent with OGC’s desire for HUD to be named on the UCC Financing Statement at all times, we recommend a simpler structure enabled by Revised Article 9 in which HUD is the only secured party of record from the time of loan origination.

- a. Going forward, at closings, HUD can be named as the sole secured party of record on every UCC Financing Statement. This can include the Operator Security Agreement for a Section 232 loan and other Security Agreements in which the lender is a secured party. Naming HUD from the start will eliminate the need for any chain of assignments (a concept already made unnecessary under Revised Article 9). OGC needs to send HUD closing attorneys improved HUD name and address instructions per our prior comment in Section 1 because, at the present time, many closing attorneys use the HUD field office address when HUD is named as a secured party of record. The Security Agreement executed at closing

or other writing can include language that provides for HUD to serve as the secured party of record of the UCC during the loan term, with the UCC continued by the lender and any of its successors and assigns as filer until an assignment to HUD occurs under the Legal Instructions.

- b. For existing loans, a lender could assign a UCC to HUD under the procedures described in a. above. This could be a particularly useful procedure for a loan in workout, where there is a likelihood of an assignment to HUD under the Legal Instructions.

5. Amount of Hazard Insurance

For decades, the Legal Instructions have required evidence of property hazard insurance comprising property damage liability totaling at least 80% of the unpaid principal balance of the mortgage. The current language is now found in Section 10 of the Legal Instructions. Hazard insurance has become considerably more sophisticated, and HUD's current administrative standards now reflect a standard more complex than the 80% UPB formula. We recommend that the Legal Instructions adopt the amount of hazard insurance required by HUD administrators at the time of the assignment, without establishing a separate formula.

I am guessing that the 80% UPB formula in the Legal Instructions originated from HUD's administrative requirements that were in effect years ago. Why an old formula like this has only recently become problematic, I suspect, is because of the multi-year seasoning of many of the Section 232 project loans currently in default. Traditionally HUD assignments have involved project loans with fresh or rolling defaults. The loan met the 80% formula under these conditions. Now, certain of the Section 232 project loans assigned to HUD are multi-year defaults in which building valuation has declined during the default period, causing a concurrent reduction in hazard insurance coverage. That is why the Legal Instructions need to be updated to reflect what HUD administrators now require.

6. Additional Section 232 LEAN Documents

For project loans insured under Section 232, a number of additional documents could be executed at closing or thereafter relating to an operating lease and /or master lease. Section 15 of the Legal Instructions specifies that these documents and related assignments should be delivered under the Legal Instructions. Section 15 should be detailed to state whether originals, copies or recorder-certified copies of the various additional Section 232 LEAN documents are required. Also, OGC has developed a special form of assignment for these documents. This assignment form should be referenced in Section 15 and made available.

We recommend that an original or recorder-certified copy be delivered for a document executed by the lender along with the related chain of assignments. A recorded copy should be acceptable for documents not executed by the lender but wanted by OGC.

For documents delivered under Sections 2-6 above that are not originals, the Legal Instructions should state if a paper or hard copy is required or if PDF delivery will suffice. We understand that OGC continues to work with a document custodian because certain documents (e.g., Note) will need to be originals. That being said, an upgrade in internal OGC procedures that provides for the PDF delivery of copies by the lender in lieu of paper benefits both HUD and the lender and, in reducing paper, is consistent with the regulatory source for the Notice – the Paperwork Reduction Act.

Title

7. Subordinate Liens

For years, the Legal Instructions permitted new subordinate liens on the title endorsement or title policy arising after loan closing.

Under Section 17 of the Legal Instructions, OGC now takes the position that it can review and except title exceptions subordinate to the lien of the insured mortgage that have appeared since loan closing. We don't know why it should need to do this. HUD insurance regulations do not require this. Moreover, the warranties made by an assigning lender to HUD (24 CFR §207.258(b)(2)) make no representations about subordinate lien status. And most important, from a practical standpoint, HUD can wipe out a subordinate lien at foreclosure.

Subordinate lien items have become more common for loans that have been in default for years prior to assignment. This has occurred for Section 232 loans when HUD delays accepting an election to assign for years. For example, a subordinate Federal tax lien was a rare occurrence for a rental housing project with a fresh or rolling default – I doubt if I saw more than one or two over a 20-year period – but it is now a more regular sighting for a Section 232 nursing home that has been in default for years. Local assessments that are in a subordinate lien position to the HUD mortgage might also appear. Typically the lien cannot be removed from Schedule B-II of the title policy endorsement unless the tax or assessment is paid. It is not the lender's responsibility to pay any taxes or assessments of the borrower other than taxes and assessments that might prime the insured mortgage, such as real property taxes. For taxes and assessments creating liens that could prime the HUD mortgage, the lender pays such taxes and assessments through a mortgage escrow and makes advances if the mortgage escrow has been depleted due to a default. Under 24 CFR §207.259(b), HUD reimburses the lender for tax payments advanced by the lender. HUD fiscal instructions make no provision for the reimbursement of payments

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arising from subordinate lien items for a reason. Subordinate lien items are wiped out at foreclosure by HUD.

We recommend changing Section 17 of the Legal Instructions to expressly provide that only liens prior to the HUD mortgage (i.e., Schedule B-I exceptions) are subject to OGC review and approval.

8. Survey Exception

For years, OGC permitted the title endorsement or title policy delivered under the Legal Instructions to include the following exception under Schedule B-I:

Such state of facts occurring subsequent to [date of survey], as would be disclosed by a current, accurate survey and inspection of the property.

A title company will typically include this exception in Schedule B-I unless it receives an updated survey and/or affidavit of the borrower concerning the title of the property. In connection with an assignment to HUD, the borrower (particularly after several years of unsuccessful workouts) is not likely to cooperate in providing a title company with assurances needed for the removal of a title exception. Moreover, if the surveyor is now out of business with no successor, a new survey would need to be prepared. Occasionally the title company might accept another review standard, such as a drive-by inspection or a review of Google Maps against the survey delivered at closing, but the requirements of the title company in removing this exception is generally out of the control of the assigning lender. Thus, if OGC wants the above language removed from the title endorsement or title policy delivered under the Legal Instructions, the lender might find itself paying for a new survey in addition to the title premium.

We recommend that Section 17 of the Legal Instructions expressly state that the above survey exception is permitted under a title endorsement or title policy delivered under the Legal Instructions.

Title Companies

In recent years, OGC has downgraded the role of title companies under the Legal Instructions and we don't know why. A title insurance policy is delivered at the initial or final endorsement of a HUD insured project loan. If OGC wants to limit the role of title companies in the origination of insured project loans, the Legal Instructions are not the place to start.

9. UCC Searches performed by Title Company

No better example of the diminished status of a title company under the Legal Instructions is Section 8 of the Legal Instructions, in which UCC searches from a title company or attorney are prohibited as evidence of no intervening liens. This is not a problem for SOS UCC searches (the Legal Instructions do not distinguish between SOS filings and local recordings), where there is often a choice in obtaining a search from the SOS or a nationwide commercial search service.

However, as previously described in Section 3 above, for a UCC Financing Statement recorded at a local recording office, many local recording offices are out of the business of responding to UCC-11 searches due to the changes ushered in by Revised Article 9. Because the Legal Instructions have taken the title company off the table as an acceptable entity that can perform the search, only a nationwide commercial search service is left as an available option. We can see three reasons why the prohibition against title companies as a search service for a local UCC filing makes no sense, particularly when the only alternative is a nationwide commercial search service.

- a. To produce a title endorsement or a title policy that is delivered to HUD (or any other lender, for that matter), a title company runs a search of the local records. OGC accepts a title policy or title endorsement produced from such search by a title company, but won't accept the underlying UCC search? This is illogical.
- b. The title company search is more comprehensive than the search produced by a national commercial search service. The national commercial search service produces a search using debtor name. Typically the title company will perform a search by debtor name and legal description, sometimes also by real property tax ID number and other criteria.
- c. The more comprehensive search by the local title company occurs because the title company or agent has more knowledge about a local recording office where it provides insurance than a commercial search service that operates nationwide. The title company needs to have more knowledge – it provides insurance. The national commercial search service only performs service for a fee.

At a minimum, we recommend the revision of Section 8 of the Legal Instructions to expressly allow an assigning lender to deliver a UCC search produced by a title company when a UCC lapse has occurred. As further explained in Section 11 below, the lender bears the risk of loss for any lapsed UCC-1 Financing Statement under an indemnity delivered to HUD. Given this fact, we question why the Legal Instructions must dictate how the lender is to assess and reduce its own risk in delivery of an indemnity to HUD.

10. Additional Assurance to Title Insurance

A title insurance company is an insurer, regulated by the State as to capital requirements and premiums charged. Sometimes a title company works through agents that can bind coverage, such as an attorney. But similar to any other insurance company, a title company assumes specialized risks based on underwriting; and charges a premium to cover such risks. As previously indicated, HUD's insurance of project loans is built on a title insurance policy delivered to HUD and the insured lender at loan origination as evidence of good title.

Yet in a prior assignment, OGC was of the view that, under the Legal Instructions, it could require additional evidence of title beyond a title endorsement under the Legal Instructions. As a condition to accepting a subordinate lien on a title endorsement, OGC wanted additional assurance because it could not confirm the subordinate lien status of a Schedule B-II exception item through its own research. The additional assurance required by OGC included a legal opinion. Nowhere in the Legal Instructions is a legal opinion mentioned as one of the forms of title assurance that could be required or that multiple forms of title assurance could be required when a subordinate title exception was second-guessed.

We recommend that Section 17 of the Legal Instructions be revised to expressly provide that a legal opinion or (as further described in Section 11.d below) indemnity or any other form of additional assurance to a title policy or endorsement will never be required.

Miscellaneous

11. Indemnity From the Assigning Lender

Traditionally OGC has required the delivery of an indemnity from the assigning lender to cover potential losses to HUD in certain instances. For years, only a limited number of events triggered the delivery of an indemnity. As time has gone on, the fact patterns triggering an indemnity from the lender have increased in number. The major fact patterns and related recommendations are detailed below.

- a. Loss of an Original Closing Document. Clearly an indemnity is needed for an original Note lost by the lender. Some of the day-to-day documents not recorded, such as an Escrow Agreement, are typically not executed as original signature documents in the private sector due to the everyday use of PDFs. But if the lender leaves the HUD closing table responsible for maintaining all original closing documents, it is not unreasonable for OGC to require an indemnity at the time of assignment under the Legal Instructions if an original cannot be found. No change is recommended.

- b. Lapsed UCC-1 Financing Statement. When a lender fails to continue a UCC in a timely manner, it must indemnify HUD for any losses that could arise from such lapse. No change to the indemnity is recommended under Section 8 of the Legal Instructions. However, the delivery of an indemnity from the lender begs the following question. Why do the Legal Instructions specify the UCC search procedures required for a lapsed UCC-1 Financing Statement under Section 8 of the Legal Instructions if the risk of loss for the lapse is held by the lender under the indemnity? No logical explanation exists for this additional regulatory burden when the Legal Instructions have shifted the risk of loss to the lender. So long as HUD receives an indemnity from the lender for a lapsed UCC-1, the Legal Instructions should not prescribe UCC search procedures that the lender must follow in assessing its risk.
- c. Chain of Title Errors, Typos, and Drafting Language of Mesne Assignments. It is possible that a project loan, after origination, is assigned to one or more lenders before the assigning lender assigns such loan to HUD. At the time of an interim or “mesne” assignment, the lender is obligated only to file a HUD 92080 to notify HUD of the change in lender and any change in servicer. HUD neither reviews the mesne assignments at the time of the transfer nor prescribes standards for these transfer documents. Traditionally, OGC relied upon the title endorsement or title policy received under the Legal Instructions as evidence that all recorded mesne assignments conveyed title, with HUD as the final lender in the chain of title and the insured lender under the title policy. But given its limited view of the role of title insurance in recent years, OGC has become considerably more involved in specifying what they want to see in the mesne assignments that were previously executed and/or recorded or filed years ago notwithstanding the delivery of a title endorsement or title policy naming HUD as the insured lender. Moreover, as we explained in Section 4 above for UCCs, the UCC assignments that OGC has wanted is not required under Revised Article 9. As a result, “indemnity creep” has occurred in recent years. In the private sector, nearly all of these events of indemnity would never make it into the indemnity provisions of a contract. The willingness of a title insurance company to name an assignee lender as the insured under a title policy would be the go-to criteria confirming the effectiveness of recorded assignments for parties in a private transaction. But the lender can assess the limited risk associated with most of these indemnity events now wanted by OGC, so the primary problem associated with these indemnities is the preparation time.
- d. Additional Assurance for Title Endorsement. As a condition to accepting a subordinate lien listed in Schedule B-II of a title endorsement, OGC has

previously required the delivery of additional assurance in the form of an indemnity from the lender because OGC could not confirm the subordinate lien status of a Schedule B-II item through its own research. In other words, OGC wanted the lender to assume liability for a title matter when insurance was already provided. Unlike most of the other events of indemnity identified in this Section 11, a lender does not have specific knowledge about many of the title matters found in a title endorsement or title policy delivered under the Legal Instructions. That is why title insurance exists. The title insurance company is in the business of knowing about title matters in a jurisdiction where it writes coverage. It has capital behind its insurance. The use of a second layer of assurance, from the lender, on a matter in which the assigning lender has no knowledge or control, is another example of senseless over-regulation. The expansive use of indemnities needs to stop when the events triggering the indemnity are already covered by insurance in a title endorsement or insurance policy delivered to HUD. That is why the affirmative language described in Section 10 is recommended as an addition to the Legal Instructions.

12. Change in Review Procedures

This 12th comment does not involve a substantive issue. It relates to process. For years, the Legal Instructions have provided for a post-recording and post-filing review of the legal documentation to be delivered under the Legal Instructions. This post-assignment review procedure needs to change.

The legal documents now delivered for an assignment to HUD under the Legal Instructions are as numerous and complex as any set of HUD project loan closing documents, yet OGC does not become engaged in an assignment review until it is presented with the “finished product.” If the same approach were adopted at a HUD initial or final endorsement, the borrower and lender would prepare, execute and complete all the closing documents, and arrange for recording and filing of applicable closing documents and issuance of a title insurance policy, prior to any review of the documentation by HUD counsel. HUD closings have legal instructions specifying requirements similar to the Legal Instructions, but there are simply too many moving parts to the closing for the borrower, lender, title insurance company and HUD counsel to operate based upon a post-recording, post-filing review. And even after the Note is endorsed, HUD counsel reviews proposed documentation in advance of various post-closing transactions.

Why is the assignment process under the Legal Instructions so different from a HUD closing and other HUD post-closing project loan transactions?

The answer is that the assignment process was not so different years ago, when a simple pre-recording review process existed for assignments to HUD. The legal instructions for assignments to HUD were changed around 25 years ago to provide express assignment language and specific requirements for the preparation of the assignment. That was considered sufficient to eliminate the need for a pre-recording, pre-filing review. So long as requirements under the legal instructions stayed simple, a post-recording, post-filing review was a viable approach. Those were the days when completion of the assignment under the legal instructions took 26 Burden Hours.

As requirements under the Legal Instructions increased, so did the amount of time increase to complete an assignment under the Legal Instructions. As a result, the number of moving parts that need to be considered in completing an assignment to HUD under the Legal Instructions now easily matches any HUD project loan initial or final endorsement. Yet the Legal Instructions continue to use review procedures that harken back to the days of simplicity.

Given this background, we think that one major way to reduce the burden hours under the Legal Instructions is for the OGC reviewer to be available to review the loan file for a project loan and the draft assignments to HUD from the date that the lender files an election to assign a project loan to HUD. If OGC cannot retrieve its own files (i.e., the Washington Docket) quickly, the lender can send PDFs of the loan file to OGC for review along with the drafts. If delays in review arise, an automatic 30-day extension of the deadline date for recording will be granted upon lender request. We think that, if the OGC reviewer confirms the acceptability of draft assignments and other documents before any assignments are sent to recording and filing, the number of burden hours under the Legal Instructions can be reduced.

From 26 Burden Hours to 90-100 Burden Hours

How did the time spent to complete an assignment to HUD nearly quadruple over the years, from 26 Burden Hours to 90-100 burden hours? Three reasons come to mind.

- a. As described in this letter, OGC initiated the review requirements described in Sections 7 through 10 above and started requiring the delivery of numerous indemnities as further detailed in Section 11. And as explained in Sections 1 through 4 above, delays in adapting to e-recording, e-filing, and Revised Article 9 also increased the burden hours in completing an assignment. We are of the view that the regulatory burdens identified in the preceding sections, combined with the current post-recording and post-filing review procedure under the Legal Instructions as described in Section 12, are the major reasons why the number of burden hours nearly quadrupled from years ago.

- b. Closing documentation under Section 232 and other transactional documentation arising under Section 232 requiring assignment or other types of legal response, as noted in Section 6 above, have expanded considerably.
- c. In recent years, Section 232 administrators delayed accepting elections to assign until the defaults are substantially seasoned, complicating the delivery of certain documentation under the Legal Instructions (see, for example, Section 5).

We recommend revising the Legal Instructions to pare back the aggressive review requirements identified in a. above by following our recommendations in this letter. That being said, we suspect that some increase in burden hours is due to the increase in complexity of the HUD closing transaction identified in b. above and the administrative delays identified in c. above. While a return to 26 Burdens Hours may no longer be possible, we think that OGC can play a major role in reducing burden hours under the Legal Instructions by following our recommendations.

Least Burdensome Collection of Information

Given the repeated reference to "Collection of Information" under Parts A and B of the Notice, I feel compelled to identify the procedures followed by a lender's counsel to deliver documentation required by the Legal Instructions. Accordingly, please refer to *Procedures for the Collection of Information* stated in Exhibit A to this letter.

The scope of coverage for a "Collection of Information" under Paperwork Reduction Act rules is broad, but in everyday English the term "Collection of Information" implies that the lender need only rummage through its files to complete the delivery of documentation under the Legal Instructions. Nothing could be further from the truth. The lender, through its counsel or other contractors, creates much of the "information" required by the Legal Instructions before it can be "collected" and delivered to HUD. In everyday English, the Legal Instructions are more accurately described as transaction instructions or requirements relating to the preparation of documentation for an assignment of project loan to HUD.

In reviewing Exhibit A, consider that the counsel to lender initiates the actions in Nos. 2-13. When the "to do" list increases the burden hours, such counsel's billable time and the lender's cost move in lockstep. Filing and recording offices charge fees for the services identified in Nos. 3 and 5. The title company charges fees for the recording services referenced in No. 6 and a premium for the issuance of the endorsement or policy as identified in No. 7. If the search of a national commercial search service must be added under No. 9, that is an additional expense.

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Burden hours and related costs rise substantially if professionals such as surveyors, property inspectors and additional counsel are retained or if OGC specifies that subordinate matters are to be removed as reflected in Exhibit A and as described more completely above.

For years, the increased regulatory burden described in this letter was not needed to successfully foreclose on an assigned loan under HUD's own broad foreclosure statute or to engage in non-foreclosure liquidations. HUD still operates under the same authority to foreclose and liquidate loans, so we question why this increased regulatory burden is needed.

Paperwork Reduction Act regulations state that any proposed Collection of Information must be the least burdensome necessary for the proper performance of the agency's function to comply with legal requirements and achieve program objectives. If OGC can establish that the preceding "least burdensome" standard has been met despite the increased requirements identified in this letter, we suspect that disclosure under the Notice needs to be updated, consistent with the Paperwork Reduction Act, to show Burden Hours in the 90-100 hour range for an assignment to HUD under the Legal Instructions.

Thank you once again for the opportunity to comment on the Legal Instructions. If I can assist further in explaining or implementing these improvements, please contact me.

Sincerely,

MARTELL & ASSOCIATES

A handwritten signature in black ink that reads "Mary Martell". The signature is written in a cursive, flowing style.

Mary Martell

Enclosure

**Procedures for the
Collection of Information**

1. The loan files for a project loan must be retrieved. This most often involves release of the GNMA custodial file for such project loan.
2. The loan files are reviewed. Interim assignments and other corrections are made, if possible, to avoid indemnities under the Legal Instructions.
3. Recorder-certified copies of documents are ordered as needed, either directly through the recording office or through the title insurance company. Certified copies of SOS UCCs are ordered from the applicable SOS office if acknowledgment copies are not in the file.
4. Draft assignments and indemnities are prepared.
5. For each project SOS UCC, a UCC assignment is filed with the SOS.
6. The title insurance company is contacted to arrange for recording of applicable assignments, including UCC assignments recorded locally. The title insurance company reviews the draft assignments to assure that they are in recordable form and otherwise meets its requirements for issuance of an endorsement to HUD.
7. The title insurance company prepares a specimen title endorsement or policy and puts such endorsement or policy into final form as required by the Legal Instructions.
8. Third parties such as surveyors and property inspectors might be needed if a survey exception is to be removed from the title policy or endorsement delivered under the Legal Instructions.
9. A UCC search from a national commercial search service could be required under the Legal Instructions even though a local UCC search has been performed by the title company.
10. If a subordinate lien is required to be removed under the Legal Instructions, the lender might need to bear a cost, such as the payment or escrow of the assessment or other fees creating the subordinate lien.
11. If OGC wants additional assurance in the form of a legal opinion, the lender must take the time and effort in finding someone with the background and ability to provide the legal opinion. If the opinion is rendered by an outside law firm, the lender absorbs the cost.
12. The property insurance endorsement needed under the Legal Instructions generally does not cost any fee, but can be difficult to obtain due to the business relationship between the insurance agent and the borrower.
13. Some Information Collection required under the Legal Instructions is nothing more than document retrieval – e.g., real property tax bills.