

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Parts 200, 207, and 232

[Docket No. FR-4883-P-01; HUD-2004-0004]

RIN 2502-A111

### HUD Multifamily Rental Projects and Health Care Facilities: Regulatory Revisions

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend certain Federal Housing Administration (FHA) regulations to update these regulations to reflect current HUD policy in the area of multifamily rental projects and health care facilities. In developing a set of comprehensive documents for use in the FHA mortgage programs for multifamily rental projects and health care facilities (excluding hospitals), HUD identified outdated language and policies that not only needed to be changed in closing documents but also in HUD's regulations. Elsewhere in today's **Federal Register**, HUD is publishing a notice that solicits comments on revisions and updates to the closing documents.

**DATES:** *Comment Due Date:* October 1, 2004.

**ADDRESSES:** Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** Gains E. Hopkins, Jr., Office of General Counsel, Room 9230, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500; telephone (202) 708-4090 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

### I. Background

The regulatory changes proposed in this rule arise from HUD's comprehensive review over the last year of multifamily rental project and health care facility closing forms and documents. In 1999, HUD developed the Multifamily Accelerated Processing (MAP) initiative. During the MAP development process, HUD noted that the FHA documents used for multifamily rental project and health care facility closings had not been amended or revised in any significant fashion since the 1960s. It became clear during the development of the MAP initiative that all of HUD's multifamily closing forms (closing documents) required thorough review and, in many cases, revision to reflect modern-day terms and inclusion of conditions that offer the requisite protection to all parties to the transaction, consistent with modern real estate and mortgage lending laws and procedures. The notice published elsewhere in today's **Federal Register** identifies revisions and updates to the closing documents and describes in detail HUD's review process that resulted in the changes to the closing documents. The notice clarifies that the revisions to the closing documents do not cover the forms for HUD's Section 202 Housing for the Elderly program (Section 202) and Section 811 Housing for Persons with Disabilities (Section 811) program. Documents for the Section 202 and Section 811 programs will be revised in the near future.

In the process of updating and revising the closing documents, HUD recognized that revisions and updates were needed to certain corresponding FHA regulations on which the authority for the closing documents is based. These regulations also were found to be outdated. This rule identifies the changes that the Department intends to make to its regulations in 24 CFR parts 200, 207 and 232.

#### 24 CFR Part 200

The requirements for commitment and endorsement of a mortgage note are provided in 24 CFR part 200, subpart A. Generally, where specific closing documents are referenced in 24 CFR part 200, subpart A, the regulations in this subpart provide that the referenced documents be in a form prescribed by HUD. The subpart also iterates other closing requirements that are reflected in the closing documents.

One regulatory change to part 200, subpart A, prompted by the review and updating of the closing documents pertains to "tenants in common" as an

eligible mortgagor entity. HUD intends to remove tenancies in common as eligible mortgagor entities, except for tenancies in common comprised only of natural persons. No tenancy in common that includes any entity, such as a partnership or a limited liability company, that is not a natural person would be eligible as a mortgagor. In this rule, HUD amends § 200.5, which defines an eligible mortgagor under HUD's multifamily and health care facility mortgage insurance programs, to reflect the removal of tenants in common as an eligible mortgagor entity.

#### 24 CFR Part 207

*Section 207.255.* Included in the update of the closing documents is a revision of the security instrument (HUD 94000M). As part of the revision to this document, HUD developed a new two-tiered default scheme. Class A is for financial defaults, which give the lender an immediate right to an insurance fund claim. Class B is for all other bases for default, and requires the prior written approval of HUD for the lender to make an insurance fund claim. Class B would include several new bases for default derived, in part, from the Freddie Mac model. These include fraud or material misrepresentation or omission by the borrower, its officers, directors, trustees, general partners, members, managers, or guarantors (1) in the application for the HUD-insured loan; (2) in the application for financial assistance, other than the HUD-insured loan; (3) in any financial statement, rent roll, or other report or information provided by the borrower during the term of the Indebtedness; and (4) in any request for lender's consent to any proposed action. Other new bases for default would include the commencement of a forfeiture action or proceeding, which in the lender's reasonable judgment could result in the loss of the property or impairment of the lien. HUD has revised 24 CFR 207.255 to reflect this two-tiered default scheme. As provided in 24 CFR 207.255, once a default exists under the security instrument and continues for a minimum period of 30 days, the lender would become eligible to receive mortgage insurance benefits.

In addition to reflecting the new two-tiered default system, § 207.255 would be revised to clarify that the purpose of the section is to define "default" and "date of default" for purposes of filing an insurance claim with the FHA Commissioner. Also, editorial revisions would be made to improve the readability of this section.

*Section 207.256.* Minor editorial changes would also be made to § 207.256 to improve readability and to

clarify which provisions in § 207.255 would be cross-referenced in § 207.256.

*Sections 207.256a, 207.256b, and 207.257.* Minor editorial changes would be made to these sections to improve readability. None of the changes would alter the substance of these provisions.

*Section 207.258.* HUD is also proposing to amend § 207.258, which provides insurance claim requirements, to conform this regulation to the requirements included in paragraph 24 of the "Mortgagee's Certificate" (HUD 92434M), one of which is that the mortgagee must request a three-month extension of the 45-day deadline prescribed by § 207.258 for a mortgage funded with the proceeds of state or local bonds, Government National Mortgage Association (Ginnie Mae) mortgage-backed securities, or other bond obligations specified by HUD, any of which contains a lock-out or penalty provision.

#### *24 CFR Part 232*

The new health care facility regulatory agreement has been revised to reflect the policy to regulate lessees of health care facilities to the same extent as owners of health care facilities. Although the Department has always taken the position that any lessee or sublessee would be subject to the same regulatory controls to which the owner is subjected under a regulatory agreement, this is the first time this policy has been clearly stated in writing. HUD's regulation in 24 CFR 232.4 also would be revised to reflect this policy.

HUD invites comment on these proposed changes, and also invites public comment on additional changes that would be necessary to avoid conflicts between HUD's regulations and the proposed revision of the closing documents in the notice published elsewhere in today's **Federal Register**.

## **II. Findings and Certifications**

### *Paperwork Reduction Act*

The information collection requirements resulting from changes to the multifamily rental project and health care facility closing documents have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (the Act). The notice on revisions to the closing documents, published elsewhere in today's **Federal Register**, presents the estimated reporting burden under the Act and meets the publication requirements of the Act. Under the Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the

collection displays a valid control number.

### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This proposed rule does not impose any federal mandate on any state, local, or tribal government or the private sector within the meaning of UMRA.

### *Environmental Impact*

A Finding of No Significant Impact with respect to the environment for this rule has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Room 10276, Office of the General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

### *Impact on Small Entities*

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this rule and in so doing certifies that this rule would not have a significant economic impact on a substantial number of small entities. The proposed rule is limited to making certain conforming amendments to FHA regulations that address multifamily rental projects and health care facilities to ensure their consistency with the recent update and revision of the documents used for multifamily rental project and health care facility closings. Notwithstanding HUD's determination that this rule would not have a significant economic effect on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that would meet HUD's objectives as described in this preamble.

### *Federalism Impact*

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the

executive order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the executive order.

### *Executive Order 12866, Regulatory Planning and Review*

The Office of Management and Budget reviewed this proposed rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this proposed rule is a "significant regulatory action," as defined in section 3(f) of the order (although not economically significant, as provided in section 3(f)(1) of the order). Any change made to the proposed rule subsequent to its submission to OMB is identified in the docket file, which is available for public inspection in the office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC, 20410–0500.

### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance number for Mortgage Insurance for the Purchase or Refinancing of Existing Multifamily Housing Projects is 14.155, and for Mortgage Insurance for Nursing Homes, Intermediate Care Facilities, Board and Care Homes and Assisted Living Facilities is 14.129.

### **List of Subjects**

#### *24 CFR Part 200*

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Incorporation by reference, Lead poisoning, Loan programs—housing and community development, Minimum property standards, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

#### *24 CFR Part 207*

Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

#### *24 CFR Part 232*

Fire prevention, Health facilities, Loan programs—health, Loan programs—housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements.

Accordingly, for the reasons discussed in this preamble, HUD proposes to amend 24 CFR parts 200, 207, and 232 as follows:

## **PART 200—INTRODUCTION TO FHA PROGRAMS**

1. The authority citation for 24 CFR part 200 continues to read as follows:

**Authority:** 12 U.S.C. 1702–1715z–21; 42 U.S.C. 3535(d).

2. Revise § 200.5 to read as follows:

### **§ 200.5 Eligible mortgagor.**

The mortgagor shall be comprised of one or more natural persons or entities acceptable to the Commissioner, as limited by the applicable section of the Act, and shall possess the powers necessary and incidental to operating the project. Tenancies in common are not eligible mortgagor entities, except for tenancies in common comprised only of natural persons.

## **PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE**

3. The authority citation for part 207 continues to read as follows:

**Authority:** 12 U.S.C. 1701z–11(e), 1713, and 1715b; 42 U.S.C. 3535(d).

4. Revise § 207.255 to read as follows:

### **§ 207.255 Defaults for purposes of insurance claim.**

This section defines “default” and “date of default” for purposes of a mortgagee filing an insurance claim with the Commissioner.

(a) The following shall be considered a default under the terms of a mortgage insured under this subpart:

(1) Failure of the mortgagor to make any payment due under the mortgage (also referred to as a “Class A Event of Default” in certain mortgage security instruments); or

(2) A violation of any other covenant under the provisions of the mortgage, if the mortgagee, because of such violation, has accelerated the debt subject to any necessary HUD approval (also referred to as a “Class B Event of Default” in certain mortgage security instruments).

(b) For purposes of a mortgagee filing an insurance claim with the Commissioner, the failure of the mortgagor to make any payment due under an operating loss loan or under the original mortgage shall be considered a default under both the operating loss loan and original mortgage.

(c) If a default as defined in paragraphs (a) and (b) of this section continues for a minimum period of 30

days, the mortgagee shall be entitled to receive the benefits of the insurance provided for the mortgage, subject to the procedures in this subpart.

(d) For the purposes of this section the date of default shall be:

(1) The date of the first failure to make a monthly payment that subsequent payments by the mortgagor are insufficient to cover when those subsequent payments are applied by the mortgagee to the overdue monthly payments in the order in which they became due; or

(2) The date of the first uncorrected violation of a covenant or obligation for which the mortgagee has accelerated the debt.

5. Revise § 207.256 to read as follows:

### **§ 207.256 Notice to the Commissioner of default.**

(a) If a default as defined in § 207.255(a) or (b) is not cured within the grace period of 30 days provided under § 207.255(c), the mortgagee must, within 30 days after the date of the end of the grace period, notify the Commissioner of the default, in the manner prescribed in 24 CFR part 200, subpart B.

(b) The mortgagee must give notice to the Commissioner, in the manner prescribed in 24 CFR part 200, subpart B, of the mortgagor’s violation of any covenant, whether or not the mortgagee has accelerated the debt.

6. Revise § 207.256a to read as follows:

### **§ 207.256a Reinstatement of defaulted mortgage.**

If, after default and prior to the completion of foreclosure proceedings, the mortgagor cures the default, the insurance shall continue on the mortgage as if a default had not occurred, provided the mortgagee gives notice of reinstatement to the Commissioner, in the manner prescribed in 24 CFR part 200, subpart B.

7. Revise § 207.256b to read as follows:

### **§ 207.256b Modification of mortgage terms.**

(a) The mortgagor and the mortgagee may, with the approval of the Commissioner, enter into an agreement that extends the time for curing a default under the mortgage or modifies the payment terms of the mortgage.

(b) The Commissioner’s approval of the type of agreement specified in paragraph (a) of this section shall not be given, unless the mortgagor agrees in writing that, during such period as payments by the mortgagor to the mortgagee are less than the amounts

required under the terms of the original mortgage, the mortgagee will hold in trust for disposition, as directed by the Commissioner, all rents or other funds derived from the secured property that are not required to meet actual and necessary expenses arising in connection with the operation of such property, including amortization charges under the mortgage.

(c) The Commissioner may exempt a mortgagor from the requirement of paragraph (b) of this section in any case where the Commissioner determines that such exemption does not jeopardize the interests of the United States.

8. Revise § 207.257 to read as follows:

### **§ 207.257 Commissioner’s right to require acceleration.**

Upon receipt of notice of violation of a covenant, as provided for in § 207.256(b), or otherwise being apprised of the violation of a covenant, the Commissioner reserves the right to require the mortgagee to accelerate payment of the outstanding principal balance due in order to protect the interests of the Commissioner.

9. In § 207.258, revise paragraph (a) and the first sentence of the introductory language of paragraph (b) to read as follows:

### **§ 207.258 Insurance claim requirements.**

(a) *Alternative election by mortgagee.* When the mortgagee becomes eligible to receive mortgage insurance benefits pursuant to § 207.255(c), the mortgagee must, within 45 days after the date of eligibility, give the Commissioner notice, in the manner prescribed in 24 CFR part 200, subpart B, of its intention to file an insurance claim and of its election either to assign the mortgage to the Commissioner, as provided in paragraph (b) of this section, or to acquire and convey title to the Commissioner, as provided in paragraph (c) of this section. For mortgages funded with the proceeds of state or local bonds, GNMA mortgage-backed securities, or other bond obligations specified by HUD, any of which contains a lock-out or penalty provision, the mortgagee must, in the event of a default during the term of the prepayment lock-out or penalty (*i.e.*, prior to the date on which prepayments may be made with a penalty):

(1) Request an extension of the deadline for filing notice of the mortgagee’s intention to file an insurance claim and the mortgagee’s election to assign the mortgage or acquire and convey title in accordance with the mortgage certificate;

(2) Assist the mortgagor in arranging refinancing to cure the default and avert

an insurance claim, if HUD grants the requested (or a shorter) extension of notice filing deadline;

(3) Report to HUD at least monthly on any progress in arranging refinancing;

(4) Cooperate with HUD in taking reasonable steps in accordance with prudent business practices to avoid an insurance claim;

(5) Require successors or assigns to certify in writing that they agree to be bound by these conditions for the remainder of the term of the prepayment lock-out or penalty; and

(6) After completion of any refinancing, notify HUD of a delinquency when a payment is not received by the 15th day after the date the payment is due.

(b) *Assignment of mortgage to Commissioner.* If the mortgagee elects to

assign the mortgage to the Commissioner, the mortgagee shall, at any time within 30 days after the date of notice of the election, file its application for insurance benefits and assign to the Commissioner, in such manner as the Commissioner may require, any credit instrument and the realty and chattel security instruments.

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**PART 232—MORTGAGE INSURANCE  
FOR NURSING HOMES,  
INTERMEDIATE CARE FACILITIES,  
BOARD AND CARE HOMES, AND  
ASSISTED LIVING FACILITIES**

10. The authority citation for part 232 continues to read as follows:

**Authority:** 12 U.S.C. 1715b, 1715w, and 1715z(9); 42 U.S.C. 3535(d).

11. In subpart A, add a new § 232.4, to read as follows:

**§ 232.4 Lessees and sublessees.**

Where a lessee or sublessee holds rights, powers or authorities to act, which would be held by the mortgagor in the absence of a lease, the lessee or sublessee is subject to program requirements to the same extent as the mortgagor under the Section 232 program.

Dated: June 29, 2004.

*Sean Cassidy,*

*General Deputy, Assistant Secretary for Housing.*

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