

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 200, 236, 880, 881 and 883

[Docket No. FR-4532-F-01]

RIN 2502-AH46

Increased Distributions to Owners of Certain HUD-Assisted Multifamily Rental Projects

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

ACTION: Final rule.

SUMMARY: This final rule adds an exception to current limits on distributions to owners for HUD-assisted multifamily rental projects. HUD may now permit increased distributions for owners of projects with section 8 project-based assistance and below-market rents, if such increases are necessary to ensure continued participation of the owners in the section 8 program.

EFFECTIVE DATE: November 13, 2000.

FOR FURTHER INFORMATION CONTACT: Willie Spearmon, Director, Office of Housing Assistance and Grants Administration, Department of Housing and Urban Development, 451 7th St. SW, Washington DC 20410, 202-708-2866. (This not a toll-free number.) For hearing- and speech-impaired persons, these numbers may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

On June 16, 1999, the Department issued Notice H 99-15, *Emergency Initiative to Preserve Below-Market Project-Based Section 8 Multifamily Housing Stock*. The Notice identified a class of HUD-assisted multifamily projects that were most at risk of “opting-out” of section 8 project-based assistance when contracts expired, and provided inducements for the owners of at-risk projects to renew the expiring contracts.

Most importantly, the Notice provided for “marking up” of rent levels for certain projects at risk of opting out, as permitted by section 524 of the Multifamily Affordable Housing Reform and Affordability Act of 1997 (MAHRA), to comparable market rents (or 150% of Fair Market Rent, if lower). Section 524 was recently amended by Public Law 106-74 to mandate marking up in certain circumstances, and the Department is addressing those

amendments in a separate rulemaking proceeding involving 24 CFR part 402.

Notice H 99-15 also announced that HUD would waive regulations to permit owners of the at-risk projects to take distributions in excess of the limits stated in regulations. This waiver approach is continued for FY 2000 by HUD Notice H 99-36 issued on December 29, 1999. Limits on distributions are not set by statute and are not directly affected by the recent legislation on “marking up”. However, the Department expects to continue to permit increased distributions along the lines of Notices H 99-15 and H 99-36 in connection with “marking up” under amended section 524 of MAHRA. Because this will become a permanent policy, it would be inappropriate to continue to rely indefinitely on the use of waivers of relevant regulatory restrictions. This final rule makes continued reliance on waivers unnecessary.

Changes to Parts 236, 880, 881, and 883 Made in This Rule

Notice H 99-15 refers to five regulatory provisions of title 24 that limit distributions to project owners: §§ 221.532(a) (1995), 236.50(a)(2) (1995), 880.205(b), 881.205(b), and 883.306(b). This rule adds language to the latter four provisions to authorize HUD to allow distributions of surplus cash, in excess of the amounts usually permitted by such provisions, for project owners who participate in a HUD-approved initiative or program to preserve assisted housing stock with below-market rates, such as the Emergency Initiative begun by Notice H 99-15. Consistent with the regulation waivers that HUD has already granted, the increased distributions will be limited to a maximum amount based on market rents and calculated according to HUD instructions. Any increased limits on distributions, or changes in those limits, will be announced in a widely-distributed HUD issuance such as a HUD Notice (which will also be available on HUD’s Internet website), but the limits will not be required to be published in the **Federal Register**. The new language also clarifies that any excess rental charges that a section 236 project owner is authorized to retain under section 236(g) of the National Housing Act (which was amended after Notice 99-15 was issued) are not considered distributions.

For part 236, we have clarified the language of the “savings provision” of § 236.1(c), which preserves language predating a 1996 regulatory “streamlining” effort. No substantive change is intended. In addition, we

added a new § 236.2 that is substantively the same as the additions to §§ 880.205, 881.205, and 883.306 described above.

Changes to Part 200 Made in This Rule

Although the waiver mentioned § 221.532(a) (1995), that provision is not amended by this final rule because it is no longer in effect as such. Section 221.532(a) was removed by a streamlining rule published on April 1, 1996, without any express savings provision. In lieu of matters that formerly appeared in subpart C of part 221 (including specific limits on distributions), § 221.501 now refers the reader to subpart A of part 200. That subpart is a restatement of eligibility requirements (including continued general authority for mortgage supervision by HUD) for FHA multifamily and health care mortgage insurance programs. Current § 200.105 contains general regulatory authority for HUD’s mortgage supervision policies and permits regulation to be by a regulatory agreement or other means prescribed by the Secretary. This general authority is supplemented by § 200.106, which specifically permits HUD to regulate as limited dividend mortgagors projects receiving government “assistance” as defined in regulations implementing the Department of Housing and Urban Development Reform Act of 1990 (as explained below, there is no longer any such definition and correction is needed). Section 200.106 permits HUD to continue to impose additional regulation for mortgagors of assisted projects beyond those applicable to all multifamily mortgagors.

The preamble to the streamlining rule made it clear that the replacement of certain part 221 provisions with those now in part 200 was not intended to affect substantive policy. Because the focus of current subpart A is on the eligibility requirements for origination of new mortgages, however, subpart A lacks some of the previous specifics on certain matters of mortgage regulation covered in former subpart C that continue to be relevant after the mortgage origination is completed.

We are taking this opportunity to amend part 200 in several respects. Most importantly, the final rule adds language (new § 200.106(b)) that is similar to the language added to the other four sections amended by the final rule. The previous language of § 200.106 is now designated as § 200.106(a) and is revised in several respects. First, the reference in § 200.106 to the definition of “assistance” is brought up to date. It appears to have been intended as a

reference to a defined term that formerly appeared in 24 CFR parts 4 and 12 before those parts were streamlined and combined in 1996 into the current 24 CFR part 4. Part 4 now uses several different definitions to encompass the concept formerly conveyed by the single defined term "assistance". Of these definitions, we have chosen to reference in § 200.106 the defined phrase "assistance within the jurisdiction of the Department to any housing project" from § 4.3. That phrase includes existing section 221 projects held by limited distribution mortgagors.

Second, we have clarified several points in what is now redesignated as § 200.106(a). The revised language expressly recognizes that regulation of limited distribution mortgagors for assisted projects may be by regulation or otherwise and is in addition to any regulation of mortgagors under § 200.105. This approach makes it clear that § 201.106 is consistent with § 201.105. Further, the revised language expressly includes regulation of the amount of the permissible distribution as an example of permissible regulation. Prior to streamlining, this and other matters especially applicable to assisted projects were spelled out in regulations, but they are now continued in force by HUD by virtue of the more general language of §§ 200.105 and 200.106.

On the technical corrections level, we have deleted from the redesignated § 200.106(a) a confusing reference to the Low-Income Housing Tax-Credit program. Existing § 200.105(b) is also revised to correct errors.

Pre-emption

Public Law 106-74 also added a new section 524(f) to MAHRA that preempts State and local laws and regulations that limit or restrict project distributions to an amount less than that provided for under regulations of the Secretary. The preemption is limited to projects which have section 8 contracts renewed under section 524 of MAHRA and which have distributions of surplus funds accruing after October 20, 1999. Preemption does not apply to State-financed projects. An owner may elect to waive the preemption. Each section of the regulations that is amended as discussed above to permit increased distributions is also covered by the statutory preemption, both with respect to distribution limits expressly set forth in regulations and to any increased amounts permitted by HUD pursuant to this final rule.

Justification for Final Rulemaking

It is the general practice of the Department to provide a 60-day public

comment period on all rules in accordance with 24 CFR part 10. However, a prior public comment procedure may be omitted under § 10.1 if the Department determines that is impracticable, unnecessary, or contrary to the public interest.

The Department has determined that prior public comment for these provisions regarding increased limits on distributions is unnecessary because these provisions do not adversely affect the interests of any person. Most of the rule simply permits HUD to continue existing practices that provide for the preservation of certain below-market projects as affordable housing resources. It is also unnecessary to seek public comment on the preemption language of the rule because this language simply sets forth a statutory provision with some interpretation of its effect. As such, that language is an interpretative rule. HUD's rulemaking procedures do not require a notice and comment procedure for interpretive rules (see 24 CFR 10.1). Additionally, the rule makes certain technical corrections and clarifications to existing regulations that do not have any substantive effect.

Findings and Certifications

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 implementing 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 and copying between 7:30 a.m. and 5:30 p.m. weekdays at the Office of the Rules Docket Clerk, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0500.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule will not have a significant economic impact on a substantial number of small entities. The final rule codifies long-established existing practices that provide for the preservation of certain below-market projects as affordable housing resources. The rule also includes a statutorily required provision on preemption and makes certain technical corrections and clarifications to existing regulations that do not have any substantive effect.

Executive Order 13132, Federalism

This final 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.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule does not impose a Federal mandate that will result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number is 14.134.

List of Subjects

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, 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 236

Grant programs—housing and community development, Low and moderate income housing, Mortgage insurance, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 880

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 881

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 883

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, chapter II of title 24 of the Code of Federal Regulations is amended as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

1. The authority citation for part 200 is revised to read as follows:

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

2. Section 200.105 is amended by revising paragraph (b) to read as follows:

§ 200.105 Mortgagor supervision.

* * * * *

(b) The Commissioner may delegate to the mortgagee or other party the Commissioner's authority, in whole or in part, in accordance with the terms, conditions and standards established by the Commissioner in any executed Regulatory Agreement or other instrument granting the Commissioner supervision of the mortgagor.

3. Section 200.106 is revised to read as follows:

§ 200.106 Projects with limited distribution mortgagors and program assistance.

(a) *Regulation as limited distribution mortgagors.* In addition to regulation under § 200.105, limited distribution mortgagors for projects receiving "assistance within the jurisdiction of the Department" (as defined in § 4.3 of this title) may be regulated by the Commissioner as to additional matters, by regulation or otherwise, including as to the amount of the permissible distribution to the mortgagor.

(b) *Increased distributions.* The Commissioner may permit increased distributions of surplus cash, in excess of the amounts the Commissioner otherwise permits for limited distribution mortgagors, to a limited distribution mortgagor who participates in a HUD-approved initiative or program to preserve housing stock with below-market rents as affordable housing. The increased distribution will be limited to a maximum amount based on market rents and calculated according to HUD instructions. Funds that the mortgagor is authorized to retain under section 236(g)(2) of the National Housing Act are not considered distributions to the mortgagor.

(c) *Pre-emption.* Any State or local law or regulation that restricts distributions to an amount lower than permitted by the Commissioner under authority of this section is preempted to the extent provided in section 524(f) of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

PART 236—MORTGAGE INSURANCE AND INTEREST REDUCTION PAYMENTS FOR RENTAL PROJECTS

4. The authority citation for this part continues to read as follows:

Authority: 12 U.S.C. 1715b and 1715z–1; 42 U.S.C. 3535(d).

5. Section 236.1(c) is revised to read as follows:

§ 236.1 Applicability, cross-reference and savings clause.

* * * * *

(c) *Savings provision.* Any mortgage approved by the Commissioner for insurance pursuant to sections 236(j) or 236(n) of the National Housing Act is governed by subpart A of this part as in effect immediately before May 1, 1996, contained in the April 1, 1995 edition of 24 CFR, parts 220 to 499, and by subparts B through E of this part, except as otherwise provided in this subpart.

6. A new § 236.2 is added to read as follows:

§ 236.2 Increased distributions to certain limited distribution mortgagors.

(a) *Increased distributions.* The Commissioner may permit increased distributions of surplus cash in excess of the amounts otherwise permitted by subpart A of this part to limited distribution mortgagors who participate in a HUD-approved initiative or program to preserve below-market housing stock. The increased distributions will be limited to a maximum amount based on market rents and calculated according to HUD instructions. Funds that the mortgagor is authorized to retain under section 236(g)(2) of the National Housing Act are not considered distributions to the mortgagor.

(b) *Pre-emption.* Any State or local law or regulation that restricts distributions to an amount lower than permitted by subpart A of this part as in effect immediately before May 1, 1996, contained in the April 1, 1995 edition of 24 CFR, parts 220 to 499, or permitted by the Commissioner under this section is preempted to the extent provided by section 524(f) of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

PART 880—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR NEW CONSTRUCTION

7. The authority citation for part 880 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

8. Section 880.205 is amended by adding new paragraphs (h) and (i) to read as follows:

§ 880.205 Limitation on distributions.

* * * * *

(h) HUD may permit increased distributions of surplus cash, in excess of the amounts otherwise permitted, to profit-motivated owners who participate in a HUD-approved initiative or program to preserve below-market housing stock. The increased distributions will be limited to a maximum amount based on market rents and calculated according to HUD instructions. Funds that the owner is authorized to retain under section 236(g)(2) of the National Housing Act are not considered distributions to the owner.

(i) Any State or local law or regulation that restricts distributions to an amount lower than permitted by this section or permitted by the Commissioner under this paragraph (i) is preempted to the extent provided by section 524(f) of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

PART 881—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR SUBSTANTIAL REHABILITATION

9. The authority citation for part 881 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

10. Section 881.205 is amended by adding new paragraphs (h) and (i) to read as follows:

§ 881.205 Limitation on distributions.

* * * * *

(h) HUD may permit increased distributions of surplus cash, in excess of the amounts otherwise permitted, to profit-motivated owners who participate in a HUD-approved initiative or program to preserve below-market housing stock. The increased distributions will be limited to a maximum amount based on market rents and calculated according to HUD instructions. Funds that the owner is authorized to retain under section 236(g)(2) of the National Housing Act are not considered distributions to the owner.

(i) Any State or local law or regulation that restricts distributions to an amount lower than permitted by this section or permitted by the Commissioner under this paragraph (i) is preempted to the extent provided by section 524(f) of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

**PART 883—SECTION 8 HOUSING
ASSISTANCE PAYMENTS
PROGRAM—STATE HOUSING
AGENCIES**

11. The authority citation for part 881 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

12. Section 883.306 is amended by adding new paragraph (g) and (h) to read as follows:

§ 883.205 Limitation on distributions.

* * * * *

(g) HUD may permit increased distributions of surplus, in excess of the amounts otherwise permitted, to profit-motivated owners who participate in a HUD-approved initiative or program to preserve below-market housing stock. The increased distributions will be limited to a maximum amount based on market rents and calculated according to HUD instructions. Funds that the owner is authorized to retain under section 236(g)(2) of the National Housing Act are not considered distributions to the owner.

(h) Any State or local law or regulation that restricts distributions to an amount lower than permitted by this section or permitted by the Commissioner under this paragraph (h) is preempted as provided by section 524(f) of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

Dated: July 7, 2000.

William C. Apgar,

*Assistant Secretary for Housing-Federal
Housing Commissioner.*

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