

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 401 and 402

[Docket No. FR-4551-P-02; HUD-2006-0001]

RIN 2502-AI35

Renewal of Expiring Section 8 Project-Based Assistance Contracts

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise current HUD regulations that govern the renewal of expiring Section 8 project-based assistance contracts. Specifically, the proposed rule would amend the regulations to include tenant protections in the case of a contract that is not renewed, and establish rent levels when an expiring contract is renewed. Certain other changes to these regulations are being made by a final rule, also published in today's **Federal Register**.

DATES: *Comments Due Date:* March 13, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Interested persons may also submit comments electronically through the HUD electronic Web site at: www.regulations.gov. Commenters should follow the instructions provided on that site to submit comments electronically.

Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted will be available, without revision, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Copies are also available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Willie Spearmon, Director, Office of Housing Assistance and Grants Administration, Department of Housing and Urban Development, 451 Seventh St. SW., Washington, DC 20410-8000, telephone 202-708-3000. (This is not a toll-free number.) For hearing- and speech-impaired persons, this number may be accessed through TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On September 11, 1998, HUD published an interim rule (63 FR 48926) that implemented certain provisions of the Multifamily Assisted Housing Reform and Affordability Act (42 U.S.C. 1437f note) (MAHRA). The September 11, 1998, interim rule established a new 24 CFR part 401, entitled "Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark-to-Market)," and a new 24 CFR part 402, entitled "Project-Based Section 8 Contract Renewal without Restructuring (Under Section 524(a) of MAHRA)." Part 402 implemented section 524 of MAHRA, which relates to Section 8 contract renewals, and part 401 implemented the other portions of MAHRA, which involve mortgage restructuring in HUD-assisted projects with expiring assistance contracts.

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act for Fiscal Year 1999 (Pub. L. 105-276, approved October 21, 1998) revised section 524(a)(2) of MAHRA to make renewal of expiring contracts under that section subject to section 516 of MAHRA. Section 516 of MAHRA provides discretionary authority to prohibit mortgage restructuring and consideration of requests for contract renewals in cases where the project owner commits certain bad acts or omissions. The Departments of Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act for Fiscal Year 2000 (Pub. L. 106-74, approved October 20, 1999) (the FY 2000 Appropriations Act) extensively revised section 524 of MAHRA. Among other changes, the FY 2000 Appropriations Act revised the method for calculating rents when an expiring or terminating Section 8 contract is renewed, and requires reduction to comparable market rents for certain projects that, prior to expiration or termination, had rents that exceeded such comparable market rents. The FY 2000 Appropriations Act also revised the language in Section 8 of the U.S. Housing Act of 1937 (the Section 8 statute) regarding the notice that the owner must provide to tenants in the event of termination of a contract for project-based assistance (see 42 U.S.C. 1437f(c)(8)(A)). The Section 8 statute, as revised, requires the notice to include a statement that, if Congress provides funds, the owner and HUD may agree to renew the contract to avoid termination. The notice must also provide that in the event of termination, HUD will provide

tenant-based assistance to eligible tenants, enabling them to choose the place they wish to rent, which is likely to include the unit in which they currently reside.

On March 22, 2000, HUD published its final rule on 24 CFR part 401, and sections of 24 CFR part 402 (65 FR 15485) (the 2000 final rule). The sections of 24 CFR part 402 that were made final are § 402.1, a statement of the purpose of part 402; § 402.4, related to renewals of expiring section 8 project-based assistance contracts and incorporating many of the statutory changes to section 524 of MAHRA; and one paragraph of § 402.6, which states the actions a project owner must take to request Section 8 contract renewal. With respect to § 402.4(a)(2), the preamble to the 2000 final rule stated, "when the complete part 402 is published in final form, HUD will make any further changes to § 402.4(a)(2) that are needed to reflect HUD's final resolution of the comments on this section." At the time of publication of the 2000 final rule, the public was provided notice that further changes based on public comments to § 402.4(a)(2) would be addressed in a future rule. This proposed rule also advises of other changes to other provisions of § 402.4, which were not contemplated at the time of the 2000, final rule.

HUD is also publishing in today's **Federal Register** a final rule based on the interim rule of 1998 and that addresses the public comments received in response to the interim rule. The final rule being published today revises 24 CFR 401.2 to reference that the definition of "eligible project" is addressed in § 401.100. The final rule also revises 24 CFR 401.600 to permit HUD to grant extensions of a contract for Section 8 assistance for longer than one year at current rents in the case of a project for which a Restructuring Plan has not yet been implemented. This change removes the need for case-by-case waivers, and is therefore less administratively burdensome.

II. This Proposed Rule

In this rule, HUD is proposing additional changes to implement recent statutory changes regarding the renewal of expiring Section 8 project-based assistance contracts, and to provide clarification of certain existing regulations. The proposed would amend §§ 401.602 and 402.4 as follows:

A. Section 401.602

This proposed rule would revise 24 CFR 401.602 with respect to the provisions regarding notices to be provided by the project owner. Section

401.602(a) (i) requires the owner to give the notice required under Section 8(c)(8) of the United States Housing Act of 1937. The notice required by Section 8(c)(8) pertains to termination of a Section 8 contract. The FY 2000 Appropriations Act amended Section 8(c)(8) as discussed in Section I of this preamble. Therefore, § 401.602(a)(ii) would be revised to clarify that an owner who has given notice but who later decides not to undergo mortgage restructuring, or who is rejected for restructuring, is not required to give a new 12-month notice of a decision to opt out of the Section 8 program. Current § 401.602(a)(1)(ii) requires an owner who elects not to renew a Section 8 assistance contract to give an additional notice 120 days before the expiration of the contract. Section 401.602(a)(1)(ii) would be redesignated as § 401.602(a)(1)(iii).

Section 401.602(a)(2) would be revised to comply with statutory tenant notification requirements in the event of termination of a Section 8 contract, and would provide for a notification process similar to the one in § 402.8. Currently, § 401.602(a)(2) requires an owner whose Restructuring Plan has been rejected to give the appropriate 12-month notice under Section 8, unless project-based assistance is renewed under the provisions of 24 CFR 402.4, which implements section 524 of MAHRA. This proposed rule also would impose this obligation on an owner who is eligible for restructuring but who has not requested restructuring.

Finally, a revision would be made to § 401.602(c)(1)(i) to include the failure of the owner to extend the assistance contract as well as failure to renew, as a basis for tenants residing in the affected units to be eligible for tenant-based assistance.

B. Section 402.4

To reflect recent statutory revisions, this proposed rule would revise § 402.4 to:

- Use mandatory rather than discretionary language regarding renewals;
- Incorporate the various statutory directions on the required rent levels in different circumstances;
- Contain the statutory provisions for periodic comparison and adjustment of rents to market levels;
- Provide that budget-based adjustments will be used instead of operating cost adjustment factors (OCAF) only at the request of the owner, and will be subject to HUD approval;
- Generally refer to terminating contracts in addition to expiring contracts; and

- Clarify that renewal requests from owners of moderate rehabilitation projects entitled to exception rents will always be governed by § 402.5(c).

III. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this proposed rule are currently approved by the Office of Management and Budget (OMB) under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520) and assigned OMB control number 2502–0533. 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 currently valid control number.

Environmental Impact

A finding of no significant impact with respect to the environment was made regarding this rule in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). Accordingly, the initial finding of no significant impact remains applicable, and is available for public inspection between 8 a.m. and 5 p.m. weekdays in the office of the Regulations Division, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500.

Executive Order 12866

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866, *Regulatory Planning and Review*. OMB determined that this rule is a “significant regulatory action” (but not economically significant) as defined in section 3(f) of the Order. Any changes made in this proposed rule subsequent to its submission to OMB are identified in the docket file. The docket file is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This rule affects only multifamily Section 8 owners. There are very few multifamily Section 8 owners who are small entities. Therefore, this rule would not affect a substantial number of small entities. Therefore, the undersigned certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Notwithstanding the determination that this rule would not have a significant impact on a substantial number of small entities, HUD specifically invites any comments regarding any less burdensome alternatives to this rule that will meet HUD’s objectives as described in this preamble.

Executive Order 13132, Federalism

This proposed rule would not have federalism implications and would 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

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 would not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects

24 CFR Part 401

Grant programs—Housing and Community Development, Housing, Housing assistance payments, Housing standards, Insured loans, Loan programs—Housing and community development, Low and moderate income housing, Mortgage insurance, Mortgages, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 402

Housing, Housing assistance payments, Low and moderate income housing, Rent subsidies.

The Catalogue of Federal Domestic Assistance number for the programs affected by this rule is 14.871.

For the reasons set forth in the preamble, HUD proposes to amend 24 CFR parts 401 and 402 as follows:

PART 401—MULTIFAMILY HOUSING MORTGAGE AND HOUSING ASSISTANCE RESTRUCTURING PROGRAM (MARK-TO-MARKET)

1. The authority citation for part 401 is revised to read as follows:

Authority: 12 U.S.C. 1715z–1 and 1735f–19(b); 42 U.S.C. 1437f(c)(8), 1437f(t), 1437f note, and 3535(d).

2. Revise § 401.602 to read as follows:

§ 401.602 Tenant protections if an expiring contract is not renewed.

(a) *Required notices.* (1)(i) An owner is required to give a 12-month notice of contract expiration or termination under section 8(c)(8) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(8)). This one-year notification must state whether or not the owner intends to renew at the time of the contract's expiration.

(ii) An owner is not required to give a new 12-month notice under paragraph (a)(1)(i) of this section if:

(A) The owner properly gives the one-year notice required by paragraph (a)(1)(i) of this section and elects to enter into restructuring negotiations but later voluntarily decides not to undergo restructuring; or

(B) The owner requests restructuring and the request is rejected under §§ 401.101, 401.403, 401.405, or 401.451.

(iii) Not less than 120 days before the contract expiration, any owner described in paragraph (a)(1)(ii) of this section must notify all affected tenants and HUD's local Hub, Program Center Director, or Contract Administrator (whichever is applicable) in writing of the owner's ultimate decision to renew or opt out of their Section 8 contract.

(2) The owner of a Mark-to-Market eligible project who has not requested a Restructuring Plan, or an owner who has requested a Restructuring Plan but who has been rejected under §§ 401.101, 401.403, 401.405, or 401.451, must provide 12 months advance notice of the expiration of the project-based assistance under section 8(c)(8)(A) of the United States Housing Act of 1937 (or notice as otherwise provided in section 8(c)(8)(C) of such Act), unless project-based assistance is renewed under § 402.4.

(3) Notices required by paragraphs (a)(1) and (a)(2) of this section must be provided to tenants and to HUD or the contract administrator. HUD will prescribe the form of notices under paragraph (a)(3) of this section to the extent that the form is not prescribed by section 8(c)(8) of the United States Housing Act of 1937.

(b) *If owner does not give notice.* If an owner described in paragraph (a)(1) or

(a)(2) of this section does not give timely notice of non-renewal or termination, the owner must permit the tenants in assisted units to remain in their units and may not increase the tenants' rent payment until the owner has provided the notice and one year has elapsed.

(c) *Availability of tenant-based assistance.* (1) Subject to the availability of amounts provided in advance in appropriations and the eligibility requirements of the tenant-based assistance program regulations, HUD will make tenant-based assistance available under the following circumstances:

(i) If the owner of an eligible project does not extend or renew the project-based assistance, any eligible tenant residing in a unit assisted under the expiring contract on the date of expiration will be eligible to receive assistance on the later of the date of expiration or the date the owner's obligations under paragraph (b) of this section expire; and

(ii) If a request for a Restructuring Plan is rejected under § 401.101, § 401.403, § 401.405, or § 401.451, and project-based assistance is not otherwise renewed, any eligible tenant who is a low-income family or who resides in a project-based assisted unit on the date of Restructuring Plan rejection will be eligible to receive assistance on the later of the date the Restructuring Plan is rejected, or the date the owner's obligations under paragraph (b) of this section expire.

(2) If the tenant was assisted under the expiring contract, assistance under this paragraph will be in the form of enhanced vouchers as provided in section 8(t) of the United States Housing Act of 1937.

PART 402—PROJECT BASED SECTION 8 CONTRACT RENEWAL WITHOUT RESTRUCTURING (UNDER SECTION 524(a) OF MAHRA)

3. The authority citation for part 402 is revised to read as follows:

Authority: 42 U.S.C. 1437f(c)(8), 1437f note and 3535(d).

4. Amend 24 CFR 402.4 as follows:

- a. Revise the section heading;
- b. Revise paragraph (a)(1);
- c. Add paragraph (a)(3), (4), and (5); and
- d. Revise paragraph (b).

§ 402.4 Contract renewals under section 524(a) of MAHRA.

(a) *Renewal.* (1) *Offer to renew.* At the request of the owner, HUD will offer to renew any expiring or terminating project-based assistance contract, except as provided in this paragraph and

§ 402.7. The rent level for an eligible project will be as provided in paragraphs (a)(3), (4), or (5) of this section, as applicable, except that the rent level for a project with a moderate rehabilitation contract described in section 524(b)(3) of MAHRA will always be determined under § 402.5(b)(3).

* * * * *

(3) *Marking up to market under section 524(a)(4)(A) and (D) of MAHRA.*

(i) Paragraph (a)(3) of this section applies if rent levels under the expiring or terminating contract do not exceed comparable market rents for the market area and the project meets the other requirements of section 524(a)(4)(A) of MAHRA (including any HUD adjustments to percentages in that section as authorized by that section of MAHRA).

(ii) HUD will approve rent levels at the lesser of:

- (A) Comparable market rents; or
- (B) 150 percent of fair market rents (or a HUD-adjusted percentage as authorized by section 524(a)(4)(A) of MAHRA).

(iii) If paragraph (a)(3)(ii) of this section would restrict rents for a project to 150 percent of fair market value (or a HUD-adjusted percentage as authorized by section 524(a)(4)(A) of MAHRA), the owner may request, and HUD may approve higher rents up to comparable market rents if the project satisfies at least one of the requirements stated in paragraph (a)(4)(ii) of this section.

(4) *Approval of rents at or below market under sections 524(a)(4)(C) of MAHRA.*

(i) If rent levels under the expiring or terminating contract do not exceed comparable market rents and the project does not meet the requirements of paragraph (a)(3) of this section, or the owner requests approval of rents higher than allowed by paragraph (a)(3), HUD will approve rent levels that:

(A) Are not less than either existing rents as adjusted by an operating cost adjustment factor (OCAF) or budget-based rents; and

(B) Are not greater than comparable market rents.

(ii) When considering approval of rent levels under paragraph (a)(4) of this section that are higher than budget-based rents, HUD will give greater consideration to approving higher rents based on the number of the following criteria that the project meets:

(A) The project has residents who are a particularly vulnerable population, as demonstrated by a high percentage of units being rented to elderly families, disabled families, or large families;

(B) The project is located in an area in which tenant-based assistance would be difficult to use, as demonstrated by a low vacancy rate for affordable housing, a high turnback rate for vouchers, or a lack of comparable rental housing; or

(C) The project is a high priority for the local community, as demonstrated by a contribution of state or local funds to the property.

(5) *Reduction of rents to market under section 524(a)(4)(B) of MAHRA.* If rent levels under the expiring or terminating contract exceed comparable market

rents, HUD will approve rent levels at comparable market rents, provided that, in the case of an eligible project, HUD first determines that renewal without a Restructuring Plan is sufficient under paragraph (a)(2) of this section.

(b) *Rent adjustments.* (1) After rents have been established under this section, any rent adjustments will be determined by using an OCAF, except that rents may be re-determined using a budget-based rent adjustment from time to time at the request of the owner and subject to the approval of HUD.

(2) HUD will compare existing rents under a contract with comparable market rents at the expiration of each five-year period, and may make an additional comparison once during each five-year period. On the basis of such a comparison, HUD may reduce rents to a level no greater than comparable market rents, or increase rents to such a level.

Dated: December 16, 2005.

Brian D. Montgomery,

Assistant Secretary for Housing-Federal Housing Commissioner.

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