

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Part 200**

[Docket No. FR-4792-F-02]

RIN 2502-AH91

Distribution of Tax Credit Proceeds

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

ACTION: Final rule.

SUMMARY: This rule adopts as final an interim rule that amended the Department's regulations with respect to funding for project completion. The regulatory change allows the proceeds from syndication of low-income housing tax credits and historic tax credits to be treated in the same manner as loan or grant funding provided through federal, state, or local government agencies. This final rule follows an interim rule that was published in the **Federal Register** of July 30, 2003. Two comments were received in response to the interim rule's invitation for public comment. After careful consideration of the two comments received, HUD is adopting the interim rule without change.

DATES: *Effective date:* January 13, 2005.

FOR FURTHER INFORMATION CONTACT: Michael McCullough, Director, Office of Multifamily Development, Office of the Deputy Assistant Secretary for Multifamily Housing, Room 6148, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-8000. Telephone (202) 708-1142, extension 5426 (this is not a toll-free number). Hearing- or speech-impaired persons may access this number by calling the Federal Information Relay Service at 800-877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:**I. Background**

On July 30, 2003, (68 FR 44844) HUD published an interim rule to revise the Department's regulations at 24 CFR 200.54. Readers are referred to the July 30, 2003, interim rule for a full discussion of the basis and rationale advanced by the Department for adopting the revised regulations.

II. This Final Rule

This final rule follows publication of the July 30, 2003, interim rule, and takes into consideration the two public comments received on the interim rule. The two comments received during the public comment period were from an association representing mortgage

bankers and an association of home builders, respectively.

Comment: Support for interim rule. One commenter strongly supported the rule, applauding HUD for taking a proactive step to simplify and improve the process of using low-income housing tax credits with FHA-insured multifamily loans. The commenter also encouraged HUD to seek additional ways to streamline the approval process for FHA-insured loans that fund low-income tax credit properties.

HUD Response. HUD appreciates the commenter's support. As suggested by the commenter, HUD will continue to pursue ways to make the approval process for FHA-insured loans more efficient.

Comment: Clarify amount of tax credit proceeds to be escrowed. The commenter requested that HUD's implementing instructions clarify that only the tax credit proceeds required for the front money escrow be placed in escrow with the mortgagee prior to the start of construction.

HUD Response. HUD agrees with the comment and has made the clarification in the implementing instructions in the Multifamily Accelerated Processing (MAP) guide.

Comment: A letter of credit should satisfy the tax credit proceeds required at closing. The second commenter recommended that to make FHA insurance a more attractive and cost-effective financing vehicle for projects with low-income housing tax credits, HUD allow tax credit proceeds required at closing to be held by the mortgagee in the form of an unconditional, irrevocable letter of credit issued by a banking institution. The commenter wrote that if this recommendation were adopted, it would conform the policy for tax credit proceeds with that now allowed where grant or loan funds such as funds provided under HUD's HOME or Community Development Block Grant (CDBG) program are provided from a government agency or instrumentality. If there is a problem with collecting on the letter of credit, the mortgagee would be at risk and required to provide the funds necessary to complete the project. The commenter concluded that HUD would be at risk only if both the banking institution and the mortgagee failed to meet their obligations.

HUD Response: HUD disagrees with the recommendation and, as noted above, adopts the interim rule without change. Where FHA has insured loans with funds from a governmental agency, the agency executes a commitment that is binding on present and future administrations. Under the commenter's

recommendation, if the lending institution that issued the letter of credit failed to honor its letter of credit, FHA's sole reliance would be on the mortgagee. FHA permits mortgagees to accept letters of credit in lieu of cash for items such as initial operating deficit, working capital, and assurance of completion. In a tax credit transaction, a mortgagee that accepted a letter of credit would be backing major equity (sometimes at least 50 percent of the cost of the transaction).

Multifamily mortgagees are currently required to have only \$250,000 of net worth. For FHA to consider an arrangement such as the one suggested by the commenter, FHA would have to evaluate the current net worth of the mortgagee at the time of the transaction or establish a separate category of mortgagees with much higher net worth that could handle such financial risk. Either solution would be too administratively burdensome for the Department to undertake at this time.

III. Findings and Certifications*Environmental Review*

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose a federal mandate that will result in expenditure by state, local, or tribal government, within the meaning of the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

The Regulatory Flexibility Act (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. There are no anti-competitive discriminatory aspects of the rule with regard to small entities, and there are no unusual procedures that would need to be complied with by small entities. Rather, this rule amends 24 CFR 200.54(b) to allow the proceeds from syndication of low-income housing tax credits and historic tax credits to be treated in the same manner as loan or grant funds provided through federal, state, or local government agencies. To the extent that the rule has an impact on program participants, it will be the beneficial impact of simplifying the use of tax credits with the FHA mortgage insurance programs by allowing the pro-rata distribution of the required borrower equity and of the mortgage proceeds. As a result, this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the undersigned certifies that this rule will not have a significant

economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the order. This rule does not have federalism implications and will not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the order.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for 24 CFR part 200 are 14.135 and 14.139.

List of Subjects in 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Lead poisoning, Loan programs-housing and community development, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons stated in the preamble, the interim rule for part 200 of title 24 of the Code of Federal Regulations, published on July 30, 2003 at 68 FR 44844, is promulgated as final without change.

Dated: November 15, 2004.

John C. Weicher,

Assistant Secretary for Housing—Federal Housing Commissioner.

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