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Part II

Department of Housing and Urban Development

**24 CFR Parts 200 and 401
Implementation of Mark-to-Market
Program Revisions; Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Parts 200 and 401**

[Docket No. FR-4751-F-02]

RIN 2502-AH86

Implementation of Mark-to-Market Program Revisions**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.**ACTION:** Final rule.

SUMMARY: Based on statutory changes and HUD's technical operational experience in administering the program, this final rule implements a number of changes to the Mark-to-Market (M2M) program, HUD's mortgage restructuring program for FHA-insured projects with project-based Section 8 assistance, to facilitate processing. Unlike the M2M proposed and final rules addressing renewal of expiring Section 8 project-based assistance contracts that HUD published on January 12, 2006, this rule addresses a range of administrative and programmatic issues other than the project-based assistance contracts. This final rule follows publication of a March 14, 2006, proposed rule and takes into consideration the public comments received on the proposed rule.

DATES: *Effective Date:* December 26, 2007.**FOR FURTHER INFORMATION CONTACT:**

Theodore Toon, Deputy Assistant Secretary, Office of Affordable Housing Preservation (OAHP), Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6230, Washington, DC 20024, telephone number (202) 708-0001 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

The Multifamily Assisted Housing Reform and Affordability Act (MAHRA) became law on October 27, 1997. (See Pub. L. 105-65, 111 Stat. 1384, 42 U.S.C. 1437f note.) 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, which prohibits mortgage restructuring

and consideration of requests for contract renewals in the case of certain kinds of conduct by the project owner. On October 20, 1999, the Departments of Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act for Fiscal Year 2000, Public Law 106-74, 113 Stat. 1047, at 1110, extensively revised section 524 of MAHRA. Among other changes, the revisions changed the method for calculating rents when an expiring or terminating Section 8 contract is renewed, and required reduction to comparable market rents for certain projects that, prior to expiration or termination, had rents that exceeded such comparable market rents.

The Mark-to-Market Extension Act of 2001 (Title VI of Pub. L. 107-116, approved January 10, 2002) (Mark-to-Market Extension Act) made a number of amendments to MAHRA and a MAHRA-related amendment to section 223(a)(7) of the National Housing Act (12 U.S.C. 1715n). A discussion of the implementation of those amendments and additional proposed revisions to HUD's mortgage restructuring program can be found in the preamble of the March 14, 2006, proposed rule (71 FR 13221).

MAHRA is currently implemented in HUD's regulations at 24 CFR parts 401 and 402. These regulations were initially published as an interim rule on September 11, 1998 (63 FR 48926). On March 22, 2000, HUD published a final rule implementing 24 CFR part 401 and portions of 24 CFR part 402 (65 FR 15485).

In order to facilitate restructurings under MAHRA, this rule also amends HUD's regulations at part 200. Part 200 is the introductory section addressing HUD's mortgage insurance programs under the National Housing Act, 12 U.S.C. 1701 *et seq.* The specific sections being amended are 24 CFR 200.20, which applies to the refinancing of insured mortgages, and 24 CFR 200.40, which sets HUD's fees and charges for its mortgage insurance programs.

For more information on the implementation of the revisions being made to the M2M program, please see the preamble of the March 14, 2006, proposed rule.

II. This Final Rule; Changes to the March 14, 2006, Proposed Rule

This final rule follows publication of the March 14, 2006, proposed rule, and takes into consideration the public comments received on the proposed rule. After careful review of the public comments, HUD has made the following changes to the proposed rule:

1. *Removal of references to the OMHAR.* HUD has removed the definition and all references to the Office of Multifamily Housing Assistance Restructuring (OMHAR). The Office of Affordable Housing Preservation (OAHP) replaced OMHAR as of October 1, 2004. OAHP was established to assure the smooth continuation of the M2M program, utilizing authorities that continued after the legislative sunset of OMHAR. HUD has taken the opportunity afforded by this rule to update its regulations to reflect the organizational structure of the program as it is currently implemented. In addition, references to the "Director" of OAHP have been replaced with more general references to "HUD" to avoid having to amend the regulations whenever the title of a HUD official is changed. "HUD" is defined to include an official authorized to act under the provisions of MAHRA.

2. *Transfer Fee Exemption.* The language of § 200.40(h) is clarified to provide for a fee exemption for transfers that are contemporaneous with the restructuring of a mortgage pursuant to a restructuring plan, rather than for transfers "in connection with" a restructuring plan.

3. *Revised Tenant Endorsement Procedure.* In response to public comment, HUD has revised the tenant endorsement procedure. A purchaser will now only be required to hold one informational meeting, but may hold additional meetings as necessary. Tenant endorsement will be based upon a potential priority purchaser receiving a majority of the tenant heads of household's written endorsement. Those tenants who do not attend the informational meeting, or any subsequent meeting, may be directly contacted by the purchaser to collect their written endorsement. Purchasers who are unable to obtain the majority of tenant heads of household's written endorsement after undertaking reasonable efforts will be able to submit a request, in writing, to HUD. Based upon the information and explanation contained in the request, HUD will make a determination whether or not to grant tenant endorsement to a purchaser based on a lower percentage of tenants' written endorsement.

III. Discussion of Public Comments Received on the March 14, 2006, Proposed Rule

The public comment period on the proposed rule closed on May 15, 2006. HUD received three public comments in response to the proposed rule. One of the comments was submitted jointly by a group of national organizations

representing real estate managers, lessors, lenders, builders, and realtors. One of the comments was submitted on behalf of a group of regional, state, and national organizations with extensive experience in preserving and improving HUD's inventory of multifamily housing. One of the comments was submitted by a statewide renter's association. This section of the preamble presents a summary of the significant issues raised by the public commenters on the March 14, 2006, proposed rule, and HUD's responses to these issues.

Section 200.40 HUD Fees

Comment: The charging of transactional fees does discourage participation in the M2M program. The commenter agrees with HUD that various transactional fees discourage owners from participating in the M2M program and that select fees should be exempt or eliminated.

HUD Response: HUD appreciates the input of regulated entities in the formulation of its regulations. Based upon HUD's experience and that of regulated entities, the regulations at § 200.40(h) and (j) will be revised to exempt transfer fees where the transfer of physical assets or substitution of mortgagors occurs contemporaneously with the restructuring of a mortgage pursuant to a restructuring plan and eliminated an application or commitment fee in connection with the insurance of a mortgage used to facilitate a restructuring plan, respectively.

Section 401.452 Property Standards for Rehabilitation

Comment: The property standards for rehabilitation are reasonable. The commenter expressed approval of the objectives of the provision to ensure that the property can attract non-subsidized tenants, but competes on rents rather than amenities, which the commenter finds reasonable.

HUD Response: HUD is implementing the property standards for rehabilitation as proposed. HUD believes that the property standards are realistic, by taking into consideration the resources of the project as well as ensuring the rehabilitation reflects current standards.

Section 401.461 HUD-held Second Mortgage

Comment: The use of discretion in whether simple or compound interest on HUD-held second mortgages will be required is good policy. The commenter wrote that in § 401.461(b)(1), HUD's proposed elimination of the reference to simple interests and its use of

administrative discretion in requiring simple or compound interest, so that waivers will no longer be required, makes good sense. The commenter also appreciates HUD's willingness to make restructuring transactions using Low Income Housing Tax Credits (LIHTCs) feasible without the need for waiver.

HUD Response: HUD appreciates the support expressed for the revisions to § 401.461(b)(1). The regulatory change removes the reference to simple interest and, thereby, allows HUD to use its administrative discretion in requiring simple or compound interest. This enables HUD to make determinations that are in the best interest of the government and the individual debt restructuring.

Comment: There should not be a time limit on the canceling, modifying, or assigning of a property's Mark-to-Market subsidiary mortgage(s) if transferring to a priority purchaser. The commenters wrote that § 401.461(b)(1) should be revised to eliminate the time limit (i.e., 3-year window) for canceling, modifying, or assigning a property's Mark-to-Market subsidiary mortgage(s), so long as the transfer is to a priority purchaser. In addition, the commenters suggested that the regulation clarify that there is no time limit for transferring Mark-to-Market restructured properties to priority purchasers. Currently, Appendix C of the Operating Procedures Guide and the Standard Restructuring Commitment form allow the forgiveness of second and third debt to qualified purchasers only if the property transfers within 3 years of restructuring.

HUD Response: HUD has not revised the regulations in response to this comment. Section 401.461(b)(5) states that HUD will consider modification, assignment of the second mortgage to an acquiring entity, or forgiveness of all or part of the second mortgage to a priority purchaser. No defined time period for making the request is contained in this section. In applying § 401.461(b)(5), as described in Appendix C of the Operating Procedures Guide and the Standard Restructuring Commitment form, HUD has generally limited its consideration to requests made by priority purchasers within 3 years of the restructuring. HUD believes that this guidance provides an appropriate and reasonable time frame for a priority purchaser to request modification, assignment of the second mortgage to an acquiring entity, or forgiveness of all or part of the second mortgage. However, HUD will consider, on a case-by-case basis, requests made by a priority purchaser that are outside of this 3-year window. Such requests remain subject to continuing statutory authority.

Section 401.480 Sale or Transfer of Project

Comment: The tenant endorsement procedure for attaining priority purchaser status should be revised. The commenters wrote that all provisions pertaining to a second meeting devoted to a formal voting process should be eliminated. This would also eliminate the need for proxies and, thereby, eliminate the increased possibility of undue influence (monetary or other promised favors), which distort the endorsement process. In place of the second meeting, the commenters suggested revising the regulations to require that 51 percent of the tenants provide written endorsement. The commenters believe that this would encourage a priority purchaser to thoroughly engage tenants in order to gain their informed, genuine, and meaningful support.

HUD Response: HUD specifically requested comment on the procedure for demonstrating tenant endorsement and solicited recommendations for a less prescriptive and more streamlined procedure that will meet the goal of providing an opportunity for the informed participation of tenants in an endorsement process that can reasonably be considered to be valid. In response to these comments and recommendations, HUD is revising the rule by adopting the commenters' suggested endorsement procedure with some modifications. A purchaser is only required to hold an informational meeting under this final rule; however, additional meetings may be scheduled in accordance with the notice requirements of § 401.480(e). Tenant endorsement under § 401.480(e) is to be demonstrated by a purchaser submitting documentation, such as ballots, letters of support, or petitions, to HUD from a majority (51 percent) of the tenant heads of household. A purchaser may contact tenant heads of households who did not attend the meeting, to collect a written endorsement.

HUD is also implementing a process by which a purchaser who has made a reasonable effort to obtain the majority of the tenants' endorsement but was unsuccessful can ask HUD to make a determination as to whether endorsement can be obtained with a lower percentage of endorsing tenants. The purchaser will have to make the request in writing and include a description of the efforts undertaken to secure the endorsement, an explanation of the circumstances that resulted in failing to receive endorsement from a majority of tenant heads of household, and any comments received from

tenants regarding the approval of the endorsement.

HUD believes that this process is less prescriptive than the procedures that were proposed and serves the interests of both purchasers and tenants.

Comment: The informational meeting should be held at a convenient time and location and conducted by a neutral third party. The commenter wrote that the proposed regulation should be revised to require that the informational meeting be held at a time and location convenient to the majority of the tenants, and should be conducted by the Participating Administrative Entity (PAE) or other neutral third party.

HUD Response: HUD has not revised the rule in response to this comment. It is HUD's intent to allow flexibility in the conduct of tenant meetings so as to allow the needs and resources of each project to be addressed. Further, since tenant endorsement will be determined based on receiving endorsement of 51 percent of the tenant heads of household, it is in the interest of all involved to hold meetings that are convenient as to time and location with competent facilitators. HUD will issue guidance, as needed, that outlines informational meeting best practices.

Comment: The final rule should state that there must be at least 3 weeks between the informational meeting and final endorsement of the purchaser.

Two commenters supported the requirement of an informational meeting, but would revise the regulation to require that 3 weeks elapse between the date of the informational meeting and when final endorsement of the purchaser is made.

HUD Response: HUD has not revised the rule in response to this comment. HUD does not believe that a required time interval between a tenant meeting and the final endorsement of the purchaser would be beneficial. HUD acknowledges that time is needed for adequate consideration and deliberation; however, HUD chooses not to prescribe how much time is necessary.

Comment: Additional elements should be required for the informational meeting. The commenters wrote that the regulations should require prospective priority purchasers to prepare materials that must be readily available at no cost to residents before and after the informational meeting. Included among the materials suggested by the commenters were any plans for repairs and improvements to the property; any changes in the on-site manager or management company; any changes in utility billing; the names and locations of other properties owned by the

potential purchaser, specifically identifying properties that are HUD-assisted; and the names and affiliations of the prospective purchaser's directors and officers. The commenters also wrote that if English is not the primary language of a significant number of tenants, then the final rule should require the prospective owner to provide interpreters and written materials for the informational meeting in other languages spoken by 15 percent of the tenants.

HUD Response: HUD has not revised the rule in response to this comment. As stated above, HUD does not want to impose overly prescriptive requirements on the tenant endorsement procedure. HUD has created the endorsement framework and believes that the needs and resources of the project and the restructuring of that project should dictate the conduct of the meeting(s) and endorsement process. HUD will supplement this framework by issuing guidance containing best practices, as needed.

Comment: A representative of the purchaser must attend the informational meeting. The commenters also wrote that the final rule should require that a representative of the prospective purchaser must be present at the informational meeting. The representative should be prepared to discuss plans for improving the property and capable of addressing tenant questions and concerns.

HUD Response: HUD agrees with this comment and has included a provision at § 401.480(e)(1), which requires that a representative of the purchasing entity attend the required tenant meeting(s), present its plan for the acquisition and improvement of the project, and answer the questions of tenants attending the meeting.

Comment: The provisions governing how tenants are to be notified of the informational meeting should be revised. The commenters wrote that § 401.480(e)(2), regarding notice to tenants and tenant organizations, should be modified to require that notice must be delivered directly or by mail to the parties listed in § 401.501, which include local government, the public housing authority, the Outreach and Training Grant (OTAG) or Intermediary Technical Assistance Grant (ITAG) organization, other appropriate neighborhood representatives, and other affected parties. Additionally, the commenters suggested the regulations must state that notice of the informational meeting must also be posted in three conspicuous places on the property and provided in appropriate languages. The commenters

wrote that if the informational meeting is not part of the second PAE-convened tenant comment meeting, then the regulations must require notice no less than 3 days and no more than 10 days prior to the informational meeting.

HUD Response: HUD has not revised the rule in response to this comment. HUD believes that the imposition of such prescriptive requirements would not be beneficial to the tenant endorsement process. HUD envisions an endorsement procedure that reflects the needs and resources of the project. However, HUD will issue, as determined to be necessary, guidance outlining best practices.

Comment: The definition of "tenant organization" should be amended to be more inclusive. The commenters wrote that the final rule should state that a "tenant organization" includes any organization based on the property, as well as any nonprofit organizing group working with the property's residents.

HUD Response: HUD has not revised the rule in response to this comment. HUD believes that the scope of the definition of "tenant organization," which is limited to households of occupied units of the property, is appropriate. Tenant-organizing groups may help establish a tenant organization, but do not themselves constitute tenant organizations for purposes of the rule.

Comment: The regulations should contain the Operating Procedures Guide regarding the posting of notices, meeting times and location, and priority purchaser "independence" criteria.

HUD Response: HUD has not revised the rule in response to this comment. HUD does not want to impose requirements as to all aspects of the tenant endorsement procedure. HUD intends to promote flexibility and responsiveness to each project. HUD will issue guidance, as needed, to inform participants of best practices for the endorsement process.

Comment: A record of the informational meeting should be submitted with the restructuring plan or as an addendum to the restructuring plan. The commenters wrote that the final rule should require that comments made by tenants at the informational meeting regarding needed repairs, current management, and other concerns must be captured in writing and submitted with the restructuring plan or as an addendum to the restructuring plan.

HUD Response: HUD has not revised the rule in response to this comment. HUD does not believe that a record of the informational meeting should be submitted with the restructuring plan,

because the meeting is outside the scope of HUD's review. This does not preclude tenants from conditioning their endorsement on the potential priority purchaser including such items in the restructuring plan; however, HUD chooses not to make this a requirement.

Comment: Claims or promises made by potential priority purchasers should be made a binding provision of the restructuring plan. The commenters stated that the final rule should provide that any claims or promises made to tenants in order to ensure their endorsement must be a binding provision in the restructuring plan, and enforceable by tenants.

HUD Response: HUD has not revised the rule in response to this comment. HUD believes that the rule adequately requires and encourages extensive tenant participation in the sale or transfer process when the sale or transfer is to a priority purchaser.

IV. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this final rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2502–0563. In accordance with the Paperwork Reduction Act, HUD 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 OMB control number.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (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 rule, which implements a statutory mandate to establish a program for the resolution of a narrow category of disputes, will not impose any federal mandates 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 was made at the proposed rule stage 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). The finding continues to apply and remains available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of

General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

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 owners of multifamily projects with Section 8 assistance. There are very few multifamily Section 8 owners who are small businesses. Therefore, 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

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.

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, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

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.

■ Accordingly, HUD amends 24 CFR parts 200 and 401 as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

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

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

■ 2. Revise § 200.20 to read as follows:

§ 200.20 Refinancing insured mortgages.

An existing mortgage insured under the Act, or an existing mortgage held by the Secretary that is subject to a mortgage restructuring and rental assistance sufficiency plan under the Multifamily Assisted Housing Reform and Affordability Act, 42 U.S.C. 1437f note (MAHRA), may be refinanced pursuant to section 223(a)(7) of the Act and such terms and conditions as may be established by the Commissioner. The term of such refinancing in connection with the implementation of an approved restructuring plan under section 401, subpart C of this title, may be up to, but not more than, 30 years.

■ 3. In § 200.40, revise paragraphs (h) and (j) to read as follows:

§ 200.40 HUD fees.

* * * * *

(h) *Transfer fee.* Upon application for the approval of a transfer of physical assets or the substitution of mortgagors, a transfer fee of 50 cents per thousand dollars shall be paid on the original face amount of the mortgage in all cases, except that a transfer fee shall not be paid where both parties to the transfer transaction are nonprofit purchasers, or when the transfer of physical assets or the substitution of mortgagors occurs contemporaneously with the restructuring of a mortgage pursuant to a restructuring plan under part 401, subpart C of this title.

* * * * *

(j) *Fees not required.* (1) The payment of an application, commitment, inspection, or reopening fee shall not be required in connection with the insurance of a mortgage involving the sale by the Secretary of any property acquired under any section or title of the Act.

(2) The payment of an application or commitment fee shall not be required in connection with the insurance of a mortgage used to facilitate a restructuring plan under part 401, subpart C of this title.

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

■ 4. The authority citation for part 401 continues to read as follows:

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

■ 5. In § 401.2(c), remove the definition of OMHAR, revise the definition of HUD, and add the definition of OAHP to read as follows:

§ 401.2 What special definitions apply to this part?

* * * * *

(c) * * *

HUD means a HUD official authorized to act under the provisions of MAHRA, and otherwise has the meaning given in § 5.100 of this title.

* * * * *

OAHP means the Office of Affordable Housing Preservation, and any successor office.

* * * * *

■ 6. In § 401.101, add a new paragraph (d) to read as follows:

§ 401.101 Which owners are ineligible to request Restructuring Plans?

* * * * *

(d) *Notice to tenants.* The PAE or HUD will give notice to tenants of a rejection in accordance with §§ 401.500(f)(2), 401.501, and 401.502.

■ 7. In § 401.304, revise paragraphs (a)(2), (b), and (d) to read as follows:

§ 401.304 PRA provisions on PAE compensation.

(a) * * *

(2) HUD will establish a substantially uniform baseline for base fees for public entities. The base fee for a PAE will be adjusted, if necessary, after the first term of the PRA.

* * * * *

(b) *Incentives.* The PRA may provide for incentives to be paid by HUD. While individual components may vary between PAEs (both public and private), the total amount potentially payable under the incentive package will be uniform. Objectives may include maximizing savings to the Federal Government, timely performance, tenant satisfaction with the PAE's performance, the infusion of public funds from non-HUD sources, and other benchmarks that HUD considers appropriate.

* * * * *

(d) *Other matters.* HUD will retain the right of final approval of any fee schedule. HUD will publish the standard form of PRA and the

compensation package annually on its Internet Web site.

■ 8. In § 401.309, revise the section heading and paragraphs (b)(2) and (c) to read as follows:

§ 401.309 PRA term and termination provisions; other provisions.

* * * * *

(b) * * *

(2) *Termination for convenience of Federal Government.* HUD may terminate a PRA, and may remove an eligible property from a PRA, at any time in accordance with the PRA or applicable law, regardless of whether the PAE is in default of any of its obligations under the PRA, if such termination is in the best interests of the Federal Government. The PRA will provide for payment to the PAE of a specified percentage of the base fee authorized by § 401.304(a) and amounts for reimbursement of third-party vendors to the PAE authorized by § 401.304(c).

* * * * *

(c) *Liability for damages.* During the term of a PRA, and notwithstanding any termination of a PRA, HUD may seek its actual, direct, and consequential damages from any PAE for failure to comply with its obligations under PRA.

* * * * *

■ 9. Revise the section heading and add a new sentence to the end of § 401.401 to read as follows:

§ 401.401 Consolidated Restructuring Plans.

* * * HUD's decision to approve or disapprove a Consolidated Restructuring Plan will be made on a case-by-case basis.

■ 10. Revise § 401.452 to read as follows:

§ 401.452 Property standards for rehabilitation.

The restructuring plan must provide for the level of rehabilitation needed to restore the property to the non-luxury standard adequate for the rental market for which the project was originally approved. If the standard has changed over time, the rehabilitation may include improvements to meet the current standards. The rehabilitation also may include the addition of significant features, in accordance with § 401.472. The result of the rehabilitation should be a project that can attract non-subsidized tenants, but competes on rent rather than on amenities. When a range of options exists for satisfying the rehabilitation standard, the PAE must choose the least costly option considering both capital and operating costs and taking into

account the marketability of the property and the remaining useful life of all building systems. Nothing in this part exempts rehabilitation from the requirements of part 8 of this title concerning accessibility to persons with disabilities.

■ 11. In § 401.461, revise paragraphs (a)(1), (a)(2)(ii), (b)(1), (b)(5), and (c) to read as follows:

§ 401.461 HUD-held second mortgage.

(a) *Amount.* (1) The Restructuring Plan must provide for a second mortgage to HUD whenever the Plan provides for either payment of a claim under section 541(b) of the National Housing Act (541(b) claim) or the modification or refinancing of a HUD-held first mortgage that results in a first mortgage with a lower principal amount. The term "second mortgage" in this section also includes a new HUD-held first mortgage (not a refinancing mortgage), if a full payment of claim is made under § 401.471 or if a full payment of claim is unnecessary because surplus project accounts are available to facilitate the Restructuring Plan, pursuant to section 517(b)(6) of MAHRA, or if § 401.460(a) does not permit a restructured first mortgage in any amount.

(2) * * *

(ii) The greater of:

(A) The section 541(b) claim (or the difference between the unpaid principal balance on HUD-held mortgage debt immediately before and after the restructuring), plus surplus project accounts from residual receipts accumulated pursuant to 24 CFR 880.205(e), 881.205(e), or 883.306(e) and derived from an expiring Section 8 Housing Assistance Payments contract and not otherwise distributed to the owner and made available to facilitate the Restructuring Plan pursuant to section 517(b)(6) of MAHRA, and

(B) The difference between the unpaid balance on the first mortgage immediately before and after the restructuring.

(b) *Terms and conditions.* (1) The second mortgage must have an interest rate of at least one percent, but not more than the applicable Federal rate.

* * * * *

(5) HUD will consider modification, assignment to the acquiring entity, or forgiveness of all or part of the second mortgage, if: The Secretary holds the second mortgage; and if the project has been sold or transferred to a tenant organization or tenant-endorsed community-based nonprofit or public agency that meets eligibility guidelines determined by HUD; accepts additional

affordability requirements acceptable to HUD; and requests such modification, assignment, or forgiveness. A community-based nonprofit group or public agency demonstrates that it is tenant-endorsed in accordance with § 401.480(e).

(c) *Additional mortgage to HUD.* (1) A Restructuring Plan shall require the owner to give an additional mortgage on the project to HUD in an amount that:

(i) For the restructuring of a mortgage insured by HUD, does not exceed the difference between:

(A) The amount of a section 541(b) claim paid under § 401.471 increased by any residual receipts, pursuant to 24 CFR 880.205(e), 881.205(e), or 883.306(e); and

(B) The principal amount of the second mortgage; or

(ii) For the restructuring of a mortgage held by HUD, does not exceed the difference between:

(A) The principal amount of a restructured HUD-held mortgage and the sum of, as applicable, a restructured HUD-held first mortgage at reduced principal amount, new mortgage funds paid to HUD at closing, and surplus project accounts other than residual receipts, pursuant to 24 CFR 880.205(e), 881.205(e), or 883.306(e); and

(B) The principal amount of the second mortgage.

(2) HUD may approve a Plan that does not require an additional mortgage, or provides for less than the full difference to be payable under the additional mortgage, or allows for subsequent modification, assignment, or forgiveness of the additional mortgage under any of the following circumstances:

(i) The anticipated recovery on the additional mortgage is less than the servicing costs; or

(ii) HUD has approved modification, assignment, or forgiveness of the second mortgage, pursuant to paragraph (b)(5) of this section.

(3) With respect to the second mortgage required by paragraph (a) of this section, any additional mortgage must:

(i) Be junior in priority;

(ii) Bear interest at the same rate; and

(iii) Require no payment until the second mortgage is satisfied, at which time it will be payable upon demand of HUD or as otherwise agreed by HUD.

■ 12. Revise § 401.472(b) to read as follows:

§ 401.472 Rehabilitation funding.

* * * * *

(b) *Statutory restrictions.* Any rehabilitation funded from the sources described in paragraph (a) of this section is subject to the requirements in

section 517(c) of MAHRA for an owner contribution.

(1) *Addition of significant features.*

With respect to significant added features, the required owner contribution will be as proposed by the PAE and approved by HUD, and not to exceed 20 percent of the total cost. Significant added features include the addition of air conditioning (including conversions from window air conditioning to central air conditioning), an elevator, or additional community space.

(2) *Cap on owner contribution.* If a restructuring plan includes additions other than those specified, and the PAE considers the additions significant, the PAE may propose to make those additions subject to the cap on owner contribution. In general, the owner will contribute 3 percent toward the cost of each significant addition. The PAE may propose a lower or higher owner contribution, not to exceed 20 percent, with respect to significant additions.

(3) *Other rehabilitation.* With respect to other rehabilitation, the required owner contribution will be calculated as 20 percent of the total cost of rehabilitation, unless HUD or the PAE determines that a higher percentage is required. The owner contribution must include a reasonable proportion (as determined by HUD) of the total cost of rehabilitation from nongovernmental resources.

(4) *Cooperatives.* The PAE may exempt housing cooperatives from the owner contribution requirement.

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■ 13. In § 401.480 revise paragraph (b) and add paragraph (e) to read as follows:

§ 401.480 Sale or transfer of project.

* * * * *

(b) *When must the restructuring plan include sale or transfer of the property?*

If the owner is determined to be ineligible pursuant to § 401.101 or § 401.403, or if the property is subject to an approved plan of action under the Emergency Low Income Housing Preservation Act of 1987 or the Low Income Housing Preservation and Resident Homeownership Act of 1990, as described in section 524(e)(3) of MAHRA, the property must be sold or transferred as a condition of implementation of a restructuring plan, which must include a condition that the owner sell or transfer the property to a purchaser acceptable to HUD, in accordance with paragraph (c) of this section. Such sale or transfer shall be a condition to the implementation of the Restructuring Plan.

* * * * *

(e) *Tenant endorsement procedure for priority purchaser status.* (1) *Required meeting.* (i) A community-based nonprofit or public agency purchaser requesting tenant endorsement to obtain priority purchaser status must conduct an informational meeting with the tenants of the project to disseminate information about both the endorsement request and the purchaser's plans for the project.

(ii) If the purchaser is acting contemporaneously with the Restructuring Plan, the informational meeting must occur at the second meeting of tenants convened by the PAE to discuss the restructuring plan pursuant to § 401.500(d).

(iii) A representative of the purchasing entity must attend the informational meeting to present its plans for the acquisition and improvement of the project and to respond to questions about the purchaser's plans for the property.

(iv) Tenants shall have the opportunity, but are not to be required, to vote for or against the acquisition at the informational meeting.

(v) For the purpose of obtaining tenant endorsement, a purchaser may conduct additional meetings with tenants in accordance with the notice requirements of paragraphs (e)(2) and (e)(3) of this section.

(2) *Parties who must receive notice.* The purchaser must deliver notice of the informational meeting, and any subsequent meeting, to each tenant household in the project and any tenant organization for the project, and post notices of the meeting in the project.

(3) *Notice contents.* The notice must identify the place, date, and time of the informational meeting, and any subsequent meeting. Include a brief description of the purpose of the meeting and provide a narrative outlining the purchaser's plans for the project, including any request made to HUD for debt relief under § 401.461(b)(5) of the second and any additional mortgage.

(4) *Tenant endorsement.* (i) A purchaser may demonstrate that it is tenant endorsed by submitting documentation to HUD that a majority (51 percent) of the tenant heads of household have given their endorsement in writing. Such documentation may include, but is not limited to, ballots, letters of support, or petitions. The endorsement of tenants who did not attend, or vote at, the informational meeting, or any subsequent meeting, may be sought directly from each of these tenants subsequent to the meeting.

(ii)(A) If the purchaser has made a reasonable effort to obtain the endorsement of a majority (51 percent) of the tenants and the necessary percentage of votes was not obtained, the purchaser may seek HUD approval to obtain endorsement based on a lower percentage of endorsing tenants.

(B) The purchaser must deliver notice to each tenant household that the purchaser is seeking HUD approval of a tenant endorsement based on less than 51 percent of tenant approval and provide tenants with at least 10 days from the date of the notice to submit comments to the purchaser on the approval of endorsement.

(C) The purchaser and/or seller must submit, in writing, to HUD an account of the efforts taken to secure tenant endorsement, the number and percentage of tenants voting for and against endorsement, and any comments received from tenants regarding the approval of endorsement.

(D) HUD will determine whether or not to approve endorsement on the basis of all the information available to HUD and will promptly notify the purchaser of HUD's determination.

■ 14. Revise § 401.500(f)(2) to read as follows:

§ 401.500 Required notices to third parties and meeting with third parties.

* * * * *

(f) * * *

(2) Within 10 days after a determination that the Restructuring Plan will not move forward for any reason, HUD or the PAE shall provide notice to affected tenants that describes the reasons for the failure of the Plan to move forward and the availability of tenant-based assistance under § 401.602(c).

■ 15. Revise § 401.645 to read as follows:

§ 401.645 Owner request to review HUD decision.

(a) *HUD notice of decision.* (1) HUD will provide notice to the owner of:

- (i) A decision that the owner or project is not eligible for the Mark-to-Market program;
- (ii) A decision not to offer a proposed Restructuring Commitment to the owner; and
- (iii) A decision to offer a proposed Restructuring Commitment. The proposed Restructuring Commitment provided to the owner constitutes the notice of decision for purposes of requesting a review of a HUD decision.

(2) The notice of decision will include the reasons for the decision.

(3) The notice of decision will also notify the owner of the right to request a review of the decision or to cure any deficiencies on which the decision was based; the date by which the review request must be submitted or the deficiencies must be cured, which will be at least 30 days after the date of the notice of decision; and the address to which the review request is to be submitted.

(b) *Review request by owner.* (1) *Written statement.* The review request must specify in writing:

- (i) Each item of the decision to which the owner objects;
- (ii) The reasons for the owner's objections; and
- (iii) All information in support of the objections that the owner wants HUD to consider.

(2) *Scope of information submitted.* HUD will not consider information first submitted to HUD in conjunction with an owner's request for review except for:

- (i) Information that could not have been submitted previously; and
- (ii) New health and safety information.

(c) *HUD review and final decision.* (1) HUD may expand the scope of review beyond the issues raised by the owner and may review and modify any term within the Restructuring Commitment without regard to whether the owner has raised an objection to that term, including adjustments to rents or expenses as underwritten by the PAE. If HUD does expand the scope of review, HUD will notify the owner of such action and provide an additional 30 days for the owner to raise any additional objections and provide additional information.

(2) Within 30 days of HUD's receipt of the owner's review request and any additional objections and information, HUD will review the request and, using a standard of what is reasonable in light of all of the evidence presented, issue a final decision. The final decision will:

- (i) Affirm the notice of decision; or
- (ii) Modify the notice of decision and, if applicable, modify the Restructuring Commitment, in which event HUD will issue an amended or restated Restructuring Commitment that incorporates the final decision; or
- (iii) Revoke the notice of decision and, if applicable, terminate the Restructuring Commitment and notify the owner that the owner is not eligible for participation in the Mark-to-Market

program or that a restructuring of the property is not feasible.

■ 16. Revise § 401.650 to read as follows:

§ 401.650 When may the owner request an administrative appeal?

(a) *No review request by owner.* If the owner does not request a review of the notice of decision under § 401.645 or does not execute the proposed Restructuring Commitment within the time provided in the notice of decision, HUD will send a written notice to the owner stating that the notice of decision is HUD's final decision and that the owner has 10 days after receipt of the letter to accept the decision, including a Restructuring Commitment, if applicable, or request an administrative appeal in accordance with § 401.651.

(b) *Upon receipt of final decision.* HUD will send the owner a written notice of the final decision under § 401.645 that will also provide the owner with 10 days to request an administrative appeal of the final decision.

(c) *HUD decision to accelerate the second mortgage.* Upon receipt of notice from HUD of a decision to accelerate the second mortgage under § 401.461(b)(4), the owner may request an administrative appeal in accordance with § 401.651.

■ 17. In § 401.651, revise paragraph (b) to read as follows:

§ 401.651 Appeal procedures.

* * * * *

(b) *Written decision.* Within 20 days after the conference, or 20 days after any agreed-upon extension of time for submission of additional materials by or on behalf of the owner, HUD will review the evidence presented for the administrative appeal and, using the standard of whether the determination of the final decision was reasonable, will advise the owner in writing of the decision to terminate, modify, or affirm the original decision. HUD will act, as necessary, to implement the decision, for example, by offering a revised Restructuring Commitment to the owner.

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Dated: November 14, 2007.

Brian D. Montgomery,
Assistant Secretary for Housing—Federal
Housing Commissioner.

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