

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 401

[Docket No. FR-4791-F-01]

#### Authority To Waive the Market-to-Market Regulations

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

**ACTION:** Final rule.

**SUMMARY:** This final rule revises HUD's regulations for the Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark-to-Market). The final rule provides that the Assistant Secretary for Housing-Federal Housing Commissioner, and not the Director of the Office of Multifamily Housing Assistance Restructuring (OMHAR), has the authority to waive the Mark-to-Market regulation.

**DATES:** Effective Date: February 24, 2003.

**FOR FURTHER INFORMATION CONTACT:** Eliot C. Horowitz, Senior Advisor to the Assistant Secretary for Housing-Federal Housing Commissioner, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9110, Washington, DC 20410-0500. Telephone (202) 708-1490 (this is not a toll-free number). A telecommunications device for hearing- and speech-impaired persons (TTY) is available at 1-800-877-9339 (Federal Information relay Service) (this is a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Department of Housing and Urban Development Reform Act (Pub. L. 101-235; 103 Stat. 1987; December 15, 1989) (Reform Act), included provisions governing the manner in which HUD can waive regulations. Specifically, section 106 of the Reform Act amended section 7 of the Department of Housing and Development Act (HUD Act) by adding a new subsection 7(q) (42 U.S.C. 3535 (7)(q)). Section 7(q)(2) of the HUD Act provides that a regulation can only be waived "by an individual of Assistant Secretary rank or equivalent rank, who is authorized to issue the regulation to be waived."

Section 622 of the Mark-to-Market Extension Act of 2001 (Title VI of the 2002 Appropriations Act for the Departments of Labor, Health and Human Services, and related agencies, Public Law 107-116, 115 Stat. 2177, approved January 10, 2002) amended section 572 of the Multifamily Assisted

Housing Reform and Affordability Act of 1997, 42 U.S.C. 1437f note, (MAHRA), altering the manner in which the Director of OMHAR is appointed. Previously, the President made the appointment, subject to confirmation by the United States Senate. Under the new law, the President makes the appointment, but Senate confirmation is not required. Consequently, the individual appointed as the Director of OMHAR is not of the equivalent rank of an Assistant Secretary (as the latter appointment requires Senate confirmation).

The Mark-to-Market Extension Act of 2001 also amended section 578 of MAHRA to provide that "all authority and responsibilities assigned under this subtitle to the Secretary shall be carried out through the Assistant Secretary of the Department of Housing and Urban Development who is the Federal Housing Commissioner."

In tandem, the three legislative provisions cited above require that the Assistant Secretary for Housing-Federal Housing Commissioner is authorized to waive regulations under part 401, whereas the Director of OMHAR cannot. The Assistant Secretary for Housing-Federal Housing Commissioner has undertaken this responsibility since the enactment of the Mark-to-Market Extension Act of 2001. Today's amendment to 24 CFR 401.3 updates the regulation to comport with current law and practice.

#### Findings and Certification

##### *Justification for Final Rule*

In general, the Department publishes a rule for public comment before issuing the rule for effect, in accordance with its own regulations on rulemaking at 24 CFR part 10. Part 10 includes exceptions to the general rule, including where the regulatory amendment governs the Department's organization, internal practices or procedures. This rule amendment reflects statutory requirements that pertain to the Department's organization, practices and procedures and merely conforms part 401 to section 572 of MAHRA, as amended. The Department has determined, therefore, that prior notice and comment are not required.

##### *Environmental Review*

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction,

or construction materials, manufactured housing or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

##### *Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (12 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 will not impose a federal mandate that will result in expenditures by state, local, or tribal governments and the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

##### *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 would not have a significant economic impact on a substantial number of small entities. The reason for HUD's determination is that the rule only addresses the Department's internal practices and procedures.

##### *Executive Order 13132, Federalism*

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (2) the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. 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.

##### **List of Subjects in 24 CFR Part 401**

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

Accordingly, for the reasons described in the preamble, HUD is amending 24 CFR part 401 to read as follows:

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

1. The authority for 24 CFR part 401 continues to read as follows:

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

2. Revise § 401.3 to read as follows:

**§ 401.3 Who may waive provisions in this part?**

The Assistant Secretary for Housing-Federal Housing Commissioner may

waive any provision of this part, subject to § 5.110 of this title.

Dated: January 9, 2003.

**John C. Weicher,**

*Assistant Secretary for Housing-Federal Housing Commissioner.*

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