

DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

24 CFR Part 207

[Docket No. FR-4679-F-03]

RIN 2502-AH64

Mortgage Insurance Premiums in Multifamily Housing Programs

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

ACTION: Final rule.

SUMMARY: This final rule adopts, without change, the prior interim rule published in the **Federal Register** on July 2, 2001, which revised Federal Housing Administration (FHA) regulations to permit the Secretary to set mortgage insurance premiums by program, within the full range of HUD's statutory authority, through notice. Premiums for Fiscal Year (FY) 2003 were announced in an August 30, 2002, **Federal Register** notice published.

DATES: Effective Date: April 16, 2003.

FOR FURTHER INFORMATION CONTACT: Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, at (202) 708-1142 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service toll-free at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On July 2, 2001, HUD issued an interim rule revising the regulatory system for establishing mortgage insurance premiums. (See 66 FR 35072.) Rather than fixing a specific premium, expressed as a percentage of the outstanding principal balance on the mortgage loan, the interim rule authorizes HUD to set a premium anywhere within the range permitted by statute, that is, between .25 percent and 1 percent of the outstanding principal balance. Specific premium rates would be set by subsequent notice, which would provide a 30-day period for public comment. More detailed background information can be found in the preamble to the interim rule at 66 FR 35070-35072. The notice that followed the July 2, 2001, interim rule, and published on August 30, 2002 (67 FR 55859), set the actual premiums for FY 2002 and FY 2003.

II. This Final Rule

This final rule adopts the interim rule without change.

III. Public Comments

HUD received five public comments on the interim rule and the accompanying notice. Four comments were from housing and mortgage industry trade groups, and one was from a law firm. The commenters addressed both rulemaking concerns and substantive concerns regarding the new mortgage insurance premium rates and the method of establishing rates by notice.

A. Rulemaking Issues

1. Interim Rulemaking

Comment: Four commenters objected to the use of interim rulemaking in this case. Two commenters stated that this type of change is highly significant to program participants and requires HUD to have the benefit of public comment. One of these commenters further stated that the purpose of advance public notice is to ensure public participation in rules of substantial import, such as this one. Without the benefit of public comment, Congress and the public cannot be assured of fair consideration of all significant impacts of the interim rule.

This commenter also stated that this rule does not fall into any rulemaking exception in the Administrative Procedure Act (APA) or HUD's rulemaking regulations at 24 CFR part 10. The commenter stated that program shutdown does not constitute "good cause" to dispense with regular public rulemaking procedures because decreasing credit subsidy is not a new crisis. The commenter stated that this has happened in the past and is something with which program participants are familiar. The commenter stated that, in the past, similar situations have always been resolved by appropriate legislative action in Congress. In addition, the new fiscal year is only weeks away and new credit subsidy will be available.

HUD Response: Unlike prior fiscal years, the amount of credit subsidy that Congress appropriated for FY 2002 would not have sufficed to keep the programs requiring credit subsidy in operation for the duration of the fiscal year. Additionally, HUD believes this situation is likely to recur. Therefore, an immediate change in the credit subsidy structure was necessary, in order for FHA's major section 221(d)(4) and certain other programs to be able to operate without credit subsidy in future fiscal years. Notwithstanding the

commenter's opinion that participants have become used to repeated program shutdowns, HUD does not believe that an environment of repeated shutdowns is an appropriate way to operate mortgage insurance programs, and that good cause existed to remedy this situation in the most expeditious manner possible, and indeed that it would have been contrary to the public interest not to do so.

Comment: Two commenters stated that the "good cause" exemption is not met because the lack of credit subsidy could have been addressed in another way, which is by taking advantage of an emergency credit subsidy allocation of \$40 million, but the Department decided not to take this action. The commenters stated that issuance of the accompanying notice was based on the same faulty justification for interim rulemaking.

HUD Response: The Conference Report (H.R. Conf. Rep. 106-1033) that accompanied the FY 2001 Consolidated Appropriations Act (Pub. L. 106-554; approved December 21, 2000), was highly critical of HUD for being in the situation where the emergency appropriation might have to be used. (See House Report 106-1033, at 331-332.) In order to access the emergency appropriation, HUD would have had to request the President to transfer to Congress an official budget request including a designation of the amount as an emergency requirement. While HUD believes that it is important that there be sufficient credit subsidy for its housing programs, HUD does not believe that the shortfall rose to the level of an emergency, particularly as there are other solutions.

Furthermore, use of "ad hoc" appropriations will not solve the long-term credit subsidy problem. For example, Congress need not approve HUD's requests for such appropriations (as in the case of HUD's request for a non-emergency supplemental appropriation in FY 2001). Rather, the credit subsidy problem can best be solved by the approach of adjusting mortgage insurance premiums (MIP) through regulation so as to decrease the need for credit subsidy.

Comment: Two of the commenters stated that the use of abbreviated comment procedures for future MIP changes also would violate the APA. One commenter stated that by removing future premium changes from full notice and comment rulemaking, the rule would make them subject to the "whim" of the Department. The commenter stated that since changes in the premium can affect the viability of housing projects and the rents of the