

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

**24 CFR Part 200**

[Docket No. FR-5290-F-02]

RIN 2502-A173

**Prohibition of the Escrowing of Tax  
Credit Equity**

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

**ACTION:** Final rule.

**SUMMARY:** This rule conforms HUD's Federal Housing Administration multifamily mortgage insurance regulations to a provision in Title VIII of the Housing and Economic Recovery Act of 2008 that prohibits a requirement that tax credit sales proceeds be placed into escrow, at the time of initial endorsement, for assurance of project completion and to pay the initial service charge, carrying charges, and legal and organizational expenses incident to the construction of the project. This rule does not prohibit HUD from requiring escrows of funds for other purposes, such as for working capital. The rule also makes other changes to reduce burdens on the use of tax credits.

**DATES:** *Effective Date:* September 22, 2010.

**FOR FURTHER INFORMATION CONTACT:** Iris Agubuzo, Project Manager, Policy Division, Office of Multifamily Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6158, Washington, DC 20410-8000, telephone number 202-402-2662 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On October 9, 2009, HUD published a proposed rule (74 FR 52354) implementing section 2834(c) of the Housing and Economic Development Act of 2008, Public Law 110-289 (approved July 30, 2008) (HERA), codified at 12 U.S.C. 1715s, which prohibits HUD from requiring the escrowing of tax credit proceeds to assure project completion. This statutory provision changes HUD's practice of requiring a substantial portion of the low-income housing tax credit equity under 26 U.S.C. 42 to be placed in escrow for potential future use over the life of the project at the time of initial endorsement. This requirement

has had an inhibiting effect on the building of new low-income housing tax credit projects, and often required the use of bridge loans until the escrowed proceeds were released. A full discussion of section 2834(c) of HERA, the tax credit programs related to this rule, and the proposed rule can be found in the proposed rule at 74 FR 52354-52355.

**II. Public Comments**

The public comment period for this rule closed on December 8, 2009. HUD received one comment during the public comment period, from a trade association involved with the mortgage industry, which was supportive of the rule. This comment may be viewed at <http://www.regulations.gov>.

**III. This Final Rule**

This final rule conforms 24 CFR 200.54 to section 2834(c) of HERA, codified as 12 U.S.C. 1715s. This final rule prohibits HUD from requiring the escrowing of equity from the sales of tax credits. In addition, the rule extends the same treatment to historic and New Markets Tax Credits so that the escrow requirement is eliminated when equity is provided from these types of tax credits. Finally, proceeds from New Markets Tax Credits are added to 24 CFR 200.54(c) as a type of funding that need not be fully disbursed prior to the disbursement of the mortgage proceeds, where approved by the Federal Housing Commissioner.

**IV. Findings and Certifications**

*Environmental Impact*

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).

*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.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), this final rule was reviewed before publication, and the undersigned certifies that this rule does not have a significant economic impact on a substantial number of small entities. There are no anticompetitive discriminatory aspects of the rule with regard to small entities, and there are no unusual procedures that need to be complied with by small entities. This rule will allow mortgagors to retain more of their tax credit proceeds and, in many cases, relieve them of the need to take out a costly bridge loan to pay the costs for assurance of completion. Therefore, this rule, in conformance with statutory mandate, removes a costly regulatory requirement and does not impose any substantial economic impact on 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 that an initial regulatory flexibility analysis is not required.

*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 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.

*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 on the private sector. This final rule does not impose any Federal mandates on any State, local, or tribal government, or on the private sector, within the meaning of UMRA.

**List of Subjects in 24 CFR Part 200**

Administrative practice and procedure, Government contracts, Organization and functions (Government agencies).

*Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance (CFDA) program numbers for

the programs related to this rulemaking are 14.112, 14.123, 14.126, 14.134, 14.135, 14.138, 14.139, 14.151, and 14.155.

■ For the foregoing reasons, HUD amends 24 CFR part 200, 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 § 200.54 to read as follows:

##### **§ 200.54 Project completion funding.**

(a) Except as provided in paragraph (d) of this section, the mortgagor shall deposit with the mortgagee cash deemed by the Commissioner to be sufficient, when added to the proceeds of the insured mortgage, to assure completion of the project and to pay the initial service charge, carrying charges, and legal and organizational expenses

incident to the construction of the project. The Commissioner may accept a lesser cash deposit or an alternative to a cash deposit in accordance with terms and conditions established by the Commissioner, where the required funding is to be provided by a grant or loan from a Federal, State, or local government agency or instrumentality.

(b) An agreement acceptable to the Commissioner shall require that funds provided by the mortgagor under requirements of this section must be disbursed in full for project work, material, and incidental charges and expenses before disbursement of any mortgage proceeds, except:

(c) Low-income housing tax credit syndication proceeds, historic tax-credit syndication proceeds, New Markets Tax Credits proceeds, or funds provided by a grant or loan from a Federal, State, or local governmental agency or instrumentality under requirements of this section need not be fully disbursed before the disbursement of mortgage proceeds, where approved by the

Commissioner in accordance with terms, conditions, and standards established by the Commissioner;

(d) In the case of a mortgage insured under any provision of this title executed in connection with the purchase, construction, rehabilitation, or refinancing of a multifamily tax credit project, the Commissioner may not require:

(1) The escrowing of equity provided by Low-Income Housing Tax Credits for the project pursuant to Title 26, section 42 of the Internal Revenue Code of 1986;

(2) The escrowing of equity provided by historic rehabilitation tax credits, New Markets Tax Credits, or any other form of security, such as a letter of credit.

Dated: August 11, 2010.

**David H. Stevens,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

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