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**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Part 207**

**[Docket No. FR-5583-P-01]  
RIN 2502-AJ16**

**Federal Housing Administration (FHA) Multifamily Mortgage Insurance;  
Capturing Excess Claim Proceeds**

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend HUD's regulations covering the contract rights and obligations of mortgagees participating in FHA multifamily mortgage insurance programs, to address reimbursement to FHA of excess claim proceeds. When a mortgagee finances mortgages through the issuance and sale of bonds or through bond anticipation notes, the mortgagee uses the FHA insurance claim funds to pay off the remaining bond debts. At times, the amount paid by the FHA insurance claim is greater than the remaining bond debts. This proposed rule would require mortgagees to return to FHA the excess bond funds that remain after FHA's payment is used to satisfy the bonds. HUD requires similar payments of excess bond funds on obligations of public housing agencies and, thus, the proposed rule would provide consistency in the administration of HUD's bond financing programs.

**DATES:** Comment Due Date: **[INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban

Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

**1. Submission of Comments by Mail.** Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

**2. Electronic Submission of Comments.** Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*Note:* To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

**Public Inspection of Public Comments.** All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202-708-3055 (this is not a toll-free number).

Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, at toll free, 800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** James Mitchell, Project Officer, Office of Multifamily Housing Programs, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 7164, Washington, DC 20410; telephone number 202-708-2612 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the Federal Relay Service, toll free, at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

FHA provides mortgage insurance on loans made by FHA-approved lenders for single-family and multifamily homes. FHA mortgage insurance provides lenders with protection against losses as the result of single-family and multifamily project owners defaulting on their mortgage loans. By insuring loans made to FHA-approved lenders, FHA facilitates the availability of mortgage financing and helps to expand affordable housing. The FHA multifamily insurance program is authorized by section 207 of the National Housing Act (12 U.S.C. 1713). HUD's regulations implementing multifamily mortgage insurance eligibility requirements and contract rights and obligations can be found at 24 CFR part 207 (entitled "Multifamily Housing Mortgage Insurance").

Under part 207, upon an assignment of the mortgage or a conveyance of the property to FHA, FHA will pay insurance benefits to the mortgagee. When the loan is bond financed<sup>1</sup>, the lender remits the payment to the bond trustee who pays off the bond debts, debt services on the bond, and fees and expenses owed to parties (such as the trustee or the bond issuer). The amount of the claim is determined in compliance with a regulatory formula<sup>2</sup> and is meant to provide only the funds needed to settle the claim. Most of the factors in determining the proper claim amount are known. However, the bond trust indenture (contract) requires that certain reserves be held, including a debt service reserve, to maintain payments to bond holders prior to a default in the case where the mortgagor does not make proper payment. Funds in the reserve accounts earn interest and, given the passage of time and uncertainty of short-term interest rates, it is difficult to know how much more money will be in the reserves at the time the claim is settled and all the obligations are finally paid. As a result, the trustee is sometimes left with additional funds, also known as “excess bond funds.”

Excess bond funds are then distributed by the bond trustee, according to the trust indenture agreement, to the mortgagor, the mortgagee, FHA, or other third parties. As a result, the mortgagor or the mortgagee may receive excess bond funds stemming from FHA’s payment on the insurance claim. FHA’s insurance payment is designed to make the mortgagee whole when the mortgagor defaults on the mortgage loan. Under the current distribution, a multifamily project owner and lender may benefit from the mortgage default, which is contrary to the intended results of FHA mortgage insurance to increase the availability of affordable housing.

## **II. This Proposed Rule**

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<sup>1</sup> HUD’s regulation at 24 CFR 207.258 provides that mortgages may be funded with the proceeds of state or local bonds, Government National Mortgage Association (GNMA or Ginnie Mae) mortgage-backed securities, participation certificates, or other bond obligations, as may be specified by the FHA Commissioner.

<sup>2</sup> See 24 CFR 207.259.

Through this proposed rule, HUD seeks to address this concern by requiring mortgagees to reimburse FHA for the excess bond funds that remain after the insurance claim payment is used to satisfy the bonds. HUD requires similar payments of excess bond funds on obligations of public housing agencies, under 24 CFR part 811, entitled “Tax Exemption of Obligations of Public Housing Agencies and Related Amendments” (see especially 24 CFR 811.108, which addresses debt service reserve). Accordingly, the proposed rule would not only rectify the possibility that a mortgagor or mortgagee benefits from the mortgage default, but would also provide consistency in the administration of HUD’s bond financing programs. The specific regulatory amendments that would be made by this proposed rule are as follows:

This proposed rule would add a new § 207.261 that requires mortgagees that use the issuance and sale of bonds or bond anticipation notes to finance FHA-insured mortgages on multifamily housing to return excess bond funds to FHA.

New § 207.261 would require the mortgagee to do three things. First, the mortgagee must include in the bond trust indenture language that, upon a conveyance or assignment of the mortgage, the bond trustee must remit to the mortgagee all remaining excess bond funds after the issuance of the refunding bond and other required payments. For purposes of § 207.261, “excess bond funds” would mean (1) money remaining in all funds and accounts other than a rebate fund,<sup>3</sup> and (2) any other funds remaining under the indenture after payment, or provision for payment, of debt service on the bonds and the fees and expenses of the credit enhancer, issuer, trustee, and other such parties unrelated to the mortgagor (other than funds originally deposited

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<sup>3</sup> A rebate fund, also referred to as an arbitrage rebate fund is a fund typically established under the bond contract for tax-exempt bonds in which arbitrage earnings from investments in various funds and accounts holding bond proceeds are accumulated in order to make arbitrage rebate payments to the Federal Government. See [http://www.msrb.org/msrb1/glossary/view\\_def.asp?param=ARBITRAGEREBATEFUND](http://www.msrb.org/msrb1/glossary/view_def.asp?param=ARBITRAGEREBATEFUND). See also <http://www.irs.gov/pub/irs-tege/part2e02.pdf>.

by the mortgagor or related parties on or before the date of issuance of the refunding bonds). Second, the mortgagee, upon FHA's payment of an insurance claim, must legally enforce the trust indenture to collect all of the remaining excess bond funds. Finally, the mortgagee must remit to FHA all excess bond funds that result from FHA's payment of an insurance claim after a conveyance or assignment of the mortgage to FHA, no later than 6 months following the date that FHA pays the mortgage insurance claim.

The proposed rule would also amend § 207.251, which is the definition section for the part 207, subpart B, regulations, to include a definition of "rebate fund" which is based on the definitions provided in footnote 3 of this preamble.

### **III. Cost and Benefits of the Proposed Rule**

The proposed rule would amend HUD's regulations covering the contract rights and obligations of mortgagees participating in FHA multifamily insurance programs and using tax-exempt bonds under section 103 of the Internal Revenue Code (IRC)<sup>4</sup>, to make explicit that proceeds remaining after bond debts have been paid off as the result of a claim must be returned to FHA. The existence and possible value of any excess bond funds to individual private entities cannot be precisely stated, as such measures are dependent on the following: the occurrence and timing of a default (which is by definition an unforeseen result of any nonfraudulent lending in the program); the current interest rate environment;<sup>5</sup> the bond indenture; and, then, on the independent actions that HUD and the trustee take. As a result, the value of any windfall is likely to be limited. Approximately 3 percent of total claims are financed by issuing section 103 tax-exempt bonds. In 2012, there were \$189 million in claims and 3 percent of this number,

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<sup>4</sup> Under section 103, payments of interest on State or local bonds are excludable from gross income. (See 26 U.S.C. 103.)

<sup>5</sup> Reserve funds may grow more slowly due to low interest rates and the low rates on taxable financing have made tax-exempt financing less advantageous to developers.

\$5.67 million, provides an estimate of the total claims for tax-exempt bond financed projects. HUD estimates that about 1.16 percent of outstanding balances are subject to recapture; therefore, in 2012 there was an estimated \$66,000 in excess claims that would be recaptured by this rule.

The transfer of excess claim funds to FHA as proposed by this rule makes explicit that FHA's payment of a claim for bond debts is not to result in either a windfall for the mortgagee, the mortgagor, or any third party. Given the inherently unexpected nature and uncertain value of any excess claims, the proposed rule, if enacted, is not expected to have a significant impact on future mortgagees or their interest or behavior in the program. If mortgagee participation in the program is unlikely to be affected, the proposed rule is also unlikely to affect how future mortgagors or others experience the program. It should be noted that, while the impact of the proposed rule on any individual entity is likely to be inconsequential, there is value to FHA from the proposed change. Across all of its borrowers, the occurrence of defaults and the payment of excess claims are statistically likely events, and the aggregate amount of program funds currently expended on such windfall payouts across all claims over time is sufficient to motivate the proposed rule. However, based on the 2012 data pertaining to claims for tax-exempt bond financed projects, as discussed in the preceding paragraph, the aggregate amount of funds is well below the amount that would make this rule economically significant.

#### **IV. Findings and Certifications**

##### **Paperwork Reduction Act**

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). In accordance with the Paperwork Reduction Act, an agency

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.

The burden of the information collections in this proposed rule is estimated as follows:

**REPORTING AND RECORDKEEPING BURDEN:**

**[OFFICE OF HOUSING TO PROVIDE MATRIX INFORMATION]**

<b>Section Reference</b>	<b>Number of Respondents</b>	<b>Number of Responses Per Respondent</b>	<b>Estimated Average Time for Requirement (in Hours)</b>	<b>Estimated Annual Burden (in Hours)</b>
§ 207.261(a)	15	1	.5	7.5
<b>Totals</b>				7.5

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., through permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposal by name and docket number and must be sent to:

HUD Desk Officer,  
Office of Management and Budget  
New Executive Office Building  
Washington, DC 20503  
Fax number: 202-395-6947

and

Reports Liaison Officer  
Office of Housing  
Department of Housing and Urban Development  
Room 9128  
451 7th Street, SW  
Washington, DC 20410

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 605(b)) generally requires an agency to conduct 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. The proposed rule would not impose any economic burdens on FHA-approved mortgagees. The proposed regulatory amendments would not modify the terms of FHA mortgage insurance through which mortgagees are made financially whole in the case of a mortgage default and filing of a mortgage insurance claim. Rather, the proposed rule seeks to rectify the possibility that a mortgagor and mortgagee may profit from a mortgage default, which is inconsistent with HUD's public housing bond financing regulations, the purpose of the FHA programs, and the proper administration of the FHA mortgage insurance funds. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

#### 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 rule will not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

#### 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

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

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for FHA mortgage insurance for the purchase or refinancing of existing multifamily housing projects is 14.155.

#### **List of Subjects in 24 CFR Part 207**

Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

Accordingly, for the reasons stated in the preamble, HUD proposes to revise 24 CFR part 207 as follows:

#### **PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE**

1. The authority citation for part 207 continues to read as follows:

**Authority:** 12 U.S.C. 1701z-11(e), 1709(c)(1), 1713, and 1715b; 42 U.S.C. 3535(d)

2. Revise § 207.251 to read as follows:

**§ 207.251 Definitions.**

As used in this subpart:

*Act* means the National Housing Act, as amended.

*Commissioner* means the Federal Housing Commissioner.

*Contract of insurance* means the agreement evidenced by such endorsement and includes the terms, conditions and provisions of this part and of the National Housing Act.

*Insured mortgage* means a mortgage which has been insured by the endorsement of the credit instrument by the Commissioner, or his duly authorized representative.

*Mortgage* means such a first lien upon real estate and other property as is commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the State, district or territory in which the real estate is located, together with the credit instrument or instruments, if any, secured thereby. In any instance where an operating loss loan is involved, the term shall include both the original mortgage and the instrument securing the operating loss loan.

*Mortgagee* means the original lender under a mortgage its successors and such of its assigns as are approved by the Commissioner, and includes the holders of the credit instruments issued under a trust indenture, mortgage or deed of trust pursuant to which such holders act by and through a trustee therein named.

*Mortgagor* means the original borrower under a mortgage and its successors and such of its assigns as are approved by the Commissioner.

*Rebate fund* means a separate fund established under a contract or agreement for tax-exempt bonds in which amounts (excess interest earnings from the tax-exempt bonds) must be deposited to make rebate payments to the federal government under the Internal Revenue Code.

3. Add § 207.261 to read as follows:

**§ 207.261 Rebate of excess claim proceeds.**

A mortgagee that finances housing insured under this part through the issuance and sale of bonds or bond anticipation notes shall:

(a) Include language in the trust indenture that states that in the event of an assignment or conveyance of the mortgage, subsequent to the issuance of the bonds, all money remaining in all funds and accounts other than the rebate fund, and any other funds remaining under the indenture after payment or provision for payment of debt service on the bonds and the fees and expenses of the credit enhancer, issuer, trustee, and other such parties unrelated to the mortgagor (other than funds originally deposited by the mortgagor or related parties on or before the date of issuance of the refunding bonds) shall be returned to the mortgagee; and

(b) Upon the Commissioner's payment of a mortgage insurance claim under § 207.258, the mortgagee shall take all legally entitled actions to enforce the clause required by paragraph (a) of this section and pay the Commissioner any remaining bond funds returned to the mortgagee by the bond trustee, no later than 6 months after the date of the Commissioner's payment of the mortgage insurance claim.

Date: June 12, 2013

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Carol J. Galante  
Assistant Secretary for Housing—  
Federal Housing Commissioner

**[FR-5583-P-01]**

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