



## 24 CFR Part 401

[Docket No. FR-6122-F-02]

RIN 2502-AJ48

### Rent Adjustments in the Mark-to-Market Program

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

**ACTION:** Final rule.

**SUMMARY:** The Mark-to-Market program preserves affordability and availability of affordable rental multifamily properties with federally insured mortgages, reducing rents to market levels by restructuring existing debt to levels supportable by these rents. This final rule revises the Mark-to-Market program regulations to clarify that annual adjustment of restructured rents under the program will be based on an operating cost adjustment factor determined by HUD and to further clarify when HUD may approve rent adjustments on a budget basis. This final rule will bring greater clarity to the Mark-to-Market program and will align HUD’s regulations with recent legislative changes that specifically allow budget-based rent adjustments for the program.

**DATES:** Effective: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

**FOR FURTHER INFORMATION CONTACT:** Thomas R. Davis, Director, Office of Recapitalization, Office of Multifamily Housing Programs, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6106, Washington, DC 20410; telephone number 202-402-7549. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Multifamily Assisted Housing Reform and Affordability Act of 1997 (Title V of Pub. L. 105-65, approved October 27, 1997, and codified at 42 U.S.C. 1437f note) (MAHRA) authorizes the Mark-to-Market program, which is designed to preserve low-income rental housing affordability while reducing the long-term costs of federal rental assistance. Under the program, multifamily housing projects with above-market rents that are subject to an expiring contract under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) (Section 8) undergo both a restructuring of the project's HUD-insured or HUD-held debt and an initial renewal of its Section 8 Housing Assistance Payments (HAP) contract so that a new first loan is serviceable based on modified rents.

On July 16, 2020, HUD issued a proposed rule in the Federal Register, at 85 FR 43165, which proposed to revise the Mark-to-Market program regulations to clarify that all annual rent adjustments for projects subject to a restructuring plan are solely by application of an operating cost adjustment factor (OCAF) established by HUD. The current regulations, at 24 CFR 401.412(b), authorize HUD to approve a request for a budget-based rent adjustment in lieu of an OCAF. HUD proposed to remove the budget-based rent adjustment provision as discussed in detail in the proposed rule at 85 FR 43166-43167.

In addition, HUD in the proposed rule sought to revise § 401.554 to remove the statement that HUD will “extend” Section 8 contracts in order to comport with HUD’s standard programmatic practice of renewing contracts rather than extending them and also to remove a parenthetical reference in § 401.554 to multiple renewal authorities for contracts subject to a Restructuring Plan.

Subsequent to the publication of the proposed rule, Public Law 117-328, Consolidated Appropriations Act, 2023, approved on December 29, 2022, amended MAHRA section 515 to add a new subsection specifically authorizing budget-based rent adjustments for Mark-to-Market

projects. As amended, the statute provides that HUD may, not more than once every 10 years, adjust rents in an amount equal to the lesser of budget-based rents or comparable market rents for the market area upon request of an owner or purchaser who meet certain criteria.

This final rule implements the statutory change enacted by the Consolidated Appropriations Act, 2023, as well as the revisions to § 401.554 contemplated in the proposed rule.

## **II. The Public Comments**

The public comment period for the proposed rule closed on September 14, 2020. HUD received five comments. The commenters included members of the public, public officials, and the assisted housing industry. Commenters were generally opposed to the contemplated regulatory changes removing the budget-based rent adjustment provision; however, this issue has been superseded and obviated by the statutory change enacted by the Consolidated Appropriations Act, 2023. The statutory change is generally aligned with the views expressed by commenters on the rent adjustment provisions. Commenters expressed no opinions with respect to the proposed revisions to § 401.554.

### ***Discretion to allow budget-based rent adjustments***

Commenters stated that HUD does retain the discretion to use a budget-based rent adjustment at the request of the property owner regardless of whether § 401.412(b) is revised. One commenter noted that in enacting MAHRA, Congress did not prohibit the Secretary's exercise of reasonable discretion to address extraordinary circumstances affecting the viability and condition of restructured projects over a 30-year period. Additionally, the commenter stated that under section 514(e) of MAHRA, the use of the mandatory "shall" with the permissive "allow" refutes any presumption that Congress intended rent adjustments by application of an OCAF to be exclusive. Congress did not provide that it must be the only option regardless of all potential circumstances at the property. In this same vein, another commenter stated that although Section 514 and Section 515 when read together make clear that the Restructuring Plan must "allow for"

an OCAF as a required element of the Restructuring Plan, and an owner must agree to an OCAF renewal if offered by HUD, there is nothing that either prevents HUD from offering or an owner from accepting an alternate renewal option. The commenter noted that MAHRA at 514(e) uses the term “allow” when describing inclusion of an OCAF rent adjustment in the Restructuring Plan without the qualifying term “only,” and uses the term “require” for other aspects of the Restructuring Plan. One commenter stated that since the publication of the Final Rule in 2000, HUD has made a “determination” that Section 515(b) is the appropriate legal authority for subsequent renewal of HAP Contracts for projects with Restructuring Plans. While conceding that HUD’s determination may be “legally correct,” the commenter stated a concern that there does not appear to have been any rulemaking or prior former public process to address how this determination was made. The same commenter opined that a plain reading of MAHRA reflects a requirement that the Restructuring Plan include an OCAF, and that an owner must agree to a subsequent OCAF renewal if offered by HUD but contains no language precluding other rent adjustment options. A commenter requested that should HUD continue to disclaim the discretion it once asserted, that the Secretary pursue and support legislation that would provide express authority to provide budget-based rent adjustments to restructured properties where necessary, i.e., where such a budget-based increase is crucial to the property’s viability.

***HUD Response:*** The explicit provision of budget-based rent adjustment authority in section 524(c)(1), but not in section 514 or 515, informed HUD’s previous determination that budget-based rent adjustments are not available for Mark-to-Market contracts. However, HUD believes that the explicit authority added to section 515 provided in the Consolidated Appropriations Act, 2023, resolves all ambiguity whether HUD has legal authority to approve budget-based rent adjustments to address extraordinary circumstances affecting the viability and condition of restructured projects. This final rule does not include the language from the proposed rule which elicited the comments described above. Instead, this final rule makes conforming edits to HUD’s regulation at 24 CFR 401.412 to align with the amended MAHRA statute.

### ***Effect of the Change***

One commenter opined that assumptions made about the ability of a restructuring to reposition a property for a 30-year period of physical and financial health are, anecdotally at least, proving to be short-sighted in many cases, and that, in the absence of options to increase the HAP Contract rents, these projects often lack viable options and provide few incentives for developers and investors willing to take on a preservation transaction. As a consequence, residents in projects restructured through the MTM program may soon find themselves living in buildings with rapidly increasing maintenance and repair needs with no viable near-term solution to reverse the building's physical and financial decline. One commenter stated a concern that, in a time when many of the approximately 2,600 properties that were restructured pursuant to Mark-to-Market have health and safety concerns, the proposed rule would limit the ability of HUD to work with property owners to redevelop properties by limiting the discretionary authority of HUD to provide a budget-based rent increase for properties, especially at-risk low-income properties that have operating and financial needs greater than the operating cost adjustment factor rent increase would cover.

***HUD Response:*** HUD believes that the now explicit authority for budget-based rent adjustments provides the Department a tool to support owners or purchasers of restructured projects in their efforts to address extraordinary circumstances affecting the viability and condition of such projects. As the Mark-to-Market portfolio continues to age, HUD recognizes the need for owners of some projects to receive additional operating funds. HUD is in the process of drafting processing guidance for owners or purchasers who request a budget-based rent increase in accordance with the new authority under MARHA section 515.

### ***Other Comments***

One commenter requested that with respect to the programmatic practice of adjusting rents annually, rents should be dropped to \$0 after three years of residence. Another commenter noted concern with how the proposed rule would benefit families who utilize section 8 and

families with disabilities in rural and frontier communities. The commenter also stated that changing information collection methods for family tenants could impact initial and continuing eligibility for all social services programs, and that the proposed rule could impact smaller PHAs and landlords' ability to collect consistent rents and section 8 HUD payment which could lead to fewer landlords seeing the value of Section 8 for families.

**HUD Response:** While HUD appreciates all feedback on its housing programs, the proposed rule and this final rule do not pertain to any rules or regulations related to the calculation of the tenant portion of rent, household information collection, or occupancy eligibility. HUD anticipates that residents living at properties that receive a budget-based rent increase will experience improved management operations and physical conditions as property owners will be able to address deferred maintenance and capital needs.

### **III. This Final Rule**

This final rule responds to the public comments and conforms the regulations to the governing statutory provision, the terms of Mark-to-Market renewal contracts, and the Consolidated Appropriations Act, 2023.

#### *§ 401.412 – Budget-based Rent Increases*

Based on the statutory change to Section 515 of MAHRA enacted by the Consolidated Appropriations Act, 2023 – which is generally aligned with the views expressed by commenters on the rent adjustment provisions – this final rule does not delete existing 24 CFR 401.412(b) as contemplated in the proposed rule. Instead, this final rule revises 24 CFR 401.412(b) to codify the conditions necessary in order to receive a budget-based adjustment.

#### *§ 401.554 – Contract Renewals*

As discussed in the proposed rule, in this final rule HUD is revising the language in 24 CFR 401.554 that indicates that HUD will “offer to renew or extend” a Section 8 contract, as provided in a project’s Restructuring Plan. Because the programmatic practice is to offer to renew rather than to extend, HUD is deleting the words “or extend” and is also removing the

parenthetical in § 401.554 suggesting that there may be more than one renewal authority for projects subject to a Restructuring Plan.

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

##### **Regulatory Review (Executive Orders 12866, 13563, and 14094)**

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”

Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

Executive Order 14094 entitled “Modernizing Regulatory Review” (hereinafter referred to as the “Modernizing E.O.”) amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

This final rule codifies the authority for budget-based rent increases in the Mark-to-Market program enacted by the Consolidated Appropriations Act, 2023 (Pub. L. 117-328, December 29, 2022) and conforms the regulations to longstanding HUD practice and the terms of the renewal contracts. This final rule does not create significant budgetary impact on the administration of Section 8 subsidy or create administrative costs, nor does it alter the underlying operation of the Mark-to-Market program. As such, this rule does not constitute a “significant regulatory action” as defined in Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, and the rule was not reviewed by OMB.

##### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (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 final rule codifies existing statutory interpretations of the authorities granted for the Mark-to-Market program. It does not create compliance costs, nor does it alter the underlying operation of the Mark-to-Market program. Therefore, the undersigned certifies that this final rule does not have a significant economic impact on a substantial number of small entities.

### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), 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 Office of Management and Budget (OMB) control number. This final rule does not change any information collection requirements.

### **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.

### **Environmental Impact**

This final rule governs the statutorily required establishment and review of rent schedules and related administrative and fiscal requirements and procedures, which do not constitute a development decision that affects the physical condition of specific project areas or building

sites. Accordingly, under 24 CFR 50.19(c)(6), 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 (Pub. L. 104–4; approved March 22, 1995) (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 the UMRA.

### **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 amends 24 CFR part 401 as follows:

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

1. The authority 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).

2. Revise and republish § 401.412 to read as follows:

#### **§ 401.412 Adjustment of rents based on operating cost adjustment factor (OCAF) or budget.**

(a) *OCAF*.

(1) The Restructuring Plan must provide for annual adjustment of the restructured rents for project-based assistance by an OCAF determined by HUD.

(2) *Application of OCAF.* HUD will apply the OCAF to the previous year's contract rent less the portion of that rent paid for debt service. This paragraph applies to renewals of contracts that receive restructured rents under either section 514(g)(1) or (2) of MAHRA.

(b) *Budget-based.* Rents will be adjusted to the lesser of budget-based rents or the comparable market rents for the market area instead of OCAF not more often than once every ten years upon request of an owner or purchaser who

(1) Demonstrates that:

(i) Project income is insufficient to operate and maintain the project, and no rehabilitation is currently needed, as determined by the Secretary; or

(ii) The rent adjustment or renewal contract is necessary to support commercially reasonable financing (including any required debt service coverage and replacement reserve) for rehabilitation necessary to ensure the long-term sustainability of the project, as determined by the Secretary, and in the event the owner or purchaser fails to implement the rehabilitation as required by the Secretary, the Secretary may take such action against the owner or purchaser as allowed by law; and

(2) Agrees to:

(i) Extend the affordability and use restrictions required under 514(e)(6) for an additional twenty years; and

(ii) Enter into a binding commitment to continue to renew such contract for and during such extended term, provided that after the affordability and use restrictions required under 514(e)(6) have been maintained for a term of 30 years:

(A) An owner with a contract for which rent levels were set at the time of its initial renewal under section 514(g)(2) shall request that the Secretary renew such contract under section 524 for and during such extended term; and

(B) An owner with a contract for which rent levels were set at the time of its initial renewal under section 514(g)(1) may request that the Secretary renew such contract under section 524 for and during such extended term.

**§ 401.554 [Amended].**

3. Amend § 401.554 by deleting the words “or extend” and the parenthetical from the first sentence.

Julia R. Gordon,  
Assistant Secretary for Housing – Federal Housing  
Administration Commissioner.

**[BILLING CODE 4210-67]**

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