

## U.S. Department of Housing and Urban Development

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### Special Attention of

All Multifamily Hub Directors  
All Program Center Directors  
All Project Managers  
All Field Office Directors

### Notice H 09-08

Issued: July 27, 2009

Expires: January 31, 2010

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#### Cross References

Handbook 4565.1

Mortgagee Letter 2009-22

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### **SUBJECT:**

Temporary Authority for Multifamily Hubs to Process Waiver Requests  
Pertaining to the Three-Year Rule for Section 223(f)

### **Purpose**

This Notice sets forth the Department's policy to grant temporary authority to Multifamily Hub Directors to grant waivers of the Three-Year Rule for Section 223(f) applications, for the purpose of providing liquidity to recently constructed or substantially rehabilitated, self-sustaining properties that are unable to secure permanent long term financing due to the freeze in the capital markets. This Notice will benefit applications that meet all of the qualifications of the Section 223(f) program, except for the fact that the property was originally constructed or substantially rehabilitated less than three years prior to the date of application for Firm Commitment. Eligible new construction applications will have a Certificate of Occupancy (CO) dated no later than the date of application. This Notice does not apply to projects that are three or more years old that have had only minor and/or cosmetic repairs less than three years ago, since these projects would qualify for processing under our existing Section 223(f) requirements. The waiver authority granted under this Notice expires six months from the publication date of the most recent ML on this subject. The Department will evaluate the effectiveness of this waiver authority based upon applications received and may elect to extend the program based upon that evaluation.

### **Background**

A number of fully operating, self-sustaining properties, which have recently been constructed or substantially rehabilitated, are now unable to secure permanent long-term financing due to the freeze in the capital markets. At this time, the Department recognizes the need to provide liquidity to the market place. In order to do so, waiver authority of the Section 223(f) eligibility restriction to properties that have been completed or substantially rehabilitated for 3 years prior to the date of application is required.

Historically, Section 223(f) program requirements have been temporarily modified to better meet program goals when economic conditions greatly decreased the availability of credit. When the Section 223(f) Handbook was originally published, it set forth a Special Eligibility Program that was applicable to recently completed projects, whose construction was started before June 30, 1974, and completed before the end of 1975. This special program was implemented to address liquidity

shortages prevailing in multifamily real estate financing at that time that prevented otherwise sound projects from obtaining permanent financing. The existing capital market credit freeze is similarly constraining the availability of permanent financing today. This Notice provides relief similar to that provided in 1974, but also includes additional requirements to ensure that the properties are viable, self sustaining and will not jeopardize the long term financial stability of the Section 223(f) program.

### **Waiver Authority**

As of the date of this Notice, Hub Directors will have temporary authority to waive the Three-Year Rule for the Section 223(f) program subject to the conditions and processing instructions below. The requirements of this Notice may not be waived by Hub Directors.

### **Conditions**

1. This waiver authority applies only to conventionally financed apartment projects that were originally constructed or substantially rehabilitated less than three years prior to the date of application for Firm Commitment and in cases of new construction have a CO for the entire project dated no later than the date of the application. For projects that were constructed in phases and have more than one CO, refer to the date of the most recent CO. Only apartment projects are eligible under this waiver authority. Any project that falls under Section 232 is ineligible.
2. Any prepayment restriction associated with the new Section 223(f) financing must be discussed with the applicant. This should be accomplished prior to or immediately upon receipt of the application.
3. The final mortgage amount shall only be sufficient to pay off existing indebtedness, and may not include an equity payment to the owner. Existing indebtedness is defined as project debt that is over 1 year old. Recently incurred debt (less than 1 year) is ineligible. Evidence that the debt is project related must be submitted with the application.
4. All other applicable program requirements for the Section 223(f) program must be met, including compliance with the nondiscrimination provisions of the Fair Housing Act, along with Executive Order 11063 and concerns on accessibility requirements for persons with disabilities.
5. The applicant must submit documentation evidencing that efforts to obtain permanent conventional financing have been unsuccessful, or that current offers of conventional financing have been cancelled. This documentation should include rejection letters from prospective lenders or cancellation letters from lenders that had previously committed financing. Acceptable documentation may also include a certification that credit is not available at reasonable rates and terms without the commitment of the FHA Insurance.
6. The applicant must submit evidence that all interest and/or debt service payments have been made on time since the beginning of the current loan. Satisfying this criteria is necessary to demonstrate the financial soundness of the proposed project.

7. The submission of financial statements for the project is required. A Certified Public Accountant (CPA) or Independent Public Accountant (IPA) should audit the latest year's financial statements, however, if audited statements are not available an owner-certified statement for the latest year, or period of operation, may be accepted. This policy is only applicable to applications submitted under the temporary authority provided by this Notice. The lender must state why audited statements are not available. Any owner-certified financial statement or owner-certified balance sheet and operating statement or CPA or IPA audited financial statements must contain at a minimum the Criminal Warning and Certification information contained on Form HUD-92417. A substitute statement must contain the following certification and criminal warning:

"I HEREBY CERTIFY that the foregoing figures and statements contained herein submitted by me as agent of the mortgagor [owner] for the purpose of obtaining mortgage insurance under the National Housing Act are true and give a correct showing of \_\_\_\_\_'s (Name of mortgagor or owner) financial position as of \_\_\_\_\_ (date of financial statement). Signed this \_\_\_\_ day of \_\_\_\_, 20\_\_.

Signature of authorized agent with name printed or typed under signature

\_\_\_\_\_.

Warning – HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802).

8. Occupancy. Projects must meet both a Sustaining Occupancy requirement and a 90% Certified Rent Roll requirement prior to Initial/Final Endorsement. These requirements apply to both new construction and substantial rehabilitation.
  - a. Sustaining Occupancy is defined as having sufficient income to pay all operating expenses, monthly debt service, escrow and reserve for replacement requirements for three consecutive months. Applications may be submitted prior to the project achieving Sustaining Occupancy. However, the project must achieve Sustaining Occupancy for a period of three consecutive months immediately prior to the date of Initial/Final Endorsement. In these cases, achievement of Sustaining Occupancy must be included as a Firm Commitment condition. Commitments containing this condition may not be extended if the condition is not satisfied within the original Commitment term.
  - b. In addition, the Certified Rent Roll level of occupancy must be 90% for all units in the entire project, including all phases, for a period of three consecutive months immediately prior to Initial/Final Endorsement. Rent concessions, other discounts and short term leases (less than 12 months) that are offered by a landlord to induce a prospective tenant to enter into a lease must be taken into consideration when evaluating the credibility of the 90% occupancy requirement. The market analysis contained in the appraisal report, or market study, if required, should include a discussion of any rent concessions and lease terms in relation to concessions employed by competing projects and must justify any processing occupancy rate that exceeds the Certified Rent Roll Occupancy level.

9. All construction or substantial rehabilitation must have been completed prior to submission of an application for Firm Commitment. Construction completion must be evidenced by a CO by the applicable local authority. It is recognized that some substantial rehabilitation cases are completed while the project is occupied and that CO may not be applicable. Other evidence of the completion of work are acceptable (i.e. local inspections or certifications) at the discretion of the processing office.
10. No waiver of the requirement for submission of “as-built” plans shall be permitted. For substantial rehabilitation, plans or other construction documents that are relative to the type of work completed should be submitted.
11. As per outstanding requirements, a current Phase I Environmental Assessment must be submitted. It should reference any prior Environmental Assessments and these older reports should be submitted if available. Environmental processing must be completed in accordance with the current requirements.
12. In accordance with the Uniform Standards of Professional Appraisal Practice, the appraisal report should discuss any current listing of the subject and any offers made and/or accepted to purchase, lease or option the project. Also, since these projects are recently constructed or rehabilitated, depreciation will be minimal or significantly reduced, contributing to the reliability of the Cost Approach. Processing offices are reminded that this approach is required and should be considered in the reconciliation process.
13. Copies of any market studies and updates that were made in conjunction with obtaining the current loan must be submitted. Projects that have achieved Sustaining Occupancy and the 90% Certified Rent Roll Occupancy requirement prior to Firm Commitment submission, may submit the market analysis in the appraisal report so long as it addresses the current market conditions of the subject property, including a discussion of long term demands for rental housing based on, but not limited to, local demographics, employment, schools, shopping, transportation and other neighborhood amenities. Applications that have not achieved Sustaining Occupancy and met the 90% Certified Rent Roll Occupancy requirement prior to Firm Commitment submission must include a Market Study completed in accordance with outstanding processing guidance.
14. Inspections/Repairs. All of the existing requirements related to project inspection, repair escrows, and protection against latent defects associated with the new Section 223(f) financing are applicable to cases processed under this waiver authority. In addition, the following requirements apply:
  - a. Any latent defects that became apparent during the warranty period provided under the project’s original construction contract, whether repaired or not, must be disclosed at the time of application.
  - b. The Project Capital Needs Assessment shall assess the adequacy of the repairs performed to address any latent defects and determine whether any additional repairs are required to correct the defects, and shall establish a cost to complete the repairs.
  - c. All repairs required under this category, whether critical or non-critical, must be performed prior to closing and may not be included in the mortgage.

Escrow requirements for all other non-critical repairs are to be determined in accordance with the current instructions.

**Hub Submission Requirements to HQ**

Current requirements mandate that waivers granted at the Hub level must be submitted with supporting documentation to the Office of Multifamily Development. This information should be provided at the time the decision is made to grant the waiver. It is important that this information is provided timely for all approved waivers in order for HQ to evaluate the effectiveness of this policy.

If there are any questions regarding the action taken on this waiver request, please contact Joseph Sealey, Director of Technical Support at (202) 402-2559.

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David H. Stevens  
Assistant Secretary for Housing –  
Federal Housing Commissioner