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DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 3560

RIN 0575-AC98

Multi-Family Housing Program Requirements to Reduce Financial Reporting Requirements

AGENCY: Rural Housing Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Housing Service (RHS) is revising its existing regulations regarding financial reporting. This action is necessary to align RHS requirements with those of the United States Department of Housing and Urban Development (HUD) utilizing a risk-based threshold reporting which will reduce the burden on the borrower to produce multiple financial reports; focus on high-risk properties; and, reduce the financial cost of reporting on properties.

DATES: This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Janet Stouder, Deputy Director, Multi-Family Housing Portfolio Management Division, Rural Housing Service, Room 1237S – STOP 0782, 1400 Independence Avenue, SW, Washington, D.C. 20250-0782, Telephone: (202) 720-9728.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, Classification

This final rule has been determined to be non-significant and, therefore was not

reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

Authority

The Multi-Family Housing program (MFH) is administered, subject to appropriations, by the U.S. Department of Agriculture (USDA) as authorized under Sections 514, 515, 516 and 521 of the Housing Act of 1949, as amended (42 U.S.C. 1484, 1485, 1486, and 1490).

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1970, “Environmental Program.” RHS has determined that this action does not constitute a major Federal action significantly affecting the quality of the environment. In accordance with the National Environmental Policy Act of 1969, Pub. L. 91-190, an Environmental Impact Statement is not required.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). The undersigned has determined and certified by signature on this document that this rule will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not involve a new or expanded program nor does it require any more action on the part of a small business than required of a large entity.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government. This rule does not impose

substantial direct compliance costs on State and local Governments; therefore, consultation with the States is not required.

Executive Order 12988, Civil Justice Reform

This rule has been reviewed under Executive Order 12988. In accordance with this rule:

(1) Unless otherwise specifically provided, all State and local laws that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division of the Department of Agriculture (7 CFR part 11) must be exhausted before bringing suit in court that challenges action taken under this rule.

Unfunded Mandate Reform Act (UMRA)

Title II of the UMRA, Pub. L. 104-4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and tribal Governments and on the private sector. Under section 202 of the UMRA, Federal Agencies generally must prepare a written statement, including cost-benefit analysis, for proposed and Final Rules with “Federal mandates” that may result in expenditures to State, local, or tribal Governments, in the aggregate, or to the private sector, of \$100 million or more in any one-year. When such a statement is needed for a rule, section 205 of the UMRA generally requires a Federal Agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal Governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Paperwork Reduction Act of 1995

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number 0575-0189. This final rule contains no new reporting or recordkeeping requirements that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

E-Government Act Compliance

RHS is committed to complying with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services and for other purposes.

Programs Affected

The programs affected by this regulation are listed in the Catalog of Federal Domestic Assistance under number 10.405-Farm Labor Housing Loans and Grants (Sections 514 and 516); 10.415-Rural Rental Housing Loans (Section 515); and 10.427-Rural Rental Assistance Payments (Section 521).

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

This executive order imposes requirements on RHS in the development of regulatory policies that have tribal implications or preempt tribal laws. RHS has determined that the final rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian tribes. Thus, the final rule is not subject to the requirements of Executive Order 13175. If tribal leaders are interested in consulting with RHS on this final rule, they are encouraged to contact USDA's Office of Tribal Relations or Rural Development's Native American Coordinator at (720) 544-2911 or AIAN@usda.gov to request such consultation.

Executive Order 12372, Intergovernmental Consultation

These loans are subject to the provisions of Executive Order 12372 which require intergovernmental consultation with State and local officials. RHS conducts intergovernmental consultations for each loan in accordance with 2 CFR part 415, subpart C.

Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at http://www.ascr.usda.gov/complaint_filing_cust.html and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:

- (1) mail: U.S. Department of Agriculture

Office of the Assistant Secretary for Civil Rights

1400 Independence Avenue, SW

Washington, D.C. 20250-9410;

(2) fax: (202) 690-7442; or

(3) e-mail: program.intake@usda.gov.

USDA is an equal opportunity provider, employer, and lender.

I. Background:

Section 515(z)(1) of the Housing Act of 1949, as amended states that the Secretary shall require that borrowers in programs authorized by this section maintain accounting records in accordance with generally accepted accounting principles for all MFH projects that receive funds from loans made or guaranteed by the Secretary. Since RHS considers Sections 514 Farm Labor Housing loans to have similar risks as Section 515 Rural Rental Housing loans, the regulatory accounting requirements apply to both types of loans. See 7 CFR 3560.578.

RHS published the financial reporting proposed rule in the Federal Register on August 6, 2015, (80 FR 46853-46855). A 60-day comment period was provided that ended October 5, 2015. The Agency received twenty-two comments from ten stakeholders, including Certified Public Accountant (CPA) groups, USDA employees, and MFH owners/ borrowers.

RHS proposed to remove engagement requirements, as well as unit-based requirements from 7 CFR 3560.11, 3560.301, 3560.302, 3560.303 and 3560.308 and replace it with risk-based requirements for audits utilizing a modified version of the HUD Office of Inspector General's (OIG) Consolidated Audit Guide standard. This proposed change was a result of RHS's participation in the White House's Domestic Policy Council's Rental Policy Working Group

(RPWG) on an initiative to reduce duplication of requirements on customers, eliminate conflicting administrative requirements, and align program requirements in the affordable rental housing industry. RHS believes that high-risk properties should receive more stringent evaluation of financial performance and that it can be accomplished in a more cost-effective manner. Implementation of this rule will reduce cost to properties, eliminate duplicate reporting to federal agencies, and further alignment objectives. HUD will accept the RHS audit in compliance with their requirements for Section 8 subsidized properties. High-risk properties are those with combined Federal financial assistance above \$750,000 for non-profit entities and \$500,000 involving for-profit entities.

Combined Federal financial assistance includes a combination of any or all of the sources identified below:

- The outstanding beginning principal balance of a USDA Mortgage, a mortgage insured by the Federal Housing Administration (FHA) or HUD-held mortgages or loans (including flexible subsidy loans);
- Any RHS Rental Assistance or Project-based Section 8 assistance received during the fiscal year;
- Interest reduction payments received during the year (interest subsidy) and/or;
- Federal grant funds received during the year.

The thresholds established in the proposed rule for non-profits are herein modified in order to conform to thresholds established by the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR parts 200 and 400.

The threshold level for the non-profit ownership audit reporting requirement has been changed to \$750,000 from \$500,000. For non-profit borrowers that receive \$750,000 or more in Federal financial assistance, RHS will accept the audit required under 2 CFR part 200 as compliance with RHS financial reporting requirements; non-profit borrowers that receive less

than \$750,000 in Federal financial assistance must submit owner certified prescribed forms on the accrual method of accounting in accordance with Statements for Account and Review Services promulgated by the Accounting and Review Services Committee of the American Institute of Certified Public Accountants.

There has been no change to the threshold requirement for for-profit ownership entities and it remains at \$500,000.

Through this rule change, the Agency has removed requirements for an engagement that examines records using agreed upon procedures established by the Agency as part of the annual financial reporting requirements. Although the Section 514 and Section 515 proposals for new development are still subject to the agreed upon cost certification procedures set-forth in 7 CFR 3560.72(b).

In addition to the changes in the annual reporting requirements outlined herein, the Agency is adding three additional certifications to the Performance Standards required under 7 CFR 3560.308(c). The proposed rule included two certifications: The borrower would be required to certify there have been no changes in project ownership other than those approved by the Agency and identified in the certification; and that real estate taxes are paid in accordance with state and/or local requirements and are current. This rule adds a third certification that Replacement Reserve accounts were used only for authorized purposes. This revision simply reflects what is required in the borrower's Loan Agreement and therefore does not constitute an additional burden on the borrower.

II. Summary of Comments:

7 CFR 3560.302(b)(1) and (2) and §3560.308

Two comments received indicated there is disparity and possible confusion in the citation as it relates to the establishment of a project's financial management procedures: i.e. "...various

methods of accounting are allowed (accrual, cash, or modified accrual); however, §3560.308 then requires that financial statements must be prepared in accordance with generally accepted accounting principles (GAAP). Why keep the accounting records on one bases of accounting, only to be forced to convert to generally-accepted accounting principles for annual reporting? It would be helpful if this section indicated what the annual financial reports must include.”

The Agency appreciates the comments received and to alleviate disparity and confusion at both §3560.302 (b)(1) and §3560.308, RHS has revised §3560.302(b)(1) to indicate that the accrual accounting method is required. The Agency will revise §3560.308 (a) (1) and (a) (2) to indicate the documentation required to provide a complete financial report under 2 CFR parts 200 and 400. Federal financial assistance is defined in accordance with 2 CFR 200.40.

Section 3560.303 (Q) Housing Project Budgets and §3560.308(a)(2) Annual Financial Reports

Five comments were received regarding the requirements of “owner-certified financial statements” and expressed concern about the impact this may have on smaller property owners and the potential of increased CPA fees on project operating budgets.

The Agency agrees with the commenters’ concerns and has amended the requirements for those for-profit borrowers receiving less than \$500,000 in combined Federal financial assistance, and non-profit borrowers receiving less than \$750,000 in combined Federal financial assistance, to a compilation of prescribed forms. The compilation of prescribed forms will include Form RD 3560-7, “*MFH Project Budget/Utility Allowance*” and Form RD 3560-10, “*MFH Borrower Balance Sheet*”, and include supporting schedules for those forms within the report package. It is believed this will be more cost effective for smaller property owners that do not have other audit requirements. Language at §3560.308 (a)(2) is revised as stated in the preceding comment.

Three comments were received regarding the Agency’s modified version of the HUD OIG Consolidated Audit Guide. The comments expressed concern about when the "modified

version" of the HUD OIG Consolidated Audit Guide would be released and that it had not been shared in the proposed rule. The commenters felt that it would be beneficial to release, as soon as possible, a draft version of the proposed HUD audit guide in order to better assess any possible changes in audit fees as well as the cost of preparing owner-certified statements

The HUD OIG Consolidated Audit Guide is not being modified for the purpose of this rule. The Agency anticipates additional cost savings to MFH property owners as the Agency will not utilize the HUD Chart of Accounts, nor will the report require the CPA to review tenant files, as that compliance test is being conducted by MFH field staff during supervisory visits and annual improper payment auditing. HUD has agreed to accept the RHS audit in lieu of a HUD audit for those projects where RHS and HUD have financing in common (i.e. Section 8/Section 515 properties). No changes were made to the proposed rule regarding this comment.

One commenter questioned the requirement within the Audit Guide, wherein CPAs are tasked with assessing housing quality standards as "...this is not typically in their skillset."

The Agency does not expect CPAs to have a skillset that qualifies them to determine whether physical standards are met. However, RHS anticipates that upon determining whether the owner (borrower) or management agent has responded to all Agency management review reports, physical inspections, and inquiries regarding financial statements or monthly accounting reports (reference §3.5 M. 2. E of the Audit Guide), the auditor can make a reasonable determination that the housing meets physical standards. The auditor should be reviewing all known reports, inspections, management reviews, etc. from each Agency holding an interest in the housing, to include RHS, HUD, Housing Finance Agencies, and Investors/Syndicators. The auditor would rely on these organizations to point out deficiencies in the repair and condition of the housing. The auditor would report on any uncorrected deficiencies within the report on audit findings, on compliance, and/or with a major program report on compliance.

Three comments were received regarding the threshold standard. OMB has established a new reporting threshold for non-profit organizations that are required to file a single audit. The

audit threshold is \$750,000, in accordance with Part 200, Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards, Subpart F Audit Requirements. Commenters believed HUD would likely make changes in guidance to follow that threshold.

The Agency recognizes the change in the reporting threshold. HUD and RHS jointly determined that they would establish similar audit thresholds for financial reporting of its financed or insured properties. Since issuance of the proposed rule, RHS and HUD agreed to modify the threshold to avoid potential conflicts in implementation. The preceding comments reflecting this change are in alignment between the two agencies.

One comment was received requesting clarification of the agreed-upon-procedure (AUP) requirements for annual operating audits and that these will no longer be required.

This is correct. AUPs will no longer be required as part of the annual financial reporting requirements. It is noted, however, new construction projects for Section 514 and Section 515 are still subject to the agreed upon cost certification procedures as set-forth in 7 CFR 3560.72(b). As a result, no changes were made to the proposed rule regarding this comment.

One comment was received regarding “non-cash interest subsidy” and whether this should be included in addition to interest reduction payments as part of the combined Federal financial assistance?

The Agency interprets the ‘interest reduction payments’ to be the equivalent of the “non-cash” interest subsidy the borrower receives annually and is included in the calculation of Federal financial assistance. Since this comment was simply requesting a clarification, no changes have been made to the rule.

One comment was received asking if there was a “...minimum amount of combined Federal financial assistance that would not require financial statements presented in accordance with GAAP?”

From earlier comments received in response to the owner-certification requirements, the Agency has agreed to amend the requirements for those for-profit borrowers, and non-profit

borrowers receiving less than \$750,000 in combined Federal assistance, and with no other audit requirements, to the receipt of a compilation of prescribed forms. As a result the Agency revised the proposed language at 7 CFR 3560.308(a) (2). Please see preceding comments reflecting this change.

Section 3560.308(b)(8) Performance Standards

One comment was received regarding the Performance Standards at 7 CFR 3560.308(b)(8), which was proposed to read that no unauthorized change in ownership have taken place. The commenter requested the regulation set forth what is expected to be identified as a change (i.e. the Borrower entity; partners/managers within the entity; limited partnership with a large financial backing).

In accordance with 7 CFR 3560.405(b) (1) and (2), borrowers must notify the Agency prior to the implementation of *any* changes in a borrower entity's organizational structure or to a change in a borrower entity's controlling interest. The Agency has decided that no revision to the rule is needed.

Section 3560.308(d) (3) Other financial reports

One commenter questioned "...in a situation where the USDA loan may be below the threshold and is subordinate to a large private mortgage or a Section 538 Guaranteed Rural Housing (GRRH) loan, other funding sources will likely still require an audit. Although not required by the Agency, will the Agency continue to require these same financial reports be provided for review?"

7 CFR 3560.308(d) (3) states, "...any audits independently obtained by the borrower must also be submitted to the Agency." As a note, the existence of the Section 538 GRRH loan constitutes "Federal financial assistance" and should be added to the total when calculating the threshold requirement.

General Comments

One commenter requested a general clarification of determining combined Federal financial assistance, "...should the beginning of the year or end of the year principal balance be used?"

Since the auditor reports on activity from the beginning of the reporting year to the end, it is appropriate that the combined Federal financial assistance shall be deemed the outstanding principal balances at the beginning of the borrower's fiscal reporting period. No change to the rule is needed.

One commenter requested the anticipated implementation date for submission under the new financial reporting requirements.

The Agency anticipates the new rule will be effective for borrowers with fiscal years beginning January 1, 2018 and thereafter. No change is needed to the proposed rule.

One commenter asked whether financial reports would be electronically submitted through the Real Estate Assessment Center (REAC).

RHS reports are not submitted to REAC, which is owned by HUD. No change to the rule is needed.

List of Subjects in 7 CFR Part 3560

Aged loan programs-Agriculture, loan programs-Housing and Community Development, Low- and moderate-income housing, Public Housing, rent subsidies.

For the reasons set forth in the preamble, chapter XXXV, Title 7 of the Code of Federal Regulations will be amended as follows:

PART 3560 – DIRECT MULTI-FAMILY HOUSING LOANS AND GRANTS

1. The authority citation for Part 3560 continues to read as follows:

Authority: 42 U.S.C. 1480.

Subpart A – General Provisions and Definitions

§3560.11 [Amended]

2. Amend §3560.11 by removing the definition of “Engagement”.

Subpart G – Financial Management

3. Section 3560.301 is revised to read as follows:

§3560.301 General.

This subpart contains requirements for the financial management of Agency-financed multi-family housing (MFH) projects, including accounts, budgets, and reports. Financial management systems and procedures must cover all housing operations and provide adequate documentation to ensure that program objectives are met.

4. Amend §3560.302 by revising paragraphs (a), (b)(1) and (2), and (e)(1) to read as follows:

§3560.302 Accounting, bookkeeping, budgeting, and financial management systems.

(a) *General.* Borrowers must establish the accounting, bookkeeping, budgeting and financial management procedures necessary to conduct housing project operations in a financially safe and sound manner. Borrowers must maintain records in a manner suitable for an audit, and must be able to report accurate operational results to the Agency from these accounts and records.

(b) * * *

(1) Borrowers are required to use the accrual method of accounting in preparing annual financial reports, as identified in §3560.308.

(2) Borrowers must describe their accounting, bookkeeping, budget preparation, and financial reporting procedures in their management plan.

* * * * *

(e) * * *

(1) Borrowers must retain all housing project financial records, books, and supporting material for at least three years after the issuance of their financial reports. Upon request, these materials will immediately be made available to the Agency, its representatives, the USDA Office of Inspector General (OIG), or the Government Accountability Office (GAO).

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5. Amend §3560.303 by revising paragraph (b)(1)(vi)(Q) to read as follows:

§3560.303 Housing project budgets.

* * * * *

(b) * * *

(1) * * *

(vi) * * *

(Q) Professional service contracts (audits, owner-certified submissions in accordance with §3560.308(a)(2), tax returns, energy audits, utility allowances, architectural, construction, rehabilitation and inspection contracts, etc.)

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6. Amend §3560.308 by:

- a. Revising paragraph (a).
- b. Removing paragraph (b).
- c. Redesignating paragraphs (c) and (d) as (b) and (c) respectively.
- d. Revising the newly redesignated paragraph (b) introductory text.
- e. Adding paragraphs (b)(8),(b)(9), and (b)(10).
- f. Revising the newly redesignated paragraph (c)(1).

The revisions and additions read as follows:

§3560.308 Annual financial reports.

(a) *General.* (1) For-profit borrowers that receive \$500,000 or more in combined Federal financial assistance must include an independent auditor's report that includes, financial statements and notes to the financial statements, supplemental information containing Agency approved forms for project budgets and borrower balance sheets, a report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements in accordance with Government Auditing Standards; a report on compliance for each major program and internal control over compliance (if applicable). Federal Financial Assistance is defined in accordance with 2 CFR 200.40.

(2) Non-profit borrowers that receive \$750,000 or more in combined Federal financial assistance must meet the audit requirements set forth by OMB, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, found at 2 CFR

parts 200 and 400,. Borrowers must provide a copy of this audit to RHS in compliance with these financial reporting requirements.

(3) Non-profit borrowers that receive less than \$750,000, and for-profit borrowers that receive less than \$500,000in combined Federal financial assistance will submit annual owner certified prescribed forms on the accrual method of accounting in accordance with the Statements on Standards for Accounting and Review Services promulgated by the Accounting and Review Services Committee of the American Institute of Certified Public Accountants (AICPA). Borrowers may use a CPA to prepare this compilation report of the prescribed forms.

(b) *Performance standards.* All Borrowers must certify that the housing meets the performance standards below:

* * * * *

(8) There have been no changes in project ownership other than those approved by the Agency and identified in the certification.

(9) Real estate taxes are paid in accordance with state and/or local requirements and are current.

(10) Replacement Reserve accounts have been used for only authorized purposes.

(c) * * *

(1) Non-profit and public borrower entities subject to OMB Uniform Guidance: Cost Principles, Audit, and Administrative Requirements for Federal Awards, must submit audits in accordance with 2 CFR parts 200 and 400.

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Dated: September 28, 2017.

Richard A. Davis,

Acting Administrator,

Rural Housing Service.

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