

general population, or should they include those nutrients that contribute to general overall health? Should the nutrients be intrinsic to the foods, or could they be provided in part—or in total—via fortification? Please provide details of your reasoning and provide any supportive data or information.

- Are there current dietary recommendations (e.g., the *Dietary Guidelines for Americans*) or nutrient intake requirements, such as those described in the final rule updating the Nutrition Facts label (see 81 FR 33742; May 27, 2016) or those provided by the Institute of Medicine (IOM) in the form of Dietary Reference Intakes (DRI) (<http://www.nationalacademies.org/hmd/Activities/Nutrition/SummaryDRIs/DRI-Tables.aspx>), that should be reflected in criteria for use of the term “healthy?”

- What are the public health benefits, if any, of defining the term “healthy” or other similar terms in food labeling? Please include any data or research related to public health benefits in your reasoning.

- What is consumers’ understanding of the meaning of the term “healthy” as it relates to food? What are consumers’ expectations of foods that carry a “healthy” claim? We are especially interested in any data or other information that evaluates whether or not consumers associate, confuse, or compare the term “healthy” with other descriptive terms and claims.

- Would this change in the term “healthy” cause a shift in consumer behavior in terms of dietary choices? For example, would it cause a shift away from purchasing or consuming fruits and vegetables that do not contain a “healthy” claim and towards purchasing or consuming processed foods that bear this new “healthy” claim?

- How will the food industry and consumers regard a change in the definition of “healthy?”

- What would be the costs to industry of the change?

Please provide supporting data, consumer research, and other information to support your comments and responses to these questions.

### III. References

The following reference is on display in the Division of Dockets Management (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at <http://www.regulations.gov>. (FDA has verified the Web site address, as of the date this document publishes in the

**Federal Register**, but Web sites are subject to change over time.)

1. U.S. Department of Health and Human Services and U.S. Department of Agriculture. 2015–2020 Dietary Guidelines for Americans, 8th Edition, December 2015, available at <http://health.gov/dietaryguidelines/2015/guidelines/>.

Dated: September 23, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016–23365 Filed 9–27–16; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Parts 203 and 234

[Docket No. FR–5715–P–01]

**RIN 2502–AJ30**

### Project Approval for Single-Family Condominiums

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement HUD’s authority under the single-family mortgage insurance provisions of the National Housing Act to insure one-family units in a multifamily project, including a project in which the dwelling units are attached, or are manufactured housing units, semi-detached, or detached, and an undivided interest in the common areas and facilities which serve the project. The rule would codify requirements for Direct Endorsement lenders to meet in order to be approved for the Direct Endorsement Lender Review and Approval Process (DELRAP) authority for condominiums, and basic standards that projects must meet to be approved as condominiums in which individual units would be eligible for mortgage insurance, as well as particular cases such as Single-Unit Approvals and site condominiums. The rule provides a method by which certain approval standards could be varied efficiently to meet market needs while providing for public comment where appropriate. Currently, single-family condominium project approval is provided under HUD’s Condominium Project Approval and Processing Guide and related Mortgage Letters.

Condominiums under this rule are distinct from condominiums in which the project has a blanket mortgage insured by HUD.

**DATES:** *Comment due date:* November 28, 2016.

**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. Communications must refer to the above docket number and title. 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) Web site 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.** HUD will make all properly submitted comments and communications 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, you must schedule an appointment in advance to review the public comments 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 toll-free Federal Relay Service at 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:**

Elissa Saunders, Director, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–8000; telephone number 202–708–2121 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:****I. Background***A. Prior Authority—Section 234 of the National Housing Act*

Prior to 2008, HUD's statutory authority to insure mortgages on condominium units came from section 234 of the National Housing Act (12 U.S.C. 1715y) (the Act). Section 234 required that: The structure is or has been covered by a mortgage insured under another section of the Act; the mortgagor is acquiring or has acquired a family unit covered by a section 234 insured mortgage for his own use and occupancy; and the mortgagor will not own more than four one-family units covered by section 234 insured mortgages (Pub. L. 87–70, June 30, 1961, 75 Stat. 161). Subsequent amendments allowed for a variety of project configurations in addition to vertical buildings (Pub. L. 97–35, August 13, 1981, 95 Stat. 416); added an 80 percent mortgagor occupancy requirement; and removed the 4-unit limitation on ownership (Pub. L. 98–181, November 30, 1983, 97 Stat. 1209).

The Housing and Economic Recovery Act of 2008, Public Law 110–289, July 30, 2008 122 Stat. 2654 (HERA) was enacted July 30, 2008 and added a requirement to section 234(c) that the project have a blanket mortgage insured by the Secretary under section 234(d). HUD does not currently insure new mortgages on condominium units in projects with blanket mortgages. Although, there are existing mortgages that were previously insured under section 234, most condominium projects are not structured in this manner.

*B. HERA of 2008 and Section 203 of the National Housing Act*

Section 2117 of Division B, Title I, Subtitle A of HERA, the FHA Modernization Act of 2008, amended the National Housing Act to provide authority for HUD to insure condominium units under the single-family program authorized by section 203 of the National Housing Act, 12 U.S.C. 1709. Specifically, section 2117 amended the definition of “mortgage”

in section 201 of the Act (12 U.S.C. 1707), which definition also applies to section 203 of the Act (12 U.S.C. 1709), to include a mortgages on a one-family unit in a multifamily project, and an undivided interest in the common areas and facilities which serve the project. The HERA changes placed all authority for mortgage insurance of projects with blanket mortgages in section 234 of the Act, and units in other condominium projects under section 203 of the Act.

*C. Current Regulations and Guidance*

Project approval for projects with FHA-insured blanket loans are governed according to the requirements of section 234 of the Act, 24 CFR part 234, and other applicable policy guidance, including the Condominium Project Approval and Processing Guide (the Guide).

**II. This Proposed Rule**

This proposed rule would codify basic regulatory requirements for condominium project approval, in addition to the current requirements under 24 CFR part 203. These requirements would be more flexible, less prescriptive, and more reflective of the current market than the requirements in the current section 234 program. The intent of this rule is to regulate where necessary to ensure financial soundness and project viability, but to be flexible where possible, and retain the ability to be responsive to the market.

The rule proposes a new 24 CFR 203.8 that would codify DELRAP for condominiums. While a similar process is currently outlined in chapter 1.2 of the Guide, this rule is proposing some changes based on HUD's experience. As now proposed, in order to participate in condominium project approval, a mortgagee would have to be granted DELRAP authority, and in order to be granted DELRAP authority, a mortgagee would have to be unconditionally approved for the Direct Endorsement program as provided in § 203.3, and additionally have the following indicia of capability in underwriting condominium mortgages specifically: Staff with at least one year experience in underwriting mortgages on condominiums and/or condominium project approval; having originated not less than 10 condominium loans in HUD-approved projects; having an acceptable quality control plan that includes provisions specific to DELRAP; and ensuring that only staff members with the required experience participate in condominium project approval using DELRAP (proposed § 203.8(b)).

Under proposed § 203.8(b)(2) and (b)(3), mortgagees would initially be granted conditional DELRAP authority upon providing a notice of their intent to participate in DELRAP. While conditionally approved, a mortgagee must submit all recommended Condominium Project approvals and denials to FHA for review, and may only proceed upon notification of HUD's agreement with the recommendation. Once the mortgagee has completed at least 5 DELRAP reviews to HUD's satisfaction, the mortgagee will be granted unconditional DELRAP authority and may approve condominium projects in accordance with HUD's requirements.

Section 203.8(c) would provide for HUD's review of a DELRAP mortgagee's performance. HUD will monitor the performance on an ongoing basis, and, if there are no material deficiencies found, HUD will select a sample of project approvals, denials, or recertifications for post-action review. If the review shows deficiencies and the mortgagee has unconditional DELRAP authority, the mortgagee may be returned to conditional status. If additional reviews continue to show deficiencies, the mortgagee authority to participate in DELRAP may be terminated, or other action taken against the staff reviewer, under proposed § 203.8(d), which includes any action available under 24 CFR 203.3(d).

Sections 203.8(d) and (e) provide for termination of DELRAP authority and requests for reinstatement of terminated authority. HUD may immediately terminate DELRAP authority or take actions under § 203.3(d) if the mortgagee violates any of the requirements and procedures established by the Secretary for mortgagees approved to participate in DELRAP, the Direct Endorsement program, or the Title II Single Family mortgage insurance program; or if other good cause exists; or for unacceptable performance. Actions under 24 CFR 203.3(d) include probation of Direct Endorsement lenders subject to conditions including additional training and changes to the mortgagee's quality control plan, or termination of Direct Endorsement approval. Termination of DELRAP authority would be effective upon the mortgagee's receipt of HUD's notice advising of the termination. Any termination of DELRAP authority is a separate action from an action for withdrawal of mortgagee approval by the Mortgagee Review Board, which could also be initiated by HUD.

Under proposed § 203.8(e), a mortgagee whose DELRAP authority is terminated under this section may request reinstatement if the mortgagee's

DELRAP authority has been terminated for at least 6 months. The request must address the eligibility criteria for participation in DELRAP under this rule as well as a corrective action plan, along with evidence that the mortgagee has implemented the corrective action plan. Following the request, HUD would be able to grant Conditional DELRAP authority if the mortgagee's application is complete and the Commissioner determines that the underlying causes for the termination have been satisfactorily remedied. The mortgagee would be required to complete successfully at least 5 test cases in accordance with § 203.8(b)(3) in order to receive unconditional DELRAP authority.

The rule proposes a minor change to current § 203.17(a)(1), which section defines "mortgage" in accordance with section 201 of the National Housing Act (12 U.S.C. 1707), but has not been updated to account for the addition of mortgages on one-family units in multifamily projects and an undivided interest in the common areas and facilities. Nor does the current regulatory definition include detached and semi-attached units. By revising this section to cross-reference section 201 of the National Housing Act rather than attempting to summarize it, HUD avoids the need to update this definition each time the statutory definition is revised, and eliminates confusion that may be caused by differences between the statutory language and HUD's regulation.

This rule proposes to revise currently reserved § 203.43b to include the regulations pertaining to the eligibility of projects for approval and for condominium units in approved projects for mortgage insurance.

Section 203.43b(a) would provide definitions of the terms Condominium Project, Condominium Unit, Rental for Transient or Hotel Purposes, Condominium Association, Single-Unit Approval, and Site Condominium under part 203. While Condominium Unit refers to a one-family unit in a multifamily project, including a project in which the dwelling units are attached, or are manufactured housing units, semi-detached, or detached, and an undivided interest in the common areas and facilities that serve the project, the term Condominium Project refers to the project as a whole in which such units are located. The term Rental for Transient or Hotel Purposes cross-references to section 513(e) of the Act (12 U.S.C. 1731b(e)). Single-Unit Approval means approval of a loan on a single unit in a project that is not approved as a condominium. The term

Site Condominium means a single family totally detached dwelling (which does not have a shared garage or any other attached building, including such improvements as archways, or breezeways), which is encumbered by a declaration of condominium covenants or condominium form of ownership, and which consists of the entire structure as well as the site and air space and is not considered to be a common area or limited common area.

Section 203.43b(b) would state that a mortgage on a Condominium Unit shall be eligible for insurance under section 203 of the National Housing Act if it meets the requirements of 24 CFR part 203, subpart A, except as provided for in § 203.43b. Section 203.43b(c) would further specify that the unit, to be eligible for insurance under § 203.43b, must be located in a Condominium Project approved by HUD or DELRAP mortgagee approved under 24 CFR 203.8, or meet the additional requirements for approval as a Site Condominium or Single-Unit Approval.

Under this rule, HUD and DELRAP lenders will not approve proposed or under construction projects; however, HUD or DELRAP lenders may approve legal phases of projects or completed projects. The condominiums that may be approved under this rule would be those where the work on the project or legal phase, including buildings and infrastructure of the project or legal phase, is fully complete. HUD would expect that all the requirements of local law would be met, including review and approval of the project or legal phase by the local jurisdiction and recordation in the property records of the condominium plat or development plan, as applicable (see §§ 203.43b(d)(4) and (d)(5)).

Section 203.43b(d) would state the basic condominium project approval eligibility requirements. The project or legal phase must be complete as to construction of the buildings and infrastructure. In addition, any legal phases must be contiguous (in a vertical building) or must consist of adjoining or contiguous homes (in a development of detached or semi-detached homes), and the units or buildings and infrastructure in each phase must be constructed and be complete. The project or legal phase must also be primarily residential in nature (although a certain amount of floor space may be set aside for commercial activities, as stated at § 203.43b(d)(6)(vii)) and not intended for transient or hotel purposes; must consist solely of one-family units, which is a statutory requirement under 12 U.S.C. 1707(a); and must be in full compliance with all Federal, State, and

local laws with respect to zoning, Fair Housing, and accessibility for persons with disabilities, including but not limited to the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, where relevant. Infrastructure includes the project's streets, storm water management, water and sewage systems, and utilities, along with the project's common elements and amenities, such as parking lots, community buildings, swimming pools, golf courses, playgrounds, and any similar items, called for in the project or legal phase.

In addition to these general requirements, condominiums must meet further approval requirements as provided by HUD. Some of these requirements are underwriting matters or existing legal requirements such as the nature of the real estate title or leasehold; unit owner control of the Condominium Association; insurance coverage; and statements regarding financial condition, special assessments, property conditions, and pending legal actions. These are the types of matters that HUD routinely considers when determining eligibility for FHA programs.

In addition, the rule would implement some regulatory standards specific to condominiums, but seeks to do so in a way that is flexible and responsive to the market while continuing to involve the public in the rulemaking process. Section 203.43b(d)(6)(vii) would provide for HUD to set a standard for the maximum commercial/nonresidential space within a range from 25 percent to 60 percent of the total floor area. Mixed-use developments are a way to integrate housing, land-use, economic and workforce development, as well as transportation and infrastructure development. However, the agency believes that allowing greater than 50 percent commercial/nonresidential space may have a negative impact on the residential character of the project; therefore, HUD would not expect in the near future to allow greater than 50 percent commercial/nonresidential space. HUD may want to allow less based on the experience it gains with this program.

Under 12 U.S.C. 1709(y)(2),<sup>1</sup> either HUD or the DELRAP lender, at the option of the requester, may grant an exception to the standard regarding the maximum percentage of commercial/

<sup>1</sup> As amended by the Housing Opportunity Through Modernization Act of 2016, Public Law 114–201 (approved July 29, 2016).

nonresidential space set by HUD. In determining whether to grant such an exception, factors relating to the economy for the locality in which the condominium project is located, or specific to the project, including the total number of family units in the project, shall be considered. A DELRAP lender, in determining whether to grant a requested exception, shall follow any procedures that HUD may establish.

Within this range, in order to remain flexible and responsive to the market, HUD would be able to vary by notice the percentage of commercial/nonresidential space allowed or required. If HUD decides to vary the upper and lower limits of the range itself, the rule provides a procedure that includes notice and an opportunity for public comment. This notice and comment procedure is stated at § 203.43b(e) of this proposed rule.

Sections 203.43b(d)(6)(viii) and (d)(6)(ix) would treat acceptable maximum percentages of units with FHA-insured mortgages and acceptable minimum levels of owner occupancy, respectively, in a similar manner, with overall ranges between 25 and 75 percent, within which HUD would be able to vary the amount by notice. The owner occupancy percentage includes both principal and secondary residences (or units that have been sold to purchasers who intend to occupy them as primary or secondary residences). Secondary residences are defined at § 203.18(f)(2), mean dwellings (i) Where the mortgagor maintains or will maintain a part-time place of abode and typically spends (or will spend) less than a majority of the calendar year; (ii) which is not a vacation home; and (iii) which the Commissioner has determined to be eligible for insurance in order to avoid undue hardship to the mortgagor. A person may have only one secondary residence at a time.

While having too few owner occupants can detract from the viability of a project, requiring too many can harm its marketability. HUD's current standard of 50 percent has worked in the recent market; however, HUD specifically invites comment on this issue. For these elements as well, the procedure to change the upper and lower limits of the range itself by notice with an opportunity to comment would apply.

Section 203.43b(d)(6)(x) addresses phasing of a project. While HUD understands that developing projects in phases as funding is secured may be necessary in some cases, HUD is concerned about the risk of approving phases in cases where failure to complete a phase could result in the

failure of the project as a whole. Therefore, only legal phasing will be allowed. All phases must be contiguous and constructed so that they are separately sustainable, meet the requirements of § 203.43b(d), and be capable of being occupied even if a subsequent phase were to be delayed or even fail to be completed.

Section 203.43b(d)(6)(xi) addresses reserve accounts. Per HUD's usual practice, this rule would require that the reserve account is funded with at least 10 percent of the monthly unit assessments, unless a lower amount is deemed acceptable by HUD based on a reserve study completed not more than 24 months before a request for a lower amount is received.

Section 203.43b(d)(6)(xii) permits HUD to set requirements regarding such other matters that may affect the viability or marketability of the project or its units. Additionally, under proposed § 203.43b(f), the Secretary may grant case by case exceptions to the regulatory requirements under § 203.43b(d)(6). This is in accordance with the discretionary nature of the Secretary's authority to insure mortgages under 12 U.S.C. 1709(a).

Proposed 203.43b(g) provides the basic mechanism for condominium approval. Condominiums would be submitted to either HUD or a DELRAP lender, and, if all eligibility criteria are met, would be approved and placed on the list of HUD-approved condominium projects. Under § 203.43b(g)(3), unless otherwise specified in writing by HUD, approval would be for a period of 3 years from the date of placement on the approved list; HUD may rescind approval at any time if the project fails to comply with any requirement for approval.

Proposed 203.43b(g)(4) provides for renewal of a project approval. The condominium could request renewal, by submitting a request for recertification no earlier than 6 months before, and no later than 6 months after, expiration of the approval. As long as the request is timely, it may be supported by updating previously submitted information, rather than by resubmitting new information. However, if the request is not submitted by the end of 6 months after the expiration of approval, a complete, new approval application would be required. HUD will specify the format for the request.

Proposed 203.43b(h) would provide overall parameters for Single-Unit Approval, that is, approvals of individual units in projects that are not otherwise approved to participate. A mortgage secured by a Single-Unit Approval may be acceptable if the

percentage of such mortgages insured in a project is within an amount determined by the Secretary to be necessary for the viability and marketability of the project, which percentage, within the range established in this rule, will be specified by HUD by notice. In addition, the unit may only be eligible for approval on a Single-Unit Approval basis if it is not located in a Condominium Project that is approved under this section or has been subject to a negative determination for significant issues that affect the viability of the project. The project must be complete (*i.e.*, not proposed, under construction, or subject to further phasing or annexation), including all common elements and those of the master association. The project must have a percentage of units sold within a range stated in the rule, with the specific percentage to be established by HUD through notice. Finally, the Single-Unit Approval must be in a project in which no single entity owns more than the percentage of units in the project that is within the range stated in rule, with the specific percentage to be established by HUD through notice. If HUD determines it is necessary to change the upper and lower limits of the ranges, it will issue a notice for comment.

Proposed § 203.43b(i) would govern site condominiums. Insurance and maintenance costs must be the sole responsibility of the owner, and any common assessments collected must be restricted to use solely for amenities outside of the footprint of the individual site.

Condominium units that meet the statutory requirements of section 203(k) of the Act, 12 U.S.C. 1709(k), are eligible for rehabilitation loans. Section 203(k) and the implementing HUD regulation at 24 CFR 203.50(a)(1)(i) provides for rehabilitation loans for 1–4 unit structures that are primarily residential. A rehabilitation loan for an individual condominium unit under 203(k) necessarily excludes the building exterior and common elements, which are the responsibility of the Association, so that the 203(k) loan would be for the portion of the structure that is inside the unit including the installation of firewalls in the attic of a unit (proposed 24 CFR 203.50(a)(1)(iv)).

In accordance with HUD's longstanding policy for 203(k) rehabilitation loans secured by condominium units, this proposed rule would add a provision stating that the maximum loan amount is 100 percent of the after-improvement value of the unit for any Condominium Unit. (proposed 24 CFR 203.50(f)(3)).

Finally, the proposed rule would address the continued applicability of 24 CFR part 234, which now applies, along with section 234 of the Act (12 U.S.C. 1715y) and other HUD issuances specific to part 234, only in cases where projects have blanket mortgages insured by HUD. This proposed rule adds a new § 234.2, entitled “Savings clause,” which clarifies that part 203 and this section apply in all cases except where the project has a blanket mortgage insured under section 234(d) of the Act, in which case section 234 of the Act, 24 CFR part 234, and other HUD issuances (including HUD Handbook 4265.1, Home Mortgage Insurance Condominiums; Chapter 11 of HUD Handbook 4150.1, Valuation Analysis for Home Mortgage Insurance and any Mortgagee Letters that discuss section 234 requirements) apply.

#### Requests for Public Comment

(1) HUD seeks public comment specifically on the proposed requirement in § 203.43b(d)(4) that the project or legal phase be “complete and ready for occupancy, including completion of the infrastructure of the project or legal phase, and not subject to further rehabilitation, construction, phasing, or annexation, except to the

extent that approval is sought for legal phasing in compliance with the requirements of paragraph (d)(6)(x) of this section.” Given that HUD approval of a fully completed project would not require an environmental review, while continuing the current practice of approving proposed or under construction projects could require environmental review, HUD seeks comments on how this rule would affect industry participation in the program.

(2) HUD seeks public comment specifically on whether there is some other indicia of appropriate experience that could be used rather than, or in addition to, experience in underwriting condominium mortgages and/or condominium approval, or the number of loans originated; for instance, is there another type of experience that could provide an indication of competency in condominium project approval, and how would it provide such indication?

(3) HUD seeks public comment specifically on the ranges this rule proposes to establish, within which HUD may set the specific requirements for percentages of Single-Unit Approvals, commercial space, FHA insured units, and owner-occupied units. HUD seeks comment on whether this range approach is the best

approach, and whether the ranges proposed are appropriate. The agency would be interested in any data or evidence that could be provided either that the ranges, as proposed, are appropriate, or that a different set of ranges would be more appropriate or would yield additional benefits.

(4) HUD seeks public comment specifically on the proposed revision of the period of project approval from 2 to 3 years, including whether there are any costs and benefits that would be associated with a shorter or longer timeframe.

### III. Findings and Certifications

#### Paperwork Reduction Act

The information collection requirements contained in this 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 rule is estimated as follows:

Information collection	Number of respondents	Frequency of response	Total annual responses	Hours per response	Total burden hours
Package Preparation .....	15,000	1	15,000	2	30,000
Package Review .....	15,000	1	15,000	1	15,000
Quality Assurance .....	15,000	.2	3,000	1	3,000
<b>Totals .....</b>	<b>45,000</b>	<b>2.2</b>	<b>33,000</b>	<b>4</b>	<b>48,000</b>

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.*, 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 (FR–5563) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax: (202) 395–6947;

and  
Reports Liaison Officer, Office of Public and Indian Housing, Department of Housing and Urban Development, Room, 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> Web site 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 Planning and Review

OMB reviewed this proposed rule under Executive Order 12866 (entitled “Regulatory Planning and Review”). This rule was determined to be a “significant regulatory action,” as defined in 3(f) of the order (although not an economically significant regulatory action, as provided under section 3(f)(1)

of the order). The docket file is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

The proposed rule establishes regulations concerning three aspects of the Direct Endorsement Lender Review and Approval Process (DELRAP) for single family condominiums. First, the rule establishes parameters regarding which kind of condominium projects are eligible for approval for the purpose of single unit mortgage insurance through the Department of Housing and Urban Development. Flexible approval standard requirements, will allow for projects to efficiently meet market needs. Second, the rule changes the frequency with which approved projects need to be reapproved from two years to three years. Third, the rule changes the standards for condominium DELRAP mortgagees in order to require minimum experience and quality control levels.

The rule could result in multiple transfers: Among lenders, among condominium projects; and to FHA. The benefit of the proposed rule is to provide flexibility in implementation providing competent lenders a role in project approval. Costs arise from any administrative burden imposed upon the private sector or lost opportunities resulting from condominium project requirements. Many provisions of the rule (Single-Unit Approval, flexible standards, a longer interval for condo approvals, and exceptions for environmental review) will reduce or eliminate the compliance costs of the rule. The Regulatory Impact Analysis discusses but does not monetize many of the difficult to evaluate impacts. Monetized annual impacts of the rule include the estimated paperwork burden of \$2.1 million. HUD finds that increasing the periodicity of approval from 2 to 3 years reduces the costs of approval by \$1 million annually.

Greater detail and analysis than this brief summary can provide is available in the full initial Regulatory Impact Analysis (RIA) prepared for this rule, which is available for public inspection in the Regulations Division and may be viewed online at [www.regulations.gov](http://www.regulations.gov), under the docket number above. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled 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 (800) 877–8339.

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

#### Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding is available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the Finding by calling the Regulations Division at (202) 402–3055 (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 (800) 877–8339.

#### 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. This proposed rule establishes regulations for single-family mortgage insurance of condominium units pursuant to 12 U.S.C. 1707 and 1709. However, HUD has been providing mortgage insurance for this purpose pursuant to statute and the Condominium Approval and Processing Guide published in 2011. While this rule makes some adjustments to the provisions on eligibility for DELRAP participation, and many DELRAP lenders are small entities, this rule is not so different as to create a significant economic impact.

#### A. Industry Sector Data Analysis

*Industries involved in mortgage origination and lending.* Mortgage

originators (reverse, purchase, refinance) include both brokers and lenders. The firms that participate in lending are divided among five primary groups: Banks, thrifts, mortgage banks, credit unions, and mortgage brokers. A precise description of these individual industries is as follows:

#### Commercial Banking (NAICS 522110)

Entities primarily engaged in accepting demand and other deposits and making commercial, industrial, and consumer loans. Commercial banks and branches of foreign banks are included.

#### Savings Institutions (NAICS 522120)

Entities primarily engaged in accepting time deposits, making mortgage and real estate loans, and investing in high-grade securities. Savings and loan associations and savings banks are included in this industry.

#### Credit Unions (NAICS 522130)

Entities primarily engaged in accepting members' share deposits in cooperatives that are organized to offer consumer loans to their members.

#### Real Estate Credit (NAICS 522292)

Entities primarily engaged in lending funds with real estate as collateral. This includes: Construction lending, farm mortgage lending, Federal Land Banks, home equity credit lending, loan correspondents (*i.e.*, lending funds with real estate as collateral), mortgage banking (*i.e.*, nondepository mortgage lending), and mortgage companies.

#### Mortgage and Nonmortgage Loan Brokers (NAICS 522310)

Entities primarily engaged in arranging loans by bringing borrowers and lenders together on a commission or fee basis.

During the 1980s and 1990s, mortgage lending evolved from the traditional portfolio lender model where single companies (bank and thrift depositories) performed all steps in the mortgage process—making, closing, funding, servicing, and holding the loan—to a more specialized industry of originators, funding lenders, warehouse lenders, separate secondary market buyers of loans, and servicers.<sup>2</sup> A major driving force behind the unbundling of the mortgage functions, as well as the rise of mortgage brokers, has been the rise and eventual dominance of mortgage securitization, which separated the provision of capital from loan origination and servicing. Brokers

<sup>2</sup>Michael G. Jacobides, "Mortgage Banking Unbundling: Structure, Automation, and Profit," *Mortgage Banking*, January 2001, pages 28–40.

originate loans mainly for wholesale lenders.

Studies of the mortgage brokerage industry do not find there to be high fixed costs for firms. There is little evidence of economies of scale in mortgage origination but there is some evidence that brokers are more efficient originators than mid-size and large lenders. Olson (2002) reports that his surveys find no economies of scale in mortgage production—a one-person firm produced as many loans per employee as a larger firm. Olson regards brokers as low-cost, highly-competitive firms, vigorously competing with one another and with little opportunity to earn above-normal profits.<sup>3</sup>

#### B. Current State of the Market

In 2014, 7,062 institutions reported data on nearly 10 million home mortgage applications, resulted in 6 million originations. This is down from 8.7 million originations in 2013. There was an historically high share of loans originated outside the federally insured banking system by institutions such as independent mortgage companies and credit unions, not subject to Community Reinvestment Act (Federal Reserve, 2015).<sup>4</sup>

The share of mortgages originated by non-depository, independent mortgage companies has increased sharply in recent years. Small banks and credit unions have also increased market shares over the past decade. The fraction of originations attributable to large banks and their nonbank subsidiaries diminished. Banks and thrifts accounted for 45 percent of all

reported mortgage originations; independent mortgage companies 40 percent, credit unions over 9 percent, affiliates, remainder (Federal Reserve, 2015).

In 2014, 7,062 reporting institutions, 4,118 banks and thrifts, 3,367 were small (assets less than \$1 billion), 1,984 credit unions, 139 mortgage companies affiliated with depositories (banks and credit unions), 821 independent mortgage companies. In 2014, small banks and credit unions were much more likely to originate conventional higher-priced loans than large banks and mortgage companies. Small banks and credit unions originated about 18 percent of conventional home-purchase loans, but accounted for 59 percent of higher-priced conventional home-purchase loans (Federal Reserve, 2015).

#### C. Size Standards

SBA's size standards (2016) define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. Size standards have been established for types of economic activity, or industry, generally under the North American Industry Classification System (NAICS). For most industries considered, a "small" business is defined by revenue. Size standards are based on another criterion if revenue is not suitable, either because prices are volatile or there are more appropriate measures.

According to the U.S. Census Bureau, revenue for Finance, Insurance and Real Estate includes commissions and fees from all sources, rents, net investment

income, interest, dividends, royalties, and net insurance premiums earned. SBA considers a real estate credit small if its annual revenue is no greater than \$38.5 million. A mortgage broker is defined as small if its revenue is no greater than \$7.5 million.

For three of the industries considered in this analysis (Commercial Banks, Savings Institutions, and Credit Unions), the SBA definition of small is by the dollar amount of assets (\$550 million). Assets include: Cash, interest-earning loans, leases, securities, real estate, letters of credit, loans to other banks, any other financial assets, and intangible assets.

The diversity of size standards makes it difficult to perform a precise analysis of the ubiquity small firms. This difficulty is compounded when sources of business statistics do not report their data by SBA's size standards and that industry definition may not be equivalent. When an exact correspondence is not possible, HUD will, by necessity, use an alternative size standard. For example, asset data is collected by the Federal Deposit Insurance Corporation (FDIC) for Commercial Banks and Savings Institutions. FDIC uses \$1 billion as a means to categorize banks and thrifts, which is more inclusive than SBA's definition.

#### D. Prevalence of Small Firms

Estimating the prevalence of small firms in making FHA-insured condominium loans requires combining statistics from different sources.

### FHA INSURED CONDOMINIUM LOANS BY LENDER TYPE \*

Type of lender	Firms (% of number)	Forward condo loans (% of number of loans)	All condo loans*** (% of number of loans)	All condo loans (% of dollar volume)
Bank (Total) .....	30	20	19	7
Small Bank** .....	13	3	3	1
Large Bank .....	17	17	16	6
Mortgage Company .....	66	79	79	93
Affiliated .....	1	0	0	0
Independent .....	65	79	79	93
Credit Union .....	3	1	1	0
Total **** .....	100	100	100	100

\* Source: Single Family Data Warehouse 6/1/14–5/31/16.

\*\* Defined as having assets no greater than \$1 Billion.

\*\*\* All = forward + HECM.

\*\*\*\* Percentages by lender type are rounded and so may not sum to 100.

The table provides us with some insight concerning the types of firms

that are involved in making FHA-condo loans. The predominant originators by

any measure are mortgage companies. Independent mortgage companies make

<sup>3</sup> Olson, David. 2002. "Report of David Olson." Report submitted to U.S. District Court, Court of Minnesota in Civil Case No. 97–2068 DWF/SRN:

Lonnie and Danny Glover (Plaintiffs) vs. Standard Federal Bank, ABN AMRO Mortgage Group, Inc. and Heartland Mortgage Corporation (Defendants).

<sup>4</sup> [http://www.federalreserve.gov/pubs/bulletin/2015/pdf/2014\\_HMDA.pdf](http://www.federalreserve.gov/pubs/bulletin/2015/pdf/2014_HMDA.pdf).



79 percent of the loans and 93 percent of the dollar volume. The largest independent mortgage company, Quicken Loans, accounts for over 5.5 percent of all condo loans. In this table, “banks” are equivalent to commercial banks and savings institutions. Small banks (assets of no greater than \$1 billion) represent a small proportion of firms (13 percent) and an even smaller percentage of condo loans (3 percent).

Given the dominance of mortgage companies, an estimate of the small companies originating mortgage loans is essential to a good economic analysis. HUD has data concerning the total FHA-insured loans made by the firms also involved in the condo business. An estimate of the total loans can be arrived

at by dividing FHA loans by FHA’s market share. Doing so will lead to estimates that are inaccurately high for some and too low for others. On average the estimate will be correct. In the last three years (2013–2015), FHA’s share of the dollar value of home purchases as varied around 15 percent.

The estimated value of loans can be converted to an estimated revenue by multiplying by an appropriate percentage. Estimates of broker income vary between 1 and 3 percent. We use the lower to arrive for a more expansive count of small business. Of all condo lenders, 31 percent of the firms are small mortgage companies (earning less than \$7.5 million). These small mortgage companies make 5 percent of

all condo loans and 2 percent of the dollar volume.

We counted a total of only 39 credit unions over a two-year period. Credit Unions are not active in making condo loans. The proportion of loans and dollar value made by credit unions is very close to 0 percent. Thus, accuracy in estimating the small/large percentage is not as important as for other types of lenders. We will assume that all credit unions are small because the average asset amount is significantly below \$1 billion (Monthly Credit Union Estimates, May 2016).

Small firms constitute 47 percent of originators of FHA-insured condo loans, 9 percent of all condo loans, and 3 percent of the dollar volume.

ESTIMATES OF PREVALENCE OF SMALL LOAN ORIGINATORS INVOLVED IN FHA CONDO LENDING

	Small firms (%)	Number of condo loans (%)	Dollar volume of condo loans (%)
Banks .....	13	3	1
Mortgage Companies .....	31	5	2
Credit Unions .....	3	1	0
Total .....	47	9	3

E. Economic Impact

Approximately half of the firms engaged in making FHA-insured condominium loans are estimated to be small. This share of small firms could change depending upon the regulatory impact of the rule and whether that impact is disproportionate. Although small business constitutes 47 percent of all firms, they originate only 9 percent of all loans, making it more difficult to pass on any costs of origination to borrowers. Reducing (raising) fixed costs benefits (harms) small firms disproportionately more than large ones.

One aspect of the rule that could have a negative and disproportionate impact on small firms are any requirements to participate in the DELRAP program. While many of the requirements will be met with little difficulty by already-approved lenders, requirements that are related to the level of business activity would place a relatively higher burden on small firms. To be qualified for Direct Endorsement authority, a mortgagee must satisfy the following characteristics: Possess at least one of year experience in condo loans; have made at least 10 FHA approved condo loans; possess a quality control plan; and participating staff is limited to those with prior experience. All of these requirements would be easier to meet by larger firms with greater capacity. Nonetheless, small firms that have at

least occasional experience should be able to satisfy the requirements without undue burden.

Other elements of the rule lift regulatory burdens. First, allowing Single-Unit Approval enables small lenders business opportunities without the cost of seeking approval for an entire condominium project.<sup>5</sup> Second, by providing that only completed projects may be approved, this rule eliminates the need for HUD to require an environmental review from lenders as a condition of approval. This change will benefit small firms that are less likely to retain specialists. Although some components of the rule raise the cost of compliance for small firms, other elements will expand their opportunities and allow them to spread the compliance costs over a greater number of loans. Also, participation in condominium insurance, like HUD’s other mortgage insurance programs, is purely voluntary.

Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD’s view that this rule will not have a significant effect on

a substantial number of small entities, HUD specifically invites comments regarding any 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, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This 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.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance number for 24 CFR parts 203 and 234 is 14.117.

List of Subjects

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians-lands, Loan

<sup>5</sup> As noted in the accompanying Regulatory Impact Analysis, the average cost of a project DELRAP approval would be \$1,250. Extending the approval period to 3 years reduces this cost by approximately one-third for all lenders.



programs-housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

#### 24 CFR Part 234

Condominiums, Mortgage insurance, Reporting and recordkeeping requirements.

For the reasons stated in the foregoing preamble, HUD proposes to amend 24 CFR parts 203 and 234 as follows:

### PART 203—SINGLE FAMILY MORTGAGE INSURANCE

■ 1. The authority citation for part 203 is revised to read as follows:

**Authority:** 12 U.S.C. 1707, 1709, 1710, 1715b, 1715z–16, 1715u, and 1715z–21; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

#### Subpart A—Eligibility Requirements and Underwriting Procedures

■ 2. Add § 203.8 to read as follows:

#### § 203.8 Approval of mortgagees for Direct Endorsement Lender Review and Approval Process (DELRAP).

(a) *General.* Each mortgagee that chooses to participate in the review and approval of Condominium Projects, as set forth in § 203.43b, must be granted authority to participate in the Direct Endorsement Lender Review and Approval Process (DELRAP).

(b) *DELRAP Authority—(1) Eligibility.* To be granted DELRAP authority, as described in § 203.43b, a mortgagee must be unconditionally approved for the Direct Endorsement program as provided in § 203.3 and meet the following requirements:

(i) Have staff with at least one year of experience in underwriting mortgages on condominiums and/or condominium project approval;

(ii) Have originated not less than 10 condominium loans in projects approved by the Commissioner;

(iii) Have an acceptable quality control plan that includes specific provisions related to DELRAP; and

(iv) Ensure that only staff members meeting the above experience requirements participate in the approval of a Condominium Project using DELRAP authority.

(2) *Conditional DELRAP Authority.* Mortgagees will be granted Conditional DELRAP authority upon provision of notice to the Commissioner of the intent to use DELRAP. Mortgagees with Conditional DELRAP authority must submit all recommended Condominium Project approvals, denials and recertifications to FHA for review. If FHA agrees with the mortgagee's recommendation, it will advise the

mortgagee that it may proceed with the recommended decision on the Condominium Project.

(3) *Unconditional DELRAP Authority.* Mortgagees will be granted unconditional DELRAP authority after completing at least five (5) DELRAP reviews to the satisfaction of the Commissioner and may then exercise DELRAP authority to approve projects in accordance with requirements of the Commissioner.

(c) *Reviews.* HUD will monitor a mortgagee's performance in DELRAP on an ongoing basis.

(1) If the review shows that there are no material deficiencies, subsequent project approvals, denials or recertifications may be selected for post-action review based on a percentage as determined by the Commissioner.

(2) If the review shows that there are deficiencies in the mortgagee's DELRAP performance, the mortgagee may be returned to Conditional DELRAP status.

(3) If additional reviews continue to show deficiencies in the mortgagee's DELRAP performance, the mortgagee's authority to participate in DELRAP may be terminated or other action taken against the mortgagee or responsible staff reviewer.

(d) *Termination of DELRAP Authority.* (1) HUD may immediately terminate the mortgagee's authority to participate in DELRAP or take any action listed in 24 CFR 203.3(d) if the mortgagee:

(i) Violates any of the requirements and procedures established by the Secretary for mortgagees approved to participate in DELRAP, the Direct Endorsement program, or the Title II Single Family mortgage insurance program; or

(ii) If HUD determines that other good cause exists.

(2) Such termination will be effective upon receipt of HUD's notice advising of the termination.

(3) Notwithstanding any provisions of this section, the Commissioner reserves the right to take administrative action, including revocation of DELRAP authority, against any mortgagee and staff reviewer because of unacceptable performance. Any termination instituted under this section is distinct from withdrawal of mortgagee approval by the Mortgage Review Board under 24 CFR part 25.

(e) *Reinstatement.* A mortgagee whose DELRAP authority is terminated under this section may request reinstatement if the mortgagee's DELRAP authority has been terminated for at least 6 months. In addition to addressing the eligibility criteria specified in paragraph (b)(1) of this section, the application for reinstatement must be accompanied by

a corrective action plan addressing the issues that led to the termination of the mortgagee's DELRAP authority, along with evidence that the mortgagee has implemented the corrective action plan. The Commissioner may grant Conditional DELRAP authority if the mortgagee's application is complete and the Commissioner determines that the underlying causes for the termination have been satisfactorily remedied. The mortgagee will be required to complete successfully at least five (5) test cases in accordance with paragraph (b)(2) in order to receive unconditional DELRAP authority as provided in paragraph (b)(3) above.

■ 3. Revise § 203.17(a)(1) to read as follows:

#### § 203.17 Mortgage provisions.

(a) *Mortgage form.* (1) The term "mortgage" as used in this part, except § 203.43c, shall have the meaning given in Section 201 of the National Housing Act, as amended (12 U.S.C. 1707).

\* \* \* \* \*

■ 4. Add 203.43b to read as follows:

#### § 203.43b Eligibility of mortgages on single-family condominium units.

(a) *Definitions.* As used in this part:

(1) *Condominium Association (Association)* means the organization, regardless of its formal legal name that consists of homeowners within a condominium project for the purpose of managing the financial and common-area assets.

(2) *Condominium Project* shall mean the project in which one-family dwelling units are attached, semi-detached, or detached, or are manufactured housing units, and in which owners hold an undivided interest in the common areas and facilities that serve the project.

(3) *Condominium Unit* shall mean real estate consisting of a one-family unit in a multifamily project, including a project in which the dwelling units are attached, or are manufactured housing units, semi-detached, or detached, and an undivided interest in the common areas and facilities that serve the project.

(4) *Infrastructure* means the condominium project's streets, storm water management, water and sewage systems, and utilities, along with the project's common elements and amenities, such as parking lots, community buildings, swimming pools, golf courses, playgrounds, and any similar items, called for in the project or legal phase.

(5) *Rental for Transient or Hotel Purposes* shall have the meaning given

in section 513(e) of the National Housing Act (12 U.S.C. 1731b(e)).

(6) *Single-Unit Approval* means approval of one unit in an unapproved condominium project under paragraph (h) of this section.

(7) *Site Condominium* means a single family detached dwelling (which does not have a shared garage or any other attached building, including such improvements as archways, or breezeways), which is encumbered by a declaration of condominium covenants or condominium form of ownership, and which consists of the entire structure as well as the site and air space and is not considered to be a common area or limited common area.

(b) *Eligibility*. A mortgage secured by a Condominium Unit shall be eligible for insurance under section 203 of the National Housing Act if it meets the requirements of this subpart, except as modified by this section.

(c) *Approval required*. To be eligible for insurance under this section, a Condominium Unit must be located in a Condominium Project approved by HUD or a DELRAP mortgagee approved under § 203.8, or meet the additional requirements for approval as a Site Condominium or Single-Unit Approval.

(d) *Condominium Project Approval: Eligibility Requirements*. To be eligible for Condominium Project approval, the Condominium Project must:

- (1) Be primarily residential in nature and not be intended for rental for Transient or Hotel Purposes;
- (2) Consist of units that are solely one-family units;
- (3) Be in full compliance with all applicable Federal, State, and local laws with respect to zoning, Fair Housing, and accessibility for persons with disabilities, including but not limited to the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, where relevant;
- (4) Be complete and ready for occupancy, including completion of all the infrastructure of the project or legal phase, and not subject to further rehabilitation, construction, phasing, or annexation, except to the extent that approval is sought for legal phasing in compliance with the requirements of paragraph (d)(6)(x) of this section;
- (5) Be reviewed and approved by the local jurisdiction with respect to the condominium plat or similar development plan and any phases; if applicable, the approved plat or development plan must have been recorded in the land records of the jurisdiction; and

(6) Meet such further approval requirements as provided by the Commissioner through notices with respect to:

- (i) Nature of title to realty or leasehold interests;
- (ii) Control over, and organization of, the Condominium Association;
- (iii) Minimum insurance coverage for the Condominium Project;
- (iv) Planned or actual special assessments;
- (v) Financial condition of the Condominium Project;
- (vi) Existence of any pending legal action, or physical property condition;
- (vii) Commercial/non-residential space, which must be within a range between 25 and 60 percent of the total floor area (which range may be changed following the procedures in paragraph (d)(6) of this section), with the specific maximum and minimum percentages within that range to be established by HUD through notice, provided that such commercial/non-residential space does not negatively impact the residential use of the project or create adverse conditions to the occupants of individual condominium units.
- (viii) Acceptable maximum percentages of units with FHA-insured mortgages, which must be within a range between 25 and 75 percent of the total number of units in the project (which range may be changed following the procedures in paragraph (d)(6) of this section), with the specific maximum percentage of units with FHA-insured mortgages within that range to be established by HUD through notice.

(ix) Acceptable minimum levels of owner occupancy, including units under a bona fide contract to purchase by a purchaser who occupies or will occupy the unit as their principal residence as well as a purchaser who occupies or intends to occupy the unit as a secondary residence, as defined in § 203.18(f)(2), within a range between 25 and 75 percent of the total number of units in the project (which may be changed following the procedures in paragraph (d)(6) of this section), with a specific minimum percentage to be established by HUD through notice.

(x) Phasing, provided that only legal phasing is permitted and individual phases must contain sufficient numbers of units to be separately sustainable as required by HUD, so that the insurance fund is not put at undue risk. In determining whether to accept legal phasing, HUD will assess the potential risk to the insurance fund and other factors that HUD may publish in notices. Phases must meet HUD's requirements for approval in paragraph

(d) of this section and must at a minimum be:

(A) In a vertical building, contiguous, with all units built out and having a certificate of occupancy; or

(B) In a detached or semi-detached development, consisting of groups of adjoining or contiguous homes (which may include, at HUD's discretion, easements for utilities and roads serving the homes), where all homes in a phase are built out and have a certificate of occupancy;

(xi) Reserve requirements, provided the reserve account is funded with at least 10 percent of the monthly unit assessments, unless a lower amount is deemed acceptable by HUD based on a reserve study completed not more than 24 months before a request for a lower amount is received.

(xii) Such other matters that may affect the viability or marketability of the project or its units.

(e) The Secretary will publish any generally applicable change in the upper and lower limits of the ranges of percentages in paragraphs (d)(6)(vii) through (ix) of this section in a notice published for 30 days of public comment. After considering the comments, the Department will publish a final notice announcing the new overall upper and lower limits of the range of percentages being implemented, and the date on which the new standard becomes effective.

(f) The Secretary may grant an exception to any specifically prescribed requirements within paragraph (d)(6) of this section on a case-by-case basis in HUD's discretion, provided that:

(1) In the case of an exception to the approval requirements for the commercial/nonresidential space percentage that HUD establishes under paragraph (d)(6)(vii) of this section, any request for such an exception and the determination of the disposition of such request may be made, at the option of the requester, under the direct endorsement lender review and approval process or under the HUD review and approval process through the applicable field office of the Department; and

(2) In determining whether to allow such an exception, factors relating to the economy for the locality in which the project is located or specific to the project, including the total number of family units in the project, shall be considered. A DELRAP lender, in determining whether to grant a requested exception, shall follow any procedures that HUD may establish.

(g) *Application for Condominium Project approval and Renewal of Approval*. (1) In order to become

approved, an application for Condominium Project approval, in accordance with the requirements of the Commissioner, must be submitted to either HUD or a DELRAP mortgagee, if consistent with the mortgagee's DELRAP approval.

(2) The application will be reviewed and if all eligibility criteria have been met, the Condominium Project will be approved and placed on the list of HUD-approved Condominium Projects.

(3) Unless otherwise specified in writing by HUD, Condominium Projects are approved for a period of three (3) years from the date of placement on the list of approved condominiums. HUD may rescind a Condominium Project's approval at any time if the project fails to comply with any requirement for approval.

(4) Eligible parties may request renewal of the approval of an approved Condominium Project by submitting a request for recertification no earlier than 6 months prior to expiration of the approval or no later than 6 months after expiration of the approval. HUD shall specify the format for the recertification request, which shall allow the request to be supported by updating previously submitted information, rather than resubmission of all information. However, if the request for recertification is not submitted within 6 months after the expiration of the Condominium Project's approval, a complete, new approval application is required.

(h) *Single-Unit Approval.* (1) *Limit on Single-Unit Approvals.* HUD will not insure mortgages in an unapproved project if the percentage of such mortgages exceeds an amount determined by the Commissioner to be necessary for the protection of the insurance fund, which percentage will be specified by the Commissioner by notice.

(2) *Single-Unit Approvals.* Mortgagees must ensure that the Condominium Unit is located in a Condominium Project that either meets the eligibility requirements for approval as set forth in paragraph (d) of this section as modified by this paragraph, except that HUD may provide that Single-Unit Approvals may be approved by meeting a subset of these standards, or less stringent standards, as stated by notice. In addition, a unit may be eligible for Single-Unit Approval if it:

(i) Is not in a Condominium Project that is on the list of FHA-approved Condominium Projects, or in a project that has been subject to adverse determination for significant issues that affect the viability of the project;

(ii) Is in a project that is complete under paragraph (d)(4) of this section;

(iii) Is not a manufactured housing condominium project or 2–4 unit project;

(iv) Is not a manufactured home and is in a project that has at least 5 dwelling units; and

(v) Is in a project in which the amount of Single-Unit Approvals is limited to a percentage of the total number of units in the project that is within a range of 0 to 20 percent, with the exact percentage within that range to be determined by HUD through notice.

(3) HUD will publish any generally applicable change in the overall upper and lower limits of the range stated in paragraph (h)(2)(v) of this section by notice published for 30 days of public comment. After considering the comments, HUD will publish a final notice announcing the new upper and lower limit of the range of percentages being implemented, and the date on which the new standard becomes effective.

(i) *Site Condominium.* Site condominiums are as defined in § 203.43b. Site Condominiums must meet all of the requirements of paragraph (d)(1) of this section for approval, except that:

(1) Insurance and maintenance costs must be the sole responsibility of the unit owner; and

(2) Any common assessments collected must be restricted to use solely for amenities outside of the footprint of the individual site.

■ 5. Amend § 203.50 to revise paragraphs (a)(1) and (f) to read as follows:

**§ 203.50 Eligibility of rehabilitation loans.**

\* \* \* \* \*

(a) \* \* \*

(1) The term *rehabilitation loan* means a loan, advance of credit, or purchase of an obligation representing a loan or advancement of credit, made for the purpose of financing:

(i) The rehabilitation of an existing one-to-four unit structure which will be used primarily for residential purposes;

(ii) The rehabilitation of such a structure and refinancing of the outstanding indebtedness on such structure and the real property on which the structure is located;

(iii) The rehabilitation of such a structure and the purchase of the structure and the real property on which it is located; or

(iv) The rehabilitation of the interior space or the installation of firewalls in the attic of a condominium unit, as defined in § 203.43b, excluding any

exteriors or areas that are the responsibility of the Association; and

\* \* \* \* \*

(f) The loan may not exceed an amount which, when added to any outstanding indebtedness of the borrower that is secured by the property, creates an outstanding indebtedness in excess of the lesser of:

(1)(i) The limits prescribed in § 203.18(a)(1) and (3) (in the case of a dwelling to be occupied as a principal residence, as defined in § 203.18(f)(1));

(ii) The limits prescribed in § 203.18(a)(1) and (4) (in the case of a dwelling to be occupied as a secondary residence, as defined in § 203.18(f)(2));

(iii) Eighty-five (85) percent of the limits prescribed in § 203.18(c), or such higher limit, not to exceed the limits set forth in § 203.18(a)(1) and (3), as the Secretary may prescribe (in the case of an eligible non-occupant mortgagor as defined in § 203.18(f)(3));

(iv) The limits prescribed in § 203.18a, based upon the sum of the estimated cost of rehabilitation and the Commissioner's estimate of the value of the property before rehabilitation;

(2) The limits prescribed in the authorities listed in this paragraph (f), based upon 110 percent of the Commissioner's estimate of the value of the property after rehabilitation; or

(3) For any Condominium Unit that is not a detached dwelling, attached townhouse dwelling, manufactured home (as defined in 24 CFR 3280.2), or site condominium (as defined in § 203.43b), 100 percent of the after-improvement value of the Condominium Unit.

\* \* \* \* \*

**PART 234—CONDOMINIUM OWNERSHIP MORTGAGE INSURANCE**

■ 6. The authority citation for part 234 continues to read as follows:

**Authority:** 12 U.S.C. 1715b and 1715y; 42 U.S.C. 3535(d).

**Subpart A—Eligibility Requirements—Individually Owned Units**

■ 7. Add § 234.2 to read as follows:

**§ 234.2 Savings clause.**

Effective [date that is 30 days after the date of publication of the final rule], HUD's regulations at § 203.43b of this chapter govern approval of real estate consisting of a one-family unit in a multifamily project, and an undivided interest in the common areas and facilities which serve the project, except where the project has a blanket mortgage insured under section 234(d) of the National Housing Act, 12 U.S.C.

1715y(d) (section 234(d)). Where the project has a blanket mortgage insured by HUD under section 234(d), this 24 CFR part 234 applies to the approval of a one-family unit in such project.

Dated: September 21, 2016.

**Edward L. Golding,**

*Principal Deputy Assistant Secretary for Housing.*

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**BILLING CODE 4210-67-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-123600-16]

RIN 1545-BN55

#### Guidance under Section 851 Relating to Investments in Stock and Securities

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document provides guidance relating to the income test and the asset diversification requirements that are used to determine whether a corporation may qualify as a regulated investment company (RIC) for federal income tax purposes. These proposed regulations provide guidance to corporations that intend to qualify as RICs.

**DATES:** Written or electronic comments and requests for a public hearing must be received by December 27, 2016.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-123600-16), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-123600-16), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-123600-16).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Matthew Howard of the Office of Associate Chief Counsel (Financial Institutions and Products) at (202) 317-7053; concerning submissions of comments and requests for a public hearing, Regina Johnson (202) 317-6901 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

#### Background and Explanation of Provisions

This document contains amendments to the Income Tax Regulations (26 CFR part 1) relating to RICs. Section 851 of the Internal Revenue Code (Code) sets forth requirements for qualifying as a RIC.

Section 851(a) provides that a RIC is any domestic corporation that (1) at all times during the taxable year is registered under the Investment Company Act of 1940, Public Law 76-768, 54 Stat. 789 (codified as amended at 15 U.S.C. 80a-1—80a-64 (2016)) (the 1940 Act), as a management company or unit investment trust or has in effect an election under the 1940 Act to be treated as a business development company; or (2) is a common trust fund or other similar fund excluded by section 3(c)(3) of the 1940 Act from the definition of “investment company” and is not included in the definition of “common trust fund” by section 584(a).

To be treated as a RIC for a taxable year, a corporation must satisfy the income test set forth in section 851(b). The income test under section 851(b)(2) requires that at least 90 percent of the corporation's gross income for the taxable year be derived from:

(A) dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the [1940 Act]) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to its business of investing in such stock, securities, or currencies, and (B) net income derived from an interest in a qualified publicly traded partnership (as defined in [section 851(h)]).

Section 851(b)(3) provides that to be treated as a RIC a corporation also must satisfy the following asset diversification requirements at the close of each quarter of the corporation's taxable year:

(A) at least 50 percent of the value of its total assets is represented by—

(i) cash and cash items (including receivables), Government securities and securities of other [RICs], and

(ii) other securities for purposes of this calculation limited, except and to the extent provided in [section 851(e)], in respect of any one issuer to an amount not greater in value than 5 percent of the value of the total assets of the taxpayer and to not more than 10 percent of the outstanding voting securities of such issuer, and

(B) not more than 25 percent of the value of its total assets is invested in—

(i) the securities (other than Government securities or the securities of other [RICs]) of any one issuer,

(ii) the securities (other than the securities of other [RICs]) of two or more issuers which

the taxpayer controls and which are determined, under regulations prescribed by the Secretary, to be engaged in the same or similar trades or businesses or related trades or businesses, or

(iii) the securities of one or more qualified publicly traded partnerships (as defined in [section 851(h)]).

These proposed regulations relate to the RIC income test and asset diversification requirements. Section A. of this preamble concerns the meaning of security. Section B. of this preamble addresses inclusions under sections 951(a)(1)(A)(i) and 1293(a). These proposed regulations also revise § 1.851-2(b)(1) of the existing final regulations to merely incorporate changes to section 851(b)(2) since the existing final regulations were published in the **Federal Register** on November 26, 1960, in TD 6500 (25 FR 11910).

#### A. Defining Securities

The income test and asset diversification requirements both use the term “securities.” For purposes of the income test, a security is defined by reference to section 2(a)(36) of the 1940 Act, while section 851(c) provides rules and definitions that apply for purposes of the asset diversification requirements of section 851(b)(3) but does not specifically define “security.” Section 851(c)(6), however, provides that the terms used in section 851(b)(3) and (c) have the same meaning as when used in the 1940 Act. An asset is therefore a security for purposes of the income test and the asset diversification requirements if it is a security under the 1940 Act.

The Treasury Department and the IRS have in the past addressed whether certain instruments or positions are securities for purposes of section 851. In particular, Rev. Rul. 2006-1 (2006-1 CB 261) concludes that a derivative contract with respect to a commodity index is not a security for purposes of section 851(b)(2). The ruling also holds that income from such a contract is not qualifying other income for purposes of section 851(b)(2) because that income is not derived with respect to the RIC's business of investing in stocks, securities, or currencies. Rev. Rul. 2006-1 was modified and clarified by Rev. Rul. 2006-31 (2006-1 CB 1133), which states that Rev. Rul. 2006-1 was not intended to preclude a conclusion that income from certain instruments (such as certain structured notes) that create commodity exposure for the holder is qualifying income under section 851(b)(2).

After the issuance of Rev. Rul. 2006-31, the IRS received a number of private