Housing Law Bulletin

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HANF Threatens Neediest Families

—see page 309

Cover: Esmeralda Gonzalez, holding a key to her recently completed cascaron—a three-bedroom, one bath 816-square feet liveable but unfinished home that meets all local building codes and standards. Cascarons are typically constructed with self-help labor by Proyecto Azteca of San Juan, Texas. They are sold to extremely low-income households at a price of $12,000 to $25,000, depending on the extent to which the unit's interior is finished. After they are built, cascarons are moved to the family's lot in the colonias of Hidalgo County, Texas. Photo courtesy Housing Assistance Council.

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Table of Contents

Page

Housing Assistance for Needy Families Act Threatens Neediest Families 309
Tax Credit Program Escapes Serious Damage from Bush Tax Plan 317
FAQ: May a Tenant Commissioner Receive a Stipend? 319
Hope VI Reauthorization Passes House Committee 319
HUD Waivers Benefit Individual Program Participants and Facilitate the Use of Project-Based Vouchers 320
HUD's New Anti-Flipping Rule—Only as Good as Its Enforcement 324
FAQ: May a PHA Retain $10 of the $25 Resident Participation Grant? 325
Lease Violation Sufficient Good Cause for LIHTC Eviction 326
Recent Cases 327
Recent Housing-Related Regulations and Notices .. 330

Announcements

RHS Proposes Revision to Rental Housing Regulations 311
2003 Advocates' Guide to Housing Policy 320
Publication List/Order Form 337

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Housing Assistance for Needy Families Act Threatens Neediest Families[1]

On April 29, House Housing Subcommittee Chair Rep. Bob Ney (R-OH) introduced H.R. 1841, the Administration's block grant bill, also called the *Housing Assistance for Needy Families Act* (HANF). HANF would require that, starting in FY 2005—after a transition period in FY 2004—HUD allocate its voucher funding to states instead of giving it directly to local PHAs as it currently does.[2] HANF's counterpart in the Senate, S. 947, was introduced by Colorado Sen. Allard, and is roughly equivalent to the House version.

Last month's *Bulletin* reviewed the basic issues raised by the Administration's proposal, which at that time had not been codified into legislation.[3] This article reviews the proposal in light of the text of the bills themselves.

Background

The federal housing voucher program currently serves more than 2.1 million households at a federal cost of more than $12 billion annually. The HANF proposal contained in these bills threatens substantial harm to these households.

The details of the bills only reinforce the primary conclusion: *changing the voucher program from its current funding structure—based on actual costs for the number of vouchers used—to the proposed block grant structure is likely to result in reduced program funding.* With less funding, fewer federal requirements and increased pressure to spread reduced funding across more households, states are likely to reduce the value of voucher subsidies, shift costs to tenants, and assist higher-income families at the expense of the poorest households. HANF's weakened federal protections will eventually translate into fewer subsidy recipients. At the same time, it will force existing recipients to pay a higher share of their income to rent lower-quality housing in less desirable neighborhoods. In addition, housing assistance may potentially be subject to time limits and work requirements.

Although families receiving voucher assistance at the time of the transition to a block grant would theoretically be protected from these changes for five years, they would not be insulated from the impacts of reduced federal funding, such as an increase in their share of the rent or a termination of their housing assistance. Furthermore, vouchers are less

[1]This article draws heavily upon the work of Barbara Sard and Will Fischer of the Center on Budget and Policy Priorities, and is revised and reprinted with permission. The *Bulletin* takes responsibility for any errors. For the original papers and additional information, *see* www.cbpp.org/housingvoucher.htm.

[2]It is important to note that Rep. Ney introduced HANF "on request" which, accompanied by a tepid statement, indicates possible reservations on his part with the Administration's problematic bill.

[3]*Administration's Voucher Block Grant Proposal Threatens Future Benefit Levels*, 33 HOUS. L. BULL. 281 (Apr./May 2003).

likely to promote housing development and homeownership because lenders will likely become more wary of relying on voucher funding.

Funding

Among its many faults, HANF would not provide any specifically authorized method of increasing funding to keep pace with rising local housing costs. The bill simply authorizes the appropriation of "such sums as may be necessary."[4] There are no provisions to increase the authorized level of funding to reflect inflation, housing cost increases or any other measure. Therefore, it would be up to the annual federal appropriations process to determine the level of block grant funding. Although voucher funding has also recently been determined by the annual appropriations process, the key difference under HANF is that future funding would not be determined by the current actual cost formula. Instead, it would be determined by whatever level Congress decided to provide.

Determining State Allocations of the Federal Funding

Beginning in FY 2005, all voucher funding would be under the block grant. At this point a state would receive the same share of the national voucher funding level as all of the PHAs in that state received in FY 2004. Relatively low or high utilization and payment standards would thus be locked in for at least the initial year of the block grant, as well as for future years, unless federal funding were to increase. Beginning in FY 2006, funding would be distributed according to a new formula, which HUD must establish by regulation. HUD, however, has discretion to add "objectively measurable conditions" to the specified statutory criteria.[5] In addition, though the current fair share statute[6] requires HUD to consider relative housing needs of the eligible population, HANF would not. Instead, the only specified criteria related to need are the current number of families assisted, housing costs and poverty; thus neglected are important factors such as rent burden, overcrowding and homelessness. Because of the bill's ambiguous new formula criteria, it is impossible to determine the likely distributional consequences as compared with the current fair share formula.

Another drawback under the HANF proposal is that any increase in the block grant—even if only for inflation—would be distributed according to the new formula. If the formula does not parallel existing allocations, some states could receive less than an inflation-based increase and have to shift costs to families and/or reduce the number of families assisted.[7] Estimating the number of additional families assisted by any block grant increase will prove elusive because states would be free to use additional funding to increase current subsidy levels (or provide additional services to current participants), rather than to aid additional families. This is likely to make it more difficult to obtain further funding because it will be harder to show an increase in the number of families assisted—typically the prime motivation for additional federal funds.

Though HANF would mandate that a state cannot decrease the number of households served, it is unclear whether this obligation would continue if a state receives less funding even when the overall HANF appropriation is not reduced.

HANF might allow states to be held harmless from any change in the "base" allocation resulting from the new formula, but the commitment is loose. The bill provides that if appropriations are equal to or greater than in FY 2005, no state will receive less funding than it did in the previous year, though funding will be adjusted for changes in housing costs in the preceding year, and for state performance.[8] Similarly, if federal funding is less than in the previous year, each state's proportional reduction would be based on its prior year's funding, also adjusted for changes in housing costs and for state performance. Therefore, even if federal funding was the same as the year before, a state could receive less money than it did in FY 2005 if rents went up less compared to other states, or if its performance was rated lower than other states. Though HANF would mandate that a state cannot decrease the number of households served (using FY 2004 as the baseline), it is unclear whether this obligation would continue if a state receives less funding even when the overall HANF appropriation is not reduced.

HANF is also problematic in that a state's unused funds would reduce its grant for the following year. This differs from TANF and other block grants, including HOME and CDBG, where states have been allowed to carry over unspent funds. It is unclear how this set-off provision differs from the required consideration of unspent funds in the new formula. Any savings in grants to states under this set-off provision would be used to provide performance bonuses to states that exceed HUD-set performance criteria.[9] In effect, this provision allows HUD to fund a performance bonus out of grants that would otherwise have been recaptured. Whether HUD would actually be able to implement such a bonus system depends on whether the appropriations process leaves these funds untouched (rather than rescinding them as has been done repeatedly in recent years).

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[4]Section 9(c) of the House bill; Section 14 of the Senate bill.

[5]Section 9(a)(2)(A) of the House bill; Section 9(b) of the Senate bill.

[6]42 U.S.C. §1439 (West 1994 and 2002 Supp.).

[7]While HANF requires states to serve at least the same numbers of families through FY 2009, that duty is subject to their receiving appropriations equal to the level of the third quarter of FY 2004.

[8]Section 9 (a)(2)(C)(i) of the House bill; Section 9(b)(3)(A) of the Senate bill.

[9]Section 9 (a)(2)(D) of the House bill; Section 9(b)(4) of the Senate bill.

Eligible Uses of Funds

HANF funds may be used for tenant-based rental assistance and also for assistance for first-time homebuyers.[10] Tenant-based rental assistance includes project-based assistance so long as tenants can move with their subsidy.[11] HANF differs from current law in that there is no limit on the proportion of funding, the proportion of units per building, or the types of neighborhoods that are eligible for project-based assistance. The bill permits states to use as much of their funding for project-based assistance as they want under rules of their own design, subject to the obligation to allow families to move with their subsidy, and whatever pressure results from performance standards. As for homeownership, assistance includes one-time lump sum down payments.[12]

To operate the program, only up to 10 percent of a state's HANF funds may be used for administration. This cap can hurt states that have low FMRs, as well as states that are challenged by large geographic areas, by many small programs, or by circumstances that result in higher administrative fees. In addition to administrative costs, however, the bill permits states to use funds for "other activities, *as specified by the Secretary*, in support of tenant-based rental housing and homeownership assistance activities."[13] While this provision appears to give states flexibility to use program funds for activities such as mobility or homeownership counseling that would now have to be supported with administrative fees (or other funds), it requires further action by HUD. Furthermore, it is unclear how a state could have sufficient funds for these additional activities without an increase in its block grant compared with FY 2004, unless, of course, the state lowers its subsidy levels.

State Participation

Each state can decide whether or not it wants to receive the HANF block grant.[14] If a state declines block grant funds, HUD will select one or more PHAs (or other entities) to receive the state's share of funds. Not surprisingly, HUD may select even for-profit or faith-based organizations. There is no possibility, however, for PHAs to receive voucher funding under current program rules.

HUD also would have authority, as of FY 2005, to choose an alternative administrator other than the state, including one or more PHAs or other entities. HUD can do so if it determines that a state does not have the capacity to administer the program.[15] It is unclear how HUD would determine state capacity in the initial year of the block grant, and HANF is ambiguous about the determination of state capacity once a state has accepted block grant funds. Section 13 of both the bills specifies that HUD may appoint an alternative administrator for a state's block grant funds after notice and hearing and a finding of substantial non-compliance with the Act. But both bills (House Section 5(d)(1) and Senate Section 6(d)(1)) apparently commit the determination of state capacity to HUD's discretion, without any further hearings.

Similar to the current situation, under HANF each state is eligible for a voucher block grant if it includes in its Consolidated Plan quantifiable objectives for meeting HUD performance standards.[16] The state, however, is not obligated to coordinate HANF with the *Temporary Assistance to Needy Families Act* (TANF) or the *Workforce Investment Act* (WIA), which will reduce the potential effectiveness of program coordination.

The performance standards[17] required by HANF include: utilization of grant funds, financial management, number

[10]Section 7 of the House bill; Section 5 of the Senate bill.

[11]This conclusion is largely based on the definitions of tenant-based rental assistance, which differ slightly in the bills. *See* Section 4(d) of the House bill and Section 3(5) of the Senate bill.

[12]The Senate bill's definition of homeownership assistance (Section 3(5)) requires that the family be able to move with the subsidy, which appears to contradict the limitation of Section 5(2) to homeownership assistance for first-time homebuyers only. The House bill does not define homeownership assistance.

[13]Section 7(4) of the House bill. Section 5(4) of the Senate bill is probably equivalent but is worded slightly differently.

[14]The governor can designate any agency or instrumentality "of the state" to receive the block grant funds from HUD.

[15]The bills phrase this determination somewhat differently. Section 5(d)(1) of H.R. 1841 puts the burden of proof on the state to demonstrate "to the satisfaction of the Secretary that it has the capacity to adequately administer grant amounts under this Act." Section 6(d)(1) of S. 947 states that the Secretary may determine at any time that "a State cannot administer grant amounts in conformity with the Act."

[16]States currently submit such plans annually to HUD to qualify for a number of HUD-administered block grants, including HOME, CDBG, and Emergency Shelter Grants.

[17]Section 5(b) of H.R. 1841 explicitly authorizes HUD to add other performance standards by regulation; Section 6(b) of S. 947 is phrased differently and appears to limit HUD to the specified criteria. Both bills include the same enumerated performance standards.

RHS Proposes Revision to Rental Housing Regulations

On June 2, 2003, the Rural Housing Service published proposed regulations governing its multi-family and farm labor rental housing programs. 68 Fed. Reg. 32,872. The proposed regulations cover every aspect of the programs, including provisions regarding resident rights, appeals procedure, management, rent subsidies, prepayment and property disposition. In an effort to streamline and reduce the scope of the regulations, RHS has also published draft handbooks that will supplement the regulations by providing greater detail about all aspects of the program. The handbooks were not published in the Federal Register, but are available online at www.rurdev.usda.gov/rhs/mfh/MFH%203560%20Handbooks.htm. Comments to the proposed regulations are due on August 1, 2003. The National Housing Law Project expects to publish a summary of the proposed changes in the July issue of the *Housing Law Bulletin*.

of families served, quality of housing, reduction of homelessness, improved living conditions for elderly and disabled families, and "the effectiveness of voucher assistance in helping families move toward homeownership and self-sufficiency."

Note, however, that there is no standard concerning the income of families to be admitted to the program, or the intended reduction in housing needs in the state, except with regard to homelessness. As a result, a state's Consolidated Plan submission concerning the block grant would not necessarily reveal whether it intended to apply for a waiver of targeting requirements. On housing quality, for example, there is no mention of the quality or poverty level of neighborhoods. On improved living conditions, there is no performance standard related specifically to outcomes for families with children, nor is there any standard concerning reduction in rent burdens.

It is unclear what the homeownership and self-sufficiency standard really means. It appears to quantifiably measure the number of families that use vouchers in some way to buy their own homes. These criteria would prove problematic, however, for states with higher homeownership costs, for states that choose to use other funds to promote homeownership, or for states that wish to continue to target vouchers to the lowest-income households. In its Budget Justifications,[18] HUD gave several examples of how it would measure a state's performance of promoting "self-sufficiency," including the length of time families receive voucher assistance, the percentage of tenants who are employed, and coordination with TANF and other state agencies. In addition, HUD stated an intention to evaluate actions by state and local government to remove barriers to affordable housing.

State Reporting Requirements

HANF mandates minimal state reporting responsibilities, only requiring each state to report on its progress in meeting its own performance standards, as well as basic data on families assisted and funds spent.[19] HUD would determine the frequency of state reports, and states would not be required to report on the average subsidy per family (which possibly could be determined by dividing the gross amount spent by the number of families assisted), nor are states required to report any data on race, ethnicity, family composition or family size, or any data on rejected applicants, making it extremely difficult to determine state compliance with certain aspects of the *Fair Housing Act*. And while states would be required to report on the poverty rates of neighborhoods in which assisted families live, they need not mention the racial composition of such neighborhoods. Because it may be impossible to obtain the data necessary to correlate the race/ethnicity of participating families—and the racial and ethnic composition of the neighborhoods in which they use their assistance, or of their prior residence—it would be hard to determine whether the program is actually promoting a wider range of housing choice, as civil rights and fair housing laws originally intended.

Program Design

Number of Households to Be Served

HANF would require that through FY 2009, *subject to the availability of appropriations*, each state must serve at least the average number of families in the state that received voucher assistance (including enhanced vouchers) during the 120-day period ending September 30, 2004.[20] The ramifications of this provision are uncertain. For example, is the obligation void if appropriations are less in absolute terms than in FY 2004? Or less than the FY 2004 level adjusted for inflation? What about for housing costs? Will states be free to make this decision? Will HUD or Congress decide?

In many cases, the performance standards themselves are likely to encourage states to stretch available appropriations to serve more households. This could mean reducing subsidy levels, increasing families' required contributions, preferring higher-income applicants (including obtaining a targeting waiver, as described below), or preferring single-person households and smaller families to reduce subsidy costs, thus cutting off households with many children or dependents, often those most in need.

If appropriations are insufficient, the grandfathering provisions require states to maintain assistance to all grandfathered tenants even if subsidy levels are reduced or family contributions increased.

If appropriations are insufficient, the grandfathering provisions discussed below require states to maintain assistance to all grandfathered tenants even if subsidy levels are reduced or family contributions increased. In any event, the duty to serve at least the same number of families probably adds to the pressure to adjust benefit levels in the face of any funding shortfalls or the inability of federal funding to keep pace with local housing costs.

Areas of the State to Be Served

States would be free to limit the program to specific parts of the state, and to redistribute current voucher allocations among areas. States also could run a single program that covers the entire state. Given the limitation of administrative fees, states may feel some financial pressure not to serve remote areas or areas with higher housing costs.

[18]www.hud.gov/offices/cfo/reports/04estimates/pihhousing.pdf.

[19]See Section 5(c) of the House bill and Section 6(c) of the Senate bill.

[20]Section 3(b) of the House bill; Section 4(b) of the Senate bill.

Eligibility and Targeting

Under the HANF proposal, as under current law, 75 percent of new admissions each year must be extremely low-income (ELI)—currently defined as at or below 30 percent of area median income. However states may obtain waivers from HUD to reduce the targeting requirement as low as 55 percent,[21] upon a showing that they could not reasonably implement the 75 percent requirement.[22] Unfortunately, under HANF, this vague standard could apparently be easily met through state claims of inadequate funding or competing policy priorities, such as preferring higher-income families more likely to become homeowners. HUD would have complete authority to approve such waivers, with no requirement for public participation.

In addition, HUD could establish a HANF income eligibility limit above 80 percent of AMI for elderly and disabled families, with no upper limit.[23] Because the dollar levels for low-income (80 percent of AMI) and extremely low-income (ELI, 30 percent of AMI) would be determined by HUD for each area, states might have to administer programs with different eligibility levels in each metro area and non-metro county.

States would also have the authority to define income, so the application of HUD definitions to particular family circumstances would differ from state to state and from current law. For example, federal law now requires exclusion of the earnings of minors and foster care payments, to name just two examples, from the definition of income. Under HANF, states would not be required to continue any HUD exclusion or deduction policies that are not otherwise required by federal statute.

HANF is silent regarding states' authority to establish initial eligibility criteria in addition to income. Also, states apparently would not be required to comply with special eligibility restrictions that apply now to some vouchers, such as welfare-to-work vouchers, family unification vouchers or vouchers for the disabled, when their grandfathered participants leave the program. For continued eligibility, states could apparently set any requirements they wish for tenant-based or homeownership assistance, subject only to the grandfathering requirements discussed below and whatever pressure the performance standards exert. *States would thus be permitted to set time limits or work requirements, as well as various behavioral standards*.

Admissions Preferences

Subject to the applicable targeting percentage, a state could set admissions preferences based on family characteristics. The Senate bill specifies that a state's preference system must be "uniform."[24] The bills are silent regarding other waiting list requirements, but the requisite of a single system of state preferences (particularly a single uniform system) *appears to wipe out waiting lists now maintained by local PHAs, ordered based on local preferences.* Even if a state chose to subcontract administration of its program in a particular area to a PHA that had operated a voucher program, it appears that the state could not authorize the PHA to use its existing waiting list or local preferences. None of the types of family characteristics enumerated in the HANF bills would be prohibited under current law, so it is not clear why—except for political reasons—the bill is so specific. The question begs—is the intent to prohibit states from having admissions preferences based on housing needs?

Under HANF, states would be permitted to set time limits or work requirements for Voucher eligibility, as well as various behavioral standards.

Two specified permissible preferences raise particular questions concerning the Administration's intent: families relocating from units with project-based voucher assistance and families affected by the conversion, sale or demolition of public housing projects. Under the grandfathering provisions of the bills discussed below, the former have a right to receive the next available voucher. It is not clear whether the listing of these families among the possible preference categories is intended to alter the current statutory continued assistance guarantee.[25] In regards to displaced public housing tenants, the question arises concerning whether the Administration intends to stop requesting additional voucher funding for these families.

Subsidy Levels

Under HANF, states would have virtually unfettered discretion to set subsidy levels, subject solely to the performance standards set out above. The bills only provide that maximum subsidy levels must be "reasonable and appropriate for the market area."[26] Thus eliminated is the current concept of a permissible range of percentages based on HUD-determined

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[21]Currently, housing agencies may obtain HUD approval to admit fewer extremely low-income families, but only if they provide substantial evidence showing that meeting the targeting requirement would be impossible and that reducing the requirement would enable the agency to serve other families living in severely substandard housing or facing very high rent burdens

[22]The Senate bill requires a state to show that it cannot "reasonably" meet the 75 percent targeting requirement in a particular year (see Section 7(a)(2)(B)); the House bill requires proof that the 75 percent requirement "cannot be met," but says nothing about what types of reasons may be adequate proof (Section 6(a)(2)).

[23]Section 6(a) of the House bill; Section 7(a)(1)(B) of the Senate bill. For other applicants, the eligibility limit is the same as currently, *i.e.*, 80 percent of AMI.

[24]Senate Section 7(c). The House bill refers to a preference system as singular, but omits the word "uniform." Section 6(c).

[25]42 U.S.C. § 1437f (o)(13)(E) (West Supp. 2002).

[26]Section 8(d) of both bills.

Fair Market Rents. *There is no floor on how low subsidy payments could be.*[27] States apparently could set higher payment standards for homeownership than for rental housing, which is not permitted under current law.

As mentioned above, because HANF's performance standards reward the number of households served but are silent on critical issues of rent burdens, reduction of severe housing needs (except for homelessness) or access to neighborhoods with lower concentrations of poverty, states may feel pressured to keep subsidy levels relatively low, regardless of the effect on the lowest-income families, in order to serve more households. Waivers of the targeting requirement may well be allowed based on any difficulty that ELI households have in using their vouchers. In contrast, current targeting requirements cannot be waived for this reason, so PHAs are more likely to increase payment standards if necessary to comply with the 75 percent ELI requirement, especially since they should eventually be reimbursed under the current voucher renewal funding formula.

Under HANF, while families would not be allowed to rent a unit unless the state finds the unit's rent "reasonable and appropriate in comparison with rents charged for nonluxury dwelling units in the private, unassisted local market,"[28] maximum subsidy levels may fall very short of such a "reasonable" rent. It is unclear whether or how HANF's addition of the word "appropriate" or the omission of any "comparable unit" requirement is intended to change the test from the current statutory rent reasonableness standard.[29]

HANF would permit states to require families to pay at least 50 percent of their income toward rent after a certain amount of time in the program.

Required Family Contributions

Under the HANF proposal, states cannot require families to pay more than 30 percent of *gross* income for rent and utilities or homeownership expenses at the time of entering into the lease, except that states *must* use a minimum rent of $50 if higher. This is more burdensome than the current law, where families cannot pay more than 30 percent of their *adjusted* income, and only about 40 percent of PHAs (with the discretion to set minimums anywhere between zero and $50) impose a $50 minimum rent for vouchers. Under HANF, states, not the HUD Secretary as proposed in HUD's FY 2004 budget, would have the option to grant hardship exceptions to the minimum rent on a case-by-case basis. Under HANF, just as under current law, elderly and disabled households would not be exempt from minimum rent requirements, in contrast to the proposed exemption in the FY 2004 budget proposal.

The change to *gross* income will result in higher required rent payments for all types of households compared with current law, and could particularly hurt elderly or disabled families with high medical expenses, and families with child care costs. In addition, states would be permitted to set higher payment requirements after the initial lease period. States could, for example, require families to pay at least 50 percent of their income toward rent after a certain amount of time in the program. Even at the time of initial leasing, there would be *no limit* on how much of their income families could pay (compared to the current 40 percent of adjusted income limit for new participants and movers and the general limit of a "reasonable" rent burden). Under HANF, a family's huge rent burden in using a voucher with low subsidy levels would be considered a family's "choice."

However, HANF does contain one good idea regarding annual recertification of income: allowing an exception from the ordinary annual practice for elderly families, for whom recertifications would be done at least every three years.[30]

Portability

The language in the House and Senate bills differs significantly on interstate portability rights. The House bill (§12(a)) is clear that a family can take a voucher from one state and use it to rent a unit in another state. (Presumably the receiving state would bill the initial state for the cost of the family's subsidy, in essentially the same way that agencies now bill when a family moves to an area served by a different housing agency.) Section 12(a) of the Senate bill, however, states that a family receiving housing assistance from one state is *eligible* to receive assistance in another state, in contrast to the House bill's mandatory "shall receive" phrasing. While the language of the Senate bill overcomes the potential obstacle of different eligibility rules, it does not require the receiving state to provide the family seeking to move with immediate voucher assistance. Thus the Senate version does not guarantee that a family can move with voucher assistance. Both bills do, however, agree that the terms of assistance are those of the new state.

In practice, families may be deterred from moving to states where they would have to pay more of their income to use a voucher or where vouchers are subject to time limits or other onerous requirements. Both bills also agree that families "receiving housing assistance" have portability rights. Restricting portability rights to voucher *recipients,* as opposed to voucher *holders,* is apparently more limited than current portability rights.

Lastly, both bills are silent regarding how states must treat moves within a state, except that families must be allowed

[27]The Administration's fact sheet claims that HUD would no longer set FMRs, though this seems unlikely because FMRs are required for HOME and other programs.

[28]Section 8(c) of both bills.

[29]*See* Section 8(o)(10)(A) of the *United States Housing Act*, 42 U.S.C.A. §1437f(o)(10)(A) (West Supp. 2002).

[30]Section 6(e) of the House bill; Section 7(e) of the Senate bill.

to use their tenant-based assistance to "move" (House bill) or "relocate" (Senate bill) "to other suitable housing."[31] As noted above, states could apparently decide not to administer the program in portions of the state, thereby prohibiting families from using their assistance to relocate to the uncovered areas.

Inspections and Housing Quality

Under current law, PHAs can use state or local housing quality standards (HQS) if they are stronger than the federal counterparts. Under HANF, however, state or local HQS will govern if they exist, regardless of how they may differ from current federal HQS.[32] It appears that this will create a patchwork of applicable rules in many states, with some areas still being subject to the federal HQS because there are no other applicable rules, and other areas subject to local rules, sometimes stronger but frequently weaker than federal HQS. Even with state codes, in areas that also have local codes both sets of rules would have to be met. It is curious that states are not given the option to continue to use federal HQS for the sake of order, uniformity and administrative simplicity. Given this hodgepodge set of standards, it is unclear what effect a change to state or local codes may have on the applicability and implementation of current federal lead paint rules.

HANF is silent on whether the states or other entities administering the block grants would have the affirmative duty to further fair housing.

Similar to current law, under HANF states will be required to inspect units before rental or purchase under the program, and units will have to pass inspection before payments are made. (Owner groups have proposed various exceptions to this current requirement to facilitate prompt rentals, some of which were incorporated in Senate and House bills last year.) However, unlike current law, ongoing inspections will be required only *once every three years*, rather than annually, though states would be free to do more frequent inspections of program units if they wish, and must "ensure that all dwelling units receiving such assistance are maintained in accordance with [applicable state and local codes]."[33]

[31]*See* the definition of "tenant-based rental housing assistance," Section 4(d) of the House bill; Section 3(5) of the Senate bill.

[32]*See* Section 11 of both bills.

[33]Section 11(c) of the Senate bill. The House bill has the same requirement but applies it to occupied units receiving assistance. It is important to note that this three-year inspection requirement applies to homeownership units as well as rentals, and HUD rules do not now require ongoing inspections of Section 8 homeownership units. The House bill has the same requirement but applies it to occupied units receiving assistance.

Family Self-Sufficiency Program

Under HANF, states would probably have no obligation to meet the prior enrollment requirements established by PHAs within their jurisdiction in the Family Self-Sufficiency (FSS) program. In addition, families participating in the FSS program would not have a right, under either bill, to complete their contracts of participation and continue to accrue savings as their earnings increase. FSS is authorized by Section 23 of the *U.S. Housing Act*,[34] and the bills continue only the rights under Section 8. If states cease to honor FSS contracts and thereby prevent families from completing them, it is not clear whether the families would be entitled to the funds PHAs had accumulated in escrow accounts on their behalf. If states do continue existing FSS contracts, they probably would not receive any additional funding to cover escrow funds. The statutory provisions concerning the new funding formula, discussed above, contain no adjustment based on the effect of tenant contributions on the amount of subsidy paid. To the extent that the bills breach current contracts between PHAs and owners or lenders, it is unclear whether such provisions would be legally valid.

Resident and Public Participation

Currently, PHAs must have a Resident Advisory Board (RAB) that includes voucher participants and must consult with the RAB on discretionary policy decisions. PHAs must respond in writing to written comments of the RAB submitted in response to the PHA's annual or five-year plan. Families assisted under HANF would have no right to be represented on a RAB, and there is no formal RAB role to participate in a state's discretionary decision-making under HANF.

However, because a state's objectives concerning the performance standards under HANF must be incorporated in the annual Consolidated Plan, the same public hearing requirements that currently apply to the Consolidated Plan would apply to the state's proposed activities under HANF. Also, under HANF each state's annual performance report would be required to be a public document.

Fair Housing

HANF is silent on whether the states or other entities administering the block grants would have the affirmative duty to further fair housing. The *1998 Housing Act* made it explicit that PHAs administering the voucher program—and public housing—have such a duty, which would be lost under HANF.

Grandfathering of Current Participants

Under both the House and Senate bills, families with tenant-based vouchers "shall, for fiscal years 2005 through 2009, continue to receive such assistance subject to the terms and conditions of [Section 8 of the *U.S. Housing Act of 1937*]" out of funding provided under the block grant.[35] Apparently, this

[34]42 U.S.C. §1437(u).

[35]This language was taken from the House bill, though the Senate bill is essentially the same.

grandfathering language requires that the same subsidy and rent rules apply and perhaps that HUD's entire regulatory structure, including grounds for termination, would apply to grandfathered families for five years. Compliance with this requirement could be nightmarishly complicated for states if they chose to vary their HANF program substantially from the current voucher program.

There are, however, differences between the House and Senate versions of HANF for certain types of current recipients. Under the House bill, families using vouchers for homeownership or with project-based assistance at the time of transition would continue to receive assistance subject to current Section 8, without a five-year time limit (*i.e.*, no new provisions would apply). The Senate bill, on the other hand, explicitly phases out the states' obligation to follow existing rules under Section 8 for all current voucher participants, including project-based and homeownership assistance, beginning in FY 2010.[36] Also, the Senate bill, unlike the House bill, grants certain continuing rights under Section 8 to "entities," although such rights end with FY 2009.[37] (Presumably this term would apply to owners with project-based and tenant-based voucher contracts, for the term of such contracts, and to lenders receiving direct payments of Section 8 homeownership assistance.) The House bill only grandfathers "families."

Despite their differences, both bills condition grandfathering rights on funding. If there is insufficient funding to continue assisting families at the subsidy levels required by the U.S. Housing Act of 1937, *states must choose to assist the maximum number of grandfathered families at lower subsidy levels.*

The Senate provision would apparently provide more protection for owners with project-based voucher contracts through FY 2009, although owners may be better off after that date under the House bill. However, because the House grandfathering provision only applies to families, owners apparently have no right to maintain the number of units under contract for project-based assistance when families move out or become ineligible for continuing voucher assistance.

Despite their differences, both bills condition grandfathering rights on funding. If there is insufficient funding to continue assisting families at the subsidy levels required by the *U.S. Housing Act of 1937*, states must choose to assist the maximum number of grandfathered families at lower subsidy levels.[38] However, rights of enhanced voucher tenants (who receive higher than ordinary subsidies in order to avoid displacement from their homes) are even more vulnerable to insufficient appropriations than are the rights of other grandfathered tenants. Families receiving enhanced voucher assistance under Section 8(t) would continue receiving those additional subsidies only if there are sufficient specific appropriations for that purpose *in addition to regular block grant funding*, and funding for such additional subsidies would be separately distributed based on the number of tenants receiving enhanced voucher assistance in each state.[39]

HUD Oversight

How HUD exercises its HANF oversight role would apparently be wholly in HUD's discretion. The bills merely state that "The Secretary may make such reviews and audits as may be necessary or appropriate to determine whether the State has carried out the housing assistance activities and objectives set forth in its plan…. in a timely or effective manner" and in accordance with applicable law and the Secretary's performance standards.[40] The Secretary has the usual remedies if HUD finds that a state has substantially failed to comply, with one important exception. The bills give HUD the authority to withhold state funds from *other programs* administered by HUD, in addition to HANF, if a state is found to be in substantial noncompliance with HANF requirements.[41]

Stay tuned for further developments on one of the major housing issues of this year, if not this era. The *Bulletin* will provide further updates on the block grant proposal and any progress in the legislative process as the bills move forward. ■

[36]To do this, the Senate bill adds a new paragraph (20) to the voucher statute, USHA Section 8(o). *See* Section 7(d)(3).

[37]*See* Section 7(d)(1).

[38]*See* Section 6(d)(2) of the House bill; Section 7(d)(2) of the Senate bill.

[39]Section 9(b) of the House bill; Section 9(c) of the Senate bill.

[40]Section 13(a) of the House bill. Section 13(a) of the Senate bill is equivalent.

[41]*See* Section 13(b)(5) of both bills.

Tax Credit Program Escapes Serious Damage from Bush Tax Plan

The compromise tax cut bill passed by both the House and the Senate and signed by the President in May[1] contains much to stir outrage, but in the end failed to include earlier proposed provisions concerning dividend taxation that threatened substantial harm to the continued production of housing through the Low-Income Housing Tax Credit (LIHTC) program. The final bill's dividend tax provisions contain only shareholder-level reductions in dividend and capital gain tax rates. Absent is any corporate-level structure, such as excludable dividend accounts (once-taxed earnings that would become eligible for tax-free treatment when paid as dividends), that would have substantially harmed the value of tax credit investments. Until such a proposed structure returns to the policy table, likely in a future effort to expand favorable tax treatment of dividends, the LIHTC appears safe from harm.

Earlier in the year, the House and Senate's originally proposed bills would have changed how corporate earnings and stockholder dividends were taxed and could have had a disastrous, though perhaps unintended, effect on the supply of affordable housing. The centerpiece of the Bush administration's original stimulus package was the elimination of the so-called "double taxation" of corporate profit, which currently is taxed at the corporate level and at the shareholder level when paid out as dividends. Many analysts predicted that proposed changes in the taxation of corporate dividends would have significantly reduced the value of existing incentives provided under the LIHTC program, which is the nation's largest active affordable rental housing production program for low-income families.[2]

What Is the LIHTC?

The LIHTC, established by the *Tax Reform Act of 1986*,[3] provides an incentive for private-sector investment in the production and rehabilitation of affordable rental housing. Equity generated by the tax credit—$6 billion annually[4]—finances the production and rehabilitation of over 100,000 affordable units per year. Credits are allocated by state agencies to specific eligible properties and claimed by equity investors in those properties over a 10-year period. Sale of tax credits provides substantial equity for project costs, reducing the amount of debt that properties must carry and enabling lower restricted rents. Each state receives tax credits based on population at the rate of $1.75 in annual tax credits per capita. States must develop an allocation plan to address the jurisdiction's needs through preferences and set-asides.[5] State or local housing credit agencies allocate the credits to developers of specific projects in a competitive process based on the allocation plan. Developers raise project capital through the syndication process, selling the credits to investors at around 80 cents in equity for each tax credit dollar sold.

Under the current system, 98 percent of tax credit purchases are made by corporate entities. The benefits of a corporation's decision to invest in LIHTC are shared at both the corporate and shareholder level: because a corporation's tax liability is reduced by its purchase of tax credits, its after-tax earnings are increased. Corporations pass on the savings by distributing increased dividends to shareholders or, if the corporation retains the earnings, by increasing the value of the stock.

The tax credit program provides a critical supply of affordable rental housing as the inventory of other subsidized apartments continues to drop. Furthermore, HUD's few new production or preservation programs such as HOME and HOPE VI, whatever their deficiencies, as well as many other federal housing preservation efforts, also depend on the leveraging of capital by tax credits. All of these efforts would have suffered from any devaluation of the credits through the original dividend tax cut provisions.

Bush's Original Proposed Dividend Tax Exemption

As originally proposed, the Bush administration's tax plan introduced in both chambers of Congress in February as H.R. 2 and S. 2, sought to end "double taxation." Double taxation occurs where corporate net earnings are taxed against the corporation, and then the payout to the shareholder in the form of dividends also is taxed against the shareholder.[6] The Administration's proposed remedy for this was the creation of the "Dividend Tax Exemption." Taxed corporate earnings would have been placed in a special account, from which dividends paid to shareholders would

[1]Pub. L. 108-27, ___ Stat. ___ (May 28, 2003).

[2]A site rich with resources on this topic, including original analyses of the proposed legislation, is maintained by Recapitalization Advisors, Inc., a Boston-based affordable housing consulting firm, at www.recapadvisors.com.

[3]Pub. L. 99-514, § 252 (Oct. 22, 1986). The LIHTC was granted permanent authority by the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. 103-66, § 13142 (Aug. 10, 1993).

[4]Local Initiatives Support Corporation (LISC), *Low Income Housing Tax Credit Q & A* (March 18, 2003) at 1.

[5]For an examination of the efficacy of using preferences and set-asides in the allocation plans to meet local needs, *see* Urban Institute, *An Analysis of State Qualified Allocation Plans for the Low-Income Housing Tax Credit Program* (May 2002), available at www.huduser.org/Publications/pdf/AnalysisQAP.pdf.

[6]Some economists and commentators challenged the Bush plan's conflation of what could be seen as two distinct earning events, both of which reasonably should be taxed. *See, e.g.*, Bernard T. Deasy, "President's Message," *Merritt Messenger – Newsletter of Merritt Comm. Capital Corporation* (Spring 2003) at 3: "There is no link between taxes paid by a corporation and taxes paid by individual investors. Trying to establish a nexus between the two by tracing a dollar of taxable profit at the corporate level through the declaration of a dividend and on to the tax return of an individual investor is a very long stretch." Others, including supporters of the LIHTC, see double taxation as inefficient and economically distortive. *See, e.g.*, David A. Smith, Recapitalization Advisors, Inc., *Dividend Tax Exemption (DTE) and Affordable Housing: A Primer on the Issue* (March 31, 2003), ¶ 3.

have been tax-free for the shareholder. Where the corporation did not distribute dividends, but instead retained earnings, the shareholder's basis would have been adjusted so that resulting capital gains realized upon the sale of stock would also have been free from double taxation. Any similar proposal that would have made a dividend exemption determination at the corporate level would also have threatened the value of housing tax credits, which are almost exclusively purchased by corporate investors.

How Would the Dividend Tax Exemption Proposal Have Harmed LIHTC?

Under the current system, as a general rule, the corporation's and shareholders' interests are aligned in terms of the benefits of avoiding tax liability. However, the originally proposed Dividend Tax Exemption would have reduced the benefit conferred by tax credits on shareholders' earnings. This is because untaxed income, such as that invested in tax credits, could not have been passed along to the shareholders tax-free. One analysis showed that under the proposal, the amount of taxes paid by shareholders on dividends sheltered from taxes by the LIHTC would have likely exceeded the net benefit realized by the corporation from the credit—that is, every $1 of tax credit investment would have resulted in a reduction of $1.86 in taxed corporate earnings to be distributed as tax-free dividends.[7]

Corporations would have likely bypassed investment in LIHTC in favor of other investment activities that benefit their shareholders. Other programs attractive due to their tax-avoidant effects, such as New Markets tax credits and tax-exempt bonds, would have been similarly impacted. Oddly, the Bush administration had also proposed a homeownership tax credit that would have been undermined as well.[8]

As a result of the reduced incentives to purchase tax credits and the decreased demand, LIHTC prices could have fallen by as much as 50 percent.[9] Coupled with the increase in supply of tax credits with inflation and population increases (allocated per capita), the market for LIHTC would probably have softened dramatically. Though the cost to the Treasury of making credits available would not have decreased, the equity leveraged by the lower-priced tax credits would have dropped significantly, reducing the number of units by as much as 35 percent, or a loss of 40,000 units annually.[10]

Analysts predicted other ancillary effects from enactment of the proposed Dividend Tax Exemption. Tax-free state and municipal bonds, in competition with what would become tax-free dividends for investment capital, would have likely borne higher interest rates.[11] The construction industry would probably have been harmed because of a reduction in new affordable units.[12] In states that use the federal definition of adjusted gross income for tax-collection purposes, state and local revenue would also have been reduced, potentially hurting those jurisdictions' abilities to provide financial resources for affordable housing.[13]

The originally proposed Dividend Tax Exemption would have reduced the benefit conferred on shareholder earnings. Untaxed income could not have been passed along tax-free.

Successful Efforts to Minimize Damage to LIHTC

Thanks to the efforts of a variety of industry and grassroots organizations, the threatened harm to LIHTC was brought to the political forefront. Examples of lobbying on behalf of LIHTC were numerous. A letter spearheaded by the National Council of State Housing Agencies and co-signed by a cross-section of national and regional groups supporting affordable housing production[14] asked the Administration to avoid negative consequences to the LIHTC. Co-signatories included the Affordable Housing Investors Council, whose members provide 80 percent of investments in LIHTC, which also expressed apprehension about the effects of the Bush tax plan on future housing production.[15] Supporters of changes to the tax plan held several meetings with Treasury officials, and Reps. Charles Rangel (D-NY) and Barney Frank (D-MA) wrote of their concerns to HUD Secretary Mel Martinez. Testimony on the tax plan's projected harm to the LIHTC was offered before the House

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[7]Ernst & Young, LLP, *The Impact of the Dividend Exclusion Proposal on the Production of Affordable Housing* (commissioned by National Council of State Housing Agencies (February 2003) (hereinafter "Ernst & Young study")) at 3. The complete Ernst & Young study is available on the NCSHA's Web site at www.ncsha.org/uploads/ACF4B11.pdf.

[8]David A. Smith, Recapitalization Advisors, Inc., *Dividend Tax Exemption (DTE) and Affordable Housing: A Primer on the Issue* (March 31, 2003), ¶ 8.

[9]Housing and Development Reporter, *Current Developments,* Vol. 31, CD-4 at 108 (Feb. 27, 2003).

[10]*Id.* Ernst & Young, *supra* note at 8.

[11]Letter from Barbara Thompson, Executive Director of National Council of State Housing Agencies, to John W. Snow, Sec'y, United States Dep't. of Treasury (Feb. 25, 2003) (accompanying submission of Ernst & Young Report).

[12]Testimony of James Rayburn,VP of Nat'l Assoc. of Home Builders, before U.S. House of Reps. Oversight and Investigations Subcommittee of Financial Services Committee on President's Economic Growth Package (March 18, 2003).

[13]Ernst &Young Study, *supra* note at 9.

[14]For information about signing on to NCSHA's statement, *The Impact of the Administration's Dividend Tax-Exemption Proposal on the Low-Income Housing Tax Credit*, contact Nicole Gobbo at (202) 624-7710 or ngobbo@ncsha.org.

[15]*See* Affordable Housing Investors Council, Press Release (March 21, 2003).

Ways and Means Committee, the House Financial Services Subcommittee on Oversight and Investigations, and the Senate Finance Committee. Rep. Bob Ney (R-OH), Chair of the House Subcommittee on Housing and Community Opportunity, offered support for the LIHTC before a House committee (although he voiced full support for the Bush plan).[16]

Ultimately the combined efforts of all the groups rallying behind the LIHTC resulted in enactment of dividend tax provisions that pose no harm to LIHTC. In the House, House Ways and Means Chair Bill Thomas (R-CA) shifted the dividend provisions away from total exclusion toward a cut in tax rates on such income. Later, the Senate passed a tax cut bill that deleted the corporate accounting provisions (limiting corporate distributions of tax-free dividends to taxed income) favored by the Bush Administration, also protecting the LIHTC. The Senate also approved a sense of the Senate "protect the LIHTC" amendment by Senator Reed (D-RI), serving additional notice to the conferees of the issue's importance. The Conference approved only the shareholder-level rate reduction approach proposed by the House, thus safeguarding LIHTC from this round of tax cut frenzy. ■

[16] *Hearing on President's Economic Growth Proposals: Hearing on H.R. 2 before the House. Comm. of Ways and Means,* 108th Cong. (2003) (statement of Rep. Robert Ney, Chair, House Subcommittee on Housing and Community Opportunity).

FREQUENTLY ASKED QUESTION

May a Tenant Commissioner Receive a Stipend?

Question

Is a conflict of interest created when a PHA pays a stipend to Public Housing tenant commissioner?

Answer

No. The HUD rules recognize and encourage the payment of stipends to public housing residents. Within the rule regarding annual income, a resident services stipend is defined as a modest amount (not to exceed $200 per month) received by a resident for performing a service for the PHA… on a part-time basis, that enhances the quality of life in the development. Such services may include, but are not limited to… serving as a member of the PHA's governing board. 24 C.F.R. § 5.609(c) (8)(iv) (2002).

In addition, the tenant participation rules cross reference to the previously cited rule regarding annual income and state that "stipends are… not subject to conflict of interest requirements." 24 C.F.R. § 964.200(b)(2).

The only conclusion that may be drawn from these regulations is that federal law allows a resident commissioner receive a stipend from a PHA and that receipt of such stipend does not create a conflict of interest.

HOPE VI Reauthorization Passes House Committee

On May 21, 2003, the House Financial Services Committee approved H.R. 1614, a bill that reauthorizes the HOPE VI program for Fiscal Year (FY) 2004 and FY 2005. No amendments were made to the bill in the full committee. H.R. 1614 incorporates all the changes originally proposed by Mel Watt (D-NC) in H.R. 1077. Those amendments augmented the selection criteria for awarding HOPE VI grants to include the extent to which the revitalization plan would (1) commence and be completed expeditiously; (2) minimize temporary or permanent displacement of current residents wanting to remain or return to the revitalized community; (3) sustain or create more project-based housing units for persons eligible for public housing in markets where there is a demand for the creation of such units; and (4) give existing residents priority for occupancy in dwelling units in the revitalized community.

On May 7, when the bill was still before the House Subcommittee on Housing and Community Opportunity, Representative Maxine Waters (D-CA), the ranking minority subcommittee member, was successful in making several amendments to the bill during the bill's "mark-up" session. Those amendments addressed issues of concern to housing advocates. Ms. Waters proposed that the definition of severely distressed public housing be expanded to include developments that are "lacking in sufficient appropriate transportation, supportive services, economic opportunity, schools, civic and religious institutions and public services." Another amendment to the selection criteria provisions of the program mandated procedures to provide for resident participation both at the beginning and during the HOPE VI planning process. Another amendment augmented the selection criteria to emphasize that proposals should be selected based upon their provision of supportive services to residents before relocation.

The House Financial Services Committee is expected to report the bill out to the full House for its consideration.

The Bush administration has made it clear that it wants to stop funding for the HOPE VI program in FY 2004 and has so proposed in its FY 2004 budget. Thus, even if the reauthorization of HOPE VI passes both the House and Senate, it remains to be seen if funding will be made available for the program.

Housing advocates and residents would like to see several additional amendments to the HOPE VI program before the reauthorization bill is finally adopted and hope to find sponsors for those amendments. The changes sought include:

- The establishment of an advisory panel that would, among other things, assist the Secretary of HUD in developing a list of severely distressed public housing developments that identifies developments by name, the public housing agency that owns the development, city and state, and the number and size of units. The list

would be maintained and published by HUD annually. The advisory panel would include members selected by organizations from state and local housing agencies and national and statewide organizations representing public housing tenants, along with academics, consultants and advocates knowledgeable about public housing.

- A requirement that priority be given to HOPE VI proposals that sustain or create more appropriately sized project-based housing units for extremely low-income persons.

- The provision of funding for resident organizations to assist them in effectively participating in the planning for and development of an application for a HOPE VI grant. These funds would be used to promote participation in the planning process and to hire technical and legal support for the residents.

- Requiring that consideration be given to plans that demonstrate that all reasonable steps will be taken to ensure that the maximum number of existing residents are given priority for and are encouraged to return to the revitalized community. Such steps should include the establishment of re-occupancy criteria that are disseminated before any relocation.

- A provision that would authorize the funding of applications only if the intention to apply for HOPE VI funding was included in the PHA annual plan and residents of the affected development were given notice and an opportunity to comment on the proposal within the 45-day comment period applicable to the PHA plan adoption process. The provision would also require PHAs to respond to any resident comments and to attach both the comments and responses to the PHA's final plan that is submitted to HUD. ■

2003 Advocates' Guide to Housing Policy

The National Low-Income Housing Coalition (NLIHC) has just released a new and expanded 2003 Advocates' Guide to Housing & Community Development Policy. The Guide contains more than 60 short chapters describing housing-related programs, proposals and issues, plus appendices that explain the federal legislative and advocacy process. The Guide is an invaluable reference for beginning or advanced advocates, students or policymakers. It is available for free from the NLIHC Web site www.nlihc.org. Hard copies can be purchased on the Web site by NLIHC members for just $15 and for $25 for non-members. Hard copies can also be purchased by phone at (202) 662-1530 x227.

Advocates are also urged to join the National Low-Income Housing Coalition! You can join electronically at www.nlihc.org/about/join.htm.

HUD Waivers Benefit Individual Program Participants and Facilitate the Use of Project-Based Vouchers

HUD is required to publish quarterly in the Federal Register any waivers of federal regulations that it has issued.[1] As of April 1, 2003, HUD published all of the waiver requests granted during each quarter of 2002.[2] The majority of the waivers granted for calendar year 2002 affecting the voucher program can be divided into three broad categories: waivers that granted voucher holders the right to rent from a relative; waivers made on behalf of families with disabled individuals who needed a reasonable accommodation, the majority of which were for payment standard increases; and waiver requests regarding the project-based voucher program.

A summary of the waivers is set out below. They should assist advocates in determining whether to urge a PHA to seek a waiver of HUD regulations to assist families in leasing a unit and in determining whether a PHA would be successful when seeking a waiver to facilitate the placement of project-based vouchers.[3] For each waiver there is a citation to the *Federal Register* where the waiver was published, which describes in greater detail the relevant activity, nature of the regulation and the reason the waiver was granted, and lists the relevant PHA, the name of the person who granted the request and a HUD contact person for more information. In all cases, Assistant Secretary Michael Liu granted the waiver and the contact person was Gerald Benoit, Director, Housing Voucher Management and Operations. For more information on the waivers, please refer to the cited *Federal Register*.

Leasing a Unit to a Close Family Member

Except in limited circumstances, a PHA is prohibited from approving the use of a voucher for a unit that is owned

[1]In 1989, Section 106 of Public Law 101-235 added the provisions regarding the reporting of waivers granted and the delegation of the authority to grant a waiver. 42 U.S.C.A. § 3535(q) (West, Westlaw, Mar. 13, 2003). Prior to that time, the published HUD regulations have contained a provision allowing the Secretary, subject to statutory limitations, to waive a regulation for good cause. *See e.g.* 24 C.F.R. § 5.110 (2002); 41 Fed. Reg. 22,814 (Jun. 7, 1976) (§ 899.101(a)).

[2]67 Fed Reg. 54,717 (Aug. 23, 2002) (first quarter); 67 Fed. Reg. 63,202 (Oct. 10, 2002) (second quarter); 68 Fed. Reg. 4,558 (Jan. 29, 2003) (third quarter); 68 Fed. Reg. 16,902 (Apr. 7, 2003) (fourth quarter).

[3]There is no limitation on who may request a waiver, but the published waivers appear to be from PHAs, project owners and other recipients of grant funds, including cities. There does not seem to be a prohibition on waiver requests from program participants, but it is not the practice. If a program participant sought a waiver, it would seem that obtaining the grant recipient's endorsement—such as the PHA—would substantially improve the likelihood of success. If that is true, there are possibly few situations in which a recipient of assistance would make the waiver request independently.

by a close family member of the voucher holder.[4] HUD has granted waivers of this prohibition for large families when other suitable vacant units were unavailable in the PHA jurisdiction.[5]

There may be additional reasons for requesting a waiver to allow a voucher holder to rent a unit owned by a close family member. For example, if the voucher holder or a family member is an adult, especially a senior citizen, who does not speak English, a waiver may be appropriate if the language is unique, the family member relies upon some form of language assistance that is available near the family-owned unit, and the limited English speaker will be denied the full benefits of the voucher program if the waiver is denied.[6]

Reasonable Accommodation for a Family with a Disabled Member

Eligible housing. HUD rules preclude PHAs from approving the use of vouchers in a school dormitory.[7] However, HUD has granted a waiver that allows a PHA to assist a disabled individual to rent a unit from a university. The individual needed the dorm-unit for easier access to classes and because there was no other accessible and affordable housing on or near the university.[8] In the past, other rules have been waived in order to make a reasonable accommodation for a person with a disability.[9]

Payment Standard. A PHA may approve a higher payment standard as a reasonable accommodation to a person with a disability if the rent is within the basic range (90 to 110 percent of Fair Market Rent (FMR)).[10] HUD field offices may approve a payment standard between 110 and 120 percent of FMR, if required as a reasonable accommodation.[11] Assistant Secretary Liu has granted a number of waiver requests to increase the payment standard to an amount above 120 percent of the FMR.[12] HUD can waive either of these two regulations and there appears to be no difference in the result. Thus, when a PHA is seeking a waiver of the 120 percent standard it may be more efficient for the PHA to ask for the waiver of its authority as it bypasses the need to first seek HUD field office approval and then a waiver of that authority.

Assistant Secretary Liu has granted a number of waiver requests to increase the payment standard to an amount above 120 percent of the FMR.

Two of the waivers granted by HUD allowed field offices to approve an increase in the payment standard above 120 percent.[13] A majority of the requests approved were for a waiver of the cap on the PHA's ability to approve a payment standard above the basic range. One request was granted so that the family would not have to move because, due to health issues, it would have been a hardship on the family to seek alternative housing.[14] The Assistant Secretary granted another waiver to permit a voucher holder to rent a unit that was large enough to also accommodate dialysis equipment needed by a household member.[15] Another waiver was granted for a special exception payment standard, in excess of 120 percent of the FMR, for a unit that would allow the use of a motorized scooter in all the rooms.[16] Secretary Liu granted another waiver to allow a voucher

[4] 24 C.F.R. § 982.306(d).

[5] 67 Fed Reg. 54,717, 54,724 (Aug. 23, 2002); 67 Fed. Reg. 63,202, 63,217 (Oct. 10, 2002); HUD has granted such waivers in the past. 65 Fed. Reg. 44,922, 44,933 (July 19, 2000), and 65 Fed. Reg. 66,138, 66,158 (Nov. 2, 2000) (granted to a hard-to-house family to prevent homelessness due to the lack of large units in the jurisdiction) (both may refer to the same waiver); 66 Fed. Reg. 36,416, 36,427 (July 11, 2001) (landlord built a separate unit to rent to relative prior to the issuance of the regulation, waiver granted to prevent further emotional hardship on the family and financial hardship on the landlord); 64 Fed. Reg. 55,378, 55,386 (Oct. 12, 1999) (reasonable accommodation).

[6] Executive Order 13166 (August 16, 2000) and Department of Justice, Title VI Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964, National Origin Discrimination Against Persons with Limited English Proficiency, 64 Fed. Reg. 50,123 (August 16, 2000).

[7] 24 C.F.R. § 982.532(a)(4).

[8] 68 Fed. Reg. 4,558, 4,575-6 (Jan. 29, 2003).

[9] For example, there have been waivers of the prohibition of renting to a relative as a reasonable accommodation. *See also* discussion above. In the past, HUD also waived based upon reasonable accommodation the requirement (24 C.F.R. § 982.307(b)) that a PHA provide the landlord the address of the prior landlord. 64 Fed. Reg. 44,088, 44,090 (Aug. 12, 1999). It is possible that the waiver procedure could have been avoided with respect to this latter rule. The rule states that the information must be given to a landlord "as shown in the PHA records" or "if known to the PHA." 24 C.F.R. § 982.307(b) (2002). The PHA could have adopted a policy or practice of not placing information regarding prior landlords in PHA files or removing it from the PHA records as a reasonable accommodation. If that had been the PHA's policy, it would not have had to seek a waiver. This same rule of providing prior addresses to a current landlord has implications for victims of domestic violence. Whether a waiver would be necessary would again depend upon how the information is collected or retained by the PHA for victims of domestic violence.

[10] 24 C.F.R. § 982.503(b) (2002).

[11] *Id.* § 982.503(c)(2)(ii).

[12] It is clear from the descriptions of the waivers that most were for a payment standard in excess of 120 percent. *Compare* 67 Fed. Reg. 63,202, 63,217 (Oct. 10, 2002). Other descriptions provided little detail regarding the underlying facts to support the requests. See *e.g.*, *id.* and 68 Fed. Reg. 4,558, 4,575 (Jan. 29, 2003).

[13] 67 Fed Reg. 54,717, 54,724 (Aug. 23, 2002).

[14] 68 Fed. Reg. 4,558, 4,575-6 (Jan. 29, 2003).

[15] 67 Fed. Reg. 63,202, 63,217 (Oct. 10, 2002).

[16] 68 Fed Reg. 16,902, 16,915 (Apr. 7, 2003).

participant who is mentally retarded and has cerebral palsy to “lease a unit with onsite supervision and assistance with living activities, without which she would not be able to live independently.”[17] In another case he granted the waiver for a participant with “chronic disorders and chemical sensitivities that are expected to last indefinitely” so as to permit the participant to lease a unit that will accommodate her disabilities.[18] HUD also granted an exception payment standard to accommodate participants who require the support of personal care assistants to enable them to live independently.[19] Finally, the Assistant Secretary granted a request because the participant's “doctors and counselors feel that moving would be a physical and emotional hardship on him because he relies upon his neighbors to drive him to doctor appointments and provide meals and emergency medical help. Without his neighbors' assistance he is not able to live independently.”[20]

Project-Based Vouchers

Assistant Secretary Liu has granted the following waivers with respect to project-based (PB) vouchers. He granted waivers of the rule that limits PB vouchers to developments in census tracts with a poverty rate of less than 20 percent. These requests were generally granted if it was demonstrated that the area was formally designated as an Enterprise Community or Empowerment Zone or there was other economic activity occurring in the area that promoted the goal of deconcentration and expanding housing and economic opportunities. Requests were also granted for waivers of the rule that requires that only 25 percent of the development receive project-based vouchers unless the development is for the elderly or disabled, or if there are supportive services. All of the granted waivers were based upon the fact that supportive services would be provided. Finally, several PHAs sought a waiver of the rules regarding competitive bidding when the development involved had already been subjected to a competitive process for other funding, such as tax credits or HOPE VI or when the PHA sought to award the contract to a particular development for other reasons. For many of the developments, waivers were granted for two or three of these rules.

Development located in census tracts with poverty rates greater than 20 percent. Section II, subpart E, Revisions to PHA Project-Based Assistance Program; Initial Guidance provides that all new PB voucher assistance agreements must be for units in census tracts with poverty rates of less than 20 percent.[21] HUD has granted waivers for several developments in census tracts with poverty rates as high as 42 percent. In some cases, the poverty rate of the census tract was not mentioned.[22] The justification for granting the waivers was primarily based upon whether the plan was consistent with the goal of deconcentration and expanding housing opportunities. HUD granted a waiver for developments located in census tracts with poverty rates of 39, 37, 32 and 27 pecent because the property was located within or near a HUD-designated Enterprise Community.[23] It granted another request for developments in census tracts with poverty rates of 43 and 41 percent because the developments were within areas for which a “comprehensive economic housing development and infrastructure improvement initiative” was planned.[24] In other cases in which a waiver was approved, the poverty rate of the census tract, which included students, exceeded 20 percent. When students were excluded from the analysis, the poverty rate was below the threshold.[25]

Requests for project-based voucher waivers were generally granted if the area was an Enterprise Community or Empowerment Zone or there was other economic activity promoting deconcentration and expanding economic opportunities.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* 16,915-6.

[21] 66 Fed. Reg. 3,605, 3,608 (Jan. 16, 2001).

[22] No census tract information mentioned in the following grant of waivers. 67 Fed. Reg. 63,202, 63,218 (Oct. 10, 2002) (waiver granted because of the planned neighborhood revitalization, creation of mixed-income housing and job opportunities and significant state investment); see also *id.* 63,219 (four developments within Empowerment Zone and another within blocks of it. Goals of Empowerment Zones include opening new businesses, creating jobs); 68 Fed. Reg. 4,558, 4,577 (Jan. 29, 2003) (Empowerment Zone); 68 Fed Reg. 16,902, 16,915 (Apr. 7, 2003) (units to be located in a redevelopment area in which goals include mixed income). For more information on HUD's Renewal Community/Empowerment Zone/Enterprise Community, *see* www.hud.gov/offices/cpd/economicdevelopment/programs/rc/about/ezecinit.cfm.

[23] 67 Fed. Reg. 63,202, 63,217 and 63,218 (Oct. 10, 2002) (32 percent and 39 percent respectively); 68 Fed. Reg. 4,558, 4,577 (Jan. 29, 2003) (27 percent); 68 Fed Reg. 16,902, 16,918 (Apr. 7, 2003) (SRO in census tract of 37 percent). The goals of the Enterprise Communities (ECs) include creating jobs, housing and new educational and health care opportunities. See also footnote above regarding goals of Empowerment Zones (EZs) and the cite to more information regarding ECs and EZs; *see also* 67 Fed. Reg. 63,202, 63,219 (Oct. 10, 2002) (four developments within EZ and another within blocks of it).

[24] 67 Fed. Reg. 63,202, 63,218-9 (Oct. 10, 2002); *see also* 68 Fed Reg. 16,902, 16,917 (Apr. 7, 2003) (census tract with poverty rate of 29 percent, but PB vouchers to be located within redevelopment area); *id*. 16,918 (census tract with poverty rate of 28.53 percent, but several projects to deconcentrate poverty and improve the quality of life have been developed in the area and large-scale market-rate developments are planned for the area).

[25] 68 Fed Reg. 16,902, 16,917-8 (Apr. 7, 2003) (census tract with poverty rate of 32.45 percent, which is only 18.37 percent if students are excluded. In addition, the development is in an economic development area); 67 Fed. Reg. 63,202, 63,219 (Oct. 10, 2002) (census tract poverty rate is 22 percent, but when students are excluded it drops to approximately 8 percent).

Requirement that PB voucher units not exceed 25 percent of the units in a development. Section II, subpart F of the Initial Guidance states that no more than 25 percent of the dwelling units in any building may be assisted under a housing assistance payment (HAP) contract for PB vouchers. However, the percentage can be exceeded when the dwelling units are specifically made available for elderly families, disabled families and families receiving supportive services.[26] HUD granted several waivers for family units based upon the self-sufficiency nature of the services, such as assistance with finding and retaining employment, financial responsibility and encouraging neighborhood and community involvement.[27] Several of the waivers granted were for HOPE VI developments.[28]

Competitive bidding waived. PHAs must engage in a competitive bidding process for awarding PB voucher assistance.[29] The regulations require PHAs to select units to be subsidized with PB assistance in accordance with a written, HUD-approved unit selection policy that prescribes advertising procedures that must be followed. In addition, the regulation requires that a PHA's written selection policy identify the factors the PHA will use to rank and select applications. HUD has previously granted waivers under this rule[30] and in 2002, PHAs continued to seek new waivers.

During 2002, HUD granted one waiver request because the particular development was competitively selected for low-income housing tax credits and under a competitive state program and there was an "urgent need for affordable rental housing" in the state.[31] HUD granted other waivers on similar grounds, including the fact that the development successfully competed for HOPE VI funds.[32] Another justification for granting a waiver included the fact that the PHA would have continuing interest in the units.[33]

Other waivers of the competitive bidding process were based on less common facts. For example, HUD granted a waiver to permit project basing for 80 units originally slated for the Section 8 moderate rehabilitation program that were severely damaged 12 years ago in Hurricane Hugo. The Assistant Secretary granted the waiver request because it will permit a renovation of the units and maintain the original intended use of the property.[34] He granted another because the request supported the city's revitalization efforts and sought to ensure that low-income families maintained access to housing in revitalized areas as the area gentrified due to redevelopment.[35] HUD approved another waiver request to allow a PHA to purchase a HUD-owned senior assisted living facility on the grounds that it was consistent with "the Department's goal of housing elders in assisted living facilities with vouchers."[36]

Using PB vouchers for a Section 236 development. A PHA may not use PB assistance in a Section 236 project.[37] A PHA requested a waiver of the provision because it wanted to attach 97 PB vouchers to a 277-unit elderly building, and HUD granted the request because the property was located within the city's Enterprise Community.[38]

Conclusion

The waiver process has many applications and may address individual tenant needs as well as facilitate the placement of project-based vouchers. Because PHAs and other grant recipients historically have sought waivers, advocates should work with PHAs when appropriate to encourage them and support their application for a waiver. ■

[26]66 Fed. Reg. 3,605, 3,608 (Jan. 16, 2001).

[27]67 Fed. Reg. 63,202, 63,218 (Oct. 10, 2002) (100 percent of units); *id*. (self-sufficiency nature of the services included child care, parenting education, job re-entry guidance and support and adult basic education instruction); *id*. 63,219 (network to local work force); See also 68 Fed. Reg. 4,558, 4,577 and 4,578 (Jan. 29, 2003) and 68 Fed Reg. 16,902, 16,915 (Apr. 7, 2003) (HUD approved several other requests for waivers of the 25 percent limit based upon the supportive services which were to be provided).

[28]67 Fed Reg. 54,717, 54,725 (Aug. 23, 2002) (10 of 22 units) (119 of 341); 67 Fed. Reg. 63,202, 63,220 (Oct. 10, 2002) (88 units exceed 25 percent of total number of units in the development).

[29]24 C.F.R. § 983.51.

[30]There are many instances of HUD waivers of this requirement in the past. *See e.g.*, 67 Fed. Reg. 19,956, 19,967 (Apr. 23, 2002) (to minimize loss of housing) (to provide supportive housing for the formerly homeless men); 67 Fed. Reg. 4,548, 4,559-60 (Jan 30. 2002); 66 Fed. Reg. 56,398, 56,407 (Nov. 2001); 66 Fed. Reg. 36,416, 36,428 (July 11, 2001).

[31]67 Fed. Reg. 63,202, 63,218 (Oct. 10, 2002).

[32]68 Fed. Reg. 4,558, 4,576 (Jan. 29, 2003) (two waivers granted because the units were tax credit and HOPE VI and had therefore gone through the competitive bidding process.); *Id*. (PHA had a substantial interest in the units and the waiver would allow the PHA to use the units as replacement housing in conjunction with a HOPE VI development); *id*. 4,577 (waiver granted because the PHA will acquire 50 percent interest in general partner and will maintain the property as a resource for low-income families); 68 Fed Reg. 16,902, 16,916 (Apr. 7, 2003) (tax credit); *id*. (tax credit and city competition); 67 Fed Reg. 54,717, 54,725 (Aug. 23, 2002) (waiver for 33 units of PHA-owned, mixed-finance senior housing on a tax credit property).

[33]68 Fed. Reg. 4,558, 4,576 (Jan. 29, 2003) (PHA has substantial interest in the property); *id*. (waiver granted because the PHA will acquire 50 percent interest in general partner and will maintain the property as a resource for low-income families).

[34]67 Fed Reg. 54,717, 54,725 (Aug. 23, 2002).

[35]*Id*.

[36]*Id*.

[37]24 C.F.R. § 983.7(c)(4).

[38]67 Fed. Reg. 63,202, 63,217-8 (Oct. 10, 2002); *see also* 64 Fed. Reg. 55,378, 55,386 (Oct. 12, 1999) (allowed PB vouchers for a Section 236 development because of tight housing market).

HUD's New Anti-Flipping Rule–Only as Good as Its Enforcement

The Department of Housing and Urban Development (HUD) recently issued regulations designed to limit the sale of "flipped" properties to purchasers who intend to insure their home loans under the Federal Housing Administration's (FHA) single-family home loan insurance program.

"Flipping" is a practice whereby properties are sold multiple times within a short period with the price of the home increasing substantially upon each sale based on inflated appraisals.[1] Typically, appraisers, real estate agents and/or lenders partner to execute such schemes and the price of the home is frequently inflated 50 to 100 percent over its original sales price.[2] The ultimate purchasers, typically first-time homebuyers who are unsophisticated, low-income, minority or immigrant households, purchase and finance the homes at prices that they cannot afford. In the process they pay the appraiser, lenders and others inflated fees and costs that are typically paid up-front either by the borrower directly or from the mortgage loan proceeds.[3] The purchasers will frequently default on their loans when they are unable to continue to make their monthly mortgage payments, particularly after being confronted with the need to make unexpected repairs, or pay property taxes or insurance. When defaulting purchasers attempt to sell these homes, they discover that they are only able to recover a fraction of the purchase price, leaving them with no equity and typically an outstanding debt to the lender. Consequently, they will simply walk away from the home, forcing lenders to foreclose on their security.

Although flipping is not limited to FHA-insured loans, when a purchaser's home loan is insured by the FHA, the lender will collect a substantial portion of its potential loss from the FHA in return for deeding the property to the FHA. The FHA then sells the property, typically at a substantial loss that is charged against the FHA insurance fund. The recently published HUD regulations were not particularly motivated by an attempt to reduce flipping, because they do not attack the practice throughout the industry, but instead are intended to limit the losses incurred by the FHA, which appear to have reached hundreds of millions of dollars over the years. Hopefully, however, the regulations may also actually reduce the incidence of flipping.

The new regulations became effective June 2, 2003. They limit FHA lenders' capacity to finance homes that are not sold by owners of record, that have been sold recently, and whose appraisals are not verified.[4]

Property Must Be Sold by Owner of Record

One of the earmarks of a flipping is that the flippers will contract to purchase a property and then resell it before actually taking title to it. They do so to avoid costs and minimize risks associated with actually taking title. Thus, as a deterrent to flippers, the final rule includes a provision requiring that the seller of any property that will receive FHA mortgage insurance be the owner of record. The burden is on the lender to verify that the seller of the property is indeed the owner, and the lender must submit documentation to that effect to HUD as part of the application for mortgage insurance. The records used to verify ownership may consist of a copy of the recorded deed, property tax bill, a sales history report, or other forms of reliable documentation.[5]

The recently published HUD regulations were not particularly motivated by an attempt to reduce flipping, because they do not attack the practice throughout the industry, but instead are intended to limit the losses incurred by the FHA.

Time Restrictions on Resales

A mortgagee may not obtain FHA mortgage insurance if the owner of record is selling the property within 90 days of acquisition. As it is common for flipping to occur within this time frame, this restriction is directly on-point. For purchase of a home acquired by the seller 91 to 180 days before the proposed resale, HUD has the power to require the lender to obtain an additional appraisal if the sales price of the home is 100 percent over the price that the seller paid. With this amount of latitude, it seems likely that few homes will become subject to this requirement.[6] However, HUD has the power to revise the trigger down to 50 percent or upward to 150 percent if it publishes a 30-days notice in the Federal Register. Advocates should view this as an opportunity to

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[1]Flipping also refers to another predatory lending practice by which a lender convinces a consumer to refinance a home loan multiple times within a very short time span—weeks or months after the acquisition of the consumer's most recent home loan. Each time, the lender/creditor charges fees, so that the consumer ends up paying many thousands of dollars for loans that do not satisfy whatever goals the consumer had or promises the lender may have made.

[2]See *Statement of Susan Gaffney, Inspector General, HUD, Before the United States Senate Permanent Subcommittee on Investigations, Committee on Governmental Affairs* (Jun. 30, 2000)(available at www.hud.gov/oig/mortgagefraud.pdf).

[3]Flipping is combined with other predatory practices, such as the processor or lender providing false documentation regarding the homebuyer's income so that the person appears qualified for a higher loan than what he/she can truly afford.

[4]68 Fed. Red. 23,370 (May 1, 2003).

[5]24 C.F.R. §203.37a (2003).

[6]Indeed, flippers may keep the sales price below the threshold in order to avoid reappraisals.

negotiate with HUD for a more appropriate trigger—the 50 percent level would certainly offer more significant protection for consumers.[7]

The most significant power that the final rule allows for but does not require comes in the form of even tighter thresholds for the monitoring of resales. For a resale within 91 days to 12 months of the seller's purchase of the property, HUD has the power to require the lender to provide additional documentation to verify the value of the property if the resale price is greater than 5 percent of the lowest sales price of the property during the preceding 12 months. If HUD exercises this power, it may require the lender, at a minimum, to provide an additional appraisal from a different appraiser.[8] If the second appraisal or other documentation indicates that the property has a value that is more than 5 percent lower than that ascribed by the first appraisal, the lower valuation must be used to calculate the level of the FHA's mortgage insurance.[9] Advocates in a region where loan flipping is a problem should advocate with HUD to exercise its power to set the bar at its most protective (5 percent) level.[10] If HUD agrees to do so, it must publish a notice of that exercise of its powers in the Federal Register.

Last but not least, advocates should verify that HUD is exercising these new enforcement powers. HUD has the power to refuse to indemnify the mortgage loan of any lender that does not comply with these regulations and should be encouraged to do so. Advocates can also contribute by reporting fraudulent practices to HUD and tracking the results of those complaints. HUD's inspector general staff has pointed to a lack of HUD oversight as an obstacle to combating fraudulent practices. According to the inspector general, HUD discrepancies are due to insufficient and inexperienced personnel, lack of clear policies and procedures, outdated handbooks and a failure to require corrective action from lenders and appraisers.[11] Active participation by advocates could go a long way towards improving outcomes on the preventive side of HUD's work when it reviews lenders and loans. Without support and encouragement for greater HUD enforcement, it is not clear how effective this new rule will be. ■

[7]24 C.F.R. § 203.37a(2003). Note that this restriction does not apply to resales by HUD of Real Estate-Owned properties and single family properties in revitalization areas, or resales of property purchased by an employer or relocation agency for purposes of employee relocation. See 24 C.F.R. §203.37a(c) (2003).

[8]HUD, at its discretion, may also require other forms of documentation.

[9]Interestingly, it does not require a lowering of the sales price, only the amount that the FHA will insure.

[10]*Id.*

[11]See *Statement of Susan Gaffney, Inspector General, HUD, Before the United States Senate Permanent Subcommittee on Investigations, Committee on Governmental Affairs*, 5 (Jun. 30, 2000)(available at www.hud.gov/oig/mortgagefraud.pdf).

FREQUENTLY ASKED QUESTION

May a PHA Retain $10 of the $25 Resident Participation Grant?

Question

Are resident organizations entitled to the $25/unit/year resident participation grants or must the organizations split the grant with the PHA ($15 for the organizations and $10 for the PHA)?

Answer

The duly elected resident organization is entitled to the $25/unit/year and is not required to split the funds with the PHA. The current rules provide that the $25/unit/year is available for resident participation and the public housing authority must negotiate with the resident council on the use of the funds. There are many public housing authorities both large and small that agree with this interpretation and have provided to their resident councils the full amount. For example, the resident councils for the Kingsport, TN housing authority and the Boston, MA housing authority are receiving the full $25/unit/year.

The action of these housing authorities is fully supported by the regulations. There are three rules in effect that address issue of the $25/unit/year. The current operating fund rules, 24 C.F.R. § 990, which were revised March 29, 2001, the HUD Notice PIH 2001-3 (January 18, 2001), and the tenant participation rules, 24 C.F.R. part 964, issued August 24, 1994. Of these rules, only the 964 regulation mentions the split of $15/$10/unit/year. 24 C.F.R. § 964.150 (2002). The operating fund rules formerly mentioned the $15/$10 split but have been amended to remove any reference to the split. *Compare* 59 Fed. Reg. 43,644 (Aug. 24, 1994) (§ 990.108(f)) with 24 C.F.R. § 990.108(e) (2002). The operating subsidy rules currently provide that "each PHA shall include in the operating subsidy eligibility calculation, $25 per occupied unit per year for resident participation activities." 24 C.F.R. § 990.108(e) (2002). The HUD Notice PIH 2001-3 repeatedly mentions the $25/unit/year but makes no reference to a $15/$10 split. Significantly, the HUD Notice anticipates that there may be some confusion between the various rules and specifically states that "because HUD has not yet completed rulemaking on 24 C.F.R. 964, this notice provides guidance on how operating subsidy funds received by PHAs... *shall be distributed* and used." (emphasis added). Thus, there is no requirement for a $15/$10 split. To the contrary, insisting on such a split is inconsistent with the intent of the revised operating fund rules and the HUD Notice PIH 2001-3.

Lease Violation Sufficient Good Cause for LIHTC Eviction

The Minnesota Court of Appeals recently affirmed a district court finding that a landlord who operates a Low-Income Housing Tax Credit (LIHTC) development needs to only show "good cause" before terminating a tenancy.[1] The court further held that when tenants commit numerous lease violations over the period of their tenancy, the good cause standard for eviction is met.

Cynthia Washington and Clyde Penny were residents in a LIHTC development that was financed pursuant to authority contained in 26 U.S.C. § 42. Under that section, an investor in affordable housing qualifies for federal tax credits[2] provided the developer of the housing makes a commitment to rent a certain percentage, or all, of the units to low-income residents.[3] In 1998, Cimarron, without good cause, declined to renew Washington's lease and sought to evict the household from the housing development.

In an earlier appeal in the same case, the Minnesota Court of Appeals held that Cimarron could not evict LIHTC residents except for good cause.[4] The court reversed and remanded the matter to the district court to determine whether the landlord had good cause.

The matter came back up on appeal on two issues: first, whether the landlord was required to show "material non-compliance" with the lease in addition to good cause and second, whether evidence of ongoing lease violations provided the requisite good cause needed to terminate the tenancy.

In the trial court the landlord presented evidence of lease violations that included numerous police calls,[5] inadequate supervision of a guest, fraudulent application for a parking permit and late payments of rent. Under the lease agreement only persons listed as residents could live in the apartment, unauthorized residents were not permitted without management's approval, and residents were responsible for the conduct of their guests or visitors on the property. The development's Community Policies provided, among other things, that three or more lease violations could be grounds for termination regardless of the level or seriousness of the violation. The lease further provided that the tenancy could be terminated for violations of the lease or policies; police calls to the apartment for noise disturbances, domestic disputes,[6] use or possession of illegal substances and non-medical reasons; failure to pay rent; or, unauthorized residents.

On May 1, 2002, a 60-day notice was sent to Washington terminating the lease for numerous and ongoing lease violations. Washington, relying on a series of Section 8 and HUD subsidized housing cases, argued on appeal that good cause should be interpreted by the court to mean material non-compliance with the lease and that the lease violations were not material so as to constitute good cause. The court held that material non-compliance was not required under the LIHTC program and that there was a clear distinction between termination from Section 8 or HUD subsidized housing and a LIHTC project. Under the LIHTC program, tenants can be evicted solely for good cause.[7] By contrast, the regulations for the Section 8 and subsidized housing programs expressly provide that landlords can terminate a tenancy only upon a showing of the tenants' material non-compliance with the lease.[8]

The court reasoned that the drafters of the Section 8 and HUD subsidized housing program regulations clearly intended to include material non-compliance while opting out of said requirement for Section 42 housing.[9] The court refused to supply language which the drafters themselves declined to provide. In so finding, the court stated that until Congress provided a clear definition of good cause, it would continue to determine its meaning on a case-by-case basis. In affirming the district courts' grant of a writ of recovery, the appeals court held the numerous lease violations committed by the tenants in this case, considered as a whole, established the necessary good cause to terminate the tenancy.[10] ■

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[1]*Cimarron Village v. Washington,* 659 N.W.2d 811 (Minn. App., 2003).

[2]The court characterized the development as federally subsidized. Technically, it is not. It is subsidized by capital contributions from private investors, mostly corporations, that, in return for their contribution, receive tax credits that offsets their tax obligations to the federal government.

[3]26 U.S.C. § 42(h)(6)(B) (West, WESTLAW through Pub. L. 108-23 (05-19-03)). The developer's initial commitment extends over 15 years. Most states now require an extended commitment which, in some states, may extend to as many as 50 years. In this case, Minnesota required an extended commitment of an additional 15 years.

[4]*Cimarron Village Townhomes Ltd., v. Washington*, No C3-99-118, 1999 WL 538110, *3 (Minn. App. July 27, 1999)(unpublished).

[5]Police testified that several of the 40 calls originated from sources other than the tenant's apartment and that the tenant's son allowed a guest into a neighbor's apartment from which the guest stole blank checks.

[6]The court noted that this lease provision was in violation of Minnesota law which prohibited adverse action against tenants who call the police for their own health and safety, including emergency assistance or domestic abuse. *See* Minn. Stat. § 504B.205, subd.2(a)(2) (West, WESTLAW current through end of 2002 1st. Sp. Sess.)

[7]26 U.S.C. § 42(h)(6)(E)(ii)(I) (West, WESTLAW through P.L. No. 108-23 (5-19-03)).

[8]24 C.F.R. §247.3(a)(1)(2002); *See also id*. § 247.2, which relates to the Section 8 programs.

[9]The court assumed, erroneously, that the drafter of the HUD regulations defining good cause for the Section 8 program and other HUD assisted-housing programs intentionally excluded the LIHTC program from the developments covered by the regulations. In fact, HUD has no direct control over the LIHTC program, which, in all material respects, is governed by regulations issued by the Internal Revenue Service.

[10]The court found sufficient evidence in the record for a finding of good cause with the exception that the district court erred in including late rent payments as a factor supporting good cause when they had, in fact, waived their right to rely on this ground by accepting late payments without reservation. *5.

Recent Cases

The following are brief summaries of recently reported federal and state housing cases that should be of interest to housing advocates. Copies of the opinions can be obtained from a number of sources including the cited reporter, Westlaw,[1] Lexis,[2] or, in some instances, the court's Web site.[3] Copies of the cases are not available from NHLP.

Nason v. Mike, 2003 WL 21213707 (Conn. Sup., May 19, 2003)(unpublished). Upon the expiration of the Section 8 voucher holder's one-year lease term, the landlord filed a notice to quit and a complaint based on termination of the lease by lapse of time. The tenant asserted that to terminate a Section 8 tenancy the landlord must have good cause to terminate the lease under federal law and a stated reason under state law. The court disagreed with respect to the applicable federal law. It found that Congress changed 42 U.S.C. § 1437f(d)(1) and eliminated the provisions that only authorized the termination of Section 8 leases upon good cause. As a consequence, termination of the lease at the end of the initial lease term was permissible and "lapse of time" was an adequate reason for termination under state law. The tenant's motion to dismiss the termination was therefore denied.

Nelson v. McGee, 2003 WL 1989641 (N.D. Ill., April 30, 2003). The court reversed a bankruptcy court's decision to discharge a landlord's debt to her tenants. Gloria Nelson and Linda Mitchell (Nelson-Mitchell) were Bertha McGee's tenants in Section 8 housing located in Chicago. They had previously delivered a $2,500 security deposit to her, which, pursuant to the Chicago Municipal Code (CMC), she put into a separate interest-bearing account. Later, when Nelson-Mitchell decided not to renew their lease and move out, McGee refused to return the deposit and filed a forcible detainer action for allegedly unpaid rent. Nelson-Mitchell responded by filing a counterclaim pursuant to the CMC seeking damages in the amount of twice their deposit based on McGee's failure to return the security deposit. While the lawsuit was pending, McGee, confident that she would prevail, removed the money from the account and put it to her own use. Unfortunately for McGee, the circuit court came to a different conclusion and entered judgment in favor of Nelson-Mitchell for $5,000 plus interest of $270.50. McGee, having spent all of the funds, filed for a Chapter 7 bankruptcy and the bankruptcy court ultimately discharged the Nelson-Mitchell debt. Under the provisions of 11 U.S.C. § 523 there are exceptions to the discharge of debt through a bankruptcy proceeding. Namely, the debt of an individual will not be discharged, "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." In the present case, the bankruptcy court concluded that while there was a clear defalcation, Ms. McGee was not acting in a fiduciary capacity and there were no claims of embezzlement or larceny. Consequently, it allowed the debt to be discharged. On review, the District Court reversed. It found that the bankruptcy court's conclusion with respect to Ms. McGee's fiduciary capacity ignored provisions in the CMC that expressly state that the security deposit remains the property of the tenant, that it shall not be commingled with the landlord's assets nor be subject to any claims from the landlord's creditors. As a result, there was a fiduciary relationship between the parties when Ms. McGee failed to return the security deposit. Accordingly, the court held that the $5,270.50 debt could not properly be discharged through a bankruptcy proceeding.

Okabue v. Metropolitan Council HRA, 2003 WL 21150175 (Minn. App. May 20, 2003)(unpublished). The court affirmed Metro Council's decision to deny Charles Okabue's application for federally subsidized housing assistance because of his bad credit history. Generally, agency decisions enjoy a presumption of correctness and will be affirmed if the findings are supported with substantial evidence when considered in light of the evidence as a whole. In the present case, Metro Council's guidelines stipulated that an applicant may be denied admission based on financial instability. Okabue was denied admission because his credit report included an unpaid property damage assessment for $1,347, three unpaid civil judgments, and seven accounts in collections. Okabue asserted that he had a good rent payment history of over five years and that the credit history relied upon by Metro Council was stale. Further, while conceding that he owed money to a private landlord he also argued that there was no evidence that any money was owed to Metro Council. The court rejected Okabue's invitation to only look at his rental payment history on the basis that Metro Council's assessment standards were within federal guidelines. It therefore concluded that the actions of Metro Council were justified because they were neither arbitrary nor capricious.

Hamad v. Woodcrest Condominium Assoc., 328 F.3d 224 (6th Cir., April 22, 2003). The court of appeals reversed and remanded the district court's decision that denied the plaintiffs, two condominium owners, motions for a preliminary injunction and summary judgment on *Fair Housing Act* (FHA) discrimination and retaliation claims against their condominium association. The court also reversed the district court's grant of summary judgment on the discrimination and retaliation claims to the condominium association. A bylaw provision governing the defendant's three-story condominium development prohibited families with children from purchasing or living in units on the second or third floors. The plaintiffs, Terri and Akram Hamad, owners of a first floor unit who were experiencing trouble selling the unit, and Kayla Joyella, an owner of a third-floor unit who was thinking about becoming the legal custodian of her 15-year-old nephew and was denied the opportunity to bring her

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[1]www.westlaw.com.

[2]www.lexis.com.

[3]For a list of courts that are accessible through the World Wide Web, see www.uscourts.gov/links.html (federal courts) and www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). See also www.courts.net.

nephew into the unit, brought the action seeking to enjoin enforcement of the bylaw provision. The district court denied the plaintiff's preliminary injunction motion on the ground that the plaintiffs lacked standing. Specifically, it held that the Hamads were not injured because they lived in a unit that was not restricted and that Joyella was not injured because she did not yet have custody of her nephew. The court of appeals reversed. It concluded that standing under the FHA is to be viewed broadly and that Joyella clearly had standing to challenge the condominiums' bylaws because they adversely affected her desire to have her teenage nephew move in with her and adversely affected her capacity to sell her third-floor unit to a family with children. With respect to the Hamads, the court concluded that they had standing because they were members of the community in which allegedly illegal discriminatory practices were taking place. Having concluded that the plaintiffs had standing, the court also reversed the summary judgment holdings in favor of the condominium because the district court never properly evaluated whether a genuine issue of material fact was in dispute with respect to the plaintiffs' claims. Accordingly, the court remanded the case for further proceedings. In so doing, it concluded that the plaintiffs did not have to prove cognizable injuries to support their retaliation claim because, if the jury finds that the defendant violated the FHA, it could award nominal damages.

Anderson v. Abidoye, WL 21088004 (D.C. App. May 15, 2003). The D.C. Appellate Court held that in a Section 8 tenant's suit against a landlord for recovery of rent for breach of the implied warranty of habitability, the portion of the rent paid by the Department of Housing and Urban Development (HUD) should either be recovered by the District of Columbia Housing Authority (DCHA), HUD or the tenant, not retained by the landlord. The tenant leased a house under the Section 8 Voucher program. The tenant paid a portion of the rent for the unit directly and, the DCHA, using HUD funds, paid the bulk of the rent. After DCHA notified the landlord that the premises did not meet the Housing Quality standards for the Section 8 program, the tenant began to withhold her rent. When the landlord initiated an eviction action for nonpayment of rent, the tenant counterclaimed that the premises violated numerous housing codes and breached the implied warranty of habitability. The lower court found in favor of the tenant, but only awarded her that portion of the rent that the tenant actually paid to the landlord, not the HUD portion. The lower court denied the tenant the balance of the rent because the Housing Assistance Payment contract between the landlord and DCHA provided that the tenant was not a third part beneficiary to the contract between the landlord and DCHA.

The appellate court, reviewing the case under a *de novo* standard of review, reversed the lower court's decision and held that in a landlord and tenant dispute, compensation for landlord-caused diminution in bargained-for value should be payable to the tenant because it is fairer to compensate the tenant, rather than the landlord. The court remanded the case for further consideration to determine whether DCHA or HUD made an appearance in the case and sought any recovery from the landlord. If they did not, the court directed that the HUD subsidy should be repaid to the tenant.

Holiday v. Martinez, 2003 WL 21242641 (2d Cir. May 29, 2003)(unpublished). The Second Circuit Court of Appeals affirmed the district court's dismissal of a tenant's substantive and procedural due process claims against the New York City Housing Authority (NYCHA) based on the housing authority's effort to evict the tenant for the conduct of her non-resident adult son. The court reasoned that the tenant's successful adjudication of the eviction action in a state court proceeding provided the tenant adequate due process particularly when the tenant did not allege the NYCHA violated the procedural aspect of the consent decree entered into by the authority after the decision in *Escalera v. New York City Housing Authority,* 425 F.2d 853, (2d Cir.1970). To the extent that the tenant claimed other violations of that consent decree, the court questioned whether the tenant had standing to bring such a challenge in a court other than that which had jurisdiction over the initial consent decree. Lastly, the court also affirmed the district court's dismissal of the tenant's substantive due process claim against NYCHA's use of form stipulations under which the tenant agreed to prohibit her son from living in or even visiting her dwelling unit. The court found that the district court lacked subject matter jurisdiction over the claim because, in order to prevail, the tenant would have to call into question the validity of findings previously made by a state court with respect to the stipulation—something that the *Rooker-Feldman* doctrine precludes a federal court from doing. The jurisdiction issue notwithstanding, the court also concluded that the tenant would also not prevail on this claim because it was barred by the statute of limitations.

Corrales v. United States, 2003 WL 21076837 (Fed. Cl. Ct., April 18, 2003). The United States Court of Federal Claims granted the Rural Housing Service's (RHS) motion to dismiss the damage claims of a couple who lost their Section 502 home at a tax sale purportedly because the RHS did not live up to its promise to pay the past due property taxes on behalf of the homeowners. The case arose after the homeowners failed to pay their property taxes for several years and Fresno County, California, informed them that their home would be sold at a public auction unless the taxes were paid. When RHS learned of the threatened sale, it wrote to the borrowers advising them that they must pay all real estate taxes and report the payment to RHS. If the borrowers did not respond, the letter advised, the USDA Centralized Servicing Center would pay the outstanding taxes, would establish an escrow account for future collection of taxes and the owner's monthly payments would be adjusted accordingly. In fact, neither the plaintiff nor RHS paid the taxes owed to the county and the home was sold at the public auction. The owners initiated a damage action in the Court of Claims against the government alleging (1) a promissory estoppel cause of action, claiming that they relied to their detriment on RHS' promise to pay the property taxes; (2) that RHS

breached its contract with the borrowers when it failed to pay the taxes that the plaintiff claimed RHS promised to pay; and (3) that RHS negligently misrepresented that it would pay the taxes on behalf of the plaintiff.

The court dismissed the plaintiffs' first and third claims on jurisdictional grounds because the *Tucker Act*, which confers jurisdiction on the Court of Claims for contract claims against the federal government, does not extend the court's jurisdiction to promissory estoppel or tort claims. It also dismissed the plaintiffs' second cause of action for failure to state a claim upon which relief may be granted. First, the court reasoned that there was no express promise by the government to pay the plaintiffs' delinquent real property taxes in any agreement between the government and the borrowers. Second, it held that the demand letter sent to the borrowers was not an agreement between the government and the plaintiffs because it was not supported by either acceptance or consideration. Third, it concluded that the demand letter was not a modification of the agreement between the borrowers and RHS because it lacked consideration and acceptance. Lastly, the court reasoned that the demand letter did not promise to pay plaintiffs' delinquent real property taxes in time to prevent a tax sale of the property. Thus, it dismissed the case.

Watt v. Hernandez, 2003 WL 2004197 (N.Y. Sup. April 11, 2003). The Supreme Court of Bronx County held that the New York City Housing Authority (NYCHA) violated its own regulations when it summarily denied a tenant's application to include a family member as a permanent member of her public housing household. Due to an unexpected illness, the tenant requested her sister to move into her home. Thereafter, when the tenant sought to include her sister as part of the household on a permanent basis, the NYCHA denied the request because an administrative proceeding seeking to evict the tenant was pending. The eviction hearing proceeding was adjourned on many occasions because of NYCHA's failure to produce witnesses. Eventually, NYCHA withdrew the charges against the tenant. Subsequently, under the advice of her doctor, the tenant moved to another state to live with relatives and continue treatment. The tenant's sister, who remained in the unit, brought suit seeking judicial review of NYCHA's denial of the petition to succeed to the tenancy as remaining household member. Using an arbitrary and capricious standard of review, the court held that there was no rational basis for NYCHA's decision to deny the tenant's request because NYCHA violated its own procedural guidelines by denying the request while the administrative eviction hearing process was pending. Under NYCHA rules, the process for adding persons to the household is suspended during the hearing process and the determination must be made after it is completed. The court reasoned that had NYCHA followed its own rules it would have been compelled to grant the tenant's request. The court also held that the summary denial of the permanent residency application did not satisfy plaintiff's due process rights as a prospective public housing tenant because NYCHA's actions replaced a procedural requirement that normally protects substantive rights of applicants with one that is devoid of any procedural safeguards. The new process, in effect, circumvented tenant's substantive rights and was not subject to judicial review. The court held that although agencies have broad discretion to restrict the occupancy of their residents, summary denial of an application on the ground that an eviction proceeding is pending without regard to its ultimate resolution is so shocking to basic notions of fairness as to constitute an abuse of discretion. Lastly, the court also rejected NYCHA's statute of limitations defense, holding that the statute of limitations did not commence until NYCHA denied the application for succession.

East Harlem Pilot Block Building 1 HDFC v. Cordero, 2003 WL 21203084 (N.Y. Civ. Ct., April 28, 2003). A New York City Civil Court granted partial summary judgment in favor of a public housing tenant who was sued by her landlord for the market-value of a unit after the tenant failed to timely submit her annual recertification paperwork. The question before the court was whether HUD regulations require Project-based Section 8 landlords to retroactively apply a rental assistance subsidy upon a tenant's late recertification. The landlord-plaintiff asserted that although the tenant had delayed her recertification due to cancer-related hospitalization, this situation did not qualify as an extenuating circumstance which could excuse the tenant's failure to recertify, and that the tenant therefore owed the landlord market-value rent for the period when the tenant was uncertified. The tenant claimed that although she recertified after the deadline, her subsidy was retroactive and thus she did not owe any additional rent. The court held that the HUD handbook's unambiguous language mandates that a tenant who has recertified, albeit belatedly, is entitled to a subsidized rent "implemented retroactive to the date the recertification was scheduled to be effective," and that the tenant need not pay market value for her unit's back rent. The court noted that the landlord's ability to temporarily charge market rent was meant to accelerate the recertification process with the imposition of this penalty and that it was not meant as a means to accelerate a tenant's possible eviction.

Khalil v. The Farash Corporation, 2003 WL 1995711 (W.D.N.Y, April 23, 2003). A New York district court denied a landlord-defendant's motion for summary judgment against three families alleging that the landlord discriminated against them in violation of 42 U.S.C. Section 3604(a) and (b) of the *Fair Housing Act.* The plaintiffs' claim that their landlord's regulations prohibiting children and not adults from congregating in certain areas of the landlord's complex amounted to unlawful discrimination that had both disparate impact and disparate treatment. The court held that the plaintiffs were able to make a *prima facie* case of both disparate impact and disparate treatment, and although the defendant had legitimate reasons for instituting rules regarding children's play areas, it would be premature to grant summary judgment in favor of the defendant without other determinations of fact that could not be resolved without a trial.

Babalola v. B.Y. Equities Inc., 2003 WL 1868487 (2nd Cir. April 11, 2003)(unpublished). The Circuit Court affirmed a district court ruling regarding matters of jurisdiction under the *Rooker-Feldman* doctrine. The plaintiff in this case alleged that her landlord discriminated against her in violation of the *Fair Housing Act* and the *Civil Rights Act of 1968*. The panel held that the *Rooker-Feldman* doctrine, which prohibits federal courts from adjudicating cases that are "inextricably intertwined" with previous state court rulings, prevented it from deciding the issue at bar because it would require the court to hold that prior state courts erred in issuing a warrant for the plaintiff's eviction. Such a ruling would clearly contravene the principles inherent in the *Rooker-Feldman* doctrine.

Cottonwood Affordable Housing v. Yavapai County, 2003 WL 21054392 (Ariz. Tax, May 12, 2003). An Arizona Tax Court granted the plaintiff's motion for summary judgment against the city of Yavapai after the latter appraised the plaintiff's property by including the value of the property's Low-Income Housing Tax Credits (LIHTCs) within the market value appraisal. The plaintiff, an owner of a low-income housing project, contested the city's estimate because he claimed the assessment was in excess of true market value. The questions before the court were 1) whether LIHTCs were intangible property, 2) whether LIHTCs should be included in the value of the plaintiff's property, and 3) whether the restrictions imposed by the LIHTC program should be considered in valuing the plaintiff's property. The tax court noted that LIHTCs were created to encourage new construction and rehabilitation of housing units for low-income families, which is accomplished when states issue federal tax credits for 15 years to owners for the creation of affordable housing. The court held that LIHTCs are intangible because as incentives they are to be used to invest in the property and are thus not income that has been derived from the rental of the property. In addition, because the tax credits have a limited life, they do not add value to the property, and are also not an integral part of the real estate. The court also held that since LIHTCs adversely affect the marketability of a housing project for at least 15 years, the restricted use must be taken into account when determining the value of a property.

***People v. King*, 2003 WL 1710861** (Ca. App., 4th Dist. April 1, 2003)(unpublished). The California State Court of Appeals upheld criminal convictions and jail terms of the defendants for welfare fraud for, among other things, failing to properly report their income to their housing authority as required by the Section 8 Voucher program. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in April and May of 2003. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's Web site on the World Wide Web,[1] (2) bound volumes of the *Federal Register*, (3) HUD Clips,[2] (4) HUD,[3] and (5) USDA's/Rural Development Web page.[4] Citations are included with each document to help you secure copies.

HUD Final Rules

68 Fed. Reg. 20,324 (Apr. 24, 2003)
Tenant Participation in State-Financed, HUD-Assisted Housing Developments

Summary: HUD's current regulations protecting the statutory right of tenants in HUD-assisted and insured multifamily housing developments to organize and participate in the operation of the development do not currently cover state-financed housing developments that receive assistance under certain HUD programs. The statutory right of tenants to organize includes those state-financed housing developments. This final rule extends the protection of tenant organizations to include state-financed housing developments assisted under certain HUD programs.

Effective Date: May 27, 2003.

68 Fed. Reg. 23,370 (May 1, 2003)
Prohibition of Property Flipping in HUD's Single Family Mortgage Insurance Programs

Summary: This final rule addresses property ''flipping,'' the practice whereby a property recently acquired is resold for a considerable profit with an artificially inflated value, often abetted by a lender's collusion with the appraiser. Specifically, the final rule establishes certain new requirements regarding the eligibility of properties to be financed with Federal Housing Administration (FHA) mortgage insurance. The regulatory amendments will comply with Congressional mandates to maintain the FHA Insurance Fund in a sound actuarial manner. The new requirements will make flipped properties ineligible for FHA-insured mortgage financing,

[1] *At* www.access.gpo.gov/su_docs.

[2] *At* www.hudclips.org/cgi/index.cgi.

[3] To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

[4] *At* www.rdinit.usda.gov/regs.

thus precluding FHA home purchasers from becoming victims of predatory flipping activity. The final rule follows publication of a September 5, 2001, proposed rule and takes into consideration the public comments received on the proposed rule.[5]

Effective Date: June 2, 2003.

68 Fed. Reg. 26,946 (May 16, 2003)
Appraiser Qualifications for Placement on FHA Single Family Appraiser Roster

Summary: This final rule makes several changes designed to strengthen the licensing and certification requirements for placement on the Federal Housing Administration (FHA) Appraiser Roster (Appraiser Roster or FHA Appraiser Roster). First, the final rule requires that appraisers on the Appraiser Roster must have credentials that are based on the minimum licensing/certification standards issued by the Appraiser Qualifications Board of the Appraisal Foundation. The final rule also clarifies that an appraiser may be removed from the Appraiser Roster if the appraiser loses his or her license or certification in any state due to disciplinary action, even if the appraiser continues to be licensed or certified in another state. Further, the final rule provides that an appraiser whose license or certification in any state has been revoked, suspended or surrendered as a result of a state disciplinary action will be automatically suspended from the Appraiser Roster until HUD receives evidence demonstrating that the state-imposed sanction has been lifted. An appraiser whose licensing or certification in a state has expired is automatically suspended from the Appraiser Roster in that state and may not conduct FHA appraisals in that state until HUD receives evidence that demonstrates renewal, but may continue to perform FHA appraisals in other states in which the appraiser is licensed or certified. This final rule follows publication of a November 30, 2001, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: With the exception of § 200.202(b)(1) and (c), this final rule is effective on June 16, 2003. HUD will publish a notice in the Federal Register announcing the effective date of § 200.202(b)(1) and (c).

HUD Interim Rule

68 Fed. Reg. 28,102 (May 22, 2003)
Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects

Summary: This interim rule provides for codification of the requirements of Executive Order 13202 (the Executive Order), entitled "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects." The Executive Order provides that, to the extent permitted by law, agencies may not permit inclusion of contract conditions requiring or prohibiting entering into or adhering to agreements with a labor organization, or otherwise discriminating against parties entering into or adhering to such agreements, as a condition for award of any federally funded contract or subcontract for construction. The purpose of this rule is to ensure compliance by all HUD grantees, recipients of financial assistance, parties to cooperative agreements, contractors and subcontractors with the requirements of open competition and government neutrality in awarding federally funded contracts or subcontracts for construction.

Effective Date: June 23, 2003.

Comment Due Date: July 21, 2003.

HUD Proposed Rules

68 Fed. Reg. 15,906 (Apr. 1, 2003)
Revisions to FHA Credit Watch Termination Initiative

Summary: This proposed rule would make several amendments to the Federal Housing Administration (FHA) Credit Watch Termination Initiative. The proposed rule provides for a fully computerized Credit Watch status notification process through use of the FHA Neighborhood Watch Early Warning System. A mortgagee will be considered to be on Credit Watch status if, at any time, it has a default and claim rate of higher than 150 percent of the normal rate, and its origination approval agreement has not been terminated. The proposed rule would also prohibit a mortgagee that has received a notice of proposed termination of its origination approval agreement from establishing a new branch for the origination of FHA-insured mortgages in the lending area covered by the proposed termination. In addition, the proposed rule would establish that the default and claim thresholds underlying the Credit Watch Termination Initiative apply to both underwriting and originating mortgagees. The proposed rule would also codify the definition of "underserved area" that is currently used under the Credit Watch Termination Initiative. Finally, the proposed rule would provide that, for purposes of Credit Watch Termination evaluation, the date of mortgage origination will be considered to be the date the loan transaction commences amortization, rather than the date of endorsement for FHA mortgage insurance.

Comment Due Date: June 2, 2003.

68 Fed. Reg. 16,461 (Apr. 4, 2003)
Public Housing Assessment System (PHAS) Proposed Rule: Notice of Extension of Public Comment Period

Summary: This notice extends, for an additional 60 days, the public comment period for the proposed rule that would amend the regulations for the Public Housing Assessment System (PHAS).

Comment Due Date: June 8, 2003.

[5]A more detailed article about this rule may be found at page 324 of this issue.

68 Fed. Reg. 17,000 (Apr. 8, 2003)
Indian Housing Block Grant Allocation Formula: Notice of Establishment of Negotiated Rulemaking Committee and Announcement of Final List of Committee Members

Summary: HUD announces the establishment of its Indian Housing Block Grant Allocation Formula Negotiated Rulemaking Committee, consistent with the *Negotiated Rulemaking Act of 1990*. In addition, this notice announces the final list of committee members. The committee will negotiate a proposed rule to revise the allocation formula used under the Indian Housing Block Grant (IHBG) Program. This document follows publication of July 16, 2001, July 5, 2002, and January 22, 2003, notices advising the public of HUD's intent to establish the negotiated rulemaking committee and soliciting nominations for membership on the committee.

Dates: The first meeting of the negotiated rulemaking committee will be held on Tuesday, April 29, 2003, Wednesday, April 30, 2003, and Thursday, May 1, 2003. The meetings will start at 9 a.m. each day and are scheduled to adjourn at 4 p.m. each day.

68 Fed. Reg. 30,390 (May 27, 2003)
Semiannual Regulatory Agenda

Summary: HUD is publishing its agenda of regulations already issued or that are expected to be issued over the next several months. The agenda also includes rules currently in effect that are under review, and describes those regulations that may affect small entities as required by Section 602 of the *Regulatory Flexibility Act*. The purpose of publication of the agenda is to encourage more effective public participation in the regulatory process by providing the public with early information about pending regulatory activities.

HUD Notices

68 Fed. Reg. 15,736 (Apr. 1, 2003)
Announcement of OMB Approval Number for Public Housing Agency Lease Requirement, Recordkeeping Requirements

Summary: This notice announces the OMB approval number for HUD regulations that prescribe the provisions that shall be incorporated in leases by Public Housing agencies (PHAs) for dwelling units assisted under the *U.S. Housing Act of 1937* in projects owned by or leased to PHAs to the tenants. The recordkeeping requirement imposed upon PHAs by HUD regulations and associated information is incidental to PHAs' day-to-day operations as landlords of rental housing.

68 Fed. Reg. 16,672 (Apr. 4, 2003)
Notice of Funding Availability (NOFA) for HOPE VI Demolition Grants Fiscal Year 2002

Summary: This NOFA announces the availability of approximately $40 million in Fiscal Year (FY) 2002 funds for HOPE VI Demolition Grants.

68 Fed. Reg. 16,902 (Apr. 7, 2003)
Notice of Regulatory Waiver Requests Granted for the Fourth Quarter of Calendar Year 2002

Summary: The purpose of this notice is to comply with the requirements of Section 106 of the *HUD Reform Act*. This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on October 1, 2002, and ending on December 31, 2002.

68 Fed. Reg. 17,065 (Apr. 8, 2003)
Announcement of Funding Awards for the Rural Housing and Economic Development Program; Fiscal Year 2002

Summary: This announcement notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability (SuperNOFA) for the Rural Housing and Economic Development Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

68 Fed. Reg. 17,252 (Apr. 8, 2003)
Notice Concerning Release of Certain Loan-Level Data on Ginnie Mae Mortgage-Backed Securities

Summary: This proposed notice announces the intent of Ginnie Mae, a government corporation within HUD, to make certain loan-level data available to the public on Ginnie Mae multifamily securities, and invites public comments on this policy. This notice also invites comments regarding the impact of releasing specific loan-level information.

Comment Due Date: May 8, 2003.

68 Fed. Reg. 20,314 (Apr. 24, 2003)
Notice of Funding Availability (NOFA) for the Permanent Housing and Special Efforts for Subpopulations Technical Assistance Program (PHASES–TA)

Summary: The purpose of the technical assistance (TA) program detailed in this NOFA is to provide technical assistance to grantees, project sponsors and potential applicants for the *McKinney-Vento Act* funded Supportive Housing Program, Section 8 Moderate Rehabilitation Single Room Occupancy, and Shelter Plus Care projects to promote the development of permanent housing and supportive services as part of the Continuum of Care (CoC) approach, including innovative approaches to enable homeless persons to live as independently as possible. In addition, this TA program is intended to provide assistance to faith-based and other community grassroots organizations, veteran-specific organizations, and organizations serving Colonias areas to better enable them to develop and implement viable project proposals to assist homeless persons using McKinney-Vento funds. Up to $2 million in FY 2002 funds is available for the PHASES–TA program. Approximately $1 million will be available in TA funds for development and implementation of permanent housing, with the remaining $1 million to be used for technical assistance for faith-based and other community organizations, veteran-specific organizations, and organizations either currently serving or desiring to serve Colonias.

Application Deadline. June 18, 2003.

Match: None.

68 Fed. Reg. 21,002 (Apr. 25, 2003)
SuperNOFA for HUD's Discretionary Programs for FY 2003

Summary: This FY 2003 SuperNOFA announces the availability of approximately $2.3 billion in HUD program funds covering 43 funding opportunities within programs operated and administered by HUD offices. This General Section of the SuperNOFA provides the application procedures and requirements that are applicable to all the programs in this SuperNOFA unless otherwise stated in the Program NOFA. The Program Section of this SuperNOFA provides a description of the specific programs for which funding is made available and describes any additional procedures and requirements that are applicable to a specific program.

Application Due Dates: Application due dates can be found in the HUD FY 2003 SuperNOFA Funding Chart located in the General Section. Information for each program is reiterated in the appropriate Program Section of the SuperNOFA.

68 Fed. Reg. 23,753 (May 5, 2003)
Privacy Act of 1974; Notice of Matching Program: Matching Tenant Data in Assisted Housing Programs

Summary: HUD is updating its notice of a matching program involving comparisons between income data provided by applicants or participants in HUD's assisted housing programs and independent sources of income information. The matching program will be carried out to detect inappropriate (excessive or insufficient) housing assistance under the *National Housing Act*, the *United States Housing Act of 1937*, Section 101 of the *Housing and Community Development Act of 1965*, the *Native American Housing Assistance and Self-Determination Act of 1996*, and the *Quality Housing and Work Responsibility Act of 1998.* The program provides for the verification of the matching results and the initiation of appropriate administrative or legal actions, primarily through public housing agencies (PHAs) and owners and agents. Indian tribes and tribally designated housing entities are not a mandatory component of the computer matching program. This notice provides an overview of computer matching for HUD's assisted housing programs. Specifically, the notice describes HUD's program for computer matching of its tenant data to: (a) The SSA's earned income and the IRS's unearned income data; (b) SSA's wage, social security, supplemental security income and special veterans benefits data; (c) State Wage Information Collection Agencies' (SWICAs') wage and unemployment benefit claim information, and (d) the Office of Personnel Management's (OPM) personnel data.

Effective Date: Computer matching is expected to begin June 4, 2003 unless comments are received which will result in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: June 4, 2003.

68 Fed. Reg. 24,078 (May 6, 2003)
Notice of Annual Factors for Determining Public Housing Agency Ongoing Administrative Fees for the Housing Choice Voucher Program and Moderate Rehabilitation Programs

Summary: This notice announces the federal FY 2003 monthly ongoing administrative fee amount paid to public housing agencies administering tenant-based assistance under the Housing Choice Voucher Program, and project-based assistance under the Project-Based Certificate Program, the Project-Based Voucher Program and the Moderate Rehabilitation Programs (including Moderate Rehabilitation Single Room Occupancy (SRO)). The notice also describes other fees, in addition to the ongoing administrative fees, that may be approved by HUD for PHA costs of program administration.

Effective date: May 6, 2003.

68 Fed. Reg. 25,055 (May 9, 2003)
Announcement of Funding Awards for the Indian Community Development Block Grant Program for Fiscal Year 2002

Summary: In accordance with Section 102(a)(4)(C) of the *Department of Housing and Urban Development Reform Act of 1989*, this announcement notifies the public of funding decisions made by HUD in a competition for funding under the FY 2002 Notice of Funding Availability (NOFA) for the Indian Community Development Block Grant (ICDBG) Program. This announcement contains the consolidated names and addresses of this year's award recipients under the ICDBG.

68 Fed. Reg. 25,387 (May 12, 2003)
NOFA for HOPE VI Demolition Grants Fiscal Year 2002; Correction

Summary: On April 4, 2003, HUD published the NOFA for HOPE VI Demolition Grants FY 2002. This document makes six technical corrections to the NOFA.

68 Fed. Reg. 26,640 (May 16, 2003)
Modification of the Statutory and Regulatory Waivers Granted to New York State for Recovery From the September 11, 2001, Terrorist Attacks

Summary: This notice advises the public of modifications of the waivers of regulations and statutory provisions granted to the State of New York for the purpose of assisting in the recovery from the September 11, 2001, terrorist attacks on New York City.

Effective Date: May 21, 2003.

68 Fed. Reg. 27,097 (May 19, 2003)
Announcement of Funding Awards for the Community Development Technical Assistance Programs; Fiscal Year 2002

Summary: This announcement notifies the public of funding decisions made by the Department in a competition for funding under the SuperNOFA for the Community Development Technical Assistance Programs. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

68 Fed. Reg. 27,680 (May 20, 2003)
NOFA for the Research Studies on Homeownership and Affordable Lending FY 2002

Summary: The purpose of this NOFA is to fund technical studies that will guide development of public policy to increase affordable lending, reduce downpayment constraints, and promote homeownership, especially for low- and moderate-income and minority families and in geographical areas which have been underserved by the mortgage finance system. HUD particularly seeks studies that will provide empirical basis for its regulation and monitoring of two Government-Sponsored Enterprises (GSEs)—Fannie Mae and Freddie Mac—including the effects of such regulation and monitoring on affordable lending in the primary mortgage market.

68 Fed. Reg. 31,726 (May 28, 2003)
SuperNOFA for HUD's Discretionary Programs for FY 2003; Technical Correction

Summary: On April 25, 2003, HUD published its FY 2003 SuperNOFA for HUD's Discretionary Programs. This document makes certain technical corrections with respect to the Section 202 Supportive Housing for the Elderly Program and the Section 811 Supportive Housing for Persons with Disabilities Program.

Dates: The application due dates of June 13, 2003, for both programs remains unchanged from the application due dates as published in the Federal Register on April 25, 2003.

68 Fed. Reg. 31,730 (May 28, 2003)
Credit Watch Termination Initiative

Summary: This notice advises of the cause and effect of termination of Origination Approval Agreements taken by HUD's Federal Housing Administration (FHA) against HUD-approved mortgagees through its Credit Watch Termination Initiative. This notice includes a list of mortgagees which have had their Origination Approval Agreements (Agreements) terminated.

68 Fed. Reg. 31,870 (May 28, 2003)
Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program—FY 2004

Summary: Section 8(c)(1) of the *United States Housing Act of 1937* requires the Secretary to publish Fair Market Rents (FMRs) annually to be effective on October 1 of each year. FMRs are used to determine payment standard amounts for the Housing Choice Voucher program, to determine initial renewal rents for some expiring project-based Section 8 contracts, and to determine initial rents for housing assistance payments (HAP) contracts in the Moderate Rehabilitation Single Room Occupancy (SRO) program. Other programs may require use of FMRs for other purposes. Today's notice proposes revised FMRs that reflect estimated 40th and 50th percentile rent levels trended to April 1, 2004.

Comments Due Date: June 27, 2003.

HUD Housing Notices

Notice H 2003-07 (April 22, 2003)
Deployment of Military Personnel to Active Duty

Summary: This notice provides general guidance to owners and management agents who administer project-based assisted contracts (Section 8, Rent Supplement, Rental Assistance Payments, Project Assistance Contracts, and Project Rental Assistance Contract) and / or mortgage-based projects (Section 236 and 221(d)(3) Below Market Interest Rate) for continuing assistance to persons called to active military duty (including reservists and guardsmen).

Expires: April 30, 2004.

Notice H 2003-08 (May 1, 2003)
Reinstatement / Extension of Notice H 96-102 Redesigned Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs —Firm Commitment Processing to Final Closing

Summary: Notice H 96-102 (HUD), issued November 26, 1996, which was previously extended by Notice H 2002-5, is being extended to May 31, 2004.

Expires: May 31, 2004.

Notice: H 2003-09 (May 6, 2003)
Extension of Notice H 00-07 —$1 Home Sales to Local Governments Program

Summary: Notice H 00-07 (HUD), which was issued April 28, 2000, and was extended to March 31, 2003, under Notice H 02-02, is hereby extended to April 30, 2004.

Expired: April 30, 2004.

HUD PIH Notices

Notice PIH 2003-10 (HA) (April 4, 2003)
Capital Fund—Replacement Housing Factor Funding Instructions

Summary: The Capital Fund Formula Rule at 24 C.F.R. 905.10(i) provides that a public housing agency (PHA) may receive Replacement Housing Factor (RHF) funding for a period of up to five years. A PHA may be given RHF funding only if the PHA did not receive funding for public housing units under public housing development, Major Reconstruction of Obsolete Public Housing, HOPE VI or other programs that would otherwise provide replacement housing. Beginning with funding provided in FY 2000, RHF funding can only be used for replacement public housing.

Expires: April 30, 2004.

Notice PIH 2003-11 (HA) (April 11, 2003)
Instructions for Obtaining Federal Bureau of Investigation Criminal History Record Information

Summary: This notice provides advice to public housing agencies for obtaining Federal Bureau of Investigation National Crime Information Center database criminal history record information and fingerprint checks that will assist

PHAs with their applicant screening, lease enforcement and eviction responsibilities.

Expires: April 30, 2004.

Notice PIH 2003-12 (HA) (May 16, 2003)
Determination of Rent Reasonableness—Revision of Request for Tenancy Approval, Form HUD-52517

Summary: This notice applies to the Housing Choice Voucher Program. The notice transmits a revised Request for Tenancy Approval, Form HUD-52517 (March 2003) and provides guidance to public housing agencies and HUD field office staff on the use of the form to obtain information on rents charged by the owner for comparable unassisted units in the same apartment complex. This notice also clarifies requirements for determining comparable rents relative to determining rent reasonableness.

Expires: May 31, 2004.

RHS Notices

68 Fed. Reg. 26,928 (May 16, 2003)
NOFA; Multi-Family Housing, Single Family Housing

Summary: The Rural Housing Service announces the availability of housing funds for FY 2003.

Effective Date: May 16, 2003.

68 Fed. Reg. 26,941 (May 16, 2003)
NOFA for the Section 515 Rural Rental Housing Program for FY 2003

Summary: This NOFA announces the availability of new construction loan funds for the Section 515 Rural Rental Housing (RRH) program for FY 2003. By prior notice in the Federal Register, the Agency announced a deadline of February 25, 2003, 5 p.m. local time for each Rural Development State Office, for submitting applications for Section 515 new construction loan funds and Section 521 Rental Assistance. The ''Notice of Timeframe to Submit Applications for the Section 515 Rural Rental Housing Program for Fiscal Year 2003'' was published in the Federal Register on December 27, 2002 (67 Fed. Reg. 79,033). This was done prior to passage of a final appropriations act to allow sufficient time for applicants to complete an application and for the Agency to select and process selected applications within the current fiscal year.

68 Fed. Reg. 26,941 (May 16, 2003)
NOFA for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for FY 2003

Summary: This NOFA announces the availability of funds for Section 514 Farm Labor Housing loan funds and Section 516 Farm Labor Housing grant funds for new construction and acquisition and rehabilitation of off-farm units for farmworker households. Applications may also include requests for Section 521 rental assistance and operating assistance for migrant units. By prior notice in the Federal Register, the Agency announced a deadline of March 27, 2003, 5 p.m., local time for each Rural Development State Office, for submitting applications for sections 514/516 Farm Labor Housing Loans and Grants and Section 521 Rental Assistance. The ''Notice of Timeframe for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003'' was published in the Federal Register on December 27, 2002 (67 Fed. Reg. 79,030). This was done prior to passage of a final appropriations act to allow sufficient time for applicants to complete an application, and for the Agency to select and process selected applications within the current fiscal year. This notice changes the timeframe to submit applications for the Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003 to be August 14, 2003. Detailed information regarding the application and selection process, as well as a listing of the Rural Development State Offices, may be found in the notice of December 27, 2002.

68 Fed. Reg. 26,943 (May 16, 2003)
NOFA for the Section 538 Guaranteed Rural Rental Housing Program (GRRHP) for FY 2003

Summary: This NOFA announces the availability of funds for the Section 538 Guaranteed Rural Rental Housing Program for FY 2003. Congress appropriated $99.350 million to the Section 538 GRRHP for FY 2003. All applicants that submitted responses to a prior Section 538 GRRHP notice published in the Federal Register on December 27, 2002 (67 Fed. Reg. 79,038) and the correction to the notice published in the Federal Register on January 28, 2003 (68 Fed. Reg. 4,166) will be considered for FY 2003 funding. The commitment of program dollars will be made to applicants of selected responses that have fulfilled the necessary requirements for obligation as described in the notice published in the Federal Register on December 27, 2002 (67 Fed. Reg. 79,038). The Agency will continue to review eligible responses from eligible applicants as described in the notice published in the Federal Register on December 27, 2002 (67 Fed. Reg. 79,038) and the correction to the notice published in the Federal Register on January 28, 2003 (68 Fed. Reg. 4,166) until all funds are expended. The Agency will issue a notice to inform the public when funds have been exhausted for FY 2003.

Dated: May 12, 2003.

68 Fed. Reg. 26,943 (May 16, 2003)
NOFA for Section 533 Housing Preservation Grants for FY 2003

Summary: This NOFA announces the availability of funds for Section 533 Housing Preservation Grant Program. By prior notice in the Federal Register, the Agency announced a deadline of March 27, 2003, 5 p.m., local time for each Rural Development State Office, for submitting applications for the Section 533 Housing Preservation Grant Program. The ''Notice of Timeframe for the Section 533 Housing Preservation Grants for Fiscal Year 2003'' was

published in the Federal Register on December 27, 2002 (67 Fed. Reg. 79,036). This was done prior to passage of a final appropriations act to allow sufficient time for applicants to complete an application and for the Agency to select and process selected applications within the current fiscal year. Detailed information regarding the application and selection process, as well as a listing of the Rural Development State Offices, may be found in the notice of December 27, 2002.

RHS Administrative Notices

RD AN No. 3867 (1930-C)(May 26, 2003)
Actions Rural Housing Service Can Take to Control Potential Abuse by Identity-of-Interest Firms

Summary: This Administrative Notice (AN) addresses concerns expressed by Congress and the Office of the Inspector General (OIG) regarding potential abuse by Identity-of-Interest (IOI) firms during the operation and management of Multi-Family Housing (MFH) projects. Provisions established under Rural Development Instruction 1930-C, Exhibit B, paragraph V B address this concern and require that all IOI relationships be identified and fully justified. Paragraph V E 3 of Exhibit B requires that borrowers justify all expenses that appear unreasonable during the budget review process by an official of the Servicing Office. It must be clearly documented in all IOI requests as to why the use of an IOI firm is in the best interest of the tenants and the government.

RD AN No. 3862 (1924-A)(April 29, 2003)
Lead-Based Paint Hazard Reduction in Residential Housing and Child-Occupied Facilities

Summary: This AN provides guidance on compliance with the final rule "Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance," published by HUD. This guidance is intended to simplify and expedite Rural Development efforts to comply with the final rule on lead-based paint which took effect on September 15, 2000. This AN does not prohibit or restrict the financing of homes constructed prior to 1978.

RD AN No. 3859 (1901-E & 2006-P)(April 22, 2003)
Conducting Compliance Reviews in the Farm Labor Housing Program

Summary: This AN addresses concerns found during the Farm Labor Housing (Off-Farm) Management Control Review conducted in FY 2001. During the reviews, it was found that: 1) employees were not ensuring that compliance reviews were done thoroughly and on schedule; 2) employees were not reviewing Affirmative Fair Housing Marketing Plans every three years and were not requesting modifications to the plans when needed; and 3) employees were not making the community contacts when conducting compliance reviews. The intended outcome of this AN is to provide guidance to field employees of their civil rights compliance responsibilities, as contained in RD Instruction 1901-E. ■

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