

Congress Considers Solutions for the Project-Based Section 8 Funding Crisis

Last fall, the *Bulletin* described HUD's inability to make timely payments to owners with executory project-based Section 8 contracts in the last quarter of FY 2007, and HUD's new practice of renewing contracts for one year but requiring owners to accept increments of only several months' worth of funding, with contract language recognizing that full one-year funding was not being provided all at once.¹

These policies were allegedly driven by HUD's need to comply with the Anti-Deficiency Act, which requires federal agencies to have sufficient budget authority on hand to fulfill the full term of the contractual commitments being made. Apparently, for an undetermined amount of time prior to late 2007, HUD had been renewing contracts for one year, but dividing the necessary funding among two fiscal years: allocating some funds from the applicable year's appropriation, but only enough to carry the property through the end of that fiscal year, and then "backfilling" the remainder of the one-year contract term that ran into the subsequent fiscal year with the next year's appropriated budget authority. Although HUD has still not issued a required finding on whether this prior practice in fact violated the Anti-Deficiency Act, as required by the Act and by the FY 2008 Appropriations Act,² it has proceeded to "short-fund" all project-based contract renewals. The shortfall—the additional funds required to fully back one year renewal contracts—has been acknowledged by HUD and estimated at between \$2.0 and \$2.4 billion,³ fully one-third of the entire \$6.14 billion appropriated for the program in FY 2008.

The Risks Ahead

Nonpayment Problems

Although HUD has recently stated that it has enough funds to carry all contracts requiring either renewal or renewed funding increments through this fiscal year, or possibly into the first two months of the next fiscal year,⁴ the nonpayment problem could crop up again around the end of this fiscal year if HUD's estimates

about total subsidy costs prove incorrectly low. Aside from underestimating the number of units involved that require renewal funding, higher than estimated per-unit subsidy renewal costs could occur as a result of inflation in operating costs, rising market rents for properties entitled to them, or decreases in tenant incomes. Another of these factors could trigger nonpayment problems, similar to those encountered last summer.

Risks to Owners, Lenders and Tenants

Even if the existing funding does not run out earlier, several problems remain front and center in the appropriations process for Fiscal Year (FY) 2009, unless Congress provides additional funding. One risk stems from the continuation of the shortfall itself, which has shaken owner confidence in the predictability of the subsidy guarantee, so that we might see a higher rate of opt-outs at contract expiration. Similarly, lenders and capital investors asked to participate in refinancing transactions necessary to preserve and improve properties that are aging or at risk of market-rate conversion may now be increasingly reluctant to participate. Tenants, who have no clear protection against the consequences of a HUD breach of contract, face growing uncertainty. More than half of the properties with project-based Section 8 contracts have HUD mortgage insurance, so that any funding interruptions could result in mortgage defaults and more costly claims on the mortgage insurance fund.

An Avoidable Train Wreck

Another growing risk is that the FY 2009 funding will be untimely or inadequate, even just to renew expiring funding increments for the necessary period of time. Since the prospects for enactment of a final appropriations bill prior to the end of the fiscal year appear dim in light of the substantial differences between the Administration and Congress on spending priorities, starting the next fiscal year under a Continuing Resolution (CR) looks probable. The funding typically provided under a CR—ordinarily based upon last year's demonstrably inadequate funding level—would not only be insufficient to provide one-year funding for all contracts, but might also prove inadequate to provide sufficient funding increments to all projects requiring them. This could occur for any of several reasons, including an influx of new contracts expiring for the first time, a dramatic increase in the number of properties with simultaneously expiring funding increments during the period covered by the CR (as compared with the same period during FY 2008), as well as the time required to actually provide new paperwork and funds to virtually all properties simultaneously. If these funds run out again, Congress will not be in session to provide emergency funding and HUD may well have no other quick fixes. Mortgage defaults, service reductions, threatened evictions, litigation—all may appear suddenly, with little warning.

¹NHLP, *Growing Reports of a Project-Based Section 8 Funding Crisis as FY 2007 Closes*, 37 HOUS. L. BULL. 149 (Sept. 2007).

²153 CONG. REC. 16514 (Jt. Expl. Stmt. covering FY 08 Transportation-HUD Appropriations, Pub. L. No. 110-161, Div. K., Title II, requiring ADA determination by Jan. 15, 2008).

³Letter from John W. Cox, HUD Chief Financial Officer, to Honorable Maxine Waters, Chairwoman, Subcommittee on Housing and Community, House Committee on Financial Services (Nov. 16, 2007).

⁴See, e.g., *id.*

Obtaining Funding and Other Responsive Policies

Advocates and owners have been seeking the necessary funds to redress the \$2.4 billion shortfall through a supplemental appropriation for FY 2008, whether through the emergency supplemental vehicle being negotiated to fund the Iraq war, or through another supplemental spending bill. In April, twenty-two senators, including five Republicans, sent a support letter requesting such funding to the Appropriations Committee (following earlier successful efforts to increase funding for this purpose in the Budget Resolution), and fifteen House members followed suit. The House Appropriations Subcommittee held a hearing exclusively focused on this topic on April 23. Whatever the outcome of these efforts, by demonstrating an increasing awareness of the need for a solution, they will pave the way for securing increased support for solving this problem in any forthcoming CR or appropriations bill for FY 2009.⁵

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Advocates and owners have also been seeking various legislative reforms that would require HUD to provide advance notice of imminent nonpayments to Congress, owners and tenants. Advocates support requiring HUD to use available funds for tenant protections or even the mortgage insurance fund to provide stopgap funding to properties with expiring funding increments. Owners affected should be authorized to draw on reserves to make mortgage payments or pay operating expenses. Tenants should also receive temporary protection from any threatened rent increases. The House Mark to Market Reform bill, H.R. 3965, as reported by the House Financial Services Committee, contains a provision requiring notice to owners, authorization for use of reserves, and interest for late payments.⁶ ■

⁵Part of the solution for FY 2009 will likely include an "advance appropriation" of FY 2010 funds, which could provide future funding on October 1, 2010, to cover the shortfall represented by contracts with tails hanging over into subsequent fiscal years. This technique, approved by the Senate's version of the FY 2009 Budget Resolution, would effectively provide assured funding when it is needed, without requiring additional scarce budget authority during FY 2009. The technique, which has been employed for many years for funding part of the voucher program, would require repetition every year to avoid a tremendous disruption.

⁶H.R. 3965, § 13, as reported April 10, 2008, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3965rh.txt.pdf.

Senate Version of SEVRA Introduced

Congress is poised to enact major revisions to the nation's largest affordable housing program serving very low-income families, the Section 8 Housing Choice Voucher program. The Section 8 Voucher Reform Act (SEVRA), passed by the House of Representatives in July 2007,¹ would provide the first comprehensive revisions to the voucher program since 1998.² The House bill focused on better funding mechanisms, streamlining the system, and making the program more flexible for public housing authorities (PHAs).³ On March 3, 2008, Senators Dodd and Schumer introduced the Senate version of SEVRA, which was referred to the Senate Banking Committee.⁴ The Senate bill, S. 2684, strives, like the House version, to improve federal housing assistance programs, but it contains some key differences intended to improve upon the House reforms.⁵ After summarizing the bills' major similarities, this article briefly reviews those provisions.

Common Provisions

Both bills seek to address numerous problems currently troubling the Section 8 Voucher program. One of the most prominent and pressing problems has been the inadequate funding formula, which resulted in underfunding of some PHAs, while creating unusable surpluses for others. Moreover, the voucher program includes numerous complicated and inefficient provisions that impair effective operations. Finally, the bills address other policy changes that make the program more tenant-friendly.

The House and Senate SEVRA bills propose many of the same solutions to these problems. Both versions authorize the appropriation of 20,000 incremental vouchers each year for five years, which would help recover some of the vouchers recently lost under the prior flawed funding formula.⁶ Another important commonality of the bills is the voucher funding formula itself. Both versions use the PHA's actual costs from the prior year, ensuring a more stable funding system.⁷

There are also similarities with regard to setting tenant rents. Both bills maintain a 30% cap on tenant contributions to rent, except as already modified by the voucher

¹H.R. 1851, 110th Cong. (2007).

²Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2518 (1998).

³For a more detailed discussion of H.R. 1851 and SEVRA background, see NHLP, *Proposed Congressional Reforms to the Section 8 Voucher Program*, 37 HOUS. L. BULL. 169 (Oct. 2007).

⁴S. 2684, 110th Cong. (2008).

⁵For a side-by-side analysis, see CBPP, *Comparison of Major Provisions of House and Senate Section 8 Voucher Reform Bills and Current Law*, available at <http://www.cbpp.org/3-10-08hous-tables.pdf>.

⁶H.R. 1851 at § 6; S. 2684 at § 21.

⁷*Id.*