"Brief Summary of Mark to Market"
[*Note:* This is excerpted from the 3d edition of the Green Book, 2003, and has not been further updated or edited since that date.]

***Summary of the development of federal policy for expiring contracts.*** Since the Section 8 contracts for most projects began to expire in the mid-1990s and the vast majority will expire prior to 2007, Congress and HUD struggled, starting in 1994, to establish a framework for deciding whether or not to renew the contracts, and at what subsidy level. The concern primarily focused on discretionary federal spending, and thus the policy debate first focused on contracts that have existing Section 8 rents or potential rents that were higher than the Section 8 Existing Housing Fair Market Rents (which Congress would generally budget for any replacement tenant-based subsidies) or market "street rents" (what unassisted tenants would pay to rent the units), either because the projects are in good condition and located in desirable neighborhoods or because their operating expenses and mortgage payments are higher than rents obtainable on the private market. For the most part, HUD and the Congress considered these projects "over-subsidized" or too costly, and did not want to renew the contracts at any rents higher than it would cost to assist the families with Section 8 Vouchers that are based upon the published FMRs. Offering to renew expiring project-based contracts only at Voucher assistance levels, however, would result in the removal of many of these units from the low-income stock. Those in good shape and good locations would have been converted to middle-income rental housing because the owners could have secured more rent from that market-rate use. Those with expenses and mortgage payments that are higher than the FMRs could support would possibly face default on their mortgages if rents were reduced to FMR levels.

For several years, Congress and HUD were unable to agree upon a satisfactory resolution of this problem. In the interim, in FYs 1996 and 1997, Congress directed HUD to renew all contracts expiring during that time on a one-year basis at current rents, if the owner requested renewal, subject to an overall cap of 120% of the Fair Market Rents, except for certain types of properties that could renew at higher current rents.[1] However, owners were not obliged to renew. During this time, Congress also modified HUD's statutory duty to renew Section 8 LMSA contracts, permitting HUD to renew those contracts to cover only tenants who were in residence as of September 30, 1996.[2] During this period, Congress directed HUD to undertake demonstration programs to develop different ways to deal with properties with expiring Section 8 contracts.[3]

Finally, during this period, Congress appropriated sufficient additional budget authority to renew all expiring Section 8 contracts, both project- and tenant-based, pursuant to the 1997 bipartisan Balanced Budget Agreement and annual appropriations Acts. The budget authority for renewing expiring contracts will continue to escalate as more and more contracts expire, until the number of contracts expiring every year levels off when all the original long-term multi-year contracts have expired and been renewed for one-year funding commitments. Congress modestly reduced the renewal costs for some of the more

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[1] Pub. L. No. 104-99, § 405, 110 Stat. 26, 44 (Jan. 26, 1996), *as amended by* Pub. L. No. 104-120, § 2(a), 110 Stat. 834 (Mar. 28, 1996); Pub. L. No. 104-204, § 211, 110 Stat. 2873, 2895-97 (Sept. 26, 1996) (Section 8 renewal authority). During FY '96, HUD had discretion to renew Section 8 Moderate Rehabilitation contracts or to substitute vouchers, but expiring contracts on those properties became entitled to project-based renewals in FY '97.

[2] 42 U.S.C.A. § 1437f(v) (West 2003), *as amended by* Pub. L. No. 104-120, § 405(c), 110 Stat. 26, 44 (Jan. 26, 1996).

[3] Pub. L. No. 104-134, § 210 of § 101(e), 110 Stat. 1321, 1321-285 (Apr. 26, 1996) (FY '96 Multifamily Restructuring Demonstration); Pub. L. No. 104-204, § 212, 110 Stat. 2873, 2897 (Sept. 26, 1996) (FY '97 Section 8 Demonstration authority).

expensive properties by setting caps on renewal offers and eventually through the methods authorized by the "Mark to Market" program described *infra*.

In late 1997, as part of the FY 1998 HUD-VA Appropriations Act, Congress finally enacted legislation governing renewal of expiring project-based Section 8 contracts, the "Multifamily Assisted Housing Reform and Affordability Act of 1997,"[4] also known as "MAHRAA" or the "Mark to Market" program.. The law was amended in 1999 and 2000, and Congress renewed this authority upon expiration in 2001 through several continuing resolutions and finally an explicit extension.[5] A brief review of this legislation and some of the major issues it raises follows. New federal requirements concerning prior notice of expirations and terminations are also reviewed *infra* in § 15.5. Other tenant protections, primarily so-called "enhanced vouchers," available to cushion the impact of conversion are covered in § 15.4.2.4, *infra*.

***Summary of the law: Section 8 contract expirations.*** The "Mark to Market" renewal and restructuring program covers expiring contracts from FY 1999 forward (after October 1, 1998) with a complex framework. Specific properties can be affected in many different ways under the various program rules, depending on numerous variables, such as type of financing, level of Section 8 rents, possible market rent levels, property location, condition, and amenities, development plans in the area, ownership goals, and so on, as briefly reviewed *infra*..

In addition to the statute, HUD issued interim regulations, mostly focusing on the restructuring component of the program, in September of 1998, and finalized those rules with few changes in early 2000.[6] Other aspects of the restructuring program, as well as the so-called "Mark to Market Lite" variation (reducing Section 8 rents to lower market levels without restructuring), are covered by an extensive manual for field staff.[7] Renewal instructions for other properties are governed by the 1997

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[4] Pub. L. No. 105-65, Title V, 111 Stat. 1343, 1384 (Oct. 27, 1997), *codified at* 42 U.S.C.A. § 1437f note (Historical and Statutory Notes, "Multifamily Housing Assistance") (West 2003). For background during the period prior to enactment, *see Section 8 Renewals Pose Extraordinary FY 1998 Budget Challenge*, 26 HOUS. L. BULL. 167 (Dec. 1996); *Not-So-New Proposals for Section 8 Program Restructuring*, 27 HOUS. L. BULL. 71 (May 1997); *HUD Introduces 1997 Version of Section 8 "Mark-to-Market" Legislation*, 27 HOUS. L. BULL. 91 (June 1997); *Section 8 Expirations: Housing Resource Up for Grabs*, 27 HOUS. L. BULL. 97 (July 1997). *See also* Pub. L. No. 104-204, § 211(b)(5), 110 Stat. 2897 (Sept. 26, 1996), *as amended by* Pub. L. No. 105-65, § 523(e), 111 Stat. 1344 (Oct. 27, 1997). For background on the laws and guidelines governing expirations and renewals during FY 1998, *see* HUD Notice H 97-66, "FY 1998 HUD Appropriations Act" (Nov. 12, 1997, expires Nov. 30, 1998); *New HUD Guidelines for FY 1998 Section 8 Contract Renewals and Opt-Outs*, 28 HOUS. L. BULL. 8 (Jan. 1998). HUD Notice 97-66 reinstated the FY '97 Notice on this issue, Notice H 96-89, "FY 1997 Appropriations Act" (Oct. 15, 1996, expired Oct. 31, 1997).

[5] Pub. L. No. 107-116, Title VI, 115 Stat. 2220 (Jan. 10, 2002). Under the 2002 extension, the restructuring authority, but not the general requirement that renewal rents for most properties be set at market, was scheduled to expire on September 30, 2006. Congress then extended the program until 2011. Pub. L. No. 110-5, § 21043, 121 Stat. 53 (Feb. 15, 2007) (extending Multifamily Assisted Housing Reform and Affordability Act of 1997 until October 1, 2011).

[6] 24 C.F.R. Parts 401, 402 (2003); 65 Fed. Reg. 15,452 (Mar. 22, 2000) (final rule), correction 65 Fed. Reg. 53,899 (Sept. 6, 2000). The interim rule was published at 63 Fed. Reg. 48,926 (Sept. 11, 1998). 72 Fed. Reg 66,033 (Nov. 26, 2007) (implementing numerous programmatic and administrative changes to the Mark-to-Market restructuring program other than changes concerning the project-based assistance contracts).

[7] HUD, Office of Multifamily Housing Assistance Restructuring, *Operating Procedures Guide* (first issued Apr. 19, 1999), available at
http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/presrv/presmfh/opglinks

MAHRAA (mostly by Section 524 establishing the rules for contract renewal) and a few other statutes that were adopted in 1998, 1999 and amended in 2000,[8] as well as by another extensive policy manual.[9] In addition, for every state, there is one or more separate organizations (a "Participating Administrative Entity") administering the restructuring process for the "above-market" expiring Section 8 properties on behalf of HUD's Office of Multifamily Housing Assistance Restructuring, perhaps adding some of its own policies and practices to those adopted by HUD.

Note that any long-term contract that expired and was already renewed before FY '99 without restructuring will usually come under these renewal and restructuring program rules. These prior renewal contracts had only one-year terms, at least until HUD permitted longer-term contracts (subject to annual appropriations) in 2000, and thus many of them expire annually. Any succeeding renewal or opt-out is subject to the ordinary program rules.

***The Current Policy in General: Owner Choice and HUD Rent Limits.*** For most Section 8 contract expirations, the law still permits the owner to decide whether to continue the Section 8 subsidy upon expiration, while establishing a general framework for determining the amount of the government's subsidy offer. In most cases, when a Section 8 contract expires, the owner may renew, or may restructure and renew (depending on the rent level), or may decline a renewal and "opt out." The owner's decision will depend upon a variety of factors, both economic and non-economic. The major exceptions to the "owner choice" principle are where the owner has been caught violating significant HUD rules, or where the property is in poor condition or rehabilitation is too expensive. Such owners or properties may be "disqualified" from renewal, and assisted tenants may receive vouchers, usually to move.[10]

Another determinative factor is the amount of HUD's rent offer to renew the Section 8 contract. Starting with expirations beginning in FY '99, the rent standard usually used to guide HUD's renewal offer, and thus determine an owner's renewal options, is the *"market rent"* for the property. While this is the general rule, it does not apply in all cases, as explained below. Also often known as the "street rent",

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[8] Pub. L. No. 106-74, § 531, 113 Stat. 1110 (1999) extensively rewrote Section 524 of MAHRAA concerning rent levels HUD can and must offer to various types of properties with expiring Section 8 contracts. Other sections of that same public law made other important revisions to various relevant statutes, such as tenant protections. *See* Section 8(t) of the United States Housing Act, *codified at* 42 U.S.C.A. § 1437f(t) (West 2003), *enacted by* Pub. L. No. 106-74, § 538, 113 Stat.1122 (Oct. 20, 1999), and *amended by* Pub. L. Nos. 106-246, § 2801, 114 Stat. 569 (July 13, 2000), 106-377, §§ 205 and 228 (Oct. 27, 2000), and 106-569, §§ 902, 903, 114 Stat. 3026 (Dec. 27, 2000). *See also* Pub. L. No. 106-74, § 531, 113 Stat. 1113 (Oct. 20, 1999) (MAHRAA § 524(d), as amended, requiring enhanced vouchers for all Section 8 contracts that are not renewed), *codified at* 42 U.S.C.A. § 1437f note (West 2003) ("Multifamily Housing Assistance"). Other laws around this time amended the federal notice requirements. Pub. L. No. 105-276, § 549, 112 Stat. 2461 (Oct. 21, 1998), *codified at* 42 U.S.C.A. § 1437f(c)(8) (West 2003) (restoring the requirement that owners provide one-year's notice of expiration or termination commencing Oct. 21, 1998); Pub. L. No. 106-74, § 535, 113 Stat. 1121 (Oct. 20, 1999) (removing requirement that notice state reasons for notices served after effective date).

[9] HUD, *Section 8 Renewal Policy Guide*, available on 4th ed. Companion Website at Ch. 12, note 562.

[10] *See* § 15.2.4.2, *infra*, MAHRAA § 524(a)(2), *as amended by* Pub. L. No. 106-74, § 531, 113 Stat. 1110 (1999), *and* Pub. L. No. 105-65, § 516(d), 111 Stat. 1400 (1997) (tenant-based assistance for tenants in disqualified properties), *codified at* 42 U.S.C.A. § 1437f note (West 2003) ("Multifamily Housing Assistance"). As of September 2003, few owners or properties had been disqualified from the Section 8 program. *See also Englewood Terrace L.P. v. United States,* 61 Fed. Cl. 583 (2004) (in owner's breach of contract suit against HUD, court held that contract entitled owner to automatic renewal of project-based Section 8 subsidy contract if funding provided, narrowly construing nonreviewability provision (Section 516(c) of MAHRAA) as inapplicable to terminations).

this is the amount that an unassisted tenant would be willing to pay to rent the unit. It is determined by a rent comparability study. The market rent may or may not resemble the HUD-published area-wide Fair Market Rent (FMR), on which local PHAs base their Voucher payment standards, which attempts to measure typical rents paid by recent renters in the locality, not the rental value of a specific property. The "market rent" offer may be about equal to the owner's current Section 8 rent, or it may be more or less than that amount. Where "market rent" is significantly less than the owner's current rents, the owner may need to seek debt restructuring under that process in order to be able to operate the property and pay debt service.[11]

In other cases, depending on the rules, HUD will offer the current rent, perhaps slightly adjusted by an operating cost adjustment factor. For owners of properties where this amount is below or about equal to true market levels, this offer may not be sufficient to encourage them to continue in the program, and they will seek to "opt-out". For other owners of properties where this amount is above true market, and Congress has authorized them to receive these higher rents anyway, renewal may be more attractive.

Again, due to budget authority limitations, Congress has generally limited the subsidy commitment on renewals to one-year terms, leaving every session of Congress to power to control the number of assisted units and subsidy levels through the annual appropriations process for subsequent renewals. While Congress now permits HUD to offer longer-term contracts with owners, subject to annual appropriations, many owners that do renew decline to commit to more than a one-year term..

Some kinds of properties are *exempt* from the ordinary "market rent" renewal offer rule (*e.g.*, Section 202, state or local bond-financed, Rural Housing Services Section 515, and McKinney Section 8 Single Room Occupancy developments), and thus from rent reductions and/or the restructuring program, even if their current Section 8 rents are above-market. Usually those owners have a renewal option at current rents, although the Section 8 contract rent may be reduced by HUD to a new budget-based level (still above-market) if the property can adequately operate on less.[12] Alternatively, those owners may choose to "opt-out," although there may be less economic incentive to do so. Thus, "above-market" exempt properties will usually take the one-year current rent renewal offer. In contrast, exempt properties that are significantly "below-market" may, like any other owner, "opt-out" if permitted by the terms of their financing and other applicable laws. Alternatively, these below-market exempt properties, like others that are below-market, may decide to remain in the program and receive a higher Section 8 rent if they are eligible, per the rules for "Mark Up to Market," *infra*.

Theoretically, the new program offers the potential for modest improvements by getting rid of some bad owners, by fostering tenant participation, and by transferring oversight to agencies with more capacity than HUD that will assume restructuring and future regulatory functions. However, actual implementation via HUD and PAE policies and project-by-project decisions over the next few years will tell the real story. Effective advocacy to preserve and improve the stock will require coordinated initiatives at the state and local levels.[13]

Under this framework, most owners of properties with expiring contracts have chosen to renew their contracts, at least temporarily. Many have renewed at or near current Section 8 rent levels. These properties usually have rents that are near market levels, or have other restrictions on their ability to obtain significantly higher rents, such as Flexible Subsidy Use Agreements, zoning variances, or other restrictions accompanying part of the financing. Some renewal properties have renewed at higher

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[11] *See* § 15.4.2.3, *infra* (Mark to Market Restructuring program).

[12] MAHRAA § 524(b), *as amended by* Pub. L. No. 106-74, § 531, 113 Stat. 1112 (1999), *codified at* 42 U.S.C.A. §1437f note (West 2003) ("Multifamily Housing Assistance").

[13] *See, e.g.*, *Moving Forward on Project-Based Section 8 Expiring Contracts*, 27 HOUS. L. BULL. 198 (Dec. 1997); *What Might Happen to Section 8 Properties Under the New Law?*, 28 HOUS. L. BULL. 17 (Feb. 1998); *Section 8 Renewal and Restructuring: Working at the State Level*, 28 HOUS. L. BULL. 35 (Mar. 1998).

"marked up" Section 8 rent levels. Some have renewed at lower Section 8 rent levels set by the market comparability study, and either figure out a way to adjust the debt service or operating expense components of their budgets to maintain operations with less income, or pursue the mortgage refinancing option offered by the "Mark to Market" restructuring program. A considerable number have discontinued their participation by "opting out", and a few have been forced out through disqualification.

Most at immediate risk of loss under the Section 8 renewal and restructuring rules are those units in multifamily properties:

- where owners are most likely to "opt-out", usually those with current Section 8 rents significantly less than true market value,
- owned by "bad owners" or in substandard condition, or
- serving families (non-"elderly or disabled" properties) in rental markets that are not considered "tight," where Section 8 rents are significantly above market and conversion of subsidy might be approved by HUD or the PAE as part of a restructuring plan.

***Probable "opt-out" properties.*** These are usually developments with expiring contracts, without other use restrictions, where rents provided under the current Section 8 contract are below market "street rents." Although the owner might be able to increase the Section 8 rents under the law ("mark up") and continue in the program, many of these owners are not willing to undertake the administrative burden of the application process, or of retaining regulated status under the program. The owner believes that conversion to market-rate rents and unregulated status outweighs the transaction costs and risks inherent in converting. For example, where the property's Section 8 rent is $600 per unit but the "street rent" value is $800 per unit, conversion is a definite risk. Most of these properties lack any other restriction on the rent chargeable upon conversion, such as a Flexible Subsidy Use Agreement or local zoning variances or rent control. Ordinarily these possible "opt-outs" do not include properties owned by nonprofit owners, who have a housing mission and less economic incentive to convert.

Often, these will be properties with HUD-subsidized mortgages and HUD budget-based rents (usually under the Section 236 or 221(d)(3) BMIR programs) that have Section 8 Loan Management Set-Aside contracts, where the opt-out from Section 8 can occur about the time of a mortgage prepayment.[14] Owners of these types of properties seeking to convert to market operation must also "prepay" the mortgage and terminate the Regulatory Agreement in order to obtain higher market-level rents. Many owners can prepay without HUD approval; others must obtain HUD approval under statutory criteria. Often properties at risk of conversion will also include newer-assisted Section 8 developments, without HUD-subsidized mortgages or HUD rent restrictions, located in hot markets.

Note that some Section 8 owners will want to escape government subsidies and attendant regulations altogether, regardless of rent levels or profit motives.

To reduce the incidence of owner opt-outs, the Section 8 law, as amended in 1999, now *requires* HUD to offer to raise (*"Mark-Up to Market"*) the Section 8 rents on some below-market properties to market levels, and permits HUD to do so on others.[15] The "mark up" on the Section 8 assistance can be an essential preservation tool, especially to encourage some owners to remain in the program. HUD has implemented this authority most recently via the Section 8 Renewal Policy Guide, which establishes the procedures for providing higher "market comparable" Section 8 renewal rents to those below-market properties meeting certain specific eligibility criteria, and to waive distribution restrictions to enable owners of properties with HUD-subsidized mortgages to obtain these higher returns.[16] Where owners

[14] *See* § 15.3.1, *supra*, discussing prepayments.

[15] Section 524(a)(1) of MAHRAA, *as revised by* Pub. L. No. 106-74, § 531, 113 Stat. 1110 (1999), *codified at* 42 U.S.C.A. §1437f note (West 2003) ("Multifamily Housing Assistance").

[16] HUD, *Section 8 Renewal Policy Guide*, available on 4th ed. Companion Website at Ch. 12, note 562. HUD first implemented the "mark up" policy via HUD Notices H 99-15 (June 1999) and H 99-36 (Dec. 28, 1999).

want to sell an eligible property to a preservation purchaser, other state and local resources may be needed, since the "marked up" Section 8 contract alone may be insufficient to support all of the financing necessary to acquire and rehabilitate a property, due to the short-term nature of the subsidy commitment and the occupancy characteristics of the property.

Despite the availability of higher rents, owners may be unwilling to pursue this option as an alternative to opting-out. Some owners decline the administrative burden of applying and negotiating the mark-up, others disagree with the new rent level determined by the rent comparability process, some view the minimum five-year commitment with only cost-based rent increases above the new base rent level during the contract term as disadvantageous in an accelerating market, and still others desire no regulatory oversight. Where owners do opt-out, most previously assisted tenants must receive certain protections, such as prior written notice and tenant-based "enhanced vouchers." *See* §§ 15.4.2.4 and 15.5, *infra*.

In addition to any procedural tenant protections such as notices, access to information and comment rights provided by the rules and guidelines applicable to the specific option selected by the owner,[17] there may be other substantive limitations on an owner's duty to renew or HUD's duty to make an appropriate renewal offer. With respect to claims under federal law, several theories are still potentially applicable. *See* § 15.5 of the Green Book 3d edition,

***Disqualifications.*** Other properties or owners may be forced out of the Section 8 program by failing the standards for contract renewal or for participation in the restructuring program ("disqualifications"). The Section 8 regulator (HUD, a contract administrator, or a PAE exercising administrative responsibilities under contract with HUD) may choose not to offer a renewal contract to an otherwise eligible and willing owner. The affected properties may face transfer to new ownership, or the project-based contract may be converted to tenant-based assistance (which the owner may also be disqualified from accepting), possibly causing a loan default and foreclosure. HUD or PAEs have discretion to terminate project-based Section 8 and substitute vouchers after a planning or review process, based on certain criteria addressing housing quality or owner performance. Similarly, HUD or the contract administrator may seek to terminate the contract for owner breach during its term. In all of these cases, early and informed tenant and community participation could prevent unwarranted conversions that will reduce the affordable housing stock.

Usually, these properties are in poor condition, or the owner also owns other HUD-assisted properties in extremely poor condition or has committed serious program violations. Section 8 rents can be at any level, but often they exceed *true* market "street rents". Restructuring under "Mark to Market" may be an important part of the solution any "above-market" property that is otherwise eligible for the program, although HUD or the PAE may require transfer to new ownership in order to permit execution of a restructuring plan.

"Disqualification" usually occurs because the property has received extremely low Real Estate Assessment Center ("REAC") scores and failed to develop or carry out a satisfactory remedial plan with HUD's Enforcement Center, or because HUD or the PAE finds the cost of rehabilitation to be "too expensive." HUD and the PAE have considerable discretion in applying the statutory criteria[18] on disqualifications. If the property is otherwise eligible for Mark to Market, HUD must develop procedures to facilitate the transfer of such properties preferably to tenant-endorsed nonprofit or public owners, with

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[17] *See generally* 24 C.F.R. Parts 401, 402 (2003); HUD, *Section 8 Renewal Policy Guide*, available on 4th ed. Companion Website at Ch. 12, note 562; HUD, *Operating Procedures Guide*, *supra* note 7. Some of these are reviewed *infra* in this section under "Procedural restrictions."

[18] Section 516 of MAHRAA, 111 Stat. 1399 (1997), and Section 524(a)(2) of MAHRAA, 113 Stat. 1110 (1999) (enumerating several material adverse acts or omissions, such as violations of laws, contracts or housing quality standards), *codified at* 42 U.S.C.A. § 1437f note (West 2003) ("Multifamily Housing Assistance").

a renewal of the Section 8 contract,[19] but HUD's rule requires little more than a notice from an owner who is facing imminent disqualification and intends to sell the property.[20] In the event of disqualification, tenants will usually receive a short-term notice from HUD or a PHA that the building is being disqualified and they must move, and that they should come in for a Voucher certification appointment.[21] Of course, even if all of the tenants could be quickly and successfully relocated to decent affordable housing of their choice, the problems of the building and its impact on the community will rarely be solved by a disqualification alone.

Solutions for these properties will require local support from organized residents and the community, combined with pressure on HUD to use its available enforcement tools and resources (and the PAE as well, if restructuring is involved) to encourage the owner to sell to a responsible tenant-endorsed purchaser, often a community-based nonprofit organization. Adequate funds, including both rehabilitation funds and operating subsidies like continued project-based Section 8, and a purchaser capable of restoring and operating the property, will both be essential parts of a solution. Litigation against the owner and HUD, using statutory, contractual and Fair Housing claims, may be important elements of a preservation strategy.[22]

Note that foreclosure of any underlying HUD-insured or HUD-held mortgage is a possible outcome of any disqualification from renewal or executory abatement action by the agency, as well as a possible resolution strategy to restructure the project's debt and ownership and management. While Congress has recently required retention of any project-based Section 8 contract at foreclosure unless infeasible,[23] whether and how this duty affects any earlier agency actions to abate or terminate the

[19] Section 516 (e) of MAHRAA, *codified at* 42 U.S.C.A. § 1437f note (West 2003) ("Multifamily Housing Assistance").

[20] 24 C.F.R. § 401.480(b)-(c) (2003).

[21] Although HUD usually takes the position that these contract terminations for owner breach do not entitle tenants to "enhanced" vouchers, arguably the relevant statutes require otherwise. 42 U.S.C.A. § 1437f(t)(2) (enhanced vouchers for any termination of Section 8 contract) (West 2003), *enacted by* Pub. L. No. 106-74, §538, 113 Stat. 1122 (1999); revised § 524(d) of the Multifamily Assisted Housing Reform and Affordability Act of 1997, *as amended by* Pub. L. No. 106-74, § 531(a), 113 Stat. 1109 (1999) (requiring enhanced vouchers for any nonrenewal of project-based contract), *codified at* 42 U.S.C.A. § 1437f note (West 2003) ("Multifamily Housing Assistance"). If tenants cannot remain due to HQS violations or otherwise choose to move, these Vouchers work like regular Vouchers under the PHA's ordinary program rules. *See* § 15.4.2.4, *infra*, re enhanced vouchers. Other language used in the statutes creates some ambiguity about coverage when HUD is terminating the contract during the term, rather than refusing to renew it at the end of the term.

[22] *See, e.g., Massie v. HUD*, No. 06-1004, 2008 WL 4443830 (W.D. Pa. Sept. 26, 2008) (unreported) (dismissing claims brought by residents of HUD-supported cooperative under "Schumer Amendment" and the Uniform Relocation Act; finding that HUD had terminated rental assistance payments due to owners' failure to maintain property and that Uniform Relocation Act did not apply because cooperative, not HUD, bore responsibility for maintaining property, and its breach resulted in relocation of residents), *on appeal*, No. 09-1087 (3d Cir. pending Dec. 2009).

[23] Since FY 2006, Congress has generally required HUD to maintain the project-based contract unless infeasible, and, more recently, to take other appropriate steps to maintain contracts prior to the foreclosure. Pub. L. No. 111-117, div. A, § 217, 123 Stat. 3100 (Dec. 16, 2009) (FY 10 "Schumer Amendment" requiring HUD to maintain project-based assistance at foreclosure or disposition sale, absent specified exceptions); Pub. L. No. 111-8, div. I, Title II, § 218, 123 Stat. 975 (Mar. 11, 2009) (same, FY 09); Pub. L. No. 110-161, div. K, 121 Stat. 2410 (Dec. 26, 2007), § 220, 121 Stat. 2436 (same, FY 08); Pub. L. No. 109-115, § 311, 119 Stat. 2462 (Nov. 2005) (similar, FY 06).

contract remains unclear.

***Possible Voucher Conversions as Part of Mark-to-Market Restructuring***. Many properties whose Section 8 contract rents are "above-market" face the prospect of renewal offers from HUD set at lower market "street rents." Unless a property is "exempt" from normal renewal rules due to their financing type, these lower rent offers will reduce the property's operating income. Some of these properties will adjust their expenses or their financing arrangements without a formal M2M restructuring plan and continue operations at the lower rents.[24] Others must pursue the formal restructuring option in order to pay debt service and continue operations with reduced Section 8 rents. As part of a full restructuring plan, units can still be lost because HUD or a PAE may approve the conversion to tenant-based Vouchers of some or all of the units under the project-based Section 8 contract. This risk is explained in the next subsection, *infra*, as part of a general basic explanation of the restructuring program.

#### 15.4.2.3 The Mark to Market Restructuring Program in General

At contract expiration, owners of almost all properties with "above-market" Section 8 contract rents face the choice of renewing the project-based contract at reduced rents, or opting out and attempting to operate at market rents approved by the PHA with Vouchers for the tenants. Owners seeking to renew when Section 8 rents must be reduced often pursue a full restructuring plan to permit continued operations, especially where the rent reduction is more than 20% from the old contract levels. Nonprofit-owned properties may elect to participate in the restructuring program even where current rents do not exceed market by much, as shedding some debt (which, as tax-exempt organizations, they can usually accomplish without an adverse tax consequence) may be advantageous.

Through mandated rent reductions to "market" for these properties, the federal government is seeking to reduce Section 8 subsidy expenditures. If rental income is reduced to market "street rent" levels, owners of affected properties often cannot pay their current debt service and operating expenses. To avoid loan default, the property often needs some relief from its current debt service obligations. The "Mark to Market" restructuring program offers lower current loan payments through restructuring of the project's financing, as well as several other features intended to preserve the property's future use as affordable housing. Thus, "Mark to Market" may be an important preservation tool for project-based Section 8 units.

However, not all "above-market" expiring Section 8 properties are eligible for the restructuring program. Restructuring eligibility includes only those multifamily developments (more than four units) with:

- project-based Section 8 (or a similar deep rental subsidy) for some or all of the units,
- a mortgage insured or held by HUD, and
- current rents (on an average per unit or per room basis) currently higher than true market value.[25]

Virtually all types of project-based assisted housing meeting the HUD-insured or HUD-held and above-market criteria are eligible, including Section 8 New Construction, Substantial Rehabilitation, Moderate Rehabilitation,[26] Loan Management Set-Aside ("LMSA", including Rent Supplement

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[24] HUD has rules governing what criteria must be met in order for an owner to choose this option, known as "Mark to Market Lite." 24 C.F.R. § 402.4 (2003); HUD *Operating Procedures Guide*, Ch. 10, *supra* note 7.

[25] Section 512(2) of MAHRAA, *codified at* 42 U.S.C.A. §1437f note (West 2003) ("Multifamily Housing Assistance"). *See also* 72 Fed. Reg 66,033 (Nov. 26, 2007) (implementing a number of programmatic and administrative changes to the Mark-to-Market restructuring program other than changes concerning the project-based assistance contracts).

[26] Most Section 8 Mod Rehabs do not have HUD-insured financing, and thus cannot take advantage of the restructuring program to cushion the impact of any Section 8 rent reductions to "market".

conversions), and Property Disposition, as well as the few Rent Supplement and Section 23 properties still remaining.[27] Above-market properties with expiring contracts that are neither eligible for the program nor exempt from the restructuring requirement will probably be forced to negotiate workouts with their lenders, if they cannot operate at the reduced "market" rents that HUD will offer. Some may do so and renew Section 8 at "market"; others may "opt-out".

For those eligible properties with HUD-insured loans, restructuring will usually reduce the amount of the first mortgage to levels serviceable with Section 8 set at market rents, placing the non-serviceable portion of the prior loan into a deferred second mortgage. Where even complete debt relief fails to permit operation at market rents, due to extraordinarily high operating expenses or low market rents, budget-based Section 8 rents ("exception rents") to cover operating expenses can be used in the restructuring plan. Generally, without a HUD waiver, these exception rents may not exceed 120 percent of the published area FMR.

"Mark to Market" Restructuring brings other risks and opportunities:

- Tenants and their advocates may be dealing with new agencies or entities assuming some traditional HUD functions. The restructuring process itself may be transferred to a new entity other than HUD ("Participating Administrative Entity", or "PAE"), often state or local housing finance agencies or contractors acting on HUD's behalf.
- The somewhat detailed planning process has its own procedures and timelines, with specified opportunities for tenant participation. The owner and the PAE must develop a specific plan for the property ("Mortgage Restructuring and Rental Assistance Sufficiency Plan."or simply "Restructuring Plan"), including a new operating budget, and an evaluation of the property's rehabilitation and management needs.
- Part of the process for many properties involves an evaluation of the appropriate form of Section 8 assistance, so each plan presents a risk that the project-based Section 8 contract will be lost, along with any advantages it offers in terms of tenant protections and housing availability.
- Owners that participate in restructuring must also agree to continued use restrictions. Those properties receiving a project-based Section 8 renewal must agree to accept Section 8 renewal contracts for at least 30 years (perhaps one year at a time, or for a longer term, but subject to annual appropriations). Those properties converting to vouchers must agree not to discriminate against voucher holders for the same term, and may be limited in the rents they can charge.

Under the applicable rules and guidance for the program, tenants have specific opportunities to participate in the restructuring process to influence the decisions made by the owner and the PAE.[28] You should refer to other resources for an overview of the procedural steps and timeline, as well as a summary of the primary issues (*e.g.*, operating budget line items for services such as maintenance important to tenants, rehabilitation plans, voucher conversions) encountered by tenants in the restructuring planning process.[29]

***Conversion Risks in the Mark to Market Restructuring Process***. The Restructuring Plan developed

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[27] Properties that received Section 8 contracts as part of a "preservation" plan of action under the ELIHPA or LIHPRHA programs are treated differently. Generally, they should not be able to opt-out of the Section 8 program upon expiration of the contract term, as the plans and contracts usually require a renewal of the contract. Properties with above-market Section 8 rents should be able to obtain a renewal contract delivering "comparable benefits" to those provided under the preservation plan. MAHRAA § 524(e), *as amended by* Pub. L. No. 106-74, 113 Stat. 1114 (1999), *codified at* 42 U.S.C.A. §1437f note (West 2003) ("Multifamily Housing Assistance").

[28] 24 C.F.R. Part 401 (2003), 65 Fed. Reg. 15,452 (Mar. 22, 2000); HUD, *Operating Procedures Guide*, *supra* note7.

[29] *See, e.g.,* National Housing Law Project, *Advocates' Restructuring Guide* (July, 2003), available free from www.nhlp.org.

by the PAE and the owner must contain a component determining whether the future Section 8 subsidies should be project-based or tenant-based vouchers, even though the property is in adequate condition and the owner has not committed any major program violations.[30] Conversion of some or all of the subsidized units to vouchers through this "Rental Assistance Assessment Plan" is possible even after restructuring, using policy factors specified in the law supposedly indicating the propriety of conversion to tenant-based assistance.[31] Properties located in a PAE-determined "tight market" (market-wide vacancy rates of six percent or less), with at least 50 percent of the units serving predominantly seniors and people with disabilities, and nonprofit cooperatives are all guaranteed project-based Section 8 renewals.[32] For units at other properties, neither the statute nor the regulations provide any guarantee, as eight factors are listed with no indication about the weight to be accorded to each in the determination .

***Renewal of Restructuring-eligible Properties Through "Mark to Market Lite."*** An owner may elect to renew a contract at lower rents for one year at a time without formal debt restructuring, through what is called the "Mark to Market Lite" process. In that case, tenants have far less time and opportunity to participate in the decision.[33] Common concerns usually include whether the owner will reduce essential services in the operating budget to fit within the new lower rental income provided, or whether any physical deficiencies will be remedied, either now or in the near future.[34]

[30] *See* Section 515(c) of MAHRAA, 111 Stat. 1397 (Oct.27, 1997), *codified at* 42 U.S.C.A. §1437f note (West 2003) ("Multifamily Housing Assistance").

[31] 24 C.F.R. § 401.421 (2003).

[32] *Id.* § 401.420.

[33] *Id.* §§ 402.4, 402.6.

[34] *See, e.g.,* National Housing Law Project, *Advocates' Restructuring Guide* (July, 2003), available free at www.nhlp.org.