

the Fair Housing Activity Fund for fair housing assistance and initiatives would receive \$46 million, the same level as FY 2005.<sup>45</sup>

### **New Technical Assistance Board Proposed**

The Senate bill would also create a new affordable housing and economic development assistance board to provide technical assistance to local nonprofits, funding it by transferring \$45 million from other HUD programs.<sup>46</sup> The funds would be used to assist nonprofits in preserving and expanding the stock of low-income housing and for economic development activities.<sup>47</sup>

For additional budget information, please see the accompanying chart prepared by the National Low Income Housing Coalition, and reprinted with permission. The *Housing Law Bulletin* will report on Congress' final decisions to reconcile these conflicting provisions when appropriations action is completed later this year. ■

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<sup>45</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 84 (2005), H.R. 3058 R.S., 109<sup>th</sup> Cong., 325 (2005).

<sup>46</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 319 (2005).

<sup>47</sup>*Id.*

## **Update on Prescription Drug Benefits and Income-Based Rents: What You Need to Know**

**By Jessica Ritter\***

By now, many have heard about the Medicare prescription drug benefits, including the credits and discount cards, authorized by the recent Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA).<sup>1</sup> Figuring out how the MMA's benefits affect the

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<sup>1</sup>Pub. L. No. 108-173, § 1860D-31(g)(6) (2003) (codified at 42 U.S.C. § 1395w-141(g)(6)). More information regarding the Medicare Prescription Drug Discount Card and Transitional Assistance can be found at

income-based rents of public and subsidized housing tenants isn't always immediately clear. This is what you need to know.

### **MMA Income Disregard**

Prior to their enrollment in a Medicare prescription drug plan, which should occur around January 1, 2006, the MMA provides very low-income senior and disabled Medicare recipients with interim benefits—a \$600 credit and a discount toward prescription drug costs.<sup>2</sup> Last year, the Department of Housing and Urban Development (HUD) and other agencies issued guidances that clearly prohibited public and subsidized housing providers from reducing housing assistance as a result of a Medicare tenant's receipt of either this interim credit or discount.<sup>3</sup>

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These guidances were issued pursuant to express provisions in the MMA stating that benefits must be disregarded in determining eligibility and benefits for other federal programs.<sup>4</sup> The HUD guidance stated that Medicare tenants paying income-based rents in HUD programs<sup>5</sup> must be allowed to deduct as medical expenses the full unsubsidized cost of their prescription drugs during the

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the Department of Health and Human Services Web site at <http://www.cms.hhs.gov/media/press/release.asp?Counter=990>.

<sup>2</sup>Qualification for the \$600 credit in 2005 is limited to those with incomes beneath 135% of the federal poverty line. See Many Medicare Discount Cards Offer Big Savings, Medicare News (June 23, 2004), available at <http://www.cms.hhs.gov/media/press/release.asp?Counter=1094>.

<sup>3</sup>See NHLP, *New Prescription Drug Benefits Should Not Affect Income-Based Rents*, 34 HOUS. L. BULL. 175, 185 (Sept. 2004) (reviewing Income Calculation Regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notices PIH-2004-11 and H-04-11 (July 15, 2004)). HUD later issued additional guidance concerning verification methods for the MMA benefits. See Income Calculation and Verification Guidance Regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notices H-04-24 and PIH-04-24 (Nov. 10, 2004).

<sup>4</sup>42 U.S.C.A. § 1860D-31(G)(6) (West WESTLAW current through P.L. 108-279 approved 7-22-04) ("The availability of negotiated prices or transitional assistance under this Section shall not be treated as benefits or otherwise taken into account in determining an individual's eligibility for, or amount of benefit under, any other Federal program.")

<sup>5</sup>The HUD programs affected by the MMA include public housing, Housing Choice Voucher Program, Section 221(d)(3) BMIR, Section 236, Rental Assistance Program (RAP), Section 101 Rent Supplement, project-based Section 8, assistance contracts under Section 202 and Section 811.

interim period, without offsetting either the credit or the value of any discount.<sup>6</sup> The same should have also been true for any residents paying income-based rents in multi-family housing financed under programs run by the Rural Housing Services of the Department of Agriculture.<sup>7</sup>

Despite the HUD guidance, some housing providers may not have properly implemented the income disregard for these interim MMA benefits when calculating rents or may not implement the disregard for the entire period during which the interim benefits are being used. It is important to note that the interim benefits under the MMA credit and discount program end no later than May 15, 2006, or any earlier date that the tenant enrolls in an MMA prescription drug plan.

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### **New MMA Benefits Are Not Subject to Disregard**

With the approach of the January 1 target for enrollment in MMA prescription drug plans,<sup>8</sup> housing providers and advocates should understand that benefits obtained under an MMA drug plan selected by a tenant paying income-based rents will be treated differently than interim benefits. *The drug plan benefits are not covered by the*

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<sup>6</sup>“PHAs and Owners and Management Agents must . . . [when applicable] include as a medical deduction the Medicare assistance provided for the cost of drugs pursuant to prescription drug cards, negotiated drug price, or transitional assistance subsidies.” Income Calculation Regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notices PIH 2004-11 and H 04-11 (July 15, 2004). Under applicable federal law, medical expenses for elderly and disabled families in excess of 3% of annual income are deductible for purposes of determining adjusted income to which the 30% ratio is then applied. *See, e.g.*, 42 U.S.C.A. § 1437a(b)(5)(A)(ii) (West 2003); 24 C.F.R. § 5.611 (2005).

<sup>7</sup> 7 C.F.R. pt. 1930, subpt. C, ex. B, ¶ II S (2004) (“Any funds which a Federal statute specifies must not be used as the basis for denying or reducing Federal financial assistance or benefits to which the recipient would otherwise be entitled.”). With respect to the MMA, RHS should have taken steps by July 26, 2004, to develop and implement a clear guidance by issuing an administrative notice applicable to subsidized RHS tenants, as well as homeowners with RHS Section 502 direct loans. Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of Executive Departments and Agencies (July 18, 2004).

<sup>8</sup> Enrollment can occur as early as November 15, 2005.

*MMA income disregard.*<sup>9</sup> Thus, because a tenant’s deductible medical expenses may well decline from their former level paid prior to enrollment in an MMA prescription drug plan—just as they would under other insurance benefits—the tenant’s adjusted income may increase, in turn precipitating a rent increase. (Note that any drug plan premiums or co-payments continue to be counted as deductible medical expenses for the housing programs.) Similarly, because medical expenses drop, food stamps may also decrease.

However, despite the loss of the statutory disregard for the benefits of the drug plan, the net benefit to the tenant certainly exceeds the amount of the rent increase and food stamp decrease. The amount of the net drug plan benefit (pre-plan drug costs less any premiums and co-payments) will be about three times the lost federal housing and food stamp benefits. Tenants need not report enrollment in a prescription drug plan and its impact on deductible medical expenses until their next annual recertification following enrollment.

The Department of Health and Human Services has recently issued a useful “tip sheet” explaining these impacts, which HUD has posted on its Web site.<sup>10</sup> The tip sheet also explains other important aspects of the prescription drug plan and enrollment. Note, however, that the tip sheet omits a potentially significant point by failing to account for impact of the 3% of the annual income floor on deductibility.<sup>11</sup> ■

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<sup>9</sup> See note 4, *supra*.

<sup>10</sup> HUD, *Information Partners Can Use on: Housing Assistance from the Department of Housing and Urban Development; New Medicare Prescription Drug Coverage*, (June 20, 2005), available at [http://www.hud.gov/offices/hsg/mfh/rhiip/medicare\\_prescriptiondrugcoverage.pdf](http://www.hud.gov/offices/hsg/mfh/rhiip/medicare_prescriptiondrugcoverage.pdf).

<sup>11</sup> For those elderly households whose medical expenses do not exceed 3% of income, rents will not increase at all as a result of the new program. All of the drug coverage they receive will increase their “in pocket” cash. For those elderly households whose medical expenses exceeded 3% of income before enrollment, but drop below that level afterward, income-based rents will increase, but only by 30% of the amount by which their former medical expenses exceeded 3% of their income. Again, what that means is that the “in pocket cash” will be slightly more than what is shown on the tip sheet. Only when a household’s unreimbursed medical expenses continue to exceed the 3% threshold after enrollment in a Medicare drug plan will the rent increase equal the amount calculated on the tip sheet (i.e. 30% of the covered medical expense, net of co-payments).