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Table of Contents

Cover: Children protesting efforts to close down ninety units of recently rehabilitated public housing at the Lafitte development in New Orleans. Photo courtesy of May Day New Orleans.

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Obama Signs Stimulus Bill Providing Major Support for Affordable Housing*

On February 17, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), the long-anticipated stimulus package intended to provide relief to those hardest hit by the recession and to steer the country back on a path toward economic recovery. As reported in the February 2009 issue of the *Bulletin*,[1] the final conference report emerged from a House and Senate conference convened to resolve significant differences between their respective bills. The bill signed into law by the President reflected the compromise reached by the two houses and contained a number of significant appropriations related to affordable housing, many of them representing important victories for advocates.[2]

Key among the affordable housing-related provisions set forth in the final bill were appropriations made to resolve the long-standing project-based Section 8 funding shortfall, infuse capital funds into public housing, provide for energy retrofitting and green investments in the stock assisted by the Department of Housing and Urban Development (HUD), and jumpstart stalled low-income housing tax-credit projects. A wide range of other programs also received support, as ARRA included funding for the Neighborhood Stabilization Program, Homeless Assistance Grants, Community Development Block Grants, Native American Housing Block Grants and the Lead Hazard Reduction Program. Excluded from the bill, however, was any funding for the National Housing Trust Fund or for new Section 8 Housing Choice Vouchers as had been urged by advocates.

The remainder of this article examines more closely the affordable housing-related provisions of ARRA.

Project-Based Section 8 Shortfall Funding – $2 Billion

As has been extensively reported in previous issues of the *Bulletin*,[3] inadequate budget requests from the prior

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[1]NHLP, *Congress Considers Affordable Housing Funding in Stimulus Package*, 39 Hous. L. Bull. 47 (Feb. 2009).

[2]*See* American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

[3]*See, e.g.*, NHLP, *Congress Acts to Address Project-Based Section 8 Funding Crisis*, 38 Hous. L. Bull. 213 (Oct. 2008); NHLP, *Congress Considers Solutions for the Project-Based Section 8 Funding Crisis*, 38 Hous. L. Bull. 87 (Apr.-May 2008); NHLP, *Growing Reports of a Project-Based Section 8 Funding Crisis as FY 2007 Closes*, 37 Hous. L. Bull. 149 (Sept. 2007).

Administration had resulted in a serious shortfall in the funds available to fully back one-year renewals of project-based Section 8 contracts. Rather than requesting the funds necessary to pay owners for a full year, the Administration had instituted a change to longstanding policy by requesting appropriations only sufficient to support contracts through the end of the current fiscal year. This practice resulted in a significant gap in funds necessary to ensure that all owners would receive timely payments for the entire contract term, threatening serious erosion of confidence in the program. At the strong urging of advocates, Congress provided an emergency short-term solution last September by passing a Continuing Resolution, a stop-gap measure authorizing the HUD Secretary to expend funds necessary to renew all contracts expiring up until March 6, 2009. It remained unclear, however, what would happen once the term of the Continuing Resolution ran out.

ARRA addressed this uncertainty through the appropriation of $2 billion to make up for the shortfall, thus plugging the gap in the FY 2008 appropriations. The text of the conference report states that the additional funding is for "payments to owners for 12-month periods." This represents a critical victory in a hard-fought campaign by housing advocates seeking to ensure the continued viability of the project-based Section 8 program. At the same time, challenges loom ahead—among them, the $6 billion shortfall in funding accounts for longer-term contracts not yet at their initial expiration date, as reportedly identified by HUD.

Public Housing Capital Fund – $4 Billion

The stimulus bill likewise provided significant funding to the Public Housing Capital Fund to be used for authorized fund purposes, which include such activities as development and modernization of public housing units, demolition and replacement, addressing deferred maintenance and making capital expenditures. While the original House and Senate bills both allocated $5 billion to this purpose, this figure was reduced to $4 billion in the final compromise. The first $3 billion is required to be allocated according to current 2008 levels and must be obligated by HUD within thirty days. The remaining $1 billion is to be allocated to public housing agencies by September 30, 2009, based on a competitive bidding process that favors "energy conservation retrofit investments" and investments that leverage private sector funding.

ARRA requires that public housing agencies give priority to projects that: (i) can award contracts within 120 days of the funds becoming available, (ii) involve rehabilitation of vacant rental units, and (iii) are already underway or are included in a housing agency's five-year capital fund plan. The bill also establishes a specific timeline for use of the funds by public housing agencies: 100% of funds must be *obligated* within one year of the funds becoming available to the agency, 60% must be *expended* within two years of that date, and 100% must be *expended* within three years. Funds may not be used for operating expenses or to provide rental assistance, though 0.5% of the total appropriated funds may be used for staffing, training, technical assistance, enforcement and other such activities.

HUD-Assisted Multifamily Housing Energy Retrofit and Green Investment – $250 Million

In addition to the $2 billion provided to cover the project-based Section 8 shortfall, ARRA also appropriated $250 million for grants or loans to be used for "energy retrofit and green investments" in projects receiving project-based Section 8, Section 202 or Section 811 assistance. These funds, to be administered by HUD's Office of Affordable Housing Preservation, will cover much-needed deferred rehabilitation of eligible properties, including improvements that will reduce escalating utility costs. They are to be awarded to eligible owners who: (i) have no less than a satisfactory management review rating, (ii) are in compliance with applicable performance standards and legal requirements and (iii) commit to an additional period of affordability of at least fifteen years. HUD is charged with undertaking the appropriate underwriting and oversight of these transactions and is allowed to set aside 5% of the total appropriation for such purposes.

The Section 8 funding represents a critical victory in a hard-fought campaign by housing advocates seeking to ensure the continued viability of the project-based Section 8 program.

ARRA sets forth a number of other provisions governing the use of these funds. Chief among them are requirements that they be expended by project owners within two years of receipt and that all grants or loans include both a financial assessment and a physical inspection of the property. HUD is also authorized to waive certain statutory or regulatory provisions that would impede the expeditious use of the funds and it is entitled to share in a portion of utility savings that result from the program. The bill also explicitly requires that all projects receiving assistance comply with federal Davis-Bacon wage rate requirements.

Low-Income Housing Tax Credit Provisions

In the lead up to the enactment of ARRA, Congress considered a number of creative proposals for jumpstarting stalled low-income housing tax credit (LIHTC) projects and reinvigorating the severely softened market for tax credits.[4] The final bill left out the oft-suggested proposal to allow investors to carry back credits against past profits, but it included two other significant LIHTC provisions.

HOME Apportioned Gap Financing – $2.25 Billion

The first of these consisted of appropriating $2.25 billion for capital investments in LIHTC projects to be apportioned to states according to the HOME program percentages of FY 2008. These funds will be allocated by state housing finance agencies according to their qualified allocation plans to projects that either simultaneously receive tax credits or had previously received them in fiscal years 2007, 2008 or 2009. State housing finance agencies are required to commit 75% of their funds within one year of the enactment of ARRA, and must show that project owners have spent 75% of funds made available within two years and 100% within three years. Funding received under this program will not reduce a project's eligible basis and priority is given to projects that will be *completed* within three years.

Tax Credit Exchange Program

In addition to appropriating additional funds to help with gap financing, Congress also acted to directly address the lower demand for tax credits caused by the recession's special impact on the financial sector, which was a primary purchaser of credits. ARRA allows a state to elect to exchange up to 100% of unused 2008 credits and credits returned in 2009, along with 40% of its 2009 allocation, for what is the funding equivalent to 85 cents on the dollar. The exchange results in a direct up-front grant to the state housing finance agency from the Treasury Department to be used to make "subawards" to qualified low-income housing buildings whether or not they have otherwise received tax credits. One factor making the exchange program politically popular was the estimate that it will only have cost the federal government $69 million by 2019, while having a significant and immediate stimulative impact.[5] Unfortunately, the exchange provision covers only 9% credits, not the 4% credits often used to rehabilitate and preserve existing affordable housing properties.

Other Related Appropriations

In addition to the foregoing provisions, ARRA includes a number of other appropriations that also support affordable housing activities.

[4]The price of low-income housing tax credits has precipitously dropped from above 90 cents per dollar of credit to 70 cents and lower. *See* Will Fischer, Ctr. on Budget & Policy Priorities, Exchange Plan in House Recovery Bill Offers Best Fix for Low-Income Housing Tax Credit 2 (2009), http://www.cbpp.org/2-2-09hous.pdf.
[5]*Id*.

Washington Post Praises Legal Services Funding, Calls for Removal of Restrictions

The Washington Post wrote in support of legal services in its editorial "Unshackling Legal Aid" on March 14, 2009. The editorial is reprinted here in its entirety.

"Never has the Legal Services Corp. been more essential. With unemployment on the rise and foreclosures surging, the group provides wide-ranging civil legal assistance to the growing ranks of those in need: representation in eviction or foreclosure proceedings, assistance in securing food stamps or unemployment benefits, guidance on insurance or medical services. But as demand for the group's services grows, its funding sources are dwindling . . . . According to the Legal Services' officials, the group routinely turns away roughly half of all low-income people who seek its help. So it was welcome news that the federal government, which remains the most important backer of the nonprofit corporation, is stepping up its assistance. The omnibus appropriations bill signed this week by President Obama set aside $390 million for the group—up $40 million, or 11 percent, over last year's funding level . . . . Lawmakers should go a step further and unshackle Legal Services from congressionally imposed restrictions that have kept it from working more efficiently and broadly. For example, unlike most others who represent plaintiffs, Legal Services lawyers who prevail in a civil case are prohibited from seeking legal fees from an opponent. This makes no sense, especially because any recovery of fees could supplement the group's funding. Legal Services is also barred from using public or private funds to engage in a range of activities, including all class-action lawsuits, any representation of immigrants who are in the country illegally and all litigation involving abortion-related matters. While some limits on the use of taxpayer dollars may be appropriate, none should limit what local legal-aid clinics can do with money they raise privately. Sen. Tom Harkin (D-Iowa) is spearheading an effort to address many of these issues and may unveil legislation as soon as next week. Such reforms are long overdue."

Neighborhood Stabilization Program – $2 Billion

Congress provided $2 billion more for the redevelopment of abandoned and foreclosed homes as authorized under the Neighborhood Stabilization Program (NSP) originally created in last year's Housing and Economic Recovery Act of 2008.[6] Unlike the original NSP funds, the stimulus bill requires that funds be awarded on a competitive basis to the following categories of eligible grantees: states, cities, nonprofits and consortia of nonprofits. HUD is charged with ensuring that grantees are in the areas with "the greatest number and percentage of foreclosures" and are capable of spending 50% of the funds within two years of receipt and 100% within three years. HUD is also authorized to use up to 10% of the $2 billion for "the provision of capacity building of and support for local communities" receiving NSP funds.

Congress provided $2 billion more for the redevelopment of abandoned and foreclosed homes as authorized under the Neighborhood Stabilization Program.

The NSP provisions of ARRA also included a number of specific protections for renters in buildings assisted by these funds. Among these protections are requirements that the initial successor in interest at foreclosure of a property acquired with NSP assistance must give at least ninety days' notice to terminate any *bona fide* tenancy.[7] Except where the initial successor intends to use a foreclosed unit as a primary residence,[8] *bona fide* tenants who entered leases prior to the foreclosure are entitled to continued occupancy for the remainder of the lease term. Furthermore, as of bill enactment, the initial successor and any recipients of NSP funds are prohibited from refusing to lease an apartment based on a prospective tenant's status as a Section 8 voucher holder, and such owners must continue to honor the voucher of any tenant residing in the building at the time of foreclosure. Public housing authorities are also authorized, under limited circumstances, to use funds that would have been paid as rent to the subsequent owner to instead pay for utility bills, where the tenant stays but the landlord fails to maintain utility service, or for moving expenses, where the unit violates program quality standards.

[6]Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified as amended in scattered sections).

[7]*Bona fide* tenancies are defined in the bill as those where the lease resulted from an arms-length transaction with rents not substantially less than fair market and where the mortgagor is not also the tenant.

[8]Note that even in these cases of intended owner occupancy, at least ninety days' notice is required to terminate a *bona fide* tenancy.

In all instances, state and local laws providing longer time periods or additional protections remain enforceable and are specifically not preempted.

Homelessness Prevention Fund – $1.5 Billion

The bill included $1.5 billion for homelessness prevention and rapid re-housing activities. The funds, to be allocated using HUD's Emergency Shelter Grant formula, may be used for the provision of short-term or medium-term rental assistance, housing relocation and stabilization services (including "housing search, mediation or outreach to property owners, credit repair, security or utility deposits, utility payments, rental assistance for a final month at a location, moving cost assistance, and case management") or other appropriate activities. HUD must publish a notice thirty days from enactment of the bill establishing other necessary requirements.

Community Development Block Grants – $1 Billion

Among the other programs receiving ARRA appropriations, the Community Development Block Grant (CDBG) program garnered $1 billion in funds to be distributed according to the usual CDBG formula. Recipients of funds are required to give priority to projects able to award contracts within 120 days of the funds being made available. HUD is instructed to establish requirements to expedite the use of funds and likewise may waive certain statutory or regulatory provisions where necessary to expedite the process.

Native American Housing Block Grants – $510 Million

The AARA provides $510 million for Native American Housing Block Grants as authorized under Title I of the Native American Housing Assistance and Self-Determination Act of 1996.[9] Of the total, $255 million will be distributed to Tribes or designees according to the FY 2008 formula and used for new construction, acquisition, rehabilitation and infrastructure development of housing on Tribal lands or areas. The other half of the funds is to be awarded on a competitive basis to projects that will promote construction and rehabilitation and that will create job opportunities for the low-income and unemployed.

Lead Hazard Reduction Program – $100 Million

An additional $100 million was appropriated to the Lead Hazard Reduction Program to facilitate grants for lead reduction and abatement. Priority is given to applicants who applied in FY 2008 and were denied due to funding limitations but otherwise qualified to receive an award. Recipients must spend 50% of funds within two years of receipt and 100% within three years.

[9]Pub. L. No. 104-330, 110 Stat. 4016 (1996) (codified as amended at 25 U.S.C. §§ 4101-4243 (2006)).

Conclusion

On February 25, 2009, HUD issued a press release stating that it had already allocated nearly 75%, or $10.1 billion, of the funds made available to it through ARRA.[10] While such a significant investment in affordable housing will no doubt provide relief to many hit hard by the recession, President Obama has signaled that a second stimulus package has not been ruled out if necessary.[11] Since affordable housing programs have received far less than needed to maintain current services for many years, and affordable housing funding provides especially effective economic stimulus, another substantial infusion of federal funding in the near future would be welcome. ■

[10] *See* Press Release, U.S. Department of Housing & Urban Development, HUD Allocates More Than $10 Billion of Recovery Act Funding One Week after Bill Signing (Feb. 25, 2009), *available at* http://www.hud.gov/recovery/ 2009/02/25/comms/pr09-014.cfm?CFID=17122744&CFTOKEN=24218341.

[11] *See* Sheryl Gay Stolberg, *Signing Stimulus, Obama Doesn't Rule Out More*, N.Y. Times, Feb 18, 2009.

HUD Appropriations for FY 2009

After much delay,[1] the Senate passed the Fiscal Year 2009 Appropriations Act on March 10, 2009, and President Obama then signed the bill into law.[2] The bill appropriates funds for the fiscal year that began on October 1, 2008. The budget increases funding on the whole, but some programs continue to be underfunded. Overall, the budget for the Department of Housing and Urban Development (HUD) increased from $37.6 billion to $41.5 billion. See the National Low Income Housing Coalition charts for Fiscal Year (FY) 2009 and FY 2010 on pages 78-79.

Voucher Program

The final spending bill for 2009 provides $16.8 billion for total voucher funding, a $426 million increase over the FY 2008 funding level. Of the total voucher funding, approximately $15 billion is allocated for voucher renewals. However, according to Center on Budget and Policy Priority estimates, the amount allocated for vouchers may lead to a funding shortfall of over $400 million.[3] The estimated shortfall could lead to a situation in which 37,000 vouchers used during FY 2008, and approximately 25,000 vouchers in use at the end of 2008, would not receive renewal funding in 2009.[4] Importantly, the voucher shortfall could be ameliorated by both HUD, through the use of rollover funds from 2008, and local public housing authorities (PHAs), through the use of each PHA's voucher funding reserves.[5] While both pools of money may be small, they could help avoid the loss of thousands of vouchers. The funding for each PHA will be allocated based on the prior year's leasing and cost data, with a HUD-established cost adjustment factor for 2009.[6] As in prior years, no PHA can fund more vouchers than authorized by HUD.[7] Moving to Work agencies will be funded pursuant to their Moving to Work agreements.

The omnibus bill funds approximately 13,000 incremental vouchers through the allocation of $125 million. The funding for the vouchers includes $20 million for the

[1] *See, e.g.*., David M. Herszenhorn, Republicans Block Spending Bill, New York Times, March 6, 2009, available at http://www.nytimes.com/2009/03/06/us/politics/06spend.html?_r=1&scp=1&sq=omnibus%20spending%20bill&st=cse (explaining Republican opposition to earmarks in spending bill).

[2] The full title of the bill is the "Omnibus Appropriations Act, 2009," Pub. L. No. 111-008 (March 10, 2009) (formerly H.R. 1105), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ008.111.pdf.

[3] Center On Budget And Policy Priorities, Preliminary Analysis of The HUD Provisions of the Omnibus Appropriations Bill for FY 2009, 2 (2009), http://www.cbpp.org/files/3-13-09housprac.pdf.

[4] *Id.* at 2.

[5] *Id.*

[6] Pub. L. No. 111-008, Tenant-Based Rental Assistance.

[7] *Id.*