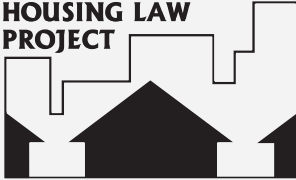


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Housing Law Bulletin

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The Section 8 Budget: HUD Manufactures a Crisis —see page 1

*Shifting Affordable Housing Cost Burdens to
Tenants: A Historical Perspective* —see page 8

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FEATURE**

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

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Cover: Winters Apartments, a 44-unit Rural Housing Service financed and subsidized Section 515 development in Winters, California. The development was acquired and rehabilitated by Community Housing Opportunities Corporation (CHOC) of Davis, California. Photo courtesy of CHOC.

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The Section 8 Budget: HUD's Half-Baked Canard

We heard it again last month on HUD's webcast training describing how the agency plans to implement the recently enacted Fiscal Year 2005 appropriations for the voucher program.¹ The line goes something like this, "Over the past four years, the Section 8 budget has increased by 30%, far outpacing the rate of inflation. Section 8 consumes a growing portion of HUD's budget. This has necessitated reduced funding for HUD's other vital programs (including public housing, Community Development Block Grants, the HOME program, etc.)." This time the words, backed by a bar graph showing HUD's voucher funding jumping from \$11.2 billion in FY 2001 to \$14.8 billion in FY 2005, came from Assistant Secretary Michael Liu. Over the past year or so, their primary source has been Secretary Alphonso Jackson, who regularly repeats the assertion in speeches, in Congressional testimony, and in op-ed pieces in newspapers around the land. While true as far as it goes, HUD's statement is selective and misleading at best.

What HUD expects the public and federal politicians to take away from this assertion is that the per-unit cost of the Section 8 program is wildly out of control, and that it must be reined in by virtually any means necessary. The most convenient policy prescription for this problem currently on the table is conveniently the Administration's block grant scheme or some variation thereof—dumping limited federal funding onto the state or local governments, or the public housing authorities (PHAs), and letting them decide how best to spend it on the local housing needs of their low-income people.

As others have clearly demonstrated over the years,² HUD's strategy relies upon perpetuating a myth about Section 8 spending that's only a little bit true. Sometimes, HUD's use of the myth relies on figures that are accurate but extremely misleading, because of the subtle but important federal budget accounting distinction between *budget authority* (permission to spend, regardless of when

¹The archived December 9 webcast is available at <http://www.hud.gov/webcasts/archives/ph.cfm>. The comment and graph occur about two minutes into the presentation.

²See, e.g., Center on Budget and Policy Priorities, *Response to HUD Secretary Jackson's New York Times Column on Housing Vouchers*, at http://www.cbpp.org/8_16_04hous.pdf (Aug. 16, 2004); Center on Budget and Policy Priorities, *The Myth of Spiraling Voucher Costs*, at http://www.cbpp.org/6_11_04hous.pdf (June 11, 2004); Center on Budget and Policy Priorities, *Nearly All Recent Section 8 Growth Results From Rising Housing Costs and Congressional Decisions to Serve More Needy Families*, at http://www.cbpp.org/2_2_04hous.pdf (Feb. 2, 2004).

it occurs) and *outlays* (actual spending during any one year). Other times, HUD's extrapolates from recent cost data that reflects circumstances that are unlikely to continue. Sometimes it's a jumble of both.

When HUD employs budget authority figures, in contrast to outlays, its assertions regarding cost growth rely only upon half the story. Under federal accounting rules, budget authority—the money necessary to fund the obligations of any multi-year contract—must be provided at the outset of that contract. Section 8 budget authority has been growing rapidly for more than the past decade.

It's difficult to understand why an agency charged with administering one of the nation's most important housing programs would continually spout half-truths unless it is deliberately trying to mislead the public and decision-makers.

There are several components to this growth in Section 8 budget authority: renewing expiring contracts, increases in per-unit costs, and funding additional vouchers. By far the biggest factor is the cost to renew all of the expiring project-based and tenant-based contracts. These contracts, which contained spending authority for only a fixed period of time (usually between five and twenty years), must be renewed with additional budget authority at expiration in order to maintain the number of units previously assisted. These increases provide no new outlays or units; they just permit HUD to support the existing number of units. Because the cost of renewing expiring contracts with multi-year contracts would cost many more billions of dollars which Congress refuses to provide, over the past decade Congress has shifted all Section 8 renewals to one-year contracts. Thus, every year, both the original multi-year contracts and the newer one-year renewal contracts expire, and must then be renewed. The required budget authority for these renewals increases each year by the cost of the multi-year contracts expiring for the first time.

The budget authority growth has indeed been dramatic over the past decade, from about \$2.6 billion in FY 1997 to about \$20.2 billion in FY 2005 (\$14.9 billion in tenant-based, \$5.3 billion in project-based). No single year has been more striking than the change from FY 1997 to FY 1998, when the needed budget authority jumped from \$3.6 billion to \$10.5 billion. Almost all of the "increase" that year was due to the need to renew an additional one million units of project-based and tenant-based Section 8 units whose longer-term contracts were expiring for the first time. Since then, the growth in required bud-

get authority for renewals of multi-year expirations has slowed, usually requiring an additional \$1 billion to \$2 billion annually. This is still a substantial figure, especially in the recent budget climate where tax cuts reign and domestic spending faces severe constraints or cuts. This part of the increase will disappear when all of the old multi-year Section 8 contracts have expired and been renewed for one-year terms, at which point budget authority and outlays will equal each other.

While two other factors contribute to this growth in Section 8 budget authority—any growth in per-unit subsidy for increased housing costs or decreased tenant incomes, and any increase in the number of vouchers—they have had a smaller impact on the overall growth over the past decade. In those few years in the late 1990s where Congress provided additional vouchers, Congress also provided additional funds for those units, which in turn added to the overall growth in Section 8 budget authority.

Another less significant source of the growth in both budget authority and outlays is the gradually increasing cost of the vouchers assisted, as private market rents increase or tenant incomes decrease. Similarly, although to a lesser extent, budget authority and outlay requirements will creep up as the operating costs for project-based units increase, or as owners with expiring contracts receive additional financial incentives to remain in the program (e.g., "Mark Up" to Market). When renewal contracts are just for one year, these budget authority increases closely mirror required increases in outlays, if recaptures of unused funds diminish.

What's really important for analyzing true growth in program spending is the figure called annual *outlays*. This is the amount that HUD spends every year to support the Section 8 units that are being subsidized. While this figure has also grown in recent years, it has done so relatively slowly, to account for increases in the per-unit costs of the Section 8 program (mostly market rents or operating cost increases or decreases in tenant incomes).

Also contributing to outlay growth was an increase of about 550,000 in the number of vouchers authorized by Congress from 1995 to 2003. However, about 40% of this component (225,000 units) was due to converting tenants from another HUD-subsidized program such as public housing or project-based Section 8; the rest resulted from Congress' deliberate decision to make more vouchers available for new families in need. But these spending increases to protect tenants or assist more families represent no increase in per-unit costs.

What all of this boils down to is that the debate should center upon increases in per-unit cost, and how to allocate that burden. Per-unit costs have indeed increased since the late 1990s, especially as a result of rent increases in the private market units that vouchers must support, but by nowhere near the levels that HUD's selective characterizations would imply. Obviously, that's the central purpose of Section 8 and any affordable housing program—to keep housing affordable to the very low-income families

who rely on it. The issues should not be obfuscated by throwing around figures that include the cost of renewing expiring contracts or subsidizing additional units.

It's difficult to understand why an agency charged with administering one of the nation's most important housing programs would continually spout half-truths unless it is deliberately trying to mislead the public and decision-makers about the true cost of the program, in order to get them to change the existing framework to relieve the federal government of its historical role of supporting those costs and shift them to tenants. It's time to fairly evaluate how the Section 8 program allocates cost burdens between tenants and the federal government. ■

Section 8 Narrowly Escapes Funding Cuts in 2005 HUD Budget

On December 8, 2004, President Bush signed into law the Consolidated Appropriations Act, 2005, combining into a single act several appropriations bills including the VA-HUD Appropriations Act.¹ Although many of the programs funded by the U.S. Department of Housing and Urban Development (HUD) received substantial cuts for the coming year, along with an additional across-the-board 0.8% cut, the Section 8 program, the largest of the low-income housing programs, escaped both the cuts and the administration's plan to block grant the program to housing agencies.² The administration had hoped to entice housing agencies to support its proposal because of its promise of deregulation and greater flexibility.³ But the support for the block grant proposal was not forthcoming. This year's attempt was the second year in a row that the Bush administration has tried and failed to block grant the Section 8 program.⁴

¹Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. I (2004), available at <http://thomas.loc.gov/home/omni2005/index.htm>.

²*Id.*

³HUD, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FISCAL YEAR 2005 BUDGET SUMMARY 9-10, available at <http://www.hud.gov/about/budget/fy05/budgetsummary.pdf>.

⁴H.R. REP. NO. 108-792, div. I, at 20-21 (2004), available at <http://thomas.loc.gov/home/omni2005/index.htm>; NHLP, *Congress Enacts Long Delayed FY 2004 Appropriations*, 34 HOUS. L. BULL. 1, 2 (JAN. 2004).

Rhetoric About Spiraling Costs of Section 8 Program is Misleading

The Section 8 Housing Choice Voucher (HCV) program assists nearly two million families in finding affordable housing in the private market.⁵ Over the past several years, members of the Bush administration have stepped up efforts to label the Section 8 program as "broken" and "expensive," claiming that the costs of the program are spiraling out of control.⁶ What they fail to acknowledge is that while spending in the program has gone up, it has been due primarily to several one-time increases which will likely not recur and are fully explainable.⁷

Last Year's Voucher Crisis Prompted by HUD Action

Last year, many housing agencies faced dramatic cut-backs in the voucher program prompted by late notices and other arbitrary actions on the part of HUD. This past April 22, nearly three months after the 2004 funding bill for HUD programs was signed into law and five months after the bill was adopted by Congress, HUD issued a notice, PIH 2004-7.⁸ That notice informed housing agencies that HUD would be implementing a new method of funding for the Section 8 Housing Choice Voucher Program based on the housing assistance payment costs (HAP) as of August 2003, adjusted for inflation.⁹ This new funding formula replaced the prior funding scheme used by HUD which had been based on the "actual" costs of housing assistance for Section 8 voucher holders.¹⁰ PIH 2004-7,

⁵BARBARA SARD & WILL FISCHER, FREQUENTLY ASKED QUESTIONS ABOUT THE ADMINISTRATION'S FISCAL YEAR 2005 HOUSING VOUCHER PROPOSAL (2004), available at http://www.cbpp.org/7_9_04hous.htm#1.

⁶Alphonso Jackson, Editorial, *A Housing Plan in Need of Repair*, N.Y. TIMES, Aug. 6, 2004; Memorandum from Secretary Alphonso Jackson, U.S. Department of Housing and Urban Development, to all voucher PHAs 2 (July 26, 2004) (describing the Section 8 program as "broken" and "in desperate need of repair").

⁷See HUD's *Half-Baked Canard* in this issue. See also Press Release, Center on Budget and Policy Priorities, Response to HUD Secretary Jackson's *New York Times* Column on Housing Vouchers (Aug. 16, 2004), available at <http://www.cbpp.org/8-16-04hous.htm>.

⁸Implementation of FFY 2004 Consolidated Appropriation Act Provisions for the Housing Choice Voucher Program, PIH 2004-7 (HA) (April 22, 2004), available at <http://www.hudclips.org>. Congress acted this year to foreclose such delay. As a result, within three weeks of the 2005 Appropriations Act passage through Congress and on the day the President signed the Act into law on December 8, 2004, HUD issued Notice PIH 2005-1 implementing the language of the Act. A day later, HUD provided a webcast to explain and answer questions surrounding the implementation of the Act.

⁹NHLP, *New HUD Constraints Threaten Some PHAs' Voucher Programs* 34 HOUS. L. BULL. 96 (2004) (This issue was erroneously labeled volume 37.).

¹⁰Implementation of FFY 2004 Consolidated Appropriation Act Provisions for the housing Choice Voucher Program, PIH 2004-7 (HA) (April 22, 2004), available at <http://www.hudclips.org>.

which was made retroactive to January 1, 2004, immediately created havoc for many agencies because their costs had risen and HUD would not cover their expenses.¹¹

According to the National Association of Housing and Redevelopment Officials (NAHRO), a trade association representing the housing agencies, this new system left nearly 500 agencies with a \$93 million shortfall—the equivalent of housing assistance for 52,000 low-income families.¹² By the time housing agencies were notified of this change, most had expended funds through April based on their “actual” costs and many were left with significant shortfalls with little to no reserve funds to fill the gap.¹³ After concerted efforts from housing agencies, tenant advocates and some members of Congress and state elected officials, HUD finally “discovered” \$150 million to use to replenish approximately 500 agency reserves in an amount up to two weeks of HAP payments and in a few cases in an amount in excess of the two-week limit.¹⁴ HUD subsequently distributed an additional \$157 million to another 379 agencies as part of the appeals of the annual adjustment factor for inflation (AAF). Even with the additional funds, it was estimated that 62% of agencies’ Section 8 based renewal amounts remained underfunded.¹⁵ As a result, those housing authorities without adequate or timely access to reserves or adequate renewal funding were forced to take drastic measures and change key discretionary policies for their voucher programs.

HUD Changes Forced Housing Agencies to Take Drastic Measures

According to a survey conducted by NAHRO, this new “budget based” approach by HUD forced housing agencies to take a number of steps. Approximately 4% of those agencies surveyed were forced to terminate vouchers for families who were currently receiving assistance. Another 10% recalled vouchers from families who were either searching for housing or who had recently signed leases for housing. And the largest number, or nearly 27% of agencies surveyed, declined to reissue vouchers once they had been returned to the agency. Another 27% of the agencies reported increasing families’ rents by an average of 9%.¹⁶

¹¹BARBARA SARD & WILL FISCHER, NEW HUD POLICY WILL FORCE IMMEDIATE CUTS IN HOUSING VOUCHER ASSISTANCE FOR LOW-INCOME FAMILIES 3 (2004), available at <http://www.cbpp.org/pubs/housing.htm>.

¹²Press Release, NAHRO, NAHRO Analysis: Effects of FY 04 Budget Based Renewal Funding Policy for Section 8 Housing Choice Voucher Program (October 11, 2004), available at <http://www.nahro.org/pressroom/2004/200410renewalstudy.pdf>.

¹³SARD & FISCHER, *supra* note 11, at 2.

¹⁴Press Release, HUD, Jackson Unveils Funding Assistance for Public Housing Authorities, HUD No. 04-046 (May 20, 2004), available at <http://www.hud.gov/news/release.cfm?content=pr04-046.cfm>.

¹⁵NAHRO, *supra* note 12, at 2.

¹⁶*Id.* at 2-3. Presumably, this statistic refers to the percentage of housing authorities that increased their payment standard which in turn would

In a follow-up NAHRO survey, housing agencies reported that 78% of them had been able to meet the Quality Housing and Work Responsibility Act (QHWRA) “affordability” standard which sets a bench mark that no more than 40% of the families should be paying more than 30% of income.¹⁷ Following implementation of the new funding scheme, only 27% of those agencies felt that they would be able to continue to meet that standard.¹⁸

The Center on Budget Policy and Priorities also conducted a survey and received information regarding more than 200 public housing authorities. This survey also found that a large number of housing authorities declined to reissue vouchers, withdrew vouchers from families who were searching, lowered payment standards, increased minimum rents and placed restrictions on portability.

Many of the actions taken by housing authorities were supported by HUD. HUD’s PIH Notice 2004-7, along with a follow-up memo from Secretary Jackson to housing agencies sent in July, suggested that agencies address their shortfalls by, among other things, increasing minimum rents, reviewing rent reasonableness and if necessary decreasing rental amounts paid to landlords and tightening up anti-fraud enforcement against residents, decrease the payment standard, require rent recertifications when tenant income increases and change the requirements regarding the number of individuals per bedroom.¹⁹

In spite of strenuous opposition to HUD’s interpretation of the 2004 HUD Appropriations language as not reflective of an actual *cost-based* model, Congress passed HR 4818 on November 20, 2004, adopting a strict *budget-based* approach to the funding of the Section 8 program and made some additional changes. This new funding method will mean that some housing agencies will again feel the budget pressure and will begin to look for ways to cut costs or reduce the number of families served.

In what appears to be record speed for the Department, on the day the President signed the bill into law, HUD issued Notice PIH 2005-1, implementing the 2005 funding provisions for the Housing Choice Voucher Program.²⁰

Difference in Section 8 Funding Structure from 2004 to 2005

Congress increased the overall funding for tenant-based Section 8 assistance to \$13.355 billion for voucher renewals (which includes an across-the-board cut of 0.8%

have increased tenant rents if the new payment standard applied to the family and the rent charged for the unit exceeded that standard.

¹⁷24 C.F.R. § 892.503(g)(1) (2003); 42 U.S.C.A. § 1437f(o)(1)(E) (West 2003).

¹⁸NAHRO, *supra* note 12, at 3.

¹⁹PIH 2004-7, *supra* note 10, at 4-5.

²⁰Implementation of the Consolidated Appropriations Act (HR 4818 - H Rept 108-792), 2005 Funding Provisions for the Housing Choice Voucher Program, PIH 2005-1 (HA) (Dec. 8, 2004).

for all programs), an increase of \$634 million more than 2004 funding levels,²¹ but also established funding restrictions that make this increase less viable.

Split of Section 8 Into Two Separate Accounts: Tenant-Based and Project-Based

For the first time, Congress split the Section 8 funding program into two separate accounts, one for Section 8 Tenant Based and the second for Section 8 Project Based. The joint committee report issued along with the bill indicates that the goal of this is “. . . to provide better transparency and oversight of expenditure in these programs that now represent over fifty percent of the Department’s budget.”²²

Shift from an Actual Cost-Based Model to a Budget-Based Model

Congress included language in its joint conference report that makes clear that the Section 8 program is no longer an “actual cost” based program but is now a strict “budget” based program. According to the report “[t]he voucher program is strictly a dollar-based, or budget-based program in 2005.”²³ The report language also indicates that this budget, unlike in years past, will not be supplemented by additional funds. “HUD shall provide all public housing agencies (PHAs) with a fixed, annual budget that each agency must manage their voucher programs within for 2005.”²⁴

There are severe tensions within a strict budget-based program if the funds are inadequate and the demands of statutory and regulatory tenant protections must continue to be met.

Under this new formula some housing agencies will receive adequate funding to serve all authorized vouchers without having to make changes to their programs while others will not. The joint committee report then seems to provide a difficult, if not impossible, mandate for some housing agencies by including language that “PHAs are expected to manage [increased] utility costs, decreased tenant contributions and protect the most at-risk families

within these budgets.”²⁵ Even more troubling is additional language in the report that instructs that “HUD shall also provide agencies with flexibility to adjust payment standards and portability policies as necessary to manage within their 2005 budgets.”²⁶ The report also directed that “[a]gencies shall ensure that current elderly and disabled voucher families be protected against significant impacts resulting from adjustments made by agencies to maintain their voucher programs within their 2005 budgets.”²⁷

There are severe tensions within a strict budget-based program if the funds are inadequate and the demands of statutory and regulatory tenant protections must continue to be met. What has become apparent over the past year is that HUD will seek ways to tighten up program integrity and encourage housing agencies to more stringently enforce program rules so as restrict the program and its benefits for participants. It is expected that there will also be an effort to modify the payment standards currently governed by HUD regulation. Under current regulations the payment standards for new families or those that are moving to a new unit may be altered (decreased) immediately while those of families under HAP contracts may not be decreased until the family’s second regular reexamination.²⁸ Another anticipated action on the part of HUD will be an effort to change the ability of residents to exercise their statutory right to portability to a new jurisdiction with their Section 8 housing choice voucher.²⁹ Such efforts may run afoul of the Fair Housing Amendments Act and will be closely watched by housing advocates.

Formula for Determining Agency’s Budget

The 2005 budget for each housing authority shall be determined by using the average of May, June and July 2004 Voucher Management System (VMS) data for leasing and costs as reported to, verified and determined to be completed by HUD.³⁰ If an agency failed to report verifiable data into the VMS during May-July, HUD will use the data from February, March and April 2004.³¹ If that data is incomplete or unavailable, then HUD will use the agency’s year-end financial statement for fiscal years ending no later than March 31, 2004.³² These costs will then be

²¹FY 2005 *Appropriations Finalized*, NAHRO MONITOR, vol. XXIV, no. 23, Dec. 15, 2004, at 5.

²²H.R. REP. NO. 108-792, div. I, at 18 (2004), available at <http://thomas.loc.gov/home/omni2005/index.htm>.

²³*Id.* at 20.

²⁴*Id.* at 19.

²⁵*Id.* at 20.

²⁶*Id.* at 21.

²⁷*Id.*

²⁸24 C.F.R. § 982.505(c)(3) (2003).

²⁹Implementation of the Consolidated Appropriations Act (HR 4818 - H Rept 108-792), 2005 Funding Provisions for the Housing Choice Voucher Program, PIH 2005-1 (HA) (Dec. 8, 2004).

³⁰*Id.* at 3.

³¹*Id.* at 5.

³²*Id.*

adjusted by the HUD-published 2005 AAF to determine the annual funding eligibility for each agency.³³

Applying this formula, some housing authorities will have sufficient funds to serve all voucher participants. This will occur if the housing authority was fully utilizing or nearly fully utilizing its vouchers during the measurement period and costs during the same period were greater or are the same as projected for calendar year 2005. Housing authorities are permitted to increase their utilization up to their authorized level, but they must do so within their budget amounts. HUD has not provided any guidance as to what a housing authority should do if it is fully utilized and has excess funds. As noted below, the amount that may be held in a housing authority's voucher renewal reserve is very limited. Thus, allocating excess funds into reserves may not benefit a housing authority. Advocates should work with these housing authorities and review discretionary policies and reverse or suspend any harsh policies adopted in the prior year so as to expend all available funds. For example, if a housing authority adopted an increased minimum rent, it should consider suspending that policy. Payment standards could be increased, especially if rents are higher than the payment standard and tenants are paying more than 30% of their income for rent.

Other housing authorities will have insufficient funds to serve all current participants as of January 2005. HUD stated in the webcast that it will work with those housing authorities and will front load the money released to them so that they will have time to gradually reduce the number of families assisted and/or put in place cost-saving measures that over the calendar year will allow them to stay within their budgets.

If their costs exceed their budgets, housing authorities will not receive any additional funds from HUD, and they will not be able to use any Fiscal Year (FY) 2005 HUD funds for overleasing. A housing authority with pre-2003 voucher funds in its reserves, administrative reserves or other non-voucher funds may use these funds to cover the cost of over-leased units. Realistically, however, there are probably few housing authorities that have any such reserves or other funds as they were more than likely exhausted in FY 2004.

HUD Must Notify Agencies of Their Budget Within Forty-Five Days of Enactment

Significantly, the joint committee report language instructs HUD to communicate to all agencies their annual budget amount within forty-five days of enactment of the Act.³⁴ If HUD complies with this prompt noti-

fication requirement, some of the problems that arose last year when HUD failed to notify housing agencies of their annual budgets until late April will be avoided.

HUD has begun the process to comply with the congressional mandate. In the December 9, 2004, webcast, HUD pledged to provide to housing authorities by December 17, 2004, their calculated 2005 budgets with the data sources.³⁵ Presumably that means that HUD will provide information on the average number of units that HUD calculates a housing authority had under lease and the average per-unit cost during the May-July period. The 2005 AAF for each applicable area is posted on the HUD Web site.³⁶ For all jurisdictions, HUD states that it selected the highest applicable AAF from either Table 1 or Table 2. Housing authorities were to have had only ten working days, until December 27, 2004, to object to the figures. This will be the only appeal that a housing authority will be allowed. Payments were to have been made to housing authorities based upon the tentative figures on January 1, 2005. Any adjustments and the final allocation were to have been determined and budgets obligated by January 21, 2005.

Decrease in Housing Agency Reserves From One Month to One Week

One of the financial tools that helped to cushion some agencies last year from the sudden notice of cutbacks in their funding was the existence and/or replenishment of reserve accounts for some agencies. These reserves were authorized in 2004 at one month but HUD practice in FY 2004 was to replenish them only up to 50%, i.e., two weeks of reserves. Each year Congress includes funds from unobligated balances and recaptures from the prior year's appropriations to support funding of certain programs. This year's language instructs HUD to achieve housing voucher rescission amounts by reducing public housing agency reserves to no more than one week.³⁷ It is not clear when HUD will implement this rescission. Congress has instructed that it should be no later than September 30, 2005.³⁸ It is also unclear whether or not the housing agencies who currently have more than a week's worth of reserves in their accounts will be able to spend those reserve funds prior to the date of rescission.

³⁵See HUD, *FY2005 Implementation of the Housing Choice Vouchers Program*, available at <http://www.hud.gov/webcasts/archives/index.cfm> (Dec. 9, 2004). See also *Implementation of the Consolidated Appropriations Act (HR 4818 - H Rept 108-792)*, 2005 Funding Provisions for the Housing Choice Voucher Program, PIH 2005-1, ¶ 4 (HA) (Dec. 8, 2004).

³⁶See HUD, *Annual Adjustment Factors for the Housing Choice Voucher (HCV) Renewal Funding for Calendar Year 2005*, at <http://www.hud.gov/offices/pih/programs/hcv/> (Jan. 13, 2005).

³⁷H.R. REP. NO. 108-792, div. I, at 51 (2004), available at <http://thomas.loc.gov/home/omni2005/index.htm>.

³⁸*Id.* at 66.

³³*Id.*; see also HUD, *Annual Adjustment Factors for the Housing Choice Voucher (HCV) Renewal Funding for Calendar Year 2005*, at <http://www.hud.gov/offices/pih/programs/hcv/> (Jan. 13, 2005).

³⁴H.R. REP. NO. 108-792, div. I, at 21 (2004), available at <http://thomas.loc.gov/home/omni2005/index.htm>.

Elimination of HUD Central Fund

In the FY 2004 Appropriations Act, Congress authorized a central fund to be maintained by HUD to support increases in utilization above that provided for in the renewal calculation up to the housing authority's authorized level. If housing agencies were able to accomplish additional leasing up between their quarterly data cycles, and could demonstrate that they had both obligated through their HAP contracts monthly budget authority and had spent 50% of their reserves, they would be automatically provided additional funds from the central fund. If the funds were not automatically provided, the funds would have to be requested. Unfortunately, the 2005 Appropriations Act eliminates this central fund. However, as previously noted, if there are sufficient funds in the 2005 budget allocation, a housing authority may increase utilization up to the authorized level.

Housing Agencies' Administrative Fees to Be Cut

The bill funds administrative fees for housing agencies at \$1.2 billion, a \$10 million decrease over the amount funded for agencies in FY 2004. Of the \$1.2 billion allotted, the bill provides that \$1.175 billion shall be distributed on a pro rata basis based on what agencies were eligible to receive in calendar year 2004. Congress also made available \$25 million for distribution to agencies that need additional funds to administer their programs. These additional funds will be used for "federally declared disasters, housing conversions, homeownership program closings and lead-based paint testing and risk assessments."³⁹ The restriction from last year that these administrative fees are limited for use only in connection with voucher program administration and related development activities carried over into the 2005 Act.

HUD May not Use Recaptures to Augment Section 8 Tenant-Based Voucher Funds

The bill further restricts the use of any recaptured amounts from prior years' appropriations, including any carryover funds from either tenant based or project based assistance from being used or made available for the 2005 activities funded under the heading "tenant-based rental assistance."⁴⁰ Interestingly, the Act does allow recaptured amounts from monies appropriated for project-based activities to be used for amendments to Section 8 project-based subsidy contracts or for performance-based contract administrators.⁴¹

³⁹Implementation of the Consolidated Appropriations Act (HR 4818 - H Rept 108-792), 2005 Funding Provisions for the Housing Choice Voucher Program, PIH 2005-1 (HA), 6 (Dec. 8, 2004).

⁴⁰*Id.*

⁴¹*Id.*

What Can Advocates Do?

There are many important lessons learned from the funding crisis of last year and the advocacy efforts that ensued. What saved the Section 8 program from decreases, or worse, block granting, for 2005 was the multilateral approach taken by those interested in preserving the voucher program.

- In several jurisdictions, advocates, housing authorities and other interested parties came together to protest the cuts.
- In some jurisdictions public hearings were held because housing agencies, faced with dramatic cuts in their programs and with limited time to respond, sought substantial input from the voucher holders, applicants and the community to determine how best to respond.
- Through coordinated data collection on the part of the Center on Budget and Policy Priorities and analysis and distribution of that data, housing agencies and advocates were able to detail the impact that such cuts would have on their local residents and organizations. In addition they were able to advocate for cost-cutting strategies that caused the least amount of harm to the families.
- Housing advocates came together early and participated in a webcast training sponsored by the National Housing Law Project and presented by the Center on Budget and Policy Priorities, Greater Upstate (New York) Law Project and NHLP. These advocates then participated in seven telephone conference calls to continue the discussion and share ideas and information.
- The National Low Income Housing Coalition posted on its Web site many of the congressional and state official responses to the funding crisis.
- The media attention that was garnered through the above actions helped to exert the necessary pressure on Congressional representatives and state elected officials who would have to answer to their jurisdictions for any failure to allocate the available funds in a fair manner.

In the face of extreme budget cuts and an-all out war on housing programs, the survival of the Section 8 program from such cuts and from block granting was nothing short of a miracle. What is clear from the past two years of budget proposals is that the current administration will likely continue its efforts toward block granting the Section 8 program and will look for ways to modify regulations and possibly move for statutory and regulatory changes that permit greater flexibility to housing agencies and loosen up tenant protections. We will know shortly what legislation the administration will propose. The President's 2006 Budget is expected to be released on February 7, 2005. ■

Shifting Affordable Housing Cost Burdens to Tenants: A Historical Perspective

Federal budget policies and politics have had an enormous impact on the shape of federal affordable housing programs over the past decade. With record-setting deficits piling up as far as the eye can see under the tax cuts championed by the Bush Administration, it's obvious that domestic discretionary spending programs such as the affordable housing programs of the Department of Housing and Urban Development (HUD) will face tremendous pressure to cut outlays.

Beyond halting any new growth in program size or cost, a spending reduction can be accomplished by cutting the number of units assisted, or reducing the per-unit cost of assistance. Increasing the proportion of families who have higher incomes is one way to reduce the federal government's per-unit cost, so affordable housing advocates should be on the lookout for proposals to decrease the federal targeting requirements.¹ HUD regulations currently require at least 75% of vouchers distributed annually (usually upon turnover), and at least 40% of public housing and project-based Section 8 units, be allocated to families with incomes less than 30% of area median.²

Another important method to reduce per-unit costs is to shift the cost burden off the federal government and onto tenants, whatever their incomes. This too may be proposed, just as it was in the mid-1990s when Congress deliberated about the changes which eventually became law in the Quality Housing and Work Responsibility Act (QHWRA) of 1998. When such proposals resurface, it will be very important to bear in mind what HUD program tenants have already contributed in this regard over the past decades.

The Brooke Amendment Rent-Income Ratio

The primary mechanism for keeping HUD housing programs affordable so that extremely low-income families can benefit from them is the Brooke Amendment,³ passed in 1969 in order to provide affordable public housing rents for tenants while making up the difference

between those rents and the cost of providing the housing with federal subsidies. Prior to 1969, federal contributions covered capital costs in public housing, but tenant rents had to cover operating expenses. As operating costs escalated, so did rents, and many tenants were priced out of public housing.

The primary mechanism for keeping HUD housing programs affordable so that extremely low-income families can benefit from them is the Brooke Amendment.

Originally, the Brooke Amendment established the affordable tenant contribution at 25% of the tenant's adjusted income. Following authorization of the Section 8 program in 1974, the affordable rent ratio was modified to establish the tenant's contribution at various levels between 15 and 25% of the tenant's income, depending on income level and family size.⁴ At the same time, addressing the concern that some tenants were not paying enough, Congress also established a minimum rent of 10% of a tenant's gross income,⁵ which still exists in the United States Housing Act, as amended.

In 1981, Congress revised the Brooke Amendment to hike any public housing or Section 8 tenant's contribution to 30% of adjusted income (making it a mandatory rent rather than a maximum that could not be exceeded) and eliminated the special lower percentages for some Section 8 tenants.⁶ Many years later, during the policy debates around the 1998 QHWRA, there were proposals to eliminate the Brooke Amendment altogether, or to limit its application only to certain very low-income tenants, but none of these proposals were enacted. With the exception of additional minimum rents for the poorest tenants imposed in the mid-1990s and in QHWRA, and the higher burdens often required under the voucher framework (where tenants also pay any rent balance beyond the local payment standard), 30% is the nominal ratio currently in effect.

The Voucher Program

One of the most significant ways in which tenants pay more than the statutory 30% of income limit results

¹Despite this, HUD recently issued a new rule authorizing public housing authorities to evict households with incomes above 80% of area median. NHLP, *New Rule Permits Eviction of Over-Income Public Housing Households*, 35 HOUS. L. BULL. (forthcoming 2005).

²42 U.S.C.A. § 1437n(b) (West 2003) (vouchers); 42 U.S.C.A. § 1437n(a)(2) (West 2003) (public housing); 42 U.S.C.A. § 1437n(c)(3) (West 2003) (project-based Section 8).

³Pub. L. No. 91-152, 83 Stat. 379 (1969), now codified at 42 U.S.C.A. § 1437a(a) (West 2003).

⁴See, e.g., 24 C.F.R. § 889.105 (1980).

⁵H.R. REP. NO. 1114, 93d Cong., 2d Sess. 373-74 (1974).

⁶Pub. L. No. 97-35, § 322(a), 95 Stat. 400 (1981). In 1979, Congress had given HUD authority to raise the ratio up to 30% for families with incomes above 50% of area median income, grandfathering all current tenants at the 25% level. Pub. L. No. 96-153, § 202(a), 93 Stat. 1106 (1979).

from the increasing reliance on the voucher program (now approximately 2 million units nationwide) and its distinctive method of determining subsidies. With vouchers, because the subsidy amount is set at the difference between the payment standard and 30% of the tenant's income, tenants end up paying 30% of income as their contribution only if they rent a unit that costs less than the locally established payment standard. The local payment standard set by the PHA generally varies within 90 and 110% of the published Fair Market Rent.⁷ If tenants cannot find a suitable unit for this amount and are forced to rent something more expensive, they must also pay the difference out of their own pocket, in addition to their 30% contribution, subject to HUD's regulation limiting total rent burden to 40% of income at initial rental. Many voucher tenants now carry rent burdens in excess of 30% of their incomes.

Adjustments to Income

Federal law requires numerous adjustments to gross income (including both exclusions and deductions), which operate to reduce a family's adjusted income for purposes of determining rent contributions. To the extent that adjustments are set at a flat dollar amount, their beneficial impact erodes over time due to inflation. For example, the dependent deduction was initially established at \$300 in 1970, more than thirty years ago. While it was increased to \$480 in 1983,⁸ it has been frozen at that level since then. Because they remained unindexed to inflation during a period of large increases in the Consumer Price Index, the real value of all of these adjustments has been substantially eroded since adoption.

Utility Allowances

The widespread misapplication of utility allowances is a major factor in shifting substantial subsidized housing cost burdens to tenants over the past twenty years. Under all of the federal programs using income-based rents, the tenant's contribution is supposed to cover both housing and a reasonable amount of utilities. Where tenants pay some or all of their own utilities, a utility allowance is supposed to be credited against their rent contribution, so that the overall payment remains within statutory limits. Prior to 1984, federal regulations were fairly explicit about how to calculate the utility allowances, primarily the amount of utilities, since the cost was easily ascertainable.⁹ Tenants successfully filed many cases to obtain legally required allowances.¹⁰ In 1984, HUD revised the regulations to

relax the standard and the methodology. However, for all the programs, the regulatory requirement that housing providers adjust allowances when rates change by 10% has remained.¹¹

Measures that result in lower payment standards will effectively transfer an additional share of the voucher cost burden to tenants, unless there is plentiful housing available at rents cheaper than that level.

Nevertheless, many PHAs and owners fail to set or adjust the allowances as required by law, and HUD has done little to require such reviews and adjustments. In fact, for public housing, HUD has given PHAs more leeway in setting the allowances, by revisions such as "streamlining" the regulations in 1996 to leave the setting of utility allowances to PHA discretion¹² and making that determination difficult to review.¹³ The net effect of loose standards and little monitoring is that tenants often effectively pay a large portion of their utility bills, even for reasonable usage, which in turn translates into rent contributions beyond the statutory limits.

Minimum Rents

As if all this were not enough, Congress has extracted even more from the poorest tenants who can afford the least. It has required public housing and voucher tenants to pay minimum rents of up to \$50 monthly, regardless of their income, and permitted HUD to establish minimum rents for project-based Section 8 tenants, which HUD has set at \$25 monthly.¹⁴

Future Proposals for Rent Simplification, Voucher Funding and Block Grants?

The past two years have seen Administration proposals to convert the current voucher program, where

⁷42 U.S.C.A. § 1437f(o)(1)(B) (West 2003); 24 C.F.R. § 982.503 (2003).

⁸Pub. L. No. 98-181, § 206, 97 Stat. 1179 (1983).

⁹Compare former 24 C.F.R. Part 865 (1984) with 24 C.F.R. Part 965 (2003).

¹⁰E.g., *Wright v. City of Roanoke Redev. and Hous. Auth.*, 605 F. Supp. 532 (W.D. Va. 1984), *aff'd*, 771 F.2d 833 (4th Cir. 1985), *rev'd*, 479 U.S. 418, 107 S.Ct. 766 (1987) (Brooke Amendment and utility allowance requirements enforceable under § 1983).

¹¹See, e.g., 24 C.F.R. § 965.507(b) (2003) (public housing).

¹²See § 965.502(a)-(d); 61 Fed. Reg. 7966, 7968-69 (Feb. 29, 1996).

¹³24 C.F.R. § 965.502(e) (2003).

¹⁴Pub. L. No. 104-99, § 402(a), 110 Stat. 26, 40 (1996); Pub. L. No. 104-204, § 201(c)(1), 110 Stat. 2873, 2892 (1996); Pub. L. No. 105-65, § 201(d), 111 Stat. 1343, 1364 (1997). These policies were codified in 1998 by QHWRA, Pub. L. No. 105-276, §507, 112 Stat. 2524 (1998), adding 42 U.S.C.A. §1437a(a) (3) (West 2003).

HUD Notes

Earned Income Tax Credit

housing cost increases are largely borne by the federal government, into a block grant where states or PHAs are given whatever funds Congress appropriates to distribute as they please, within a few remaining federal rules. No doubt the Brooke Amendment will not be part of any such future proposal. In addition, the FY 2004 voucher funding fiasco resulted in pressure on PHAs to reduce payment standards, and the language of the FY 2005 bill will have a similar effect. Measures that result in lower payment standards will effectively transfer an additional share of the voucher cost burden to tenants, unless there is plentiful housing available at rents cheaper than that level.

Expansion of the Moving to Work demonstration for more PHAs' public housing or voucher programs could have the same result. The current move for "rent simplification" may have a similar effect, especially if its morphs into "rent reform" driven by federal budget reductions; even if revenue neutral, increases will be inevitable for many tenants adversely affected by any changes in the rules. Not far behind could be a simple repeal of the Brooke Amendment, or a revision of the applicable percentage.

In any such debate, the record should clearly reflect these increased burdens already borne by tenants over the past decades. ■

On December 6, 2004, the U.S. Department of Housing and Urban Development (HUD) and the Internal Revenue Service (IRS) signed an agreement to work together to help millions of low-income families learn about and apply for the Earned Income Tax Credit (EITC), which could benefit families as much as \$4,300.¹ According to HUD, last year 21 million families with two or more children qualified for and received the benefit of the EITC and millions more were eligible to receive it.² These federal agencies hope to work through existing programs such as the Volunteer Income Tax Assistance Program to target information, free tax preparation and electronic filing assistance to the 3 million low-income, elderly, disabled and limited English speaking individuals served by HUD housing programs.³ The Memorandum of Understanding (MOU) signed by the two agencies reveals that this partnership hopes to provide and disseminate information on the child care tax credits and individual development accounts in addition to information regarding the EITC.⁴

While the MOU between the two agencies contains over sixty steps that each will take to ensure the information gets into the hands of these low-income individuals and families, the undertaking does not allot any additional funds for each to accomplish these lofty goals.⁵ Instead the agreement pools the existing resources of HUD and the IRS in order to achieve said goals.⁶ Many of these goals include contacting HUD grantees and requesting that those grantees meet with tax specialists to develop strategies and initiate contact with qualified residents. This may be a difficult task without additional funds for these housing providers who are already stretched to the maximum following program cuts this year by Congress. ■

¹See News Release, HUD and IRS Partner to Help Low-Income Families Cut Their Taxes, No. 04-146 (Dec. 6, 2004), available at <http://www.hud.gov/news/release.cfm?content=pr04-146.cfm>.

²*Id.*

³*Id.* at 2.

⁴Memorandum of Understanding Between the U.S. Department of Housing and Urban Development and the Internal Revenue Service (Dec. 6, 2004), available at <http://www.hud.gov/content/releases/hudirsagreement.pdf>.

⁵*Id.* at 2.

⁶*Id.*

Long-Awaited Rural Rental Housing Report Released

After much anticipation, the Department of Agriculture's (USDA) Rural Development (RD) agency permitted ICF Consulting¹ to publish its study of the agency's Section 515 Rural Rental Housing Stock.² The November 2004 study, for which RD contracted with the firm, is entitled *Rural Rental Housing—Comprehensive Property Assessment and Portfolio Analysis, Final Study Report* and purportedly “analyze[s] the Rural Development Multi-family Housing program, identify[ies] problems, and provide[s] recommendations for changes to address such problems.”³ It is unclear how many, if any, of the report's recommendations RD will seek to adopt. Also unknown is whether the agency's new interim housing rule, effective February 24, 2005, will sufficiently address any of the proposed problems.⁴

What is certain is that the study: (1) suggests new loan structures for current owners; (2) recommends instituting minimum rents for even very-low income RD program housing tenants; (3) recommends that RD not preserve 10% of the housing stock that it assists; and (4) greatly limits tenant protections. Although problems within the stock need to be addressed, advocates would be ill-advised to accept the study's recommendations on a wholesale basis and wait for the agency to act upon the study's less controversial recommendations.

¹In its Web site, http://www.icfconsulting.com/About_Us/, ICF Consulting describes itself as a firm that “develops solutions to complex energy, environment, homeland security, community development, and transportation issues.” The study's team included persons who were previously involved in a Department of Housing and Urban Development's (HUD) program study and restructuring.

²The Section 515 program is a direct loan program through which RHS makes loans to for-profit, nonprofit and public entities for the construction of rental housing in rural areas. 42 U.S.C.A. § 1485 (West 2003). The loans are made over a term of thirty to fifty years at the federal market rate of interest. *Id.* Most of the RHS loans are subsidized by a shallow subsidy, commonly called “Interest Credit,” that effectively reduces the market rate of interest that the owner has to pay on the loan to a rate equivalent to a 1% interest rate. 42 U.S.C.A. § 1490a(a)(1)(B) (West 2003). Residents living in assisted projects pay the higher of 30% of their income or the projects' basic rent, which is a rent that is based on the project loan being amortized at the 1% interest rate.

³KEVIN S. BLAKE ET AL., RURAL RENTAL HOUSING – COMPREHENSIVE PROPERTY ASSESSMENT AND PORTFOLIO ANALYSIS FINAL STUDY REPORT (2004), available at, http://www.ruralhome.org/infoAnnouncements_515PortfolioStudy.php [hereinafter STUDY]. The consulting team included Shekar Narasimhan and Thom White of Beekman Advisors; Rick Samson of AEW Capital Management, L.P.; Charlie Wilkins of the Compass Group, LLC; Ned Daly and David Whiston of On-Sight Insight; Patrick Carter of Carter & Associates; and Eric Oetjen and Kevin Blake of ICF Consulting. ICF Consulting has agreed to present its report through briefing sessions for any interested organizations.

⁴Reinvention of the Sections 514, 515, 516, and 521 Multi-Family Housing Programs, 69 Fed. Reg. 69,032, 69,168 (Nov. 26, 2004) (to be codified at 7 C.F.R. pt. 3560).

Overview of the Study

According to the consulting team's opening memorandum to RD officials, the study was initiated in September 2003 and included 333 field inspections and thirty-two market studies out of an overall inventory of 15,899 properties (totaling 434,296 units, excluding farm labor housing).⁵ The consultants' stated objectives were to:

- Review issues and develop solutions directly pertaining to the market demand for such housing.
- Review and define potential approaches to address the increasing propensity for owners to prepay RD subsidized loans and thereby displace needy tenants.
- Analyze and develop solutions for the increasing rehabilitation and recapitalization requirements of the aging existing properties.⁶

Despite these broadly stated objectives, the consultants have explained that their review only considered economic factors.⁷

The Study's Results and Suggested Implications

Like the consultants, many advocates have long suspected that the Section 515 stock is aging and needs revitalization. The study warns that the agency should forgo addressing the stock's problems through traditional approaches.⁸ Instead, ICF suggests that its alternative approach would ultimately cost the government less although addressing the issues would cost more upfront than the current budget baseline can support.⁹ They caution that, “continuing the status quo is an unattractive alternative; [sic] continued pressure on the Rental Assistance budget as costs go up and tenant incomes remain low; deterioration of the properties causing foreclosures and tense, unproductive relationships with private owners distracting attention from the future of the rural communities being served.”¹⁰

ICF's advice stems from its analysis of the study's findings. Their summarized results and implications of the study include:

- 40% of the loans have been made on age-restricted properties; overall the existing tenant base is 58% elderly, handicapped [or] disabled, or both; the average

⁵STUDY, *supra* note 3, at Memo 1.

⁶*Id.*

⁷ICF Consulting, Briefing Session at the Housing Assistance Council's National Rural Housing Conference, Washington, D.C. (December 8, 2004) [hereinafter HAC Briefing Session I].

⁸STUDY, *supra* note 3, at Memo 2.

⁹*Id.*

¹⁰*Id.*

property age is twenty-three years; the average annual adjusted household income is \$9,075.

- Based on a sample of properties, which the RD selected in order to be statistically valid, the following was determined:
 - While there are few immediate life and safety issues, *no property* has adequate reserves or sufficient cash flow to do needed repairs or for adequate maintenance over time.
 - *Doing nothing is not an option . . . unless the roofs never leak, the paint jobs last forever, no furnaces or air-conditioners ever need replacement, etc.*
- *Several factors may contribute to owners lacking motivation to maintain, upgrade or transfer their properties, including tax consequences, lack of equity in the property, and the inability to receive a return on investment.*
- The location, physical condition and tenant profile of the properties suggest that the *public interest is best served by revitalizing most of this housing as affordable housing for the longer-term.*
- Based on the data [ICF Consulting] reviewed and reasonable economic assumptions, a large majority of the owners do not have an economically attractive alternative to continuing in the program, and therefore [ICF Consulting] think prepayment is unlikely to occur at the rates previously assumed.¹¹

Anticipated Budget Impact

The study's proposal recommends that changes be adopted in whole such that confusion and substantial cost increases are not incurred.¹² The proposal consists of three aspects which will be fully discussed later in this article. The initial budget impact of the proposal's recommended debt service relief, economic tenant protections, capital advances and administrative costs across the suggested seven years was estimated by ICF at \$1 billion above the baseline.¹³ However, the study indicates that "to accomplish the same result of preserving affordable housing for 20 years using Rental Assistance (currently the only real tool available) we estimate the cost to be as high as \$2.9 billion above current funding levels."¹⁴ Beyond the costs, ICF expects that its proposal would yield an equitable deal where:

- Owners get a reasonable return of providing capital and good management

¹¹*Id.* (emphasis in original).

¹²*Id.*

¹³*Id.* at 3.

¹⁴*Id.* Rental Assistance (RA) is a deep subsidy that reduces the rent paid by eligible households to 30% of their annual income. 42 U.S.C.A. § 1490a(a)(2)(A) (West 2003).

- Congress and the Administration know they are getting results for the dollars spent
- RD is perceived as providing leadership and focused management
- Local communities have an affordable housing asset in which they have pride and
- Above all, tenants are protected while [sic] Department's portfolio is revitalized¹⁵

ICF's Three-Part Proposal

ICF's recommendations emphasize revitalization within the Section 515 program, instead of preservation of properties or long-term tenant protections. The study's three-part proposal requires: (1) additional capital and a new bargain with the owners and tenants;¹⁶ (2) allowing the market to determine prepayment;¹⁷ and (3) reorganizing the multifamily program.¹⁸

ICF states that its approach to addressing revitalization largely consists of policies that reduce required loan payments and add capital tools and the creation of a specialized team within the agency.¹⁹ According to ICF, if rent increases match inflation, major repair needs will go unmet and most 515 loans will go into default. It goes on to say that if rent increases are below inflation, repair problems escalate geometrically, and these problems cannot be solved through rent increases because: (1) vacancy rates will increase, (2) unassisted tenants will suffer and (3) RA costs will be unacceptably high.²⁰ While suggesting that the agency leverage funds from other programs (e.g., the LIHTC and HOME programs),²¹ it says that its approach will cost less than half of what it would cost to stabilize the portfolio with rent increases, Rental Assistance and new Section 515 funds.²²

New Bargains

Part one of the three-part proposal seeks new bargains with owners and tenants. According to ICF:

"[t]he capital [for revitalization] would come primarily from debt relief on the current RD loans with built-in recapture provision and new private

¹⁵STUDY, *supra* note 3, at Memo 3.

¹⁶*Id.* at 2.

¹⁷*Id.* at 3.

¹⁸*Id.*

¹⁹*Id.* at Executive Briefing Powerpoint Handout 11.

²⁰*Id.* at 6.

²¹26 U.S.C.A. §§ 42 *et seq.* (West, WESTLAW, current through 108-450 approved Dec. 10, 2004) (Low Income Housing Tax Credit program); 42 U.S.C.A. §§ 12721 *et seq.* (West, WESTLAW, current through P.L. 108-450 approved Dec. 10, 2004) (HOME Investment Partnership program).

²²STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 11.

capital—including potential co-investment by the owners. The new bargain would be that owners must accept a regulatory and enforcement regime that would ensure affordability and accountability for performance, but also offer incentives for good ownership and good management. *A minimum contribution for shelter would be expected from all tenants.*²³

Owner Bargains

The study delineates five categories for Section 515 properties that prescribe the type of new loan restructure, if any, which should be employed.²⁴ With its Type I transaction, ICF suggests that owners be allowed to prepay once the agency determines eligibility and that tenants are “protected.”²⁵ This transaction type will be discussed in greater detail herein. The Type II transaction is for properties that can cover operating and capital replacement needs at current rents or with rents up to 10% higher. It maintains the current regulatory structure while future rent increases will match inflation.²⁶ ICF estimates that the Type II transaction could affect 1,500 properties (49,000 units).²⁷

The later three categories require significant changes. The shared aspects of the new regulatory structure for Types III-V consist of:

- New regulatory agreements with improved enforcement provisions
- Long-term use agreements (e.g., affordability, non-discrimination, maintenance)
- Performance-based incentives instead of current “owner return” structure
- Deregulated rent increases approach (e.g., LIHTC-type rent caps, or inflation-factor increases)²⁸

The Type III transaction (for properties with two to twenty-four units) includes debt service relief²⁹ and “simple” restructuring consisting of little more than the above items.³⁰ An estimated 14.5% of the properties fall into this

category.³¹ The Type IV transaction (for properties with twenty-five to fifty units) includes debt service relief and “moderate” restructuring which includes the above and other dictated requirements.³² An estimated 21.9% of the properties fall into this category.³³ The Type V transaction is geared towards owners who are not in “good standing,” for whom debt relief alone would be inadequate, or towards those who own properties with fifty-one or more units.³⁴ This transaction requires “complex” restructuring and makes use of a number of tailored requirements.³⁵ An estimated 41.7% of all properties are expected to fall into this category.³⁶

A minimum contribution for shelter would be expected from all tenants.

Tenant “Bargains” with Minimum Rents

The study makes no suggestion as to what type of “new bargain” would be offered to tenants although it suggests the implementation of minimum rents, which currently do not exist for Section 515 tenants. How the institution of minimum rents can be viewed as a “new bargain” or a conscionable bargain remains unseen. In fact, in a briefing session ICF explained that the minimum rent recommendation came about in order to respond preemptively to those who might complain about tenant fraud in misreporting incomes, although it was not believed that this constituted a material problem.³⁷ The recommendation of minimum rents is one example of how the study not only overlooks the purpose of the program, but how its recommendations could do a severe disservice to low- and very low-income households.³⁸

Market Control of Prepayment

Although the study states that the portfolio continues to serve a needed purpose and is worthy of revitalization,³⁹ its Transaction I essentially suggests elimination of

²³*Id.* at Memo 2 (emphasis added).

²⁴At the December 2004 National Rural Housing Conference, ICF stated that the unit-based categories may be subject to change upon consultation with state RD directors. *See* note 7 *supra*.

²⁵STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 21.

²⁶*Id.* at 22. Type II transactions are for properties that can cover their operating and capital replacement needs at current rents or with rents up to 10% higher.

²⁷STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 22.

²⁸*Id.* at 27.

²⁹As of August 31, 2004, the average outstanding loan balance is reported to have been \$25,722 per unit. *Id.* at 3.

³⁰STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 23. Type III transactions are for owners in “good standing” with properties of two to twenty-four units.

³¹ICF Consulting, Distribution of Properties in the RD Portfolio as Projected by the Comprehensive Property Assessment Findings (Draft Only) 1 (Dec. 13, 2004) (unpublished, on file with NHLP) [hereinafter Distribution of Properties].

³²STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 24. Type IV transactions are for owners in “good standing” with properties of twenty-five to fifty units.

³³Distribution of Properties, *supra* note 31.

³⁴STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 25-26.

³⁵*Id.* at 25-26.

³⁶Distribution of Properties, *supra* note 31.

³⁷HAC Briefing Session I, *supra* note 7.

³⁸ICF made mention of a possible waiver program should minimum rents be instituted. *Id.*

³⁹STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 10.

the entire Emergency Low Income Housing Prepayment Act (ELIHPA) prepayment structure,⁴⁰ a structure that was designed to keep the Section 515 housing stock within the program. The second part of ICF's proposal allows the market to determine prepayment as opposed to current statutory and regulatory requirements. Under this part, RD would be required to:

protect current tenants for a finite period (as determined by Congress and the Administration) from the rent burden that would result from prepayment. For purposes of modeling the level of resources needed, [ICF] used a five-year period of protection for currently assisted tenants to be consistent with pre-2004 Rental Assistance Contract renewals (a 30-month protection period was used for non-assisted tenants). Allowing the market to determine prepayment avoids potential windfalls to owners, and goes beyond the current focus of preventing prepayment with limited resources.⁴¹

The recommendation of minimum rents is one example of how the study not only overlooks the purpose of the program, but how its recommendations could do a severe disservice to low- and very low-income households.

ICF makes these suggestions at a time when there has been no significant new construction of Section 515 housing for a number of years and without suggesting new construction itself.

Assumed Scope of Potential Prepayment Activity

The study states that, of all Section 515 properties, 61% (62% of all units) are pre-1989 properties.⁴² Half of these

could be subject to prepayment now and the rest could prepay once their twenty-year restrictions expire (all by 2009).⁴³ Of 9,698 properties with prepayment potential, approximately 1,648 would be economically viable to prepay (affecting 10.4% of all properties; approximately 46,000 units).⁴⁴ At one of its briefing sessions, ICF commented that its likely prepayment estimate does not include non-economic factors that might cause an owner to seek prepayment.⁴⁵ An owner's desire to sell because of her or his advanced age, or the inheritance of the property by persons without capacity to operate the housing, illustrates how the 10% figure might actually be an underestimate. Although the Government Accountability Office's (GAO) study reported that 24% of the properties stand at risk of prepayment, ICF contends that its bases are not far apart and the firm plans to meet with GAO to discuss figure differences.⁴⁶ Also, the study did not look at prior prepayment factors, markets or motivations of property owners who have already prepaid and withdrawn from the program; nor did it make on-the-ground comparisons to actual comparable housing in the market areas for all of the projects studied.⁴⁷

Limited Tenant Protections

The recommended five-year cap on tenant protections, found in the second part of ICF's proposal, appears to diminish tenant rights upon prepayment without forming an adequate nexus between the recommendation and how tenants will best benefit from the new structure. In the first instance, the placement of a five-year cap for HUD-like enhanced vouchers offers limited protections. Upon inquiry, an ICF team member conceded that the enhanced voucher cap was set without reasoned consideration of tenant needs, but was based upon how much cost the agency should bear.⁴⁸ Although advocates believe that the enhanced vouchers would better protect tenants if prepayment occurs where post-prepayment use restrictions are not required, the recommended cap on their use goes under supported. Second, the study fails to recognize that tenant protections expand beyond mere economic protections. Once a tenant no longer resides in a Section 515

⁴⁰ELIHPA is a federal statute that requires a set of steps that owners and the agency must take before it is determined that prepayment may occur. See 42 U.S.C.A. §§ 1472(c) *et seq.* (West 2003); 7 C.F.R. 965.201 *et seq.* (2003). These steps include agency incentives to owners to stay in the program and determinations about how the prepayment will effect tenants.

⁴¹STUDY, *supra* note 3, at Memo 3. Under the current regulations, in order to prepay, owners whose prepayments will result in tenant displacement often agree to keep rents affordable for *current* tenants for a twenty-year period upon prepayment. 7 C.F.R. § 1965.215(c)(1)(i) (2003). Most of these owners initially rely upon project-based Section 8 subsidies, which are already on certain properties, to help facilitate affordability.

⁴²STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 8. Evaluation of the impact of court decisions was noted to have been outside of the scope of the study. Pre-1989 properties' loans were entered into before December 15, 1989, and are the only ones not fully precluded from prepayment. 42 U.S.C.A. § 1472(c)(1)-(2) (West 2003).

⁴³STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 8.

⁴⁴STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout 9. ICF acknowledges that its 10% estimate differs from the Government Accounting Office's (GAO) May 2002 estimate of 24% of owners with viable prepayment options. See *id.* at Executive Summary 8.

⁴⁵HAC Briefing Session I, *supra* note 7. The report recognizes the fact that non-economic reasons for prepayment exist. STUDY, *supra* note 3, at Market Assessment Report: Limiting Conditions 37 (Owner Entity Dynamics).

⁴⁶HAC Briefing Session I, *supra* note 7.

⁴⁷STUDY, *supra* note 3, at Market Assessment Report: Limiting Conditions 19.

⁴⁸HAC Briefing Session I, *supra* note 7.

property, she or he loses other important rights such as the right to certain grievance procedures and the limitations of good cause evictions.⁴⁹ Third, ICF's suggestion fails to consider how the abandonment of the former Section 515 tenants after the finite period would be consistent with the agency's duty to affirmatively further fair housing under the Fair Housing Act.⁵⁰

The recommended five-year cap on tenant protections appears to diminish tenant rights upon prepayment without forming an adequate nexus between the recommendation and how tenants will best benefit from the new structure.

ICF would make the reader of the study believe that it is dedicated to protecting tenants, but to concentrate on tenant *economic* protections alone (upon prepayment),⁵¹ is to ignore real tenant protections that exist when a property is kept within the Section 515 program. By suggesting the elimination of incentives and other mechanisms that keep properties within the program, ICF would eliminate protections such as good cause eviction and certain grievance procedures.

New Office of Portfolio Revitalization

In the third part of the proposal, which seeks reorganization of the multi-family program, ICF notes that

[t]o meet the challenges of implementing the new functions under the Revitalization Initiative, [it] recommend[s] expanding the Agency's technical expertise, and making organizational changes that provide the Agency the authority, flexibility, and accountability to succeed. [It is] proposing the establishment of an empowered Office of Portfolio Revitalization (OPR), which would be exclusively focused on the existing portfolio. We have broken the entire portfolio into five (5) transaction types and analyzed the resources necessary to address the long-term recapitalization needs. This program envisages a significant role for the State RD offices as well as outside experts.

Many nonprofit, mission driven developers and industry professionals agree that additional expertise is needed

within the agency. But the creation of a new office at the national level, without direct control over state RD offices, will be ineffective. Therefore, the requested authority to create the office, as well as authority over state offices, is imperative.

Recommendations: Additional Authority and Appropriations

In order to effect these five transaction models, ICF sets out policy requests that the agency should seek from Congress. They include:

- debt relief authority
- authority to convert debt to soft loan that claims a share of future cash flow
- permit charging of minimum rents in RHS projects, similar to HUD authority
- capital advances
- more Rental Assistance for use as a last resort and streamlining RA recapture rules
- ability to use RA dollars in a more flexible fashion
- 538 (RD's guaranteed loan program) for revitalization and ability to risk-share/use delegated process with GSEs (government sponsored enterprises) and SHFAs (state housing finance agencies)
- authority to create and funding to independently operate the Office of Portfolio Revitalization for an initial period, such as five years
- authority for new regulatory structure and tools, such as: use agreements, rent setting, owner/manager incentives, monitoring and enforcement, and owner investment requirements
- tenant protection authority, in case of prepayment.⁵²

Although these suggested requests do not reference ELIHPA, they in effect would require the repeal of ELIHPA and the tenant protections that the sixteen-year-old statute secures. Under ICF's proposed transaction models and scheme, the statute's present requirement to first determine whether prepayment would have a material affect on minority housing opportunities before a prepayment may be accepted finds no place. And, it can be concluded that the agency's duty to affirmatively further fair housing, under the Fair Housing Act, finds no place in the recommendations either. In the name of supposedly saving the

⁴⁹7 C.F.R. § 1944.553(f) (West 2003) (evictions); 7 C.F.R. § 1944.554-56 (2003) (grievance and appeal procedures).

⁵⁰42 U.S.C. A. § 3608 (West, WESTLAW, current through P.L. 108-450 approved Dec. 10, 2004).

⁵¹STUDY, *supra* note 3, at, Executive Summary 5.

⁵²STUDY, *supra* note 3, at Executive Briefing Powerpoint Handout, fig. 1 (Authorizations Needed from Congress).

Section 515 program, true tenant protections are woefully absent from the study's overall policy recommendations.

*In the name of supposedly saving the
Section 515 program, true tenant
protections are woefully absent from the
study's overall policy recommendations.*

Conclusion

While ICF recommends a new approach to addressing the study's findings, affordable housing advocates should continue to press current improvement efforts. When, and if, the agency will adopt the recommended program changes calls for speculation. Hardly any of the study's findings about the state of the stock come to a surprise to advocates, who have slowly witnessed the deterioration of the Section 515 housing stock as program budgets have plummeted over the last fifteen years.⁵³ Further, the study's recommendations unnecessarily place true tenant protections at the bottom of the totem pole while forgoing any efforts to maintain the stock within the program and/or maintain tenants under its unique protections.

In the interim, affordable housing advocates should continue to monitor and push for the amendment and support of bipartisan exit tax relief legislation which would provide diminished exposure to capital gains taxes, thereby further motivating owners to transfer assisted properties to preservation entities (nonprofits and public agencies).⁵⁴ Advocates such as the National Rural Housing Coalition⁵⁵ have already been seeking full funding of the Section 515 program and its related Rental Assistance program at levels that help keep owners within the program through timely and effective prepayment incentives⁵⁶ and

increase occupancy through rent subsidies to very-low income residents.⁵⁷ Attention to the agency's regulations and practices should continue in order to ensure that the agency not only complies with program mandates and ELIHPA, but to other legal requirements as well such as the Fair Housing Act and the agency's duty to affirmatively further fair housing.

Nonprofit developers and public agencies should seek opportunities to make preservation purchases before an owner considers applying to prepay. In so doing, these potential purchasers should utilize new tools that might help facilitate purchases by:

- Registering with the state RD's office as an interested organization to receive prepayment notices which may be potential offers of sale⁵⁸
- Examining RD's new Transfer and Assumption administrative notice⁵⁹
- Following up with RD regarding the new Rural Preservation grant and contact nonprofit grantees of the fund who agree to help facilitate deals⁶⁰
- Contacting financial institutions who have shown interest in Section 515 deals and inquiring about their capacity to assist⁶¹

ICF Consulting's charge may have been limited to economic considerations, but many of its recommendations overreach the rationales it presents. As the study states, the Section 515 multifamily stock consists of 434,296 units.⁶² The Rural Rental Housing program provides needed homes to hundreds of thousands of elderly, disabled and low-income residents. Tenant interests are what created the program and those interests should remain at the fore throughout new iterations of the program. Although the Section 515 program needs improvement, it is a program that is worth preserving through both revitalization and the preservation of units within the program. All of these factors should be taken into consideration as the agency determines how it will use the study's information and recommendations. ■

⁵³NHLP, *Kellogg Foundation Issues Report on Rural Development Policy Shortcoming*, 37 HOUS. L. BULL. 199, 207 (2004) (noting evolution of program funding).

⁵⁴Affordable Housing Preservation Tax Relief Act of 2003, H.R. 3485, 108th Cong. (2004). This bill was introduced to the first session of the 108th Congress by Jim Ramstad (R-MN) and Benjamin Cardin (D-MD). The bill addresses a significant portion of the USDA- and HUD-assisted stock that is at risk of being lost as a source of affordable rental units, including both higher-value properties that can be converted to market-rate units, and lower-value properties affected by tax rules that discourage investors from selling or putting new capital into the property. Well-drafted contractual and recorded use restrictions will position purchasers to maintain units as affordable and make necessary physical and management improvements. See NHLP, *Exit Tax Relief Sought by Housing Advocates Begins to Take Shape*, 34 HOUS. L. BULL. 1, 6 (2004).

⁵⁵National Rural Housing Coalition, *Rural Rental Housing Issues Briefing Sheet* (Dec. 2004) (on file with NHLP).

⁵⁶42 U.S.C.A. § 1965(c)(4)(B); 7 C.F.R. § 1965.213 (2003).

⁵⁷42 U.S.C.A. § 1490a (West 2003).

⁵⁸42 U.S.C.A. § 1472(c)(3) (West 2003).

⁵⁹Revitalizing the Multi-Family Housing Portfolio Using Transfers, Assumptions and Other Servicing Authorities, RD Admin. Notice 4010 (1965-B) (Sept. 23, 2004), available at <http://rdinit.usda.gov/regs/an/an4010.pdf>.

⁶⁰Consolidated Appropriations Act, 2005, Pub. L. 108-447, 118 Stat. 2809 (2004).

⁶¹Washington Mutual and Fannie Mae have recently become involved in Section 515 deals.

⁶²STUDY, *supra* note 3, at Memo 1.

Technical Assistance Conference Puts Focus on Preservation

Supported by a technical assistance grant from the Department of Housing and Urban Development (HUD) and the National Bank of Arizona, the Rural Community Assistance Corporation (RCAC)¹ convened affordable housing stakeholders from Nevada and Arizona to learn more about available tools for affordable rental housing preservation. Its December 14-15, 2004, gathering, "Preserving Affordable Rental Housing: Extending Affordability Conference," drew over fifty registrants and participants including nonprofit developers, city and state representatives, housing authorities, technical assistance providers and HUD and Department of Agriculture (USDA) staff members.

Preservation interests focused on a wide variety of assisted housing including projects with USDA-issued loans subject to prepayment, HUD-insured projects subject to opt-outs and Low Income Tax Credit projects with expiring use restrictions. Notably, Arizona attendees left the two-day conference with the intention of creating a state-wide task force which would examine, monitor and address the state's preservation issues. With the assistance of the Housing Preservation Project,² initial steps under consideration include the creation of a state-wide database of all at-risk publicly assisted projects.

RCAC has begun preliminary discussions about replicating the conference in other states within its service area.³ For more information about the conference or similar conferences in other states, contact Eileen Piekarcz at epiekarcz@rcac.org.

¹RCAC is a nonprofit organization that provides training, technical assistance and access to resources to rural communities. RCAC, *RCAC's Mission*, at <http://www.rcac.org/about/mission.html> (undated).

²The Housing Preservation Project (HPP) is a nonprofit public interest law firm formed to preserve existing, privately owned affordable rental housing and to encourage the production of new affordable rental housing. HPP, *Welcome to HPP*, at <http://www.hppinc.org> (2002).

³RCAC operates throughout the western states including: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, New Mexico, Nevada, Oregon, Utah and Washington. RCAC, *Contact Us*, at <http://www.rcac.org/people/contact.html> (undated).

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.

Fair Housing — Administrative Enforcement

Mitchell v. Cellone, 389 F.3d 86 (3rd Cir. 2004). Reversing an order of dismissal for lack of subject matter jurisdiction by the federal district court, the Court of Appeals for the Third Circuit held that the filing of an administrative housing discrimination complaint under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, did not prevent the complainants from pursuing a private lawsuit in federal court. The Third Circuit reached this conclusion despite the fact that the administrative complaint was referred to an analogous state civil rights agency, which had filed an action on the complainants' behalf in state court.

Fair Housing — Harassment; Federal Courts — Private Right of Action

Halprin v. The Prairie Single Family Homes of Dearborn Park Assoc., 388 F.3d 327 (7th Cir. 2004). In this action challenging harassment on the basis of religion by a homeowners' association, the Court of Appeals for the Seventh Circuit concluded, in an opinion by Judge Richard A. Posner, that a HUD regulation prohibiting such harassment, 24 C.F.R. § 100.400(c)(2), was enforceable under the private enforcement provisions of the Fair Housing Act, 42 U.S.C. § 3617, despite the fact that the substantive provisions of the act did not prohibit such conduct.

Grievance Hearings

Whitfield v. Public Hous. Agency of the City of St. Paul, 2004 WL 2801589 (D. Minn. Dec. 7, 2004). Plaintiff public housing resident filed various claims against Defendant public housing authority challenging the termination of her

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

tenancy. Several of Plaintiff's claims were previously dismissed. Granting Defendant's motion for summary judgment on Plaintiff's remaining claim regarding Plaintiff's right to a pre-termination grievance hearing, the federal district court concluded that Plaintiff had, in a prior settlement agreement with Defendant, prospectively waived her statutory grievance rights.

Lead Paint; Federal Courts — Private Right of Action

L.B. III v. Hous. Auth. of Louisville, 345 F. Supp. 2d 725 (W.D. Ky. 2004). Plaintiff minor public housing residents filed suit against Defendant public housing authority alleging, *inter alia*, violations of Lead-Based Paint Poisoning Prevention Act (LPPPA), 42 U.S.C. §§ 4821 *et seq.*, and the Residential Lead-Based Paint Hazard Reduction Act (RLPHRA), 42 U.S.C. §§ 4851 *et seq.*, which Plaintiffs sought to enforce via 42 U.S.C. § 1983. Defendant moved to dismiss these claims. Granting Defendant's motion, the federal district court concluded, *inter alia*, that the LPPPA and RLPHRA did not create federal rights enforceable under § 1983.

Public Housing — Demolition; Fair Housing — Generally; Federal Courts — Private Right of Action

English Woods Civic Assoc./Resident Community Council v. Cincinnati Metropolitan Hous. Auth., 2004 WL 3019505 (S.D. Ohio Dec. 17, 2005). Plaintiff public housing resident organization challenged Defendant public housing authority's occupancy consolidation plan as a de facto demolition in violation of Section 18 of the United States Housing Act, 42 U.S.C. § 1437p, and as racially discriminatory in violation of the federal constitution and fair housing and civil rights laws, 42 U.S.C. §§ 3604, 3608, and 2000d. After trial, the federal district court concluded that Plaintiff had a private right of action to enforce § 1437p, but rejected Plaintiff's de facto demolition theory in light of 1998 amendments to that section. The court also concluded that Plaintiff had not presented sufficient evidence to support its constitutional and civil rights claims. In particular, the court noted that the mere fact that a majority of the persons affected by Defendant's actions were African American was insufficient to show a disparate racial impact. ■

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 December of 2004. 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*,² (3) HUD Clips,³ and (4) HUD,³ and (5) USDA's Rural Development Web page.⁴ Citations are included with each document to help you secure copies.

HUD Federal Register Final Rules

69 Fed. Reg. 70,894 (Dec. 7, 2004) Modification of the Community Development Block Grant Definition for Metropolitan City and Other Conforming Amendments

Summary: This rule makes final the interim Community Development Block Grant (CDBG) program regulations that updated various terminology in CDBG regulations. This rule makes final without change the interim rule published on December 12, 2003.

Effective Date: January 6, 2005.

69 Fed. Reg. 74,894 (Dec. 14, 2004) Distribution of Tax Credit Proceeds

Summary: This rule adopts as final and without change an interim rule that amended HUD's regulations with respect to funding for project completion. The regulatory change allows the proceeds from syndication of low-income housing tax credits and historic tax credits to be treated in the same manner as loan or grant funding provided through federal, state or local government agencies.

Effective Date: January 13, 2005.

¹At http://www.access.gpo.gov/su_docs.

²At <http://www.hudclips.org/cgi/index.cgi>.

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

⁴At <http://www.rdinit.usda.gov/regs>.

HUD Federal Register Interim Rules

69 Fed. Reg. 75,802 (Dec. 17, 2004)

Revisions to FHA Credit Watch Termination Initiative

Summary: On April 1, 2003, HUD published a proposed rule to amend the regulations for the Federal Housing Administration (FHA) Credit Watch Termination Initiative. Specifically, HUD proposed to provide for a fully computerized Credit Watch status notification process through use of the FHA Neighborhood Watch Early Warning System; remove the regulatory "cap" on the default and claim rates for placing a mortgagee on Credit Watch status; prohibit a mortgagee that has received a notice of proposed termination from establishing a new branch in the lending area covered by the proposed termination; provide that the default and claim thresholds underlying the Credit Watch Termination Initiative apply to both underwriting and originating mortgagees; codify the definition of "underserved area" that is currently used under the Credit Watch Termination Initiative; provide that 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; specify the timeframes for the informal conference that may be requested by a mortgagee prior to termination; and describe the procedures a terminated mortgagee must follow to have its origination approval agreement reinstated. This interim rule follows publication of the April 1, 2003, proposed rule, and takes into consideration the public comments on the proposed rule. In addition, this rule further clarifies the applicability of the Credit Watch Termination Initiative to underwriting mortgagees, and requests comments on the regulatory provisions regarding underwriting mortgagees.

Effective Date: January 18, 2005.

Comments Due Date: February 15, 2005.

69 Fed. Reg. 77,114 (Dec. 23, 2004)

Prohibition of Property Flipping in HUD's Single Family Mortgage Insurance Programs; Additional Exceptions to Time Restriction on Sales

Summary: HUD's regulations addressing the predatory practice of property "flipping" establish certain time restrictions regarding the sale of properties whose purchase is being financed with Federal Housing Administration (FHA) mortgage insurance. The regulations include an exception from the time restrictions for properties acquired and subsequently sold by FHA. This interim rule broadens the exception to include all other federal agencies that acquire properties as a result of a function of their programs and quickly market and sell these acquired properties. The interim rule also clarifies that the time restrictions on sales do not apply to properties that are acquired by inheritance.

Effective Date: January 24, 2005.

Comment Due Date: February 22, 2005.

HUD Federal Register Proposed Rules

69 Fed. Reg. 70,016 (Dec. 1, 2004)

Manufactured Home Construction and Safety Standards

Summary: This proposed rule would amend the Federal Manufactured Home Construction and Safety Standards by adopting recommendations made to HUD by the Manufactured Housing Consensus Committee.

Comment Due Date: January 31, 2005.

69 Fed. Reg. 70,868 (Dec. 7, 2004)

Office of Inspector General (OIG) Subpoenas and Production in Response to Subpoenas or Demands of Courts or Other Authorities

Summary: This proposed rule would amend HUD's Office of Inspector General's (OIG's) regulations to provide an appellate review procedure regarding the OIG's responses to subpoenas issued to OIG employees requesting documents or testimony in legal proceedings where the OIG is not a party. The establishment of an appellate proceeding is designed to ensure both a thorough review process by the OIG and a complete opportunity for a party or person to take formal exception to the OIG's determination.

Comment Due Date: February 7, 2005.

69 Fed. Reg. 73,300 (Dec. 13, 2004)

Semiannual Regulatory Agenda

Summary: In accordance with Section 4(b) of Executive Order 12866, "Regulatory Planning and Review," as amended, HUD is publishing its agenda of regulations already issued or that are expected to be issued during 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.

69 Fed. Reg. 75,188 (Dec. 15, 2004)

Demolition or Disposition of Public Housing Projects

Summary: This proposed rule revises HUD's regulations governing demolition or disposition of public housing projects. This rule establishes the general and specific requirements for HUD approval of demolition or disposition applications, relocation of residents, resident participation in the form of consultation and opportunity to purchase a public housing project, the replacement of units, and a new authority for a public housing agency to demolish a small number of its units without a formal application under certain circumstances, referred to as "de minimis" demolition. This proposed rule seeks comments on these provisions as well as any other provision of this proposed rule.

Comment Due Date: February 14, 2005.

69 Fed. Reg. 78,830 (Dec. 30, 2004)
Revisions and Updates To Consolidated Plan

Summary: This proposed rule would amend the consolidated plan regulations of state and local governments to make clarifying and streamlining changes that are expected to make the consolidated plan of state and local jurisdictions more results-oriented and useful to communities in assessing their own progress toward addressing the problems of low-income areas. The consolidated plan is the document that is submitted to HUD by jurisdictions that receive funding under any of HUD's Community Planning and Development formula grant programs and serves as the jurisdiction's planning document for the use of the funds received under these programs. The proposed rule would eliminate some obsolete and redundant provisions and make other changes that would conform the consolidated plan regulations with HUD's public housing regulations that govern the Public Housing Agency Plan.

Comment Due Date: January 31, 2005.

HUD Federal Register Notices

69 Fed. Reg. 70,276 (Dec. 3, 2004)
The Performance Review Board

Summary: The Department of Housing and Urban Development announces the appointment of Deputy Secretary Roy A. Bernardi as Chairperson of the Performance Review Board. The address is: Department of Housing and Urban Development, Washington, DC 20410-0001.

69 Fed. Reg. 75,418 (Dec. 16, 2004)
Emergency Capital Repair Grants for Multifamily Housing Projects Designated for Occupancy by the Elderly

Summary: This notice announces the availability of up to \$10 million in grant funds to make emergency capital repairs to eligible multifamily projects that are owned by private nonprofit entities and designated for occupancy by elderly tenants. The capital repair needs must relate to items that present an immediate threat to the health, safety, and quality of life of the tenants. The intent of these grants is to provide onetime assistance for emergency items that could not be absorbed within the project's operating budget, and where the tenants' continued occupancy in the immediate future would be called into question by a delay in initiating the proposed cure. The notice provides instructions for owners to request the funding and instructions for the HUD field offices to process the request.

Effective Date: December 16, 2004.

69 Fed. Reg. 76,001 (Dec. 20, 2004)
Announcement of Funding Awards for Fiscal Year 2004 Community Outreach Partnership Centers

Summary: This document identifies the institutions selected for funding under the Fiscal Year 2004 Community Outreach Partnerships Centers (COPC) Program. The COPC program provides funds to two- and four-year

colleges and universities to establish and operate COPCs that will: (1) Conduct competent and qualified research and investigation on theoretical or practical problems in large and small cities; and (2) facilitate partnerships and outreach activities among institutions of higher education, local communities, and local governments to address urban problems.

69 Fed. Reg. 77,768 (Dec. 28, 2004)
Notice of Proposed Information Collection for Public Comment: The Voucher Homeownership Survey

Summary: The proposed information collection requirement described below will be submitted to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal. This request is for the clearance of a survey instrument designed to provide a broad, statistically accurate picture of the program and how it operates nationwide. This survey would be based on a sample of 350 PHAs that have implemented the Voucher Homeownership Program. The purpose of the survey is to: (1) provide an accurate, but general, picture of the program's implementation nationwide and (2) help the Department identify the operational characteristics that contribute to the success of a voucher homeownership program and use the resulting detailed analysis of those operational characteristics to further improve the program.

69 Fed. Reg. 78,040 (Dec. 29, 2004)
Emergency Capital Repair Grants for Multifamily Housing Projects Designated for Occupancy by the Elderly; Supplemental Notice

Summary: On December 16, 2004, HUD published a notice announcing the availability of up to \$10 million in grant funds to make emergency capital repairs to eligible multifamily projects that are owned by private nonprofit entities and designated for occupancy by elderly tenants. The December 16, 2004, notice provides instructions for owners to request the funding and instructions for the HUD field offices to process the request. This notice supplements the December 16, 2004, notice by providing additional information regarding the information collection requirements contained in that notice and republishes Appendix 1, the Rental Use Agreement.

69 Fed. Reg. 78,100 (Dec. 29, 2004)
Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants Fiscal Year 2004; Correction

Summary: On November 3, 2004, HUD published the Notice of Funding Availability (NOFA) for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization and Demolition Grants for Fiscal Year 2004. This notice announces several corrections to the NOFA.

HUD Housing Notice

Notice H 2004-25 (Dec. 17, 2004)

Reinstatement/Extension of Notice H03-23 Office of Management and Budget Mandated Reporting Changes to Race and Ethnicity Categories

Summary: Notice H 03-23, issued November 13, 2003, is being reinstated and extended to December 31, 2005.

Expires: December 31, 2005.

RHS Federal Register Rules

69 Fed. Reg. 75,454 (Dec. 17, 2004)

Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs

Summary: The Rural Housing Service is correcting an interim final rule published on November 26, 2004, (69 FR 69032-69176). This action is taken to correct an error regarding the comment period and effective date of the rule as stated in the preamble.

Effective Date: November 26, 2004.

69 Fed. Reg. 77,609 (Dec. 28, 2004)

Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs

Summary: The comment period for the interim final rule is being extended an additional thirty days from December 27, 2004, in order to provide opportunities for further comment on this rule and its criteria. This interim final rule was published in the Federal Register on November 26, 2004 (69 FR 69032).

Dates: Comments on the interim final rule must be received on or before January 26, 2005, to be assured of consideration.

RHS Administrative Notices

RD AN No. 4025 (1980-D) (Nov. 30, 2004)

Single Family Housing Guaranteed Loan Program Loss Mitigation Clarification of Policy

Summary: This Administrative Notice reiterates the policies concerning loss mitigation actions in the USDA Rural Development single family housing guaranteed loan program. An attached guide describes loss mitigation options, the circumstances for their use, and the situations in which each option may be appropriate. It is intended for use by lenders who service USDA Rural Development-guaranteed home loans, and for the Agency's field office staff who may be asked to give guidance to lenders and borrowers. Lenders are encouraged to use the guide as a reference when considering loss mitigation options for USDA Rural Development-guaranteed home loan borrowers. Agency staff should use it when considering the appropriateness of a lender's loss mitigation options.

Expiration Date: November 30, 2005.

RD AN No. 4026 (1980-D) (Dec. 2, 2004)

Single Family Housing Guaranteed Loan Program Refinancing of Single Family Housing Guaranteed Loans

Summary: This Administrative Notice renews instructions to field staff involved in the Guaranteed Rural Housing (GRH) loan program of the process used to refinance existing GRH loans.

Expiration Date: December 31, 2005.

RD AN No. 4027 (1980-D) (Dec. 2, 2004)

Single Family Housing Guaranteed Loan Program Refinancing of Section 502 Direct Loans with Section 502 Guaranteed Loans

Summary: This Administrative Notice renews instructions to field staff involved in the Guaranteed Rural Housing (GRH) loan program of the process used to refinance Direct loans to GRH loans.

Expiration Date: December 31, 2005.

RD AN No. 4036 (1965-B) (Dec. 28, 2004)

Revitalizing the Multi-Family Housing (MFH) Portfolio Demonstration of New Revitalization Concepts

Summary: This Administrative Notice announces that the Rural Housing Service is seeking participants to demonstrate the viability of the revitalization concepts of the MFH Comprehensive Property Assessment and Portfolio Analysis recently released and available online at <http://www.rurdev.usda.gov/rhs>. The goal is to revitalize a selected group of Rural Rental Housing (RRH) properties using debt relief or deferral, small capital advances or soft loans, and funds provided by third parties. The intent is that the revitalization will not rely on additional rental assistance or rent increases. As a result of the transactions, owners may receive a new regulatory agreement emphasizing performance-based returns. The results of the demonstration will help shape the Agency's future MFH revitalization efforts.

Expiration: January 31, 2005. ■

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