

AFFORDABLE HOUSING HUD REGULATORY POLICY PRIORITIES 2009

NAHMA will work closely with the new Obama Administration to address the major challenges to developing and preserving quality affordable multifamily housing. To that end, NAHMA has compiled a list of affordable multifamily housing policy priorities which we believe are necessary to restore owners' confidence in federal housing programs, streamline administration of the programs, and increase the choices of affordable communities of quality for low-income Americans. These priorities include:

1. Ensuring full funding and timely payment of project-based Section 8 housing assistance payment (HAP) contracts.
2. Obtaining relief across the affordable portfolio for escalating utility/operating costs.
3. Obtaining clarity and consistency in application of HUD's previous participation certification process.
4. Obtaining clarity and consistency in REAC inspections, protocol and scoring.
5. Ensuring HUD's policies regulating management agents do not discourage companies from providing 401(k) retirement benefits to on-site management staff.
6. Improving HUD's regulations and procedures for assuring proper income determinations.
7. Improving the performance-based contract administration program, including the transparency, fairness and processes for conducting management occupancy reviews.
8. Ensuring Federal agencies allow appropriate public review and comment prior to issuance of new guidelines, policies, guidance or handbook changes, etc. that impact affordable housing.
9. Ensuring HUD's use of appropriations designated to provide services and translated documents for persons with limited English proficiency is consistent with the congressional intent.
10. Advancing an interagency working group with stakeholder participation to identify and resolve major regulatory conflicts for mixed subsidy properties.

Please find more detailed descriptions of each NAHMA priority attached.

1. Ensuring full funding and timely payment of project-based Section 8 housing assistance payment (HAP) contracts.

Shortfalls in the project-based Section 8 program have had two immediate impacts on the day-to-day operations of affordable properties: late subsidy payments to owners and “incremental” or partial funding of the housing assistance payment (HAP) subsidy contracts. The detrimental effects of unreliable funding compromised housing providers’ ability to manage properties effectively, diminished confidence in the federal commitment to the program, and wasted administrative time for the HUD staff who had to reprocess the funding several times for the same contract.

Congress has taken decisive action to fully fund the 12-month terms of project-based Section 8 contract renewals. The American Recovery and Reinvestment Act (HR 1, PL 111-5) directed \$2 billion specifically to help fund the 12-month terms of project-based Section 8 contracts. Likewise, the FY 09 Omnibus Appropriations Act (HR 1105, PL 111-8) provided \$6.87 billion for contract renewals, plus \$400 million in advanced appropriations for FY 2010.

President Obama’s FY 2010 budget proposes to preserve 1.3 million affordable rental units through a \$1 billion funding increase over FY 09 appropriations for the project-based Section 8 program. NAHMA welcomed language in the HUD budget summary which states, “Annual renewal funding should be predictable, timely, and sufficient to fund rental contracts for a full 12 months, a sharp contrast to the short funding of contracts that occurred in recent years.” Based on NAHMA’s conversations with Senate and House Appropriations staff, we feel very optimistic that they will provide full 12-month funding for contract renewals in the FY 2010 THUD appropriations bills.

Having made a commitment to fully fund HAP contracts, HUD should also concentrate on streamlining its regulatory processes to provide more timely obligations of project-based Section 8 funds for contract renewals. In November 2005, the U.S. Government Accountability Office (GAO) released its report, “Project-Based Rental Assistance HUD Should Streamline Its Processes to Ensure Timely Housing Assistance Payments.” GAO recommended that HUD implement three major initiatives to address the late payment problem:

- “Streamline and automate the contract renewal process to prevent processing errors and delays and eliminate paper/hard copy requirements to the extent practicable;”
- “Develop systematic means to better estimate the amounts that should be allocated and obligated to project-based housing assistance payment contracts each year, monitor the ongoing funding needs of each contract, and ensure additional funds are promptly obligated to contracts when necessary to prevent payment delays;” and
- “Notify owners if their monthly housing assistance payments will be late and include in such notifications the date by which HUD expects to make the monthly payment to the owner.”

The contract renewal process is especially cumbersome. It is a paper-intensive process which begins four months (120 days) prior to the contract expirations. Rather than simplifying the contract renewal procedures, HUD has further added to the paperwork burden, for example, by requiring the contract administrator’s signature. We strongly urge HUD to review its own contract renewal procedures in order to streamline and simplify the process.

Likewise, it is essential that the Department review its own financial management and internal controls to ensure project-based Section 8 subsidies are paid to owners as quickly as possible. NAHMA is aware that it can take several weeks (or longer) to move appropriations from the Office of Management and Budget to HUD and then through the HUBs, to the contract administrators, and finally to the owners. Our members have experienced many occasions in which HAP payments were late as appropriations worked their way through the Administration.

Finally, HUD must improve its procedures to ensure timely completion of the Mark-Up-To-Market process. Properties most at risk of opting-out are those with below-market rents in desirable neighborhoods.

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Nevertheless, NAHMA has received reports from several members that the Mark-Up-To-Market process can drag out for months or more than a year. In another case, a local HUD office incorrectly advised a management agent that a property was not eligible for the Mark-Up-To-Market program. Worse still, members reported that they have had to fight local HUD offices for the full amount of the Mark-Up-To-Market rent increases that they were denied because of processing delays which were actually caused by HUD or the contract administrator. While these particular Mark-Up-To-Market problems have been resolved, we believe HUD must place a much greater emphasis on training local staff and contract administrators to avoid a recurrence in the future.

NAHMA is requesting that HUD:

- Carefully monitor the timeliness of project-based Section 8 HAP payments;
- Request sufficient appropriations in all future budgets to fully fund the 12-month HAP contracts at the time of renewal;
- Implement the GAO recommendations for improving the timeliness of HAP payments;
- Examine its financial management procedures and internal controls to ensure project-based Section 8 appropriations are obligated and distributed to owners as HAP payments as quickly as possible; and
- Ensure timely completion of the Mark-Up-To-Market process.

2. Obtaining relief across the affordable portfolio for escalating utility/operating costs.

Because of its relationship to long-term sustainability of properties preserved under the Multifamily Assisted Housing Reform and Affordability Act (MAHRA), and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRA) programs, an insufficient OCAF is extremely problematic. Two key concerns of affordable multifamily housing operators are that restricted rents in affordable properties are not keeping pace with operating costs, and that HUD lacks a mechanism to help properties offset unforeseen cost increases between rent adjustments.

The major OCAF criticisms prior to FY 08 were they took too long to calculate and were obsolete by the time they were released. Unfortunately, HUD took the OCAF in a very questionable direction for FY 2008. HUD abandoned the nine price indices used to develop OCAFs and replaced them with state-level data derived from changes in operating expenses reported by properties filing Annual Financial Statement (AFS) data. HUD explained,

“HUD calculated the average, per unit, change in operating costs (excluding debt service and bad debt expense), by state, for all projects submitting consecutive valid financial statement reports with Fiscal Year end dates between July 31, 2005 and July 31, 2007. The projects comprise all multifamily properties excluding nursing homes and hospitals. Furthermore, data for projects with unusually high or low expenses due to unusual circumstances were deleted from the analysis. These changes in actual operating costs experienced by properties within HUD's portfolio have become the FY 2008 OCAFs.”¹

Basing OCAFs on past expenditures bears no relation to current or future funding needs. This methodology does not even necessarily reflect a property's true costs in the past. It only reflects what the property was able to spend. It is unrealistic and short-sighted for HUD to expect owners to maintain affordable, financially sound properties when the lack of meaningful rent adjustments threaten to cash-starve the projects in the long-term.

Worse still, there is no mechanism to help properties offset unforeseen cost increases between rent adjustments. Many properties have had to absorb substantial, unforeseen and unbudgeted expenses due to increases in utility and other operating costs. Cuts in municipal budgets have also resulted in operating increases for properties when the owners must pay for services the local government will no longer provide free of charge.

In August 2006, a coalition of affordable multifamily housing industry trade groups developed the Recognized Increased Cost (RIC) proposal. The RIC plan would provide *real time*, mid-cycle relief for unforeseen operating costs between rent increases. Properties whose rents are approved by HUD (which include Section 515 rural housing with project-based Section 8) would be eligible for RIC loans. It assumes that owners will borrow against future higher rents based on the recognized cost increase. Sources for RIC loans would include residual receipts, replacement reserves, forgoing deposits to replacement reserves, or other sources such as owner affiliates.

Such an approach has three regulatory consequences:

- At the next rent increase, the property's baseline rents would be increased by the RIC, as a starting point for processing the next rent increase (budget-based, OCAF, AAF, or otherwise);
- Similarly, the property's 'comparable market rents' would likewise be presumed to have risen by the RIC; and
- Owners who borrow funds to cover shortfalls between application and the post-RIC rent increase would have the debt service on that borrowing (a "RIC Loan") recognized as a project expense.

The RIC loans could be used to offset unforeseen cost increases related to:

¹ Notice of Certain Operating Cost Adjustment Factors for 2008, *Federal Register* Vol. 72, No. 206, Thursday October 25, 2007, pg. 60689.

- Higher charges for utilities, insurance, property taxes, labor, supplies, equipment, and regulatory requirements;
- Unreimbursed losses from natural disasters; and
- Other costs the Secretary may approve (subject to limitations).

To date, HUD has declined to implement this proposal. NAHMA is seeking a legislative change to enact the RIC proposal, but in the meantime, we request that HUD reconsider its decision.

NAHMA is asking HUD to:

- Revisit its method for determining the OCAF, with emphasis on timely application and an accurate representation of operating cost increases; and
- Reconsider implementing the RIC proposal, or a comparable mechanism, to provide mid-cycle rent adjustments for unforeseen cost increases.

3. Obtaining clarity and consistency in application of HUD's previous participation certification process.

The purpose of the Previous Participation Certification process (also known as the 2530 process) is to ensure that prospective participants in HUD's multifamily housing programs have a history of carrying out their past financial, legal, and administrative obligations in a satisfactory and timely manner. The current system requires HUD's business partners that want to participate in multifamily housing programs to submit Previous Participation Certifications every time they wish to do business with HUD. HUD analyzes the applicant's record to ensure it reflects an acceptable risk to the public interest. Although the process is intended as a "risk-assessment" tool for HUD, in practice, failure to receive timely 2530 approval precludes applicants from taking on new HUD-related property ownership or management opportunities.

HUD requires previous participation certifications to be submitted electronically through its Active Partners Performance System (APPS), although an option to submit paper 2530 certification forms still exists in the short-term (until HUD submits a revised 2530 regulation for congressional review). APPS allows HUD's business partners to manage their company and individual participation information and to submit electronic certifications to HUD via the Internet. The system also allows owners and management agents to see "flags" placed on their records for regulatory noncompliance.

NAHMA members report problems with both the policy and technical aspects of this process. Among these problems are:

- Excessive processing time (often more than a month) on HUD's part;
- Lack of transparency in policy and procedures;
- Inconsistency among field offices on flag placement, flag removal and certification processing;
- Need for additional APPS training for HUD field staff; and
- Inaccurate information in HUD databases.

By far, the most common previous participation complaints NAHMA hears from property owners and management agents involve flags. Our members report considerable difficulty in having flags removed, even after the noncompliance event has been cured. A major source of frustration originates from conflicts caused by one field office placing a flag on a property which prevents a company from acquiring new business in another HUD field office jurisdiction. Proceedings will be stopped, and the certification will be returned to the applicant. The applicant will then have to resubmit, deal with the different field offices and will often need to involve HUD headquarters. This is time consuming, administratively burdensome, and jeopardizes new business for the company. "Inherited flags" are also difficult to remove. For example, when a new management company takes over a property, it may inherit the flags for the property which resulted from the previous management's actions. Also, flags associated with dead people and former employees continue to show, even after the management agent updates the 2530 information to remove the deceased or a former employee. It is particularly frustrating to agents with very large portfolios that a single flag on a property can jeopardize new business for a company that manages hundreds of other properties with good management reviews and REAC scores; these agents feel they are unfairly stigmatized by a flag that does not reflect the true quality of their management portfolios.

NAHMA members feel strongly that these factors cause unreasonable and unnecessary delays in 2530 processing. Prompt turn-around is essential since agents will lose business if the process drags out.

NAHMA believes that these problems can be solved. We request that the new HUD leadership:

- Place a high priority on publishing a workable, updated revision of the previous participation regulations;
 - Transparent regulations can eliminate many inconsistencies among field offices in processing certifications and removing flags; and
- Meet regularly with industry stakeholders to identify technical difficulties as well as areas of possible improvement to make the APPS system more user-friendly.

4. Obtaining clarity and consistency in REAC inspections, protocol and scoring.

The Real Estate Assessment Center (REAC) is responsible for assessing the physical and financial condition of all public housing and multifamily housing projects assisted by the Department. Overall, REAC has been successful as an independent evaluation tool for the HUD portfolio. The most recent physical inspection scores confirm that the majority of HUD's multifamily inventory is in good condition.

Nevertheless, there is room for improvement in the inspection process. NAHMA has raised specific concerns about the process with REAC and Housing staff on a number of occasions. Although we would prefer that HUD address our concerns through normal regulatory procedures, we are also seeking legislative relief.

NAHMA strongly believes the REAC physical inspection process should be improved in the following areas:

- **Improving the predictability in scheduling of inspections.** It is essential for REAC to set a mutually agreeable inspection date with the owner or property agent, especially when rescheduling is necessary due to emergencies or rehabilitation.
- **Providing much needed transparency and consistency in REAC policies.** Management agents and owners have become incredibly frustrated by the inability of HUD's Office of Housing and REAC to find consensus on policies that affect REAC scoring.
 - It is especially frustrating to lose points on REAC inspections for an uncovered elevator control box (which the manufacturer designed without a cover) when they are located in locked rooms. For some members, this single deficiency has resulted in up to a 16 point deduction. Several industry groups have requested that HUD find a solution to this problem, but months after discussions began, REAC and Housing have not released a finalized agreement. Going forward, procedures must be developed to inform the industry more quickly about policy changes which affect the owner/agent's ability to keep properties in compliance.
 - When the Office of Housing sends policy directives to REAC and does not share them with property owners and agents, the result is further confusion about the owner/agents' rights, responsibilities and how to remain in compliance. NAHMA believes the Office of Management and Budget's "Final Bulletin for Agency Good Guidance Practices" provides a useful framework that HUD's Office of Housing, Office of Public and Indian Housing, and REAC should use as the *minimum* requirements for agency transparency. Many REAC policies that affect regulatory compliance will fall below the \$100 million economic impact threshold. Similarly, internal agency communications or internal policy interpretations that affect regulatory compliance should be publicly disclosed.
- **Offering greater assurance of professional, qualified REAC inspectors.** REAC inspectors are contractors who act on behalf of HUD. It is in the best interest of the Department, the affordable properties and the residents to have knowledgeable, professional inspectors. For these reasons, NAHMA is requesting:
 - Stronger insurance coverage requirements.
 - Certificate of Insurance (COI) naming the property as an additional named insured. There have been instances where REAC inspectors caused significant damage to HUD-assisted properties (e.g. left a gas burner on and caused a fire). To protect the HUD portfolio, we are seeking a requirement that all REAC inspectors produce a COI naming the property as an additional named insured, upon request of the property owner or agent. This requirement is necessary to protect HUD-assisted properties from having to absorb expenses for damage caused by a contractor acting on HUD's behalf. In 2006, a series of e-mails circulated between REAC and Housing which seemed to indicate support for such a requirement. Unfortunately, because HUD failed to implement the policy as a business rule, some inspectors refuse O/A requests for COIs naming the property as an additional insured.
 - Minimum insurance coverage. NAHMA also proposes to increase REAC inspectors' required minimum insurance coverage to \$2 million before they are permitted to conduct inspections. We appreciate that REAC recently raised the minimum insurance

requirement to \$1 million. Nevertheless we believe \$2 million is more appropriate in the event that it is necessary to compensate the owner for damages caused by the inspector.

- Stricter conflict of interest standards for inspectors. We are requesting that HUD prohibit inspectors from offering or performing pre-inspection consultations and actual REAC inspections in the same state or HUD field office jurisdiction.

- **Streamlining the inspection and appeals processes.** Appealing a REAC score can be time consuming and labor intensive. NAHMA members report that their properties continue to be cited in REAC inspections for deficiencies that were successfully appealed. We understand that future REAC software will allow database adjustments to be recorded in the master system. At this time, however, the burden is on the owner/agent to contact REAC and request a “pre-database adjustment” on items they have successfully appealed. NAHMA has asked for legislation requiring REAC to make a permanent correction in its records when an owner or PHA has successfully appealed a database adjustment request so that the non-deficiency is no longer cited and will not affect the score. We have also asked Congress to provide funding for REAC’s information system in order to comply with our requested mandate.

- **Minimizing the burden of the inspection process on owners, management agents, and residents.** The property owner or his agent is required to accompany the REAC inspector during the inspection. We are seeking legislative language requiring inspectors to make their best efforts to complete inspections in one business day and during the property’s normal business hours. Since a sample of tenants’ apartments will also be inspected, REAC should be required to schedule the inspection on a day that allows at least 14 days advanced notice to the residents.

- **Allowing for a more accurate reflection of the property’s condition in the REAC score.** NAHMA strongly believes there is room for common sense in the inspection process. Many owners and agents recall instances where points were deducted on their REAC scores for deficiencies that were being repaired while the inspection was underway. One of our proposed changes would require inspectors to include written observations for cited deficiencies and to indicate if active repairs were underway during the inspection.

5. Ensuring HUD's policies regulating management agents do not discourage companies from providing 401(k) retirement benefits to on-site management staff.

NAHMA is concerned that HUD's prohibition on pro-rating 401(K) benefit expenses among the properties served by rotating or office staff (who are providing front-line services to the properties) conflicts with requirements of the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). HUD's policy jeopardizes the retirement benefits of front-line management staff. It also undermines management companies' ability to attract and retain professional, experienced front line managers.

It is standard industry practice to use rotating and/or to use central office staff to conduct front line duties. While the compensation of these workers is an eligible project expense, HUD has taken the position that any pension benefits paid to the retirement accounts for front line worker working less than 20 hours at a single HUD community is an in-eligible project expense. HUD's narrow position would affect the reimbursement to the managing agent for all rotating staff or staff working at the central office conducting front-line duties if any worker has less than 20 hours per week charged to a HUD project.

The HUD requirements regarding the retirement plan qualifications of rotating employees are found in the Management Agent Handbook 4381.5 REV-2 at Section 6.38(e)(2)(b), which provides:

"Only permanent, front-line employees who work full-time at the project (i.e. more than 20 hours per week) may participate. Temporary or part-time on-site employees are not eligible. Also, rotating employees working at more than one project are not eligible unless they qualify as a full-time employee at one project.

Note: The definition of full-time employment must be consistent with federal and state law definitions of full-time employment, however in no event can it be less than 20 hours per week."

The HUD requirement conflicts with the minimum participation and benefit accrual provisions of ERISA and the IRC. It also creates inequities for entities that manage multiple HUD properties. The rotating management staff are not employed by or paid by the single-asset entities that own the individual HUD-assisted properties. They are full-time employees of the management company. ERISA sections 202 and 204, and IRC section 410(a) require an employer to count total hours of service for eligibility to participate in the plan and to receive employer contributions. Therefore, it is imperative that HUD modify its Handbook to permit hours worked by a rotating employee at all projects to be aggregated for purposes of determining whether the rotating employee is a full-time employee.

Any employer that sponsors a qualified retirement plan is subject to the mandatory requirements of ERISA section 202 and Code section 410(a). This means that an employer must allow any employee who attains age 21 and completes a minimum of 1,000 hours of service to participate in the retirement plan. This also means that the employer, in computing whether an individual has completed 1,000 hours of service, must take into account all hours of service that the employee completes for the employer, regardless of whether the hours of service are completed at one project and regardless of whether the hours of service are completed for a particular profit center, division or subsidiary of the employer.

The Handbook requirement that a rotating employee must qualify as a full-time employee at one project ignores the ERISA and IRC instructions as to how an employer must determine whether an individual completes 1,000 hours of service. Both ERISA and the IRC require the employer to take into account all hours of service completed for the employer on a controlled group basis, regardless of where the hours of service are completed, in determining whether the individual is entitled to participate in the retirement plan.

If a HUD-regulated management company wanted to revise the eligibility provisions of its retirement plan so that only individuals who perform 20 or more hours of service with a single property are permitted to participate in the plan, it would not be permitted to do so. The provisions in ERISA and the IRC are clear that an employer must take into account all hours completed for the employer. A management company can not structure its retirement plan in the way HUD requires (for the rotating employee's retirement contribution to be

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an eligible project expense) without running afoul of ERISA. Ironically, by ignoring the ERISA and IRC requirements that prescribe “how” an employer must calculate hours of service for participating in a retirement plan, HUD violates its own handbook requirement that, “definition of full-time employment must be consistent with applicable federal and state law definitions of full-time employment.”

HUD’s policy that a rotating employee must qualify as a full-time employee at one project also ignores the requirements of ERISA section 204, and IRC sections 411(b)(4) and 414(s), which require an employer to base the employer contribution on all hours of service and compensation earned with the employer on a controlled group basis. For purposes of determining the amount of employer contribution that should be allocated to a rotating employee, the employer is not permitted to ignore the total hours of service and compensation earned by a rotating employee--regardless of whether such hours of service were earned at more than one project.

Accordingly, if a HUD-regulated management company wanted to revise the benefit formula of its retirement plan so that an individual would only receive an employer contribution under the plan if the individual performs more than 20 hours of service with a single property, and further, that the retirement contribution would only be based on the hours of service and compensation associated with the single property, the management company would not be permitted to do so under Federal law. Such a restriction in the benefit formula would cause the retirement plan to violate both ERISA and the IRC, which clearly state that an employer must take into account all hours of service performed by the rotating employee for the employer.

In the interest of conforming HUD policies to federal laws governing retirement benefits, providing retirement security for front-line management staff, and providing sound management on HUD properties by enabling managers to attract and retain knowledgeable, qualified staff, NAHMA is asking HUD to:

- Permit the hours worked by a rotating employee at all projects to be aggregated for purposes of determining whether the rotating employee is a full-time employee; and
- Immediately revise Section 6.38(e)(2)(b) of the Management Agent Handbook to eliminate existing conflicts with ERISA and the Internal Revenue Code, and make the changes retroactive to 2004.
 - Section 6.38(e)(2)(b) of the Handbook should be revised to read as follows:
“Front-line employees who work 20 or more hours per week may participate. This includes rotating employees who work at more than one project so long as their aggregate hours per week across all projects equal 20 or more hours.”

6. Improving HUD's regulations and procedures for assuring proper income determinations.

NAHMA shares HUD's goal to ensure that the proper amount of rental assistance is received by eligible families. We have made suggestions to improve the recent income and rent determination rule. Our members have also expressed interest in exploring alternative rent structures.

In public comments, NAHMA urged HUD to delay the effective date of the final rule, "Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs (Docket No. FR-4998-N-03)," by *at least* 60 days to allow for an appropriate review by the new Administration. Our organization identified specific areas of concern related to the definition of annual income and providing assistance to immigrant families. Furthermore, NAHMA strongly urged the new Administration to indefinitely postpone the *mandatory* use of the Enterprise Income Verification (EIV) System in assisted multifamily housing until the difficulties accessing the system have been resolved and until other federal agencies (Rural Housing Service and Internal Revenue Service) whose housing programs are commonly used with HUD rental assistance receive access to the interagency databases in EIV. The effective date of the final rule is currently January 31, 2010.

NAHMA urges the Department to revise the definition of annual income. The final rule indicates that annual income will be determined in two ways. The first method is to project the actual income received forward for twelve months. The second way is to use past actual income received or earned within the last 12 months of determination date. NAHMA members were unclear about when they should "project-forward" the tenant/applicant's current income or "look back" at past income received. Without further clarification, the final rule will create unnecessary confusion about which method to use. If HUD implements the new definition, it should provide housing operators with specific instructions which explain when to project the tenant's income forward and when to use the tenant's historical past income. It should be noted, however, that the historical income is more compatible with the EIV data at the time of recertification.

The requirement for owners/agents to verify citizenship or eligible immigrant status is another area of concern. We believe more specific instructions about which documents will be considered acceptable verification should be written into the rule. At the very least, a list of acceptable verification documents should be included in supplemental guidance and released concurrently with a revised final rule.

NAHMA also urges HUD to revise the final rule to specify social security numbers are not required from individuals in mixed families who do not claim eligible immigration status. We believe revising the actual regulation is the most likely administrative procedure to ensure proper benefits are received by eligible families. To that end, we recommend that HUD publish additional clear-cut guidance with specific examples that demonstrate how these regulations apply to applicants and current residents. In addition, NAHMA also requests specific instructions about which documents will be considered acceptable verification of citizenship or immigration status. Ideally, HUD should publish the guidance concurrently with any revisions to the final rule.

The EIV system gives owners, management agents and performance-based contract administrators access to the Health and Human Services new hires database, unemployment information and social security information. Such income would be untraceable if the tenant did not voluntarily report it. NAHMA supports the voluntary use of EIV for assisted housing programs, but we strongly urge HUD to postpone the requirement for *mandatory* EIV usage until the well-documented administrative problems with this system are resolved and until the system may be used for income verification in the other major federal multifamily housing programs commonly used with HUD programs (the Low Income Housing Tax Credit and Rural Housing Service multifamily housing programs). These administrative problems include:

- Getting the necessary authorization and information to access EIV--especially passwords and activation key codes;
- The administrative burden associated with setting up and certifying EIV users, which is further complicated by high staff turnover at the site level; and
- The administrative burdens on property management staff in mixed-financed properties;

- Different procedures for income verification must be followed, tenant files with EIV information must be kept separately, and compliance auditors may not have access to the EIV information used to verify income for HUD-assisted residents.

Finally, some NAHMA members have expressed concerns about “negative rent” which results when a tenant’s utility allowance exceeds their rent contribution. For example, if 30 percent of the tenant’s income is \$25 and the utility allowance is \$40, the tenant has a “negative rent” of \$15. The owner/agent bills HUD for that \$15, and pays the tenant upon receipt. The process for reimbursing the tenant is administratively burdensome. We would ask HUD to consider changes to the rent structure which might include allowing owners in assisted multifamily housing to establish a reasonable minimum rent policy. Congress established minimum rents for public housing in the Quality Housing and Work Responsibility Act of 1998.

NAHMA recommends that HUD:

- Revise the final rule, “Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs” to:
 - Indefinitely postpone the *mandatory* use of the EIV System;
 - Streamline and simplify the process to gain authorization and access to EIV.
 - Clarify the definition of annual income and how to apply it;
 - Revise the final rule to specify social security numbers are not required from individuals in mixed families who do not claim eligible immigration status;
 - Clarify which documents will be considered acceptable for verification of citizenship and/or immigration status; and
- Consider changes to the rent structure which might include allowing owners in assisted multifamily housing to establish a reasonable minimum rent policy.

7. Improving the performance-based contract administration program, including the transparency, fairness and processes for conducting management occupancy reviews.

NAHMA understands that major changes are ahead for the project-based Section 8 performance-based contract administration (PBCA) program. We have been informed that HUD plans to revise its ACC contract with the PBCAs to build in flexibility to move or change PBCA tasks as HUD's business changes, and also to ensure PBCAs are more consistent in application of their responsibilities. We understand the Department's goal is to have the revised ACC completed and publicly available by October 2009. Further, HUD intends to re-compete all current PBCA contracts, with the goal of having all PBCAs who won the bids operating under the new ACC by January 1, 2011.

NAHMA believes these changes represent an opportunity to significantly improve the PBCA program. Our members would welcome the chance to build greater objectivity, consistency and positive reinforcement into this program. Some recommendations on ways to achieve these goals follow. All of these recommendations were included in our public comments about Chapter 6 of HUD's 4350.1 handbook.

First, our members have been very confused about how PBCAs assign ratings on the Management Occupancy Review (MOR). NAHMA strongly urges HUD to work with the multifamily industry to develop criteria to determine whether the rating will be "superior," "above average," "satisfactory," etc. We also believe that the criteria should be readily available to the public, perhaps on the instructions for completing the 9834, or an addendum to the form.

Because NAHMA members typically operate in multiple states, their companies interact with a number of different HUBs and PBCAs. Over the years, NAHMA members have observed considerable variation in how PBCAs administer HUD policies. In some cases, members were particularly frustrated by PBCAs that imposed more stringent mandates on properties than what was required by HUD regulations or the HUD handbook. We believe greater consistency will be observed across the PBCA program if HUD were to clarify that PBCAs are to administer HAP contracts pursuant to HUD's regulatory requirements, and PBCAs may not impose additional paperwork, policies or procedures on owner/agents.

HUD should offer positive reinforcement for properties that receive above average scores on their management reviews. A precedent for this recommendation is the scheduling for REAC physical inspections. REAC inspects properties every three years if they score 90 or above, every two years if they score at least 80 points, and annually for all others. Similarly, NAHMA urges HUD to schedule management reviews every three years for affordable properties with "superior" overall ratings on the HUD-9834, every two years for "above average" properties and annually for all others.

NAHMA requests that HUD:

- Establish objective, transparent criteria for determining the ratings used on the HUD-9834 management review form;
- Prohibit PBCAs from imposing additional regulatory requirements on owner/agents beyond what is required by HUD regulations; and
- Stagger the scheduling of management reviews, based on the overall rating listed on the HUD-9834.

8. Ensuring Federal agencies allow appropriate public review and comment prior to issuing new guidelines, policies, guidance or handbook changes, etc. that impact affordable housing.

NAHMA is extremely concerned by the manner in which HUD has changed long-standing policies, or issued new policies, without going through the formal rule-making process to provide for appropriate comment and review by industry stakeholders. We urge the new Administration at the highest levels of leadership to emphasize the importance of transparency and issuing policy changes or guidance with proper administrative procedures.

There are numerous examples to illustrate the breakdown in HUD's administrative procedures. In mid-2008, new policies pertaining to the multifamily model leases were issued via a HUD listserv that has a voluntary subscription basis, and new policy was made via Q&A to this voluntary listserv. We believe this is an inappropriate approach which should be discontinued in favor of a more deliberate, thoughtful and open approach that provides for review and comment by practitioners in the industry.

Communication with industry partners about regulatory compliance is critical—especially with the layers of oversight from different contract administrators and field offices. Affordable housing operators report spending an increasing amount of time at properties trying to keep up with policy interpretations that (from the owner/agent's point of view) seem to come out of nowhere; and an even greater amount of time is spent trying to correct erroneous interpretations after the fact. We believe that greater consistency in policy implementation and greater regulatory compliance could be achieved if HUD used proper administrative procedures to communicate policy changes, interpretations, or guidance *and promptly shared those communications with industry stakeholders.*

The Office of Management and Budget's "Final Bulletin for Agency Good Guidance Practices" provides a useful framework to increase the quality, transparency, accountability, and coordination of agency guidance documents. Published in the *Federal Register* January 25, 2007, the bulletin gives a definition of a "significant guidance document" and an "economically significant guidance document." It then establishes agency approval procedures, standard elements, and procedures for providing public feedback or comment on these documents. We would ask HUD to use this document as a *starting point* for transparency, since many HUD policies which affect regulatory compliance will fall below the \$100 million economic threshold, and will not be impacted by the good guidance procedures. In the past, policy changes have been treated as "internal communications," leaving many agents in the dark about new interpretations of HUD policies. Procedures must be developed to inform the industry more quickly and efficiently about policy changes which affect the owner/agent's ability to keep properties in compliance.

There is room for common sense and transparency in regulatory compliance. Simple gestures such as allowing reasonable implementation time to incorporate policy changes, breaking the cycle of micromanagement, placing an emphasis on the "reduction" component of the paperwork reduction act as it applies to multifamily forms and information collections, and following transparent procedures for issuing policies would go a long way in addressing the "HUD fatigue" owners and agents feel.

For these reasons, NAHMA is requesting:

- A commitment from the Obama Administration to adhere to good guidance procedures as the *minimum* requirements for agency transparency.
- Timely communication of HUD policy changes, interpretations, or guidance which affect a housing provider's ability to keep the property in compliance with HUD requirements; and
- Reasonable implementation periods for placing new HUD policies into effect on the properties.

9. Ensuring HUD's use of appropriations designated to provide services and translated documents for persons with limited English proficiency is consistent with the congressional intent.

On August 11, 2000, President Clinton's Executive Order 13166 directed each federal agency to publish guidance for recipients of federal funds regarding obligations under Title VI of the Civil Rights Act of 1964 to provide persons with limited English proficiency (LEP) meaningful access to federal programs and activities.

In March 2007, HUD's final LEP guidance took effect. The guidance stated that recipients of HUD funding, including affordable rental housing providers, were obligated to provide translated documents and oral interpretation services to persons with limited English proficiency. However, at the time the guidance took effect, HUD had not provided additional funding to offset the costs associated with providing language services, nor had the Department identified a specific list of documents housing providers were expected to translate. While NAHMA supported the goals of LEP guidance, our members were concerned about the unfunded costs to properties associated with providing language services.

In order to address the concerns of industry stakeholders, civil rights advocates, and tenants with limited English proficiency, Congress has taken important actions to improve implementation of the Department's Limited English Proficiency (LEP) guidance. First, Rep. Maxine Waters included LEP authorization language in the Section 8 Voucher Reform Act (SEVRA) of 2007 (H.R. 1851). This legislation was supported by a coalition of multifamily housing industry and civil rights advocacy organizations. Of particular interest to affordable housing providers were provisions in the bill to:

- Create a task force of industry and civil rights stakeholders to identify vital documents (to include both official HUD forms and unofficial property documents);
- Require HUD to translate the vital documents within six months;
- Create a HUD-administered 1-800 hotline to assist with oral interpretation needs; and
- Authorize appropriations.

Senator Robert Menendez subsequently introduced this LEP authorization language as free-standing legislation (S. 2018). It was also included in the Senate version of SEVRA, S. 2684. These bills were not signed into law before the 110th Congress ended in December, 2008.

NAHMA is working with the 111th Congress to ensure passage of the LEP authorization language in 2009. Our June 4 testimony before the House Financial Services Subcommittee on Housing and Community Opportunity voiced strong support for including the LEP authorization in the SEVRA of 2009.

We have also begun to see the results of appropriations Congress provided for LEP technical assistance (\$380,000 in FY 2008 and an additional \$500,000 in FY 2009). HUD has used these funds to begin translating vital agency documents, such as the multifamily model leases. Several translations have been completed as of May 2009 and are posted to the HUD website. NAHMA strongly supports continued funding for new translations, updates to documents when necessary, and additional services.

NAHMA strongly opposes the Obama Administration's FY 2010 budget proposal to eliminate the LEP line item account and merge the funding into a larger fund. NAHMA is concerned that removing the line-item appropriation and requiring LEP funding to come from an alternative, larger account will eliminate or minimize the money available for LEP translations.

NAHMA requests that HUD:

- Continue working with interested stakeholders to identify which documents should be translated and into which languages;
- Support legislation consistent with the LEP authorization language included in H.R. 1851, S. 2018, and S. 2684 from the 110th Congress; and
- Rescind its proposal to eliminate the LEP line-item account.

10. Advancing an interagency working group with stakeholder participation to identify and resolve major regulatory conflicts for mixed subsidy properties.

Federal affordable multifamily housing programs span three agencies: the Department of Agriculture (USDA)—Rural Housing Service (RHS), Treasury-Internal Revenue Service (IRS) and the Department of Housing and Urban Development (HUD).

In recent years, more and more properties are using multiple sources of government assistance from these three agencies to preserve, rehabilitate, and/or recapitalize the projects. It is increasingly common to preserve older HUD-assisted Project-Based Section 8 housing with Low Income Housing Tax Credits (LIHTC) administered by the IRS (and local state agencies). In fact, without the equity from the tax credits, many of the preserved HUD properties may have opted-out, defaulted on their mortgages or fallen into physical disrepair. Likewise, mixed subsidy properties that combine RHS' Section 515 program with HUD's Project Based Section 8 rental assistance have existed for decades.

The Housing and Economic Recovery Act of 2008 (P.L. 110-289) included a number of provisions that remove major barriers to the development and management of mixed-financed properties. The new law also requires HUD and RHS to consult with IRS about coordinating rules and policies to facilitate using tax credits with their multifamily housing programs. An interagency working group would facilitate the required consultations. NAHMA also believes this working group would be enriched by the input of industry stakeholders.

With multiple agencies providing the subsidies to one property, there are often conflicting regulatory issues. NAHMA believes a working group comprised of the three agencies and industry partners would also offer agencies the opportunity to address remaining regulatory barriers to developing and managing mixed-financed properties. For example, we strongly believe HUD should overturn its policy prohibiting owners from charging mandatory LIHTC compliance fees as eligible project expenses. It is unfair for HUD to rely so heavily on the LIHTC program as a preservation tool and then require owners to pay out-of-pocket for mandatory fees associated with the LIHTC program.

Because IRS and the RHS do not have access to the EIV system, mixed-finance properties must use different tenant income verification processes and even keep separate tenant files if EIV was used for HUD income verification. Furthermore, compliance auditors for the RHS and IRS housing programs may not have access to the EIV information used to verify income for HUD-assisted residents in those properties. This situation is problematic for our members who manage mixed-financed affordable rental properties, and is likely to cause more confusion when HUD's requirement to use EIV for third-party verification in its programs takes effect on September 30. It would greatly simplify the owner or agent's job if they could use EIV for income verification for all tenants in the same affordable housing community. Additionally, extending EIV income verification to the LIHTC and RHS affordable housing programs will offer much greater assurance that the proper housing assistance is directed to eligible families. Therefore, it is essential to address these statutory and interagency barriers before HUD *requires* owners to participate in EIV.

NAHMA requests that HUD:

- Permit mandatory LIHTC compliance fees to be allowable project expenses on HUD properties;
- Spearhead an interagency working group to identify and solve regulatory conflicts among HUD, IRS and RHS multifamily housing programs; and
- Postpone the September 30, 2009 deadline for mandatory use of EIV in HUD assisted housing until RD and IRS also have access to the program.