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AFFORDABLE HOUSING HUD REGULATORY POLICY PRIORITIES 2011

NAHMA believes the most critical steps to overcoming the major challenges to developing and preserving quality affordable multifamily housing include:

- 1. Ensuring full funding and timely payment of Section 8 and PRAC contracts.**
- 2. Resolving problems related to HUD's Office of Affordable Housing Preservation (OAHP) Mark-to-Market (M2M) annual surplus cash analyses.**
- 3. Preserving affordable rental housing through practical, voluntary policies which ensure long-term viability for the properties and equal opportunity for all capable housing providers to participate.**
- 4. Obtaining clarity and consistency in application of HUD's previous participation certification process.**
- 5. Improving the performance-based contract administration program, including the transparency, fairness and processes for conducting management occupancy reviews.**
- 6. Ensuring efficient, effective programs to provide supportive housing for the elderly and disabled under HUD's Section 202 and Section 811 programs.**
- 7. Providing an extension for Section 8, Section 202, and Section 811 property owners to register with Dun and Bradstreet and Central Contract Registry databases.**

Please find detailed descriptions of each NAHMA priority attached.

1. Ensuring full funding and timely payment of Section 8 and PRAC contracts.

HUD officials, members of Congress and housing providers have invested a considerable amount of effort to stabilize funding for project-based Section 8 HAPs. Most of the late payment problems have been resolved since the appropriations for project-based Section 8 have allowed HUD to fully fund the 12-month contract terms at the time of renewal. Advanced appropriations have also helped reduce the frequency of late HAPs when HUD's budget has not been enacted at the start of the new fiscal year, because it can take several weeks after a bill is signed before the owner receives the HAP payment.

Although not as widespread as previous episodes involving late Section 8 HAPs, late PRAC payments for Section 202 and Section 811 properties have been problematic for the nonprofit sponsors. NAHMA members primarily report late PRAC payments in the first quarter of new federal fiscal years. As with Section 8 HAPs, NAHMA believes the keys to providing timely PRAC payments are sufficient appropriations to cover the contract terms and advanced appropriations to avoid payment disruptions under continuing resolutions (CRs).

As Congress searches for budget cuts, HUD must be a strong advocate for its rental assistance programs. Although across-the-board budget cuts or proposals to roll-back appropriations to FY 2008 levels may seem appealing, these policies would devastate the project-based Section 8, elderly and disabled housing assistance programs. For example, cutting appropriations for Section 8 contract renewals would recreate the very chaos which caused the nation-wide late payments and "stub" contract funding in the first place. Underfunding the HUD contractual obligations to apartment owners will damage the federal government's credibility with housing providers and lenders. It will jeopardize rental assistance for the most vulnerable families. Finally, it may also place HUD-insured properties at risk of default.

NAHMA also encourages HUD to streamline its regulatory processes to ensure timely obligation of funding for HAP and PRAC contracts. For example, renewing a project-based Section 8 contract is a cumbersome paper-intensive process which begins four months (120 days) prior to the contract expiration. NAHMA concurs with a previous Government Accountability Office recommendation that HUD should streamline and automate this process. Likewise, it is essential for HUD to review its financial management and internal controls to ensure property owners receive HAP and PRAC payments 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 this process. The payment process can be more erratic during continuing resolutions, although advanced appropriations have helped mitigate disruptions for project-based Section 8 payments. We believe advanced appropriations would provide similar stability for the PRAC properties which are home to elderly and disabled families.

NAHMA is requesting that HUD:

- **Request sufficient appropriations in all future budgets to fully fund the 12-month HAP contracts and PRAC contracts at the time of renewal;**
- **Examine its financial management procedures and internal controls to ensure project-based Section 8 and PRAC payments are distributed to owners as quickly as possible—especially when the federal government operates under a continuing resolution.**
- **Continue requesting advanced appropriations for project-based Section 8 and begin requesting them for PRACs in order to minimize contract payment disruptions between federal fiscal years.**

2. Resolving problems related to HUD's Office of Affordable Housing Preservation (OAHP) Mark-to-Market (M2M) annual surplus cash analyses.

As a result of the surplus cash analyses (SCA) conducted by its contractor, OAHP determined:

- If any capital repairs were paid out of operating accounts, then the property's Reserves for Replacement (R4R) must be used to repay the operating accounts;
- Project owners must forfeit their Incentive Performance Fees ("IPFs") and Capital Recovery Payments ("CRPs") if they do not refund the cost of any repairs and replacements that were paid for from the project's Operating Account instead of the Replacement Reserve; and
- Incentive Performance Fees (IPF) must be retroactively repaid to OAHP if the owner/ management agent (O/A) made a late payment on his/her HUD mortgage note – even if the O/A subsequently paid the HUD mortgage note, and thus, was current with such payments at the time the IPF was taken.

NAHMA and other industry representatives strongly disagreed with OAHP's positions. Fortunately, industry groups and HUD were able to agree on a consensus plan to move forward. Although HUD did not change its policy positions, it did establish a process for owners and agents (O/As) "who acted in good faith, but in a manner inconsistent with the requirements of the MAHRA program" to recover the forfeited IPFs. Also, HUD officials directed field offices to allow the reimbursement from R4R to operating accounts of those sums which OAHP determined should have been drawn from the Replacement Reserves.

As of early March, some members had received approval to withdraw R4R funds to reimburse the operating accounts. However, a substantial number of O/As were still waiting for HUD's decisions on their IPF appeals and R4R withdrawal requests. In both cases, NAHMA has heard several common concerns from members. First, delays in conducting and finalizing the SCAs have a negative impact on O/As, and their audit firms. Disputed expenditures from several years ago are having ripple effects on subsequent financial statements, and even complicating 2010 audits for some members. Secondly, R4R needs and expenses do not always fit neatly into the same years. One member explained,

"Due to the timing required by HUD and considering the paper work needed for the withdrawal request and approval of the request by HUD, usually it is impossible to request Reserve for Replacement releases for all eligible expenses that occur in the current year within that same year. This is especially true for the expenses that occur in the last months of the fiscal year and when a portion of the expenses are included in the next year's withdrawal requests."

Finally, O/As are unsure how to replenish the R4R funds used to reimburse the operating account for previous capital repairs. Members are concerned that restricted rents and increasing operating costs leave very few funds available to increase contributions to reserves. It is essential for HUD to consider the challenges of maintaining adequate reserves when the Department issues new policy guidance this year and updates the 4350.1 Asset Management Handbook to ensure consistent R4R guidance between OAHP and the Office of Multifamily Asset Management.

As HUD implements these policies, NAHMA requests that the Department:

- **Address ongoing concerns about the late SCAs and the impact disputed expenditures have on subsequent financial statements;**
- **Continue engaging multifamily industry representatives to develop workable Replacement Reserve policies which will:**
 - **Allow meaningful input from experienced industry practitioners before taking effect;**
 - **Harmonize guidance on R4R policies issued by OAHP and the Office of Multifamily Asset Management; and**
 - **Provide for the property's sound financial operations.**

3. Preserving affordable rental housing.

To NAHMA, “preservation” means maintaining the current portfolio of privately-owned, federally-assisted apartments as affordable to low-income families through a voluntary public-private partnership. Preservation must also ensure long-term physical and financial sustainability of the properties. Likewise, it must allow equal opportunity for participation by both non-profit and for-profit entities. Finally, the programs used to preserve affordable housing must be transparent with clearly defined rights and responsibilities for both the agencies and owners.

NAHMA believes overcoming the most immediate challenges will require congressional action—either through statutory changes or appropriations. These challenges include:

- **Preserving assisted properties with expiring mortgages;**
- **Preserving the multifamily properties assisted through the “orphan” RAP, Rent Supp and Mod Rehab programs;**
 - NAHMA supports using the current Multifamily Assisted Housing Reform and Affordability Act (MARHA) and project -based Section 8 programs;
- **Extending the Mark-to-Market (M2M) restructuring authority, which expires on September 30, 2011;**
 - NAHMA supports extending the program through September 20, 2015;
- **Addressing obsolete operating and utility cost underwriting assumptions for the early (pre-October 1, 2001) M2M properties and allowing a voluntary second mortgage restructuring to help the early restructured properties with rehabilitation needs;**
- **Protecting tenants from displacement when mortgages mature by;**
 - Extending tenant protection vouchers to residents of properties with maturing HUD mortgages;
 - Allowing apartment owners to convert enhanced vouchers to project-based assistance;
 - Allowing apartment owners to choose project-based assistance in lieu of enhanced vouchers; and
- **Recapitalizing and preserving public housing;**
 - NAHMA recognizes there is an urgent need to address public housing capital needs, and we urge the Department to work closely with the PHA-oriented trade groups to develop solutions.

On the regulatory side, HUD should use its administrative authority to facilitate preservation by:

- **Continuing to promote and create incentives for owners to accept long-term project-based Section 8 contracts, which also helps secure better underwriting terms;**
- **Permitting use of residual receipts and replacement reserves for preservation or rehabilitation;**
- **Providing voluntary incentives and funding for green initiatives;**
- **Permitting greater access to distributions to nonprofit owners, who could use the resources to build or preserve more affordable housing; and**
- **Expanding on the draft Section 8 Renewal Guide’s proposal to allow properties requesting budget-based increases to include the cost of LIHTC compliance reports as eligible project expenses;**
 - We strongly urge HUD to extend this policy to OCAF and AAF properties; and
 - Ensure that mandatory compliance fees charged by state LIHTC allocating agencies are also permitted as project expenses for all mixed-financed HUD properties with LIHTCs.
- **Simplifying processes for subsidy layering and underwriting.**

HUD is pursuing several of these policies through changes to the Section 8 Renewal Guide and the 4350.1 Asset Management Handbook. NAHMA encourages HUD to implement these policies as soon as possible.

Finally, it is important to continue interagency efforts to identify statutory and regulatory changes which would enable federal affordable housing programs to efficiently work together.

- **NAHMA actively participates in the Federal Rental Policy Working Group;**
- **We support proposals in the Treasury Department's 2012 Budget to allow a basis boost for preservation and to permit income averaging on Low Income Housing Tax Credit properties; and**
- **We believe it is essential for the Administration's financial reform plans to ensure financing is available for affordable multifamily housing construction and preservation through the Federal Housing Administration (FHA), the Government Sponsored Enterprises (GSEs) and the private market.**

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

The purpose of the Previous Participation Certification process is to ensure that 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 those wishing to participate in multifamily housing programs to submit Previous Participation Certifications (also known as 2530 or APPS submissions) 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 certifications still exists. APPS allows HUD's business partners to manage both company and individual participation information. 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; 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 flag placed by one HUD field office can prevent a company from acquiring new business in another HUD field office's jurisdiction. Proceedings will be stopped, and the certification will be returned to the applicant owner/management agent (O/A). The O/A will then have to resubmit, deal with the different field offices and will often need to involve HUD headquarters. This process 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 sometimes continue to show, even after the O/A updates the 2530 information to remove these individuals. It is particularly frustrating to O/As with very large portfolios that a single flag on a property can jeopardize new business for a company that manages hundreds of other properties; they feel unfairly stigmatized by a flag that does not reflect the true quality of their portfolios.

NAHMA members feel strongly that the previous participation certification process should be reformed to eliminate unreasonable and unnecessary delays in 2530 processing. Prompt turn-around is essential, since O/As will lose business if the process drags out.

NAHMA believes that these problems can be solved. We strongly urge HUD's leadership to:

- **Place a high priority on publishing workable, updated previous participation regulations which could 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.**

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

Major changes are in store for the Project-Based Section 8 performance-based contract administration (PBCA) program.

Recently, HUD took positive steps to improve the management review (MOR) process by updating Chapter 6, "Conducting Management Reviews," of *the 4350.1 Multifamily Asset Management and Project Servicing Handbook*. The revision includes a number of changes NAHMA requested, such as removing the requirement for PBCAs to give an automatic unsatisfactory MOR rating to a property that failed its REAC inspection. The revised Chapter 6 also lists specific criteria and numerical weights for reviewing officials to use in assigning ratings / performance indicators. NAHMA welcomed this change because we believed it would create a more objective process. However, some members have raised concerns that PBCAs will not show them the actual numerical scores, which are the basis of the ratings. We were also pleased that HUD included a section which establishes a process for O/As to appeal below average and unsatisfactory scores.

Going forward, the new ACC for Section 8 performance-based contract administration proposes substantial changes to the PBCA program which are intended to give HUD greater cost-control and oversight. NAHMA supports a number of the specific changes HUD made in the ACC contract released in May 2010. We applaud HUD for taking a very positive step to incentivize customer service to O/As as part of the ACC. NAHMA is also pleased that the ACC included a second-level appeal of rent increase decisions to HUD. We understand that HUD is currently accepting PBCA applications under the rebid.

Having previously experienced turnovers between PBCAs, our members remain concerned about the impact PBCA changes will have on their properties. Overall, NAHMA members were impressed by the thoughtful approach the Draft PBCA Working Group Transition Handbook proposed for PBCA transitions. NAHMA appreciates the detailed assignment of responsibility for transition tasks among the incumbent PBCA, the incoming PBCA and HUD. Similarly, the handbook establishes deadlines for completing the assigned tasks. Nevertheless, the success of the transition hinges on three assumptions:

- An incoming PBCA will have 90 day ramp-up period from the date of notification of award to the first day of the contract;
- Enhancements are necessary to HUD systems and PBCA vendor software in order to make timely payments to properties during the transition; and
- Both the HUD system changes and PBCA vendor software changes will be in place for the transition.

If HUD insists on a 90-day transition period, regardless of whether the necessary software updates have been completed, the burden of the transition will likely fall on the O/As in the form of late HAP payments and wasted administrative time spent assisting new PBCAs.

NAHMA members are concerned that the proposed 90 day "ramp-up" period for new PBCAs may not provide enough time for a seamless transition--especially if the transition involves a PBCA with no previous experience in the program. In only three months, if all goes as planned, the new PBCA will be responsible for processing vouchers, making HAP payments, renewing contracts, conducting MORs, and other activities which directly impact the owners/agents. Because this deadline is the assumption over which HUD has the most direct control, we would strongly urge the Department to allow greater flexibility on the transition period. In previous comments, NAHMA recommended a 120-day transition period. More important than the specific number of transition days, however, is assurance that HUD's IT infrastructure and a workable system for transferring all necessary information to new PBCAs are in place before proceeding with the transition.

If the Department's own system enhancements are incomplete after the 90-day transition, the Guidebook explains that HAP payments would be an estimated 7-20 days late during the transfer month, and the incoming PBCA would have to re-create any vouchers that failed. NAHMA feels that when HUD is setting the deadlines for the transition and associated tasks, it is the Department's responsibility to ensure that its own infrastructure is prepared for the changes. We remain concerned that the 90-day transition period between PBCAs leaves insufficient time for a seamless transition, and we strongly urge HUD to reconsider this deadline.

NAHMA believes it is important to provide the incoming PBCA with a history baseline that spans five years of certifications. A five-year timeframe corresponds with the maximum time period allowed to recapture subsidy overpayments and underpayments. A five-year historical baseline would help ensure that subsidies are correctly calculated, tenant repayment agreements are substantiated, and O/As will not be burdened with sending paper vouchers/certifications to prove miscellaneous adjustments. The Working Group specifically recommended that HUD require outgoing PBCAs to electronically transfer five years of tenant data and associated contract data to the new incoming PBCA.

NAHMA takes the position that regardless of whether the historical baseline is transferred from PBCA to PBCA, as the Working Group recommended, or from HUD to the new PBCA, the burden of the transition must not fall on the property O/As under any circumstances. NAHMA strongly believes it is *HUD's* responsibility to ensure the new PBCAs receive all necessary information to perform their tasks *without burdening the properties' staff* to fill gaps in information that the new PBCA did not receive from either the incumbent or HUD. If the incumbent PBCA cannot or will not comply with HUD's requirements to transfer a baseline, then the burden to provide the new PBCA with necessary information should fall on HUD, not properties.

NAHMA requests that HUD:

- **Allow O/As to see the numerical scores that PBCAs used to determine the MOR ratings;**
- **Select new PBCAs based on their:**
 - **Ability to perform the contract administration responsibilities;**
 - **Knowledge of HUD policies applicable to project-based Section 8 housing; and**
 - **Commitment to quality customer service in existing housing-related operations;**
- **Implement a 120-day "ramp-up" period, for PBCAs to transition to the new ACC contract;**
- **Ensure that HUD's IT infrastructure and a workable system for transferring all necessary information to new PBCAs are in place before proceeding with the transition;**
- **Provide incoming PBCAs with a history baseline that spans five years of certifications;**
- **Provide incoming PBCAs with all necessary documentation related to the property or EIV that is necessary for them to perform their tasks;**
- **Ensure the transition does not disrupt property operations;**
 - **Through delayed HAP payments, delayed special claims or wasted administrative time filling information gaps for new PBCAs; and**
- **Prohibit PBCAs from imposing additional regulatory requirements on owner/agents beyond what is required by HUD regulations.**

6. Ensuring efficient, effective programs to provide supportive housing for the elderly and disabled under HUD's Section 202 and Section 811 programs.

Two of HUD's only remaining multifamily housing new production programs, the Section 202 Housing for the Elderly and the Section 811 Housing for the Disabled programs, fill a critical housing need for very-low income vulnerable households.

NAHMA is pleased that HUD has requested new construction funding for FY 2012, thanks in part to passage of the Section 202 Supportive Housing for the Elderly Act (P.L. 111-372) and the Frank Melville Supportive Housing Investment Act (P.L. 111-374). We look forward to working with the Department to develop and implement new rules for the Section 202:

- Non-metropolitan funds allocation.
- Refinancing rules for older 202 properties without rental assistance to make them more attractive in preservation deals; and
- Grant authority for assisted living conversions to include unlicensed "service enriched housing."

For many Section 202 sponsors, a major concern is the confusion about HUD's waiver policies for age and income restrictions. The Department believes it lacks the statutory authority to continue granting age and income waivers for Section 202 PRAC properties. Our understanding is that HUD's policies are still under development, but they will permit one last round of 12-month age or income waivers.

Feedback from our members suggests there is a need for immediate clarification on Section 202 waiver policies. Members wonder if the field offices are prematurely applying the waiver restrictions to the wrong properties, because they are having greater difficulty getting waivers for Section 202/8 properties. For example, a HUD field office recently told one owner that some disabled tenants living in a Section 202/8 property would have to move because the tenants were not mobility impaired. However, HUD's regulations for Section 202/8 projects make no such distinction. In fact, 24 CFR 891.520 states that populations eligible to be served include the elderly, physically handicapped, developmentally disabled, or chronically mentally ill. The rules also allow owners to seek permission from HUD to serve *"tenant groups other than the one it was selected to serve,"* and *"Upon review and recommendation by the field office, HUD Headquarters will approve or disapprove the request."* (Emphasis added.)

To ensure that residents are not wrongly displaced, NAHMA strongly urges HUD to issue prompt written clarification to HUD field offices, owners, and agents which explains HUD's waiver policies for Section 202 PRAC and Section 202/8 properties.

NAHMA understands that HUD will seek additional legislative changes to the Section 202 and Section 811 programs. Our members encourage the Department to build on the strengths of these important programs. While NAHMA appreciates the need to stretch limited federal dollars, we advise against replacing capital advances with gap financing. Such a change would reverse the current development practice by requiring project sponsors to line up outside financing first and then awarding HUD funds as gap financing to cover the shortfall needed to finance the project. Also, NAHMA supports the *option* for sponsors to combine Section 202 and 811 funds with LIHTCs, but we do not believe the LIHTC should become the de facto replacement for capital advances. Finally, we are skeptical of proposals to replace PRACs with a new hybrid rental assistance program such as the Preservation, Enhancement, and Transforming Rental Assistance (PETRA) Act or successor legislation.

The Section 202 and Section 811 programs are critically important. We strongly urge HUD to:

- **Support appropriations for new construction of Section 202 and Section 811 housing;**
- **Move to quickly implement the much-needed program reforms authorized in the Section 202 Supportive Housing for the Elderly Act and the Frank Melville Supportive Housing Investment Act;**
- **Issue prompt written clarification to HUD field offices, owners, and agents regarding HUD's waiver policies for Section 202 PRAC properties and Section 202/8 properties;**
- **In developing future legislative proposals for Section 202 and Section 811, work with affordable housing providers to develop policies that build on the strengths of these programs, but also:**
 - **Allow sponsors to achieve economies of scale;**
 - **Ensure properties' long-term physical & financial sustainability;**
 - **Encourage supportive services to residents;**
 - **Simplify the regulatory framework to focus on results rather than processes; and**
 - **Gather additional data on the potential impact of changes to the programs' financing structures, rental assistance programs, or selection preferences before pursuing major statutory changes.**

7. Providing an extension for Section 8, Section 202, and Section 811 property owners to register with Dun and Bradstreet (DUNS) and Central Contract Registry (CCR) databases.

On January 5, 2011, HUD issued Notice H 2011-01, which required Section 8, Section 202, and Section 811 properties to obtain DUNS Numbers and register with the Central Contractor Registry by March 7, 2011. The requirement stems from the *Federal Register* interim rule "Conforming Changes to Applicant Submission Requirements; Implementing Federal Financial Report and Central Contractor Registration Requirements" (July 15, 2010, Docket No. FR-5350-I-01). Upon completing registration, owners were also required to certify to their local HUD office they had complied with the requirements of Notice H 2011-01 by the March 7 deadline. According to the Notice, failure to register or certify compliance by the deadline would result in suspension or delay of housing assistance payments.

However, O/As have reported difficulties in obtaining DUNS Numbers and registering with CCR within the estimated one to seven business days required for processing. Many O/As were unable to comply with the March 7 deadline due to slow processing times and technical difficulties outside of their control. NAHMA members also reported delays due to conflicting information between IRS and the Dun and Bradstreet and/or CCR databases.

A similar situation occurred in September and October 2009 when some recipients of project-based Section 8 funds had to comply with the American Recovery and Reinvestment Act (ARRA) reporting requirements. To satisfy the reporting requirements, owners had to obtain DUNS Numbers and register with CCR. Many members reported it took Dun and Bradstreet and CCR several weeks to issue account numbers and approve registrations.

NAHMA is pleased that HUD has decided to continue making HAPs payments to property owners who did not meet the March 7 deadline. We believe that suspending subsidy payments for non-compliance would have been inappropriate when processing delays are beyond the O/A's control. However, HUD has not yet made a determination on a deadline extension. Under these circumstances, we do not believe the 60-day compliance period established by the Notice was sufficient.

As a result, NAHMA urges HUD to:

- **Extend the compliance deadline to least April 30, 2011 to give O/As additional time to fulfill the registration requirements of Notice H 2011-01; and**
- **Hold harmless the O/As who have made good faith efforts to comply.**