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Regulations Division  
Office of General Counsel  
U.S. Department of Housing and Urban Development  
451 Seventh Street S.W.  
Room 10276  
Washington, DC 20410

**RE: Docket No. FR-5506-N-01  
Reducing Regulatory Burden: Retrospective Review Under E.O. 13563**

Thank you for this opportunity to comment on ways to make the Department's regulations more effective and less burdensome. NAHMA applauds the Administration's initiative to update existing rules and to develop an on-going process for evaluating regulations.

In its March 2 *Federal Register* notice, HUD requested feedback on seven questions intended to help the Department prioritize which regulations should be reviewed, which should be improved and which should be eliminated altogether. NAHMA's comments will answer these questions as they apply to HUD's multifamily rental assistance programs.

NAHMA is a trade association whose mission is to promote the development and preservation of quality affordable multifamily housing by advancing legislative and regulatory policy, and preparing affordable housing professionals to succeed in evolving economic and political environments. NAHMA's members are property owners and managers, industry stakeholders, and providers of goods and services to the affordable housing industry. Our members have considerable experience with the following federal housing programs:

- Project-based Section 8;
- Section 202 housing for the elderly;
- Section 811 housing for the disabled;
- FHA Multifamily Mortgage Insurance programs including Sections 236, 221(d)(3) and 221(d)(4);
- Section 8 Housing Choice Voucher program;
- HOME;
- CDBG;
- Section 515 Rural Housing (administered by USDA-RD); and
- The Low Income Housing Tax Credit (administered by Treasury-IRS).

NAHMA's comments on reducing regulatory burdens will primarily focus on the multifamily housing programs administered by HUD's Office of Housing. Our responses to HUD's seven questions are based on feedback from management agents and owners who have direct experience operating properties subject to HUD's regulations.

In certain instances, the regulatory burden on affordable housing owners and management agents who participate in HUD's programs lies less in a regulation itself than in HUD's process-heavy and paper-intensive means of implementing that regulation. NAHMA urges HUD to use this review as an opportunity to:

- Discourage excessive focus over the processes owners and management agents (O/As) must use to demonstrate regulatory compliance;
- Place an emphasis on the "reduction" component of the Paperwork Reduction Act as it applies to multifamily forms and information collections; and
- Keep its regulations current, easy to understand, and fully transparent.

NAHMA's responses to HUD's questions follow.

**1. How can HUD best obtain and consider accurate, objective information and data about the cost, burdens, and benefits of existing regulations? Are there existing sources of data available that HUD can use to evaluate the effects of its regulations over time?**

NAHMA believes HUD can gather a significant amount of accurate data about the cost, burdens and benefits of existing regulations by seeking feedback from the industry stakeholders who must comply with the regulations. First, HUD should ensure that industry groups that are impacted are always at the table to discuss the implementation of a particular rule, requirement or policy. Likewise, HUD should make it easier to comment on the burden hours for documents its sends to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act. HUD does print a public notice in the *Federal Register* when it is sending a document to OMB for approval. Although HUD does list a staff contact who can provide commenters with the information sent to OMB, it does not publish the new or revised document(s) as part of the *Federal Register* notice, and it does not include any citation where a commenter could find the information on HUD's website. Making it easier for commenters to access the justifications sent to OMB for rule changes, forms, or information collections would increase the likelihood of receiving thoughtful, informed feedback from stakeholders and funding recipients.

**2. What factors should HUD use to select and prioritize rules and reporting requirements for review?**

NAHMA offers several criteria which we believe the Department should use to prioritize rules and reporting requirements for review:

- *Regulations affected by changes in statutory law.* When a statute changes, it is necessary to update existing regulations or to propose new implementing regulations. In many cases, the new law will include a deadline for the agency to issue regulations. In the absence of a specific statutory deadline, we urge HUD to consider using whether a regulation is affected by statutory changes as a criterion for prioritizing rules and reporting requirements for review.
- *Economically significant regulations.* According to the Office of Management and Budget (OMB), an economically significant regulation meets at least one of two conditions. First, it is anticipated to have an annual effect on the economy of \$100 million or more in benefits, costs, or transfers. A rule is also economically significant if it adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. NAHMA urges HUD to periodically review economically significant regulations to determine whether more cost-effective means are available to achieve the regulatory goal.

- *Regulations which carry serious consequences for noncompliance, including criminal or civil penalties, debarment, enforcement action, or other substantial financial penalties.* Communication with industry partners about regulatory compliance is critical—especially with the layers of oversight from different contract administrators and field offices that administer HUD's multifamily housing programs. It is essential for HUD to keep regulations up-to-date when the penalties for noncompliance can result in serious legal and/or financial consequences.
- *Regulations which have not been reviewed for 6 or more years.* Regulations do not always age gracefully. In the experience of NAHMA members, when important regulations become outdated but are left in the CFR, compliance becomes more difficult to achieve. The agency's procedures for implementing outdated regulations bear less resemblance to the original rule over time. For example, HUD's outdated previous participation certification regulations refers to program offices and staff positions within agencies that no longer exist.

Affordable housing operators report spending a significant amount of time trying to keep up with policy interpretations that (from the O/A's point of view) seem to come out of nowhere. Even more time is spent trying to reconcile conflicting interpretations of outdated regulations from HUD headquarters, program offices within headquarters, field offices and contract administrators. It also becomes extremely difficult for stakeholders to know exactly what HUD's policy is because the obsolete rule is reinterpreted over the years through numerous handbooks, memos, letters, forms and other guidance documents.

We believe that greater consistency in policy implementation and greater regulatory compliance could be achieved if HUD placed greater emphasis on keeping its regulations current. Handbooks, memos and letters have a role in the regulatory process, but they are not a substitute for actual regulations, which carry the authority of law. NAHMA strongly believes that the public interest would be better served if HUD invested more time writing clear, concise regulations which focus on regulatory results rather than issuing numerous policy changes across various other mediums which focus on *procedures* to achieve desired results.

- *Regulations associated with forms subject to review under the Paperwork Reduction Act.* NAHMA urges HUD to consider reviewing the underlying regulations used to justify information collections concurrently with the Paperwork Reduction Act (PRA) deadlines. In this way, HUD could comprehensively review both the regulation itself and the forms or other information collection vehicles used to gauge compliance on a regular basis. Because approval of forms and information collection activities under the PRA must be renewed every three years, a more practical timeframe for the comprehensive review might be every six years.
- *Regulations which protect health and safety of people and HUD's portfolio.* When there is imminent danger to the health and safety of persons or HUD-assisted properties, the Department may not have time to follow the normal rulemaking procedures. While it is important to review or update regulations that protect health and safety, when HUD must immediately respond to a situation (such as a natural disaster), it is appropriate to issue notices or policy guidance to stakeholders as an immediate response. Once the immediate crisis is under control, the Department can determine whether the appropriate regulations should be reviewed or revised.

### **3. Are there any specific existing HUD regulatory requirements that are ill-advised or so burdensome as to merit elimination?**

NAHMA reiterates that much of the regulatory burdens our members face are the result of the Department's methods for implementing the rules rather than the rule itself.

**4. Are there any specific existing HUD regulatory requirements that, while necessary, are ineffective and in need of streamlining or other modification to achieve their objectives? Why are these requirements ineffective—are they unnecessarily complicated, burdensome, or outdated? What changes to the regulations would increase their usefulness and meet HUD's objectives?**

NAHMA will primarily discuss the need for updated regulations governing replacement reserves on properties that have gone through the Mark-to-Market restructuring process and previous participation certification approval policies.

***24 CFR Part 401—Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark-To-Market) Subpart C—Restructuring Plan***

***24 CFR 401.450 Owner evaluation of physical condition***

***24 CFR 401.451 PAE Physical Condition Analysis (PCA)***

***24 CFR 401.452 Property standards for rehabilitation***

***24 CFR 401.453 Reserves***

As one recent example of how an old rule was reinterpreted through special letters and supplementary documents, please consider the different guidance from HUD's Office of Affordable Housing Preservation (OAHP) and the Office of Multifamily Asset Management for use of reserves for replacement. At issue was:

- Whether OAHP could require owners of Mark-to-Market (M2M) restructured properties to use a project's replacement reserve to pay for all major repairs and replacements; and
- Whether OAHP had authority to financially penalize an owner for using the property's operating account, instead of reserves, to fund a portion of such repairs and replacements.

Industry representatives argued that OAHP had no legal basis for requiring a M2M project owner to use a project's replacement reserves to pay for all major repairs and replacements. In fact, OAHP's interpretation seemed to contradict Multifamily Asset Management's longstanding policy guidance on using reserves. Similarly, the multifamily industry contended that OAHP lacked authority to forfeit certain fees to the owner if he or she used the operating account, instead of reserves, to fund a portion of such repairs and replacements.

OAHP argued its positions were justified by the Multifamily Assisted Housing Reform and Affordability Act (MAHRA) statute, 24 CFR Sections 401.450 to 401.453, the M2M regulatory agreement and various "accounting letters." Although OAHP cited sections of MAHRA Sections 514(e)(3), 514(e)(5) and 517(a)(3) to justify its position on use of reserves for replacement, *none* of these provisions imposed any requirement on M2M project owners to fund all major repairs and replacements from the replacement reserve – or to use the replacement reserve "first." Similarly, none of HUD's M2M regulations OAHP cited at 24 CFR Sections 401.450 to 401.453 indicated that the project owner must pay for all replacement and repair items from the replacement reserve. Although the M2M Regulatory Agreement Rider indicates that the project owner should maintain a replacement reserve "to cover the cost of major replacements," it never indicates that "all" such needs must be satisfied from the replacement reserve – or that the replacement reserve must be used first. OAHP officials also stated these policies were outlined in accounting letters issued subsequent to the regulatory agreement. On the other hand, industry representatives argued that OAHP's position was strongly contradicted by the longstanding policies established in Section 4 of HUD's 4350.1 REV-1 Asset Management Handbook. The 4350.1 handbook explains that the replacement reserve is intended "to help defray the costs of replacing a project's capital items." It is not intended "to provide for a complete, dollar for dollar, capability of replacing all building structural components and equipment as these wear out but rather to provide a readily available source of capital that will help defray these costs."

The Department did establish a process for O/As "who acted in good faith, but in a manner inconsistent with the requirements of the MAHRA program" to recover the forfeited Incentive Performance Fees. Also, HUD officials directed field offices to allow the reimbursement from replacement reserves to operating

accounts of those sums which OAHF determined should have been drawn from the replacement reserves in the first instance. We also understand that HUD is updating its regulations and handbook guidance on use of reserves for replacement. Nevertheless, NAHMA strongly believes confusion could have been avoided if the Department had simply followed proper administrative procedures by using the rulemaking process in the first place.

Finally, as HUD updates its rules governing use of reserve for replacements, NAHMA encourages the Department to explore automating its process for O/As to request withdrawals from replacement reserves. The HUD-9250 form along with paper copies of all support (invoices, contracts, etc) must be mailed to the local HUD project manager for approval. It's not uncommon for approvals to be delayed because HUD asks the O/A to resubmit the paper copy. It would seem to be a more efficient use of time and resources to create an automated submission and approval process. Alternatively, HUD should allow the necessary forms and documentation to be sent through e-mail.

***24 CFR Part 200 Subpart H Participation and Compliance Requirements (2530 rules—policy)***  
***24 CFR 200.227 Multifamily Participation Review Committee***  
***24 CFR 200.230 Standards for Disapproval***

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.

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 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.

Additionally, updated policies which describe the responsibilities of HUD field office, HUB and headquarters staff are critically needed. For example, members report that some field offices seem unaware of their role when an owner submits a 2530 for an organizational change. Some offices consider this as a notification of a change, but other offices begin their own reviews, which necessitates many questions.

Some specific citations for outdated 2530 policies include:

- *24 CFR 200.227 Multifamily Participation Review Committee.* The rule refers to staff positions within HUD which no longer exist. The rule should be updated to reference the successor positions.
- *24 CFR 200.230 Standards for disapproval.* The current rule lists infractions for which HUD may deny participation, but does not reflect the current practice with APPS flags or "critical findings."

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.

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. 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.

The regulation should provide a time limit by which HUD must remove flags when the principal has submitted evidence that the flag was erroneously placed or the noncompliance has been cured. Likewise, when an issue on the 2530 is resolved, the rule should require HUD to note a specific and clear indication in the system that the issue has been resolved.

"Critical findings" are not mentioned in the current 2530 regulation, but they have delayed previous participation approval for some O/As. A HUD memo, "Critical Findings – Modification to Previous Participation Review and Approval Process," sent to field staff on January 17, 2007, instructs, "...critical findings, not including APPS Participant Flags (a.k.a. Flags) will be reclassified in APPS." An attachment to the memo defines critical findings as "all events of noncompliance and/or performance issues shown in HUD systems and those elements within a participant's Previous Participation Certificate (PPC) disclosure and certification that indicate noncompliance or performance below established norms." The memo also notes that APPS flags are "a subset of the critical finding universe."

Based on this memo, it is still unclear what critical findings are, or what weight they are given in the 2530 process. NAHMA urges HUD to either use the formal rulemaking process to propose a definition of "critical findings" and explain their role in the 2530 process or to discontinue using them as a factor for previous participation approval.

#### ***24 CFR 5.801 Uniform financial reporting standards. (As it applies to small properties.)***

The rule requires assisted properties to submit annual audited financial statements to HUD. NAHMA members have expressed concerns that this requirement is financially burdensome for small properties. We are aware that some non-profit properties are already exempted from the rule. HUD's rule Audit Requirements for Non-Profit Organizations, at 24 CFR 5.107, directs certain non-profit entities to comply with the audit requirements of revised OMB Circular A-133. We urge HUD to explore further revisions to its financial reporting rules which will strike a balance between necessary regulatory oversight and the financial impact on all small properties.

#### **5. Are there any HUD regulatory requirements that have been overtaken by technological developments? Can new technologies be used to modify, streamline, or do away with these requirements?**

NAHMA's comments will discuss our recommendations for improving the technical aspects of HUD's previous participation certification process, streamlining procedures for gaining access to the Enterprise Income Verification (EIV) System, and automating the project-based Section 8 contract renewal process.

#### ***24 CFR 200.217 Filing of previous participation certificate on prescribed form.***

This rule requires electronic submission of previous participation certificates (form HUD-2530) for new or revised participation. It also lists specific occurrences (such as changes in ownership) which require the O/A to seek 2530 approval. As noted earlier, the submissions are filed through HUD's Active Partners Performance System (APPS).

Unfortunately, APPS is not fully automated. Despite the electronic filing, O/As must still mail a paper copy "2530 Package" signed by all owners to the appropriate HUD office. This is an extremely redundant step that slows the process. NAHMA strongly urges HUD to add electronic signature capability to the APPS system. At the very least, let the signature pages be scanned into the system and transmitted electronically.

NAHMA also recommends that HUD update its APPS system and procedures to ensure appropriate authorized persons can access the system. To access the APPS system, the Secure Systems Coordinator (SSC) requests a key code for all new ownership entities. However, HUD Secure Systems must send the new code to the ownership entity through the U.S. mail rather than send it to the requesting Secure Systems Coordinator. This is not an effective means of notification. In the experience of NAHMA members, the computer generated letter is often ignored by the owner because it does not look like an official communication; or, the letter is bounced around from department to department because the owner does not know what a key code is and does not take the time to read the lengthy document.

NAHMA recommends exploring sending an electronic notification to the owner with a brief explanation of what the key code is, the name, mailing address and e-mail address of the Secure Systems Coordinator, and why the SSC needs the key code. Ideally, the upgrade would allow the owner to electronically approve sending the key code, and would automatically transmit the key code to the SSC when they owner responds. If HUD does not upgrade its system, we strongly suggest reworking the key code letter to be more obvious. The letter should be an official HUD form subject to OMB approval. It should include the explanations described above, as well as the mailing and email address of the Secure Systems Coordinator. The envelope for the letter should include a HUD return address, and it should be stamped urgent or priority. Finally, HUD should email the Secure Systems Coordinator who requested the key code when the letter was sent to the owner it could at least be tracked by the SSC.

Another aspect of the APPS system that members find troublesome is that the system does not allow an end date for an entity. A member commented,

"The number of years worth of information goes back 40 years and the number of entities we have in that system is unnecessary due to changes that were made in the system to have a live person in at every entity. We have several entities that are no longer active yet the system does not allow for an end date for an entity. We have to maintain a large number of inactive entities because of the live person requirement that was added to the system. This in turn has created a large number of organization changes that go straight to HUD Headquarters. There is no practical use of HUD's time or [the Industry's] time to maintain inactive entities. The entire APPS System was done without redoing regulations. "

#### ***24 CFR 5.233 Mandated use of HUD's Enterprise Income Verification (EIV) System.***

The EIV process is a combination of paper and technology. There are several steps for a user to gain access to the system which shift between paper and technology and must be shuttled between the user

and the coordinator. This is extremely burdensome and should be streamlined. This process should be reviewed and wrapped into one technology solution.

In addition, there were several occasions last year that O/As could not use EIV because the system was offline. Through a list-serve, HUD notified O/As to document in the tenant files that EIV was unavailable, and that contract administrators should not issue findings on management reviews for failure to use EIV during these times. NAHMA believes this rule should be revised to state that O/As will not be considered non-compliant for failure to use EIV if the reason was because the system was not available.

#### ***24 CFR Part 402--Section 8 Project-Based Contract Renewal under Section 524 of MAHRA.***

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. Additionally, once automated, HUD should provide electronic signature capability for the parties to the contract, or at least, grant permission to electronically scan signed pages of the contract.

#### **6. Are there any existing HUD requirements that duplicate or conflict with requirements of another Federal agency? Can the requirement be modified to eliminate the conflict?**

A major conflicting requirement that NAHMA urges HUD and Treasury-IRS to address is conflicting requirements for occupancy by full time students. This is a statutory issue for both agencies, but we believe interagency cooperation to propose a solution would greatly assist legislative efforts.

Management of mixed-financed multifamily properties could also be greatly assisted by reducing the number of inspections required by each program used to finance or assist the properties.

#### ***24 CFR 5.612 Restrictions on assistance to students enrolled in an institution of higher education (for HUD Section 8 programs).***

##### ***Internal Revenue Code Section 42(i)(3)(D) Certain Students Not To Disqualify Unit.***

The student occupancy rules for both the Section 8 program and the Low Income Housing Tax Credit (LIHTC) are intended to ensure that qualified families are not displaced by college students who need affordable off-campus housing.

Where these occupancy requirements conflict is in the treatment of student households. HUD's policy establishes criteria which generally allow an adult resident to pursue an education as long as he or she meets the Section 8 program and income qualifications. If the resident is a tax dependent of his or her parents, the parents must also be income-qualified for Section 8. No distinction is made between part-time or full time students for HUD's occupancy requirements. On the other hand, the LIHTC program prohibits full-time student households from living in a low-income unit unless they satisfy one of the statutory exemptions. If one person is living in a LIHTC unit, and that person is a full-time student, he is a full-time student household who may be ineligible for occupancy.

The conflicting treatment of students is becoming a greater concern for O/As of mixed-finance multifamily properties. As LIHTCs are used to preserve and recapitalize older HUD-assisted properties, O/As are concerned that residents who are full-time students may be displaced under the LIHTC rules. For example, if a single adult who is the sole member of the household is a full-time student living in a project-based Section 8 property that is awarded LIHTCs, there is not definitive guidance about whether the resident may continue to live in the property after the LIHTCs are awarded. NAHMA urges HUD and Treasury-IRS to propose a legislative solution which ensures residents in mixed-finance multifamily properties may pursue educational opportunities which will allow them to climb the economic ladder.



**24 CFR Part 5 Subpart G--Physical Condition Standards and Inspection Requirements**  
**24 CFR Part 200 Subpart P--Physical Condition of Multifamily Properties**  
**24 CFR 880.612 Reviews during management period**  
**24 CFR 92.504 (HOME) Participating jurisdiction responsibilities; written agreements; on-site inspection**  
**26 CFR 1.42-5 Monitoring compliance with low-income housing credit requirements**  
**7 CFR Part 3560 Subpart H--Agency Monitoring (Rural Housing Service)**

Project-Based Section 8, HOME, LIHTC and Rural Housing Service multifamily programs all require physical and administrative inspections. While administrative requirements differ, the physical inspections should be combined and coordinated so that the property is subject to no more than one annual inspection. Under the current practices, mixed-finance or multiple-subsidy multifamily properties are subjected to a variety of inspections that are not only disruptive to management but also to residents, who must be notified to be ready for a random inspection.

**7. Are there HUD regulations that are working well and that can be expanded or used as a model for other HUD programs?**

NAHMA offers no comments on this question.

**Conclusion**

NAHMA commends HUD for undertaking this important review. Our comments are not exhaustive, but they do represent a strong consensus about the most important regulatory concerns among our members. There are a number of implementation issues in the areas of Project-Based Section 8 contract administration and other reporting requirements that we are working with HUD officials to improve. We look forward to continuing our partnership with the Department to strike the appropriate balance between common sense and appropriate regulatory oversight of federal programs.

Sincerely,



Kris Cook, CAE  
Executive Director