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Department of Housing and Urban Development

24 CFR Part 905

**Public Housing Capital Fund Program
Obligation and Expenditure of Funds;
Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 905

[Docket No. FR-4507-F-02]

RIN 2577-AC16

Public Housing Capital Fund Program Obligation and Expenditure of Funds

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule promulgates HUD's regulation for section 9(j) of the United States Housing Act of 1937, which deals with the obligation and expenditure of Capital Fund Program funds by public housing agencies, in accordance with congressional direction.

DATES: Effective Date: September 2, 2003.

FOR FURTHER INFORMATION CONTACT: William Thorson, Director, Office of Capital Improvements, Public and Indian Housing, Room 4134, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-5000; telephone (202) 708-1640, ext. 4999 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: Section 519 of the Quality Housing and Work Responsibility Act of 1998 (Pub.L. 105-276, approved October 21, 1998) (QHWRA) amends section 9 of the United States Housing Act of 1937 (1937 Act) (42 U.S.C. 1437g) to provide a "Capital Fund," to be established by HUD for the purpose of making assistance available to public housing agencies (PHAs) to carry out capital and management improvement activities. Among other things, section 9 requires HUD to develop a formula for determining the amount of assistance provided on an annual basis to PHAs from the Capital Fund, including a mechanism to reward performance. The statute also requires the Capital Fund Formula (CFF) be developed through negotiated rulemaking procedures. The CFF is the subject of a separate final rule, published on March 16, 2000 (65 FR 14422), and amended on May 2, 2000 (65 FR 25446). HUD will also publish a proposed rule that would provide additional Capital Fund Program (CFP) requirements.

Section 9(j) of the 1937 Act establishes time limits for the obligation

and expenditure of CFP funds, and penalties for violations of those limits. Under section 9(j), unless HUD grants an extension, a PHA has 24 months for obligation and four years for expenditure of CFP funds, which are received pursuant to section 9(d), before the statutory penalties may be imposed.

HUD's Fiscal Year 2003 Appropriations Act, Title II of Division K of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108-7, 117 Stat. 11, approved February 20, 2003) (FY 2003 Appropriations Act) includes a requirement "That the Secretary shall issue final regulations to carry out section 9(j) of the United States Housing Act of 1937 (42 U.S.C. 1437g(j)) not later than August 1, 2003." HUD is issuing this final rule to address that requirement. This rule places the obligation and expenditure requirements at 24 CFR 905.120 of HUD's regulations. The rule basically follows the statutory language of section 9(j) without addition except to conform the statutory language to a regulatory format as noted in this preamble.

The addition made by this rule consists of explicitly stating at § 905.120(b)(1) that a PHA may request an extension of the time period for obligation, as permitted under section 9(j)(2). Section 9(j)(2) permits HUD to grant an extension, and it follows that a PHA must be allowed to request an extension.

Findings and Certifications

Justification for Final Rulemaking

In general, HUD publishes a rule for public comment before issuing a rule for effect, in accordance with HUD's own regulations on rulemaking at 24 CFR part 10. Part 10, however, does provide for exceptions for that general rule where HUD finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is determined to be "impracticable, unnecessary, or contrary to the public interest." HUD finds that good cause exists to publish this final rule for effect without first soliciting public comment in that prior public procedure would be unnecessary. Section 905.120 only repeats the statutory requirements of section 9(j) of the 1937 Act, which do not need rulemaking to be effective and which HUD may not, in any event, change through a regulation in response to public comment.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made for this rule in accordance with

HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-0500.

Regulatory Planning and Review

The Office of Management and Budget (OMB) has reviewed this rule under Executive Order 12866 (Regulatory Planning and Review). OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not economically significant as provided in section 3(f)(1) of the Order). Any changes made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the Regulations Division, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-0500.

Regulatory Flexibility Act

The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this rule would not have a significant economic impact on a substantial number of small entities. The rule only includes statutory requirements that the Department may not alter by regulation and all entities are treated as required by the statute.

Executive Order 13132, Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (2) the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments within the meaning of Executive Order 13132.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) requires federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector.

This rule does not impose, within the meaning of the UMRA, any federal mandates on any state, local, or tribal governments or on the private sector.

List of Subjects in 24 CFR Part 905

Grant programs—housing and community development, Modernization, Public housing, Reporting and recordkeeping requirements.

Catalog

The Catalog of Federal Domestic Assistance number for the program affected by this rule is 14.850.

■ For the reasons discussed in the preamble, chapter IX of title 24 of the Code of Federal Regulations is amended as follows:

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

■ 1. The authority citation for 24 CFR part 905 continues to read as follows:

Authority: 42 U.S.C. 1437g and 3535(d).

■ 2. Add a new § 905.120 to read as follows:

§ 905.120 Penalties for slow obligation or expenditure of CFP assistance.

In addition to any other statutory, regulatory, or contractual sanctions available to HUD, the penalties for slow obligation or expenditure of CFP assistance will be applied as follows:

(a) *Obligation of amounts.* (1) Except as provided in paragraph (b) of this section, a PHA must obligate any assistance received under this part not later than 24 months after, as applicable:

(i) The date on which the funds become available to the PHA for obligation in the case of modernization; or

(ii) The date on which the PHA accumulates adequate funds to undertake modernization, substantial rehabilitation, or new construction of units.

(2) Notwithstanding paragraph (a)(1) of this section, any funds appropriated

to a PHA for Fiscal Year 1997 or prior fiscal years shall be fully obligated by the PHA not later than September 30, 1999.

(b) *Exceptions to obligation requirement.* (1) *Extension before expiration of obligation period.* A PHA may request and HUD may approve a longer timeframe or HUD may, by prior approval granted before the expiration of the time period in paragraph (a) of this section, extend the time period under paragraph (a) of this section for an additional period not to exceed 12 months, based on:

- (i) The size of the PHA;
- (ii) The complexity of the capital program of the PHA;
- (iii) Any limitation on the ability of the PHA to obligate the amounts allocated for the PHA from the Capital Fund in a timely manner as a result of state or local law; or
- (iv) Such other factors as HUD determines to be relevant.

(2) *Extension of obligation period.* HUD may extend the time period under paragraph (a) of this section for a PHA, for such period as HUD determines to be necessary, if HUD determines that the failure of the agency to obligate assistance in a timely manner is attributable to:

- (i) Litigation;
- (ii) Obtaining approvals of the federal government or a state or local government;
- (iii) Complying with environmental assessment and abatement requirements;
- (iv) Relocating residents;
- (v) An event beyond the control of the PHA; or
- (vi) Any other reason established by HUD by notice published in the **Federal Register**.

(3) *Disregard of minimal unobligated amounts.* HUD will disregard the requirements of paragraph (a) of this section with respect to any unobligated amounts made available to a PHA, to the extent that the total of such amounts does not exceed 10 percent of the

original amount made available to the PHA.

(c) *Effect of failure to comply.* (1) *Prohibition of new assistance.* A PHA will not be awarded CFP assistance for any month during any fiscal year in which the PHA has funds unobligated in violation of paragraph (a) or (b) of this section.

(2) *Withholding of assistance.* During any fiscal year described in paragraph (c)(1) of this section, HUD will withhold all assistance that would otherwise be provided to the PHA. If the PHA cures its failure to comply during the year, it shall be provided with the share attributable to the months remaining in the year.

(3) *Redistribution.* The total amount of any funds not provided PHAs by operation of this section shall be allocated for PHAs determined to be high-performing under the Public Housing Assessment System (at 24 CFR part 902) (or the applicable performance evaluation program for public housing).

(d) *Expenditure of amounts.* (1) *In general.* A PHA must spend any assistance received under this part not later than four years (plus the period of any extension approved by HUD under paragraph (b) of this section) after the date on which funds become available to the PHA for obligation.

(2) *Enforcement.* HUD will enforce the requirement of paragraph (d)(1) of this section through default remedies up to and including withdrawal of the CFP funding.

(e) *Right of recapture.* Any obligation entered into by a PHA is subject to the HUD's right to recapture the obligated amounts for violation by the PHA of the requirements of this section.

Dated: July 28, 2003.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

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