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Department of Housing and Urban Development

24 CFR Part 92

**HOME Investment Partnership Program;
American Dream Downpayment Initiative
and Amendments to Homeownership
Affordability; Final Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 92

[Docket No. FR-4832-F-02]

RIN 2501-AC93

**HOME Investment Partnerships
Program; American Dream
Downpayment Initiative and
Amendments to Homeownership
Affordability**

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This rule follows publication of, and considers the public comments on, two earlier HUD rules. First, this rule makes final the March 30, 2004, interim rule establishing regulations for a downpayment assistance component under the HOME Investment Partnerships Program (HOME), referred to as the American Dream Downpayment Initiative (ADDI). Through the ADDI, HUD makes formula grants to participating jurisdictions under the HOME Program for the purpose of assisting low-income families to achieve homeownership. In addition, this rule also makes final HUD's November 22, 2004, interim rule, which revised and clarified the HOME Program homeownership affordability requirements of the HOME Investment Partnerships Program. In response to the public comments received on both interim rules, this final rule clarifies that the purchase of manufactured homes is an ADDI eligible activity, and broadens and clarifies the use of HOME funds to help preserve affordable housing previously assisted with HOME funds.

DATES: *Effective Date:* May 4, 2007.

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SUPPLEMENTARY INFORMATION:

I. Background

A. The HOME Program

The HOME Investment Partnerships Program (HOME Program) is authorized under Title II of the Cranston-Gonzalez National Affordable Housing Act (42

U.S.C. 12704 *et seq.*) (NAHA). Through the HOME Program, HUD allocates funds by formula among eligible state and local governments to strengthen public-private partnerships and to expand the supply of decent, safe, sanitary, and affordable housing for very low-income and low-income families. Generally, HOME funds must be matched by nonfederal resources. State and local governments that become participating jurisdictions may use HOME funds to carry out multiyear housing strategies through acquisition, rehabilitation, and new construction of housing, and through tenant-based rental assistance. Participating jurisdictions may provide assistance in a number of eligible forms, including grants, loans, advances, equity investments, interest subsidies, and other forms of assistance that HUD approves. HUD's regulations for the HOME Program are located at 24 CFR part 92.

B. The March 30, 2004, Interim Rule Implementing the American Dream Downpayment Initiative

The American Dream Downpayment Act (Pub. L. 108-186, approved December 16, 2003) (ADDI statute) amended NAHA to establish a downpayment assistance component under the HOME program, referred to as the American Dream Downpayment Initiative (ADDI). Specifically, the ADDI statute established a separate formula under the HOME Program by which HUD allocates funds to states that are participating jurisdictions under the HOME Program and to participating jurisdictions within those states for the purpose of making downpayment assistance to low-income families who are first-time homebuyers for the purchase of single family housing that will serve as the family's principal residence. The ADDI statute revised section 271 of NAHA (12 U.S.C. 12881) to establish specific statutory requirements for administration of ADDI, including the allocation of funds.

With respect to allocation of funds, the ADDI statute established a formula that is based primarily on the need for assistance to homebuyers as measured by the percentage of low-income households residing in rental housing within the participating jurisdiction. This formula governs the allocation of ADDI funds. Among other requirements, the ADDI statute also established the definitions applicable to ADDI, authorized the use of ADDI funds for certain rehabilitation costs completed in conjunction with ADDI downpayment assistance, established new Consolidated Plan requirements, and

prescribed other requirements regarding the allocation and use of ADDI funds. Through the statutory requirement that participating jurisdictions have a plan for conducting targeted outreach to public housing tenants and to families receiving rental assistance from public housing agencies, the ADDI statute envisioned that among the low-income families who will move from rental to homeownership are those families who are currently public housing residents or who are receiving rental assistance. ADDI provides a much-needed resource to participating jurisdictions to assist low-income families achieve the dream of homeownership.

On March 30, 2004 (69 FR 16758), HUD published an interim rule that established regulations at 24 CFR part 92 for ADDI. The interim rule codified the statutory formula (located at 42 U.S.C. 12821) for allocation of ADDI funds to HOME participating jurisdictions, identified eligible activities and costs under ADDI, and established other applicable requirements.

C. The November 22, 2004, Interim Rule Revising the HOME Program Homeownership Affordability Requirements

Section 215(b) of NAHA establishes affordability requirements for HOME-assisted homeownership housing. These requirements apply to both the initial sale to a HOME-assisted homebuyer and to any subsequent resale by that homebuyer during the applicable period of affordability. Specifically, the statute provides that participating jurisdictions must impose restrictions that either require that (1) the HOME-assisted housing be resold to another low-income homebuyer at an affordable price; or (2) the HOME-assisted housing may be resold to any homebuyer regardless of income, but the subsidy to the original homebuyer must be recaptured unless the net proceeds of the sale are insufficient.

On November 22, 2004 (69 FR 68050), HUD published an interim rule that amended the regulations at 24 CFR part 92 for homeownership housing under the HOME Program. The interim rule revised the affordability requirements for homeownership housing assisted under the HOME program. Specifically, the interim rule limited the amount of the HOME investment subject to recapture after the sale of a HOME-assisted homebuyer project during the period of affordability to the net proceeds of the sale. In addition, the rule created a provision to allow participating jurisdictions to preserve HOME-assisted homebuyer housing as

affordable housing by investing additional HOME funds to acquire the housing before foreclosure or at a foreclosure sale.

II. This Final Rule: Differences Between the March 30, 2004, ADDI Interim Rule, the November 22, 2004, Affordability Requirements Interim Rule, and This Final Rule

This final rule follows publication of the March 30, 2004, and the November 22, 2004, interim rules and takes into consideration the public comments received on the interim rules. After careful consideration of the public comments, HUD has made the following changes to the interim rules.

1. *Definition of first time homebuyer; clarifying language regarding manufactured housing as an eligible activity.* HUD is amending the definition of first time homebuyer in the HOME Investment Partnerships program definitions to include those individuals who own dwelling units not permanently affixed to a foundation (inadvertently omitted from the March 30, 2004, regulation); and amending the ADDI regulations to include statutory language on the purchase of manufactured housing as an ADDI eligible activity. Specifically, language has been included stating that individuals shall not be excluded from consideration as a first-time homebuyer on the basis that the individual owns or owned, as a principal residence during the three-year period prior to assistance with ADDI funds, a dwelling unit whose structure is not permanently affixed to a permanent foundation in accordance with local or other applicable regulations or not in compliance with state, local, or model building codes, or other applicable codes, and cannot be brought into compliance with such codes for less than the cost of constructing a permanent structure. Also, although the regulatory definition of "housing" includes manufactured housing and manufactured housing lots, the ADDI regulations now state that ADDI funds may be used to purchase manufactured housing units and manufactured housing lots; the manufactured housing must be connected to permanent utility hook-ups; and the land on which the manufactured housing is located must be owned by the manufactured housing owner, owned as cooperative, or subject to a leasehold interest with a term, at minimum, equal to the term of the mortgage financing on the unit or the period of affordability, whichever is greater.

2. *HOME funds for the preservation of affordable housing.* HUD has amended

the HOME program's eligible administrative and planning costs to now include as eligible the preservation of affordable homeownership housing previously assisted with HOME funds. Also, the HOME program's prohibitions were amended to make clear that funds may be used for assistance to preserve affordability of homeownership housing. Additionally, § 92.254(a)(9) has been reorganized to more clearly explain that HOME funds may be used to acquire housing in default through a purchase option, right of first refusal, or other preemptive right before foreclosure or through acquisition at a foreclosure sale, as well as to assist another homebuyer in purchasing the housing. Furthermore, although HOME funds cannot be used to repay a loan made with HOME funds, HOME funds may be used to pay foreclosure costs. The regulations were also amended to clarify that the investment of additional HOME funds to preserve affordability is considered an amendment of the original project rather than a new project.

3. *HOME fund recaptures.* HUD has amended the final rule to clarify that HOME fund recaptures cannot exceed net proceeds, if there are in fact net proceeds. No substantive change is being made to the recapture requirement; but, rather, HUD is rewording the regulatory text for the sake of clarity.

III. Discussion of Public Comments on the March 30, 2004, Interim Rule Establishing ADDI Regulations

The public comment period on the ADDI interim rule closed on June 1, 2004, and HUD received 15 public comments. Comments were received from trade and professional organizations representing the realtor, homebuilder, and manufactured home industries; state and local community development agencies (as well as the national organizations representing these state and local agencies); private citizens; and non-profit downpayment assistance organizations. This section of the preamble presents a summary of the significant issues raised by the public comments and HUD's responses to those issues.

A. General Comments

Six commenters expressed general support for the ADDI interim rule. The commenters wrote that "this program will help reduce home buying costs and allow people to achieve homeownership" and that ADDI is "focused on providing additional resources to HOME participating jurisdictions for homeownership

activities." One commenter wrote that it was pleased that HUD included displaced homemakers and single parent households among those eligible to benefit from ADDI, and that the inclusion of condominiums and cooperative units within the definition of single family housing was a positive step.

The primary area of concern that commenters mentioned was the inability to use ADDI funds for ADDI administrative costs. Several commenters were concerned that even though the regulation permits HOME funds to be used for ADDI's administration and planning, lack of additional funds for ADDI administration will make oversight and execution of the ADDI program extremely difficult. Another area of concern related to the requirement that participating jurisdictions repay HOME/ADDI funds on homes that go into foreclosure.

Additional comments involved perceived negative connotations of manufactured housing, questions about eligible new construction costs, questions about the definition of first time homebuyer, and concerns that nonprofit homebuyer assistance organizations may not be permitted to participate in the ADDI. A breakdown of the comments by subject area follows.

B. Use of HOME Administrative Funds for ADDI Administrative Costs; ADDI Funding

The March 30, 2004, interim rule amended § 92.207 to make clear that a participating jurisdiction may expend HOME funds for payment of ADDI administrative expenses. The expended amount cannot exceed ten percent of the fiscal year HOME basic formula. ADDI funds cannot be used for administration costs of the ADDI program.

Comment: Not providing for additional funding for the ADDI program is unduly burdensome to participating jurisdictions. One commenter wrote that the intent of the ADDI program is to provide funding for a new homebuyer initiative rather than supplement funding for already existing programs. According to the commenter, new initiatives require new administrative costs; thus, additional funding is required in order to sufficiently get the ADDI program up and running. Another commenter wrote that a 10 percent allocation of HOME funds for both HOME and ADDI administrative costs is inadequate to meet program costs. An additional commenter wrote that HUD should add a participating jurisdiction's ADDI allocation to its HOME allocation to

calculate its ten percent program administration limit. One commenter asked HUD to amend the rule to allow all participating jurisdictions to expend up to 10 percent of their ADDI allocations on administrative costs.

HUD Response. ADDI is a downpayment assistance program under the HOME Program. Most participating jurisdictions already fund homebuyer projects with their HOME Program funds. Many of these projects are part of homebuyer programs that provide downpayment assistance to low-income homebuyers. Consequently, many participating jurisdictions will choose to implement ADDI as part of their existing homebuyer programs. HUD agrees that it may be burdensome to some participating jurisdictions to implement ADDI without additional funding for program administration. However, the ADDI statute does not provide additional funds for ADDI program administration from ADDI funds.

Comment: Congress intended to allow for the expenditure of ADDI funds as administrative expenses. One commenter wrote that Congress' silence on an administrative fee in the final statutory language for the ADDI program allows HUD the discretion to include a jurisdiction's FY 2004 and subsequent ADDI allocation into its HOME allocation for purposes of calculating an administrative fee. Another commenter wrote that Congress considered including administrative funds for ADDI and that the Senate Banking, Housing and Urban Affairs Committee amended the original Senate bill, S. 811, during its mark-up of the bill to include a five percent administrative provision for ADDI. A third commenter wrote that the ADDI statute should be interpreted to authorize the same level of administrative funding for ADDI activities as is already available for all other HOME activities, including those that provide homeownership assistance. Another commenter wrote that it interprets 24 CFR 92.602 of the HOME regulation as allowing a participating jurisdiction to use ADDI funds to finance ADDI project delivery costs.

HUD Response. HUD disagrees that Congress' silence on the eligibility of administrative costs in the final statutory language for the ADDI program allows HUD the discretion to include a jurisdiction's FY 2004 and subsequent ADDI allocations into its HOME allocations for purposes of calculating an administrative fee. As pointed out by a commenter, Congress considered including administrative funds for ADDI and the Senate Banking, Housing and Urban Affairs Committee amended the original Senate bill, S. 811, during its

mark-up of the bill to permit five percent of ADDI funds to be used for administrative provision. However, this language was struck from the legislation before enactment. Section 92.602 identifies eligible costs under ADDI including staff and overhead costs directly related to carrying out an ADDI project, which are eligible project related soft costs under § 92.602(b)(3)(iv).

Comment: ADDI should be funded as a standalone program instead of a set-aside within the HOME program. One commenter made this suggestion.

HUD Response. Congress wrote the ADDI legislation to be a component of the HOME Program. The American Dream Downpayment Act amended the HOME statute (subtitle E of Title II of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12821)) to create ADDI. The implementation of ADDI was facilitated because ADDI is a set-aside within the HOME Program.

C. Recaptured/Repaid Funds Due to Foreclosure

Several commenters on the ADDI rule expressed concern about HOME recapture and repayment requirements, which are applicable to ADDI under § 92.616. HUD addressed the concerns of these commenters by publishing the November 22, 2004, rule.

Comment: Validation is sought as to whether 24 CFR 92.254(a)(5) requires the participating jurisdiction to submit for HUD approval the resale and recapture provisions of the ADDI program before a participating jurisdiction may implement the program.

HUD Response. The HOME regulations at § 92.254(a)(5) require HOME participating jurisdictions to establish resale or recapture requirements that comply with the provisions of that section of the HOME rule and to set forth the requirements in their consolidated plans. In addition, § 91.220(g)(2)(ii) and § 91.320(g)(2)(ii) direct local participating jurisdictions and states, respectively, that will use HOME funds to assist homebuyers, to state the guidelines for resale or recapture as required in § 92.254. HUD reads § 92.254(a)(5) to include both HOME and ADDI funds used to assist homebuyers. Therefore, it is not necessary for a participating jurisdiction to separately submit for HUD approval the resale and recapture provisions it will use for the ADDI program unless the provisions used for ADDI projects differ from the provisions previously set forth in the consolidated plan for HOME homebuyer projects.

D. Manufactured Homes

Comment: Maintaining the current action plan language regarding manufactured homes is contrary to current federal and state policy. Two commenters wrote that the language requiring targeted outreach to residents and tenants of public and manufactured housing creates negative and inaccurate connotations for manufactured housing that are contrary to current policy. One of the commenters wrote that this language strongly implies that jurisdictions must have targeted plans to displace persons from manufactured homes.

HUD Response. The language added to the consolidated plan regulations at 24 CFR part 91 is the statutory requirement. Specifically, the language added to the action plan provisions for local HOME participating jurisdictions at § 91.220 and for states at § 91.320 requires a recipient of ADDI funds to include in its action plan a plan for conducting targeted outreach to residents and tenants of manufactured housing. Because the definition of single family housing in the ADDI statute and rule includes manufactured housing and a manufactured housing lot, the consolidated plan requirement regarding outreach to residents and tenants of manufactured housing has been read by commenters as contradicting the eligibility of manufactured housing as ADDI eligible single-family housing. However, tenants of the manufactured housing qualify as first-time homebuyers. In addition, ownership of manufactured housing that is not permanently affixed does not disqualify the family as a first-time homebuyer. In order to clarify the language in the interim rule regarding participating jurisdictions' responsibilities providing outreach to residents and tenants of manufactured housing, HUD is revising the definition of first-time homebuyer in the ADDI regulations that more closely tracks the statutory definition of single family housing. Specifically, the definition of first-time homebuyer now states that an individual shall not be excluded from consideration as a first-time homebuyer on the basis that the individual owns or owned, as a principal residence during the three-year period prior to assistance with ADDI funds, a dwelling unit whose structure is not permanently affixed to a permanent foundation in accordance with local or other applicable regulations or not in compliance with state, local, or model building codes, or other applicable codes, and cannot be brought into compliance with such

codes for less than the cost of constructing a permanent structure.

Comment: The definition of single family housing should be revised to use the exact statutory language pertaining to manufactured housing. Two commenters wrote that the statutory language provides that manufactured housing owned as a cooperative or subject to a leasehold interest is an eligible activity under ADDI. The commenters urged that this be clarified in the final rule.

HUD Response. HUD agrees that additional language is needed clarifying that the purchase of manufactured homes is an eligible activity. HUD has added language to § 92.602(a) stating that ADDI funds may be used to purchase a manufactured housing unit, manufactured housing lots, and that the manufactured housing unit must, at the time of project completion, be connected to permanent utility hook-ups and be located on land that is owned by the manufactured housing owner, owned as a cooperative, or is subject to a leasehold interest with a term equal to at least the term of the mortgage financing on the unit or the period of affordability (whichever is greater).

E. Nonprofit Downpayment Assistance Programs

Comment: The interim rule unfairly excludes certain nonprofit organizations from participation in ADDI. Two commenters objected to the limitation on subrecipients and contractors contained in the interim rule. The interim rule prohibits a participating jurisdiction from providing ADDI funds to an entity or organization that provides downpayment assistance, if the activities of that entity are financed by contributions, service fees, or other payments from the sellers of housing, whether or not made in conjunction with the sale of specific housing acquired with ADDI funds. The commenters wrote that this limitation goes beyond the statutory prohibition and unfairly excludes certain nonprofit organizations from participating in ADDI, because the commenters believe the statute can be interpreted to permit an entity to run two programs, one program with seller-provided funds and another—the ADDI program—without seller funds. In addition, the commenters objected to the rationale in the preamble to the interim rule, which provided that seller-financed downpayment assistance artificially inflated the fees charged to homebuyers in excess of the amount necessary to compensate sellers for their payment of

certain closing charges or contributions to the cost of the downpayment.

HUD Response. The ADDI statute prohibits participating jurisdictions from using ADDI to provide funding to an entity or organization that provides downpayment assistance if the activities of that entity or organization are funded in whole or in part, directly or indirectly, by contributions, service fees, or other payments from the sellers of housing. The ADDI regulations at § 92.602(f) copy the statutory language and adds the following phrase: “whether or not made in conjunction with the sale of specific housing acquired with ADDI funds.” HUD purposefully added this language to better articulate the statutory prohibition against organizations that receive funds from sellers of housing. The prohibition applies to the entire organization, not just to specific programs of the organization.

The statement in the preamble about seller-funded downpayment programs is supported by a recent study. “An Examination of Downpayment Gift Programs Administered by Non-profit Organizations” (March 2005), prepared for HUD by Concentrance Consulting Group, found strong evidence that the cost of downpayment assistance added to the sales price, increased the loan amount, and eliminated any borrower equity in the property. This study can be found at: <http://www.hud.gov/offices/hsg/comp/rpts/dpassist/dpa2.pdf>.

F. Other Comments

Comment: The language relating to the usage of ADDI funds for new construction financing and the definition of “single family home” should be made more clear. One commenter requested that HUD clarify that, although ADDI funds cannot be used for hard or soft costs related to new construction, ADDI funds may be used for the acquisition and financing of new construction. Two commenters requested a clarification on the definition of single family housing and whether that definition includes both newly constructed and existing homes. One commenter suggested the rule should state that downpayment funds can only be used in association with the purchase or repair of existing homes. The commenter interpreted the interim rule to prohibit the use of ADDI funds for newly constructed homes.

HUD Response. The ADDI statute and § 92.602(a) of the ADDI regulations clearly state that the only eligible activities are downpayment assistance towards the purchase of single family housing by low-income families who are first-time homebuyers and rehabilitation

that is completed in conjunction with the home purchase assisted with ADDI funds. Single family housing includes housing that is newly constructed. Section 92.601(b)(4) prohibits the use of ADDI funds for the development costs of new construction of housing or for rental assistance. Since ADDI funds can only be used for downpayment assistance towards the purchase of single family housing and for rehabilitation of the ADDI-assisted housing, ADDI funds can be used to assist low-income first-time homebuyers to purchase newly constructed housing, but not to develop or finance new construction.

Comment: The definition of first-time homebuyer should include a financial cap on ownership of other real estate. One commenter wrote that under the interim rule’s definition of a first-time homebuyer, the first-time homebuyer could feasibly own other types of real estate prior to purchasing a first home, such as industrial, agricultural, commercial, and rental housing which did not include the buyer’s residence. The commenter wrote that if HUD intends to allow for this kind of additional property ownership, the appraised value of such allowable property be capped at \$300,000.

HUD Response. The purpose of the ADDI program is to assist low-income first-time homebuyers with downpayment assistance to purchase modest single family housing. An individual who has owned housing—whether or not it is the principal residence—within the three-year period before purchase of a home with ADDI assistance is not a first-time homebuyer, unless that person is a displaced homemaker or single parent as defined in the rule. If the participating jurisdiction is using the definition of “annual income” in § 5.609, the assets of the individual must be considered in determining whether the person is low-income.

Comment: The definition of low-income family at 24 CFR 92.2 should be waived for high-cost localities. One commenter wrote that HUD should allow a waiver of the definition of low-income families for higher cost areas where there may be a shortage of affordable housing for purchase by persons at 80 percent of area median income or below.

HUD Response. HUD disagrees with the commenter’s suggestion that HUD waive the definition of low-income families in high cost areas. The definition of low-income families is statutorily based (42 U.S.C. 12704(10)) and cannot be waived. Moreover, allowing participating jurisdictions in

high cost areas in which there may be a shortage of affordable housing for low-income families to serve families with a higher income is contrary to the purpose of ADDI and will not resolve the affordable housing shortage for low-income families in that area.

Comment: Eligible ADDI costs should include pre-purchase housing inspections and housing counseling, regardless of ultimate ADDI assistance. One commenter wrote that pre-purchase housing inspections should be allowed as an eligible soft cost. The commenter wrote that in the event the purchase falls through due to the inspection uncovering problems that cancel the sale, HUD should allow participating jurisdictions to pay for those inspections with HOME administrative funds. The commenter also wrote that lead-based paint stabilization and clearance testing be included as an acceptable ADDI rehabilitation or soft cost, respectively. Another commenter wrote that HUD should recognize as an eligible ADDI cost the provision of pre-purchase services, such as housing counseling, to potential buyers who are ADDI-eligible, whether or not those eligible buyers are ultimately assisted with ADDI funds. Another commenter suggested that ADDI funds received by housing counseling organizations be chargeable as project costs even when the individual receiving the assistance is not immediately able to qualify for mortgage financing or receives such financing without ADDI assistance. The commenter also wrote that HUD should give ADDI funds directly to housing counseling agencies rather than filtering the funds through participating jurisdictions and urged that the 25 percent match associated with FY 2003 ADDI funds be waived in the case of awards to housing counseling organizations.

HUD Response. The ADDI statute and § 92.602(a) of the ADDI regulations identify eligible activities as downpayment assistance and home repairs. Section 92.602(b) identifies eligible project costs of ADDI projects. Included in eligible project costs are acquisition costs, rehabilitation costs, and related soft costs. Pre-purchase inspections and housing counseling are considered eligible soft costs, provided the eligible low-income, first-time homebuyer purchases single-family housing with ADDI assistance. If the purchase falls through and the sale is cancelled, there is no eligible ADDI project, and therefore, there are no eligible project soft costs. In this case, participating jurisdictions may use HOME administrative funds to pay for related soft costs expended on the

cancelled ADDI project. Likewise, lead paint clearance testing is an eligible ADDI project related soft cost and lead paint stabilization is an eligible ADDI rehabilitation cost provided an eligible low-income, first-time homebuyer purchases the subject single-family housing with ADDI assistance.

HUD agrees that housing counseling is a crucial component of a successful homeownership program. However, the chief purpose of ADDI is to assist low-income families to achieve homeownership. HUD currently administers a housing counseling program through the Federal Housing Administration (FHA) that could assist persons who will not purchase single family housing with ADDI assistance. ADDI only authorizes HUD to "award grants to participating jurisdictions to assist low-income families to achieve homeownership. * * *" "Participating jurisdiction" is defined in the ADDI statute as a State or unit of general local government. Accordingly, housing counseling entities that are not participating jurisdictions are not eligible direct recipients of ADDI funds. The ADDI statute does not require participating jurisdictions to match ADDI funds. However, because FY 2003 ADDI funds are governed by the FY 2003 HOME appropriation act, not the ADDI statute, participating jurisdictions are required to match their FY 2003 ADDI funds. HUD cannot waive the statutory match requirement for these funds.

Comment: Clarification requested regarding 20 percent cap on rehabilitation. One commenter asked for clarification about the actual percentages the homebuyer may receive for rehabilitation. The commenter asked if, for example, a homebuyer is receiving \$4,000 in downpayment assistance, whether the homebuyer is limited to rehabilitation expenditures of 20 percent of the \$4,000 assistance total (in that case, \$800), or can that homebuyer actually receive \$6,000 in rehabilitation assistance (the maximum allowable under § 92.602(e)) as long as the participating jurisdiction's total entire ADDI rehabilitation amount does not exceed 20 percent of the fiscal year formula allocation.

HUD Response. According to ADDI statute, not more than 20 percent of the grant funds provided under the formula allocation to a participating jurisdiction may be used to provide assistance to low-income, first-time homebuyers for home repairs. The regulation at § 92.602(a)(2) states that "total rehabilitation shall not exceed 20 percent of the participating jurisdiction's ADDI fiscal year formula

allocation." Therefore, a homebuyer can receive ADDI funds for downpayment assistance and home repairs, subject to the maximum amount of assistance set forth at § 92.602(e)—the greater of 6 percent of the purchase price or \$10,000—as long as the participating jurisdiction has not reached 20 percent of its ADDI formula allocation for home repairs. Thus, in the example the commenter set forth above, the homebuyer could receive up to \$6,000 in rehabilitation assistance as long as the participating jurisdiction's entire ADDI rehabilitation amount does not exceed 20 percent of its fiscal year formula allocation.

Comment: ADDI funds should be disbursed in the same manner HOME funds are disbursed. One commenter, citing 24 CFR 92.502, wrote that certain costs associated with downpayment assistance will be charged against ADDI funds which involves per-household assistance caps. The commenter wrote that ADDI costs will be assigned to projects by HUD computers and those computers cannot effectively discern separate ADDI expenditures. The commenter wrote that rather than assigning ADDI funds to individual projects, HUD should disburse ADDI funds in the same manner as HOME funds, since local jurisdictions are better suited to decide how funds should be distributed.

HUD Response. ADDI funds are disbursed in the same manner as HOME funds through HUD's Integrated Disbursement and Information System (IDIS). However, ADDI funds cannot be separated from HOME funds in IDIS, and therefore, HUD has developed a report that uses a number of project identification factors to identify ADDI projects. These reports may be useful to participating jurisdictions to track ADDI disbursements. However, participating jurisdictions are free to maintain their own records of ADDI project disbursements. The sum of HOME and ADDI disbursements in IDIS will match a participating jurisdiction's records.

Comment: HUD should accept the median area purchase price developed by the real estate industry in the participating jurisdiction as the price for single family housing as per 24 CFR 92.254(a)(2)(iii). One commenter made this suggestion.

HUD Response. A participating jurisdiction that receives ADDI funds may use the Single Family Mortgage Limits under section 203(b) of the National Housing Act or it may determine 95 percent of the median area purchase price as set forth in 24 CFR 92.254(a)(2)(iii).

IV. Discussion of Public Comments on the November 22, 2004, Interim Rule on the HOME Program Homeownership Affordability Requirements

The public comment period on the November 22, 2004, interim rule closed on January 21, 2005, and HUD received seven public comments. Comments were received from state and local HOME participating jurisdictions, as well as the national organizations representing these state and local agencies, and private citizens. This section of the preamble presents a summary of the significant issues raised by the public comments and HUD's responses to those issues.

A. General Comments

Five commenters expressed general support for the interim rule. One commenter expressed "strong support" for the interim rule. Commenters wrote that they "appreciate the clarification of the HOME affordability requirements relating to homebuyer projects" and that "the interim rule goes a long way towards addressing our concerns about participating jurisdictions' liability in cases of foreclosure." Another commenter wrote that it appreciated the renewed flexibility provided in the interim rule.

The November 22, 2004, interim rule made changes to the affordability requirements in § 92.254. One commenter wrote that it is supportive of the language in the interim rule that allows participating jurisdictions the flexibility to invest additional HOME funds in a HOME-assisted property in order to prevent foreclosure or acquire the HOME-assisted property at the foreclosure sale.

B. Net Proceeds Limitation

The November 22, 2004, interim rule limited recapture amounts in sales (voluntary and involuntary) of HOME-assisted homebuyer projects during the period of affordability to the net proceeds of the sale. One commenter wrote that HUD should ease the repayment requirement for HOME rental properties, homebuyer properties in which participating jurisdictions impose resale restrictions rather than recapture restrictions, and noncompliance other than foreclosure for housing that is subject to recapture.

HUD Response. HUD is not expanding the coverage of this rule to include the commenter's requests. However, HUD is aware of issues involving troubled HOME-assisted rental housing and is taking steps to address the issues, including using Technical Assistance funds to deploy experts to analyze specific projects and work out solutions.

Homeownership housing that is subject to resale restrictions must continue to be affordable for the period of affordability. This portion of the rulemaking only addresses housing that is subject to recapture, not housing subject to resale restrictions. The participating jurisdiction determines which option—recapture or resale—it will impose to ensure the housing meets the affordability requirements for the period. The participating jurisdiction's written agreement with the homebuyer sets forth its remedies for noncompliance. In addition, the rule permits additional investment of HOME funds to preserve previously assisted HOME homeownership housing, both housing subject to recapture and to resale restrictions. No substantive change is being made to the recapture requirement; but, rather, HUD is rewording the regulatory text for the sake of clarity.

C. Additional Home Funds for Preserving Affordability

The November 22, 2004, interim rule added language to the HOME regulations for the purpose of preserving the affordability of housing that was previously assisted with HOME funds and subject to the requirements of § 92.254(a). The new paragraph (a)(9) allows a participating jurisdiction to use additional HOME funds to acquire HOME-assisted homebuyer housing through a purchase option, right of first refusal, or other preemptive right before foreclosure, or to acquire the housing at the foreclosure sale, to undertake any necessary rehabilitation, and to provide assistance to another homebuyer. The section also allows participating jurisdictions to use HOME administrative funds under § 92.207 for this purpose.

Comment: The prohibition against using HOME funds to acquire a unit that has a HOME mortgage at a foreclosure sale may be problematic for some participating jurisdictions. One commenter questioned why participating jurisdictions are permitted to use additional HOME funds to preserve homebuyer housing for which HOME funds were already used but not when a jurisdiction forecloses on a defaulted HOME loan. Another commenter wrote that participating jurisdictions with limited resources would be unable to enforce affordability requirements of the HOME loan agreement because of the costs associated with foreclosing on the HOME loan and reselling the unit. Another commenter wrote that HUD needs to clarify the language in the interim rule if its intent was to permit

the participating jurisdiction to use HOME administrative funds to acquire HOME-assisted homebuyer housing before foreclosure or at the foreclosure sale when the mortgage being foreclosed is a HOME loan.

HUD Response. In response to the comments, HUD is broadening the eligible uses of HOME funds to preserve affordable homeownership housing previously assisted with HOME funds in the final rule. Also, as noted earlier in the preamble, the HOME program's prohibitions have been amended to make clear that funds may be used for assistance to preserve affordability of homeownership housing. Additionally, § 92.254(a)(9) has been reorganized to more clearly explain that HOME funds may be used to acquire housing in default through a purchase option, right of first refusal, or other preemptive right before foreclosure or through acquisition at a foreclosure sale, as well as to assist another homebuyer in purchasing the housing. Furthermore, although HOME funds cannot be used to repay a loan made with HOME funds, HOME funds may be used to pay foreclosure costs. HOME funds cannot be used to repay a loan made with HOME funds because, as stated in the preamble to the interim rule, if a participating jurisdiction forecloses on a HOME loan, it receives the housing without additional cost to the HOME program. However, the rule now permits the use of HOME funds to pay the foreclosure costs (92.207(h)). The regulation also permits HOME funds to be used for any necessary rehabilitation and for assistance to another homebuyer and for the cost of owning/holding the housing pending resale to another homebuyer—regardless of whether the housing was acquired due to default of a HOME loan or loan superior to the HOME loan.

Comment: The use of HOME administrative funds to purchase a HOME-assisted property facing foreclosure may be problematic for some participating jurisdictions. A commenter expressed concern about the provision in the interim rule that allows participating jurisdictions to preserve the affordability of HOME-assisted homebuyer housing through the use of additional HOME funds to acquire the housing before foreclosure or at the foreclosure sale. According to the commenter, using HOME administrative funds to acquire the housing would be a burden to participating jurisdictions with limited administrative funds. In addition, the commenter wrote that the use of administrative funds to acquire the housing would not allow the participating jurisdiction to sell the

affected property to an eligible homebuyer wishing to assume the existing HOME loan without having to permanently lose the administrative funds expended to foreclose and possibly rehabilitate the home.

HUD Response. HUD is sympathetic to the commenter's concern and understands that it may not be feasible for a participating jurisdiction to use its administrative funds to preserve affordability. However, for participating jurisdictions with sufficient administrative funds available for this purpose, the regulatory language provides participating jurisdictions another option to preserve their affordable housing portfolio.

Comment: HUD should ensure that homebuyers purchasing homes already assisted with HOME funds that were acquired by the participating jurisdiction as a result of noncompliance can be assisted with HOME funds as direct homebuyer assistance. One commenter wrote that the interim rule should allow homebuyers purchasing housing previously assisted with HOME funds that was subsequently acquired by the participating jurisdiction before foreclosure or at the foreclosure sale to be assisted with HOME funds as direct homebuyer assistance, if they are eligible for HOME assistance.

HUD Response. The HOME regulation at § 92.214(a)(6) has long provided an exception to the HOME prohibited activities to permit HOME funds to be used to provide assistance to a homebuyer to acquire housing previously assisted with HOME funds during the period of affordability. Section § 92.254(a)(9) also permits HOME funds to be used to provide direct homebuyer assistance to an eligible homebuyer purchasing that property that the participating jurisdiction has acquired to preserve its affordability. HUD has amended the HOME prohibited activities to now allow HOME funds to be used for assistance to preserve affordability of homeownership housing in accordance with § 92.254(a)(9) to a project previously assisted with HOME funds during the proscribed period of affordability. This clarification will help to ensure the preservation of affordable housing and ensure that homebuyers purchasing homes already assisted with HOME funds that were acquired by the participating jurisdiction as a result of noncompliance can be assisted with HOME funds as direct homebuyer assistance.

IV. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled "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 an economically significant regulatory action, as provided under section 3(f)(1) of the order). The docket file is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an advance appointment to review the docket file by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number).

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made for this final 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 *et seq.*). This Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule makes final two interim rules that established regulations for the downpayment assistance program under the ADDI program and that revised and clarified the HOME program affordability requirements of the ADDI downpayment assistance program,

respectively. This final rule is not imposing any additional regulatory requirements on participating jurisdictions. The majority of jurisdictions that are statutorily eligible to receive HOME formula allocations are relatively larger cities, counties, or states; thus, the final rule will not significantly affect a substantial number of small entities. Additionally, the final rule broadens the use of HOME funds to help preserve affordable homeownership housing. This expansion of the eligible use of funds actually benefits all participating jurisdictions, regardless of size. Accordingly, the undersigned certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

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

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule will not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Paperwork Reduction Act

Under section 3504(h) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid control number. There are no information collection requirements contained in this final rule.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance Number for the HOME program is 14.239.

List of Subjects in 24 CFR Part 92

Administrative practice and procedure, Grant programs—housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD revises 24 CFR part 92 as follows:

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 1. The authority citation for 24 CFR part 92 continues to read as follows:

Authority: 42 U.S.C. 3535d and 12701–12839.

■ 2. In § 92.2 revise the definition of “First-time homebuyer” to read as follows:

§ 92.2 Definitions.

* * * * *

First-time homebuyer means an individual and his or her spouse who have not owned a home during the three-year period prior to purchase of a home with assistance under the American Dream Downpayment Initiative (ADDI) described in subpart M of this part. The term first-time homebuyer also includes an individual who is a displaced homemaker or single parent, as those terms are defined in this section. An individual shall not be excluded from consideration as a first-time homebuyer on the basis that the individual owns or owned, as a principal residence during the three-year period, a dwelling unit whose structure is not permanently affixed to a permanent foundation in accordance with local or other applicable regulations or is not in compliance with State, local, or model building codes, or other applicable codes, and cannot be brought into compliance with the codes for less than the cost of constructing a permanent structure.

* * * * *

■ 3. Section 92.207 is amended to add a new paragraph (h) to read as follows:

§ 92.207 Eligible administrative and planning costs.

* * * * *

(h) *Preserving affordable housing already assisted with HOME funds.* Costs specified under § 92.254(a)(9) may be charged as an administrative cost or may be charged to the project as provided in § 92.254(a)(9). In addition, the foreclosure cost of a HOME-assisted rental housing project with a HOME loan in default is an eligible administrative cost.

■ 4. Revise § 92.214(a)(6) to read as follows:

§ 92.214 Prohibited activities.

* * * * *

(a) * * *

(6) Provide assistance (other than tenant-based rental assistance, assistance to a homebuyer to acquire housing previously assisted with HOME funds, or assistance to preserve affordability of homeownership housing in accordance with § 92.254(a)(9)) to a project previously assisted with HOME funds during the period of affordability established by the particular jurisdiction in the written agreement under § 92.504. However, additional HOME funds may be committed to a project for up to one year after project completion (see § 92.502), but the amount of HOME funds in the project may not exceed the maximum per-unit subsidy amount established under § 92.250.

* * * * *

■ 5. In § 92.254 revise paragraphs (a)(1), the second sentence of (a)(2)(ii), (a)(5)(ii)(A) introductory text, and (a)(9) to read as follows:

§ 92.254 Qualification as affordable housing: Homeownership.

(a) * * *

(1) The housing must be single family housing.

(2) * * *

(iii) * * * The participating jurisdiction must set forth the price for different types of single family housing for the jurisdiction. * * *

(5) * * *

(ii) * * *

(A) The following options for recapture requirements are acceptable to HUD. The participating jurisdiction may adopt, modify or develop its own recapture requirements for HUD approval. In establishing its recapture requirements, the participating jurisdiction is subject to the limitation that when the recapture requirement is triggered by a sale (voluntary or involuntary) of the housing unit, the amount recaptured cannot exceed the net proceeds, if any. The net proceeds are the sales price minus superior loan repayment (other than HOME funds) and any closing costs.

* * * * *

(9) *Preserving affordability of housing that was previously assisted with HOME funds.*

(i) To preserve the affordability of HOME-assisted housing a participating jurisdiction may use additional HOME funds for the following costs:

(A) The cost to acquire the housing through a purchase option, right of first refusal, or other preemptive right before

foreclosure, or at the foreclosure sale. (The foreclosure costs to acquire housing with a HOME loan in default are eligible. However, HOME funds may not be used to repay a loan made with HOME funds.)

(B) The cost to undertake any necessary rehabilitation for the housing acquired.

(C) The cost of owning/holding the housing pending resale to another homebuyer.

(D) The cost to assist another homebuyer in purchasing the housing.

(ii) When a participating jurisdiction uses HOME funds to preserve the affordability of such housing, the additional investment must be treated as an amendment to the original project. The housing must be sold to a new eligible homebuyer in accordance with the requirements of § 92.254(a) within a reasonable period of time.

(iii) The total amount of the original and additional HOME assistance may not exceed the maximum per unit subsidy amount established under § 92.250. Alternatively to charging the cost to the HOME program under § 92.206, the participating jurisdiction may charge the cost to the HOME program under § 92.207 as a reasonable administrative cost of its HOME program, so that the additional HOME funds for the housing are not subject to the maximum per-unit subsidy amount. To the extent administrative funds are used, they may be reimbursed, in whole or in part, when the housing is sold to a new eligible homebuyer.

* * * * *

■ 6. Section 92.602 is amended to add a new paragraph (a)(3) to read as follows:

§ 92.602 Eligible activities.

(a) * * *

(3) *Manufactured housing.* ADDI funds may be used to purchase a manufactured housing unit and purchase a manufactured housing lot. The manufactured housing unit must, at the time of project completion, be connected to permanent utility hook-ups and be located on land that is owned by the manufactured housing owner, owned as a cooperative, or is subject to a leasehold interest with a term equal to at least the term of the mortgage financing on the unit or the period of affordability (whichever is greater).

* * * * *

Dated: March 23, 2007.

Roy A. Bernardi,
Deputy Secretary.

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