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Part III

Department of Housing and Urban Development

24 CFR Part 92

**HOME Investment Partnerships Program;
Amendments to Homeownership
Affordability Requirements; Interim Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 92

[Docket No. FR-4940-I-01]

RIN 2501-AD06

**HOME Investment Partnerships
Program; Amendments to
Homeownership Affordability
Requirements**

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule revises the homeownership affordability requirements of the HOME Investment Partnership program. First, the interim rule clarifies that, upon the sale of HOME-assisted homeownership housing before the close of the required affordability period, a participating jurisdiction may recapture an amount less than or equal to the net proceeds of the sale. Second, the interim rule also provides a participating jurisdiction with the flexibility to invest additional HOME funds in homebuyer housing for which HOME funds have already been used.

DATES: *Effective Date:* December 22, 2004.

Comment Due Date: January 21, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Electronic comments may be submitted through either:

- The Federal eRulemaking Portal: at <http://www.regulations.gov>; or
- The HUD electronic Web site at: <http://www.epa.gov/feddocket>. Follow the link entitled "View Open HUD Dockets." Commenters should follow the instructions provided on that site to submit comments electronically.

Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Copies are also available for inspection and downloading at <http://www.epa.gov/feddocket>.

FOR FURTHER INFORMATION CONTACT: Virginia Sardone, Director, Program Policy Division, Office of Affordable Housing Programs, Room 7164, Department of Housing and Urban

Development, 451 Seventh Street, SW., Washington, DC 20410-7000; telephone (202) 708-2470. (This is not a toll-free number.) A telecommunications device for hearing- and speech-impaired persons (TTY) is available at 800-877-8339 (Federal Information Relay Service).

SUPPLEMENTARY INFORMATION:

I. Background

The HOME Investment Partnerships program (HOME program) is authorized under Title II of the Cranston-Gonzalez National Affordable Housing Act (Public Law 101-625, approved November 28, 1990) (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 non-federal resources. State and local governments that become participating jurisdictions may use HOME funds to carry out multi-year 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 in 24 CFR part 92.

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.

Under the second provision discussed above (*i.e.*, the recapture of the subsidy), NAHA limits the amount of the recaptured assistance to an amount equal to the net proceeds of the resale. Specifically, Section 215(b)(3)(B) of NAHA requires that a participating jurisdiction adopt restrictions to recapture the HOME investment "except

where there are no net proceeds or where the net proceeds are insufficient to repay the full amount of the assistance."

HUD has implemented the homeownership affordability requirements, including the recapture provisions, at § 92.254. The regulation does not explicitly track the statutory language limiting recaptures to the amount of the net proceeds. However, § 92.254(a)(5)(ii)(3) allows net proceeds to be shared if they are not sufficient to recapture the full HOME investment and enables the homeowner to recover the downpayment and any capital improvement investment.

II. This Interim Rule

This interim rule revises the affordability requirements for homeownership housing assisted under the HOME program. This section of the preamble describes the specific changes that will be made by this interim rule.

A. Limitation of Recapture to Net Proceeds

This interim rule revises § 92.254 to clarify that recaptures are limited to the amount of the net proceeds and to more closely track the statutory language of NAHA. Specifically, the interim rule explicitly provides that when the recapture requirement is triggered by a sale (voluntary or involuntary) of the housing, and there are no net proceeds or the net proceeds are insufficient to repay the HOME investment due, the participating jurisdiction may recapture an amount less than or equal to the net proceeds. The net proceeds are the sales price minus loan repayment (other than HOME funds) and any closing costs. The new regulatory language conforms the regulation to the statutory language in Section 215(b)(3)(B) of NAHA. That section limits repayment of HOME assistance to recapture out of net proceeds when the property is sold before the affordability restrictions expire. For example, a low-income homebuyer receives \$10,000 in HOME assistance to purchase a home and sells the property during the period of affordability. The net proceeds of the sale "after the seller pays the first mortgage and closing costs—is \$7,500. The new regulatory language reflects the statute in limiting the maximum amount that the participating jurisdiction may recapture up to the \$7,500 available from the sale, as opposed to the entire \$10,000.

B. Investment of Additional HOME Funds in Homeownership Projects

In addition to clarifying the repayment requirements, this interim

rule will provide an additional tool for the participating jurisdiction to preserve HOME-assisted homebuyer housing. Specifically, the interim rule creates a new § 92.254(a)(9) to provide flexibility to participating jurisdictions to invest additional HOME funds to preserve homebuyer housing for which HOME funds were already used.

The interim rule permits participating jurisdictions to use additional HOME funds to acquire the housing through a purchase option, right of first refusal or other preemptive right before foreclosure, to acquire the housing at the foreclosure sale, to undertake any necessary rehabilitation, and to provide assistance to another eligible homebuyer. The participating jurisdiction may invest additional HOME funds whether the housing was subject to resale restrictions or to recapture requirements.

New § 92.254(a)(9) authorizes the use of additional HOME funds to preserve the HOME-assisted homeownership housing stock on which the affordability requirements would lapse upon foreclosure. If a participating jurisdiction forecloses on a HOME loan, it receives the housing and can preserve affordability without additional cost to the HOME program. Accordingly, the interim rule does not permit the use of additional HOME funds in the case of foreclosure of a defaulted HOME loan.

The per-unit HOME subsidy limit in § 92.250 applies to the total HOME funds used for the housing (*i.e.*, the original amount plus the additional amount). To provide some relief from this requirement, the interim rule permits HOME "administrative" funds to be used so long as they do not exceed the cap on administrative funds in § 92.207. HUD believes this use of funds is a reasonable administrative cost of the HOME program. To the extent administrative funds are used, they can be reimbursed, in whole or in part, when the housing is sold to a homebuyer. The reimbursement of administrative funds will be considered a return of grant funds and all returned funds will continue to be available for administrative and planning costs. Any additional amount realized from the sale of the housing will be HOME program income.

III. Justification for Interim Rulemaking

In general, before issuing a rule for effect, HUD publishes it for public comment, in accordance with its own regulations on rulemaking in 24 CFR part 10. Part 10 provides for exceptions to the general rule if HUD finds good cause to omit advanced notice and

public participation. The good cause requirement is satisfied when prior public procedure is "impractical, unnecessary, or contrary to the public interest" (see 24 CFR 10.1). For the following reasons, HUD has determined that good cause exists to publish this rule for effect without soliciting prior public comments.

The interim rule revises § 92.254 to more closely track the statutory language of NAHA regarding recapture of HOME homeownership assistance. The amendment does not impose a new regulatory obligation, nor modify an existing requirement. Rather, the new regulatory language conforms the HOME program regulations to the statutory language in Section 215(b)(3)(B) of NAHA. That section limits repayment of HOME assistance to recapture out of net proceeds when the property is sold before the affordability restrictions expire. Since the recapture limitation is statutory in nature, HUD does not have the discretion to revise the new regulatory language in response to public comments. Accordingly, it is unnecessary to delay the effectiveness of this regulatory change in order to solicit prior public comment.

In addition to clarifying the repayment requirements, this interim rule will make a change to the HOME homeownership affordability requirements. Specifically, the interim rule provides flexibility to participating jurisdictions to invest additional HOME funds to preserve homebuyer housing for which HOME funds were already used. This change will not impose a new regulatory burden on participating jurisdictions but, rather, provide them with an additional tool to preserve HOME-assisted homebuyer housing. Accordingly, HUD believes it would be contrary to the public interest to delay effectiveness of this change to solicit public comment.

Although HUD believes that good cause exists to publish this rule for effect without prior public comment, it recognizes the value of public comment in the development of its regulations. Therefore, HUD has issued these regulations on an interim basis and has provided the public with a 60-day comment period. HUD welcomes comments on the regulatory amendments made by this interim rule. The public comments will be addressed in the final rule.

IV. Findings and Certifications

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). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

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

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this interim rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities for the following reasons.

First, the majority of jurisdictions that are statutorily eligible to receive HOME formula allocations are relatively larger cities, counties or states. The new regulatory language regarding recaptures will not have any impact on participating jurisdictions. Rather, the change will conform the HOME program regulations to the statutory language in Section 215(b)(3)(B) of NAHA. That section limits repayment of HOME

assistance to recapture out of net proceeds when the property is sold before the affordability restrictions expire. Second, the interim rule provides flexibility to participating jurisdictions to invest additional HOME funds to preserve homebuyer housing for which HOME funds were already used. To the extent this change has any impact on participating jurisdictions, it will be a beneficial one of providing them with an additional tool to preserve HOME-assisted homebuyer housing.

Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made 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(2)(C)). The 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, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

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, HUD amends 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. 3535(d) and 12701-12839.

■ 2. In § 92.254, add two sentences at the end of paragraph (a)(5)(ii)(A) and add new paragraph (a)(9) to read as follows:

§ 92.254 Qualification as affordable housing: Homeownership.

(a) * * *

(5) * * *

(ii) * * *

(A) * * * 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, and there are no net proceeds or the net proceeds are insufficient to repay the HOME investment due, the participating jurisdiction can only recapture 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.* (i) Notwithstanding § 92.214(a)(6), to preserve the affordability of housing that was previously assisted with HOME funds and subject to the requirements of § 92.254(a), a participating jurisdiction may use additional HOME funds to acquire the 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 housing must be sold to a new eligible homebuyer in accordance with the requirements of § 92.254(a). Additional HOME funds may not be used if the mortgage in default was funded with HOME funds.

(ii) The total amount of 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 2 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.

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Dated: October 22, 2004.

Alphonso Jackson,
Secretary.

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