HUD OGC Legal Opinions Regarding Modernization Funds

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

December 30, 1999

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM FOR: Elinor R. Bacon, Deputy Assistant Secretary, Office of Public Housing Investments, PI

FROM: Robert S. Kenison, Associate General Counsel, Office of Assisted Housing and Community Development, CD

SUBJECT: FY 1996 HOPE VI Grant Agreement Establishing Time Frame for Executing GC Contract and Commencing Contract Activities

This is in response to your December 27, 1999 request for a legal opinion, transmitted via email to Michael Reardon, Assistant General Counsel, Office of Assisted Housing, in which you request that we determine whether there is any legal requirement that HOPE VI Grantees "expend [HOPE VI] funds" within a particular time frame. Ultimately, you request that we determine whether HUD must declare a default and recapture funds from Grantees that have not obligated or expended funds within any such time frame or whether HUD may instead grant a formal extension of the time frame. Your email message indicates that your request follows an OIG finding that twenty-two HOPE VI Grantees, representing $520 million in obligated HOPE VI funds which HUD awarded in FY 1993 through FY 1996, are in violation of program regulations. A document which you provided us contains data that appears to indicate that eight of the twenty-two grants at issue were awarded during FY 1996. In addition, you have further requested that we provide a legal opinion on a Notice recently issued, i.e., "Notice of PIH Policy for dealing with FY 1997 and Prior Unobligated Funds." 64 Fed. Reg. 71798 (Dec. 22, 1999).

With respect to the first part of your inquiry, we must point out that there are no program regulations governing the HOPE VI program. From 1993 until the Quality Housing and Work Responsibility Act of 1998, the HOPE VI program had been authorized in HUD's annual Appropriations Acts. The HOPE VI program has been governed by the annual authorization provision in the Appropriations Acts, the annual NOFA, and the Grant Agreement for the program. With respect to FY 1995 and prior years, there were no requirements in the applicable statutory provsions, NOFAs, or Grant Agreements governing the program that required Grantees to expend funds within a specified time frame. Nor does the FY 1996 Grant Agreement require Grantees to expend program funds within any particular time frame.

The FY 1996 Grant Agreement, however, does contain language which establishes a two year-time frame, beginning on the date of HUD's written approval of the Revitalization Plan, within which the General Contractor's Contract must be executed and "commencement of activities [under the GC Contract] must be accomplished." FY 1996 Grant Agreement, Article II, Paragraph

3(a).* We, therefore, assume that it is this provision upon which the OIG somehow based its conclusion that grantees were in default of the HOPE VI program regulations and which is the subject of your request for a legal opinion.

The legal authority for the requirement in the FY 1996 Grant Agreement that Grantees execute a GC contract and begin performing, or obtaining performance of, the contracted-for activities within a maximum time of two years from the date of HUD's execution of the Grant Agreement is required by neither statute, nor regulation. Rather, the authority for this requirement flows from HUD's authority to "impose such conditions and requirements as the Secretary deems appropriate to effectuate the purposes of [the HOPE VI FY 1996 Appropriations Act]". Pub. L. No. 104-134, 110 Stat. 1321, 269-70 (1996). See also, 42 U.S.C. § 3535(d) ("The Secretary . . . may make such rules and regulations as may be necessary to carry out his functions, powers, and duties"). While there are prohibitions against waiving statutory provisions and regulatory provisions which effectuate specific statutory requirements, Nat'l Wildlife Federation v. Marsh, 721 F.2d 767, 773 (11th Cir. 1983), there is no legal obstacle that would prevent HUD from extending the two-year time frame established in Article II, Paragraph 3(a) of the FY 1996 Grant Agreement.. We therefore conclude that PIH may grant an extension of the two-year time frame, thus making it unnecessary to declare a default of the Grant Agreement and recapture funds where the Grantee has not executed a GC Contract or commenced activities under the contract within the two-year time frame. In cases in which the Grantee has not complied with the two year-time frame, we recommend that PIH treat such noncompliance as a request by the Grantee for an extension of time in which to comply. We further recommend that PIH convey its decision to grant these requests by letter and that it document its files accordingly by including a copy of the letter in the Grantee file.

Regarding your second question, i.e., concerning our legal opinion on the Notice cited above, Mr. Reardon and I concurred in the Notice. We believe that it constitutes a legally sound means of implementing section 9(j)(4)(B) of the U.S. Housing Act of 1937, as amended by section 519(a) of the Public Housing Reform Act with respect to the obligation of FY 1997 and prior public housing modernization funds. Section 9(j)(4)(B) provides that such funds shall be fully obligated by the PHA not later than September 30, 1999. However, there is no provision in the law with respect to sanctions or other actions that HUD must take with respect to a PHA's failure to obligate the funds by the date specified in the statute. Specifically, the Office of General Counsel concluded that while HUD could not grant any formal extensions of the September 30, 1999 date for obligation of these funds, there was nothing in the law that would prohibit PHAs from obligating such funds after that date and HUD could encourage PHAs to do so until such time as HUD implemented its timely policy with respect to recapture of the funds, which policy was articulated in the December 22, 1999 Federal Register Notice. As indicated above, we believe that this policy is consistent with the law.

Should you have any questions regarding this opinion, please telephone Mr. Reardon on 708-0470.

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* The cited provision of the FY 1996 Grant Agreement reads in part as follows: "Execution of the GC Contract, and commencement of activities thereunder, must be accomplished within 18 months from the date of HUD's written approval of the Revitalization Plan; but in no event may such time period exceed 24 months from the date of execution of the Grant Agreement."

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF THE GENERAL COUNSEL

FEB 9 2000

MEMORANDUM FOR: Elinor R. Bacon, Deputy Assistant Secretary, Office of Public Housing Investments, PT

FROM: Robert S. Kenison, Associate General Counsel, Office of Assisted Housing and Community Development, CD

SUBJECT: Remedies for PHA Failure to Fully Obligate Public Housing Modernization Funds by September 30, 1999

This memorandum is in response to your request for an expansion of our December 30, 1999 memorandum concerning possible remedies against public housing agencies ("PHAs") for their failure to fully obligate public housing modernization funds appropriated for FY 1997 and prior fiscal years, as required by section 9(j)(4)(B) of the United States Housing Act of 1937 ("Act"). Your request follows a January 14, 2000 meeting among you and Milan Ozdinec of your staff; Jim Heist, Randy McGinnis, and Bryan Saddler of the Office of Inspector General ("OIG"); and Michael Reardon and Jeff Hall of my staff. OIG's "Interim Briefing for PIH Management / HUD FY 1999 Financial Statement Audit" ("Audit") indicates that OIG has identified 23 PHAs with $148 million of Comprehensive Grant modernization funds awarded in FY 1997 and prior funding years and $64 million in FY 1995 and prior years unexpended Comprehensive Improvement Assistance Program modernization funds, which remained unobligated as of September 30, 1999.[1] It is our understanding that OIG contends that HUD must impose the remedies contained in section 9(j) against PHAs that are found to be in violation of section 9(j)(4)(B).

Before the enactment of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2518 ("Public Housing Reform Act"), modernization funds were governed by section 14 of the unamended Act.[2] Section 522(a) of the Public Housing Reform Act, however, repealed section 14 of the unamended Act. Section 519(a) of the Public Housing Reform Act

[1] Since the January 14, 2000 meeting, Bill Flood of your staff informed Jeff Hall that the current amount of unexpended modernization funds for FY 1995 and prior years is $170 million.

[2] For purposes of this memorandum, the term "Act" means the Act as amended by the Public Housing Reform Act, and the term "unamended Act" means the Act as it existed immediately prior to the enactment of the Public Housing Reform Act.

amended section 9, "Annual Contributions for Operation of Lower Income Housing," of the unamended Act, to read as "Public Housing Capital and Operating Funds" ("new section 9"). Section 9(d) of the amended Act provides for the establishment of a Capital Fund for the purpose of making assistance available to PHAs for capital and management activities. Section 519(e) of the Public Housing Reform Act provides in part that PHAs shall continue to receive funding under section 14 of the unamended Act until HUD promulgates a formula implementing the Capital Fund. On September 14, 1999, HUD issued a rule proposing a new formula for implementing the Capital Fund, 64 Fed. Reg. 49924 (1999), but to date the final rule has not been published.

Section 9(j), "Penalty for Slow Expenditure of Capital Funds," consists of six paragraphs. As discussed more fully below, paragraphs (1), (2), (3), and (5), by their own terms, have a uniquely prospective application. Paragraph (4) applies to FY 1997 and prior year funds, whereas paragraph (6) applies on its face to all of subsection 9(j), i.e., to both FY 1997 and prior year funds and to those funds to be provided under new section 9(d), the Capital Fund. Paragraph (1) provides as follows:

> ***Except as provided in paragraph (4) and subject to paragraph (2),*** a public housing agency ***shall*** obligate any assistance received ***under this section*** no later than 24 months after, as applicable—
>
> (A) the date on which the funds become available to the agency for obligation in the case of modernization; or
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> (B) the date on which the agency accumulates adequate funds to undertake modernization, substantial rehabilitation, or new construction of units (emphasis added).

The principal directive of section 9(j)(1), i.e., that PHAs "shall obligate" funds within the specified time frame, is designated in the future tense and applies only prospectively to funding made available "under this section," i.e., the new section 9. See Puget Sound Power & Light Co. v. Fed. Power Comm'n, 557 F.2d 1311, 1315 (9th Cir. 1977) ("The statute [Federal Power Act, § 23(b)] itself and the legislative history use the prospective terms 'intending to construct' which indicates to us that the statute is to apply only to projects *begun* after the effective date."). See also, Sutherland Stat. Const., § 49.02 (5th Ed. 1992) (statutes written in future tense apply to future things and conditions).

Section 9(j)(1) expressly provides that its requirements concerning the obligation of funds apply to "assistance received ***under this section***" (emphasis added), i.e., ***new*** section 9, "[e]xcept as provided in paragraph (4)" (emphasis added).[3] Section 9(j)(2), "Extension of Time Period for Obligation," provides for the discretionary extension of the 24-month time frame established under paragraph (1) and is thus subject to the same prospective limitation, i.e., "assistance received under this section," as section 9(j)(1). Section 9(j)(3), "Effect of Failure to Comply," and section 9(j)(5), "Expenditure of Amounts,"[4] are likewise limited to assistance received

[3] Section 9 of the unamended Act pertained to operating subsidy, which is distinct from the subject of new section 9, which pertains to operating and capital funds. It would thus be illogical to conclude that, by the phrase "assistance received under this section," Congress meant something other than assistance received under new section 9.

[4] The third paragraph under the heading "Audit Results to Date" of the IG's Audit correctly represents the content of

"under this section." The use of the phrase "under this section" in paragraphs (1), (2) (by reference to paragraph (1)), (3), and (5) qualifies and limits the application of these paragraphs to funds appropriated under ***new*** section 9.[5] The last paragraph of subsection 9(j), paragraph (6), "Right of Recapture," provides as follows: "Any obligation entered into by a public housing agency shall be subject to the right of the Secretary to recapture the obligated amounts for violation by the public housing agency of the requirements of this subsection."[6] By its own terms, this provision applies to all of subsection 9(j), including paragraph 4(B). The extent of the import of this provision is somewhat unclear in that it discusses funds ***obligated*** by a PHA, which seemingly would mean that the PHA is in compliance with subsection 9(j). While not facially clear, perhaps this provision provides the Secretary with the right to recapture funds obligated by the PHA after the expiration of the applicable period for fund obligation by the PHA, e.g., obligation by the PHA after 24 months have elapsed since the funds became available. However, and in any case, we note that under the express terms of paragraph 6, while the Secretary has the "right" to recapture such funds, the exercise of that right is discretionary on the part of the Secretary.

Paragraph (4)(B) applies on its face to "any funds appropriated to a public housing agency for fiscal year 1997 or prior fiscal years [which are not] fully obligated by the public housing agency [by] September 30, 1999." Because paragraph (4)(B) is silent as to remedies,[7] I orally advised Rod Solomon, Deputy Assistant Secretary, Office of Policy, Programs and Legislative Initiatives, that the Office of Public and Indian Housing ("PIH") can also rely on other provisions in amended section 6(j) of the Act.

Section 521, "Sanctions for Improper Use of Amounts," of the Public Housing Reform Act added new section 6(j)(4), consisting of the following: (1) terminating assistance payments under section 9; (2) withholding amounts from the total allocations for the PHA pursuant to section 9; (3) reducing the amount of future assistance payments under section 9 by an amount equal to the amount of unexpended funds; (4) limiting the availability of assistance amounts provided under section 9 to programs and activities not affected by the PHA's failure to comply; (5) withholding amounts allocated for the PHA under section 8; or (6) "order[ing] other corrective action with

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section 9(j)(5)(A) of the Act, i.e., that PHAs are required to "spend any ***assistance received under this section*** not later than 4 years . . .after the date on which the funds become available to the agency for obligation" (emphasis added). As indicated above, however, paragraph (5) applies by its own terms only to funds made available under new section 9, i.e., not to those appropriated for FY 1997 or prior years, which are expressly excepted in the first sentence in paragraph (1) from that paragraph's application.

[5] Because HUD has not yet promulgated regulations implementing new section 9, the requirements of subsection (j), with the exception of paragraph (4)(B), have had no application to date.

[6] Prior to the enactment of the Public Housing Reform Act, there was no subsection 9(j). Thus, when Congress stated that paragraph 9(j)(6) of the amended Act applies "for violation . . . of the requirements of ***this subsection***" (emphasis added), it clearly meant subsection 9(j). With the exception of paragraph (4)(B), which HUD implemented by Notice, 64 Fed. Reg. 71798 (1999), as discussed below, subsection 9(j) has not yet been implemented.

[7] As indicated above, section 9(j)(3), which provides remedies for noncompliance with paragraph (1), applies only to funds yet to be awarded under new section 9 and, thus, has no bearing on FY 1997 and prior funds.

respect to the agency." However, the statutory language of section 6(j)(4)(A) limits its availability of resources for sanctions against violations of the Act to PHAs "receiving assistance amounts under section 9" of the Act. HUD has already interpreted section 521 of the Public Housing Reform Act to apply to PHAs "receiving amounts from the Capital Funds or Operating Fund," i.e., assistance under new section 9. 64 Fed. Reg. 71799, 71809 (1999). The remedies established in section 6(j)(4)(A) of the Act therefore can only apply to such funds, but would be available for the violation (non-use of funds) under paragraph (4)(B).

In addition, section 6(j)(3)(A) of the Act provides four remedies in the event that HUD declares a substantial default, which could apply to modernization funds not obligated as of September 30, 1999. Those remedies consist of the following: (1) PHA residents and HUD may select other PHAs and private housing management agencies to manage all or part of the housing administered by the noncompliant PHA; (2) HUD petitions for the appointment of a receiver; (3) HUD may take possession of the PHA, including any project or program of the agency; and (4) HUD requires the noncompliant PHA to make arrangements acceptable to HUD for managing the PHA's programs. (A fifth remedy applies only to assistance made available from the Capital Fund and, thus, only applies to funds yet to be made available under new section 9(d). See, § 6(j)(3)(A)(iii) of the Act.) PIH could determine to use any of these remedies, none of which necessarily entails the withholding or recapture of funds, with respect to PHA violations of section 9(j)(4)(B) which rise to the level of substantial default.

On December 22, 1999, PIH issued a Notice addressing PIH's policy regarding FY 1997 and prior unobligated funds. 64 Fed. Reg. 71798 (1999). The Notice provided that all PHAs which have failed to fully obligate public housing modernization funds by September 30, 1999, in violation of section 9(j)(4)((B) of the Act will be subject to the following remedial measures: (1) HUD will not release any FY 2000 funds for modernization activities until all unobligated funds become fully obligated; and (2) if the unobligated funds do not become fully obligated by March 30, 2000, the ACCs of such PHAs will be subject to default and the outstanding unobligated funds will be subject to recapture. Id. at 71799.

Besides the statutory sanctions in section 9(j)(6) and 6(j)(3) and (4), other remedies are available under 24 C.F.R. Part 85, which establishes uniform administrative rules for Federal grants to PHAs, 24 C.F.R. §§ 85.1 and 85.3. HUD's standard Annual Contributions Contract ("ACC") specifically requires PHAs to "develop and operate all projects covered by this ACC in compliance with all the provision of . . . all applicable statutes, executive orders, and regulations issued by HUD." Form HUD-53012A at 3,¶ 5 ("Covenant to Develop and Operate"). Such regulations would include the Grant Administration requirements at 24 C.F.R. Part 85. Paragraph (a), "Remedies for noncompliance," of 24 C.F.R. § 85.43, "Enforcement," provides as follows:

> If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation. . .or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:
>
> (1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

Therefore, it is our opinion that PIH has many statutory, regulatory, and contractual remedies available for use in connection with PIH violations of section 9(j)(4)(B). With respect to the remedies prescribed in section 9(j), those in paragraph (3), by their own terms, are not available to PIH for violations of paragraph (4)(B). While the remedies in paragraph (6) are available to PIH, there is no legal requirement that PIH exercise those remedies. The December 22, 1999 Federal Register Notice was a clearly legal and reasonable exercise of PIH's authority to prescribe remedies for violations by PHAs of section 9(j)(4)(B).

Should you have any questions regarding this opinion, please telephone Michael Reardon or Jeff Hall on 708-0470.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF THE GENERAL COUNSEL

FEB 25 2000

MEMORANDUM FOR: Elinor R. Bacon, Deputy Assistant Secretary, Office of Public Housing Investments, PT

FROM: Robert S. Kenison, Associate General Counsel, Office of Assisted Housing and Community Development, CD

SUBJECT: Remedies for PHA Failure to Fully Obligate Public Housing Modernization Funds by September 30, 1999

On February 9, 2000, we provided you with an Office of General Counsel opinion concerning possible remedies against PHAs for failure to comply with the provisions of section 9 of the U.S. Housing Act of 1937, as amended by the Quality Housing and Work Responsibility Act of 1998 ("the Act"). In that opinion, we concluded that the provisions in the new section 9, with the exception of section 9(j)(4) and section 9(j)(6), govern only Capital Fund assistance provided under the new section 9. Subparagraph 9(j)(4)(B) expressly applies to modernization funds received by a PHA in FY 1997 and prior years, and provides that such funds must be obligated by the PHA not later than September 30, 1999. However, there are no provisions in section 9 that prescribe remedies for a PHA's failure to meet the September 30, 1999 obligation deadline. Consequently we concluded that PIH's implementation of remedies and sanctions against such PHAs in the December 22, 1999 Federal Register Notice was a clearly legal and reasonable exercise of PIH's authority to prescribe remedies for violations by PHAs of subparagraph 9(j)(4)(B).

Subsequent to that memorandum, you received information indicating that the Office of Inspector General ("OIG") continues to dispute HUD's general proposition that the other provisions of the new section 9, are inapplicable to modernization funds received by a PHA under the public housing modernization programs contained in section 14 of the unamended Act. OIG has two basic contentions with respect to FY 1997 and prior years modernization funds. First, OIG concludes with respect to FY 1997 and prior year modernization funds that were unobligated by September 30, 1999, that the remedies provided in PIH's December 22, 1999 Federal Register Notice, 64 Fed. Reg. 71798, 71799 (1999), for failure to obligate such funds by September 30, 1999 "are not in accordance with the provisions of the Act."[1] Further, OIG concludes that the "provisions [of the new section 9] apply [to FY 1995 and prior year modernization funds, unexpended as of September 30, 1999] because the Act specifically merged the [assistance provided under old section 14] into the present 'Capital Fund,' [and that such merger subjects old section 14 assistance] to the enforcement provisions of The Act."[2]

[1] OIG memorandum from James Heist to William Dobrzykowski dated February 18, 2000, Attachment 1, page 1, ¶ 2.

[2] Although the meaning of OIG's statement that "the provisions do apply . . . to the previously awarded funds . . .

Subsection 9(a), "Merger into Capital Fund," of the Act provides, "[e]xcept as otherwise provided in the Quality Housing and Work Responsibility Act of 1998, any assistance made available for public housing under section 14 of this Act before October 1, 1999, shall be merged into the Capital Fund established under subsection (d)" (emphasis added). OIG concludes, based presumably on this subsection, that Congress intended that all of section 9's requirements apply to assistance made available for public housing under old section 14. This interpretation ignores the underlined portion of subsection (a), quoted above. The introductory phrase "[e]xcept as otherwise provided in the Quality Housing and Work Responsibility Act of 1998," indicates that one or more of the Act's provisions are not subject to the merger. And, in fact, Congress specifically provides that paragraphs 9(j)(1), (2), (3), and (5) apply to "assistance received under this section," i.e., the new Capital Fund.[3] If Congress had intended all of section 9 to apply to both Capital Fund assistance and old modernization assistance provided under section 14, the merger provision in subsection 9(a) would have been sufficient to accomplish such a result, and there would have been no need to separately address FY 1997 and prior years modernization funds in subsection 9(j). Instead, Congress provided a separate provision, subparagraph 9(j)(4)(B) with respect to FY 1997 and prior years modernization funding, clearly indicating that this funding was not Capital Funds, i.e., assistance received under the new section 9.

The OIG concludes that Congress intended paragraph 9(j)(3)'s remedies to be applicable to PHA violations of subparagraph 9(j)(4)(B), i.e., for PHA failures to obligate FY 1997 and prior year funds by September 30, 1999.[4] The statute does not so provide, nor do we find any Congressional intent to do so. Because paragraph (3) provides remedies for failure to obligate Capital Funds "received under this section," i.e., section 9, within the applicable time period, as established in paragraph (1), and because subparagraph (4)(B) applies only to FY 1997 and prior year funds, we interpret the remedies provided in paragraph (3) to be applicable only to future PHA failures to obligate Capital Funds and not to PHA failures to obligate FY 1997 and prior year funds by September 30, 1999, as required by subparagraph (4)(B).

We believe OIG's conclusion is erroneous that the merger of assistance provided under old section 14 with the Capital Fund subjects all old section 14 funds to the remedies provided in paragraph (3), which are intended to apply exclusively to untimely obligations of Capital Funds. In our February 9 memorandum, we concluded that the PIH Notice, which provides for (1) the withholding of FY 2000 modernization funds for PHAs that have not complied with subparagraph (4)(B) until HUD confirms compliance with that subparagraph; and (2) recapture of 1997 and prior year unobligated funds if not obligated by March 30, 2000, is a reasonable exercise of PIH's authority to prescribe remedies for violations of subparagraph (4)(B). 64 Fed. Reg. at 71799. It continues to be our opinion that PIH's December 22, 1999 Notice concerning FY 1997 and prior year unobligated modernization funds is legally sufficient and consistent with the Act.

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thereby subjecting [them] to the enforcement provisions of the Act," is unclear, we infer from the surrounding context that by "the provisions," OIG meant the "enforcement provisions" of the Act, which we further infer from the context to mean paragraph 9(j)(5) of the Act. Id. at ¶ 2

[3] As we stated in footnote 5 of our February 9 memorandum, HUD has not yet promulgated a final rule establishing a formula for determining the amount of Capital Fund assistance or for otherwise implementing section 9 of the Act and, thus, **no Capital funds have been made available to date**. Nor will such funds be made available until HUD publishes a final rule in the Federal Register implementing new section 9.

[4] From this point forward, this memorandum will reference the various paragraphs and subparagraphs of section 9(j) of the Act by their respective paragraph and subparagraph designations.

While OIG continues to contend that the Notice remedies are not in accordance with the Act, it fails to give any indication as to the basis which led it to this conclusion. In fact, the two remedies which PIH chose to impose in the Notice on the basis of other remedy and sanction authority are clearly consistent with the Act. To begin, the first remedy which the Notice provides, withholding of FY 2000 modernization funds, is identical to the remedy which subparagraph (3)(A) provides, and which OIG argues must apply to funds unobligated in violation of subparagraph (4)(B). And, the recapture remedy goes even further than what paragraph (3) would require as a remedy. 64 Fed. Reg. at 71799.[5] Second, the date provided in subparagraph (4)(B), September 30, 1999, is the date by which PHAs must obligate FY 1997 and prior year funds, not a date by which HUD is required to take remedial action for failures to comply with subparagraph (4)(B). In fact, the Act is silent as to any date by which HUD must redress failures to comply with that subparagraph. OIG appears to believe that, somehow, on September 30, 1999, the sanctions in section 9 were to be automatically applied to PHAs with FY 1997 and prior years unobligated modernization funds. There is just no basis for any such conclusion in the law. We believe PIH's actions to be based on a permissible, i.e., reasonable, interpretation of section 9. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984) ("[I]f [a] statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . The question [is] not whether the [administrative interpretation] is 'inappropriate' in the general context of [the] program, but whether the Administrator's view that it is appropriate in the context of [the] particular program is a reasonable one").

OIG states that its "review of HUD records relating to the expenditure of fiscal year 1995 and prior years' public housing modernization funds showed $337 million in unexpended funds as of September 30, 1999." Heist memorandum, Attachment 1, page 1, ¶2. Merely by making this statement, OIG jumbles subparagraph (4)(B) with paragraph (5) of the Act. As discussed above and on page 3 of our February 9 memorandum, subparagraph (4)(B) applies by its own terms exclusively to FY 1997 and prior years funds which PHAs failed to obligate as of September 30, 1999. Paragraph (5), by contrast, which is captioned "Expenditure of Funds," applies to (a) to expenditures (not obligations) of (b) "assistance received under this section," i.e., new section 9. Despite our explanation that assistance "under this section" means assistance received under new section 9 and not assistance already provided under old section 14, which we have now repeated many times, OIG and its counsel still elect to ignore that the requirements of paragraphs 9(j)(1), (2), (3), and (5) apply only to assistance to be received under new section 9, i.e., after promulgation of an implementing rule. In other words, assistance which PHAs have already received under old section 14 is not tantamount to "assistance [yet to be] received under this section," i.e., new section 9.

Moreover, nothing in paragraph (5) requires that any old section 14 assistance, let alone specifically FY 1995 and prior years funds, be expended by September 30, 1999, as OIG concludes in Attachment 1, page 1, paragraph (2). Whereas paragraph (1) requires PHAs to obligate Capital Funds within 2 years of the date on which the funds become available for obligation, or the date on which the agency accumulates sufficient funds to undertake modernization, paragraph (5) requires that PHAs expend Capital Funds within 4 years (plus the period of any extension provided under paragraph (2)) of the date on which the Capital Funds become available for obligation."[6] As established in our February 9 memorandum, paragraph (1), which expressly excludes subparagraph 4(B) from its sweep, applies only to funding yet to be provided under the Capital Fund and, thus, has had no application to date.

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[5] Contrary to OIG's claim that the Notice's recapture remedy "shall be implemented" for failure to obligate funds by March 30, 2000, see Heist memorandum, Attachment 1, page 1, ¶3, the Notice merely makes noncomplying PHAs "subject to" the two sanctions which it provides. There is no statutory requirement that any remedies apply to violations of subparagraph (4)(B) or that any discretionary remedies be applied by a specific date.

[6] See footnote 3.

While paragraph (4)(B)'s September 30, 1999 deadline applies exclusively to FY 1997 and prior year funds, paragraph (5)(A)'s requirement, i.e., that "assistance received under this section [be spent] not later than 4 years (plus the period of extension approved by the Secretary under paragraph (2) after the date on which funds become available for obligation," as discussed above, clearly applies exclusively to Capital Funds.

Should you have any questions regarding this memorandum, please telephone Michael Reardon or Jeff Hall on 708-0470.

HUD OIG Legal Analysis Regarding Modernization Funds

U.S. Department of Housing and Urban Development
Office of Inspector General
451 7th St., S.W.
Washington, D.C. 20410

February 18, 2000

MEMORANDUM FOR: James A. Heist, Director, Financial Audits Division, GAF

FROM: Bryan Saddler, Acting Counsel to the Inspector General, GC

SUBJECT: Remedies for PHA Failure to Obligate and/or Expend Modernization Funds[1]

This memorandum responds to your request for an opinion concerning whether subsection 9(j) of the United States Housing Act of 1937 ("the Act"),[2] as amended by subsection 519(a) of the Quality Housing and Work Responsibility Act of 1998 ("QHWRA"),[3] can be applied to Public Housing Authority ("PHA") modernization funds received prior to October 1, 1999. We conclude that subsection 9(j) is applicable to modernization funds received both before and after the effective date of QHWRA, October 1, 1999. However, OGC has expressed a differing opinion, and, thus, we shall discuss OGC's opinion as part of our response.

I. Background

On February 9, 2000, partially in response to the draft audit report that you had provided to the Office of Public and Indian Housing for comment, OGC issued a legal opinion advising that four of the six paragraphs of subsection 9(j) of the Act will not become effective until HUD implements section 519(a) of the QWHRA by establishing and publishing a Capital Fund Formula. This formula is not yet put in place, and, therefore, according to OGC, paragraphs (1), (2), (3), and (5) are not yet in effect. However, with respect to paragraph (4)(B), which states "any funds appropriated ... for fiscal year 1997 or prior ... shall be fully obligated ... not later than September 30, 1999," OGC maintains that the provision is effective, but that the Act provides no specific remedy for non-compliance with it, and the remedy provisions of paragraph (6) are completely within HUD's discretion, in spite of the mandatory nature of paragraph (4)(B).

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[1] This opinion is an opinion of the Office of Counsel to the Inspector General, and does not purport to represent the official legal position of the Department of Housing and Urban Development ("HUD"). The Office of General Counsel ("OGC") is responsible for issuing opinions that set forth HUD's official legal position.

[2] Section 9(j) is codified as 42 U.S.C. § 1437g(j).

[3] See Pub. Law 105-276, 112 STAT. 2461, 2551 (Oct. 21, 1998).

The Memorandum of Understanding ("MOU") between the Office of Inspector General ("OIG") and OGC, states that OGC has the authority to "issue opinions that set forth the legal position of the Secretary and the Department." This MOU, however, does not vitiate or in any way modify OIG's responsibility:

> to review existing and proposed legislation and regulations relating to programs and operations of [HUD] and to make recommendations in the semiannual reports required by section 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations administered or financed by [HUD] or the prevention and detection of fraud and abuse in such programs and operations.

5 U.S.C. App. 3 § 4(a)(2). Accordingly, we are obligated to review HUD/OGC's implementation and construction of subsection 9(j) of the Act. This obligation is particularly important where, as here, we believe that OGC's interpretation conflicts with the plain language of the section 9(j) and the maxim of statutory construction that states that remedial statutes have retroactive effect. OGC's interpretation also promotes inefficiency because it permits HUD to allow PHAs that have failed to utilize scarce modernization funds to retain such funds while tenants in these PHAs, and elsewhere throughout the nation, are homeless or without adequate housing.

II. Analysis

A. Plain Language

The keystone of OGC's opinion is that the phrase "assistance received under this section" in paragraphs (1) and (5) refers only to assistance awarded after the effective date of QHWRA. In support of its opinion, OGC does not identify precedent or legislative history. Rather, OGC's construction rests upon its reading of the plain language of the statute. Nonetheless, since assistance was received under section 9 and section 14 of the Act prior to the enactment of QHWRA,[4] OGC's construction of the "plain language" necessarily appends the phrases "as amended" or "following the effective date of QHWRA" at the end of "assistance received under this section".

OGC's confined construction of section 9(j) is analogous to the Department of Labor's ("DOL") faulty construction of section 33(g) of the Longshore and Harbor Worker's Compensation Act ("LWCHA"), 33 U.S.C. § 901 *et seq.*, in Estate of Cowart v. Nicklos Drilling, 505 U.S. 469 (1992). In Estate of Cowart, the Supreme Court analyzed the plain meaning of terms, considered the structure of the LWCHA, and affirmed the

[4] Section 519(a) of the QHWRA merely amended, not created, section 9 of the Act. Moreover, section 519(a) merged assistance previously provided under section 14 of the Act into section 9.

reversal of DOL's interpretation of section 33(g). See 505 U.S. at 475. Section 33(g) stated, in relevant part:

> Compromise obtained by person entitle to compensation
>
> (1) If the person entitled to compensation . . . enters into a settlement with [a] third person . . .for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under . . . this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed . . . .
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

See id. at 472 (quoting 33 U.S.C. § 933(g)). DOL's Benefits Review Board construed the phrase "person entitled to compensation" in section 33(g)(1) to refer only to injured employees whose employers were making compensation payments, or in whose favor an award of compensation has been made. See id. at 475. In other words, DOL also read restrictive language into a statute to support their construction.

The Court determined that DOL's construction of section 33(g) was too narrow, stating "the natural reading of the statute supports the Court of Appeals' conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor." Id. at 477. The Court added that its opinion was buttressed by the structure of section 33(g), as follows:

> If the language of §33(g)(1), in isolation, left any doubt, the structure of the statute would remove all ambiguity. First, and perhaps most important, when Congress amended § 33(g) in 1984, it added the explicit forfeiture features of § 33(g)(2), which specify that forfeiture occurs "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." We read that phrase to modify the entirety of subsection (g)(2), including the beginning part discussing the written-approval requirement of paragraph (1). The BRB did not find this amendment controlling because the quoted language is not an explicit modification of subsection (1). This is a strained reading of what Congress intended.

Id. at 477.

B. Retroactivity

Additionally, it is a maxim of statutory construction that statutory changes that are remedial in nature apply retroactively. See, e.g., Lussier v. Dugger, 904 F.2d 661, 665 (11th Cir. 1990) (quoting United States v. Vanella, 619 F.2d 384, 386 (5th Cir. 1980)); United States v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir. 1985) ("Cases in this circuit have held that new statutes . . . that affect only . . . remedy will apply retroactively"); see also Norman J. Singer, Sutherland Stat. Const. § 41.09 (5th Ed. 1992)). Subsection 9(j) is remedial in nature and, would thus be subject to retroactive application, because PHAs' obligations and expenditures of modernization funds were already subject to timing limitations under grant agreements.

In addition to failing to give effect to this statutory construction principle, OGC in construing subsection 9(j) has articulated a position that is at odds with its interpretation of 12 U.S.C. § 1715z-4a, an analogous remedial provision applicable to HUD's multifamily mortgage insurance programs. With respect to section 1715z-4a, HUD sought double damages against a project owner who had used project funds in violation of regulatory agreements applicable to his projects. These improper disbursements occurred prior to the effective date of section 1715z-4a, but, like the PHAs' grant agreements which placed controls on the timing of obligations and expenditures, the projects' regulatory agreements were in place at the time of, and controlled, the improper disbursements. The United States District Court for the Northern District of Alabama, rejecting the project owner's challenge to the retroactive application of section 1715z-4a, awarded HUD double damages for the project owner's improper disbursements, and the Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court. See United States v. Peppertree Apartments, 942 F.2d 1555, 1560 (11th Cir. 1991).[5] In affirming the District Court, the Court of Appeals acknowledged and followed the construction maxim. OGC's position with respect to the application of subsection 9(j) cannot be reconciled with its efforts to obtain double damages in the Peppertree case.

C. Inefficiency

Finally, OGC's interpretation also promotes inefficiency because it permits HUD to allow PHAs that have failed to utilize scarce modernization funds to retain such funds. You have identified approximately $148 million in unobligated FY 1997 and prior modernization funds, and $337 million in unexpended modernization funds awarded in FY 1995 and prior years. It defies logic that HUD would take the position that it cannot remedy this situation at the same time that its customers go homeless or are forced to live in inadequate housing.

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[5] The project owner subsequently appealed the Court of Appeals' decision, and the Department of Justice determined not to pursue any further HUD's claim for double damages. See United States v. Peppertree Apartments, 961 F.2d 1538, 1539 (11th Cir. 1992) (explaining Bailes v. United States, 503 U.S. 1001 (1992)).

It is reasonable to conclude that as long as PHAs think that HUD will not enforce statutory and contractual timing requirements, they will have no motivation to improve their efforts at obligating and expending modernization funds and thereby improving the living conditions of their tenants. We recognize that remedial actions may unintentionally, adversely impact some tenants in PHAs that fail to carry out their obligations, but we are also confident that the strong message that the first set of remedial actions will send will encourage PHAs to meet their responsibilities and assist a larger number of tenants.

If you have any further inquiries or questions concerning this memorandum, please contact Thomas J. Short, Assistant Counsel to the Inspector General at (202) 708-1613.