

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****Office of the Assistant Secretary for Community Planning and Development****24 CFR Parts 91 and 570**

[Docket No. FR-2905-F-02]

RIN 2506-AB24

**Community Development Block Grant Program; Correction of Identified Deficiencies and Updates; Final Rule****AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.**ACTION:** Final rule.

**SUMMARY:** This final rule corrects identified deficiencies in the Community Development Block Grant (CDBG) program, implements relevant portions of the Cranston-Gonzalez National Affordable Housing Act, amends the CDBG conflict of interest provisions, implements statutory changes from the Housing and Community Development Act of 1987 and the Appropriations Act of 1989, and provides criteria for performance reviews and timely expenditure of funds under the CDBG program.

This rule also furthers goals of reinventing government by incorporating public input in rulemaking, providing performance standards, and clarifying regulatory language. Very few of this rule's provisions impose any additional burden on grantees, and these are designed to increase program accountability, primarily in areas identified by the Inspector General as material weaknesses or other serious recurrent audit issues.

**EFFECTIVE DATE:** December 11, 1995.

**FOR FURTHER INFORMATION CONTACT:** Deirdre Maguire-Zinni, Director, Entitlement Communities Division, Room 7282, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, DC 20410, telephone number (202) 708-1577. A telecommunications device for deaf persons (TDD) is available at (202) 708-2565. FAX inquiries (but not comments on the rule) may be sent to Ms. Maguire-Zinni at (202) 708-2575. (These telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:****I. Paperwork Reduction Act Statement**

The information collection requirements for the Community Development Block Grant (CDBG) program have been approved by the

Office of Management and Budget under the Paperwork Reduction Act of 1980, and have been assigned OMB Control Number 2506-0077. This rule does not contain additional information collection requirements.

**II. Background**

The CDBG program is a key component of HUD's legislative reinvention proposal, the American Community Partnerships Act. By its nature, the CDBG program places responsibility for meeting program requirements squarely on the recipients entitled to receive and administer the grants. Because the CDBG regulations are the primary program guidance issued by HUD, program practitioners refer to them often (unlike other Federal regulations, the primary readers of which are often attorneys). Therefore, this rule, which updates the CDBG regulations to reflect significant statutory enhancements since 1987, furthers the reinvention of government, and of HUD in particular, by providing local CDBG decisionmakers the advantage of regulatory and statutory flexibility to design and use their CDBG program resources. This rule also contains several provisions that enhance grantee accountability to national program and financial performance standards. For example: the definition of "income" helps ensure that low- and moderate-income persons are served; the consolidated plan performance criteria will guide assessment of the extent to which grantees are carrying out their consolidated plans; and revolving loan fund and other related changes ensure that funds are not unduly sheltered from United States Treasury requirements.

Several of the provisions of this final rule were published for comment as a proposed rule on August 10, 1994 (59 FR 41196). As further discussed below, these provisions were designed to correct program deficiencies identified by HUD's Office of Inspector General (OIG), HUD staff, and HUD clients. The August 10, 1994 proposed rule included: a flexible definition of "income" for families and households; a change in calculating the planning and administration limitation; new revolving fund requirements to remove the special protection from drawdown requirements afforded program income in revolving funds; a clarification limiting the scope of the definition of "ineligible income payments" in 24 CFR 570.207(b)(4); a description of "float-funded" activities in the action plan; a specification of three situations in which income earned on grant funds must be remitted to the U.S. Treasury;

a requirement of a determination of benefit when CDBG funds are used outside the jurisdiction of the recipient; and performance standards to replace the Housing Assistance Plan (HAP) standards at § 570.903, for determining whether a grantee has carried out its consolidated plan housing strategy (formerly Comprehensive Housing Affordability Strategy (CHAS)).

The preamble to the August 10, 1994 proposed rule stated that any differences between the rule and the Consolidated Plan final rule, published on January 5, 1995 (60 FR 1878), would be resolved at the final rule stage. In making the resolution, HUD included some of the provisions of the August 10, 1994 proposed rule in the Consolidated Plan final rule. These pieces include incorporation of some of the final statement requirements into the consolidated plan and language at § 91.220 describing CDBG program-specific requirements for the action plan, including some language on float-funded activities. HUD also incorporated the provision in the August 10, 1994 proposed rule regarding delay of the grant when performance reports are delinquent into the Consolidated Plan final rule at § 91.520(f). In addition, HUD has adjusted terms and approaches in both rules to conform to the consolidated plan process.

Two provisions of this final rule were published for comment as a proposed rule on November 12, 1993 (58 FR 60088) regarding performance reviews, timely expenditure of CDBG funds, sanctions, and due process hearings. As further discussed below, this final rule only includes the provisions from the November 12, 1993 rule on performance standards and timely expenditure of CDBG funds.

Four of the provisions of this final rule were published for comment as an interim rule on June 17, 1992 (57 FR 27116). The June 17, 1992 interim rule implemented relevant portions of the Cranston-Gonzalez National Affordable Housing Act (Pub. L. 101-625, approved November 28, 1990) (the NAHA). The June 17, 1992 interim rule included: enhancing the calculation of the public services limitation by permitting CDBG entitlement recipients to include certain program income in the base amount of CDBG funds from which the funds available for public services are calculated; limiting the reach of the conflict of interest provisions; and responding to grantee requests by broadening the forms in which funds may be provided to subrecipients for their use.

Several other provisions of this final rule were published for comment as a proposed rule on March 28, 1990 (55 FR 11556). The March 28, 1990 proposed rule implemented: section 511 of the Housing and Community Development Act of 1987 (Pub. L. 100-242, approved February 5, 1988) (the 1987 Act) regarding the availability of CDBG funds for Uniform Emergency Telephone Number Systems; and relevant portions of the Department of Housing and Urban Development—Independent Agencies Appropriations Act of 1989 (Pub. L. 100-404, approved August 19, 1988) (the Appropriations Act).

As further discussed below, this final rule also implements statutory provisions that require little or no regulatory elaboration. This rule implements three provisions of the Multifamily Housing Property Disposition Reform Act of 1994 (Pub. L. 103-233, approved April 11, 1994): (1) section 207, regarding the use of CDBG funds to pay for administration of the HOME program and (2) authorization of a housing services eligibility category; and (3) section 234, permitting statutory waivers for activities designed to address a Federally declared disaster.

In addition, this rule implements the following provisions of the NAHA that require little or no regulatory elaboration: (1) section 902(a), regarding the overall benefit of 70 percent; (2) section 903, regarding city and county classification; and (3) section 912, regarding discrimination on the basis of religion. HUD included certain other self-implementing changes from the NAHA in the Consolidated Plan final rule, published in the Federal Register on January 5, 1995 (60 FR 1878).

This rule also implements changes from the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992) that require little or no regulatory elaboration: (1) section 807(a), regarding separate eligibility categories for provision of technical assistance to public or private entities and assistance to institutions of higher education for carrying out eligible activities; (2) section 807(b), regarding the extension of the authority to use CDBG funds for direct homeownership assistance for a specified additional period; (3) section 807(c)(1), regarding recipient and subrecipient capacity building to carry out microenterprise activities; (4) section 807(e), regarding amendments to the current restrictions on areas in which CDBG funds may be used for code enforcement to take into account privately funded development in addition to publicly funded development; and (5) section 809,

permitting as eligible administrative expenses the costs of establishing and administering Federally approved Empowerment Zones and Enterprise Communities.

Finally, as further described below, the rule contains miscellaneous technical updates and corrections to the CDBG Entitlement, State, Small Cities, and Insular Areas provisions.

### III. Provisions From the August 10, 1994 Proposed Rule

HUD received 45 comments on the August 10, 1994 proposed rule. The following discussion summarizes those comments.

#### A. Definition of "Income"

The CDBG program is unique among HUD's major programs in needing a definition of income that will be familiar and useful to private businesses and others outside the industry of housing service providers, and that will be useful when measuring benefit for an activity that will serve an area generally. This rule furthers the reinvention of HUD by providing a great deal of administrative flexibility while improving accountability in an area of identified weakness. This flexibility is provided in the design of the definition as well as in the documentation requirements (which are unaffected by this rule). Grantees may choose to assess participant income in one of three ways based on the cash or asset elements included in either the Section 8, Internal Revenue Service, or Census definitions of income. The existing documentation requirements permit participants to self-certify their family incomes or to substitute documentation of their qualification in a Federal or State program that has income qualifications at least as rigorous as the selected definition. Standardizing the definitions ensures that citizens are treated fairly, and retaining the current documentation requirements continues to provide significant administrative flexibility to grantees. Further, grantees still retain the responsibility for determining how much assistance to provide.

HUD received eighteen comments on the proposed definition of income, including comments from five urban counties, four metropolitan cities, three national public interest groups, two low-income citizens advocacy groups, two single city nonprofit housing rehabilitation groups, one State, and one regional community development group. Twelve of the commenters were generally in favor of the new, flexible definition. Almost without exception, the commenters requested that if HUD

implemented the proposed definition, HUD should permit a fourth option. The commenters suggested that this fourth option be either: (1) to qualify automatically an individual already qualified under a means-tested program, or (2) to allow each grantee to develop its own definition, to be approved by HUD. Some confusion about the difference between the documentation and definition provisions was apparent in the comments on these points.

The two low-income advocates generally endorsed the definition of income as proposed, although one requested additional clarification of two points. The first point involves clarification of the language proposed in paragraph (2) of the definition. By "integrally related activities of the same type," HUD intended to denote, for example, a program of single family rehabilitation lending activities (which are generally grouped for reporting purposes), a "bundle" of public services provided through a single program to the same clientele (such as services provided during transitional housing to the homeless), or a portfolio of commercial loans made by a particular subrecipient. If the grantee administers a community-wide single family rehabilitation loan program, it should use the same definition of household income or family income (as applicable) in evaluating each loan in that program.

HUD does not intend the phrase "integrally related activities of the same type" to denote activities that are part of the same "project," because many community development projects are for mixed uses and mixed purposes. For example, a three-story building may have public parking in the basement, commercial space and a community center on the ground floor, and affordable housing in the upper stories. This is all one construction project, but with distinct activities serving different populations and meeting distinct national objectives within the CDBG program. Further, while the term "project" is used throughout the HOME program, it is only used for limited purposes in the CDBG program (for example, under §§ 570.203 and 570.204 and for environmental and Davis-Bacon purposes).

Ideally, HUD would like each grantee to select one definition for all its CDBG activities, or at least for purposes of meeting each income-based national objective category. However, as described in the preamble to the August 10, 1994 proposed rule, HUD recognizes that this would be administratively difficult and not useful for many grantees.

Some commenters appeared to confuse definition and documentation issues. Both advocacy groups suggested that the rule require, in § 570.3, that none of the three definitions be used if the assistance was to be provided to a person who provides documentation of income-eligibility for another program "recognized as more rigorous than CDBG." This suggestion mixes the definition of income at § 570.3 and the documentation of income at § 570.506(b). The definition of income merely describes the assets (if any), salaries, and other income flows that must be considered in determining income. The documentation requirements describe how to verify income at the time assistance is provided. Therefore, if a person provides documentation from another means-tested program to show that the necessary elements (and possibly more than those elements) were considered, and affirms that his/her financial status remains the same at the time the CDBG assistance is provided, then HUD would find this acceptable.

The groups also requested that Aid to Families with Dependent Children (AFDC) and Supplemental Security Income (SSI) be added to the definitions of "programs at least as restrictive" at § 570.506. HUD has decided to add neither, however, because the programs listed at that point are illustrative. Documentation from any means-tested program may be used if the grantee determines that the program's elements and thresholds are at least as restrictive as the CDBG definition being used for the activity.

Five grantees, one public interest group, and two nonprofits requested that a fourth option be added to permit grantees to develop their own definitions, or to continue using the definitions they had been using. Because HUD intends to limit the variation in definitions of income, HUD did not adopt these suggestions. However, as noted above, if a person is participating in a means-tested State or Federal program at least as restrictive as CDBG with regard to income elements and thresholds, documentation of qualification for that program may be used to determine CDBG income eligibility.

One grantee and two of its nonprofit subrecipients apparently misconceived how the IRS and Census definitions are to be used. These commenters apparently thought HUD meant that the Census or tax form, as completed at the time required for Census or tax purposes, should be used to determine CDBG income eligibility—even when the CDBG assistance was provided

months or years after an individual completed the form. In almost all cases, neither of these documents alone would accurately represent the level of income of the family or household at the time CDBG assistance is provided. Instead, the familiar terms used on these forms will help each person receiving assistance to understand which cash and asset values to consider before making the certification required by § 570.506 as to their current family or household (not individual) income, as appropriate. Although the IRS 1040 form is often used to report individual income, not family or household income, that form provides a familiar way to show people which kinds of income are to be considered. One commenter asked whether the IRS short form could be used. Any form can be used, provided the grantee ensures that the information is current and that all sources of income covered by the selected definition are considered in making income eligibility determinations.

Finally, several commenters to the August 10, 1994 proposed rule and to the Consolidated Plan proposed rule requested that the terms used for the various income groups be conformed among the regulations for the CDBG program, the consolidated plan, and other programs. After discussion, HUD decided to use the existing CDBG terms in the regulations for both the CDBG program and the consolidated plan. In the consolidated plan HUD added two additional terms—"middle-income," to denote families whose income is 80 to 95 percent of median income, and "very low-income" to denote families whose income is below 30 percent of median income. HUD did not need to make changes in this rule to accommodate this decision.

#### *B. Calculation of the Planning and Administration Limitation*

HUD's original proposal was to rule out source-year based calculation of the spending limit and to require program-year based calculation based on expenditures. In response to the comments and in adherence with the principles of reinventing government, HUD changed the rule at this final stage to make the calculation more accommodating of costs (notably planning costs) which may unexpectedly cross program year boundaries. HUD retained the regulatory provision specifying the calculation method in the regulations instead of using less binding guidance materials, because abuse in this area would decrease funds available directly to improve the lives of low- and moderate-

income persons and to rebuild their communities.

HUD received thirteen comments on the proposed change to the language describing the calculation of the limitation on planning and administration expenditures. Two commenters, both low-income citizens advocacy groups, supported the change. One group commented that the change would "inhibit grantees from playing shell games" with administrative funds. Both commenters felt that this change would make it harder for grantees to hide from citizens the exact amount of funds used for administering the program each year. One major metropolitan city commented that the change would not affect it.

Three metropolitan cities, three counties, one State, and three public interest groups submitted opposing comments. As one public interest group commented: "Although the source year method of calculation is infrequently used by CDBG grantees, those who do use it find the proposed change extremely detrimental." Almost every one of these commenters cited the disruption that could be caused by the calculation by a large contract (such as a planning contract) unexpectedly extending into another program year. Several commenters disagreed with the reasons HUD proposed the language change, stating that if the performance report did not support source-year funding, it should be modified. One commenter pointed out that program income can simply be sourced to the year in which it is received. The State commenter agreed with HUD's decision to rule out the source-year method as inherently arbitrary. It argued, however, that it may be necessary when apportioning expenditures among agencies with "varied non-CDBG funding sources," and the source-year method might also be the most efficient way to govern and track expenditures by other entities. An urban county and the interest groups made similar arguments.

The opposing commenters suggested a variety of solutions. One suggestion was to drop the proposed change entirely. However, this suggestion does not address the issues that led HUD to propose the change in the first place or the issues raised by the advocacy organizations in their comments. Another suggestion was to permit grantees that use this method of accounting to submit to an audit to determine whether they are using the method correctly, and to submit the results of any audit in their favor to HUD for approval to use this method. Another suggestion was to base the cap calculation on the amount "committed"

for administration during the program year, rather than the amount expended. A variation of this suggestion was that the grantee count expenditures when the activity was to be carried out by its own staff and count commitments when the activities were to be carried out by a subrecipient, a contractor, or, in the case of the State, another agency.

In the past, HUD has based the planning and administrative limitation on expenditures because many, if not most, of the expenditures for these activities are for the grantee's own staff on payroll. Prediction and management of annual payroll expenses is a normal part of the budgeting process. Therefore, the expenditure basis of the cap is not a burden for most grantees, but rather is the simplest method of calculating and governing the cap. According to HUD data, some grantees also have an unused margin each year.

In drafting the final rule, HUD rejected suggestions allowing grantees to calculate 20 percent of each annual grant, and to use this amount in the current year or to carry it over into future grant years until the entire amount was expended. This could have the effect of making expenditure of the maximum possible for program administration costs the norm. Any funds spent on program administration are not being spent on activities that more directly implement the purposes of the Housing and Community Development Act of 1974 (the Act). However, HUD agrees with commenters who argued that even with proper management, planning and administrative contracts can occasionally involve expenditures occurring in a year other than the one in which the costs were budgeted. HUD also agrees that an expenditures-only test ignores the difficulties in managing the precise period when a contractor or subrecipient will actually expend funds. Therefore, this rule changes the cap calculation by basing it on annual obligations (rather than expenditures) for purposes of calculating the 20 percent cap. At the end of the program year, grantees will reconcile these amounts using the same method now used for reconciling the public services limitation, which is currently calculated based on obligations. (While the base for the public services cap includes the amount of program income received during the previous program year, the base for the planning and administration cap uses the current year's program income.) Using this approach, a grantee that does not obligate any planning and administrative funds before expending them is still treated as though the

requirement is based on expenditures rather than obligations, while a grantee that requires some additional flexibility will have it.

### *C. Revolving Funds and Returning Excess Program Income*

HUD proposed the revolving loan fund (RLF) and return of program income provisions in response to Inspector General findings. HUD is making these changes to ensure that recipients of Federal resources meet certain responsibilities (in this case demonstrating fiscal responsibility and not unnecessarily increasing the Federal deficit) in return for the Federal assistance, which is one of the principles of reinventing government. The proposed rule language would have eliminated the provision that sheltered money in RLFs from the requirement that no additional funds be drawn down from the line of credit when CDBG funds are already on hand.

HUD received 31 comments from groups and individuals regarding the revolving loan fund proposed changes. Fourteen metropolitan cities, four urban counties, three national interest groups, three community-based nonprofit organizations, two regional community development groups, two States, two local HUD program officers, and one low-income citizens advocacy group were included among the commenters. All commenters opposed the changes. Many of the comments linked the proposed revolving loan fund changes to the proposed rule to require grantee- or subrecipient-held program funds in excess of one-twelfth of the grant amount to be returned to the line of credit.

HUD has considered all the comments and finds some of them persuasive. However, several commenters apparently misunderstood how the proposed changes would work and were concerned that HUD was striking at the activities typically funded by RLFs, instead of just adjusting the RLF mechanism. This in turn led to confusion of the issues associated with permitting revolving funds to shelter program income. However, HUD did not propose to eliminate revolving loan funds, and HUD agrees that the activities typically carried out through revolving funds (e.g., housing rehabilitation) serve vital program purposes.

Any activity carried out under a revolving fund can be carried out through the normal CDBG delivery mechanism. The basic question, therefore, is whether the revolving fund structure, per se, serves a vital program purpose. Under the proposed rule,

principal and interest payments for loans in a revolving fund would have been held in the grantee's general program account, while RLF accounts would have been kept separately. In effect, the proposed changes would have made the grantee the "bank" in which the RLF was held. HUD did not contemplate changes to the budgeting of RLF amounts in the final statement (now called the action plan), so comments claiming that the changes would increase the difficulty of securing funding during the local budgeting process seem misplaced. Even under existing rules, program income to RLFs must be projected for citizens who are then able to comment on whether to propose another use for the funds.

Other comments include those described in the following paragraphs. All of the following comments were expressed to some degree by more than one commenter. Several commenters asserted that the proposed rule changes would cause enough additional delay and expense that administration of RLFs would become time prohibitive. For instance, commenters remarked that RLFs held in local financial institutions can provide access time as short as one day; such short access times are often critical to small and minority contractors carrying out CDBG activities. One commenter remarked that management of its own RLF by a neighborhood- or community-based nonprofit organization empowers the organization. Allowing it to manage and keep its own funds teaches the skills that foster successful, sustainable organizations. Other commenters added that if a financial institution is used as a depository, it often can be persuaded to provide other benefits. Commenters also argued that the proposed changes will increase administrative costs to the RLF administrator caused by constant passing back and forth of small amounts of money, resulting in fewer CDBG dollars being used to assist activities.

In response, HUD agrees that it would be more advantageous for a number of reasons to keep loan repayments in a separate account and not "mix" it with other program income, the use of which has not been predetermined. This convenience does justify some expense to taxpayers.

Many commenters suggested as an alternative to the proposed rule that HUD require a minimum expenditure from a revolving fund in a year, or a maximum carryover percentage from year to year. One commenter, a local HUD program officer, suggested a single system that at least partly addresses the issues behind both the RLF proposal and the return of grant funds proposal.

Because many of the commenters indicated linkages between the RLF and return of excess program income proposals, the comments and issues related to the return of excess program income proposal are discussed immediately below, followed by the description of the final regulatory provisions adopted in response to comments on both proposals.

The proposal to require return of excess program income drew 17 comments opposing it in whole or in part. The commenters included six metropolitan cities, four urban counties, three public interest groups, one low-income citizens advocacy group, one local HUD program officer, one community-based nonprofit organization, and one State. The strongest opposition came from those who interpreted the language to mean that, on an ongoing basis, as a grantee accumulated in its program account an amount greater than one-twelfth of its annual grant amount, that amount must be remitted to the grantee's CDBG line of credit. This is what HUD originally intended. Several commenters expressed intense objection to this proposal, based on the costs of administering such a complex system and passing small amounts of funds back and forth. Three commenters stated that such a system would be a significant disincentive to carrying out the revenue-producing activities that currently generate approximately \$450 million in additional funds for community development activities annually.

Several commenters suggested that the funds should be required to be remitted only at specific intervals, such as quarterly or annually. This process would establish CDBG balances and allow HUD to be certain that large sums were not being held unused, in violation of Treasury guidelines. One commenter, the HUD program officer, linked the concept of an annual remittance of funds on hand to his suggestion for how to better manage RLFs. This commenter suggested that all unexpended funds, except those needed immediately, those in RLFs, or those resulting from legal lump-sum drawdowns, be remitted to the line of credit annually near the beginning of the program year to establish a beginning balance. Under this proposal, with this one exception, program income received during the program year would be treated as it is now. At the time of the remittance, the recipient would describe to HUD the exact amount of funds in each RLF. The HUD program officer further proposed annual RLF expenditure and carryover standards, which, if violated, would

result in HUD requiring the grantee to dissolve the RLF.

HUD is yielding to the unanimous view of the commenters that RLFs are an important CDBG tool by retaining a specific provision for RLFs in this final rule. The RLF provision in this final rule accommodates the suggestions of the commenters while substantially addressing the original problem, the loss of revenue to the U.S. Treasury. The final rule provides that cash balances of each RLF must be held in an interest-bearing account, and that any interest earned by funds accumulating in this account must be remitted annually, at the end of each program year, to the Treasury. This remittance will partially offset the cost to the Treasury of removing RLF funds from the general requirement that funds on hand must be used before any draws to the Treasury. Interest paid by borrowers on loans made from the RLF will remain program income and may be used as part of the RLF for further lending.

Furthermore, in response to comments on the return of grant funds proposal, HUD modified the rule to require all program income cash balances or investments thereof in excess of one-twelfth of the grant or subgrant amount—except for those needed immediately, those in RLFs, those resulting from lump-sum drawdowns authorized under § 570.513, and those invested or held as additional security for a Section 108 loan guarantee—be remitted to the CDBG line of credit annually. This remittance will take place as soon as practicable following the end of the grantee's program year. HUD expects that all such remittances will be complete within 60 days following the end of a grantee's program year. The amount to be remitted will be calculated based on the total program income balances (with the exceptions above) held by the grantee and all of its subrecipients as of the last day of the grantee's program year. While the rule requires at § 570.503(b)(3) that subrecipient agreements include a provision allowing the grantee to require subrecipient remittance of program income cash balances or investments at the end of the program year, the grantee is responsible for determining whether amounts held by any subrecipient or subrecipients are sufficiently large that such remittance will be necessary to enable it to meet the requirement at § 570.504(b)(2)(iii). HUD anticipates that information describing the exact amount of any program income cash balances and investments thereof that the rule permits grantees to retain will be provided to HUD by the

grantee as part of the annual performance report.

#### *D. Income Payments*

The income payments provision of this final rule follows the principles of reinventing government by clarifying and limiting burdensome regulations; the rule allows grantees more options for empowering program participants. On the effective date of this rule, downpayment assistance (other than that authorized by § 570.201(n)), and loans for subsistence will be eligible public services, rather than ineligible income payments. Only subsistence grants will remain CDBG-ineligible.

HUD received 17 comments on the new definition of prohibited income payments. The commenters included five urban counties, four metropolitan cities, three public interest groups, two HUD program officers, two low-income citizens advocacy groups, and one State. Only the two HUD program officers opposed the change entirely.

First, one of the HUD program officers was concerned that loans for income payments would often be made to those who could not or would not make payments. Since grants are ineligible, this program officer asked what HUD's position would be on the eligibility of a subsistence loan activity that appeared from its results to be a grant activity. HUD recognizes that loans for small amounts for subsistence activities are risky. However, some grantees have had success in offering people the responsibility of loan repayments along with subsistence assistance. Grantees are responsible for meeting program requirements. If a loan program default rate is unusually high, HUD would examine the system the grantee has in place to ensure payment, and in this case, to ensure eligibility. If such a system was absent or faulty, HUD would recommend and, if necessary, enforce corrective actions.

The other program officer's objection was that other programs exist to provide for subsistence and downpayment assistance, and that it is inappropriate for the CDBG program to allow such activities. HUD acknowledges that the regulatory prohibition against direct-to-the-individual subsistence-type income payments exists, in part, because other large programs, such as food stamps, Aid to Families with Dependent Children (AFDC), Section 8, and Social Security are designed to provide such assistance. None of these programs, however, provides general assistance in the form of loans or is linked to an overall community development program. Further, since such loans in the CDBG program are subject to the 15

percent cap on public services obligations, their use will be limited. In response to similar comments on downpayment assistance activities, HUD believes it is clear that the amount required to meet the need for downpayment assistance for low- and moderate-income persons exceeds the amount of funds available under all HUD's programs within its Office of Community Planning and Development (CPD). HUD strongly supports expanding the resources available for homeownership, and many grantees have already found CDBG useful for this purpose.

Five commenters opposed the placement of downpayment assistance in the public services category upon its removal from the income payment category, although all agreed that it is not an income payment. Some suggested other placements for it, such as the economic development, rehabilitation, or acquisition categories. HUD understands the commenters' desire to keep downpayment assistance unencumbered by the public service cap, and agrees that the category is not a perfect fit. However, downpayment assistance also clearly does not belong under economic development, as it is defined in the CDBG regulations. Assisting acquisition by an individual homebuyer for the purpose of rehabilitation is already eligible, but activities not associated with rehabilitation do not fit in § 570.202. Furthermore, the law limits the eligibility of acquisition for purposes other than economic development or rehabilitation to grantees and other public or private nonprofit entities. Downpayment assistance may also be carried out by qualified Community-Based Development Organizations (CBDOs) as part of a § 570.204 eligible activity (such activities will generally be subject to the annual limitation on public services obligations).

Some of the commenters may have objected to changing the eligibility of downpayment assistance because they believed that HUD was indicating that such activities could meet the national objective of benefit to low- and moderate income persons under the criteria at § 570.208(a)(2)—Limited clientele activities. However, application of the limited clientele criteria would allow downpayment assistance qualifying under § 570.201(e) to be provided to a substantial percentage (up to 49 percent) of above-income persons even if it is not part of a neighborhood revitalization effort. The more appropriate low- and moderate-income category to apply is § 570.208(a)(3)—Housing activities. For

clarification, HUD modified the second sentence of that section to include acquisition or rehabilitation by an individual homebuyer on the exemplary list of activities covered by that provision.

In terms of eligibility, downpayment assistance fits best as part of the temporary category at § 570.201(n)—Direct homeownership assistance. The eligibility for this activity expired on its "sunset" date of October 1, 1995. However, HUD has requested that Congress amend the statute to reinstate the activity's eligibility. One commenter, a public interest group, objected to HUD allowing downpayment assistance as a public service because this would remove pressure from Congress to delete the sunset provision on direct homeownership assistance (a broad category that includes downpayment assistance) as a separate activity. However, HUD believes that downpayment assistance is useful to grantees in meeting the needs of their residents and therefore has decided to make this activity eligible under CDBG (although it is constrained by the public services cap).

Four commenters requested that child care be removed from the list of prohibited income payments. One wanted ongoing "scholarship" payments made to a family, organization, or institution for medical and child care made eligible. HUD agrees that scholarships for child care should be eligible and is removing child care from the list of ineligible subsistence payments. However, the grantee must design a system that ensures that any cash payment made to a family for child care (or any purpose) is actually used as the grantee intended. To this end, HUD recommends that, whenever possible, payments for such purposes are made in the form of vouchers or payments directly to the provider.

One commenter wanted clarification that loans for housing rehabilitation are not public services. Loans for housing rehabilitation are eligible under § 570.202 as rehabilitation activities. Such loans are not eligible as public services. This includes loans and downpayments to assist acquisition for the purpose of rehabilitation.

The two advocacy groups wanted emergency one-time payments to be changed to emergency payments made over no longer than a three-month period. HUD agrees and has made the suggested change. Further, HUD wants to clarify that, under the language of this rule, payments to help a family or individual meet one emergency do not

preclude such assistance being provided to the same family or individual at some later, not immediately sequential, point in time to meet a different emergency. The commenters also wanted the preamble language stating that loans for subsistence would not be considered income payments to be stated in the regulation, along with language in § 570.207 stating that downpayment assistance was no longer prohibited by that paragraph. HUD has adopted the first half of the suggestion at § 570.201 by adjusting the specific activity list. However, adding language in § 570.207 would be redundant.

#### *E. Float-Funded Activities*

Float-funded activities use undisbursed funds in the line of credit and the CDBG program account that are budgeted in action plans for one or more other activities that do not need the funds immediately. HUD included the provision governing float-funded activities in the proposed rule at the urging of the Office of Inspector General, which had identified serious repeated findings of program mismanagement in two audits of interim financing carried out during the 1980s.

In the proposed rule, HUD added criteria for float-funded activities in the final statement section of the regulations. These criteria included citizen participation and security requirements necessary to offset the risks of float-funding. In this final rule, because HUD incorporated basic final statement requirements into the regulations for the consolidated plan (24 CFR part 91), the float-funded activities language is the bulk of the language remaining in § 570.301.

HUD received 11 comments with respect to these proposed requirements. Three public interest groups representing community development practitioners, three urban counties, two low-income advocacy organizations, two large metropolitan cities, and a local HUD Community Planning and Development program officer responded. Seven of the commenters, including the HUD program officer, wanted the 2.5-year time limit for the duration of a float-funded activity either removed, lengthened, or modified by adding a provision permitting exceptions to the limit in certain cases. One advocacy organization suggested the 2.5-year limit might be too long, but admitted a lack of experience with the issue area. The other two commenters, a city and a county, generally supported HUD's proposed changes. The county characterized the rule as "logical and sufficient."

In the preamble to the proposed rule, HUD noted that among the primary risks to the CDBG program inherent in the float funding process are, first, that the float-funded activity will not generate sufficient program income to allow for timely undertaking of previously budgeted activities. HUD also noted that in undertaking a float-funded activity from which funds will not return for use for previously budgeted activities for a particularly long time period, grantees apparently assume that they will receive sufficient additional CDBG funds in future years to continue funding those previously budgeted activities until the float-funded activity generates program income. HUD further noted that grantees are only authorized to use such a funding technique (e.g., relying on future CDBG funds to backstop a large loan for a particular activity in the present) under the Section 108 Loan Guarantee program. Although one commenter, a city, stated that an irrevocable letter of credit removes the first risk, HUD's experience is that this is not always the case. Most of the commenters did accept the 2.5-year limit as the general rule or as a guideline. However, in response to comments, HUD is clarifying that, while it expects most float-funded activities will conform to the 2.5-year requirement, a float-funded loan may be extended, reissued, or "rolled over" by treating it as though it were a new float-funded activity and showing that it meets all the same requirements that apply to float funding. (In the past, HUD equated float extensions and rollovers with refinancing existing indebtedness, which is not generally allowed under the CDBG program.)

The advocacy organizations suggested a variety of special action plan amendment procedures for float-funded activities, including the following requirements: relating changes to consolidated plan priorities, focusing citizen participation on the area or neighborhood that would have benefited from a defaulted or canceled float-funded project, and reprogramming action within 30 days of learning of the delay or default. HUD has long held that float-funded activities must meet all the same requirements that apply to CDBG-assisted activities generally, and the proposed rule added additional requirements only in response to the identified primary risks to the program stemming from the float-funding process. The suggested additional citizen participation requirements far exceed the existing requirements covering all CDBG activities. Therefore

HUD is not adopting these suggested changes.

One of the public interest groups asked HUD to clarify that the rule did not mean that each float-funded activity be identified separately in the action plan, but rather that such activities be identified by eligibility category, as many other activities may be designated (e.g., community-wide single family rehabilitation loan programs). However, to ensure that citizens are properly informed, HUD does intend that each float-funded activity be identified separately in the action plan.

Another of the public interest groups stated that the income stream from an activity can be difficult to predict, and it requested information on how HUD would treat a grantee who carried out a float activity that exceeded the 2.5-year limit. In response, HUD suggests that activities appropriate for float funding be evaluated for the predictability of their income streams, with only more predictable activities being so funded. HUD further notes that the corrective actions permitted to HUD under the CDBG program vary from issuing a letter of warning to enforcing a grant reduction. The local HUD offices (in the case of float-funded activities, usually in conjunction with Headquarters) will assess each deficiency and design a corrective action to prevent a continuation of the performance deficiency, mitigate the adverse consequences of the deficiency, and prevent a recurrence of the deficiency. As noted above, the rule does provide for float-funded activities to be extended, reissued, or rolled-over, provided certain requirements are met.

Two grantees responded to the request for comment on whether a limit should also be set on the proportion of a grantee's funds that could be used for float funding. Both grantees responded that there should be no limit, stating that the other proposed requirements were sufficient to address the identified risks. Therefore, HUD will impose no such limit at this time.

One commenter, a grantee, suggested that the rule permit the action plan covering the float-funded activity to describe the characteristics of the lender that will provide an irrevocable letter of credit, rather than providing the actual lender's name. The commenter also suggested describing the maximum and minimum terms for the letter of credit in the action plan, because the terms may change somewhat when the deal is negotiated after the action plan is amended. HUD finds no problem with this approach if the language used is as specific as possible. Therefore, any grantee choosing this approach should

contact its local HUD office for guidance in developing a suitable description.

Another commenter, the local HUD program officer, suggested that the action plan break out the identified float payment amount into principal and interest, so that citizens can tell whether the activity will "make money." This rule requires at § 570.301(b) that each float-funded activity be individually listed in the action plan, and that the "full amount" of income expected to be generated by that activity must be shown (the latter requirement is also included in the consolidated plan regulations at 24 CFR 91.225(g)(1)(ii)(D)). These requirements will permit citizens to determine easily whether the activity is expected to "make money." The rule language is also easily adaptable to float-funded activities that do not involve loans.

The program officer also suggested that HUD allow in the rule for HUD approval of grantee-proposed methods, other than those described in the rule, of securing the repayment of the float funding. HUD accepted this proposal, so long as the method ensures fund availability within 30 days of default or shortfall. This approval can be made in writing by the appropriate local HUD office, in advance of carrying out the float-funded activity.

#### *F. Using CDBG Funds Outside the Grantee's Jurisdiction*

HUD included this provision in this rule as a result of the Inspector General's audit findings regarding grantees loaning funds to other jurisdictions rather than using the funds in their own. The proposed language would have added a new § 570.309 to require that, prior to using CDBG funds to assist projects outside jurisdiction boundaries, grantees make a determination that the principal benefit of the activities will accrue to persons residing within jurisdiction boundaries.

HUD received 13 comments on this portion of the proposed rule, nine of which expressed some opposition. Those opposed included four urban counties, one State, one national public interest group, one regional nonprofit organization, and one large metropolitan city. An advocacy group and a national public interest group supported the proposal with little additional comment. A metropolitan city and an urban county neither supported nor opposed the proposed change, but requested clarification on its effects. In addition, HUD received one comment from a local HUD program officer opposing the rule as proposed and raising some related issues.

The opposition to this proposal was primarily based on the chilling effect the commenters felt this proposal would have on projects that were jointly funded by cities and counties. The large metropolitan city argued that this change would increase the isolation of central cities. One urban county argued that all economies are linked—there are indirect effects of development and long-term benefits to an area from an activity, even one outside the county's jurisdiction. HUD's concern should be assuring that a national objective is met. Several grantees requested that different activities, such as water and sewer developments, that are expected to result in jobs be excluded from the requirement.

One public interest group cited a February 7, 1986 HUD memorandum signed by former Assistant Secretary for Community Planning and Development Moran. The Moran memorandum discussed an issue raised by an urban county using CDBG funds in cities within the county, but outside the jurisdiction of the urban county. As stated in that memorandum, HUD believes that the determination of to whom and how an activity will provide benefit is best left to the county. At that time, HUD had not yet come across any grantee that appeared to be regularly spending CDBG funds outside its jurisdiction. Since that time, several grantees have loaned their CDBG funds to nonparticipating or nonentitled jurisdictions, or have used CDBG funds outside their jurisdictions, despite pressing need for facilities and services within their own jurisdictions.

The CDBG formula results in grant awards to communities to benefit the residents whose poverty and housing needs determined (via the formula) the amount of funding. HUD has noticed that, particularly in large urban counties, citizens can easily be unaware of the boundaries of the urban county for purposes of the CDBG program when it differs from the boundaries of the county as a whole, and may not be aware that funds that were supposed to benefit one community are being spent to benefit another. Since HUD is aware that activities located outside a grantee's jurisdiction may indeed provide substantial benefits to the citizens within the jurisdiction, the rule does not prohibit such activities. The rule simply requires that the grantee consider whom the funds will benefit and make a determination. HUD will not question the determination unless it is clearly unreasonable. The rule does not limit the amount or percentage of funds that may assist such an activity, and should

not affect joint efforts by cities and counties to benefit their residents.

Several commenters noted that "principal" benefit would be difficult to determine in certain cases. For example, the amount of benefit to ascribe to each jurisdiction participating in joint affirmative fair housing activities might not be easily assigned. In response, HUD has adjusted the final rule to require a determination that the activity was necessary to meet the purposes of the Act and community development objectives of the recipient, and that "reasonable" benefits will accrue to the residents of the recipient. The recipient is free to determine the reasonableness of the benefits in such case.

HUD received an inquiry from a large metropolitan city about whether this rule change would block affirmative fair housing efforts to develop minority housing outside of areas of minority concentration. In response, HUD definitely does not believe that this provision will cause any such problem, especially as HUD has adjusted the provision in this final rule.

One commenter, the HUD program officer, raised issues about the difficulty of monitoring this provision. The purpose of this provision is to ensure that, in funding an activity outside its boundaries, the recipient has properly considered the purposes for which it was awarded the funds. In most cases, HUD monitoring will simply involve making certain that the determination has been made. Only when the HUD monitor believes that the likely extent of the benefits to residents within the jurisdiction is clearly not commensurate with the amount of funds spent on the activity should it be raised as an issue with the recipient. For example, a loan of CDBG funds to another jurisdiction for an activity that would provide little or no benefit to the recipient's residents would be very likely to provoke a challenge from HUD.

#### *G. Remission of Grant Funds*

This provision responds to Inspector General findings and implements a General Accounting Office (GAO) opinion that income generated by an ineligible CDBG-assisted activity must be returned to the U.S. Treasury. Since, in the context of the GAO opinion, eligibility includes meeting a national objective, this provision should invoke a sharpened grantee focus on successful outcomes—interest generated from CDBG-funded loans may only be kept by the grantee when the national objective requirements are achieved.

HUD received four comments on this portion of the proposed rule. A low-income advocacy group commented

simply that it supported the change. Another commenter, a State, had no objection, but suggested the language "or fail substantially to meet any other requirement of this part" was overly broad. However, HUD is retaining this language, as it is standard language throughout the CDBG regulations in similar situations.

A large metropolitan city requested a clarification on whether return of interest is possible with CDBG funds. It gave an example of an economic development loan that was supposed to meet the national objective of low- and moderate-income jobs, but does not. The commenter stated: "Auditors declare the loan ineligible because no national objective was met. Can the City identify CDBG funds and pay HUD the interest earned, or is the grantee expected to use non-federal funds for repayment?" If a grantee received interest that is required to be remitted to HUD pursuant to § 570.500(a)(2) and used the interest for payment of the costs of carrying out activities in its CDBG program, it may remit CDBG funds (grants or program income) to HUD. Grants should not be used for this purpose, however, if program income is available. The commenter also wanted to know whether it is correct in presuming that only interest, not principal, need be repaid in such a case. The rule requires the interest to be remitted to the Treasury; there is no recovery of principal amounts required for this purpose. If HUD advises reimbursement of the principal amount using local funds, any such payments would be available for use by the grantee under CDBG rules and would not go to the Treasury.

One commenter, a public interest group, wants HUD to pay more attention to the initial use for an eligible activity. HUD understands the commenter to be objecting to consideration of the national objective outcome in determining whether funds should be remitted. However, this rule provides that if a grantee makes a loan that is found not to meet a national objective, the interest may not be retained by the grantee, whether the loan was eligible in a more narrow sense or not. HUD intends to continue emphasizing loan programs that are outcome-oriented.

#### *H. Consolidated Plan Performance Standard*

This rule provides performance criteria for implementing the consolidated plan. This is important because every CDBG grantee must certify, before receiving its annual grant, that it is carrying out its consolidated plan—not just for its CDBG activities,



but for all programs and actions covered by the plan. Without a published, regulatory performance standard, grantees are unlikely to understand the significance of this certification.

HUD received six comments on this portion of the proposed rule. Also, several entities commenting on the Consolidated Plan final rule, published on January 5, 1995 (60 FR 1878), asked what standard HUD would use to judge whether a grantee had "carried out" its consolidated plan. HUD placed the standard in this rule because the standard is driven by a CDBG-specific certification (see § 91.225(b)(3)) required by statute to be made before CDBG funds can be awarded. A grantee making the certification affirms that it is following its consolidated plan—in its entirety, not just the CDBG portions—and that each CDBG-assisted activity will be consistent with the plan. Failure to follow the consolidated plan can result in loss of future CDBG funds. Parts of the Stewart B. McKinney Homeless Assistance Act, including the Emergency Shelter Grants program, are governed by a similar certification (§ 91.225(c)(9)), so forfeit of these funds may also be possible if the consolidated plan is not followed.

One national public interest group commented that the proposed standard is vague. The commenter requested clarification of the standard and conformance of the standard with the consolidated plan. HUD agrees that the proposed standard is general; it designed the criteria to cover broad categories of actions (to pursue and use resources, to make certifications of consistency, to take promised actions, and to refrain from obstructionism) that HUD considers most important in ensuring each plan is implemented. Within these categories, the standard will be as general or as vague as the descriptions of actions contained in each community plan. The same grounds that led HUD to adopt custom-tailoring of each plan to the needs and priorities of each community also led HUD to decide that the suitable policy for administering the certification was to hold each community to the standard of action the community set for itself in its consolidated plan. The HUD review will be carried out by the same local HUD office that is responsible for approving the plan. HUD made no change to the rule as a result of this comment.

Two low-income advocacy organizations asked HUD to make grantees "follow" the consolidated plan by allocating fair share based on needs. As HUD noted in the preamble to the Consolidated Plan final rule, HUD

declines this suggestion. HUD's goal for the consolidated plan is to provide the framework for communities to have meaningful plans. HUD does not wish to substitute its judgment for locally developed plans and priorities framed through the strengthened citizen participation process.

A national public interest organization and an urban county commented that the proposed standard of taking all promised actions is too high and inappropriate. Instead, they suggest a "due diligence" clause. HUD believes a standard that all promised actions should be carried out will strengthen the consolidated plan process by strengthening the confidence of citizens that the grantee really intends to implement the actions described in the plan. The regulation allows for consideration of events beyond the control of the grantee and for grantee rebuttal of HUD reviews. Therefore, HUD made no change in response to these comments.

One metropolitan city suggested this section be eliminated as unnecessary. HUD agrees that this section would be unnecessary if the certification was not to be reviewed. However, section 104(e) of the Act requires HUD to review a grantee's performance to determine, among other things, whether a grantee has "carried out \* \* \* its certifications." Without some standard for performance review, the consolidated plan would be an empty exercise. HUD has the responsibility to ensure that each grantee meets all program requirements, including the certification. Grantees have the right to know against what standard their performance will be judged.

#### IV. Provisions From the November 12, 1993 Proposed Rule on Sanctions

HUD published for comment two provisions of this final rule as a proposed rule on November 12, 1993 (58 FR 60088). This proposed rule covered performance reviews, timely expenditure of CDBG funds, sanctions, and due process hearings. HUD has included the first two topics in this final rule, but has withdrawn the other two topics. After thoroughly considering the comments on the November 12, 1993 proposed rule, HUD decided to adjust its approach to these issues, and HUD will be publishing another proposed rule in these areas shortly.

Therefore, this rule reflects the following changes to subpart O of part 570—Performance Reviews. HUD has withdrawn its changes to §§ 570.907–913 and plans to repropose changes to these sections.

#### A. Performance Review Procedures

In order to clarify the relationship between HUD's review procedures and HUD's process for resolving findings of deficiencies, this final rule amends several of the elements of the performance review procedures under § 570.900 to: clarify what the primary information sources will be for such reviews; provide the recipient that has failed to comply with a program requirement an opportunity to provide additional information; and indicate what initial actions HUD may take.

#### B. Timely Performance

With respect to entitlement recipients, this final rule revises and clarifies how HUD will review to determine if CDBG-funded activities are being carried out in a timely manner.

HUD received two comments, both from grantees. One commenter suggested that the measurement of timely performance be taken at a date coincident with consolidated planning or reporting. Another commenter recommended that program income not be coupled with the balance in the line of credit because of the effect of balloon repayments on timeliness calculations. This final rule at § 570.902 indicates that HUD will not only consider a recipient's line of credit balance but also its program income on hand 60 days prior to the end of the program year, as well as any evidence that lack of timeliness resulted from factors beyond the grantee's reasonable control, believing that generally a grantee should be able to plan and budget for the use of scheduled loan repayments, including balloon repayments. HUD has decided to continue measuring timeliness 60 days prior to the end of the program year so that program progress can be considered prior to the next grant award.

#### V. Provisions From the June 17, 1992 Interim Rule

##### A. Public Services Cap

This provision expands the public services limitation and rewards entrepreneurial grantees by allowing a portion of program income to be included in the amount available for public services. This increases the amount of funds available for public services for grantees that earn program income, and furthers government reinvention by maximizing the grantees' options for fund use.

HUD received three comments on this portion of the rule. One grantee suggested that the program income used in the calculation should come from the time period that ends one year before

the beginning of the program year for which the cap is being determined. HUD had considered this option prior to publication of the interim rule, but rejected the time period as being overly remote from the time period for which the action plan was being prepared. The other two comments supported counting program income from the program year immediately preceding the year for which the cap is being determined. HUD selected this method for the final rule.

#### *B. Conflict of Interest*

This rule also incorporates a change to the prohibition against conflicts of interest in the use of CDBG funds. This change furthers government reinvention by clarifying regulatory requirements and by limiting regulatory burdens. The conflict of interest provisions of this rule include coverage of the subrecipient relationships that are central to CDBG, but that are not as common in programs outside HUD's Office of Community Planning and Development. (The regulation does not apply to conflicts in regard to procurement contracts, which are covered by 24 CFR part 85.) As described in the preamble to the June 17, 1992 interim rule (57 FR 27117-18), HUD believes that the conflict rules should be limited to the prohibition of situations that provide a financial interest or benefit.

HUD received three outside comments on the new provision, two from national community development organizations and one from a city official. All the commenters supported the change, believing that the new regulation is sufficient without requiring further definition or restriction. One commenter, employed as a community development director in a CDBG entitlement community, offered personal experience that his ability to serve on the boards of nonprofit corporations was an effective use of his time. The commenter cited his belief that it ensures better use of CDBG funds and compliance with Federal mandates as the CDBG-funded activities are carried out. Both national organizations expressed hope that amending the conflict of interest regulation is a sign that HUD is moving away from "overregulation of public officials" who are involved with nonprofit subrecipients. These two commenters believe that serving on such organizations' boards has a positive public benefit to the grantee, the subrecipient, and HUD.

In addition, HUD received comments from two local HUD offices, one from an office manager and another from a

community planning and development director. Although both agreed that the use of the word "personal" has created difficulty, one was concerned that its removal may undermine HUD's efforts to eliminate improper lobbying and influence peddling. The other supported the proposed change.

Both HUD commenters offered additional points for consideration. First, both expressed concern about the introductory phrase at § 570.611(b): "Except for the use of CDBG funds to pay salaries and other related administrative or personnel costs. \* \* \*" One commenter felt that persons outside HUD read the phrase literally, and that the phrase could appear, by itself, to allow current board members of a CDBG subrecipient routinely to request CDBG-paid employment with that subrecipient and to be considered routinely for open positions, without prior approval from HUD.

The other HUD commenter believed the application of this exception to the grantee and its subrecipients is not clear. This commenter expressed concern that the exception implies that subrecipient board members or city directors would be allowed to hire family members as staff, and that other forms of nepotism or preferential treatment could occur (absent any local civil service rules to the contrary). The commenter described a situation in which the paid director of a nonprofit subrecipient leased space in a building he owned to the nonprofit for its offices. Both his salary and the rent were paid with CDBG funds. While the field office interpreted this as a conflict, this could have been considered "related administrative costs" excepted under the rule's introductory phrase, instead of a situation that requires a request for an exception under the provisions of § 570.611(d) and (e). Both commenters recommended that HUD add clarifying language expressly to indicate that receipt of a salary by an existing CDBG-funded staff person for performing eligible activities is not to be considered, in itself, a prohibited interest or benefit under § 570.611.

Since the existing introductory language at § 570.611(b) appears to cause confusion, HUD has deleted it. Although the commenters suggested changing or adding clarifying language, HUD decided that the existing restrictions at § 570.206 (Program administration costs) along with § 570.611 are sufficient to prevent inappropriate situations. Exceptions can be handled through the mechanism in § 570.611(d).

HUD received a second comment about § 570.611(b), specifically the

phrase "may obtain a financial interest or benefit from a CDBG-assisted activity." The commenter expressed concern that a strict interpretation could prohibit a covered person in a subrecipient entity from obtaining an interest or benefit from any CDBG funded activity, not just the one(s) administered by the subrecipient. Although such an extreme interpretation is possible, generally a subrecipient employee is restricted to just the activity run by the subrecipient (although a city employee would be restricted from any CDBG activity). Thus, HUD made no change in the current language.

A third commenter raised the suggestion that HUD should replace the words "contract, subcontract" in § 570.611(b) with words such as "subrecipient agreements." This commenter remarked that the current terminology confuses the application of these rules, since procurement activities are covered in other regulations (in 24 CFR parts 84 and 85). Since the word "agreement" is already in § 570.611 (in the same phrase), it is not appropriate to follow this suggestion. "Contract" and "subcontract," as defined words, are appropriate to use in part 570 as well as parts 84 and 85, and in OMB Circular A-110.

A fourth commenter suggested that the phrase "family or business ties" in § 570.611(b) needs an expanded definition. This commenter expressed concern that, without more definition, it is unclear whether "immediate family," as defined in 24 CFR 85.36, is intended. The commenter argued that, in some communities with histories of extended family ties, it could be difficult to avoid a conflict. Similarly, the commenter expressed concern that, without definition, the business ties between, for example, an individual and the family doctor would be construed to pose the same conflict of interest concern as those between members of a partnership in a business. In response to this concern, HUD has amended § 570.611(b) to include the word "immediate" to clarify the extent of family to be covered. HUD has left the term "business" unchanged, however, on the basis that the exception provisions will allow for the necessary distinction.

A fifth comment concerned the existing language at § 570.611(c) (Persons covered). By not including the word "of" at the beginning of the final phrase, "subrecipients that are receiving funds under this part," the commenter argued that a subrecipient would not include in the regulation's coverage the same persons as those "of the recipient, or of any designated public agencies." It

could instead be construed only to mean the subrecipient as an entity and not its employees as individuals. HUD has therefore amended the rule at the beginning of that final phrase, "subrecipients that," to commence with the word "of," to be consistent with the other two types of entities covered.

Another commenter expressed concern that handling exceptions on a "case-by-case basis" has created a time-consuming exercise for both HUD and grantees in responding to the current regulation, which the commenter found to be too broad and vague. This commenter offered a number of suggestions, including allowing grantees to establish procedures "in a manner acceptable to HUD," exempting specific members and officials of subrecipients from persons covered, and separating the regulations applicable to the grantees from those applicable to subrecipients. HUD has clarified the conflict of interest provision in this rule, which should eliminate many of the exception cases that would now come to HUD for a determination. The exception thresholds in this rule continue to include a determination by the recipient's attorney that the conflict in question does not violate local or State standards. HUD does not believe, however, that permitting grant recipients to exempt some of their employees or subrecipient employees from CDBG conflict of interest provisions is in the best interests of the CDBG program.

In reviewing the comments, HUD determined that, although no further substantive changes to the regulation at § 570.611 are necessary, some editorial reorganization of § 570.611(d) would further clarify the exception requirements. Therefore, this final rule adjusts the language at § 570.611(b) as specified above, and makes additional adjustments to § 570.611 (d) and (e).

#### C. Loans to Subrecipients

This provision expands the ways CDBG assistance may be provided to subrecipients. It follows the principles of government reinvention by increasing grantee flexibility.

HUD received four comments on this provision. Two of the four commenters, an urban county and a public interest group, requested HUD to permit the urban county to make loans to units of general local government participating under an urban county consortium. The commenters gave the following reasons for this proposal: (1) the change would enhance program options and creativity; (2) the change would allow the grantee greater leverage in monitoring an activity and provide more opportunity

for reusing funds; and (3) grants could be continued to communities experiencing widespread distress, but loans could be provided to better-off communities capable of repayment as an incentive to serve low-income areas.

HUD understands that the commenters would like the units of government participating in an urban county to be subrecipients for almost all purposes. However, since the urban county is simply a jurisdiction composed of a group of local governments (including a county) joined into one entity for the purpose of receiving a CDBG entitlement, any loan by the administering entity (the county government) to a member of the jurisdiction is a loan by the urban county to itself, and, as such, is not permissible.

HUD has adjusted § 570.500(c), defining "subrecipient" to clarify that a subrecipient may receive funds from the recipient or from another subrecipient.

#### D. Program Income Generated by Loans to Subrecipients

The intent of this provision is to permit grantees to accept loan payments derived from program income from subrecipients while eliminating any double-counting of program income received through that process. HUD received two comments on the revisions to program income in relation to loans to subrecipients, one from an urban county and one from a national public interest organization. HUD made no changes to the rule as the result of these comments.

One commenter objected to excluding from the calculation of total program income received any loan repayments received by grantees from subrecipients when such payments are made from program income received by the subrecipient. The commenter stated that while it may be appropriate in some cases for the repayment of principal to be classified as a "return or transfer of grant funds," interest payments should always be treated as new income. The comment suggests a misunderstanding of what HUD intended by the new § 570.500(a)(3). This section does not classify loan repayments to grantees by subrecipients using program income as a "return of grant funds," as that term is generally used in the CDBG program. It classifies them as "transfer[s] of program income."

If the funds used by a subrecipient to make principal or interest payments on a CDBG loan it received from a grantee consist solely of program income received by the subrecipient, no amount of those payments to the grantee represents "new income" to the

grantee's CDBG program as a whole. If, however, the subrecipient uses non-CDBG funds to make the principal or interest payments, those payments to the grantee are "new income" to the CDBG program. The new § 570.500(a)(3) does not affect the treatment of such payments.

#### VI. Provisions From the March 28, 1990 Proposed Rule

HUD received a number of comments on the March 28, 1990 proposed rule. This final rule will not be implementing citizen participation changes resulting from the Housing and Community Development Act of 1987. These changes were included in the Consolidated Plan final rule, published on January 5, 1995 (60 FR 1878). Additional CDBG citizen participation changes, most notably requirements regarding float-funded activities, were published in the August 10, 1994 proposed rule discussed above. This rule will also not be implementing the substantial reconstruction provision of the March 28, 1990 proposed rule at this time, because pending legislative proposals would make this change unnecessary.

#### A. Use of CDBG Funds for Assisting Certain Uniform Emergency Telephone Number Systems

This provision increases grantee flexibility by implementing a new eligibility provision. HUD received nine comments on the proposed provisions implementing this use of CDBG funds. Two of the commenters were national organizations, one of them having an interest in the administration of the CDBG program generally, and the other representing persons involved in administering emergency number systems. Three of those commenting were officials of urban county grant recipients under the CDBG program. Two others represented law enforcement agencies that would presumably be involved in a uniform emergency number system. The remaining two commenters were from Congress—one Senator and one Representative. The commenters generally did not provide a basis for changing the proposed provisions, and the final rule reflects only minor clarifying changes to the proposed rule.

Two of the commenters argued that the information that grantees would be required to submit to HUD for approval under these provisions for the use of CDBG funds for uniform emergency telephone number systems (ETNS) would be too costly and impractical, especially for large metropolitan cities and urban counties. They believed that

since grantees can only use CDBG funds under this provision for the activity for two years, it would not be worth the expenditure of time and effort to gather and submit the proposed material. HUD acknowledges this possibility, but has been unable to identify any other more suitable ways to determine that the proposed activity meets all of the requirements set forth in the Act. The Act requires HUD to determine that at least 51 percent of the users of the system in question will be low- and moderate-income persons. It is not possible for HUD to make such a determination without factual information about the system and its likely users. Since the commenters did not offer any other approaches for HUD to consider, the final rule does not vary much from the proposal.

However, some of the commenters appeared to misunderstand how the proposed provision would operate in the CDBG program. The proposal would only come into play with respect to those emergency number systems that serve a geographical area that does not contain a high enough percentage of low- and moderate-income persons to qualify under the present regulations. (See § 570.208(a)(1) as it existed before this rule.) For emergency systems serving areas having percentages of such persons amounting to 51 percent or more, or where the service area's percentage is less than 51 percent but still falls within the community's "highest quartile" (see § 570.208(a)(1)(ii)), there would be no need for the grantee to submit information to HUD or for HUD to make any of the determinations called for in this rule.

One commenter believed the requirement that the CDBG contribution to the cost of the system be limited in proportion to the percentage of low- and moderate-income persons residing in the service area constituted a "method and perhaps a test of proportional accounting." This may have been a reference to HUD's announced intention several years ago to seek legislation aimed at changing the benefit accounting method for the program, which HUD subsequently decided not to pursue. However, HUD derived this portion of the proposed rule directly from the statute, and does not have any intention to change the method of accounting used generally in the CDBG program.

Two commenters suggested that HUD adopt a rule on the use of CDBG funds for ETNS that would allow all communities the opportunity to use funds to develop, establish, and operate ETNS to meet their own specific needs.

The commenters were concerned that the proposed rule limited the usage to communities in which more than 51 percent of the residents of the area were low- and moderate-income (except for those communities covered by the "highest quartile" provision in the regulations). However, this is not the case. HUD designed the proposed rule to allow communities to use CDBG funds for ETNS in areas in which less than 51 percent of the residents are low- and moderate-income, if 51 percent of the users of the system will be low- and moderate-income. (In making this determination, HUD will assume that the distribution of income among the callers generally reflects the distribution of income among the entire population residing in the same area where the callers reside.)

For example, a community has an ETNS that covers three census tracts (tracts A, B, and C) with low- and moderate-income residents consisting of 20 percent for tract A, 80 percent for tract B, and 40 percent for tract C. (The percentages of low- and moderate-income persons are derived by dividing the total number of low- and moderate-income persons per census tract by the total number of persons within the census tract.) A total of 95 calls were received: 15 calls from tract A, 50 from tract B, and 30 from tract C. HUD would presume that 3 of the calls from tract A, 40 calls from tract B, and 12 calls from tract C were from low- and moderate-income persons ( $20\% \times 15 = 3$ ;  $80\% \times 50 = 40$ ; and  $40\% \times 30 = 12$ ). Thus, HUD would consider 55 of the 95 calls to be from low- and moderate-income persons, which is equivalent to 57.89 percent, exceeding the minimum required threshold of 51 percent.

One commenter, a rural county, suggested that rural communities be allowed to apply directly to HUD for CDBG funds for ETNS. The Housing and Community Development Act of 1974 requires States to distribute CDBG funds to nonentitled areas, unless a State has elected not to carry out the CDBG program. Only two States, Hawaii and New York, have made such an election. Therefore, nonentitled communities may not receive funds directly from HUD in the other States. This commenter also stated that grants for ETNS in the rural counties in its State had not been included in the State's most recent final statement. Because this provision has not yet been made a part of the regulations, a State would not have been expected to include activities qualifying under this provision in its final statement. For years, however, States have been able to make grants to be used for ETNS serving

areas in which at least 51 percent of the residents are low- and moderate-income.

Another commenter sought clarification concerning the extent to which CDBG funds may be used to support an ETNS. The statute itself limits the percentage of the total cost of the ETNS development, establishment, or operation that is to be provided using CDBG funds to be no higher than the percentage of low- and moderate-income persons residing in the area served by the system. For example, using the same hypothetical situation as described above, assume that the grantee's jurisdiction consists of three census tracts (tract A having 20 percent, tract B having 80 percent, and tract C having 40 percent low- and moderate-income persons), and that the ETNS would serve the entire community. Also assume that tracts A and C each contain 100 people, while tract B contains only 80. Thus, the number of low- and moderate-income persons residing in these tracts would be 20 persons in tract A, 64 in tract B, and 40 in tract C. The total number of low- and moderate-income persons in the service area would be 124 out of a total of 280 persons. The percentage of low- and moderate-income persons in the service area would then equal 44.3 percent. CDBG funds for developing, establishing, and operating an ETNS during a one- or two-year period could therefore not exceed 44.3 percent of the total cost of developing, establishing, or operating the system. If it is assumed that the grantee only wanted to assist the operation of the system for one year, and that such an operation would cost \$100,000 in total, CDBG funds in an amount not to exceed \$44,300 could be used for this purpose.

The same commenter also asked what research had been done before the proposed rule was developed, arguing that the guidelines would have been quite different had research been done regarding what segment of the population actually used ETNS. HUD sought information from various State, local, and national organizations before developing the proposed rule. None of them was aware of any data already available that would demonstrate that any particular percentage of the total users of an ETNS would likely be of low or moderate income. In fact, one national organization suggested that interested communities should be required to gather data over a three-year period to determine the characteristics of the system's users. HUD determined, however, that such a requirement would be unnecessarily onerous for grantees, and decided instead that one year's

experience would be adequate for this purpose.

One of the commenters, a grantee, sought clarification on several issues not related to applying for approval of an ETNS under the proposed provisions. Noting apparent inconsistencies in the preamble to the proposed rule, the grantee asked which HUD office was to be making the required HUD determinations that: (1) The system will contribute substantially to the safety of the residents of the area served by the system; (2) not less than 51 percent of the use of the system will be by persons of low- and moderate-income; and (3) other Federal funds received by the recipient are not available for the development, establishment, and operation of the system due to the insufficiency of the amount of the funds, restrictions on the use of the funds, or the prior commitment of the funds for other purposes by the recipient. This determination is to be made by the appropriate local HUD office.

This commenter also asked about HUD's definition of "emergency services." HUD did not propose a definition of emergency services, believing that communities would only include services that involve emergency situations under their respective ETNS. HUD believes the emergency services that would typically be included in an ETNS are police, fire, and ambulance services. However, it recognizes that larger communities could be expected to include others, such as a suicide hotline. The same commenter also argued that, particularly in some rural communities, information on the number of calls received over the preceding 12-month period and the location from which those calls were made may not be available. This final rule provides that the grantee is to submit "information that serves as a basis for HUD to determine whether 51 percent of the use of the system will be by low- and moderate-income persons." The information on past users discussed by the commenter is to be supplied "as available." HUD is unaware of any basis upon which it could make the required determination about the income levels of likely users of a ETNS other than that specified in the rule. However, the grantee may submit whatever it believes could be used for this purpose, and HUD will review it as necessary to make a judgment about its usefulness. Since HUD expects that a grantee not having the past-use data mentioned in the rule may contemplate expending considerable effort to acquire other data for submission to HUD for this purpose, the rule suggests that the grantee make

known its planned methodology to HUD in advance, in order to find out if HUD would consider the planned methodology to be acceptable as a basis for making its required determination.

The same commenter also recommended that the requirement that 51 percent of the users be low- and moderate-income should be reduced, pointing to the provision in § 570.208(a)(3)(i)(B) that permits as little as 20 percent occupancy by low- and moderate-income residents in cases in which CDBG funds are used to assist newly constructed, multifamily, nonelderly rental housing. However, the statute provides specific requirements for activities that benefit an area generally, such as an ETNS. These requirements are more exacting than those required for housing activities. For an ETNS that cannot qualify under the provisions in the regulations as they existed before this rule, the requirement to determine that at least 51 percent of the users will be low- and moderate-income persons is statutory and cannot be changed by regulation.

The commenter also thought that HUD should consider permitting ETNS to be carried out in Urban Development Action Grant (UDAG) eligible areas, because these areas qualify as distressed communities. However, the UDAG program has been terminated, and HUD no longer determines community distress levels for that program. Moreover, a designation of UDAG eligibility could not necessarily be substituted for the determination of income status of the likely users of an ETNS for the community, which the statute requires for this purpose.

One commenter stated that, given the regulatory requirements in the proposed rule, it was unlikely that significant amounts of CDBG funds would be spent on ETNS. While this may be the case, HUD does not have flexibility under the statute to reduce the requirements associated with this provision to increase the likelihood of use of CDBG funds.

#### *B. Use of CDBG Funds To Pay Special Assessments*

This provision increases grantee flexibility, furthering the principles of reinventing government, by allowing assistance for an eligible activity to consist solely of special assessments made on behalf of low- and moderate-income households. HUD received four comments on this proposed provision. None of the comments provided a basis for changing the rule. One commenter suggested that when CDBG funds are used just for the special assessments and are not used to pay for the

construction of the public improvement directly, the project should not be subject to all the requirements of the CDBG program, such as Davis-Bacon and citizen participation. However, there is no eligibility category under which CDBG funds can be used for paying a special assessment except for the eligibility of the improvement for which the assessment is made. Thus, even when the only form of CDBG usage assisting a public improvement is in paying for special assessments levied for that improvement, all of the CDBG program rules are triggered with respect to the construction (see § 570.200(c)(3)).

Two commenters suggested that HUD amend this provision to limit the use of CDBG funds for the payment of assessments. One suggested that it should be limited to payments on behalf of low-income households, instead of both low- and moderate-income households, in order to avoid the use of CDBG funds in what they described as the "better parts of town." However, the statutory provision itself authorizes the use of funds for both categories of households, and HUD does not believe there is a need to so limit the regulatory provision. The second commenter suggested that the rule allow the use of CDBG funds to pay for the assessments for the very lowest-income households among those assessed, without having to pay the assessments on behalf of all of the low- and moderate-income households involved. To the degree that the statute allows, the regulations do provide for an exception only with respect to moderate-income households in certain circumstances. Given the clear statutory provisions, HUD cannot allow additional payment limitations based on income.

#### VII. Statutory Amendment Provisions

Title I of the Housing and Community Development Act (the Act) has been amended a number of times since 1987. Several self-implementing changes to the Act affecting the CDBG program are included in this rule merely to conform the regulations with statutory provisions. This furthers government reinvention by bringing the CDBG rule current with all its authorizing legislation, as grantees have requested. An updated entitlement CDBG rule will simplify program administration for CDBG entitlement grantee staff who currently must research back and forth among various statutes and outdated regulations, handbooks, and guidance to determine activity eligibility and program standards. The statutory additions largely increase grantee options and enhance CDBG flexibility.

### A. National Affordable Housing Act

Subtitle A of title IX of the Cranston-Gonzalez National Affordable Housing Act (Pub. L. 101-625, approved November 28, 1990) (the NAHA) amends the Housing and Community Development Act of 1974 (the Act). Section 903 of the NAHA amends section 102 of the Act, which includes the definitions of "metropolitan city" and "urban county." HUD has amended the definition of "metropolitan city" in § 570.3 to reflect the statute. No amendment is needed to the definition of "urban county" in § 570.3, because the regulation includes any other county eligible under section 102(a)(6) of the Act.

Section 904 of the NAHA amends section 102(a)(12) of the Act, which includes the definition of "extent of growth lag," to provide for boundary changes for a metropolitan city or urban county as a result of annexation. HUD has amended § 570.3 to add the new statutory language. In § 570.3, however, HUD refers to the more appropriate 1990 census, rather than the 1980 census to which section 102(a)(12) refers. This modification is required by section 102(b) of the Act.

Section 912 of the NAHA amends section 109 of the Act to prohibit discrimination on the basis of religion. HUD has amended § 570.602 to add the term "religion."

### B. Housing and Community Development Act of 1992

Section 807 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992) (the 1992 Act) amends section 105(a) of the Act to establish two new categories of eligible CDBG activities: the provision of technical assistance to public or private entities to increase their capacity to carry out eligible neighborhood revitalization or economic development activities as outlined in a new § 570.201(p), and the provision of assistance to institutions of higher education for carrying out eligible activities.

Provision of technical assistance to public or nonprofit entities to increase their capacity to carry out eligible neighborhood revitalization or economic development activities is specifically exempted from the 20 percent limitation on planning and administrative costs under §§ 570.205 and 570.206. Since this new provision became effective upon enactment, any costs incurred after October 28, 1992 for building such capacity should be considered eligible under the new provision and not subject to the 20

percent limitation, provided that the use of such funds after the effective date can be shown to meet one of the national objectives.

Since this provision of the statute clarifies that the capacity building must be linked to CDBG-eligible neighborhood revitalization or economic development activities, a grantee must determine the eligibility of the activity for which it is attempting to build capacity. It must also determine which national objective can reasonably be expected to be met once the entity has received the technical assistance and undertakes the activity. For example, a grantee may provide CDBG record-keeping, work write-up, loan underwriting, and rehabilitation inspection training to a nonprofit organization that anticipates carrying out a housing rehabilitation loan program. The grantee's contract with the nonprofit should identify the eligible activity and the national objective expected to be met by the rehabilitation program that is to be undertaken as a result of this capacity building effort. In determining the national objective to be met, the grantee should: (1) Review the nature of the organization, the type and eligibility of the activity expected to be carried out, the location of the activity, and the entity's expected (or traditional) clientele; and (2) as a result of the review, have a reasonable expectation that the activity to be undertaken by the nonprofit entity would comply with a national objective. For example, the grantee might reasonably conclude that the contemplated activity would meet the national objective of benefit to low- and moderate-income persons based on a review of the nonprofit's charter that showed the organization's activities would be directed toward and benefit the low- and moderate-income persons in the neighborhood in which it operates. HUD makes conforming changes to reflect the recipient determinations at §§ 570.200(e) and 570.506(c).

The 1992 Act also added a new paragraph 105(a)(22) to the Act. CDBG funds may now be used by colleges and universities that have the demonstrated capacity to use the funds for eligible activities. HUD intends to permit grantees to make this determination of demonstrated capacity using their own judgment. A grantee determination is the most effective way to meet this requirement, since the grantee is most familiar with the entities to which it proposes to give CDBG funds and is therefore in the best position to make a judgment of capacity. This rule adds a new paragraph § 570.201(q), and makes conforming changes to reflect the

recipient determinations at §§ 570.200(e) and 570.506(c).

Section 807(b) of the 1992 Act amended section 907(b)(2) of the NAHA by extending the date that use of funds for direct homeownership assistance is eligible under the CDBG program to October 1, 1994. In addition, the date to which the Secretary of HUD may, under certain circumstances, extend such eligibility was changed to October 1, 1995. HUD received three comments in response to the publication of the direct homeownership assistance provision in the June 17, 1992 interim rule. All three commenters supported the extension. Two commenters recommended extending it beyond the original NAHA date of October 1, 1992 and making it a permanent eligible use of CDBG funds. HUD published a Federal Register notice on September 30, 1994 (59 FR 49954) extending the provision to October 1, 1995, and this final rule amends the regulations to reflect that date. Although the provision terminated when the extension period ended, HUD has requested that Congress change the statute to reinstate the activity's eligibility. Thus, HUD has retained the provision for now, although it is not in effect. HUD also made a conforming change to § 570.506.

Section 807(c)(1) of the 1992 Act amended section 105(g)(2) of the Act to authorize training, technical assistance, or other support services to increase the capacity of small businesses, microenterprises, the recipient, or subrecipient to carry out CDBG economic development activities. These costs were not to be included in the limitation on administration and planning expenditures. This provision was effective upon enactment. The Economic Development Guidelines, published on January 5, 1995 (60 FR 1922), incorporated into the CDBG regulations at § 570.201(o) the portions of the statute dealing with the microenterprises. This rule adds a new § 570.201(o)(4), allowing capacity building for the grantee and subrecipient as microenterprise activities.

Section 807(e) of the 1992 Act amended section 105(a)(3) of the Act with respect to the current restrictions on areas in which CDBG funds may be used for code enforcement activities, and now permits grantees to take into account privately funded development. Previously, CDBG-funded code enforcement was only permitted in deteriorated or deteriorating areas in which such enforcement, together with public improvements and services to be provided, would be expected to arrest the decline of the area. This rule

amends § 570.202(c) to permit consideration of private improvements in determining areas in which CDBG-assisted code enforcement may be provided. Section 570.202(c) now also clarifies that only the costs of inspections, not the costs of any improvements done as a result, are eligible in this category.

Section 809 of the 1992 Act amends section 105(a)(13) of the Act to make eligible the use of CDBG funds to pay for the reasonable administrative costs related to establishing and administering a Federally approved Enterprise Zone. While this authority became effective upon enactment, its utility is dependent on the implementing regulations at 24 CFR part 597, published January 12, 1995 (60 FR 3434), for the Federal Empowerment Zone and Enterprise Community legislation. This rule adds a new paragraph (i) to § 570.206 to provide authority for such costs for officially designated Federal Empowerment Zones and Enterprise Communities (EZ/EC).

#### *C. Residential Lead-Based Paint Hazard Reduction Act of 1992*

The Residential Lead-Based Paint Hazard Reduction Act of 1992 is title X of the 1992 Act. This final rule includes one statutory provision from this Act requiring little or no regulatory elaboration. The provision allows for evaluation and reduction of lead-based paint hazards as a separate activity. While reduction of lead-based paint hazards has always been a CDBG-eligible activity (provided the activity could meet a national objective), evaluation was heretofore only eligible in conjunction with a rehabilitation activity. Section 570.202(f) provides authority for evaluation as a rehabilitation activity in itself.

#### *D. Multifamily Housing Property Disposition Reform Act*

The Multifamily Housing Property Disposition Reform Act of 1994 (Pub. L. 103-233, approved April 11, 1994) (the 1994 Act) included two eligibility enhancements and expanded CDBG waiver authority for disaster areas. Section 234 of the 1994 Act added section 122 to the Act to provide flexibility to the CDBG program for disaster areas. This rule adds this provision to the regulatory waiver provisions at § 570.5. When a CDBG recipient designates its CDBG funds to address the damage in an area for which the President has declared a disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170-5189b),

the Secretary may suspend all requirements for purposes of assistance under section 106 of the Act for that area, except for those related to public notice of funding availability, nondiscrimination, fair housing, labor standards, environmental standards, and requirements that activities benefit persons of low- and moderate-income.

To use this provision, a CDBG recipient may designate funds from existing or future grants to address damage in a Presidentially declared disaster area and request the Secretary to waive provisions of law or regulation for the purpose of making such funds available for disaster recovery purposes. Local HUD offices receiving disaster recovery waiver requests will expedite the forwarding of such requests, together with local office reviews and recommendations, to the Assistant Secretary for Community Planning and Development for consideration.

Assuming HUD grants the waivers, the activities being carried out with the designated funds would operate under different requirements than the regular CDBG program. Therefore, the grantee will be required to annotate its performance report in such a way that activities for which waivers have been granted are distinguishable from regular program activities. Also, the grantee will be required to annotate and describe the activity in such a way in its annual action plan or amended action plan, as appropriate, that the activity is clearly distinguishable as a designated disaster recovery activity.

Section 207 of the 1994 Act also amended section 105(a)(13) of the Act to allow payment of reasonable administrative costs and carrying charges related to administering the HOME program under title II of the NAHA. This provision is included together with the EZ/EC provision at § 570.206(i). The costs covered by these provisions do not include planning costs under § 570.205. All administrative costs, whether used to administer the EZ/EC, HOME, or CDBG programs, are summed before applying the CDBG 20 percent limit on planning and administration expenditures. Activities may not be carried out under § 570.206(g), which currently is not available because of its link to a Housing Assistance Plan (HAP) that is no longer in effect for any grantees. HUD is currently exploring possible ways to update this provision.

Section 207 of the 1994 Act also amended section 105(a)(21) of the Act, authorizing housing services, such as housing counseling in connection with tenant-based rental assistance and affordable housing projects assisted

under title II of the NAHA, energy auditing, preparation of work specifications, loan processing, inspections, tenant selection, management of tenant-based rental assistance, and other services related to assisting owners, tenants, contractors, and other entities participating or seeking to participate in housing activities assisted under title II of the NAHA.

These activities have been eligible since the enactment of CDBG amendments in 1992, but otherwise ineligible CDBG assistance in support of the HOME program was subject to the 20 percent limit on administrative and planning expenditures. The current amendment removes this restriction. This rule includes this provision at § 570.201(k).

Any costs of delivering the housing services made eligible under the amended section 105(a)(21) are eligible. CDBG grantees using the two programs together should be reminded that the eligibility and benefit requirements of the two programs differ, that the HOME term "project" and the CDBG term "activity" are not synonymous, and that care should be exercised in management and documentation of blended activities. To simplify this process, this rule adds a new paragraph at § 570.208(a)(3)(iii), which states that when CDBG funds are used for housing services eligible under § 570.201(k), such funds shall be considered to benefit low- and moderate-income persons when the housing for which the services are provided is to be occupied by low- and moderate-income households. Documentation demonstrating that the HOME project (or projects) supported by the CDBG housing services activity meets the HOME income targeting criteria at 24 CFR 92.252 and 92.254 should be sufficient to demonstrate compliance with this provision.

#### VIII. Miscellaneous Technical Updates and Corrections

This rule replaces the obsolete references in subpart J to OMB Circular A-110 with references to 24 CFR part 84, and this rule updates the references to OMB Circular A-87 to reflect recent revisions to that document. In conjunction with this update, HUD is clarifying and broadening the rule at § 570.200(h) defining pre-agreement (now pre-award) costs. The current CDBG rule authorizes a few types of costs that may be incurred prior to execution of the annual grant agreement; this rule permits grantees to incur any cost that meets certain standards (e.g., the activity is included

in the consolidated plan and citizens have been informed) and then charge the costs to the grant after the effective date of the grant agreement. Further, until now when a cost was not one of the types specified in the rule, the grantee had to request a pre-agreement cost waiver from HUD Headquarters. Under this rule, a grantee wishing to incur a cost that does not meet the new, broader standards may request certain pre-award cost exceptions from the local HUD office. This change furthers reinvention by providing local jurisdictions greater flexibility to determine use of resources and by devolving responsibility for decisionmaking to the local offices, thereby greatly limiting the number of cases that will need the Assistant Secretary's approval.

Another technical change is to replace the term "handicapped" in §§ 570.208 and 570.506 with terms compatible with available income data on persons with a disability provided by the Bureau of the Census' Current Population Reports. The data, issued in 1993 from the Survey of Income and Program Participation, provide a basis for a national presumption that adults meeting the Census criteria for severe disability meet the low- and moderate-income national objective under the CDBG program. The Census definition of severe disability only applies in the CDBG program for purposes of making presumptions about income levels for groups of disabled persons; it does not apply for purposes of meeting responsibilities under section 504 of the Rehabilitation Act of 1973, the Americans With Disabilities Act, or the Architectural Barriers Act. Therefore, HUD is changing the terminology in this rule to clarify the distinction between the income presumption provision and the civil rights requirements. Also, this rule adds the term "persons living with AIDS" to § 570.208(a)(2)(i)(A), because reliable national data has become available from the Center for Disease Control in Atlanta to support a reasonable presumption that at least 51 percent of such persons in a given geographic area are low- and moderate-income. This rule also clarifies provisions under which the use of CDBG funds is authorized for the removal of barriers to accessibility for elderly and disabled persons. Section 105(a)(5) of the Act makes eligible the use of program funds for special projects directed to the removal of material and architectural barriers that restrict the mobility and accessibility of elderly and handicapped persons. Under current law and regulation, this provision has

very limited usefulness and has caused confusion. HUD believes that it is important that the rules clearly state how CDBG funds may be used for barrier removal. The real questions arise with respect to national objective compliance. Virtually all public facilities and improvements serve an area generally and are thus subject to the limitations imposed by section 105(c)(2) of the Act. This provision states that activities that serve an area generally may be considered to address the national objective of benefit to low- and moderate-income persons only if the percentage of residents in the service area who are of such income meets certain minimum levels. In the regulations, this limitation is implemented at § 570.208(a)(1). Where accessibility barriers exist in a facility or improvement that serves an area that does not meet this requirement, the use of CDBG funds to remove such barriers can be problematic. Many years ago, to provide a way to authorize the use of CDBG funds to remove barriers in such cases, § 570.208(a)(2) was added to the regulations allowing use of CDBG funds for the following to be considered to meet the national objective of benefit to low- and moderate-income persons:

"(ii) A special project directed to removal of material and architectural barriers which restrict the mobility and accessibility of elderly or handicapped persons to publicly owned and privately owned non-residential buildings, facilities and improvements and the common areas of residential structures containing more than one dwelling unit."

This presumption assumes that the principal benefit will go to elderly and disabled persons, and that the general public will not also benefit substantially from the activity, since if it did the activity might not meet the general rule that the majority of the beneficiaries must be low- and moderate-income persons. A number of recent policy cases have arisen from grantee confusion about the current language. To clarify the eligibility of architectural barrier removal, this rule removes the separate eligibility category at § 570.201(k) and describes in § 570.201(c) and § 570.202(b) that architectural barrier removal is an eligible activity. This rule also changes § 570.208(a)(2) to clarify in which circumstances the limited clientele presumption may be applied to such activities.

Another technical change at §§ 570.304(a), 570.429(g), and 24 CFR 91.500 restores language inadvertently deleted by the Consolidated Plan final rule, and clarifies that HUD retains authority under the CDBG program to require additional assurances from

grantees when substantial evidence exists that a certification of future performance is not valid. This CDBG authority is in addition to the current Consolidated Plan final rule (based on the Comprehensive Housing Affordability Strategy statutory language) that simply provides for certifications to be wholly accepted or wholly rejected. Requiring additional assurances and potentially delaying or limiting the grantee's access to funds may trigger CDBG due process hearing requirements. Therefore HUD will coordinate such actions between HUD local offices and Headquarters.

Another technical change reinstates the applicability of the Architectural Barriers Act of 1968 (42 U.S.C. 4151-4157) (the ABA) to the CDBG Entitlement program. The ABA requires certain Federal and Federally funded buildings and other facilities to be designed, constructed, or altered in accordance with standards that ensure accessibility to, and use by, persons with physical disabilities. HUD's original regulations implementing the CDBG program required compliance with accessibility standards issued pursuant to the ABA. (See former 24 CFR 570.606, 39 FR 40148, November 13, 1974; 42 FR 33020, June 28, 1977.) By final rule published September 23, 1983, and made effective November 2, 1983 (48 FR 43538), HUD amended its regulations governing the CDBG program to reflect changes made in the Act by the Housing and Community Development Act of 1980 (Pub. L. 96-399, approved October 8, 1980), and the Housing and Community Development Amendments of 1981 (Pub. L. 97-35, approved August 13, 1981). The purpose of the amending regulations, as noted by HUD in the proposed rule published October 4, 1982 (47 FR 43900), was to eliminate requirements not mandated by statute. On this basis, HUD eliminated the requirement that the CDBG program comply with the ABA accessibility standards (47 FR 43909, 48 FR 43549). HUD stated that the CDBG program was not statutorily subject to the accessibility standards of the ABA because the CDBG statute does not provide authority for imposing design, construction, or alteration standards on CDBG-funded facilities, as required by section 4151(3) of the ABA, and that it had imposed the ABA standards on the CDBG program as an administratively adopted requirement (47 FR 43909). HUD noted, however, that some facilities constructed or altered with CDBG assistance would remain subject to accessibility standards



by reason of the applicability of section 504 of the Rehabilitation Act of 1973.

Since HUD's decision in 1983 to remove compliance with the ABA as a CDBG program requirement, two significant events caused HUD to reconsider this decision. The first event was the passage of the Fair Housing Amendments Act of 1988 (Pub. L. 100-430, approved September 13, 1988) (Fair Housing Act), which amended Title VIII of the Civil Rights Act of 1968 to add prohibitions against discrimination in housing on the basis of handicap and familial status. The Fair Housing Act also made it unlawful to design and construct certain multifamily dwellings for first occupancy after March 13, 1991 in a manner that makes them inaccessible to persons with disabilities. Further, the Fair Housing Act made it unlawful to refuse to permit, at the expense of the person with a disability, reasonable modifications to existing premises occupied or to be occupied by such person if such modifications are necessary to afford such person full enjoyment of the premises.

The second event was the passage of the Americans with Disabilities Act (Pub. L. 101-336, approved July 26, 1990) (ADA), which provides comprehensive civil rights to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommunications. The ADA provides that discrimination includes a failure to design and construct facilities for first occupancy no later than January 26, 1993 that are readily accessible to and usable by individuals with disabilities. Further, the ADA requires the removal of architectural barriers and communication barriers that are structural in nature in existing facilities, where such removal is readily achievable—that is, easily accomplishable and able to be carried out without much difficulty or expense. (See the final rule implementing the ADA published by the Department of Justice on July 26, 1991 (56 FR 35544, 35568)).

The Fair Housing Act and the ADA indicate a clear policy that housing and commercial facilities and public accommodations should be "readily accessible and usable by" individuals with disabilities. In light of these developments and to foster consistency in the administration of HUD's programs, this final rule reinstates compliance with the ABA as a CDBG program requirement.

Compliance with the requirements of the ABA will be applicable to funds allocated or reallocated under the CDBG

Entitlement, State, and HUD-administered Small Cities programs and the Section 108 Loan Guarantee program, after the effective date of this final rule. Assisted facilities must meet the requirements of the Uniform Federal Accessibility Standards for alterations if the alterations are financed in whole or in part by CDBG funds made available after the effective date of this final rule. Although alterations made without the use of Federal funds would not have to comply with the accessibility requirements of the ABA, alterations made to these facilities, in most instances, will have to comply with the accessibility requirements of the public accommodations provisions of the ADA. This final rule makes this regulatory change at § 570.614(a).

This final rule also provides a specific listing at § 570.614(b) for the ADA. The ADA is (and has been) covered by the grantee's annual certification that it will comply with "applicable laws." The addition of the specific provision highlighting the ADA is being made for consistency with other applicable laws for which HUD has enforcement responsibilities. The Federal Communications Commission has enforcement authority for enforcing the portion of the ADA applicable to emergency telephone numbering systems (the CDBG-eligibility of which is highlighted and enhanced in this regulation) and to common carriers.

This final rule replaces an obsolete reference to the Small Cities Application in § 570.405(e) on Insular Areas with a requirement that insular area applicants submit a final application and certifications to the appropriate HUD office in a form prescribed by HUD. This rule clarifies how HUD-administered Small Cities in New York will be treated under the consolidated plan. Section 570.423(a) has been revised to state clearly that New York HUD-administered Small Cities applicants that submit an abbreviated consolidated plan must prepare and publish a proposed application and comply with the citizen participation requirements of § 570.431 whether or not their application contains housing activities. HUD has previously determined that the Insular area grantees were subject to § 570.200(a)(3), which requires compliance with the primary objective of the Act. HUD is specifically adding insular areas recipients to this section to enhance clarity.

## IX. Other Matters

### A. Executive Order 12866

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, Regulatory Planning and Review, issued by the President on September 30, 1993. Any changes made in this rule subsequent to its submission to OMB are identified in this docket file, which is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

### B. Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule does not affect the portion of the CDBG regulations that affects small entities.

### C. Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The finding is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the address provided under the section of this preamble entitled "Executive Order 12866."

### D. Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order. This rule is limited to implementing statutory provisions and responding to identified deficiencies in the CDBG program.

### E. Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on

family formation, maintenance, and general well-being, and thus is not subject to review under the Order. No significant change in existing HUD policies or programs will result from promulgation of this rule, as those policies and programs relate to family concerns.

List of Subjects

24 CFR Part 91

Aged, Grant programs—housing and community development, Homeless, Individuals with disabilities, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Lead poisoning, Loan programs—housing and community development, Low and moderate income housing, New communities, Northern Mariana Islands, Pacific Islands Trust Territory, Pockets of poverty, Puerto Rico, Reporting and recordkeeping requirements, Small cities, Student aid, Virgin Islands.

Accordingly, 24 CFR part 91 is amended; and part 570 is amended by adopting the interim rule published June 17, 1992 (57 FR 27116) as final, and is further amended, as follows:

**PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS**

1. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

2. Section 91.500 is amended by revising paragraph (b) introductory text to read as follows:

**§ 91.500 HUD approval action.**

(b) *Standard of review.* HUD may disapprove a plan or a portion of a plan if it is inconsistent with the purposes of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12703), if it is substantially incomplete, or, in the case of certifications applicable to the CDBG program under § 91.225 (a) and (b), if it is not satisfactory to the Secretary in accordance with § 570.304 or § 570.429(g) of this title, as applicable. The following are examples of

consolidated plans that are substantially incomplete:

\* \* \* \* \*

**PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS**

3. The authority citation for part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5300–5320.

4. Section 570.2 is amended by revising the second sentence to read as follows:

**§ 570.2 Primary objective.**

\* \* \* Consistent with this primary objective, not less than 70 percent of CDBG funds received by the grantee under subparts D, F, and M of this part, and under section 108(q) of the Housing and Community Development Act of 1974 shall be used in accordance with the applicable requirements for activities that benefit persons of low and moderate income.

5. Section 570.3 is amended by revising the definitions of “CDBG funds”, “Extent of growth lag”, “Low- and moderate-income household”, “Low- and moderate-income person”, “Low-income household”, “Low-income person”, “Metropolitan city”, “Moderate-income household”, and “Moderate-income person”, and by adding a new definition of “Income” in alphabetical order, to read as follows:

**§ 570.3 Definitions.**

\* \* \* \* \*

*CDBG funds* means Community Development Block Grant funds, including funds received in the form of grants under subparts D or F of this part, funds awarded under section 108(q) of the Housing and Community Development Act of 1974, loans guaranteed under subpart M of this part, urban renewal surplus grant funds under subpart N of this part, and program income as defined in § 570.500(a).

\* \* \* \* \*

*Extent of growth lag* means the number of persons who would have been residents in a metropolitan city or urban county, in excess of the current population of the metropolitan city or urban county, if such metropolitan city or urban county had a population growth rate between 1960 and the date of the most recent population count available from the United States Bureau of the Census referable to the same point or period in time equal to the population growth rate for that period of all metropolitan cities. Where the boundaries for a metropolitan city or urban county used for the 1990 census

have changed as a result of annexation, the current population used to compute extent of growth lag shall be adjusted by multiplying the current population by the ratio of the population based on the 1990 census within the boundaries used for the 1990 census to the population based on the 1990 census within the current boundaries.

\* \* \* \* \*

*Income.* For the purpose of determining whether a family or household is low- and moderate-income under subpart C of this part, grantees may select any of the three definitions listed below for each activity, except that integrally related activities of the same type and qualifying under the same paragraph of § 570.208(a) shall use the same definition of income. The option to choose a definition does not apply to activities that qualify under § 570.208(a)(1) (Area benefit activities), except when the recipient carries out a survey under § 570.208(a)(1)(iv). Activities qualifying under § 570.208(a)(1) generally must use the area income data supplied to recipients by HUD. The three definitions are as follows:

(1)(i) “Annual income” as defined under the Section 8 Housing Assistance Payments program at 24 CFR 813.106 (except that if the CDBG assistance being provided is homeowner rehabilitation under § 570.202, the value of the homeowner’s primary residence may be excluded from any calculation of Net Family Assets); or

(ii) Annual Income as reported under the Census long-form for the most recent available decennial Census. This definition includes:

- (A) Wages, salaries, tips, commissions, etc.;
- (B) Self-employment income from own nonfarm business, including proprietorships and partnerships;
- (C) Farm self-employment income;
- (D) Interest, dividends, net rental income, or income from estates or trusts;
- (E) Social Security or railroad retirement;
- (F) Supplemental Security Income, Aid to Families with Dependent Children, or other public assistance or public welfare programs;
- (G) Retirement, survivor, or disability pensions; and
- (H) Any other sources of income received regularly, including Veterans’ (VA) payments, unemployment compensation, and alimony; or

(iii) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 for individual Federal annual income tax purposes.

(2) Estimate the annual income of a family or household by projecting the prevailing rate of income of each person at the time assistance is provided for the individual, family, or household (as applicable). Estimated annual income shall include income from all family or household members, as applicable. Income or asset enhancement derived from the CDBG-assisted activity shall not be considered in calculating estimated annual income.

\* \* \* \* \*

*Low- and moderate-income household* means a household having an income equal to or less than the Section 8 low-income limit established by HUD.

*Low- and moderate-income person* means a member of a family having an income equal to or less than the Section 8 low-income limit established by HUD. Unrelated individuals will be considered as one-person families for this purpose.

*Low-income household* means a household having an income equal to or less than the Section 8 very low-income limit established by HUD.

*Low-income person* means a member of a family that has an income equal to or less than the Section 8 very low-income limit established by HUD. Unrelated individuals shall be considered as one-person families for this purpose.

\* \* \* \* \*

*Metropolitan city* means:

(1) A city within a metropolitan area that is the central city of such area, as defined and used by the Office of Management and Budget.

(2) Any other city within a metropolitan area that has a population of 50,000 or more.

(3)(i) Any city that was classified as a metropolitan city for at least two years pursuant to paragraph (1) or (2) of this definition shall remain classified as a metropolitan city.

(ii) Any unit of general local government that becomes eligible to be classified as a metropolitan city, and was not classified as a metropolitan city in the immediately preceding fiscal year, may, upon submission of written notification to HUD, defer its classification as a metropolitan city for all purposes under the Act, if it elects to have its population included in an urban county.

(iii) Notwithstanding paragraph (3)(i) of this definition, a city may elect not to retain its classification as a metropolitan city.

(iv) Any city classified as a metropolitan city under this definition, and that no longer qualifies as a metropolitan city in a fiscal year

beginning after fiscal year 1989, shall retain its classification as a metropolitan city for the fiscal year in which the city ceases to qualify, and for the succeeding fiscal year, except that in the succeeding fiscal year the amount of the grant to that city shall be 50 percent of the amount calculated under section 106(b) of the Act, the remaining 50 percent shall be added to the amount allocated under section 106(d) of the Act to the State in which the city is located, and the city shall be eligible, in that succeeding fiscal year, to receive a distribution from the State allocation under section 106(d) of the Act.

\* \* \* \* \*

*Moderate-income household* means a household having an income equal to or less than the Section 8 low-income limit and greater than the Section 8 very low-income limit, established by HUD.

*Moderate-income person* means a member of a family that has an income equal to or less than the Section 8 low-income limit and greater than the Section 8 very low-income limit, established by HUD. Unrelated individuals shall be considered as one-person families for this purpose.

\* \* \* \* \*

6. Section 570.5 is revised to read as follows:

**§ 570.5 Waivers.**

(a) The Secretary may waive any requirement of this part not required by law whenever it is determined that undue hardship will result from applying the requirement and when application of the requirement would adversely affect the purposes of the Act.

(b) For funds designated under this part by a recipient to address the damage in an area for which the President has declared a disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170-5189b), the Secretary may suspend all requirements for purposes of assistance under section 106 of the Act for that area, except for those related to public notice of funding availability, nondiscrimination, fair housing, labor standards, environmental standards, and requirements that activities benefit persons of low- and moderate-income.

7. Section 570.200 is amended by revising the second sentence of paragraph (a)(3), paragraph (a)(5), the second sentence of paragraph (d)(1), the third sentence of paragraph (e), and paragraphs (g) and (h), to read as follows:

**§ 570.200 General policies.**

(a) \* \* \*

(3) *Compliance with the primary objective.* \* \* \* Consistent with this objective, Entitlement, HUD-administered Small Cities, and Insular area recipients must ensure that, over a period of time specified in their certification not to exceed three years, not less than 70 percent of the aggregate of CDBG fund expenditures shall be for activities meeting the criteria under § 570.208(a) or § 570.208(d)(5) or (6) for benefiting low- and moderate-income persons. \* \* \*

\* \* \* \* \*

(5) *Cost principles.* Costs incurred, whether charged on a direct or an indirect basis, must be in conformance with OMB Circulars A-87, "Cost Principles for State, Local and Indian Tribal Governments"; A-122, "Cost Principles for Non-profit Organizations"; or A-21, "Cost Principles for Educational Institutions," as applicable.<sup>1</sup> All items of cost listed in Attachment B of these Circulars that require prior Federal agency approval are allowable without prior approval of HUD to the extent they comply with the general policies and principles stated in Attachment A of such circulars and are otherwise eligible under this subpart C, except for the following:

(i) Depreciation methods for fixed assets shall not be changed without HUD's specific approval or, if charged through a cost allocation plan, the Federal cognizant agency.

(ii) Fines and penalties (including punitive damages) are unallowable costs to the CDBG program.

(iii) Pre-award costs are limited to those authorized under paragraph (h) of this section.

\* \* \* \* \*

(d) \* \* \*

(1) *Employer-employee type of relationship.* \* \* \* In no event, however, shall such compensation exceed the equivalent of the daily rate paid for Level IV of the Executive Schedule. \* \* \*

\* \* \* \* \*

(e) *Recipient determinations required as a condition of eligibility.* \* \* \* A written determination is required for any activity carried out under the authority of §§ 570.201(f), 570.201(i)(2), 570.201(p), 570.201(q), 570.202(b)(3), 570.202(f)(2), 570.206(f), 570.209, and 570.309.

\* \* \* \* \*

(g) *Limitation on planning and administrative costs.* No more than 20 percent of the sum of any grant, plus

<sup>1</sup> These circulars are available from the American Communities Center by calling the following toll-free numbers: (800) 998-9999 or (800) 483-2209 (TDD).

program income, shall be expended for planning and program administrative costs, as defined in §§ 570.205 and 507.206, respectively. Recipients of entitlement grants under subpart D of this part shall conform with this requirement by limiting the amount of CDBG funds obligated for planning plus administration during each program year to an amount no greater than 20 percent of the sum of its entitlement grant made for that program year (if any) plus the program income received by the recipient and its subrecipients (if any) during that program year.

(h) *Reimbursement for pre-award costs.* The effective date of the grant agreement is the program year start date or the date that the consolidated plan is received by HUD, whichever is later. For a Section 108 loan guarantee, the effective date of the grant agreement is the date of HUD execution of the grant agreement amendment for the particular loan guarantee commitment.

(1) Prior to the effective date of the grant agreement, a recipient may incur costs or may authorize a subrecipient to incur costs, and then after the effective date of the grant agreement pay for those costs using its CDBG funds, provided that:

(i) The activity for which the costs are being incurred is included in a consolidated plan action plan or an amended consolidated plan action plan (or application under subpart M of this part) prior to the costs being incurred;

(ii) Citizens are advised of the extent to which these pre-award costs will affect future grants;

(iii) The costs and activities funded are in compliance with the requirements of this part and with the Environmental Review Procedures stated in 24 CFR part 58;

(iv) The activity for which payment is being made complies with the statutory and regulatory provisions in effect at the time the costs are paid for with CDBG funds;

(v) CDBG payment will be made during a time no longer than the next two program years following the effective date of the grant agreement or amendment in which the activity is first included; and

(vi) The total amount of pre-award costs to be paid during any program year pursuant to this provision is no more than the greater of 25 percent of the amount of the grant made for that year or \$300,000.

(2) Upon the written request of the recipient, HUD may authorize payment of pre-award costs for activities that do not meet the criteria at paragraph (h)(1)(v) or (h)(1)(vi) of this section, if HUD determines, in writing, that there

is good cause for granting an exception upon consideration of the following factors, as applicable:

(i) Whether granting the authority would result in a significant contribution to the goals and purposes of the CDBG program;

(ii) Whether failure to grant the authority would result in undue hardship to the recipient or beneficiaries of the activity;

(iii) Whether granting the authority would not result in a violation of a statutory provision or any other regulatory provision;

(iv) Whether circumstances are clearly beyond the recipient's control; or

(v) Any other relevant considerations.

8. Section 570.201 is amended by adding a parenthetical sentence following the first full sentence in paragraph (c); by revising the first two sentences of the introductory text of paragraph (e), paragraph (k), and the introductory text of paragraph (n); and by adding new paragraphs (o)(4), (p), and (q) to read as follows:

**§ 570.201 Basic eligible activities.**

(c) \* \* \* (However, activities under this paragraph may be directed to the removal of material and architectural barriers that restrict the mobility and accessibility of elderly or severely disabled persons to public facilities and improvements, including those provided for in § 570.207(a)(1).) \* \* \*

(e) *Public services.* Provision of public services (including labor, supplies, and materials) including but not limited to those concerned with employment, crime prevention, child care, health, drug abuse, education, fair housing counseling, energy conservation, welfare (but excluding the provision of income payments identified under § 570.207(b)(4)), homebuyer downpayment assistance, or recreational needs. To be eligible for CDBG assistance, a public service must be either a new service or a quantifiable increase in the level of an existing service above that which has been provided by or on behalf of the unit of general local government (through funds raised by the unit or received by the unit from the State in which it is located) in the 12 calendar months before the submission of the action plan.

(k) *Housing services.* Housing services, as provided in section

105(a)(21) of the Act (42 U.S.C. 5305(a)(21)).

(n) *Homeownership assistance.* Until October 1, 1995, CDBG funds may be used to provide direct homeownership assistance to low- and moderate-income households to:

(o) \* \* \* (4) Assistance under this paragraph (o) may also include training, technical assistance, or other support services to increase the capacity of the recipient or subrecipient to carry out the activities under this paragraph (o).

(p) *Technical assistance.* Provision of technical assistance to public or nonprofit entities to increase the capacity of such entities to carry out eligible neighborhood revitalization or economic development activities. (The recipient must determine, prior to the provision of the assistance, that the activity for which it is attempting to build capacity would be eligible for assistance under this subpart C, and that the national objective claimed by the grantee for this assistance can reasonably be expected to be met once the entity has received the technical assistance and undertakes the activity.) Capacity building for private or public entities (including grantees) for other purposes may be eligible under § 570.205.

(q) *Assistance to institutions of higher education.* Provision of assistance by the recipient to institutions of higher education when the grantee determines that such an institution has demonstrated a capacity to carry out eligible activities under this subpart C.

9. Section 570.202 is amended by:

- a. Removing "and" at the end of paragraph (a)(3);
- b. Redesignating paragraph (a)(4) as paragraph (a)(5);
- c. Adding a new paragraph (a)(4);
- d. Removing "and" at the end of paragraph (b)(9), and removing the period at the end of paragraph (b)(10) and adding "; and" in its place;
- e. Adding new paragraphs (b)(11) and (f); and
- f. Revising paragraph (c), to read as follows:

**§ 570.202 Eligible rehabilitation and preservation activities.**

(4) Nonprofit-owned nonresidential buildings and improvements not eligible under § 570.201(c); and

(11) Improvements designed to remove material and architectural

barriers that restrict the mobility and accessibility of elderly or severely disabled persons to buildings and improvements eligible for assistance under paragraph (a) of this section.

(c) *Code enforcement.* Costs incurred for inspection for code violations and enforcement of codes (e.g., salaries and related expenses of code enforcement inspectors and legal proceedings, but not including the cost of correcting the violations) in deteriorating or deteriorated areas when such enforcement together with public or private improvements, rehabilitation, or services to be provided may be expected to arrest the decline of the area.

\* \* \* \* \*

(f) *Lead-based paint hazard evaluation and reduction.* Lead-based paint hazard evaluation and reduction as defined in section 1004 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851b).

10. Section 570.206 is amended by adding paragraph (i) to read as follows:

**§ 570.206 Program administration costs.**

\* \* \* \* \*

(i) Whether or not such activities are otherwise assisted by funds provided under this part, reasonable costs equivalent to those described in paragraphs (a), (b), (e), and (f) of this section for overall program management of:

(1) A Federally designated Empowerment Zone or Enterprise Community; and

(2) The HOME program under title II of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12701 note).

11. Section 570.207 is amended by:

a. Amending the second sentence of paragraph (a)(1) by removing the citation “§ 570.201(k)” and by adding in its place the citation “§ 570.201(c)”; and

b. Revising the first sentence of paragraph (b)(2)(i) and paragraph (b)(4), to read as follows:

**§ 570.207 Ineligible activities.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) Maintenance and repair of publicly owned streets, parks, playgrounds, water and sewer facilities, neighborhood facilities, senior centers, centers for persons with a disabilities, parking and other public facilities and improvements. \* \* \*

\* \* \* \* \*

(4) *Income payments.* The general rule is that CDBG funds may not be used for income payments. For purposes of the CDBG program, “income payments”

means a series of subsistence-type grant payments made to an individual or family for items such as food, clothing, housing (rent or mortgage), or utilities, but excludes emergency grant payments made over a period of up to three consecutive months to the provider of such items or services on behalf of an individual or family.

12. Section 570.208 is amended by:

a. Redesignating paragraphs (a)(1)(iii), (a)(1)(iv), and (a)(1)(v) as paragraphs (a)(1)(v), (a)(1)(vi), and (a)(1)(vii), respectively;

b. Adding new paragraphs (a)(1)(iii), (a)(1)(iv), and (a)(3)(iii);

c. Revising the second sentence of paragraph (a)(2)(i)(A), paragraph (a)(2)(ii), and the second sentence of paragraph (a)(3) introductory text;

d. Amending the second sentence of paragraph (a)(4)(vi)(F)(2) by removing the phrase “final statement” and by adding in its place the phrase “action plan under part 91 of this title”; and

e. Amending paragraphs (d)(5)(i), (d)(6)(i), and (d)(7) by removing the citation “paragraph (a)(1)(v) of this section” and by adding in its place the citation “paragraph (a)(1)(vii) of this section”; to read as follows:

**§ 570.208 Criteria for national objectives.**

(a) \* \* \*

(1) \* \* \*

(iii) An activity to develop, establish, and operate for up to two years after the establishment of, a uniform emergency telephone number system serving an area having less than the percentage of low- and moderate-income residents required under paragraph (a)(1)(i) of this section or (as applicable) paragraph (a)(1)(ii) of this section, provided the recipient obtains prior HUD approval. To obtain such approval, the recipient must:

(A) Demonstrate that the system will contribute significantly to the safety of the residents of the area. The request for approval must include a list of the emergency services that will participate in the emergency telephone number system;

(B) Submit information that serves as a basis for HUD to determine whether at least 51 percent of the use of the system will be by low- and moderate-income persons. As available, the recipient must provide information that identifies the total number of calls actually received over the preceding 12-month period for each of the emergency services to be covered by the emergency telephone number system and relates those calls to the geographic segment (expressed as nearly as possible in terms of census tracts, enumeration districts, block groups, or combinations thereof that are

contained within the segment) of the service area from which the calls were generated. In analyzing this data to meet the requirements of this section, HUD will assume that the distribution of income among the callers generally reflects the income characteristics of the general population residing in the same geographic area where the callers reside. If HUD can conclude that the users have primarily consisted of low- and moderate-income persons, no further submission is needed by the recipient. If a recipient plans to make other submissions for this purpose, it may request that HUD review its planned methodology before expending the effort to acquire the information it expects to use to make its case;

(C) Demonstrate that other Federal funds received by the recipient are insufficient or unavailable for a uniform emergency telephone number system. For this purpose, the recipient must submit a statement explaining whether the lack of funds is due to the insufficiency of the amount of the available funds, restrictions on the use of such funds, or the prior commitment of funds by the recipient for other purposes; and

(D) Demonstrate that the percentage of the total costs of the system paid for by CDBG funds does not exceed the percentage of low- and moderate-income persons in the service area of the system. For this purpose, the recipient must include a description of the boundaries of the service area of the emergency telephone number system, the census divisions that fall within the boundaries of the service area (census tracts or enumeration districts), the total number of persons and the total number of low- and moderate-income persons within each census division, the percentage of low- and moderate-income persons within the service area, and the total cost of the system.

(iv) An activity for which the assistance to a public improvement that provides benefits to all the residents of an area is limited to paying special assessments (as defined in § 570.200(c)) levied against residential properties owned and occupied by persons of low and moderate income.

\* \* \* \* \*

(2) \* \* \*

(i) \* \* \*

(A) \* \* \* Activities that exclusively serve a group of persons in any one or a combination of the following categories may be presumed to benefit persons, 51 percent of whom are low- and moderate-income: abused children, battered spouses, elderly persons, adults meeting the Bureau of the Census’

Current Population Reports definition of "severely disabled," homeless persons, illiterate adults, persons living with AIDS, and migrant farm workers; or

\* \* \* \* \*

(ii) An activity that serves to remove material or architectural barriers to the mobility or accessibility of elderly persons or of adults meeting the Bureau of the Census' Current Population Reports definition of "severely disabled" will be presumed to qualify under this criterion if it is restricted, to the extent practicable, to the removal of such barriers by assisting:

(A) The reconstruction of a public facility or improvement, or portion thereof, that does not qualify under paragraph (a)(1) of this section;

(B) The rehabilitation of a privately owned nonresidential building or improvement that does not qualify under paragraph (a) (1) or (4) of this section; or

(C) The rehabilitation of the common areas of a residential structure that contains more than one dwelling unit and that does not qualify under paragraph (a)(3) of this section.

\* \* \* \* \*

(3) \* \* \* This would include, but not necessarily be limited to, the acquisition or rehabilitation of property by the recipient, a subrecipient, a developer, an individual homebuyer, or an individual homeowner; conversion of nonresidential structures; and new housing construction. \* \* \*

\* \* \* \* \*

(iii) When CDBG funds are used for housing services eligible under § 570.201(k), such funds shall be considered to benefit low- and moderate-income persons if the housing units for which the services are provided are HOME-assisted and the requirements at 24 CFR 92.252 or 92.254 are met.

\* \* \* \* \*

13. Section 570.301 is added to read as follows:

**§ 570.301 Activity locations and float-funding.**

The consolidated plan, action plan, and amendment submission requirements referred to in this section are those in 24 CFR part 91.

(a) For activities for which the grantee has not yet decided on a specific location, such as when the grantee is allocating an amount of funds to be used for making loans or grants to businesses or for residential rehabilitation, the description in the action plan or any amendment shall identify who may apply for the assistance, the process by which the grantee expects to select who

will receive the assistance (including selection criteria), and how much and under what terms the assistance will be provided, or in the case of a planned public facility or improvement, how it expects to determine its location.

(b) *Float-funded activities and guarantees.* A recipient may use undisbursed funds in the line of credit and its CDBG program account that are budgeted in statements or action plans for one or more other activities that do not need the funds immediately, subject to the limitations described below. Such funds shall be referred to as the "float" for purposes of this section and the action plan. Each activity carried out using the float must meet all of the same requirements that apply to CDBG-assisted activities generally, and must be expected to produce program income in an amount at least equal to the amount of the float so used. Whenever the recipient proposes to fund an activity with the float, it must include the activity in its action plan or amend the action plan for the current program year. For purposes of this section, an activity that uses such funds will be called a "float-funded activity."

(1) Each float-funded activity must be individually listed and described as such in the action plan.

(2)(i) The expected time period between obligation of assistance for a float-funded activity and receipt of program income in an amount at least equal to the full amount drawn from the float to fund the activity may not exceed 2.5 years. An activity from which program income sufficient to recover the full amount of the float assistance is expected to be generated more than 2.5 years after obligation may not be funded from the float, but may be included in an action plan if it is funded from CDBG funds other than the float (e.g., grant funds or proceeds from an approved Section 108 loan guarantee).

(ii) Any extension of the repayment period for a float-funded activity shall be considered to be a new float-funded activity for these purposes and may be implemented by the grantee only if the extension is made subject to the same limitations and requirements as apply to a new float-funded activity.

(3) Unlike other projected program income, the full amount of income expected to be generated by a float-funded activity must be shown as a source of program income in the action plan containing the activity, whether or not some or all of the income is expected to be received in a future program year (in accordance with 24 CFR 91.220(g)(1)(ii)(D)).

(4) The recipient must also clearly declare in the action plan that identifies

the float-funded activity the recipient's commitment to undertake one of the following options:

(i) Amend or delete activities in an amount equal to any default or failure to produce sufficient income in a timely manner. If the recipient makes this choice, it must include a description of the process it will use to select the activities to be amended or deleted and how it will involve citizens in that process; and it must amend the applicable statement(s) or action plan(s) showing those amendments or deletions promptly upon determining that the float-funded activity will not generate sufficient or timely program income;

(ii) Obtain an irrevocable line of credit from a commercial lender for the full amount of the float-funded activity and describe the lender and terms of such line of credit in the action plan that identifies the float-funded activity. To qualify for this purpose, such line of credit must be unconditionally available to the recipient in the amount of any shortfall within 30 days of the date that the float-funded activity fails to generate the projected amount of program income on schedule;

(iii) Transfer general local government funds in the full amount of any default or shortfall to the CDBG line of credit within 30 days of the float-funded activity's failure to generate the projected amount of the program income on schedule; or

(iv) A method approved in writing by HUD for securing timely return of the amount of the float funding. Such method must ensure that funds are available to meet any default or shortfall within 30 days of the float-funded activity's failure to generate the projected amount of the program income on schedule.

(5) When preparing an action plan for a year in which program income is expected to be received from a float-funded activity, and such program income has been shown in a prior statement or action plan, the current action plan shall identify the expected income and explain that the planned use of the income has already been described in prior statements or action plans, and shall identify the statements or action plans in which such descriptions may be found.

14. Section 570.304 is amended by revising paragraph (a) and by removing paragraph (d) to read as follows:

**§ 570.304 Making of grants.**

(a) *Approval of grant.* HUD will approve a grant if the jurisdiction's submissions have been made and approved in accordance with 24 CFR part 91, and the certifications required

therein are satisfactory to the Secretary. The certifications will be satisfactory to the Secretary for this purpose unless the Secretary has determined pursuant to subpart O of this part that the grantee has not complied with the requirements of this part, has failed to carry out its consolidated plan as provided under § 570.903, or has determined that there is evidence, not directly involving the grantee's past performance under this program, that tends to challenge in a substantial manner the grantee's certification of future performance. If the Secretary makes any such determination, however, further assurances may be required to be submitted by the grantee as the Secretary may deem warranted or necessary to find the grantee's certification satisfactory.

15. Section 570.309 is added to subpart D to read as follows:

**§ 570.309 Restriction on location of activities.**

CDBG funds may assist an activity outside the jurisdiction of the grantee only if the grantee determines that such an activity is necessary to further the purposes of the Act and the recipient's community development objectives, and that reasonable benefits from the activity will accrue to residents within the jurisdiction of the grantee. The grantee shall document the basis for such determination prior to providing CDBG funds for the activity.

16. Section 570.405 is amended by revising paragraph (e)(2), by redesignating paragraph (e)(3) as paragraph (e)(4), and by adding a new paragraph (e)(3) to read as follows:

**§ 570.405 The insular areas.**

(2) Applicants shall prepare and publish or post a proposed application in accordance with the citizen participation requirements of paragraph (h) of this section.

(3) Applicants shall submit to HUD a final application containing its community development objectives and activities. This application shall be submitted to the appropriate HUD office, together with the required certifications, in a form prescribed by HUD.

17. Section 570.423 is amended by revising paragraph (a) to read as follows:

**§ 570.423 Application for the HUD-administered New York Small Cities Grants.**

(a) *Proposed application.* The applicant shall prepare and publish a

proposed application and comply with the citizen participation requirements as described in § 570.431. The applicant should follow the citizen participation requirements of 24 CFR part 91 if it submits a complete consolidated plan.

18. Section 570.429 is amended by revising paragraph (g) to read as follows:

**§ 570.429 Hawaii general and grant requirements.**

(g) *Application approval.* HUD will approve an application if the jurisdiction's submissions have been made and approved in accordance with 24 CFR part 91 and the certifications required therein are satisfactory to the Secretary. The certifications will be satisfactory to the Secretary for this purpose unless the Secretary has determined pursuant to subpart O of this part that the grantee has not complied with the requirements of this part, has failed to carry out its consolidated plan as provided under § 570.903, or has determined that there is evidence, not directly involving the grantee's past performance under this program, that tends to challenge in a substantial manner the grantee's certification of future performance. If the Secretary makes any such determination, however, further assurances may be required to be submitted by the grantee as the Secretary may deem warranted or necessary to find the grantee's certification satisfactory.

19. Section 570.500 is amended by removing and reserving paragraph (a)(1)(viii); by revising paragraphs (a)(2), (a)(3), and (c); by adding a new paragraph (a)(5); and by adding two sentences to the end of paragraph (b), to read as follows:

**§ 570.500 Definitions.**

(2) Program income does not include income earned (except for interest described in § 570.513) on grant advances from the U.S. Treasury. The following items of income earned on grant advances must be remitted to HUD for transmittal to the U.S. Treasury, and will not be reallocated under section 106(c) or (d) of the Act:

- (i) Interest earned from the investment of the initial proceeds of a grant advance by the U.S. Treasury;
- (ii) Interest earned on loans or other forms of assistance provided with CDBG funds that are used for activities

determined by HUD either to be ineligible or to fail to meet a national objective in accordance with the requirements of subpart C of this part, or that fail substantially to meet any other requirement of this part; and

(iii) Interest earned on the investment of amounts reimbursed to the CDBG program account prior to the use of the reimbursed funds for eligible purposes.

(3) The calculation of the amount of program income for the recipient's CDBG program as a whole (i.e., comprising activities carried out by a grantee and its subrecipients) shall exclude payments made by subrecipients of principal and/or interest on CDBG-funded loans received from grantees if such payments are made using program income received by the subrecipient. (By making such payments, the subrecipient shall be deemed to have transferred program income to the grantee.) The amount of program income derived from this calculation shall be used for reporting purposes, for purposes of applying the requirement under § 570.504(b)(2)(iii), and in determining limitations on planning and administration and public services activities to be paid for with CDBG funds.

(5) Examples of other receipts that are not considered program income are proceeds from fund raising activities carried out by subrecipients receiving CDBG assistance (the costs of fundraising are generally unallowable under the applicable OMB circulars referenced in 24 CFR 84.27), funds collected through special assessments used to recover the non-CDBG portion of a public improvement, and proceeds from the disposition of real property acquired or improved with CDBG funds when the disposition occurs after the applicable time period specified in § 570.503(b)(8) for subrecipient-controlled property, or in § 570.505 for recipient-controlled property.

(b) Each revolving loan fund's cash balance must be held in an interest-bearing account, and any interest paid on CDBG funds held in this account shall be considered interest earned on grant advances and must be remitted to HUD for transmittal to the U.S. Treasury no less frequently than annually. (Interest paid by borrowers on eligible loans made from the revolving loan fund shall be program income and treated accordingly.)

(c) *Subrecipient* means a public or private nonprofit agency, authority, or organization, or a for-profit entity authorized under § 570.201(o), receiving CDBG funds from the recipient or

another subrecipient to undertake activities eligible for such assistance under subpart C of this part. The term excludes an entity receiving CDBG funds from the recipient under the authority of § 570.204, unless the grantee explicitly designates it as a subrecipient. The term includes a public agency designated by a unit of general local government to receive a loan guarantee under subpart M of this part, but does not include contractors providing supplies, equipment, construction, or services subject to the procurement requirements in 24 CFR 85.36 or 84.40, as applicable.

20. Section 570.502 is amended by revising the introductory text of paragraph (a) and by revising paragraph (b), to read as follows:

**§ 570.502 Applicability of uniform administrative requirements.**

(a) Recipients and subrecipients that are governmental entities (including public agencies) shall comply with the requirements and standards of OMB Circular No. A-87, "Cost Principles for State, Local, and Indian Tribal Governments"; OMB Circular A-128, "Audits of State and Local Governments" (implemented at 24 CFR part 44); and with the following sections of 24 CFR part 85 "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" or the related CDBG provision, as specified in this paragraph:

\* \* \* \* \*

(b) Subrecipients, except subrecipients that are governmental entities, shall comply with the requirements and standards of OMB Circular No. A-122, "Cost Principles for Non-profit Organizations," or OMB Circular No. A-21, "Cost Principles for Educational Institutions," as applicable, and OMB Circular A-133, "Audits of Institutions of Higher Education and Other Nonprofit Institutions" (as set forth in 24 CFR part 45). Audits shall be conducted annually. Such subrecipients shall also comply with the following provisions of the Uniform Administrative requirements of OMB Circular A-110 (implemented at 24 CFR part 84, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals and Other Non-Profit Organizations") or the related CDBG provision, as specified in this paragraph:

- (1) Subpart A—"General";
- (2) Subpart B—"Pre-Award Requirements," except for § 84.12, "Forms for Applying for Federal Assistance";

- (3) Subpart C—"Post-Award Requirements," except for:
  - (i) Section 84.22, "Payment Requirements." Grantees shall follow the standards of §§ 85.20(b)(7) and 85.21 in making payments to subrecipients;
  - (ii) Section 84.23, "Cost Sharing and Matching";
  - (iii) Section 84.24, "Program Income." In lieu of § 84.24, CDBG subrecipients shall follow § 570.504;
  - (iv) Section 84.25, "Revision of Budget and Program Plans";
  - (v) Section 84.32, "Real Property." In lieu of § 84.32, CDBG subrecipients shall follow § 570.505;
  - (vi) Section 84.34(g), "Equipment." In lieu of the disposition provisions of § 84.34(g), the following applies:
    - (A) In all cases in which equipment is sold, the proceeds shall be program income (prorated to reflect the extent to which CDBG funds were used to acquire the equipment); and
    - (B) Equipment not needed by the subrecipient for CDBG activities shall be transferred to the recipient for the CDBG program or shall be retained after compensating the recipient;
  - (vii) Section 84.51 (b), (c), (d), (e), (f), (g), and (h), "Monitoring and Reporting Program Performance";
  - (viii) Section 84.52, "Financial Reporting";
  - (ix) Section 84.53(b), "Retention and access requirements for records." Section 84.53(b) applies with the following exceptions:
    - (A) The retention period referenced in § 84.53(b) pertaining to individual CDBG activities shall be four years; and
    - (B) The retention period starts from the date of submission of the annual performance and evaluation report, as prescribed in 24 CFR 91.520, in which the specific activity is reported on for the final time rather than from the date of submission of the final expenditure report for the award;
    - (x) Section 84.61, "Termination." In lieu of the provisions of § 84.61, CDBG subrecipients shall comply with § 570.503(b)(7); and
- (4) Subpart D—"After-the-Award Requirements," except for § 84.71, "Closeout Procedures."

21. Section 570.503 is amended by revising paragraph (b)(3) to read as follows:

**§ 570.503 Agreements with subrecipients.**

(b) \* \* \*

(3) *Program income.* The agreement shall include the program income requirements set forth in § 570.504(c). The agreement shall also specify that, at the end of the program year, the grantee may require remittance of all or part of

any program income balances (including investments thereof) held by the subrecipient (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump sum drawdown, or cash or investments held for Section 108 security needs).

22. Section 570.504 is amended by revising the introductory text of paragraph (b)(2) and by adding a new paragraph (b)(2)(iii), to read as follows:

**§ 570.504 Program income.**

(b) \* \* \*

(2) If the recipient chooses to retain program income, that program income shall be disposed of as follows:

- (iii) At the end of each program year, the aggregate amount of program income cash balances and any investment thereof (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump-sum drawdown, or cash or investments held for Section 108 loan guarantee security needs) that, as of the last day of the program year, exceeds one-twelfth of the most recent grant made pursuant to § 570.304 shall be remitted to HUD as soon as practicable thereafter, to be placed in the recipient's line of credit. This provision applies to program income cash balances and investments thereof held by the grantee and its subrecipients. (This provision shall be applied for the first time at the end of the program year for which Federal Fiscal Year 1996 funds are provided.)

23. Section 570.506 is amended by:

- a. Revising paragraphs (b)(3)(i) and (c);
- b. Removing "and" at the end of paragraph (b)(4)(v), removing the period at the end of paragraph (b)(4)(vi) and adding a semicolon in its place; and
- c. Adding paragraphs (b)(4)(vii) and (b)(4)(viii), to read as follows:

**§ 570.506 Records to be maintained.**

(b) \* \* \*

(3) \* \* \*

(i) Documentation establishing that the facility or service is designed for the particular needs of or used exclusively by senior citizens, adults meeting the Bureau of the Census' Current Population Reports definition of "severely disabled," persons living with AIDS, battered spouses, abused children, the homeless, illiterate adults, or migrant farm workers, for which the

any program income balances (including investments thereof) held by the subrecipient (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump sum drawdown, or cash or investments held for Section 108 security needs).

22. Section 570.504 is amended by revising the introductory text of paragraph (b)(2) and by adding a new paragraph (b)(2)(iii), to read as follows:

**§ 570.504 Program income.**

(b) \* \* \*

(2) If the recipient chooses to retain program income, that program income shall be disposed of as follows:

- (iii) At the end of each program year, the aggregate amount of program income cash balances and any investment thereof (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump-sum drawdown, or cash or investments held for Section 108 loan guarantee security needs) that, as of the last day of the program year, exceeds one-twelfth of the most recent grant made pursuant to § 570.304 shall be remitted to HUD as soon as practicable thereafter, to be placed in the recipient's line of credit. This provision applies to program income cash balances and investments thereof held by the grantee and its subrecipients. (This provision shall be applied for the first time at the end of the program year for which Federal Fiscal Year 1996 funds are provided.)

23. Section 570.506 is amended by:

- a. Revising paragraphs (b)(3)(i) and (c);
- b. Removing "and" at the end of paragraph (b)(4)(v), removing the period at the end of paragraph (b)(4)(vi) and adding a semicolon in its place; and
- c. Adding paragraphs (b)(4)(vii) and (b)(4)(viii), to read as follows:

**§ 570.506 Records to be maintained.**

(b) \* \* \*

(3) \* \* \*

(i) Documentation establishing that the facility or service is designed for the particular needs of or used exclusively by senior citizens, adults meeting the Bureau of the Census' Current Population Reports definition of "severely disabled," persons living with AIDS, battered spouses, abused children, the homeless, illiterate adults, or migrant farm workers, for which the

any program income balances (including investments thereof) held by the subrecipient (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump sum drawdown, or cash or investments held for Section 108 security needs).

22. Section 570.504 is amended by revising the introductory text of paragraph (b)(2) and by adding a new paragraph (b)(2)(iii), to read as follows:

**§ 570.504 Program income.**

(b) \* \* \*

(2) If the recipient chooses to retain program income, that program income shall be disposed of as follows:

- (iii) At the end of each program year, the aggregate amount of program income cash balances and any investment thereof (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump-sum drawdown, or cash or investments held for Section 108 loan guarantee security needs) that, as of the last day of the program year, exceeds one-twelfth of the most recent grant made pursuant to § 570.304 shall be remitted to HUD as soon as practicable thereafter, to be placed in the recipient's line of credit. This provision applies to program income cash balances and investments thereof held by the grantee and its subrecipients. (This provision shall be applied for the first time at the end of the program year for which Federal Fiscal Year 1996 funds are provided.)

23. Section 570.506 is amended by:

- a. Revising paragraphs (b)(3)(i) and (c);
- b. Removing "and" at the end of paragraph (b)(4)(v), removing the period at the end of paragraph (b)(4)(vi) and adding a semicolon in its place; and
- c. Adding paragraphs (b)(4)(vii) and (b)(4)(viii), to read as follows:

**§ 570.506 Records to be maintained.**

(b) \* \* \*

(3) \* \* \*

(i) Documentation establishing that the facility or service is designed for the particular needs of or used exclusively by senior citizens, adults meeting the Bureau of the Census' Current Population Reports definition of "severely disabled," persons living with AIDS, battered spouses, abused children, the homeless, illiterate adults, or migrant farm workers, for which the

any program income balances (including investments thereof) held by the subrecipient (except those needed for immediate cash needs, cash balances of a revolving loan fund, cash balances from a lump sum drawdown, or cash or investments held for Section 108 security needs).



regulations provide a presumption concerning the extent to which low- and moderate-income persons benefit; or

\* \* \* \* \*

(4) \* \* \*  
 (vii) For any homebuyer assistance activity qualifying under §§ 570.201(e), 570.201(n), or 570.204, identification of the applicable eligibility paragraph and evidence that the activity meets the eligibility criteria for that provision; for any such activity qualifying under § 570.208(a), the size and income of each homebuyer's household; and

(viii) For a § 570.201(k) housing services activity, identification of the HOME project(s) or assistance that the housing services activity supports, and evidence that project(s) or assistance meet the HOME program income targeting requirements at 24 CFR 92.252 or 92.254.

\* \* \* \* \*

(c) Records that demonstrate that the recipient has made the determinations required as a condition of eligibility of certain activities, as prescribed in §§ 570.201(f), 570.201(i)(2), 570.201(p), 570.201(q), 570.202(b)(3), 570.202(f)(2) 570.206(f), 570.209, and 570.309.

\* \* \* \* \*

**§ 570.600 [Amended]**

24. In § 570.600, the last sentence of paragraph (a) is amended by removing the citation “§ 570.496” and by adding in its place a citation “§ 570.487”.

**§ 570.602 [Amended]**

25. Section 570.602 is amended in paragraphs (a), (b)(1), (b)(2), (b)(3), (b)(4)(i), and (b)(4)(ii), by adding the phrase “religion,” before the phrase “national origin” wherever it appears.

26. Section 570.606 is amended by:

- a. Revising paragraph (b)(2)(i)(A);
- b. Amending the first sentence of paragraph (c)(1)(iii)(G) by removing the phrase “HUD-approved Comprehensive Housing Affordability Strategy” and by adding in its place the phrase “HUD-approved consolidated plan”;
- c. Amending the second sentence of paragraph (c)(1)(iii)(G) by removing the phrase “a Housing Assistance Plan” and by adding in its place the phrase “a consolidated plan”;
- d. Amending the last sentence of paragraph (c)(1)(iv)(A) by removing the phrase “HUD-approved Comprehensive Housing Affordability Strategy” and by adding in its place the phrase “HUD-approved consolidated plan”;
- e. Revising paragraph (c)(3)(ii)(A)(I), to read as follows:

**§ 570.606 Displacement, relocation, acquisition, and replacement of housing.**

\* \* \* \* \*

- (b) \* \* \*
- (2) \* \* \*
- (i) \* \* \*

(A) After notice by the grantee to move permanently from the property, if the move occurs after the initial official submission to HUD for grant, loan, or loan guarantee funds under this part that are later provided or granted.

\* \* \* \* \*

- (c) \* \* \*
- (3) \* \* \*
- (ii) \* \* \*
- (A) \* \* \*

(I) After notice by the grantee to move permanently from the property, if the move occurs after the initial official submission to HUD for grant, loan, or loan guarantee funds under this part that are later provided or granted.

\* \* \* \* \*

27. Section 570.610 is revised to read as follows:

**§ 570.610 Uniform administrative requirements and cost principles.**

The recipient, its agencies or instrumentalities, and subrecipients shall comply with the policies, guidelines, and requirements of 24 CFR part 85 and OMB Circulars A-87, A-110 (implemented at 24 CFR part 84), A-122, A-133 (implemented at 24 CFR part 45), and A-128<sup>2</sup> (implemented at 24 CFR part 44), as applicable, as they relate to the acceptance and use of Federal funds under this part. The applicable sections of 24 CFR parts 84 and 85 are set forth at § 570.502.

28. Section 570.611 is revised to read as follows:

**§ 570.611 Conflict of interest.**

(a) *Applicability.* (1) In the procurement of supplies, equipment, construction, and services by recipients and by subrecipients, the conflict of interest provisions in 24 CFR 85.36 and 24 CFR 84.42, respectively, shall apply.

(2) In all cases not governed by 24 CFR 85.36 and 84.42, the provisions of this section shall apply. Such cases include the acquisition and disposition of real property and the provision of assistance by the recipient or by its subrecipients to individuals, businesses, and other private entities under eligible activities that authorize such assistance (e.g., rehabilitation, preservation, and other improvements of private properties or facilities pursuant to § 570.202; or grants, loans, and other assistance to businesses, individuals, and other private entities pursuant to §§ 570.203, 570.204, 570.455, or 570.703(i)).

(b) *Conflicts prohibited.* The general rule is that no persons described in

paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this part, or who are in a position to participate in a decisionmaking process or gain inside information with regard to such activities, may obtain a financial interest or benefit from a CDBG-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to a CDBG-assisted activity, or with respect to the proceeds of the CDBG-assisted activity, either for themselves or those with whom they have business or immediate family ties, during their tenure or for one year thereafter. For the UDAG program, the above restrictions shall apply to all activities that are a part of the UDAG project, and shall cover any such financial interest or benefit during, or at any time after, such person's tenure.

(c) *Persons covered.* The conflict of interest provisions of paragraph (b) of this section apply to any person who is an employee, agent, consultant, officer, or elected official or appointed official of the recipient, or of any designated public agencies, or of subrecipients that are receiving funds under this part.

(d) *Exceptions.* Upon the written request of the recipient, HUD may grant an exception to the provisions of paragraph (b) of this section on a case-by-case basis when it has satisfactorily met the threshold requirements of (d)(1) of this section, taking into account the cumulative effects of paragraph (d)(2) of this section.

(1) *Threshold requirements.* HUD will consider an exception only after the recipient has provided the following documentation:

(i) A disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made; and

(ii) An opinion of the recipient's attorney that the interest for which the exception is sought would not violate State or local law.

(2) *Factors to be considered for exceptions.* In determining whether to grant a requested exception after the recipient has satisfactorily met the requirements of paragraph (d)(1) of this section, HUD shall conclude that such an exception will serve to further the purposes of the Act and the effective and efficient administration of the recipient's program or project, taking into account the cumulative effect of the following factors, as applicable:

(i) Whether the exception would provide a significant cost benefit or an essential degree of expertise to the

<sup>2</sup> See footnote 1 at § 570.200(a)(5).

program or project that would otherwise not be available;

(ii) Whether an opportunity was provided for open competitive bidding or negotiation;

(iii) Whether the person affected is a member of a group or class of low- or moderate-income persons intended to be the beneficiaries of the assisted activity, and the exception will permit such person to receive generally the same interests or benefits as are being made available or provided to the group or class;

(iv) Whether the affected person has withdrawn from his or her functions or responsibilities, or the decisionmaking process with respect to the specific assisted activity in question;

(v) Whether the interest or benefit was present before the affected person was in a position as described in paragraph (b) of this section;

(vi) Whether undue hardship will result either to the recipient or the person affected when weighed against the public interest served by avoiding the prohibited conflict; and

(vii) Any other relevant considerations.

29. Section 570.614 is added to subpart K, to read as follows:

**§ 570.614 Architectural Barriers Act and the Americans with Disabilities Act.**

(a) The Architectural Barriers Act of 1968 (42 U.S.C. 4151–4157) requires certain Federal and Federally funded buildings and other facilities to be designed, constructed, or altered in accordance with standards that insure accessibility to, and use by, physically handicapped people. A building or facility designed, constructed, or altered with funds allocated or reallocated under this part after December 11, 1995 and that meets the definition of “residential structure” as defined in 24 CFR 40.2 or the definition of “building” as defined in 41 CFR 101–19.602(a) is subject to the requirements of the Architectural Barriers Act of 1968 (42 U.S.C. 4151–4157) and shall comply with the Uniform Federal Accessibility Standards (Appendix A to 24 CFR part 40 for residential structures, and Appendix A to 41 CFR part 101–19, subpart 101–19.6, for general type buildings).

(b) The Americans with Disabilities Act (42 U.S.C. 12131; 47 U.S.C. 155, 201, 218 and 225) (ADA) provides comprehensive civil rights to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommunications. It further provides that discrimination includes a failure to

design and construct facilities for first occupancy no later than January 26, 1993 that are readily accessible to and usable by individuals with disabilities. Further, the ADA requires the removal of architectural barriers and communication barriers that are structural in nature in existing facilities, where such removal is readily achievable—that is, easily accomplishable and able to be carried out without much difficulty or expense.

30. Section 570.900 is amended by revising paragraphs (b)(3), (b)(5), and (b)(6) to read as follows:

**§ 570.900 General.**

\* \* \* \* \*

(b) \* \* \*

(3) In conducting performance reviews, HUD will primarily rely on information obtained from the recipient’s performance report, records maintained, findings from monitoring, grantee and subrecipient audits, audits and surveys conducted by the HUD Inspector General, and financial data regarding the amount of funds remaining in the line of credit plus program income. HUD may also consider relevant information pertaining to a recipient’s performance gained from other sources, including litigation, citizen comments, and other information provided by or concerning the recipient. A recipient’s failure to maintain records in the prescribed manner may result in a finding that the recipient has failed to meet the applicable requirement to which the record pertains.

\* \* \* \* \*

(5) If HUD finds that a recipient has failed to comply with a program requirement or has failed to meet a performance criterion in § 570.902 or § 570.903, HUD will give the recipient an opportunity to provide additional information concerning the finding.

(6) If, after considering any additional information submitted by a recipient, HUD determines to uphold the finding, HUD may advise the recipient to undertake appropriate corrective or remedial actions as specified in § 570.910. HUD will consider the recipient’s capacity as described in § 570.905 prior to selecting the corrective or remedial actions.

\* \* \* \* \*

31. In § 570.901, paragraph (a) is amended by removing the phrase “60 percent” and by adding in its place the phrase “70 percent”; and paragraph (e) is revised, to read as follows:

**§ 570.901 Review for compliance with the primary and national objectives and other program requirements.**

\* \* \* \* \*

(e) For HUD-administered small cities grants only, the citizen participation requirements at § 570.431, the amendment requirements at § 570.427 (New York HUD-administered small cities) or § 570.430(f) (Hawaii HUD-administered small cities), and the displacement policy requirements of § 570.606;

\* \* \* \* \*

32. Section 570.902 is amended by revising paragraph (a) to read as follows:

**§ 570.902 Review to determine if CDBG funded activities are being carried out in a timely manner.**

\* \* \* \* \*

(a) *Entitlement recipients.* (1) Before the funding of the next annual grant and absent contrary evidence satisfactory to HUD, HUD will consider an entitlement recipient to be failing to carry out its CDBG activities in a timely manner if:

(i) Sixty days prior to the end of the grantee’s current program year, the amount of entitlement grant funds available to the recipient under grant agreements but undisbursed by the U.S. Treasury is more than 1.5 times the entitlement grant amount for its current program year; and

(ii) The grantee fails to demonstrate to HUD’s satisfaction that the lack of timeliness has resulted from factors beyond the grantee’s reasonable control.

(2) Notwithstanding that the amount of funds in the line of credit indicates that the recipient is carrying out its activities in a timely manner pursuant to paragraph (a)(1) of this section, HUD may determine that the recipient is not carrying out its activities in a timely manner if:

(i) The amount of CDBG program income the recipient has on hand 60 days prior to the end of its current program year, together with the amount of funds in its CDBG line of credit, exceeds 1.5 times the entitlement grant amount for its current program year; and

(ii) The grantee fails to demonstrate to HUD’s satisfaction that the lack of timeliness has resulted from factors beyond the grantee’s reasonable control.

(3) In determining the appropriate corrective action to take with respect to a HUD determination that a recipient is not carrying out its activities in a timely manner pursuant to paragraphs (a)(1) or (a)(2) of this section, HUD will consider the likelihood that the recipient will expend a sufficient amount of funds over the next program year to reduce the amount of unexpended funds to a level that will fall within the standard

described in paragraph (a)(1) of this section when HUD next measures the grantee's timeliness performance. For these purposes, HUD will take into account the extent to which funds on hand have been obligated by the recipient and its subrecipients for specific activities at the time the finding is made and other relevant information.

\* \* \* \* \*

33. Section 570.903 is revised to read as follows:

**§ 570.903 Review to determine if the recipient is meeting its consolidated plan responsibilities.**

The consolidated plan, action plan, and amendment submission requirements referred to in this section are in 24 CFR part 91.

(a) *Review timing and purpose.* HUD will review the consolidated plan performance of each entitlement and Hawaii HUD-administered small cities grant recipient prior to acceptance of a grant recipient's annual certification under 24 CFR 91.225(b)(3) to determine whether the recipient followed its HUD-approved consolidated plan for the most recently completed program year, and whether activities assisted with CDBG funds during that period were consistent with that consolidated plan, except that grantees are not bound by the consolidated plan with respect to the use or distribution of CDBG funds to

meet nonhousing community development needs.

(b) *Following a consolidated plan.* The recipient will be considered to be following its consolidated plan if it has taken all of the planned actions described in its action plan. This includes, but is not limited to:

(1) Pursuing all resources that the grantee indicated it would pursue;

(2) Providing certifications of consistency, when requested to do so by applicants for HUD programs for which the grantee indicated that it would support application by other entities, in a fair and impartial manner; and

(3) Not hindering implementation of the consolidated plan by action or willful inaction.

(c) *Disapproval.* If HUD determines that a recipient has not met the criteria outlined in paragraph (b) of this section, HUD will notify the recipient and provide the recipient up to 45 days to demonstrate to the satisfaction of the Secretary that it has followed its consolidated plan. HUD will consider all relevant circumstances and the recipient's actions and lack of actions affecting the provision of assistance covered by the consolidated plan within its jurisdiction. Failure to so demonstrate in a timely manner will be cause for HUD to find that the recipient has failed to meet its certification. A complete and specific response by the recipient shall describe:

(1) Any factors beyond the control of the recipient that prevented it from following its consolidated plan, and any actions the recipient has taken or plans to take to alleviate such factors; and

(2) Actions taken by the recipient, if any, beyond those described in the consolidated plan performance report to facilitate following the consolidated plan, including the effects of such actions.

(d) *New York HUD-administered Small Cities.* New York HUD-administered grantees shall follow the provisions of paragraph (b) of this section for their abbreviated or full consolidated plan to the extent that the provisions of paragraph (b) of this section are applicable. If the grantee does not comply with the requirements of paragraph (b) of this section, and does not provide HUD with an acceptable explanation, HUD may decide, in accordance with the requirements of the notice of fund availability, that the grantee does not meet threshold requirements to apply for a new small cities grant.

Dated: October 30, 1995.

Andrew M. Cuomo,

*Assistant Secretary for Community Planning and Development.*

[FR Doc. 95-27488 Filed 11-8-95; 8:45 am]

BILLING CODE 4210-29-P