

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91 and 93

[Docket No. FR-5246-I-03]

RIN 2506-AC30

Housing Trust Fund

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Interim rule.

SUMMARY: The Housing and Economic Recovery Act of 2008 (HERA) establishes a Housing Trust Fund (HTF) to be administered by HUD. The purpose of the HTF is to provide grants to State governments to increase and preserve the supply of rental housing for extremely low- and very low-income families, including homeless families, and to increase homeownership for extremely low- and very low-income families. This rule establishes the regulations that will govern the HTF. HUD is issuing this rule as an interim rule. It is HUD's intention to open this interim rule for public comment to solicit comments once funding is available and the grantees gain experience administering the HTF program.

DATES: *Effective:* March 31, 2015.

FOR FURTHER INFORMATION CONTACT: Marcia Sigal, Director, Program Policy Division, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7164, Washington, DC 20410; telephone number 202-708-2684 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8389.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Purpose

This interim rule establishes the regulations that will govern HTF and the formula that will determine how HTF funds are distributed among eligible grantees. The purpose of HTF is to provide grants to State governments to increase and preserve the supply of rental housing for extremely low- and very low-income families, including homeless families, and to increase homeownership for extremely low- and very low-income families. HERA (Pub. L. 1110-289, approved July 30, 2008) establishes HTF and provides for it to be administered by HUD.

States and State-designated entities are eligible grantees for HTF. Annual formula grants will be made, of which at least 80 percent must be used for rental housing; up to 10 percent for homeownership; and up to 10 percent for the grantee's reasonable administrative and planning costs. HTF funds may be used for the production or preservation of affordable housing through the acquisition, new construction, reconstruction, and/or rehabilitation of nonluxury housing with suitable amenities.

Summary of Major Provisions

This rule contains both the program regulations that establish how the HTF program will be administered and the allocation formula that establishes how grant funds will be distributed to States. The formula allocation, located in subpart B of the rule, codifies language found in the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (FHEFSSA) (42 U.S.C. 4502 *et seq.*), as revised by HERA (see Division A of HERA), and provides for the distribution of funds to the 50 States, the District of Columbia, Puerto Rico, and the Insular Areas. Allocation amounts are based on four need factors as well as a construction cost adjustment factor. The four need factors are found in 24 CFR 93.51(a)-(d). These need factors include: a State's relative shortage of rental housing available to extremely low-income families; a State's relative shortage of rental housing available to very low-income families; the relative number of extremely low-income renter households living in substandard, overcrowded or unaffordable units in a particular State; and the relative number of very low-income renter households living in substandard, overcrowded, or unaffordable units in a particular State. In addition, the State's local cost of construction is factored in as described in § 93.51(e).

The program regulations for HTF are found in subparts C through J of part 93 and closely mirror the regulations for the HOME Investment Partnerships program located in 24 CFR part 92. While HTF specifically targets affordable housing for very low and extremely low-income households, many of the program requirements applicable to the HOME program are similar to those for HTF. Further, each State is a participating jurisdiction in the HOME program, and all States or their designated housing entities will be HTF grantees. Consequently, many of the participation and submission requirements as well as many of the program requirements are modeled on

provisions found in the regulations for HOME.

Major provisions in the HTF program regulations include: siting and neighborhood standards; income determinations; eligible costs and activities; project requirements; tenant and homeowner qualification requirements; other Federal requirements; program administration regulations; and quality control provisions. Significant changes from the proposed rule include: removal of a proposed incentive for transit-oriented development; inclusion of guidelines for a recapture provision of homeownership funds; permitting the use of HTF funds for public housing under certain Federal housing programs; and a requirement that all HTF funds be used for extremely low-income housing when HTF is less than \$1 billion.

Costs and Benefits

The three primary impacts of this rule include: transfers from the government-sponsored enterprises (GSEs) and/or Treasury to States for investment in low-income housing; distribution among the States based on the formula HUD establishes for the HTF program; and the effects of HUD's program administration requirements. Of these, the largest impact is the infusion of Federal dollars into the affordable housing market.

Congress authorized HTF with the stated purpose of benefiting specific low-income populations by: (1) Increasing and preserving the supply of rental housing for extremely low-income families with incomes between 0 and 30 percent of area median income and very low-income families with incomes between 30 and 50 percent of area median income, including homeless families, and (2) increasing homeownership for very low and extremely low-income families. The formula in this rule is designed to distribute funds primarily to States with a shortage of rental housing affordable to very low and extremely low-income households. Specifically, this program provides funding to add a supply of affordable housing to markets where there is strong evidence of an inadequate supply.

The primary benefits of the HTF program are expected to be similar to the Housing Choice Voucher program. An evaluation of the impact of receiving a housing voucher versus not receiving one has shown that the primary benefit of housing assistance programs is to reduce homelessness and housing cost burdens. Thus, the primary benefit of the HTF program will be the reduction of number of homeless families and

individuals, as well as the number of families paying a disproportionate share of their income for housing in relatively tight housing markets.

HTF is a transfer to the low-income housing sector from the GSEs and/or Treasury. The size of the annual impact is equivalent to the size of the total HTF expenditures, which will vary depending on the amount of GSE business in a given year and any amounts that may be appropriated, transferred, or credited to the HTF under any other provision of law. (See 12 U.S.C. 4568.) There will be no allocation of grants under HTF if there is neither revenue from GSEs nor other funds as provided by HERA.

The formula for distributing among the States is largely determined by the statutory formula in FHEFSSA, which includes the four need factors described above, plus a construction cost adjustment factor. In addition, FHEFSSA directs that each of the 50 States and the District of Columbia are to receive a minimum allocation of \$3 million. HUD's policy discretion in choosing the weights for housing needs factors has the impact of redistributing allocations among States. Different States are characterized by different measures of housing needs as well as construction costs. At a national level, however, the discretion has almost no impact because all funds are spent on low-income housing regardless of the State. The transfers are only among States, re-distributing the funds geographically.

Finally, the regulations governing program administration are not expected to have significant economic impacts. Regulations for the HOME program, which, like HTF, also provide grants for construction of low-income housing, served as the model for HTF regulations. Consequently, State grantees are already familiar with HTF's basic compliance requirements and procedures, and will not have to develop significant capacity to participate in the program. A more detailed cost-benefit analysis is provided in the regulatory impact analysis that accompanies this rule.

II. Background

HERA was major housing legislation enacted to reform and improve the regulation of the GSEs—Fannie Mae and Freddie Mac, strengthen neighborhoods hardest hit by the foreclosure crisis, enhance mortgage protection and disclosures, and maintain the availability of affordable home loans. The reform of the GSEs is provided in the Federal Housing Finance Regulatory Reform Act of 2008, which is Division

A, Title I of HERA. Section 1131 of Division A amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (the Act) to add a new section 1337 entitled “Affordable Housing Allocations” and a new section 1338 entitled “Housing Trust Fund.”

Section 1337 of the Act provides for the HTF (and other programs) to be funded with an affordable housing set-aside by Fannie Mae and Freddie Mac. The total set-aside amount is equal to 4.2 basis points (.042 percent) of the GSEs' new mortgage purchases, a portion of which is directed to the HTF. Under section 1337 of the Act, the Director of the Federal Housing Finance Agency (FHFA), the independent federal agency with oversight of the GSEs, has the authority to suspend Fannie Mae's and Freddie Mac's affordable housing contributions if such contributions were to have an adverse impact on the financial stability of the GSEs, as described in section 1337(b). Shortly after being placed in conservatorship in 2008, the GSEs were instructed by the FHFA to suspend the contributions.

On December 11, 2014, the Director of FHFA issued a letter to the GSEs that reinstated the GSE contributions under section 1337, in accordance with the following terms and conditions (which may be supplemented or modified by specific guidance or directive from FHFA). During each GSE fiscal year (which runs from January 1 to December 31), commencing with the GSE's fiscal year 2015 and in each fiscal year thereafter, each GSE will set aside an amount equal to 4.2 basis points of each dollar of unpaid principal balance of its total new business purchases during the fiscal year for allocation in accordance with section 1337(a). Within 60 calendar days after the end of each fiscal year commencing with fiscal year 2015 and for each fiscal year thereafter, the GSEs will allocate to the HTF the amount set aside unless during the fiscal year the GSE has made a draw from the Department of the Treasury under the terms of the Senior Preferred Stock Purchase Agreement (SPSPA) or unless the allocation would cause the GSE to have to make a draw from the Treasury Department under the terms of the SPSPA. If the GSE has made a draw from the Department of the Treasury under the terms of the SPSPA during fiscal year 2015 or makes a draw during a subsequent fiscal year or if the allocation would cause the GSE to make a draw for that fiscal year, the GSE will make no allocation for the fiscal year for which the draw was made or for any fiscal year in which it is determined that

the allocation would cause a draw, and the set aside will be reversed for that fiscal year.

The letter from FHFA also noted that although the profit levels the GSEs experienced since 2012 are not expected to be sustainable, reasonable projections indicate that the GSEs will remain profitable for the foreseeable future. FHFA continues to monitor the financial condition of the GSEs and retains the authority to revise or reverse the decision at any time in accordance with the provisions of section 1337(b). Accordingly, HUD is proceeding with this rule to implement the HTF.

Congress authorized the HTF with the stated purpose of: (1) Increasing and preserving the supply of rental housing for extremely low-income (ELI) families with incomes between 0 and 30 percent of area median income and very low-income (VLI) families with incomes between 30 and 50 percent of area median income, including homeless families, and (2) increasing homeownership for ELI and VLI families. HUD's periodic reports to Congress on worst-case needs for affordable rental housing document that shortages of affordable rental housing for ELI and VLI families have grown more severe. A household defined as experiencing worst-case housing needs means that the household has an income at or below 50 percent of the area median income, receives no housing assistance, and has a severe rent burden (paying more than half of its income for rent) and/or lives in severely inadequate conditions (e.g., incomplete plumbing). As of 2011, the combined number of ELI and VLI renters with worst-case housing needs was 8.48 million, or 44 percent of all ELI and VLI renters (19.27 million). Because extremely low income households also constitute by far most (61.1 percent) very low-income renters, nearly three out of four (73.3 percent) households with worst case needs had extremely low incomes during 2011.¹

There is a documented shortage of low-cost rental units, as builders and housing providers are unable to construct, finance, and operate a sufficient supply of rental housing affordable to ELI and VLI households. In 2011, for every 100 ELI renters, on average, there were only 36 affordable units available, and for every 100 VLI renters nationwide, only 65 rental units

¹ See HUD's Worst Case Housing Needs 2011 Report to Congress at http://www.huduser.org/portal/Publications/pdf/HUD-506_WorstCase2011_reportv3.pdf. See page 7.

available.² The HTF will provide funds to produce additional units affordable to ELI and VLI households with the greatest need, thus increasing the supply and reducing the most critical component of the existing shortage.

Housing Trust Fund—Formula Allocation

Section 1338 of the Act directs HUD to establish, through regulation, the formula for distribution of amounts made available for the HTF. The statute specifies that only certain factors are to be part of the formula, and assigns priority to certain factors. HUD's proposed formula for the allocation of HTF funds was published for public comment on December 4, 2009, at 74 FR 63938.

Housing Trust Fund—Administration of the Fund

In addition to the statutory direction to establish by regulation a formula for the allocation of HTF funds, section 1338 of the Act directs HUD to establish and manage the HTF, the purpose of which is to provide grants to States for use to: (1) Increase and preserve the supply of rental housing for ELI and VLI families, including homeless families; and (2) increase homeownership for ELI and VLI families. Section 1338 of the Act also directs HUD to establish regulations to administer the HTF, and this rule presents the regulations that will govern the HTF, on an interim basis, as provided in the Summary of this rule.

HUD's proposed rule for the administration of the HTF funds was published for public comment on October 29, 2010, at 75 FR 66978. HUD proposed to codify the HTF regulations in a new subpart N of 24 CFR part 92. Part 92 contains the regulations for HUD's HOME Investment Partnerships program (HOME program). The HOME program is the largest federal block grant program that produces affordable housing for very low-income households. The HOME program provides formula grants that communities use, often in partnership with local nonprofit groups, to fund a wide range of activities that build, buy, and/or rehabilitate affordable housing units for rent or homeownership. The HTF will operate in substantially the same manner, by providing formula grants to States used to develop affordable housing units for rent or homeownership. In addition, the grant activities in both programs require the

same grantee administration and HUD oversight functions.

III. Overview of Key Changes Made in Interim Rule

This interim rule largely adopts the provisions of the proposed rule, although HUD is making some changes based on public comments and other considerations. The following highlights key changes made to the proposed rule at this interim rule stage:

- The HTF regulations will be codified in a new part 93. While the HTF regulations have been synchronized with the HOME program regulations for the reasons set forth in the preamble to the proposed rule, HUD agrees with commenters that it would be clearer to place the HTF regulations into a new 24 CFR part. Therefore, the HTF formula allocation and program administration regulations are now found in 24 CFR part 93.

- The HTF proposed rule was published prior to the publication of the HOME final rule. (The HOME final rule published on July 24, 2013, at 78 FR 44638.) In order to synchronize the applicable requirements of the HTF regulations with those of the HOME regulations, HUD has revised several provisions in the HTF proposed rule. The proposed provisions revised by this interim rule include definitions, eligible costs, eligible administrative and planning costs, property standards, inspections, income determinations, tenant protections and selections. For some of the proposed provisions revised, only minor word changes were made so that the language in the HTF regulations matches the HOME regulations, while in other sections the exact language of certain HOME regulations was incorporated in the HTF regulations.

- HUD removed the proposed regulatory sections on property standards (§§ 92.741–92.745) that require HTF units to meet Energy Star and Water Sense certifications. Since issuance of the HTF proposed rule and the HOME program final rule, HUD proposed, in a notice published in the **Federal Register** on April 15, 2014, at 79 FR 21259, to adopt revisions to the 2006 International Energy Conservation Code (IECC) and to the 2004 energy codes of the American Society of Heating, Refrigerating, and Air-conditioning Engineers (ASHRAE), and apply these revised standards to the HUD programs covered by the Energy Independence and Security Act of 2007 (EISA). The covered HUD programs include the HOME program, and HUD also applies these standards to HTF to

synchronize with the standards to be applied to the HOME program.

- At the proposed rule stage, HUD proposed to facilitate the use of HTF funds in transit-oriented development by proposing a different definition of commitment of HTF funds for transit-oriented development projects. HUD removes this definition in this interim rule and instead grantees will determine how best to use HTF funds in transit-oriented development projects within the requirements for commitment and allocation plans established in this rule.

- HUD adds a process by which minimum grant awards will be determined if the amount of funds in the HTF, in any given fiscal year, is insufficient to award each grantee a minimum grant of \$3 million.
- The HTF regulations regarding operating cost assistance and operating cost reserves have been modified. In response to public comment to allow more flexibility for grantees to provide operating cost assistance, the limit on the amount of operating cost assistance and operating cost reserves that a grantee may award from its annual grant was increased from 20 percent to one third. In addition, the requirements for operating cost reserves will differ depending on the source of funds for the HTF. For non-appropriated funds (*i.e.*, the allocations from Fannie Mae and Freddie Mac) that become available for the HTF formula distribution, grantees will be allowed to fund operating cost reserves at the amount required for a period of up to 30 years (the term for the period of affordability for each HTF-assisted project). However, if appropriated funds become available for HTF, grantees will be allowed to fund operating cost reserve for a period of no more than five years, as provided in the proposed rule and retained in this interim rule. At the proposed rule stage, HUD did not propose to allow use of HTF funds for public housing. This interim rule allows the use of HTF funds (1) in connection with the Choice Neighborhoods (Choice), and low-income housing tax credit (LIHTC) programs for construction of new units that replace existing public housing properties; and (2) for the rehabilitation of existing public housing units in connection with the Rental Assistance Demonstration, Choice and LIHTC programs.

IV. Discussion of Public Comments and HUD Responses

The public comment period for the proposed formula rule closed on February 2, 2010. HUD received 13 public comments on the proposed formula rule. Commenters included

² See HUD's *Worse Case Housing Needs 2011 Report to Congress* at page 9.

local housing and community development agencies, housing groups, housing authorities, trade associations, and individuals. A majority (eight) of the commenters wrote in support of the rule or portions of it, including a national advocacy organization that fully endorses the proposed rule. HUD is not addressing these favorable comments because they do not raise issues which require a response. Other comments are discussed below. The public comments on the proposed formula rule can be found at: <http://www.regulations.gov/#!docketDetail;D=HUD-2009-0149>.

The public comment period for the proposed program rule closed on December 28, 2010. HUD received 93 comment letters; commenters included State and local housing and community development agencies, housing groups, housing authorities, trade associations, and individuals. The comment letters included general comments about the proposed rule and statutory requirements for the HTF, as well as suggestions for changes to specific provisions in the proposed rule. The public comments on the proposed program rule can be found at: <http://www.regulations.gov/#!docketDetail;D=HUD-2010-0101>.

Issues raised in public comments on the proposed formula and proposed program rule and HUD's responses to these comments follow.

Part 91—Consolidated Submissions for Community Planning and Development Programs (Consolidated Plan Revisions)

The proposed program rule proposed to make conforming changes to the Consolidated Plan regulations at 24 CFR part 91 to require information related to the HTF to be included in State or local government strategic and annual action plans. As stated at § 91.220 and § 91.320, HUD proposed to require that the action plan must include the HTF allocation plan.

Comments: HUD received several comments which suggested additional required elements be added to the allocation plan, including: National standards for green, healthy, sustainable development will be met by HTF units; caps on operating assistance; transit-oriented development projects; an explanation of the State's decision to use subgrantees, criteria for selecting subgrantees, and a method for distributing funds among subgrantees. One commenter suggested that HUD require the allocation plans for HTF

funds to specifically prioritize transit-oriented development. One commenter suggested specific revisions to the language for the sake of further clarity, such as cross references between the definition of HTF funds at § 92.702 in § 92.220(l)(4)(i) and § 92.320(k)(5)(l). A commenter suggested that HUD require, at § 92.725(c), that the subgrantee's HTF allocation plan be consistent with the State's HTF allocation plan.

Similarly, a commenter suggested that HUD revise § 92.220(l)(4)(i) and § 92.320(k)(5)(i) so that they have identical language and requirements. One commenter suggested that the housing market characteristics in the HTF formula be added to the general housing market characteristics required in the consolidated plan at § 92.210(a) and § 92.310(a). Another commenter recommended that the rule require HTF allocation plans to certify that the HTF funds will not be subject to State or local laws and policies that impose requirements for subsidized housing development that exceed the requirements for similar residential development not involving subsidies. Two commenters stated that the proposed rule should not restrict the types or locations of HTF units, but instead should retain maximum flexibility to meet local needs.

HUD Response: HUD appreciates the concern expressed by commenters that HTF allocation plans at the State and local level mirror each other so that the HTF funds expended are targeted to the needs identified in the state plans. However, it is possible that a State or State-designated entity would provide HTF funds to different subgrantees for different types of projects and programs throughout the state to address various needs. In these situations, having identical State and local plans would not be practicable. To address these concerns, rather than modifying part 91 requirements related to HTF allocation plan, at this interim rule stage, HUD modified language at § 93.404 (§ 92.774 of the proposed rule) to require that grantees include executed written agreements with subgrantees that specify allowable programs and requirements.

An explanation of the State's decision to use subgrantees, criteria for selecting subgrantees, and method for distributing funds among subgrantees are required at § 91.320(k)(5). The housing market characteristics used in the HTF formula are reflected in the analyses required in the consolidated plan. In response to

comments about the locations where HTF funds will be used, HUD notes that the HTF statute does not preempt State or local law, and the regulation cannot prevent the use of HTF funds in places that impose requirements on subsidized projects that are not in violation of Federal laws.

General Comments on Promulgation of the HTF Regulations as Subpart N of Part 92 of the Proposed Rule

HUD specifically solicited input from HTF grantees and interested parties on HUD's proposed coordination of the HOME program and HTF regulations, as well as additional or alternative ways to better coordinate and use HTF funds with funding from other Federal, State, local programs, or private sources typically used to produce mixed-income affordable housing developments.

Comments: Some commenters expressed concern that by including HTF regulations in Subpart N of the HOME program regulation, the HTF program will lack an identity as a separate program.

HUD Response: HUD agrees with commenters that the regulations should be located in a new part 93, as this approach highlights HTF as a separate program, and this rule codifies the regulations in new part 93. However, many of the requirements are the same for both the HOME and HTF programs (e.g., administrative requirements; monitoring, site and neighborhood standards; and affirmative marketing), therefore, in moving the HTF regulations as proposed in part 92 for the HTF to part 93, HUD repeated the requirements in the HOME rule that also apply to the HTF.

Several commenters also called for streamlining between HTF and other programs and asked that HUD avoid duplicative requirements. Because many HTF grantees also administer the HOME program, streamlining the regulations this way will help grantees avoid having to create entirely new or separate structures to administer HTF funds, and this may help grantees develop and deliver more affordable housing sooner to households and communities in need.

In addressing public comments on specific provisions in the proposed rule, this preamble will refer to the regulatory sections as they were originally proposed in part 92. The following table matches the proposed rule sections with the new sections in this interim rule:

Proposed	Final	Subject
Subpart A—General		
92.701	93.1	Overview.
92.702	93.2	Definitions.
92.703	93.3	Waivers.
Subpart B—Allocation Formula; Reallocations		
92.710	93.50	Formula Allocation.
92.711	93.51	Formula Factors.
92.712	93.52	Minimum State Allocations.
92.713	93.53	Federal Register Notice of Formula Allocations.
92.714	93.54	Reallocations by Formula.
Subpart C—Participation and Submission Requirements; Distribution of Assistance		
92.720	93.100	Participation and Submission Requirements.
92.725	93.101	Distribution of Assistance.
Subpart D—Program Requirements		
92.726	93.150	Site and Neighborhood Standards.
92.727	93.151	Distribution of Assistance.
Subpart E—Eligible and Prohibited Activities		
92.730	93.200	Eligible Activities: General.
92.731	93.201	Eligible Project Costs.
92.732	93.202	Eligible Administrative and Planning Costs.
92.734	93.203	HTF Funds and Public Housing.
92.735	93.205	Prohibited Activities and Fees.
Subpart F—Income Targeting		
92.736	93.250	Income Targeting: Rental Units.
92.737	93.251	Income Targeting: Homeownership.
Subpart G—Project Requirements		
92.740	93.300	Maximum Per-Unit Subsidy Amount, Underwriting, and Subsidy Layering.
92.741	93.301	Property Standards.
92.746	93.302	Qualification as Affordable Housing: Rental housing.
92.747	93.303	Tenant Protections and Selection.
92.748	93.304	Qualification as Affordable Housing: Homeownership.
92.749	93.305	Qualification as Affordable Housing: Modest Housing Requirements for Homeownership.
92.750		
Subpart H—Other Federal Requirements		
92.760	93.350	Other Federal Requirements and Nondiscrimination; Affirmative Marketing.
92.761	93.351	Lead-Based Paint.
92.762	93.352	Displacement, Relocation, and Acquisition.
92.763	93.353	Conflict of Interest.
92.764	93.354	Funding Accountability and Transparency Act.
Subpart I—Program Administration		
92.770	93.400	Housing Trust Fund (HTF) Accounts.
92.771	93.401	HTF Grant Agreement.
92.772	93.402	Program Disbursement and Information System.
92.773	93.403	Program Income and Repayments.
92.774	93.404	Grantee Responsibilities; Written Agreements; Onsite Inspections; Financial Oversight.
92.775	93.405	Applicability of Uniform Administrative Requirements.
92.776	93.406	Audit.
92.777		Closeout.
92.778	93.408	Recordkeeping.
92.779		Performance reports.
Subpart J—Performance Review and Sanctions		
92.780	93.450	Accountability of Recipients.
92.781	93.451	Performance Reviews.
92.782	93.452	Corrective and Remedial Actions.

Proposed	Final	Subject
92.783	93.453	Notice and Opportunity for Hearing; Sanctions.

Definitions Proposed § 92.702; Final § 93.2

In § 92.702(a), HUD proposed that several definitions in the HOME program regulations (24 CFR 92.2) be applicable to the HTF. In § 92.702(b), HUD outlined key definitions applicable to the HTF, including: “Commitment,” several definitions related to energy efficiency, “Grantee,” “Recipient,” “State,” “State-Designated Entity,” and “Subgrantee.” HUD received several comments regarding the language proposed to define terms applicable to the HTF.

Commitment

To facilitate transit-oriented development projects, the proposed definition of “commitment” permitted a unit of general local government to acquire the land for a transit-oriented development project in advance of having specific project plans. Specifically, HUD proposed that the unit of general local government must hold title to the land for the transit-oriented development project; the proposed rule allowed 36 months from the date of acquisition of the property for a transit-oriented development project to commit additional funds to a specific project on the property.

Comments: HUD received several comments regarding this proposed definition of and deadline for “commitment” for transit-oriented development projects. Some commenters suggested the deadline to commit additional funds to transit-oriented development should be extended to 42 months, while others suggested 48 months, and one commenter suggested 60 months. Another commenter suggested that the commitment deadline for transit-oriented development should be less than 36 months.

Some commenters stated that the proposed definition of “commitment” for transit-oriented development should be revised to allow non-local government entities to commit the few funds necessary to comply with the rule and two commenters suggested that these non-local government entities be allowed to hold title to the transit-oriented development property. A few commenters stated that the rule’s emphasis on transit-oriented development gives preference to urban areas, and asked that the rule provide a framework for balancing transit-oriented

development goals with rural areas that have limited or no transit services. Commenters asked HUD to instruct States to give the same priority to developments meeting the greatest rural needs as is given to transit-oriented development in urban areas. Some commenters stated that the rule should not mandate that all projects be located in a sustainable community since some States do not have fully developed transit systems, and the rule should provide flexibility to meet the varying needs of States.

Another commenter suggested that the rule should require a minimum percentage of HTF funds be expended for transit-oriented development and mixed-income housing development. A few commenters supported allowing HTF funds to be used in combination with other government programs to leverage sources for creating a transit-oriented development land acquisition or land bank program. A commenter proposed a more detailed definition for transit-oriented development that is intended to better target developments that promote transit ridership and reduce motor vehicle trips, remove the requirements for mixed-use and mixed-income development, require that developments within transit-oriented development be along a walkable route, and clarify what constitutes a “transit facility.” A few commenters suggested various methods to incentivize development of housing for ELI families in transit-oriented development projects that are accessible to transit and employment centers.

Several commenters expressed concern over potential abuses of the different commitment deadlines and asked HUD to include additional requirements in the final rule to ensure that grantees do not tie up funds, *e.g.*, to prevent local governments from using HTF funds to serially purchase land and hold it as if “land banking.” Some commenters stated that the rule should require that if the original land purchased is not used for ELI households, then the recipient must place the planned ELI housing within the same transit-oriented development area. A few commenters stated that the rule should also require that the correct zoning be in place before property is purchased for transit-oriented development, and one commenter suggested that the final rule include specific parameters for when property

acquisition for transit-oriented development would be permissible. Finally, one commenter requested that the definition of “commitment” include a mechanism to ensure project completion, such as deadlines, progress schedules, or a recapture mechanism.

HUD Response: HUD appreciates the comments regarding how HUD may provide incentives to encourage the use of HTF funds to develop housing affordable to ELI households that is also accessible to transit and employment centers. However, HUD acknowledges and agrees with the concerns expressed by many commenters that a separate commitment deadline for HTF funds used in transit-oriented development may cause a decrease in the amount of HTF units produced.

Transit-oriented development is not required in the HTF statute or regulations. As proposed, § 92.725 stated that grantees are responsible for distributing HTF funds throughout the State according to the State’s assessment of the priority housing needs within the State, as identified in the HTF allocation plan, which is part of the State’s consolidated and annual action plan. These plans contain several analyses of priority housing needs. Based on these identified priority needs, grantees may choose to prioritize development of HTF-assisted units near transit access and sustainable development.

HUD agrees with commenters that the separate definition of commitment for transit-oriented development could lead to “land banking.” Land acquisition for banking purposes is not an eligible activity in the HTF statute, and HUD does not seek to encourage the use of HTF funds for “land banking.” Based on the comments received, HUD decided that use of HTF funds in transit-oriented development projects is best addressed at the State and local level, and that it is not necessary at this time to establish a separate definition or deadline related to the use of HTF funds for transit-oriented development projects. Each grantee may include incentives and priorities in its HTF allocation plan to further promote sustainable development that is appropriate to the local communities where housing developed with HTF funds will be located.

This rule, at § 93.2, eliminates the separate definition of commitment for transit-oriented development.

State-Designated Entity, Grantee, Recipient

In the proposed rule, a State-designated entity was defined as a State housing finance agency, tribally designated housing entity, or any other qualified instrumentality of the State that is designated by the State to be the grantee.

Comments: One commenter recommended that the definition of “State-designated entity” be revised to include “housing community development entity.” A commenter stated that the definitions of “grantee” and “recipient” should be consistent between HOME and HTF. Other commenters suggested that the rule be revised to explicitly state that public agencies, local governments, public housing authorities, non-profit entities, and for-profit entities are eligible recipients.

HUD Response: The terms “state-designated entity” and “recipient” are defined in the statute. This rule includes examples of the types of entities, such as public housing agencies, that may be eligible recipients providing that they meet the statutory qualifications for a recipient.

Extremely Low- and Very Low-Income Families

The HTF statute contains definitions of extremely low and very low-income families based on percent of median income, with adjustments for family size (30 percent of area median income (AMI) for extremely low and 50 percent of AMI for very low income).

Comments: Some commenters stated that the proposed definitions of “very low-income families” and “extremely low-income families” are inconsistent with the statute. A few commenters requested HUD provide a definition of “rural area” in the definition of “very low-income families.” Other commenters suggested that the HTF should adopt the definition of “family” as used in the HOME program. A commenter requested the term “household” replace “family” throughout the rule.

HUD Response: While the terms “family” and “household” do not have the same meaning (a “household” can comprised more than one family), HUD acknowledges that the terms are sometimes used interchangeably in statute, regulation and guidance (*i.e.*, HOME uses the part 5 definition of “family” at 24 CFR 5.403, and defines household as one or more persons residing in a unit).

HUD agrees with commenters that the HTF statute does not allow for the same

adjustments in income as in the HOME program and modified the regulatory language at § 93.2 (from § 92.702 of the proposed rule) to reflect only the adjustments allowed by the HTF statute.

For the purposes of the definition of very low-income families, in this interim rule, HUD defines the term “rural” based on the term “metropolitan” as defined by the Office of Management and Budget. All “non-metropolitan” areas will be considered “rural.”

Allocation Formula Proposed § 93; Final § 93, Subpart B

Comments: A commenter states that the need factors should be weighted equally to ensure fair distribution of resources. Another commenter specifically supports the 50 percent weight assigned to factor 1 (shortage of units), and the 25 percent weight assigned to factor 3. A commenter states, in the absence of information about how much of an increase California would receive compared to the proposed allocation, and the substantial housing needs of California’s low and very low-income population, that the factors should be weighted in accordance with alternative three, under which the first factor would be weighted at 60 percent and the other factors weighted at 13.3 percent. Another commenter states that the extremely low-income focus of this program means that it should be a key resource for assisting the homeless, and the formula allocation should reflect that priority.

HUD Response: Section 1338(c)(3)(C) of the Act requires the formula to give priority emphasis and consideration to the first factor in section 1338(c)(3)(B)(i), and therefore the factors cannot be weighed equally. The proposed rule reflected this priority consideration by weighting this factor higher than the other factors in the proposed allocation formula. The interim rule is adopting the proposal that the two factors addressing the needs of extremely low-income households, Factors 1 and 3, have a combined weight of 75 percent in keeping with the statutory targeting of funds.

The Regulatory Impact Analysis (RIA) for the formula allocation HTF proposed rule was issued on December 4, 2009, and can be found on HUD’s Web site (<http://www.huduser.org/portal/publications/pubasst/riaforhtf.html>). The RIA describes in detail the alternative weight structures that HUD analyzed in developing the HTF allocation formula, the resulting impacts of each alternative on the States, and the analysis that supports HUD’s selection

of the alternative in the proposed allocation formula. The proposed formula strikes a balance between the high levels of housing needs in California and other States, as well as the competing priorities discussed in the RIA.

An extremely low-income household, by statutory definition, means a household whose income does not exceed 30 percent of the area median income, with adjustments for family size. Homeless individuals and families who qualify as extremely low-income will be eligible for HTF units. The combined weight of 75 percent for the two factors that address the needs of extremely low-income households, factors one and three, reflects the statutory targeting of funds to extremely low-income households in the proposed formula. Furthermore, section 1338(a)(1)(A) of the Act specifically states that the purpose of the HTF is “to increase and preserve the supply of rental housing for extremely low- and very low-income families, including homeless families . . .”

Data Used in the Allocation Formula

Comments: A commenter states that homeless households should be included in the aggregate number of extremely low-income renter households to determine the true need. Data are readily available from Continuum of Care (CoC) programs and the Homeless Management Information System (HMIS). Another commenter states that more detail is needed on the sources of data the proposed formula uses. A commenter states that HUD should state exactly which American Community Survey data it will use, whether such data will be updated and used every year, and at what point 2010 Census data will be used. The commenter also states that HUD should clarify which RSMean Cost Survey data will be used, and recommends data specific to multifamily construction. This commenter states that HUD should advise what sampling method will be used. Whatever method is used, the commenter stated that HUD should recognize that most multifamily construction is in the higher-cost areas.

HUD Response: The proposed allocation formula incorporated the required statutory factors in section 1338(c)(3)(B). Consistent with the Community Development Block Grant (CDBG) and HOME formulas, the data source used to determine the number of extremely low-income renters with housing problems for factor three will be the most currently available data

from the United States Census Bureau.³ For HTF allocations in Fiscal Year (FY) 2016, the most current data will be a special tabulation of the latest available three-year average data from the American Community Survey.⁴ Census standard tabulation data do not provide counts of households by the income breaks required by statute so HUD must request a special tabulation of American Community Survey data to calculate the HTF formula. HUD is using the three-year average data to avoid problems with year-to-year bias in the data caused by small samples in some of the smaller population states. These data do not include homeless individuals and families.

HUD appreciates the commenter's view that homeless families should be included in the count of extremely low-income families. HUD has considered the idea of including CoC counts or (HMIS) counts of homeless people in the counts for extremely low-income. HUD has decided not to implement these suggestions for two reasons:

- Inconsistent and incomplete data.

Neither CoC nor HMIS data are complete for all parts of the country and the method of data collection is somewhat different from place to place. That makes the data poorly suited for an allocation formula because they do not have full national coverage and different data collection methods may result in bias toward one place over another.

- Incentive bias. Even when the data have full coverage, HUD is unlikely to use CoC or HMIS data for any allocation formulas because the data are being reported by grantees. HUD is concerned that some grantees may adjust their method of reporting if they perceive they might get a different funding allocation based on that reporting.

The RSMeans construction cost data used in the formula are the RSMeans Square Foot Costs. Specifically, HUD used city-level location factors for residential construction to prepare state-level estimates of the relative cost of residential construction. In developing these State estimates, HUD did not select a subset or sample of cities. Rather, every city with a published location factor was included, and location factors were weighted in proportion to city populations. Data are not available for rural areas or for multifamily residential construction specifically. However, because construction costs are generally higher in population centers, HUD believes that the methodology adequately

accommodates the commenter's concern about multifamily construction in costly areas. High-cost areas are reflected in the use of urban data to prepare State estimates as well as by the use of population weighting to ensure that the most populated cities receive their due priority. HUD intends to use the most recent available cost data and population data in developing future estimates.

Minimum Allocations

The interim rule contains a new provision to address minimum grant allocations. As noted earlier in this preamble, section 1338(c)(4)(C) of the Act directs that each of the 50 States and the District of Columbia is to receive a minimum grant of \$3 million. This section of the statute further provides that if the formula amount determined in any fiscal year would result in an allocation of a minimum grant of less than \$3 million to any of the 50 States or the District of Columbia, the allocation for any such State or the District of Columbia shall be allocated a minimum grant of \$3 million, and the increase shall be deducted pro rata from the allocations made to all the other States.

The Act did not envision a situation in which the HTF lacked sufficient funds to award each of the 50 States and the District of Columbia a minimum grant of \$3 million. After the deposits are made to the HTF for a fiscal year, section 1338(c)(4)(B) of the Act requires HUD to make allocations to its grantees. To give meaning to both of these statutory sections, HUD interprets the statute to require the allocation of grants even if the grants are less than the \$3 million minimum. If the amount for a fiscal year is insufficient to provide the minimum allocations, HUD will publish a notice in the **Federal Register** for comment, describing an alternative allocation method.

Participation and Submission Requirements; Distribution of Assistance Proposed §§ 92.720–92.725; Final §§ 93.100–101

Allocation Plan/Participation and Submission Requirements § 92.720

In § 92.720, HUD proposed requiring each State to notify HUD of its intent to participate in the HTF program and to have a consolidated plan that contains its HTF allocation plan required by the Act. HUD proposed to implement the requirement for an HTF allocation plan by amending its regulations in 24 CFR 91.220 and 91.320 to include these requirements in the consolidated plans of grantees and, where applicable,

subgrantees. Section 92.720 of the proposed rule directed States to include the HTF allocation plan in the consolidated plan and follow the citizen participation requirements found in the consolidated plan regulations in 24 CFR part 91.

Comments: Several commenters expressed concern that the proposed requirements do not place enough emphasis on public participation and transparency.

HUD Response: HUD recognizes the commenters' concerns but believes the requirements adopted in this rule provide for sufficient public input on the allocation of HTF funds without the need for additional or new citizen participation requirements. Section 92.720(b) of the proposed rule directed States to include the HTF allocation plan in the consolidated plan and follow the citizen participation requirements in the consolidated plan regulations in 24 CFR part 91. The HTF allocation plan must consider the merits of the application in meeting the priority housing needs of the State. The rule provides flexibility to allow each grantee to include incentives and priorities in its HTF allocation plan that are appropriate to the communities where housing developed with HTF funds will be located.

The language is adopted in this rule as proposed.

Distribution of Assistance: HTF Grantees, Subgrantees, and Recipients § 92.725

HUD proposed that a formula grant be provided to each State for each year that funds are made available for the HTF. In § 92.725, HUD described the proposed ways HTF funds will flow to the communities and recipients, as well as the participation and submission requirements for grantees receiving an HTF allocation.

Comments: Some commenters suggested that HTF funds should be allocated directly to municipalities and local participating jurisdictions, as is done with other Community Planning and Development programs (e.g., HOME, CDBG, Emergency Solutions Grants) because States may be unsuited to determine local housing priorities and unable to effectively administer the HTF. In addition, they stated that passing the funding through the State delays the use of funds at the local level, and local governments are more in tune with local needs.

Several commenters stated that HUD's rule should ensure adequate allocation to rural areas, and that allocations should be made based on the relative or proportional need of frontier, rural, and

³ See <http://www.census.gov/housing/>.

⁴ See http://www.census.gov/acs/www/data_documentation/data_main/.

urban areas. A few commenters suggested that the final rule should require funding to be allocated by formula to areas of greatest need, and adjusted for high-cost living areas and the lack of affordable housing.

HUD Response: States and State-designated entities are the only permissible grantees in the HTF statute. HUD does not have the authority to designate local governments as grantees. An HTF grantee may choose to distribute HTF funds through one or more subgrantees. A subgrantee may be a State public agency or a unit of general local government. Section 91.320(k)(5) requires the action plan to reflect the State's decision to distribute HTF funds through grants to subgrantees, and § 92.725(d) requires the grantee to ensure that its subgrantees comply with the HTF requirements and carry out the responsibilities of the grantee. The HTF allocation formula is statutorily prescribed and HUD does not have the authority to change the allocation method. However, as described in § 92.725(b), each grantee is responsible for distributing HTF funds throughout the State according to the State's assessment of the priority housing needs within the State, as identified in the State's approved consolidated plan (which will include the HTF allocation plan). The HTF allocation plan must describe the distribution of the grant and priority housing needs, including rural housing needs.

The language is adopted in this rule as proposed.

Program Requirements Proposed
§§ 92.726–92.727; Final §§ 93.150

Site and Neighborhood Standards
§ 92.726

In § 92.726, HUD proposed that the site and neighborhood standards contained in the HOME program regulations at § 92.202 apply to the HTF.

Comments: A commenter suggested that HUD adopt all the site and neighborhood standard criteria applicable to existing housing being considered for project-based vouchers rather than limiting the criteria to new construction projects. The commenter reasoned that HTF, unlike HOME, will fund rehabilitation projects. Another commenter suggested that HUD's rule include a provision that requires site selection to occur in a manner that will not exclude people with disabilities. A commenter stated that the rule should allow HTF funds to be held when local opposition has delayed a project or when exclusionary zoning is being challenged.

HUD Response: HUD is adopting the site and neighborhood standards from § 92.202 of the proposed rule in new § 93.150, with an updated cross-reference to the applicable standard for new construction projects at 24 CFR 983.57(e). As with the HOME program, HUD is not applying site and neighborhood standards to rehabilitation projects under HTF. However, if project-based vouchers are used in an HTF rehabilitation unit, the site and neighborhood standards for project-based vouchers will apply. In addition, the requirements of 24 CFR part 8 (which implement section 504 of the Rehabilitation Act of 1973) apply to the HTF, and specifically address the site selection with respect to accessibility for persons with disabilities.

Income Determinations § 92.727

In § 92.727, HUD proposed a definition for "annual income" and described the process for determining the annual income of tenants and homebuyers for eligibility in HTF-assisted housing.

Comments: A commenter requested the proposed language be revised to further clarify which set of income determination provisions are applicable to the HTF. Another commenter recommended that HUD's rule allow residents and applicants to contest income determinations. Another commenter expressed concern that the use of the Enterprise Income Verification can pose a problem for recently institutionalized persons, as it can cause significant delays.

HUD Response: HUD appreciates the suggestions but the income determination provisions provided in this HTF rule are those that HUD uses in its HOME program rule, which HUD believes work well. Therefore HUD is not inclined to change these provisions. The income determinations will be made in accordance with the HTF program requirements, which mirror the HOME program requirements, and do not involve the use of the Enterprise Income Verification system.

Eligible and Prohibited Activities
Proposed §§ 92.730–92.735; Final
§§ 93.200–93.205

In §§ 92.730–92.735, HUD proposed requirements that govern eligible and prohibited activities, eligible project costs, and planning and administrative costs. Allowable and prohibited fees were also addressed in these sections.

Eligible Activities § 92.730

In § 92.730, HUD set forth HTF-eligible activities. Section 1338(c)(7)(A)

of the Act provides that HTF funds may be used for assistance for the production, preservation, rehabilitation, and operating costs of rental housing. To achieve the goal of using HTF funds primarily for the production of new affordable units, HUD proposed to limit the amount of HTF funds that may be used for operating cost assistance to 20 percent of each annual grant.

Section 1338(c)(7)(B) provides that the production, preservation, and rehabilitation of housing for homeownership, including forms of down payment assistance, closing cost assistance, and assistance for interest rate buy-downs, are eligible activities. HTF funds may be used only for units that will be the principal residence of eligible families who are first-time homebuyers.

Section 1338(c)(10)(A) of the Act provides that not more than 10 percent of the annual grant may be used for homeownership activities. If a grantee chooses to implement a homeownership program with HTF funds, HUD proposed requiring grantees to perform underwriting analysis.

Eligible Activities: General § 92.730(a)

Comments: HUD received several comments which suggested the rule expand the list of eligible activities. A commenter stated that HUD's rule should allow for HTF funds to be used in projects already underway. Another commenter suggested HUD add explicit language clarifying that HTF funding may be used in mixed-income developments. A few commenters suggested that HUD's rule permit HTF funds to be used for development costs associated with laundry facilities and community space located in buildings which are separate from residential space. A commenter requested additional clarification regarding the prohibition on charging laundry access fees does not impact the ability to impose reasonable charges for the use of a washer or dryer. Another commenter recommended that HUD's rule include language that provides a basis for charging impact fees, and clarifies "reasonable and necessary costs." A commenter asked for a definition of "non-luxury," and stated that this requirement, as it applies to construction costs, is impractical to apply. Another commenter suggested that HUD allow grantees to charge property owners monitoring costs for the entire period of affordability up front and include monitoring costs as an eligible use of HTF funds. A commenter recommended that refinancing costs be included as an eligible cost.

Several commenters objected to allowing transitional housing as an eligible activity because it does not meet the intent of increasing access to rental properties available to ELI households and does not appear in the authorizing statute. Another commenter expressed concern that there may be conflicts between fair housing laws and transitional housing plans impacting people with disabilities.

Another commenter stated that there should be a greater focus on homeownership in the final rule, and that downpayment assistance programs should constitute an eligible use of HTF funds. A few commenters opposed the first-time homebuyer restriction and recommend the final rule permit the rehabilitation of ELI owner-occupied homes as a more effective means of addressing homeownership for ELI households. Other commenters recommended HUD's rule stress the voluntary nature of using 10 percent of HTF funds for homeownership activities.

HUD Response: This rule makes clear that projects underway when the HTF rule is implemented are not eligible to receive HTF funds. HUD does not agree that HTF funds should be permitted to pay costs for constructing community space or laundry facilities in buildings that are separate from the residential space. Although it is sometimes necessary to provide such space in separate buildings, HUD believes that States should leverage other funds to pay such costs so that HTF funds are used to create as many ELI and VLI units as possible. Nothing in this interim rule prohibits reasonable charges for washing machines.

HUD does not believe that inclusion of a definition of non-luxury in the HTF rule is practical, as amenities considered luxury change over time. For example, air conditioning in certain HUD-assisted housing was considered a luxury item at one time. HTF grantees have experience with ensuring that only non-luxury items are included in housing because they also administer the HOME program, which has similar requirements.

HUD has reconsidered making transitional housing an eligible type of housing in the HTF and agrees with commenters that this type of housing is contrary to the primary purpose of the HTF, which is to increase the supply of permanent affordable housing. Transitional housing is frequently developed to address the needs of homeless persons, to provide housing assistance and services that will enable them to obtain permanent affordable housing. The language in this section

was revised to delete transitional housing as an eligible type of housing.

Monitoring is an eligible administrative cost. This interim rule does not allow grantees to charge property owners monitoring costs for the entire period of affordability "up front" as suggested by commenters but does permit HTF grantees to charge property owners monitoring fees (see § 93.205).

Rehabilitation of housing for existing homeowners is not an eligible activity in the statute. The statute restricts the use of HTF funds for homeownership to first-time homebuyers and limits the amount of each annual HTF grant that may be used for homeownership to 10 percent. Each State is allowed by the statute to determine how it will use HTF funds for homeownership assistance. Downpayment assistance is an eligible activity in the regulation.

The proposed rule made refinancing of existing rental projects permissible as part of rehabilitation when the proportional cost of rehabilitation is greater than the amount of debt refinanced. HUD proposed these restrictions on refinancing in order to synchronize with the HOME program and to facilitate the preservation and rehabilitation of existing housing for ELI and VLI households. These proposed restrictions are therefore retained in this interim rule.

Eligible Project Costs § 92.731

In § 92.731, HUD proposed eligible project costs to include development hard costs, refinancing costs in conjunction with rehabilitation, acquisition of standard projects, development-related soft costs, architectural and engineering fees, project audit costs, staff overhead related to the development of the units, settlement costs, impact fees, the cost to address and meet environmental and historic preservation property standards, operating costs, relocation costs, repayment of construction or other loans, and certain types of costs for construction undertaken before HTF funds were committed to the project.

Operating Cost Assistance and Operating Cost Assistance Reserves (§ 92.731(e))

To achieve the goal of using HTF funds primarily for the production of new affordable units, HUD proposed, in § 92.730(a)(1), to limit the amount of HTF funds that may be used for operating cost assistance to 20 percent of each annual grant. The proposed rule stated that operating cost assistance can be provided for the entire period of affordability, but may be awarded only

in two-year increments from each HTF grant. Operating cost assistance, as defined in § 92.731(e), may include the cost of utilities, insurance, taxes, and scheduled payments to a replacement reserve. The eligible amount of HTF funds per unit for operating costs is determined based on the deficit remaining after the tenant monthly rent payment for the HTF-assisted unit is applied to the HTF-assisted unit's share of monthly operating costs. The written agreement between the grantee and the recipient must set forth the maximum amount of the operating assistance to be provided to the HTF-assisted rental project.

The proposed rule also included operating cost reserves of up to five years worth of operating cost assistance as an eligible activity (§ 92.731(e)(2)). Grantees would be allowed to establish operating cost reserves for specific HTF-assisted projects if necessary to ensure the financial feasibility of a project.

Comments: Several commenters disagreed with the proposed 20 percent cap on the amount of each annual grant that may be used for operating cost assistance and suggested that HUD eliminate any restriction on the amount of each annual grant that may be used for operating cost assistance. Others suggested increasing the cap. Still others recommended that any limits on operating cost assistance should be based on each State's housing needs and should be left to the discretion of the States. Commenters also recommended that HUD impose no restriction on using HTF funds for operating assistance in the absence of Section 8 voucher assistance. Some commenters stated that HTF funding for operating assistance should be limited to HTF-assisted units and units being developed with HTF funds, while others support allowing HTF operating assistance for units funded by other State and Federal programs.

A commenter stated that it will be difficult to attract investors and ensure the long-term financial success of projects without giving States flexibility in determining how to apply HTF funds toward operating assistance. Another commenter stated that the program will encounter underwriting challenges regardless of operating assistance, but depending on the mix of units, there may be sufficient revenue generated to support the properties. Commenters expressed concern that the proposed cap will limit the number of units that can be developed with HTF funds, particularly units that serve ELI households.

A commenter stated that the rule must clarify that States are permitted to limit

and target operating assistance. Commenters recommended that the final rule should permit the initial HTF grant to include sufficient funding for operating assistance or operating reserves to last for the entire term of affordability. A few commenters stated that the final rule should permit the creation of capital reserves aimed at increasing affordability for ELI households.

In response to a request from HUD for input on whether tax abatements can significantly reduce operating costs, one commenter stated that while tax abatements can reduce operating cost, local governments will hesitate to provide tax abatements due to current economic pressures.

A few commenters stated that the time limits for offering operating cost assistance and operating reserves should be eliminated at the final rule stage. Commenters stated that HTF-assisted units that require operating assistance during the first two years will almost certainly need operating assistance throughout the entire term of affordability, and that grantees should have the flexibility to provide more than two years of assistance when faced with underwriting or feasibility concerns. Another commenter stated that the HTF funding should be allowed to capitalize Section 8 transition reserves to encourage private lenders to underwrite HTF-assisted projects with Section 8 project-based assistance. A few commenters recommended that HUD provide guidance in the HTF program guidelines to State grantees on underwriting standards for reinvestment and building reserves to self-finance rehabilitation during the period of affordability.

Lastly, several comments were submitted regarding the use of Section 8 vouchers in conjunction with HTF funds. Some commenters recommended that Section 8 vouchers be awarded along with the HTF funding. Another commenter asks whether there is a unit-based or project-based prohibition on using HTF funds for operating costs when Section 8 project-based vouchers are also involved in the project.

HUD Response: The HTF is primarily a production program meant to add units to the supply of affordable housing for ELI and VLI households. Analyses of the use of HTF funds for both development and operating cost assistance showed that the use of HTF funds for operating assistance could very quickly consume each State's annual grant. This would deter the use of HTF funds for production of additional units, as well as preservation and rehabilitation of units, targeted to

ELI households—the primary purpose of the HTF. HUD also assumes that HTF funds will be combined with other sources to produce and preserve affordable units, mostly in mixed-income projects, and that the HTF will not be the sole source of funding for operating cost assistance. Therefore, establishment of a cap on the amount of HTF funding in each annual grant that may be used for operating cost assistance is appropriate.

However, to provide more flexibility to grantees to develop and finance HTF-assisted projects, this interim rule establishes the cap at up to one-third of each annual grant. This interim rule also makes clear that the cap applies to both amounts used for operating cost assistance as well as the operating cost reserves. Within this cap, each fiscal year the grantee will have discretion in how it awards operating cost assistance to projects. The grantee may apply the one-third limit to all projects or adjust it accordingly, as long as no more than one-third of each annual grant is used for operating cost assistance and for operating cost reserves.

HUD also revised the proposed rule at this interim rule stage to address comments about the way in which operating cost assistance may be provided to a project. This interim rule establishes that a grantee may provide operating cost assistance to a project during the entire period of the affordability for the project. The written agreement between the grantee and the owner that commits funds from an HTF grant received in a single fiscal year may provide operating cost assistance over a period for multiple years as long as the grantee to meet its five-year expenditure deadline in § 93.400(d). Allowing such commitment provides the grantee with flexibility to manage its grant funds when providing operating cost assistance to a project; however, HUD will recapture funds not expended by the five-year deadline. Because operating cost assistance is an eligible activity and may be provided to a project by more than one grant, the prohibition in the rule on providing additional HTF funds to a project during the period of affordability (§ 93.205(a)) does not apply to renewal of funds committed to operating cost assistance. The grantee may renew operating cost assistance for HTF-assisted units during the affordability period by executing written agreements after future fiscal year HTF grants are awarded.

If Section 8 project-based vouchers or other project-based rental assistance is made available to HTF projects for HTF-assisted units, HUD prohibits the use of HTF funds available for operating cost

assistance for those same units, but such limitation will not hinder HTF implementation. Section 93.200(c) of the interim rule (§ 92.730(c) of the proposed rule) requires that only the actual cost of development and operation of HTF units can be charged to the HTF program, and describes the methods for allocating costs and determining HTF units in multi-unit projects. In this interim rule, HUD does not impose a limit on the use of Section 8 project-based vouchers in a project for which HTF is also providing operating cost assistance, as long as the Section 8 project-based voucher is not provided to the same unit receiving HTF operating cost assistance. HUD cannot guarantee that funds for project-based Section 8 or other project-based assistance will be appropriated for HTF-assisted projects; therefore, awards of HTF funding to projects should be made based on existing resources and underwriting.

HUD understands the need for both capital (replacement) and operating reserves in housing projects. When grantees provide HTF funding for a project, the need for annual or monthly contributions to these reserves are determined through the underwriting process. Funding for capital or operating reserves “up front” for the present value of the entire amount needed over the required period of affordability (30 years) is not possible if the HTF funds are appropriated, as Federal funds cannot be drawn in that manner, years in advance of need. However, funding for the HTF may come from non-appropriated sources, *i.e.*, the proceeds from GSEs as described in section 1337 of the Act. Therefore, in the interim rule HUD establishes separate requirements for operating cost reserves funded by appropriated and non-appropriated funds.

If the operating cost assistance reserve is funded with appropriated HTF funds, the allowable amount of the reserve may not exceed the amount necessary to provide operating cost assistance to the HTF-assisted units in an HTF-assisted project for a period of up to five years. Because operating cost assistance reserves are an eligible activity and may be provided by more than one grant, the prohibition on providing additional HTF funds to a project during the period of affordability (§ 93.205(a)) does not apply to renewal of operating cost assistance reserves. The grantee may renew operating cost assistance reserves for HTF-assisted units during the affordability period by executing written agreements after future fiscal year HTF grants are awarded. The grantee must demonstrate the necessity of the reserve amount based on an analysis of

potential deficits remaining after the expected rent payments for the HTF-assisted unit are applied to the HTF-assisted unit's expected share of operating costs.

If the operating cost assistance reserve is funded with non-appropriated HTF funds, the amount necessary to fund the reserve must be calculated using the same methodology; however, the reserve may be funded for the amount estimated to be necessary for the entire period of affordability up front, or if this amount would exceed the cap (one-third of each annual grant), could be funded in phases from future grants determined to be suitable and necessary to secure advantageous financing. HUD will provide guidance and training to states about underwriting standards for investment of HTF funds and establishing replacement reserves to provide necessary rehabilitation during the period of affordability in their HTF program guidelines.

Administration and Planning Costs § 92.732

As noted earlier in this preamble, the administrative costs allowable by statute in the HTF program cannot exceed 10 percent of the annual grant. In § 92.732, HUD proposed eligible administrative and planning costs similar to the HOME program at § 92.207.

Comments: HUD received very few comments regarding the entity eligible for the 10 percent allocation to administrative and planning costs. One commenter suggested that HUD's rule clarify that only the agency responsible for the award, compliance, monitoring, and reporting of HTF funds is eligible and another commented that these funds should only be charged by the subgrantee, not the grantee. Other commenters offered recommendations about what should and should not be considered an eligible administrative and planning cost. A commenter stated that monitoring funds should be included, another stated project delivery costs (*i.e.*, inspections, work write-ups) should not be eligible to charge as administrative costs, and another requested clarification that the administrative costs in § 92.732(b)(2) are not the same as prohibited travel costs at section 1338(c)(10)(D)(i)(V) of the Act. Another commenter suggested that HUD's rule require the allocation to administrative and planning costs be proportional to the amount of HTF units in the project. Another commenter expressed concern that the 10 percent cap on administrative costs is not enough to cover all the monitoring requirements. A commenter requested that HUD make clear whether the

amounts available for rental housing and homeownership activities are calculated based on the funds available after 10 percent of the annual formula grant is deducted for administrative costs.

HUD Response: This interim rule permits grantees to charge monitoring fees to cover the costs of required monitoring. The HTF grantee (State or State-designated entity) may use up to 10 percent of its annual grant for administrative costs. A grantee may provide funding for administrative costs to subgrantees. Program-related travel that is eligible under § 92.732(b)(2) remains an eligible cost in this rule, as this is not the same type of travel prohibited in section 1338(c)(10)(D)(i)(V) of the Act. Only non-program-related travel is prohibited as an eligible cost in the HTF statute. The Act permits up to 10 percent of the annual HTF grant to be used for homeownership activities, and up to 10 percent of the grant for administrative costs. Therefore, up to 10 percent of each annual grant may be spent on administrative costs, up to 10 percent may be spent on eligible homeownership activities, and the remainder on eligible rental housing.

HTF and Public Housing and Rental Assistance Demonstration § 92.734

HUD proposed prohibiting the use of HTF funds for public housing, including public housing that is developed under the HOPE VI program.

Comments: Several commenters requested that HUD's rule explicitly include public housing authorities as eligible recipients of HTF funding. Some commenters requested that the development, preservation, and rehabilitation of public housing be allowed as an eligible activity, as the exclusion of public housing was not clearly mentioned in HERA or the Act; public housing tenants meet the HTF eligibility requirements and public housing funding sources are inadequate to meet the demands.

HUD Response: Public housing agencies (PHAs) are already eligible entities to be HTF recipients. They are eligible to apply for HTF funding if they have the required capacity defined in the HTF statute and at § 93.2. PHAs, if qualified as recipients, can compete for HTF funding to develop HTF-assisted projects. HUD has considered the comments that the HTF should be permitted to be used for public housing projects and agrees that there is a role for the HTF in public housing. HUD has decided to allow the use of HTF funds (1) in connection with the Choice and LIHTC programs for construction of new

units that replace existing public housing properties; and (2) for the rehabilitation of existing public housing units in connection with the Rental Assistance Demonstration (RAD), Choice, and LIHTC programs.

When the HTF program proposed rule was published on October 29, 2010, RAD was not yet established. RAD was established by HUD's 2012 Appropriations Act (Pub. L. 112-55, 125 Stat. 552, approved November 18, 2011, at 125 Stat. 673). Consequently, there were no public comments submitted on the HTF program proposed rule about the possible interplay between HTF and RAD. However, with RAD now an active demonstration program, questions have been raised to HUD about whether HTF may be used for RAD units, and HUD takes the opportunity to address those questions in this preamble. HTF funds can be used in connection with RAD for the rehabilitation of public housing properties in which assistance will be converted and used. HTF funds can also be used for rehabilitation of "RAD units" (that is public housing properties in which assistance has been converted) after conversion takes place. Such uses are not contrary to HUD's position that use of HTF funds for public housing is limited to use with other programs to rehabilitate or replace public housing properties, and not for the expansion of the public housing inventory, which can be achieved through other funding sources.

Prohibited Activities § 92.735

HUD proposed prohibited activities in § 92.735. To synchronize with the HOME program, prohibited activities and fees at § 92.735 mirror the HOME program regulation at § 92.214. In addition, § 92.735 also includes activities expressly prohibited in the HTF statute. Section 1338(c)(10)(D) of the Act provides that HTF funds may not be used for: Political activities; advocacy; lobbying, whether directly or through other parties; counseling services; travel expenses; and preparing or providing advice on tax returns. This statutory section further provides that, subject to the exception in section 1338(c)(10)(D)(iii) of the Act, HTF funds may not be used for administrative, outreach, or other costs of the grantee, or any other recipient of such grant amounts. The statutory exception to this prohibition is that a grantee may use up to 10 percent of the HTF grant for the administrative costs of carrying out its HTF-funded program, including homeownership counseling.

Comments: A commenter stated that several provisions, including provisions

on renewing operating assistance and grants for transit-oriented development projects, seem to conflict with the prohibition on using additional HTF assistance for previously assisted projects, and requested clarification. Several commenters requested that HUD eliminate the prohibition on using HTF funds in developments previously assisted with HTF. Alternatively, these commenters recommended that the final rule should limit the prohibition to 15 years after initial receipt of HTF funds, and allow for exceptions to the prohibition during the period of affordability. Other commenters stated that the rule should allow projects previously receiving HTF funds to obtain subsequent capital funds, operational expenses, and maintenance costs under the condition that the period of affordability would be reset, extended, or expanded to additional units upon receipt of additional HTF assistance. Another commenter stated that the final rule should include a provision that HUD has the ability to waive the prohibition in exchange for an extension of the affordability period.

HUD Response: Per the requirements of 24 CFR 93.300, HUD expects that HTF projects will be properly constructed or rehabilitation with HTF funds and underwritten to ensure that capital needs can be addressed at the appropriate time in the life cycle of the property. Therefore, HUD will not change the regulation to allow the addition of HTF funds after 15 years, as commenters suggested. To address concerns about projects that may need additional operating cost assistance during the 30-year period of affordability, HUD revised § 93.205(a).

Income Targeting Proposed §§ 92.736–92.737; Interim §§ 93.250–93.251

Sections 92.736 and 92.737 of the proposed rule set forth the proposed income targeting requirements, as required by section 1338(c)(7) of the Act, for HTF-assisted rental units and homeownership units, respectively.

The Act requires that not less than 75 percent shall be used for the benefit only of ELI families or families with incomes at or below the poverty line (whichever is greater). Not more than 25 percent may be used for the benefit only of VLI families. Under the rulemaking authority of section 1338(g) of the Act, the Secretary has the discretion to direct grantees, in any given year, to use more than 75 percent of the HTF funds for the benefit only of ELI families or families with incomes at or below the poverty line, whichever is greater. HUD proposed that for the first year in which HTF funds are made available, of the

amount made available for rental and homeownership housing, grantees are required to expend 100 percent of HTF funds to provide rental and homeownership housing for ELI households. The proposed rule provided that the HUD would publish subsequent income targeting requirements when HUD's allocation amounts to states are published.

Comments: HUD received many comments opposing the proposed targeting of 100 percent of the HTF funds to ELI households in the first year that funding is provided under the program. The commenters stated that the income targeting should not change between the first year and subsequent years of funding, as it will make the HTF more difficult to administer. Commenters also stated that this approach to targeting is not reflective of the statute.

Several commenters expressed support for targeting some VLI households in the first year of funding, with one commenter expressing concern that there may not be adequate local support to target ELI households exclusively. Other commenters requested that HUD continue to target 100 percent of ELI households until the shortage of ELI housing is resolved. Several commenters expressed concern that the proposed income targets will limit the use of HTF funds in rural and non-urban areas. Another commenter recommended that the proposed language be revised to explicitly state that any portion of HTF funding not be targeted to ELI households and should be used for VLI households only.

HUD also received many comments advising of challenges resulting from use of HTF funds for homeownership activities targeted at ELI households, with many of these commenters suggesting that HTF funding for homeownership would be better served targeting VLI households or other income groups.

HUD Response: HUD is aware that changes over time to income targeting may require grantees to adjust their approaches to using HTF funds to produce affordable housing, but believes this necessary in order to target limited resources to ELI households. There is a well-documented and overwhelming need to increase the supply of housing targeted to ELI households within each grantee's jurisdiction.

However, in consideration of the comments received, at this interim rule stage, HUD adjusted the targeting based on the amount of resources being made available through the HTF. With limited resources available for production of affordable housing targeted to ELI

households, HUD has determined that targeting 100 percent of HTF to ELI households is appropriate if the amount available in a fiscal year for HTF is less than \$1 billion. If the amount exceeds \$1 billion, grantees may spend up to 25 percent for the benefit of VLI households. In either scenario, any funds not used for ELI households must be used to serve VLI households.

HUD acknowledges the commenters' concerns regarding the difficulty of providing homeownership assistance to ELI households. The statute and regulation are clear—there is no minimum percentage of HTF funds to be spent on homeownership, only a maximum percentage (10 percent). If HTF-eligible homeownership activities are not appropriate for ELI households in their jurisdictions, grantees are not required to use HTF funds for homeownership projects. HUD believes grantees are in the best position to determine whether a homeownership program for ELI or VLI households is appropriate within their jurisdictions. Public input on the use of HTF funds for rental housing or homeownership must be sought through public participation on a grantee's proposed HTF allocation plan.

Project Requirements Proposed §§ 92.740–92.750; Interim §§ 93.300–93.306

In §§ 92.740 through 92.750, HUD proposed requirements applicable to HTF-assisted housing projects. HUD proposed maximum per-unit development subsidy, underwriting, and subsidy layering requirements at § 92.740. To align with the HOME rule, the HTF proposed rule at § 92.740 mirrored the HOME Prohibited Activities and Fees provisions in § 92.250, with the exception of the maximum per-unit development subsidy amount section. The maximum per-unit development subsidy amount section is now § 93.300.

Maximum Per-Unit Subsidy, Underwriting and Subsidy Layering § 92.740

At § 92.740(a), HUD proposed requiring the grantee to establish maximum limitations on the amount of HTF funds the grantee may invest on a per-unit basis. In § 92.740(b), HUD proposed requiring the grantee to perform subsidy layering analysis before committing HTF funds to a project. Included in this proposed provision was the requirement that the grantee must determine that costs are reasonable, examine the sources and uses of funds, and ensure that the amounts available and their use are necessary to provide

quality affordable rental or homeownership housing for ELI households for the affordability period (30 years). The proposed rule also stated that recipients of HTF-assisted projects may not receive undue returns on their investments.

Comments: Of the commenters that submitted comments on this provision, the majority addressed the proposed requirement that the grantee must establish a maximum per-unit development subsidy limit. A few commenters opposed that the subsidy limit be established as a total dollar amount and suggested the requirement be revised to allow States to set the maximum subsidy limit as a percentage of the project cost on a per-project basis. Another commenter wrote that States should have the flexibility to establish their maximum per-unit subsidy at 100 percent of the development costs for HTF-assisted units. A commenter suggested that the maximum per-unit subsidy requirement at § 92.710 be eliminated. Finally, a commenter stated that the per-unit subsidy limit and subsidy layering should only take into account capital development costs.

With respect to a subsidy layering review, a commenter suggested that HUD's rule should allow a subsidy layering review, conducted as a requirement of another program to satisfy the subsidy layering review for an HTF project. Another commenter suggested that the language in the proposed rule be clarified so that it is not interpreted to mean that certification of underwriting and subsidy layering requires HUD-specified processes, standards, and forms because it would be burdensome. Another commenter suggested that HUD establish minimum underwriting standards for homeownership.

HUD Response: This interim rule adopts this provision as essentially proposed, although HUD revised the language to more closely mirror the language on subsidy layering from the HOME final rule. HUD does not agree that maximum subsidy limits should be established based on a percentage of total project cost. Some project costs are not eligible HTF costs, and one of the purposes of this requirement is to ensure the determination of the cost of HTF-assisted housing units includes a cost reasonableness test. With respect to a subsidy layering review, HUD does not prescribe specific subsidy layering forms or processes. The grantee may use the subsidy layering reviews conducted by other project funders, but a subsidy layering review conducted by another agency or funder does not "satisfy" the proposed requirement in § 92.740(b) (in

this rule at § 93.300(b) unless the review is completed in accordance with the HTF grantee's standards.

Grantees must establish the minimum underwriting standards for their HTF-funded homeownership programs, as required by § 93.304.

To address comments on maximum subsidy limits, HUD chose not to establish national maximum subsidy limits that would be published by HUD. The amount of subsidy needed to produce affordable rental units targeted to ELI or VLI households will vary depending upon the project proforma. It is possible that in some projects, the entire development cost of an HTF unit must be paid for with HTF funds in order to achieve affordability. For example, it would be desirable to pay the entire development cost of HTF units so that they carry no debt service because rents are likely to be insufficient to pay for the debt service of the units. However, to address accountability, HUD added language to require grantees to adopt maximum subsidy limits that are appropriate for non-luxury housing units, based on reasonable and actual costs of developing such housing in the area.

Property Standards §§ 92.741 Through 92.745, Interim § 93.301

At the proposed rule stage, HUD proposed property standards applicable to HTF-assisted properties at §§ 92.741 through 92.745. Section 92.741 contains the property standards for new construction, § 92.742 establishes the standards for housing undergoing rehabilitation, § 92.743 contains the property standards for existing housing that is acquired with HTF funds, § 92.744 establishes property standards for manufactured housing, and § 92.745 establishes ongoing property standards for rental housing during the period of affordability. HUD requested comments from interested parties on how additional minimum property standards may be imposed to increase the efficiency and reduce the operating costs of HTF assisted units.

Comments: Several commenters stated that HUD's rule should provide more flexibility in adopting property and energy efficiency standards and that the proposed property standards are too specific. A commenter stated that HUD's rule should specify who will conduct the environmental reviews for HTF projects. Several commenters stated that the units must meet habitability standard requirements, but not necessarily the use of Housing Quality Standards (HQS). Another commenter stated that HUD's rule should require properties to be free of all health and

safety standards and specify the life-threatening conditions that must be addressed.

A commenter stated that HUD's rule should provide standards that will be applied on a building-by-building basis. A few commenters stated that the proposed efficiency requirements will drive up the costs of developing ELI units. A commenter stated that for major life systems HUD should clarify improvements necessary to meet the standard. Another commenter stated that the term for the useful life is burdensome and too expensive.

A commenter requested that buildings seeking historic tax credits or that are located in historic districts be provided with an exception from property requirements. Another commenter stated that the property standards will make it difficult for developers to use HTF funding to buy existing properties for rehabilitation.

A commenter stated that HUD's rule should include a "discreet" funding allocation to create affordable and accessible housing for people with developmental disabilities. Several commenters stated that HUD's rule should require "visitability" and "universal design." Other commenters stated that HUD's rule should address accessibility by requiring 100 percent of units in new construction and substantial rehabilitation projects be both visitable by wheelchair users and adaptable, and that 30 percent of the units are fully accessible.

HUD Response: To ensure compatibility with the HOME rule and in an effort to ease implementation of HTF by maintaining consistency with the requirements of the HOME rule to the extent feasible, this interim rule adopts the language used in the HOME final rule property standards section at § 92.251, with the exception of the environmental review requirements.

For the HTF program, HUD proposed at minimum that all HTF-assisted units that are newly constructed or undergoing gut rehabilitation must be certified that they meet the guidelines for ENERGY STAR-Qualified New Homes (for residential buildings up to three stories) or exceed, by 20 percent, the energy efficiency requirements of the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 90.1–2007, Appendix G: Performance Rating Method (for residential buildings over three stories), as defined in § 92.741. A Home Energy Rater (HER) must inspect the units to certify that the units meet the ENERGY STAR guidelines. HUD does not adopt these proposed requirements in this interim rule. HUD

plans to establish new and consistent energy and water efficiency requirements for both the HTF program and HOME program through separate rulemaking. For new construction, the interim rule adopts the energy efficiency standards established under section 109 of the Cranston-Gonzalez National Affordable Housing Act, so that the standards are the same for HTF and HOME.

HTF grantees are responsible for ensuring compliance with these environmental review requirements. HUD knows of no justification to provide a blanket exemption of HTF-assisted projects seeking historic tax credits or located in historic districts from property requirements. While HUD would encourage grantees to include "visitability" standards in the development of HTF-assisted and other affordable housing, these visitability standards are not required by any Federal statute and are not included in this rule.

HTF Property Standards Environmental Requirements

Comments: Several commenters stated that the rule creates a new definition for "wetlands." These commenters stated that HUD's rule should incorporate the U.S. Army Corps of Engineers and the Environmental Protection Agency definition in regulations pursuant to the Clean Water Act. A commenter stated that the regulations for environmental remediation, testing for toxins, and other property standards are too detailed. A commenter suggested that the HTF rule should include language permitting States to request that reports are prepared in accordance with the most current ASTM standard. Another commenter stated that for HTF projects developed within a quarter mile of a site with an unclosed environmental case status, the final rule should require a written justification for determination that the proposed site does not pose a health and safety risk for the HTF project. A commenter recommended that the HTF rule require a State to maintain files with written justification for the State's determination that a proposed site does not pose a health and safety risk for an HTF project located within a quarter mile of a site with a reported Federal, State, or local environmental case status that is open. Another commenter stated that HUD's rule needs to specify who will conduct the environmental review for HTF projects. Several commenters stated the proposed rule was overly detailed and the final rule should replace these requirements with standards from the

National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). Another commenter stated that HUD's rule should clarify that a single environmental review may satisfy the requirements for both the HTF and project-based voucher programs, when both sources of assistance are used. Another commenter requested an exception in the property requirements for buildings seeking historic tax credits or located in historic districts.

HUD Response: This rule adopts the definition of "wetland" as defined in HUD regulation at 24 CFR 55.2(b)(11) and which is used for all HUD programs. The guidance within the regulation for environmental remediation, testing for toxins, and other standards must remain detailed because the purpose of the regulations is to assist grantees to comply with the requirements of the regulations.

HUD agrees that its HTF rule should not include references to the ASTM year and rather include language that reports should be prepared in accordance with the most current ASTM standard. HUD already requires HTF projects to avoid sites located within .25 miles of a Superfund or Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) site or other contaminated site reported to Federal, State, or local authorities without a statement in writing from the U.S. Environmental Protection Agency or the appropriate state agency that there is no hazard that could affect the health and safety of the occupants or conflict with the intended use of the property.

HUD disagrees with the comment that the HTF rule should clarify that a single environmental review may satisfy requirements for both HTF and project-based voucher (PBV) programs. The grantee that is responsible for these environmental requirements may in some cases be the same as the "responsible entity" that conducts an environmental review under 24 CFR part 58 for a PBV project, and much of the environmental information needed to comply with both requirements may be the same. However, the HTF environmental requirements, to be codified at § 93.301(f), are not identical to the environmental review requirements under part 58 for PBV projects. For example, the HTF environmental requirements do not include certain interagency consultation and public notice requirements that are required for PBV projects under some of the environmental laws and authorities cited in part 58.

Qualification as Affordable Housing: Rental Housing § 92.746, Interim § 93.302

In § 92.746(a), HUD proposed that all HTF-assisted rental housing be occupied only by ELI families. Section 92.746(b) proposed to establish the maximum rent (including utilities) for HTF-assisted units at 30 percent of the annual income of a family whose income equals 30 percent of the area median income, or 30 percent of the poverty line, whichever is greater. Section 92.746(c) provided that grantees must establish maximum monthly allowances for utilities and services (excluding telephone, television, and Internet service), and must approve rents proposed by the owner for HTF units. Section 92.746(d) proposed to establish an affordability period of not less than 30 years for rental housing assisted with HTF funds. Section 92.746(e) proposed to require that HTF project owners verify the initial and continued eligibility of tenants living in HTF-assisted rental units and establishes the methods by which HTF project owners must verify tenant income.

Comments: Several commenters requested that HUD adopt income-based limits that cap the amount of rent paid by tenants at 30 percent of household income. Several other commenters suggested creating operating subsidy reserves to fund income-based rents, and requiring a percentage of units set aside for people with disabilities or people who receive their income from supplemental social security (SSI) income. Some commenters expressed concern about individuals whose sole source of income is SSI, because many of these people have incomes well below 30 percent of AMI and without operating subsidy for HTF-assisted units tenants will be forced to pay a substantial proportion of their income toward rent (or lose the opportunity to benefit from HTF-assisted housing).

Several commenters asked for clarification whether there will only be one rent limit for the HTF program or whether there will be different rent limits for ELI and VLI households. Several stated that there should be a means for limiting a tenant's rent burden depending on the type of rental subsidy. Another commenter stated that subsidy amounts should also be adjusted downward for units not carrying any debt to avoid over-subsidizing units. Another commenter asked whether HUD could provide rent and income limit levels in 5 percent increments.

A commenter stated that grantees should be permitted to set utility allowances for new projects that best reflect the costs to tenants. Another stated that HUD's rule should provide additional protections to tenants regarding the utility allowance, including notice, opportunity to seek review, and allowance for utilities be provided in the lease.

Many commenters stated that HUD should increase the minimum period of affordability proposed in the rule to 40, 45, or 55 years, and that HUD's rule should incentivize projects which agree to longer periods of affordability. Another commenter stated that the rule should increase the minimum period of affordability for non-low income housing tax credit (LIHTC) projects, but only if HUD develops a means for recapitalizing projects and applying the affordability restrictions to the land, not the building. Several commenters stated that the determination of the period of affordability should be left to the discretion of the State, or should match the period of affordability used by other funding sources.

HUD Response: Unlike public housing, the HTF has no separate annual appropriation source of funding for operating costs. In any given year, if no funding for the HTF is provided, it is possible that no operating cost assistance would be available for HTF-assisted units. Therefore, while operating costs may be paid with HTF funds, the assistance cannot be based on a formula that assumes income-based rents and an annual appropriation to pay for operating costs. For this reason, it is necessary to establish fixed rents for the HTF for underwriting purposes and required subsidy layering analyses. Section 8 project-based vouchers may be made available to HTF-assisted units, and these vouchers alleviate cost burdens for ELI tenants, including individuals whose source of income is from Supplemental Social Security Income.

This interim rule includes rent limits for both extremely low-income and very low-income households. For extremely low-income households, rents are set at 30 percent for a households at 30 percent of the area median income. For very low-income households, rents are set at 30 percent for households at 50 percent of the area median income. HUD will provide the actual rent limits for each State.

If utility data are available on a project-by-project basis or utilities are individually metered, it would be permissible to establish utility allowances more reflective of the actual cost for the HTF-assisted unit.

HTF grantees are allowed to impose longer periods of affordability, beyond the period in the regulation. HUD anticipates that States may adopt criteria whereby projects will be incentivized to adopt longer periods of affordability.

Tenant Protections and Selection § 92.747, Interim § 93.303

In § 92.747, HUD proposed tenant protection, lease, and selection requirements, and incorporated the requirements of section 1338(c)(8) of the Act.

Comments: A commenter recommended greater safeguards be required for tenant selection, including prohibition of local residency or employment preferences, the use of lottery-based selection, and strong affirmative marketing and outreach requirements. A few commenters suggested HUD's rule be revised to include additional tenant and homeowner protections, including the right to organize, associate, advocate for stronger protections without fear of retaliation. Other commenters requested that HUD's rule to clarify tenant rights regarding the applicant screening process, the prohibition on eviction without good cause, the lease provision protections, and how tenants can participate and protect their tenant rights. A few commenters pointed out the importance of retaining economic diversity in projects containing HTF-assisted units, and suggested that HUD's rule incorporate some mixed-income standards and limits on the number of families using vouchers. Another commenter suggested that § 92.747(c) be removed to permit residents to pursue a "housing first" model for ending homelessness. Some commenters requested that the protections offered to people receiving any type of tenant-based assistance from being denied access to HTF-assisted units be enhanced.

A commenter provided several comments about resident access to judicial review. The commenter stated that the rule should include greater access to judicial review for tenants and applicants, and that the regulations should require residential leases to include any conditions of tenancy found in HTF allocation plans and to explicitly state that a resident or tenant organization may seek judicial enforcement of plan violations which result in injury. The commenter recommended that grant agreements with subgrantees and recipients should incorporate a resident complaint review, grievance system, and right to judicial enforcement. Another commenter stated

that if HUD has the right to initiate an administrative hearing or impose sanctions, then residents and applicants should have the right to join as a party to the proceeding. The commenter stated that the right to pursue an independent action for redress of injury in court should be included in the rule and incorporated into residential leases.

Another commenter stated that a reference to the Violence Against Women Act (42 U.S.C. 13701 *et seq.*) should be added to § 92.747(c).

HUD Response: The Violence Against Women Act of 2013 (VAWA 2013), enacted March 7, 2013, did not specify HTF as a covered program. The possible applicability of VAWA to HUD programs not listed in VAWA 2013 will be addressed in HUD's upcoming proposed rule on VAWA 2013.

Section 93.303 of the rule prohibits lease terms which require tenants residing in HTF-assisted units to waive their rights with respect to their tenancy. The statute does not create any right to judicial review; however, State and local law may provide rights to judicial review of HTF grantees or landlords of HTF-assisted properties. HUD's proposed language is compliant with applicable civil rights laws and regulations, including section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8, and therefore is not changed at this interim rule stage. Additionally, the proposed rule language did not present problems for the particular permanent supportive housing model favored by several commenters, which was their primary concern, and therefore this language is not changed at the interim rule stage. In fact, adopting the suggested language would limit flexibility to use other models of permanent supportive housing.

Qualification as Affordable Housing: Homeownership § 92.748, Final § 93.304

In § 92.748(a), the proposed rule required that homeownership activities funded by the HTF must be for first-time homebuyers. Section 92.748(b) proposed to require that only single family housing, as defined in § 92.2, is eligible for HTF-assisted homeownership activities. Section 92.748(c) would require that all HTF-assisted homeownership activities apply to modest housing, in accordance with § 92.749. Section 92.748(d) proposed to establish the requirements for HTF requirements for first-time homebuyers and income requirements. Section 92.748(e) proposed to establish the period of affordability for HTF-assisted homeownership activities. Section 92.748(f) proposed to establish the

resale requirements for homeownership units assisted by the HTF.

Comments: Some commenters suggested that HUD's rule should include a recapture provision for homeownership funds, as permitted under the HOME program, and they expressed concern that limiting homeownership properties to resale, without the option of recapture, will be too burdensome for grantees and subgrantees. Other commenters stated that HUD's rule should include more language to encourage the use of land trusts.

HUD Response: HUD agrees with commenters that the recapture provisions should be added to the HTF rule. Accordingly, this rule, at § 93.304, adopts the structure of the HOME program requirements for recapture, with adjustments to the subsidy amounts to reflect the greater need for subsidy for very low-income homebuyers. The periods of affordability also differ from the HOME program to tiers that reflect the maximum period of affordability (30 years) for the HTF program. The use of land trusts in conjunction with the HTF is permitted. However, HUD does not agree that the HTF rule needs modification to encourage the use of land trusts; guidance and technical assistance may be provided in the future on this topic.

Other Federal Requirements Proposed § 92.760–92.764; Final § 93.350–93.355

Proposed §§ 92.760 through 92.764 set forth other Federal requirements that are applicable to the use of HTF funds, including nondiscrimination, affirmative marketing, lead-based paint, relocation, and funding accountability and transparency requirements. However, the proposed regulations inadvertently omitted a provision in section 1337(f) of the Act that prohibits the use of HTF funds in conjunction with property taken by eminent domain unless eminent domain is employed only for a public use. The HTF regulation at § 93.355 includes this statutory prohibition.

Program Administration Proposed § 92.770–92.779; Final § 93.400–93.409

Proposed §§ 92.770 through 92.779 set forth the conditions and requirements by which States are to administer their HTF funds, including HTF accounts, allocation and reallocation of HTF funds, program disbursement and the establishment of an information system, written agreement, onsite inspections, financial and project reporting, record retention, and audit requirements.

Comments: Several commenters suggested that HUD eliminate duplicative monitoring, review, and inspection requirements. A few commenters stated that if a subgrantee receives HOME funding, the subgrantee should be directly responsible for compliance and alleviate grantees of the burden of annual performance reviews. A commenter recommended revising the HTF audit requirements to mirror HOME and that additional audit requirements should be removed. A few commenters suggested that equivalent onsite property inspections for other public funding programs and construction oversight by third parties should be allowed to satisfy the HTF requirements to avoid duplicative inspections. A commenter stated that the rule should permit HOME inspection standards rather than Uniform Physical Conditions Standards (UPCS) standards. Another commenter stated that the initial inspection during the period of affordability should be required to occur within 24 months instead of 12 months, as proposed, to align with LIHTC requirements. A commenter stated that the requirement to follow up with an inspection within 12 months of observing a deficiency during an onsite inspection is burdensome and suggested that evidence of the correction, with the right to re-inspect, should be sufficient.

Some commenters offered recommendations for other administrative issues. A commenter suggested that the project completion date for HTF units should be the date the project is placed in service. Another commenter stated that HUD's rule should clarify that the recordkeeping requirements in § 92.778 would allow a grantee to delegate record maintenance to the project owner or manager who would make the records accessible to the grantee.

Several commenters stated that the rule should increase opportunities for forgiveness under the repayment and recapture provisions. Commenters suggested that the rule permit a prorated reduction of the repayment obligation based on the extent that the affordability period was satisfied. A commenter suggested that this prorated reduction in the repayment obligation also apply to HTF-assisted housing lost through a foreclosure action, natural events or disasters, or similar events that are not the result of malfeasance on the part of the grantee or subgrantee. A few commenters suggested that complete forgiveness should be permitted when there have been best faith efforts to avoid foreclosure. A commenter stated that the repayment provisions are too

onerous and repayments for failed ELI housing projects should be limited to instances when the grantee directly provides funds for an ineligible activity.

Some commenters offered suggestions about the foreclosure provisions. A commenter suggested that if HUD is the foreclosing entity, the affordability restrictions should not terminate and funds should not be required to be repaid. Another commenter suggested that the rule should authorize HUD and the grantee to modify the affordability restrictions in limited circumstances (e.g., loss of rental assistance through no fault of the owner), if doing so is necessary to avoid a foreclosure and complete loss of affordable units. Another commenter suggested that HUD should require grantees to use purchase options, right of first refusal, or other preemptive rights to purchase as tools to protect HTF-assisted housing from foreclosure or deed in lieu of foreclosure. Another commenter suggested that additional data collection requirements be required. The commenter attached a list of 22 project-level data points that should be listed in § 92.778(a)(2)(i).

HUD Response: The HTF statute includes mandatory monitoring, reporting, and audit requirements. HUD does not have the authority to change these requirements.

Except where that statute differs, or where policy determinations about the HTF have been made by HUD that preclude alignment, HUD adopted the majority of the requirements of the HOME program for the HTF rule, but the HTF audit requirements cannot be modified to mirror HOME requirements, as suggested by a commenter, because the HTF statute imposes different requirements for the audit of HTF-assisted projects than what is required by the HOME program.

HUD does not agree that grantees are relieved of responsibility for compliance if a subgrantee receives the HTF funds. The statute makes clear that the State or State-designated entity is the grantee of the HTF funds and that compliance with all requirements, including compliance monitoring of subgrantees, is the responsibility of the grantee. Moreover, HUD has no relationship with a subgrantee and has no basis to take action against a subgrantee.

This interim rule requires that Uniform Physical Condition Standards (UPCS) be incorporated into the property standards, as is the case with the property standards for the HOME program. This will facilitate alignment of HTF-assisted projects with projects assisted by the LIHTC program and HOME. Training and guidance will be

provided to address some of the concerns about implementing UPCS.

HUD has chosen not to synchronize when project completion occurs for an HTF-assisted projects with when an LIHTC project is placed in service. The HTF rule requires beneficiary reporting that is different than that required for LIHTCs. The project completion date must ensure timely occupancy. Accordingly, HUD adopts the language as proposed.

One commenter suggested that the rule should authorize HUD and the grantee to modify the affordability restrictions in limited circumstances (e.g., loss of rental assistance through no fault of the owner). To ensure compatibility with the HOME rule and in an effort to ease HTF implementation, this interim rule contains language that is consistent with the repayment language in the HOME regulations. For natural events or other disasters, insurance proceeds should be used to replace the lost housing. In the case of foreclosure, repayment would not be required if the affordability restrictions are preserved and the project continues to meet HTF requirements. Grantees have the option, rather than a requirement, of using preemptive rights to ensure flexibility for each grantee to ensure HTF projects remain affordable. The repayment and foreclosure provisions are required and the language is adopted in this interim rule as proposed.

Performance Review and Sanctions Review Proposed § 92.780–92.783; Final § 93.450–93.453

HUD proposed that grantees report on their progress and performance in meeting the requirements of the HTF in HUD's Integrated Disbursement and Information System (IDIS) and the consolidated plan. The statutory requirements for corrective and remedial actions at section 1338(e)(1)(B) of the Act are reflected in § 92.782. The statutory requirements at section 1338(e)(2)(B) of the Act for notification of determination and opportunity for hearing and sanctions are reflected in § 92.783.

Comments: One commenter recommended that performance report on grantees be posted regularly on public Web sites.

HUD Response: In this interim rule, HUD moved the requirement for a HTF performance report to the Consolidated Plan regulations at 24 CFR part 91. The HTF performance report is included in the performance reports for the consolidated plans in 24 CFR 91.520, thereby subjecting the report to the citizen participation plan of the grantee

and subgrantee. In addition, the HTF grant is subject to the requirements of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282, approved September 26, 2006), as amended by section 6202 of Public Law 110–252, approved June 30, 2008 (Transparency Act) (See § 93.354 of the HTF regulations.)⁵

Other Comments

Align the HTF With Other Programs

Comments: Some commenters suggested that the HTF be coordinated with and mirror the LIHTC rules to the greatest extent possible to provide maximum flexibility. They suggested that LIHTC is more likely to be used in combination with HTF funds for development than HOME. Other commenters suggested that the HTF requirements should be aligned with other program requirements (e.g., such as those required under HUD's Section 811 Supportive Housing for Persons with Disabilities program, HUD's Housing Choice voucher program, U.S. Department of Health and Human Services program, Supplemental Security Income, and U.S. Department of Veterans Affairs) and HUD should identify any potential conflicts between the program requirements. A few commenters recommended that HUD's HTF rule should waive requirements of Section 8 project-based vouchers that complicate using them in HTF projects. A few commenters suggested that HUD eliminate duplicative reviews and requirements that create conflict when the HTF is combined with other sources of funding in development projects.

HUD Response: HUD expects that HTF funds will be combined with other sources of private funding and financing typically used for the development of affordable housing, such as LIHTCs. The affordability period for HTF-assisted units is consistent with the 30-year affordability period (compliance period plus extended use period) for LIHTC projects. Grantees may also establish longer affordability periods in their HTF allocation plans. The VLI income targeting and frequency of onsite inspections during the period of affordability regulations in the HTF also align with LIHTC. Some HTF requirements, such as ELI income targeting and rents, are statutory and HUD does not have the discretion to change these statutory requirements to

align with other programs. Also, the HTF rule cannot waive the requirements of other Federal programs. In order to allow maximum flexibility when combining and coordinating the HTF with other Federal funding sources, HUD streamlined the HTF requirements and aligned them with other Federal programs (e.g., HOME, LIHTC, Federal Housing Administration (FHA), Public Housing, and other HUD programs) to the greatest extent possible, given statutory constraints and policy decisions by HUD.

Manufactured Housing

In the proposed rule, HUD stated that HTF funds may be used to purchase and/or rehabilitate a manufactured housing unit, or purchase the land upon which a manufactured housing unit is located. HUD stated that the manufactured housing unit must, at the time of project completion, be connected to permanent utility hookups and be located on land that is owned by the manufactured housing unit owner or land for which the manufactured housing owner has a lease for a period at least equal to the applicable period of affordability. The proposed rule also required that construction of all manufactured housing must meet the Manufactured Home Construction and Safety Standards codified at 24 CFR part 3280. HUD noted that these standards pre-empt State and local codes covering the same aspects of performance for such housing.

Comments: A commenter stated that language should be added to the rule to clarify that manufactured housing can be purchased with HTF funds for both rental and homeownership purposes. One commenter stated that eligible relocation costs should include one-for-one replacement when manufactured homes are demolished or converted for another use. A commenter recommended that the language in the proposed rule should be changed to clarify that HTF funds may be used to purchase the land under manufactured homes to preserve the affordability of these homes, and another stated that the requirement that the land under assisted manufactured housing be owned or leased will be difficult to meet. Another commenter states that the proposed rule conflicts with other HUD policies, including the Model Manufactured Home Installation Standards and Manufactured Housing Installation Rules and Regulations, 24 CFR parts 3285 through 3286. A commenter stated that HUD's rule should eliminate the "permanent foundation requirement" to avoid confusion, and to align with 24 CFR parts 3285 through 3286. Another

⁵ The Transparency Act requires disclosure to the public of all entities or organizations receiving Federal funds, beginning in fiscal year 2007. The disclosure of such funds can be found at the USA Spending.gov Web site, which is managed by the Office of Management and Budget.

commenter stated that HUD's rule should create an exception to the requirement that homeownership funds be targeted to income-eligible, first-time homebuyers because manufactured homes are a means for older, low-income homeowners to transition from their current home to a more affordable alternative, and they are often not first-time homebuyers. Another commenter stated that HUD's rule should include mobile home park infrastructure improvements as eligible costs and give more consideration to deteriorating park infrastructure.

HUD Response: The HTF statute requires that homebuyer assistance be provided to first-time homebuyers only—this would apply to manufactured housing that is purchased by eligible families with HTF assistance.

This interim rule does not prohibit the expenditure of HTF funds on manufactured housing that is rental housing. A State may award HTF funds for the development of a manufactured housing park for rental units. The Act does not contain any requirement for the one-for-one replacement of housing units if HTF funds are used in the demolition or conversion of any unit.

If HTF funds are used to purchase land to develop a manufactured home, or relocate a manufactured home, the manufactured housing must be secured with a foundation system meeting 24 CFR part 3280.

The use of HTF funds for infrastructure to rehabilitate the parks in which manufactured homes are situated is only eligible if all units are rental housing with income eligible tenants. Infrastructure that is not on the site of the HTF project is not eligible for HTF financing.

Consistent with the HOME rule, the definition of "permanent foundation" in the HTF rule means a foundation system of supports that is capable of transferring all design loads to the ground that meets the requirements of 24 CFR 3282.12. This definition is also consistent with the FHA mortgage insurance requirements for all manufactured homes that must be constructed in conformance with the Federal Manufactured Home and Safety Standards, as evidenced by an affixed certification label in accordance with 24 CFR 3280.11.

III. Opportunity for Further Comment

As noted in the Summary portion at the beginning of this preamble, HUD is issuing this rule as an interim rule. It is HUD's intention that following funding of the HTF as provided in HERA, and allocations of funds to States as provided in this rule, HUD will open

this interim rule for public comment to solicit comment on how these regulations work once funding is available and the grantees gain experience administering the HTF program.

IV. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled, "Regulatory Planning and Review"). This rule was determined to be economically significant as provided in section 3(f)(1) of the Order. The reasons for the determination are as follows:

As discussed above in this preamble, HERA charged HUD to establish, the formula for the distribution of HTF grants to states through regulation, and to follow that rule with one that implements the programmatic requirements for the HTF. Consistent with that statutory direction, on December 4, 2009 (74 FR 63938), HUD published a proposed rule submitting for public comment the proposed formula for allocating HTF funds. As the first rule to be issued in the rulemaking process for the HTF, the formula allocation constituted, on behalf of the entire HTF rulemaking, an economically significant regulatory action under Executive Order 12866. The preamble to the December 2009 rule summarized the economic impacts of the HTF program, as proposed to be implemented through the formula issued for public comment on December 4, 2009. (For a discussion of the economic impact, please see 74 FR 63940–63941.)

On October 29, 2010, HUD published the proposed program rule for the HTF (see 75 FR 66978). This interim rule incorporates the December 4, 2009, allocation formula rule and October 29, 2010, program rule. HUD's full economic analysis for the proposed allocation rule is available for inspection on HUD's Web site at <http://www.huduser.org/portal/publications/pubasst/riaforhtf.html>.

The docket file is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Persons with hearing or speech impairments may access the

above telephone number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Under the HTF program, HUD makes grants to the relatively large entities of States or their designated housing entities for the purposes of preserving and increasing the supply of rental housing and increasing homeownership for eligible families. Therefore, the primary focus on the rule is on these large entities. The States and State-designated housing entities may, in turn, make funding available to recipients, which may include smaller entities (such as nonprofit or for-profit organizations), but the funding made available to recipients is provided under application procedures and requirements established by the States or State-designated housing entities, not HUD; however, the grantees must ensure their recipients' adherence to the statutory requirements and regulatory requirements promulgated by HUD.

Additionally, the regulatory text largely reflects statutory requirements of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*). Where HUD has exercised the discretion to elaborate on the statutory requirements, HUD has strived to closely model these procedures on existing development programs, which are familiar to entities likely to be participants under the new HTF program. For example, as noted earlier in this preamble, the HTF program adopts several definitions used under the HOME program. The organization of the HTF regulations is modeled after those for the HOME program, and HUD has elected to adopt many existing HOME program requirements. Given that HTF funding is statutorily provided for the benefit of the States and is to be allocated to the States, HUD has determined that the rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to the environment was made, at the proposed rule stage, in accordance with HUD regulations at 24 CFR part 50, which

implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That Finding remains applicable to this rule and can be found at

www.regulations.gov under docket number FR-5246-F-03.

Executive Order 13132, Federalism

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

Unfunded Mandates Reform Act

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

Congressional Review Act

This rule constitutes a “major rule” as defined in the Congressional Review Act (5 U.S.C. Chapter 8). The Congressional Review Act provides for major rules to have a 60-day delayed effective date.

Paperwork Reduction Act

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned an OMB control number. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The burden of the information collections in this rule is estimated as follows:

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 93

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

For the reasons stated in the preamble, HUD amends 24 CFR chapter I as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

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

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, 12901–12912, and 12 U.S.C. 1301 *et seq.*

■ 2. In § 91.2, remove the word “and” at the end of paragraph (a)(3), remove the period at the end of paragraph (a)(4) and add “; and” in its place, and add paragraph (a)(5) to read as follows:

§ 91.2 Applicability.

(a) * * *
(5) The Housing Trust Fund (HTF) program (see 24 CFR part 93).

* * * * *

■ 3. In § 91.10, revise the first sentence of paragraph (a) to read as follows:

§ 91.10 Consolidated Program Year.

(a) Each of the following programs shall be administered by a jurisdiction on a single consolidated program year, established by the jurisdiction: CDBG, ESG, HOME, HOPWA, and HTF. * * *

* * * * *

■ 4. In § 91.215, revise paragraph (b)(2) to read as follows:

§ 91.215 Strategic Plan.

* * * * *

(b) * * *

(2) The affordable housing section shall include specific objectives that describe proposed accomplishments the jurisdiction hopes to achieve and must specify the number of extremely low-income, low-income, and moderate-income families to whom the jurisdiction will provide affordable housing as defined in 24 CFR 92.252 for rental housing, 24 CFR 92.254 for homeownership, and 24 CFR 93.302 and 24 CFR 93.304 (if the jurisdiction receives HTF funds from the State) over a specific time period.

* * * * *

■ 5. In § 91.220, add paragraph (l)(5) to read as follows:

§ 91.220 Action Plan.

* * * * *

(l) * * *

(5) *Housing Trust Fund.* (i) If the jurisdiction receives HTF funds from the State under 24 CFR 93.105, the action plan must include the HTF allocation plan (consistent with the State’s HTF requirements) that describes the distribution of the HTF funds, and establishes the application requirements and the criteria for selection of applications submitted by eligible recipients that meet the jurisdiction’s priority housing needs. The plan must include the following:

(A) The plan must identify priority factors for funding that shall include the following: geographic distribution which is a description of the geographic areas of the State (including areas of low-income and minority concentration) in which it will direct assistance during the ensuing program year; the applicant’s ability to obligate HTF funds and undertake eligible activities in a timely manner; in the case of rental housing projects, the extent to which rents for units in the project are affordable to extremely low-income families; in the case of rental housing projects, the duration of the units’ affordability period; the merits of the application in meeting the priority housing needs of the jurisdiction (such as housing that is accessible to transit or employment centers, housing that includes green building and sustainable development features, and housing that serves special needs populations); the location of existing affordable housing, and the extent to which the application makes use of non-federal funding sources.

(B) The plan must include the requirement that the application contain a description of the eligible activities to be conducted with the HTF funds (as provided in 24 CFR 93.200) and contain a certification by each eligible recipient that housing units assisted with the HTF will comply with HTF requirements. The plan must also describe eligibility requirements for recipients (as defined in 24 CFR 93.2).

(C) The plan must provide for performance goals, consistent with the jurisdiction’s goals established under 24 CFR 91.215(b)(2).

(D) The plan must provide the jurisdiction’s rehabilitation standards, as required by 24 CFR 93.301(b).

(E) If the jurisdiction intends to use HTF funds for first-time homebuyers, it must set forth the guidelines for resale or recapture, and obtain HUD’s specific,

written approval, as required in § 93.304(f). Approval of the consolidated plan or action plan under § 91.500 or the failure to disapprove the consolidated plan or action plan does not satisfy the requirement for specific HUD approval for resale or recapture guidelines.

(F) If the jurisdiction intends to use HTF funds for homebuyer assistance and does not use the HTF affordable homeownership limits for the area provided by HUD, it must determine 95 percent of the median area purchase price and set forth the information in accordance with § 93.305.

(G) The jurisdiction may limit the beneficiaries or give preferences to a particular segment of the extremely low- or very low-income population only if described in the action plan.

(1) Any limitation or preference must not violate nondiscrimination requirements in 24 CFR 93.350, and the jurisdiction must not limit or give preferences to students.

(2) The jurisdiction may permit rental housing owners to limit tenants or give a preference in accordance with 24 CFR 93.303 only if such limitation or preference is described in the action plan.

(H) The plan must describe the conditions under which the jurisdiction will refinance existing rental housing project debt.

(ii) [Reserved].

■ 6. In § 91.315, revise paragraph (b)(2) to read as follows:

§ 91.315 Strategic Plan.

* * * * *

(b) * * *

(2) The affordable housing section shall include specific objectives that describe proposed accomplishments the State hopes to achieve and must specify the number of extremely low-income, low-income, and moderate-income families to which the State will provide affordable housing, as defined in 24 CFR 92.252 for rental housing, 24 CFR 92.254 for homeownership, and 24 CFR 93.302 for rental housing and 24 CFR 93.304 for homeownership over a specific time period.

* * * * *

■ 7. In § 91.320, revise paragraph (k)(5) to read as follows:

§ 91.320 Action Plan.

* * * * *

(k) * * *

(5) *Housing Trust Fund*. The action plan must include the HTF allocation plan that describes the distribution of the HTF funds, and establishes the application requirements and the criteria for selection of applications

submitted by eligible recipients that meet the State's priority housing needs. The plan must also establish the State's maximum per-unit development subsidy limit for housing assisted with HTF funds. If the HTF funds will be used for first-time homebuyers, it must state the guidelines for resale and recapture as required in 24 CFR 93.304. The plan must reflect the State's decision to distribute HTF funds through grants to subgrantees and/or to select applications submitted by eligible recipients. If the State is selecting applications submitted by eligible recipients, the plan must include the following:

(i) The plan must provide priority for funding based on geographic diversity (as defined by the State in the consolidated plan); the applicant's ability to obligate HTF funds and undertake eligible activities in a timely manner; in the case of rental housing projects, the extent to which the project has Federal, State, or local project-based rental assistance so that rents are affordable to extremely low-income families; in the case of rental housing projects, the duration of the units' affordability period; the merits of the application in meeting the priority housing needs of the State (such as housing that is accessible to transit or employment centers, housing that includes green building and sustainable development features, or housing that serves special needs populations); and the extent to which the application makes use of non-federal funding sources.

(ii) The plan must include the requirement that the application contain a description of the eligible activities to be conducted with the HTF funds (as provided in 24 CFR 93.200) and contain a certification by each eligible recipient that housing units assisted with the HTF will comply with HTF requirements. The plan must also describe eligibility requirements for recipients (as defined in 24 CFR 93.2).

(iii) The plan must provide for performance goals and benchmarks against which the State will measure its progress, consistent with the State's goals established under 24 CFR 91.315(b)(2).

(iv) The plan must include the State's rehabilitation standards, as required by 24 CFR 93.301(b)(1).

(v) If the State intends to use HTF funds for first-time homebuyers, it must set forth the guidelines for resale or recapture, and obtain HUD's specific, written approval, as required in § 93.304(f). Approval of the consolidated plan or action plan under § 91.500 or the failure to disapprove the

consolidated plan or action does not satisfy the requirement for specific HUD approval for resale or recapture guidelines.

(vi) If the State intends to use HTF funds for homebuyer assistance and does not use the HTF affordable homeownership limits for the area provided by HUD, it must determine 95 percent of the median area purchase price and set forth the information in accordance with § 93.305.

(vii) The State may limit the beneficiaries or give preferences to a particular segment of the extremely low- or very low-income population only if described in the action plan.

(A) Any limitation or preference must not violate nondiscrimination requirements in 24 CFR 93.350, and the State must not limit or give preferences to students.

(B) The State may permit rental housing owners to limit tenants or give a preference in accordance with 24 CFR 93.303(d)(3) only if such limitation or preference is described in the action plan.

(viii) The plan must describe the conditions under which the State will refinance existing debt.

■ 8. In § 91.520, redesignate paragraphs (h) and (i) as paragraphs (i) and (j), respectively and add a new paragraph (h) to read as follows:

§ 91.520 Performance reports.

* * * * *

(h) *HTF*. For jurisdictions receiving HTF funds, the report must describe the HTF program's accomplishments, and the extent to which the jurisdiction complied with its approved HTF allocation plan and the requirements of 24 CFR part 93.

* * * * *

■ 9. Add part 93 to read as follows:

PART 93—HOUSING TRUST FUND

Subpart A—General

- 93.1 Overview.
- 93.2 Definitions.
- 93.3 Waivers.

Subpart B—Allocation Formula; Reallocations

- 93.50 Formula allocation.
- 93.51 Formula factors.
- 93.52 Minimum allocations.
- 93.53 **Federal Register** notice of formula allocations.
- 93.54 Reallocations by formula.

Subpart C—Participation and Submission Requirements; Distribution of Assistance

- 93.100 Participation and submission requirements.
- 93.101 Distribution of assistance.

Subpart D—Program Requirements

- 93.150 Site and neighborhood standards.

93.151 Income determinations.

Subpart E—Eligible and Prohibited Activities

- 93.200 Eligible activities: General.
 93.201 Eligible project costs.
 93.202 Eligible administrative and planning costs.
 93.203 HTF funds and public housing.
 93.204 Prohibited activities and fees.

Subpart F—Income Targeting

- 93.250 Income targeting.

Subpart G—Project Requirements

- 93.300 Maximum per-unit subsidy amount, underwriting, and subsidy layering.
 93.301 Property standards.
 93.302 Qualification as affordable housing: rental housing.
 93.303 Tenant protections and selection.
 93.304 Qualification as affordable housing: homeownership.
 93.305 Qualification as affordable housing: modest housing requirements for homeownership; resale or recapture requirements.

Subpart H—Other Federal Requirements

- 93.350 Other Federal requirements and nondiscrimination; affirmative marketing.
 93.351 Lead-based paint.
 93.352 Displacement, relocation, and acquisition.
 93.353 Conflict of interest.
 93.354 Funding Accountability and Transparency Act.
 93.355 Eminent domain.

Subpart I—Program Administration

- 93.400 Housing Trust Fund (HTF) accounts.
 93.401 HTF grant agreement.
 93.402 Program disbursement and information system.
 93.403 Program income and repayments.
 93.404 Grantee responsibilities; written agreements; onsite inspections; financial oversight.
 93.405 Applicability of uniform administrative requirements, cost principles, and audits.
 93.406 Audits.
 93.407 Recordkeeping.
 93.408 Performance reports.

Subpart J—Performance Reviews and Sanctions

- 93.450 Accountability of recipients.
 93.451 Performance reviews.
 93.452 Corrective and remedial actions.
 93.453 Notice and opportunity for hearing; sanctions.

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 4568.

Subpart A—General

§ 93.1 Overview.

(a) This part implements the Housing Trust Fund (HTF) program established under section 1338 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4501 *et seq.*) (the Act). In

general, under the HTF program, HUD allocates funds by formula to eligible States to increase and preserve the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing for extremely low-income and very low-income households, including homeless families.

(b) Section 1337 of the Act requires a percentage of the unpaid principal balance of total new business for the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae) (collectively, the government-sponsored enterprises or GSEs) to be set aside and allocated as a dedicated source of annual funding for the HTF, unless allocations are suspended by the Director of the Federal Housing Finance Agency, the agency that regulates the GSEs. These funds will be deposited into an HTF account established in the Treasury of the United States by the Secretary of the Treasury to carry out the HTF program. The Act also provides that the HTF may be funded with amounts appropriated, transferred, or credited to the HTF under other provisions of law.

§ 93.2 Definitions.

1937 Act means the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*).

Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4501 *et seq.*).

Annual income. See § 93.151.

Commitment means:

(1) The grantee has executed a legally binding written agreement (that includes the date of the signature of each person signing the agreement) with an eligible recipient for a project that meets the definition of “commit to a specific local project” of paragraph (2) of this definition.

(2) “Commit to a specific local project” means:

(i) If the project consists of rehabilitation or new construction (with or without acquisition), the grantee and recipient have executed a written legally binding agreement under which HTF assistance will be provided to the recipient for an identifiable project for which construction can reasonably be expected to start within 12 months of the agreement date. The written agreement for rehabilitation or new construction of rental housing may also provide operating cost assistance and/or operating cost assistance reserves.

(ii) If the project consists of acquisition of standard housing and the grantee is providing HTF funds to a

recipient to acquire rental housing, or to a first-time homebuyer family to acquire single family housing for homeownership, the grantee and recipient or the family have executed a written agreement under which HTF assistance will be provided for the purchase of the rental housing or single family housing and the property title will be transferred to the recipient or family within 6 months of the agreement date. The written agreement for acquisition of rental housing may also provide operating cost assistance and/or operating cost assistance reserves.

(iii) If the project is for renewal of operating cost assistance or operating cost assistance reserves, the grantee and the recipient must have executed a legally binding written agreement under which HTF funds will be provided to the recipient for operating cost assistance or operating cost assistance reserves for the identified HTF project.

Consolidated plan means the plan submitted and approved in accordance with 24 CFR part 91.

Displaced homemaker means an individual who:

(1) Is an adult;

(2) Has not worked full-time full-year in the labor force for a number of years, but has, during such years, worked primarily without remuneration to care for the home and family; and

(3) Is unemployed or underemployed and is experiencing difficulty in obtaining or upgrading employment.

Extremely low-income families means low-income families whose annual incomes do not exceed 30 percent of the median family income of a geographic area, as determined by HUD with adjustments for smaller and larger families.

Family has the same meaning given that term in 24 CFR 5.403.

First-time homebuyer means an individual and his or her spouse who have not owned a home during the 3-year period prior to purchase of a home with assistance under this part. The term first-time homebuyer also includes an individual who is a displaced homemaker or single parent, as those terms are defined in this section.

Grantee means the State or the State-designated entity that receives the HTF funds from HUD.

HTF allocation plan means the annual submission to HUD required by the Act that describes how the grantee will distribute its HTF funds, including how it will use the funds to address its priority housing needs, what activities may be undertaken with those funds, and how recipients and projects will be

selected to receive those funds. See 24 CFR 91.220(l)(4) and 91.320(k)(5).

HTF funds means funds made available under this part through formula allocations and reallocations, plus program income.

Homeownership means ownership in fee simple title in a 1- to 4-unit dwelling or in a condominium unit, or equivalent form of ownership approved by HUD.

(1) The land may be owned in fee simple or the homeowner may have a 99-year ground lease.

(i) For housing located in the insular areas, the ground lease must be 40 years or more.

(ii) For housing located on Indian trust or restricted Indian lands or a Community Land Trust, the ground lease must be 50 years or more.

(iii) For manufactured housing, the ground lease must be for a period at least equal to the applicable period of affordability in § 93.304(e).

(2) Right to possession under a contract for deed, installment contract, or land contract (pursuant to which the deed is not given until the final payment is made) is not an equivalent form of ownership.

(3) The ownership interest may be subject only to the restrictions on resale required under § 93.304; mortgages, deeds of trust, or other liens or instruments securing debt on the property as approved by the grantee; or any other restrictions or encumbrances that do not impair the good and marketable nature of title to the ownership interest.

(4) The grantee must determine whether or not ownership or membership in a cooperative or mutual housing project constitutes homeownership under State law; however, if the cooperative or mutual housing project receives low income housing tax credits, the ownership or membership does not constitute homeownership.

Household means one or more persons occupying a housing unit.

Housing includes manufactured housing and manufactured housing lots, permanent housing for disabled homeless persons, single-room occupancy housing, and group homes. Housing does not include emergency shelters (including shelters for disaster victims) or facilities such as nursing homes, convalescent homes, hospitals, residential treatment facilities, correctional facilities, halfway houses, housing for students, or dormitories (including farmworker dormitories).

HUD means the Department of Housing and Urban Development.

Income-eligible means a family, homeowner, or household (as

appropriate given the context of the specific regulatory provision) that is very low-income, extremely low-income, or both, depending on the income-targeting requirements set forth in § 93.250.

Insular areas means Guam, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, and American Samoa.

Neighborhood means a geographic location designated in comprehensive plans, ordinances, or other local documents as a neighborhood, village, or similar geographical designation that is within the boundary but does not encompass the entire area of a unit of general local government; except that if the unit of general local government has a population under 25,000, the neighborhood may, but need not, encompass the entire area of a unit of general local government.

Poverty line is defined in section 673 of the Omnibus Budget Reconciliation Act of 1981 (42 U.S.C. 9902).

Program income means gross income received by the grantee that is directly generated from the use of HTF funds. When program income is generated by housing that is only partially assisted with HTF funds, the income shall be prorated to reflect the percentage of HTF funds used. Program income includes, but is not limited to, the following:

(1) Proceeds from the disposition by sale or long-term lease of real property acquired, rehabilitated, or constructed with HTF funds;

(2) Gross income from the use or rental of real property owned by the grantee that was acquired, rehabilitated, or constructed with HTF funds, minus costs that were incidental to generation of the income; therefore, program income does not include gross income from the use, rental, or sale of real property received by the recipient, unless the funds are paid by the recipient to the grantee);

(3) Payments of principal and interest on loans made using HTF funds;

(4) Proceeds from the sale of loans made with HTF funds;

(5) Proceeds from the sale of obligations secured by loans made with HTF funds;

(6) Interest earned on program income pending its disposition; and

(7) Any other interest or return on the investment of HTF funds, as permitted under § 93.200(b).

Project means a site or sites together with any building (including a manufactured housing unit) or buildings located on the site(s) that are under common ownership, management, and financing and are to be assisted with HTF funds as a single undertaking

under this part. The project includes all the activities associated with the site and building.

Project completion means that all necessary title transfer requirements and construction work have been performed, the project complies with the requirements of this part (including the property standards under § 93.301 of this part), the final drawdown has been disbursed for the project, and the project completion information has been entered in the disbursement and information system established by HUD, except that with respect to rental housing project completion, for the purposes of § 93.402(d) of this part, project completion occurs upon completion of construction before occupancy.

Recipient means an organization, agency, or other entity (including a public housing agency, or a for-profit entity or a nonprofit entity) that receives HTF assistance from a grantee as an owner or developer to carry out an HTF-assisted project. A recipient must:

(1) Make acceptable assurances to the grantee that it will comply with the requirements of the HTF program during the entire period that begins upon selection of the recipient to receive HTF funds, and ending upon the conclusion of all HTF-funded activities;

(2) Demonstrate the ability and financial capacity to undertake, comply, and manage the eligible activity;

(3) Demonstrate its familiarity with the requirements of other Federal, State, or local housing programs that may be used in conjunction with HTF funds to ensure compliance with all applicable requirements and regulations of such programs; and

(4) Have demonstrated experience and capacity to conduct an eligible HTF activity as evidenced by its ability to:

(i) Own, construct, or rehabilitate, and manage and operate an affordable multifamily rental housing development; or

(ii) Design, construct, or rehabilitate, and market affordable housing for homeownership.

(iii) Provide forms of assistance, such as down payments, closing costs, or interest rate buydowns for purchasers.

Reconstruction means the rebuilding, on the same lot, of housing standing on a site at the time of project commitment, except that housing that was destroyed may be rebuilt on the same lot if HTF funds are committed within 12 months of the date of destruction. The number of housing units on the lot may not be decreased or increased as part of a reconstruction project, but the number of rooms per unit may be increased or decreased. Reconstruction also includes

replacing an existing substandard unit of manufactured housing with a new or standard unit of manufactured housing. Reconstruction is new construction for purposes of this part.

Shortage of standard rental units both affordable and available to extremely low-income renter households means

(1) For any State or other geographical area the gap between:

(i) The number of units with complete plumbing and kitchen facilities with a rent that does not exceed 30 percent of 30 percent of the adjusted area median income (AMI) as determined by HUD that either are occupied by extremely low-income renter households or are vacant for rent; and

(ii) The number of extremely low-income renter households.

(2) If the number of units described in paragraph (1)(i) of this definition exceeds the number of extremely low-income households described in paragraph (1)(ii) of this definition, there is no shortage.

Single family housing means a one-to-four-family residence, condominium unit, cooperative unit, combination of manufactured housing and lot, or manufactured housing lot.

Single parent means an individual who:

(1) Is unmarried or legally separated from a spouse; and

(2) Has one or more minor children of whom the individual has custody or joint custody, or is pregnant.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and American Samoa.

State-designated entity means a State housing finance agency, tribally designated housing entity, or any other qualified instrumentality of the State that is designated by the State to be the grantee.

Subgrantee means a unit of general local government or State agency selected by the grantee to administer all or a portion of its HTF program. A local government subgrantee must have an approved consolidated plan submitted in accordance with 24 CFR part 91. The selection of a subgrantee by a grantee is not subject to the procurement procedures and requirements.

Tribally designated housing entity has the meaning given the term in section 4 of the Native American Housing Assistance and Self-Determination Act of 1997 (25 U.S.C. 4103).

Unit of general local government means a city, town, township, county, parish, village, or other general purpose political subdivision of a State; and any

agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive to act on behalf of the jurisdiction with regard to provisions of this part. When a county is an urban county, the urban county is the unit of general local government for purposes of the HTF program.

Urban county has the meaning given the term in 24 CFR 570.3.

Very low-income renter households means a household whose income is in excess of 30 percent but not greater than 50 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD.

Very low-income families means low-income families whose annual incomes are in excess of 30 percent but not greater than 50 percent of the median family income of a geographic area, as determined by HUD with adjustments for smaller and larger families. "Very low-income family" also includes any family that resides in a nonmetropolitan area that does not exceed the poverty line applicable to the family size involved.

§ 93.3 Waivers.

HUD may, upon a determination of good cause and subject to statutory limitations, waive any provision of this part and delegate this authority in accordance with section 106 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3535(q)).

Subpart B—Allocation Formula; Reallocations

§ 93.50 Formula allocation.

(a) *Allocations to States.* HUD will provide to the States allocations of funds in amounts determined by the formula described in this part.

(b) *Amount available for allocation.* The amount of funds available for allocation by the formula is the balance remaining after providing for other purposes authorized by Congress, in accordance with the Act and appropriations.

(c) *Allocations for the insular areas.* The allocation amount for each insular area is determined by multiplying the funds available times the ratio of renter households in each insular area to the total number of renter households in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the insular areas.

(d) *Allocations for the 50 States, the Commonwealth of Puerto Rico, and the District of Columbia—(1) Amounts available for allocations.* The amount of funds that is available for allocation by

the formula to the 50 States, the Commonwealth of Puerto Rico, and the District of Columbia is determined using the most current data available from the U.S. Census Bureau that is available for the same year for all these geographic areas. The amount is equal to the balance of funds remaining after determining formula allocations for the insular areas under § 93.50(c). For purposes of paragraphs (d)(1) and (2) of this section, the term "State" means any of the 50 United States, the Commonwealth of Puerto Rico, and the District of Columbia.

(2) *Allocations.* (i) Allocations to the States are determined using the four needs factors described in § 93.51(a) through (d), multiplying each factor by the amount available under § 93.51(d)(1) by its priority weight, and summing the four factors for each State.

(ii) The factor described in § 93.51(a) is weighted 0.5. The factors described in § 93.51(b) and (d) are weighted at 0.125 and the factor described in § 93.51(c) of this section is weighted at 0.25.

(iii) The sum of the four needs factors for each State is then multiplied by the construction cost factor described in § 93.51(e) of this section and by the total amount of funds available for State allocations.

§ 93.51 Formula factors.

(a) *Need factor one.* The ratio of the shortage of standard rental units both affordable and available to extremely low-income renter households in the State to the aggregate shortage of standard rental units both affordable and available to extremely low-income renter households in all the States.

(b) *Need factor two.* The ratio of the shortage of standard rental units both affordable and available to very low-income renter households in the State to the aggregate shortage of standard rental units both affordable and available to very low-income renter households in all the States.

(c) *Need factor three.* The ratio of:

(1) Extremely low-income renter households in the State living with either incomplete kitchen or plumbing facilities, more than one person per room, or paying more than 50 percent of income for housing costs, to

(2) The aggregate number of extremely low-income renter households living with either incomplete kitchen or plumbing facilities, more than one person per room, or paying more than 50 percent of income for housing costs in all the States.

(d) *Need factor four.* The ratio of very low-income renter households in the State paying more than 50 percent of income on rent relative to the aggregate

number of very low-income renter households paying more than 50 percent of income on rent in all the States.

(e) *Construction cost factor.* The resulting sum calculated from the factors described in paragraphs (a) through (d) of this section shall be multiplied by the relative cost of construction in the state. For purposes of calculating this factor, the term “cost of construction”:

(1) Means the cost of construction or building rehabilitation in the State relative to the national cost of construction or building rehabilitation; and

(2) Is calculated so that values higher than 1.0 indicate that the State’s construction costs are higher than the national average, a value of 1.0 indicates that the State’s construction costs are exactly the same as the national average, and values lower than 1.0 indicate that the State’s cost of construction are lower than the national average.

§ 93.52 Minimum allocations.

(a) In accordance with the HTF statute, HUD is required to provide each of the States and the District of Columbia with a minimum grant of \$3 million. If the formula amount determined for a fiscal year is less than \$3 million to any of the 50 States or the District of Columbia, then the allocation to that State or the District of Columbia is increased to \$3 million, and allocations to States and the District of Columbia above \$3 million and to the Commonwealth of Puerto Rico and the insular areas are adjusted by an equal amount on a pro rata basis.

(b) If in any fiscal year, funding in the HTF is insufficient to provide each of the 50 States and the District of Columbia with a minimum grant of \$3 million, HUD will, through notice published in the **Federal Register** for public comment, describe an alternative method for allocating grant funds to the 50 States and the District of Columbia.

§ 93.53 Federal Register notice of formula allocations.

Not later than 60 calendar days after the date that HUD determines the formula amounts under this subpart, HUD will publish a notice in the **Federal Register** announcing the availability of the allocations to States.

§ 93.54 Reallocations by formula.

(a) HUD will reallocate under this section:

(1) Any HTF funds available for reallocation because HUD reduced or recaptured funds from an HTF grantee under § 93.400(d) for failure to commit

or expend the funds within the time specified, or under § 93.453 for failure to comply substantially with any provision of this part;

(2) Any HTF funds reduced for failure by the grantee to obtain funds required to be reimbursed or returned under § 93.450; and

(3) Any HTF funds remitted to HUD under § 93.403(b)(4) when a grantee ceases to be an HTF grantee for any reason.

(b) Any reallocation of funds must be made only among all participating States, except those States from which the funds were recaptured or reduced.

(c) Any amounts that become available for reallocation shall be added to amounts for formula allocation in the succeeding fiscal year.

Subpart C—Participation and Submission Requirements; Distribution of Assistance

§ 93.100 Participation and submission requirements.

(a) *Notification of intent to participate.* Not later than 30 calendar days after HUD’s publication of the formula allocation amounts as provided in § 93.53, the State must notify HUD in writing of its intention to become an HTF grantee for the first year of HTF funding.

(b) *Submission requirement.* To receive its HTF grant, the grantee must submit a consolidated plan in accordance with 24 CFR part 91.

§ 93.101 Distribution of assistance.

(a) A State may choose to be the HTF grantee to receive and administer its grant or it may choose a qualified State-designated entity to be the HTF grantee.

(b) Each grantee is responsible for distributing HTF funds throughout the State according to the State’s assessment of the priority housing needs within the State, as identified in the State’s approved consolidated plan.

(c) An HTF grantee may choose to directly fund projects by eligible recipients in accordance with the State’s HTF allocation plan or to fund projects by eligible recipients through one or more subgrantees. An HTF subgrantee that is a unit of general local government must have a consolidated plan under 24 CFR part 91, and must include an HTF allocation plan in its consolidated plan (see 24 CFR 91.220(l)(4)), and must select projects by eligible recipients in accordance with its HTF allocation plan. Because a State has only one consolidated plan, and HTF allocation plan for an HTF subgrantee that is a State agency must be included in the State’s HTF allocation plan. The

grantee or subgrantee must determine that the applicant is an eligible recipient that meets the definition of “recipient” in § 93.2 before awarding HTF assistance.

(d) If the HTF grantee subgrants HTF funds to subgrantees, the grantee must ensure that its subgrantees comply with the requirements of this part and carry out the responsibilities of the grantee. The grantee must annually review the performance of subgrantees in accordance with 24 CFR 93.404(a).

Subpart D—Program Requirements

§ 93.150 Site and neighborhood standards.

(a) *General.* A grantee must administer its HTF program in a manner that provides housing that is suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4), the Fair Housing Act (42 U.S.C. 3601 *et seq.*, E.O. 11063, 3 CFR, 1959–1963 Comp., p. 652) and HUD regulations issued pursuant thereto; and promotes greater choice of housing opportunities.

(b) *New rental housing.* In carrying out the site and neighborhood requirements with respect to new construction of rental housing, a grantee is responsible for making the determination that proposed sites for new construction meet the requirements in 24 CFR 983.57(e)(2).

§ 93.151 Income determinations.

(a) *General.* The HTF program has income-targeting requirements. Therefore, the grantee must determine that each family occupying an HTF-assisted unit is income-eligible by determining the family’s annual income.

(b) *Definition of “annual income.”* (1) When determining whether a family is income-eligible, the grantee must use one of the following two definitions of “annual income”:

(i) “Annual income” as defined at 24 CFR 5.609; or

(ii) “Adjusted gross income” as defined for purposes of reporting under the Internal Revenue Service (IRS) Form 1040 series for individual federal annual income tax purposes.

(2) The grantee may use only one definition for each HTF-assisted program (e.g., down payment assistance program) that it administers and for each rental housing project.

(c) *Determining annual income—*(1) *Tenants in HTF-assisted housing.* For families who are tenants in HTF-assisted housing, the grantee must initially determine annual income using the method in paragraph (d)(1) of this

section. For subsequent income determinations during the period of affordability, the grantee may use any one of the methods described in paragraph (d) of this section, in accordance with § 93.302(e).

(2) *HTF-assisted homebuyers.* For families who are HTF-assisted homebuyers, the grantee must determine annual income using the method described in paragraph (d)(1) of this section.

(d) *Methods of determining annual income.* (1) Examine at least 2 months of source documents evidencing annual income (e.g., wage statement, interest statement, unemployment compensation statement) for the family.

(2) Obtain from the family a written statement of the amount of the family's annual income and family size, along with a certification that the information is complete and accurate. The certification must state that the family will provide source documents upon request.

(3) Obtain a written statement from the administrator of a government program under which the family receives benefits and which examines each year the annual income of the family. The statement must indicate the tenant's family size and state the amount of the family's annual income; or alternatively, the statement must indicate the current dollar limit for very low- or low-income families for the family size of the tenant and state that the tenant's annual income does not exceed this limit.

Subpart E—Eligible and Prohibited Activities

§ 93.200 Eligible activities: General.

(a)(1) HTF funds may be used for the production, preservation, and rehabilitation of affordable rental housing and affordable housing for first-time homebuyers through the acquisition (including assistance to homebuyers), new construction, reconstruction, or rehabilitation of nonluxury housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, and other expenses, including financing costs, relocation expenses of any displaced persons, families, businesses, or organizations; for operating costs of HTF-assisted rental housing; and for reasonable administrative and planning costs. Not more than one third of each annual grant may be used for operating cost assistance and operating cost assistance reserves. Operating cost assistance and operating cost assistance reserves may be provided only to rental

housing acquired, rehabilitated, reconstructed, or newly constructed with HTF funds. Not more than 10 percent of the annual grant shall be used for housing for homeownership. HTF-assisted housing must be permanent housing. The specific eligible costs for these activities are found in §§ 93.201 and 93.202. The activities and costs are eligible only if the housing meets the property standards in § 93.301, as applicable, upon project completion.

(2) Acquisition of vacant land or demolition must be undertaken only with respect to a particular housing project intended to provide affordable housing within the time frames established in the definition of "commitment" in § 93.2.

(3) HTF funds may be used to purchase and/or rehabilitate a manufactured housing unit, and purchase the land upon which a manufactured housing unit is located. The manufactured housing unit must, at the time of project completion, be connected to permanent utility hook-ups and be located on land that is owned by the manufactured housing unit owner or land for which the manufactured housing owner has a lease for a period at least equal to the applicable period of affordability.

(b) *Forms of assistance to projects.* A grantee may provide HTF funds as equity investments, interest-bearing loans or advances, non-interest-bearing loans or advances, interest subsidies consistent with the purposes of this part, deferred payment loans, grants, or other forms of assistance that HUD determines to be consistent with the purposes of this part. Each grantee has the right to establish the terms of assistance, subject to the requirements of this part.

(c) *Multi-unit projects.* (1) HTF funds may be used to assist in the development of one or more housing units in a multi-unit project. Only the actual HTF eligible development costs of the assisted units may be charged to the HTF program. If the assisted and non-assisted units are not comparable, the actual costs may be determined based on a method of cost allocation. If the assisted and non-assisted units are comparable in terms of size, features, and number of bedrooms, the actual cost of the HTF-assisted units can be determined by prorating the total HTF-eligible development costs of the project so that the proportion of the total development costs charged to the HTF program does not exceed the proportion of the HTF-assisted units in the project.

(2) After project completion, the number of units designated as HTF-assisted may be reduced only in

accordance with § 93.203, except that in a project consisting of all HTF-assisted units, one unit may be converted to an onsite manager's unit if the grantee determines the conversion is reasonable and that, based on one fewer HTF-assisted unit, the costs charged to the HTF program do not exceed the actual costs of the HTF-assisted units and do not exceed the subsidy limit established pursuant to § 93.300(a).

(d) *Terminated projects.* An HTF-assisted project that is terminated before completion, either voluntarily or otherwise, constitutes an ineligible activity and the grantee must repay any HTF funds invested in the project to its HTF account from which the funds were drawn (i.e., local or Treasury account), in accordance with § 93.403(b). A project that does not meet the requirements for affordable housing must be terminated and the grantee must repay the HTF funds to the grantee's HTF account.

§ 93.201 Eligible project costs.

HTF funds may be used to pay the following eligible costs:

(a) *Development hard costs.* The actual cost of constructing or rehabilitating housing. These costs include the following:

(1) For new construction projects, costs to meet the new construction standards of the grantee in § 93.301;

(2) For rehabilitation, costs to meet the property standards for rehabilitation projects in § 93.301(b);

(3) For both new construction and rehabilitation projects, costs:

- (i) To demolish existing structures;
- (ii) To make utility connections including off-site connections from the property line to the adjacent street; and
- (iii) To make improvements to the project site that are in keeping with improvements of surrounding, standard projects. Site improvements may include onsite roads and sewer and water lines necessary to the development of the project. The project site is the property, owned by the project owner, upon which the project is located.

(4) For both new construction and rehabilitation of multifamily rental housing projects, costs to construct or rehabilitate laundry and community facilities that are located within the same building as the housing and which are for the use of the project residents and their guests.

(5) Costs to make utility connections or to make improvements to the project site, in accordance with the provisions of paragraphs (a)(3)(ii) and (iii) of this section are also eligible in connection

with the acquisition of standard housing.

(b) *Refinancing costs.* (1) The cost to refinance existing debt secured by rental housing units that are being rehabilitated with HTF funds, but only if the refinancing is necessary to reduce the overall housing costs and to make the housing more affordable and proportional to the number of HTF-assisted units in the rental project. The proportional rehabilitation cost must be greater than the proportional amount of debt that is refinanced.

(2) The grantee must establish refinancing guidelines and state them in its consolidated plan described in 24 CFR part 91. The guidelines shall describe the conditions under which the grantee will refinance existing debt. At minimum, the guidelines must demonstrate that rehabilitation is the primary eligible activity and ensure that this requirement is met by establishing a minimum level of rehabilitation per unit or a required ratio between rehabilitation and refinancing.

(c) *Acquisition costs.* Costs of acquiring improved or unimproved real property, including acquisition by homebuyers.

(d) *Related soft costs.* Other reasonable and necessary costs incurred by the owner or grantee and associated with the financing, or development (or both) of new construction, rehabilitation or acquisition of housing assisted with HTF funds. These costs include, but are not limited to:

(1) Architectural, engineering, or related professional services required to prepare plans, drawings, specifications, or work write-ups. The costs may be paid if they were incurred not more than 24 months before the date that HTF funds are committed to the project and the grantee expressly permits HTF funds to be used to pay the costs in the written agreement committing the funds.

(2) Costs to process and settle the financing for a project, such as private lender origination fees, credit reports, fees for title evidence, fees for recordation and filing of legal documents, building permits, attorneys' fees, private appraisal fees and fees for an independent cost estimate, and builders' or developers' fees.

(3) Costs of a project audit, including certification of costs performed by a certified public accountant, that the grantee may require with respect to the development of the project.

(4) Costs to provide information services such as affirmative marketing and fair housing information to prospective homeowners and tenants as required by § 93.350.

(5) For new construction or rehabilitation, the cost of funding an initial operating deficit reserve, which is a reserve to meet any shortfall in project income during the period of project rent-up (not to exceed 18 months) and which may only be used to pay project operating expenses, scheduled payments to a replacement reserve, and debt service. Any HTF funds placed in an operating deficit reserve that remain unexpended after the period of project rent-up may be retained for project reserves if permitted by the grantee.

(6) Staff and overhead costs of the grantee directly related to carrying out the project, such as work specifications preparation, loan processing, and inspections. For multi-unit projects, such costs must be allocated among HTF-assisted units in a reasonable manner and documented. Although these costs may be charged as project costs, these costs cannot be charged to or paid by the assisted families.

(7) For both new construction and rehabilitation, costs for the payment of impact fees that are charged for all projects within a jurisdiction.

(e) *Operating cost assistance and operating cost assistance reserves.* For HTF-assisted units for which project-based assistance is not available, when necessary and subject to the limitations in § 93.200(a), HTF funds may be used to pay for operating cost assistance and operating cost assistance reserves, as follows:

(1) Operating costs are costs for insurance, utilities, real property taxes, and maintenance and scheduled payments to a reserve for replacement of major systems (provided that the payments must be based on the useful life of each major system and expected replacement cost) of an HTF-assisted unit. The eligible amount of HTF funds per unit for operating cost assistance is determined based on the deficit remaining after the monthly rent payment for the HTF-assisted unit is applied to the HTF-assisted unit's share of monthly operating costs. The maximum amount of the operating cost assistance to be provided to an HTF-assisted rental project must be based on the underwriting of the project and must be specified in a written agreement between the grantee and the recipient. The written agreement may commit, from a fiscal year HTF grant, funds for operating cost assistance for a multiyear period provided that the grantee is able to meet its expenditure deadline in § 93.400(d). The grantee may renew operating cost assistance with future fiscal year HTF grants during the affordability period and the amount must be based on the need for the

operating cost assistance at the time the assistance is renewed.

(2) An operating cost assistance reserve may be funded by the grantee for HTF-assisted units in a project where the grantee determines in its underwriting of the project the reserve is necessary to ensure the project's financial feasibility. If the operating cost assistance reserve is funded with appropriated HTF funds, the allowable amount of the reserve shall not exceed the amount determined by the grantee to be necessary to provide operating cost assistance for HTF-assisted units, for a period not to exceed 5 years, based on an analysis of potential deficits remaining after the expected rent payments for the HTF-assisted unit are applied to the HTF-assisted unit's expected share of operating costs. The grantee may renew operating cost assistance reserves with future fiscal year HTF grants during the affordability period and the amount must be based on the need for the operating cost assistance reserve at the time the assistance for the reserve is renewed. If the operating cost assistance reserve is funded with non-appropriated HTF funds, the reserve may be funded for the period of affordability.

(f) *Relocation costs.* The cost of relocation payments and other relocation assistance to persons displaced by the project are eligible costs.

(1) Relocation payments include replacement housing payments, payments for moving expenses, and payments for reasonable out-of-pocket costs incurred in the temporary relocation of persons.

(2) Other relocation assistance means staff and overhead costs directly related to providing advisory and other relocation services to persons displaced by the project, including timely written notices to occupants, referrals to comparable and suitable replacement property, property inspections, counseling, and other assistance necessary to minimize hardship.

(g) *Costs relating to payment of loans.* If the HTF funds are not used to directly pay a cost specified in this section, but are used to pay off a construction loan, bridge financing loan, or guaranteed loan, the payment of principal and interest for such loan is an eligible cost only if:

(1) The loan was used for eligible costs specified in this section, and

(2) The HTF assistance is part of the original financing for the project and the project meets the requirements of this part.

(h) *Construction undertaken before the HTF funds are committed to the*

project. HTF funds cannot be used for development hard costs, as provided in paragraph (a) of this section, or for acquisition, undertaken before the HTF funds are committed to the project. However, the written agreement committing the HTF funds to the project may authorize HTF funds to be used for architectural and engineering costs and other related professional services, as provided in paragraph (d)(1) of this section.

§ 93.202 Eligible administrative and planning costs.

(a) *General*. A HTF grantee may expend, for payment of reasonable administrative and planning costs of the HTF, an amount of HTF funds that is not more than 10 percent of the sum of each fiscal year HTF grant and of program income deposited into its local account or received and reported by its subgrantees during the program year. A HTF grantee may expend the funds directly or may authorize its subgrantees, if any, to expend all or a portion of such funds, provided total expenditures for planning and administrative costs do not exceed the maximum allowable amount. Reasonable administrative and planning costs are those costs described in paragraphs (b) through (h) of this section:

(b) *General management, oversight and coordination*. Reasonable costs of overall program management, coordination, monitoring, and evaluation. Such costs include, but are not limited to, necessary expenditures for the following:

(1) Salaries, wages, and related costs of the grantee's staff. In charging costs to this category the grantee may either include the entire salary, wages, and related costs allocable to the program of each person whose *primary* responsibilities with regard to the program involves program administration assignments, or the prorated share of the salary, wages, and related costs of each person whose job includes *any* program administration assignments. The grantee may use only one of these methods. Program administration includes the following types of assignments:

(i) Developing systems and schedules for ensuring compliance with program requirements;

(ii) Developing interagency agreements and agreements with entities receiving HTF funds;

(iii) Monitoring HTF-assisted housing for progress and compliance with program requirements;

(iv) Preparing reports and other documents related to the program for submission to HUD;

(v) Coordinating the resolution of audit and monitoring findings;

(vi) Evaluating program results against stated objectives; and

(vii) Managing or supervising persons whose primary responsibilities with regard to the program include such assignments as those described in paragraphs (a)(1)(i) through (vi) of this section;

(2) Travel costs incurred for official business in carrying out the program;

(3) Administrative services performed under third party contracts or agreements, including such services as general legal services, accounting services, and audit services;

(4) Other costs for goods and services required for administration of the program, including such goods and services as rental or purchase of equipment, insurance, utilities, office supplies, and rental and maintenance (but not purchase) of office space; and

(c) *Staff and overhead*. Staff and overhead costs of the grantee directly related to carrying out the project, such as work specifications preparation, loan processing, inspections, lead-based paint evaluations (visual assessments, inspections, and risk assessments), other services related to assisting potential owners, tenants and homebuyers (*e.g.*, housing counseling); and staff and overhead costs directly related to providing advisory and other relocation services to persons displaced by the project, including timely written notices to occupants, referrals to comparable and suitable replacement property, property inspections, counseling, and other assistance necessary to minimize hardship. These costs (except homeownership counseling) may be charged as administrative costs or as project costs under § 93.201(d)(6) and (f)(2), at the discretion of the grantee; however, these costs (except homeownership counseling) cannot be charged to or paid by the low-income families.

(d) *Public information*. The provision of information and other resources to residents and citizen organizations participating in the planning, implementation, or assessment of projects being assisted with HTF funds.

(e) *Fair housing*. Activities to affirmatively further fair housing in accordance with the grantee's certification under 24 CFR part 91.

(f) *Indirect costs*. Indirect costs may be charged to the HTF program in accordance with 2 CFR part 200, subpart E.

(g) *Preparation of the consolidated plan*. Preparation of the consolidated plan required under 24 CFR part 91. Preparation includes the costs of public hearings, consultations, and publication.

(h) *Other Federal requirements*. Costs of complying with the Federal requirements in subpart H of this part.

§ 93.203 HTF funds and public housing.

(a) HTF funds may be used for new construction or rehabilitation of public housing units only in accordance with the following:

(1) HTF funds may be used for new construction of public housing as part of the Choice Neighborhoods (Choice) program under a HUD appropriation act or for new public housing units that have been allocated and will receive low-income housing tax credits under section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42).

(2) HTF funds may be used for the rehabilitation of existing public housing units in which the public housing assistance will be converted and used at the properties under the Rental Assistance Demonstration (RAD) program under HUD's 2012 Appropriations Act (Pub. L. 112-55, 125 Stat. 552, approved November 18, 2011) or subsequent statutes. HTF funds may also be used for the rehabilitation of existing public housing under the Choice program, and of existing public housing units that have been allocated and will receive low-income housing tax credits under section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42).

(b) The public housing units constructed using funds under this part must replace units that were removed from a public housing agency's public housing inventory as part of a Choice program grant, or as part of a mixed-financed development under section 35 of the 1937 Act. The number of replacement units cannot be more than the number of units removed from the public housing agency's inventory. The public housing units constructed or rehabilitated using funds under this part must receive Public Housing Operating Fund assistance (and may receive Public Housing Capital Fund assistance) under section 9 of the 1937 Act. These units cannot receive operating costs assistance or operating cost assistance reserves under this part.

(c) Except as provided in paragraph (b) of this section, HTF-assisted housing may not receive Operating Fund or Capital Fund assistance under section 9 of the 1937 Act during the HTF period of affordability.

(d) Consistent with § 93.200(c), HTF funds may be used for affordable housing in a project that also contains public housing units, provided that the HTF funds are not used for the public housing units and HTF funds are used only for eligible costs, in accordance with this part.

§ 93.204 Prohibited activities and fees.

(a) HTF funds may not be used to:

(1) Provide assistance (other than assistance to a homebuyer to acquire housing previously assisted with HTF funds or renewal of operating cost assistance or renewal of operating cost assistance reserve) to a project previously assisted with HTF funds during the period of affordability established by the grantee in the written agreement under § 93.404 (c)(2)(iv). However, additional HTF funds may be committed to a project up to one year after project completion, but the amount of HTF funds in the project may not exceed the maximum per-unit development subsidy amount established pursuant to § 93.300.

(2) Pay for the acquisition of property owned by the grantee, except for property acquired by the grantee with HTF funds or property acquired in anticipation of carrying out an HTF project.

(3) Pay delinquent taxes, fees, or charges on properties to be assisted with HTF funds.

(4) Pay for political activities, advocacy, lobbying (whether directly or through other parties), counseling services (except for housing counseling), travel expenses (other than those eligible under § 93.202(b)), or preparing or providing advice on tax returns. The prohibited use of funds for political activities includes influencing the selection, nomination, election, or appointment of one or more candidates to any Federal, State, or local office as codified in section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501).

(5) Pay for administrative, outreach, or other costs to manage and operate the grantee of HTF funds, except those administrative costs necessary to carry out the HTF program in § 93.202, including housing counseling.

(6) Pay for any cost that is not eligible under § 93.201 and § 93.202.

(b)(1) The grantee may not charge (and must prohibit subgrantees and recipients from charging) servicing, origination, or other fees for the costs of administering the HTF program.

However, the grantee may charge owners of rental projects reasonable annual fees for monitoring compliance during the period of affordability. The fees must be based upon the average

actual cost of performing the monitoring of HTF-assisted rental projects. The basis for determining the amount of the fee must be documented and the fee must be included in the costs of the project as part of the project underwriting.

(2) The grantee may also charge nominal application fees (although these fees are not an eligible HTF cost) to eligible recipients, to discourage frivolous applications. The amount of application fees must be appropriate to the type of application and may not create an undue impediment to an extremely low-income family to be able to participate in the grantee's program.

(3) All fees are applicable credits under 2 CFR part 200, subpart E.

(4) In addition, the grantee must prohibit project owners from charging fees that are not customarily charged in rental housing (e.g., laundry room access fees), except that rental project owners may charge:

(i) Reasonable application fees to prospective tenants;

(ii) Parking fees to tenants only if such fees are customary for rental housing projects in the neighborhood; and

(iii) Fees for services such as bus transportation or meals, as long as the services are voluntary and fees are charged for services provided.

Subpart F—Income Targeting

§ 93.250 Income targeting.

(a) In any fiscal year in which the total amount available for allocation of HTF funds is less than \$1 billion, the grantee must use 100 percent of its HTF grant for the benefit of extremely low-income families or families with incomes at or below the poverty line (whichever is greater). In any fiscal year in which the total amount available for allocation of HTF funds is greater than \$1 billion, the grantee must use at least 75 percent of its grant for the benefit of extremely low-income families or families with incomes at or below the poverty line.

(b) Any grant funds not used in accordance with paragraph (a) of this section must be used for the benefit of very-low income families.

Subpart G—Project Requirements

§ 93.300 Maximum per-unit development subsidy amount, underwriting, and subsidy layering.

(a) *Maximum per-unit development subsidy amount.* The grantee must establish maximum limitations on the total amount of HTF funds that the grantee may invest per-unit for development of non-luxury housing, with adjustments for the number of

bedrooms and the geographic location of the project. These limits must be reasonable and based on actual costs of developing non-luxury housing in the area. The grantee must include these limits in its consolidated plan and update these limits annually.

(b) *Underwriting and subsidy layering.* Before committing funds to a project, the grantee must evaluate the project in accordance with guidelines that it has adopted for determining a reasonable level of profit or return on recipient's investment in a project and must not invest any more HTF funds, alone or in combination with other governmental assistance, than is necessary to provide quality affordable housing that is financially viable for a reasonable period (at minimum, the period of affordability in § 93.302 or § 93.304) and that will not provide a profit or return on the recipient's investment that exceeds the grantee's established standards for the size, type, and complexity of the project. The guidelines adopted by the grantees must require the grantee to undertake:

(1) An examination of the sources and uses of funds for the project (including any operating cost assistance, operating cost assistance reserve, or project-based rental assistance that will be provided to the project) and a determination that the costs are reasonable; and

(2) An assessment, at minimum, of the current market demand in the neighborhood in which the project will be located, the experience of the recipient, the financial capacity of the recipient, and firm written financial commitments for the project.

(3) For HTF-funded downpayment assistance, a market analysis is not required.

§ 93.301 Property standards.

(a) *New construction projects.* (1) State and local codes, ordinances, and zoning requirements. Housing that is newly constructed with HTF funds must meet all applicable State and local codes, ordinances, and zoning requirements. HTF-assisted new construction projects must meet State or local residential and building codes, as applicable or, in the absence of a State or local building code, the International Residential Code or International Building Code (as applicable to the type of housing) of the International Code Council. The housing must meet the applicable requirements upon project completion.

(2) *HUD requirements.* All new construction projects must also meet the requirements described in paragraphs (a)(2)(i) through (v) of this section:

(i) *Accessibility.* The housing must meet the accessibility requirements of 24 CFR part 8, which implements section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and Titles II and III of the Americans with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, as applicable. “Covered multifamily dwellings,” as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR 100.205, which implements the Fair Housing Act (42 U.S.C. 3601–3619).

(ii) *Energy efficiency.* The housing must meet the energy efficiency standards established pursuant to section 109 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12709).

(iii) *Disaster mitigation.* Where relevant, the housing must be constructed to mitigate the impact of potential disasters (e.g., earthquakes, hurricanes, flooding, and wildfires), in accordance with State and local codes, ordinances, or other State and local requirements, or such other requirements as HUD may establish.

(iv) *Written cost estimates, construction contracts, and construction documents.* The grantee must ensure the construction contract(s) and construction documents describe the work to be undertaken in adequate detail so that inspections can be conducted. The grantee must review and approve written cost estimates for construction and determine that costs are reasonable.

(v) *Construction progress inspections.* The grantee must conduct progress and final inspections of construction to ensure that work is done in accordance with the applicable codes, the construction contract, and construction documents.

(b) *Rehabilitation projects.* All rehabilitation that is performed using HTF funds must meet the requirements of this paragraph (b).

(1) *Rehabilitation standards.* The grantee must establish rehabilitation standards for all HTF-assisted housing rehabilitation activities that set forth the requirements that the housing must meet upon project completion. The grantee’s description of its standards must be in sufficient detail to determine the required rehabilitation work including methods and materials. The standards may refer to applicable codes or they may establish requirements that exceed the minimum requirements of the codes. The rehabilitation standards must address each of the following:

(i) *Health and safety.* The grantee’s standards must identify life-threatening

deficiencies that must be addressed immediately if the housing is occupied.

(ii) *Major systems.* Major systems are: structural support; roofing; cladding and weatherproofing (e.g., windows, doors, siding, gutters); plumbing; electrical; and heating, ventilation, and air conditioning. For rental housing, the grantee’s standards must require the grantee to estimate (based on age and condition) the remaining useful life of these systems, upon project completion of each major system. For multifamily housing projects of 26 units or more, the grantee’s standards must require the grantee to determine the useful life of major systems through a capital needs assessment of the project. For rental housing, if the remaining useful life of one or more major system is less than the applicable period of affordability, the grantee’s standards must require the grantee to ensure that a replacement reserve is established and monthly payments are made to the reserve that are adequate to repair or replace the systems as needed. For homeownership housing, the grantee’s standards must require, upon project completion, each of the major systems to have a remaining useful life for a minimum of 5 years or for such longer period specified by grantee, or the major systems must be rehabilitated or replaced as part of the rehabilitation work.

(iii) *Lead-based paint.* The grantee’s standards must require the housing to meet the lead-based paint requirements at 24 CFR part 35.

(iv) *Accessibility.* The grantee’s standards must require the housing to meet the accessibility requirements in 24 CFR part 8, which implements section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and Titles II and III of the Americans with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, as applicable. “Covered multifamily dwellings,” as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR 100.205, which implements the Fair Housing Act (42 U.S.C. 3601–3619). Rehabilitation may include improvements that are not required by regulation or statute that permit use by a person with disabilities.

(v) [Reserved].

(vi) *Disaster mitigation.* Where relevant, the grantee’s standards must require the housing to be improved to mitigate the impact of potential disasters (e.g., earthquake, hurricanes, flooding, and wildfires) in accordance with State and local codes, ordinances, and requirements, or such other requirements as HUD may establish.

(vii) *State and local codes, ordinances, and zoning requirements.*

The grantee’s standards must require the housing to meet all applicable State and local codes, ordinances, and requirements or, in the absence of a State or local building code, the International Existing Building Code of the International Code Council.

(viii) *Uniform Physical Condition Standards.* The standards of the grantee must be such that, upon completion, the HTF-assisted project and units will be decent, safe, sanitary, and in good repair as described in 24 CFR 5.703. HUD will establish the minimum deficiencies that must be corrected under the grantee’s rehabilitation standards based on inspectable items and inspected areas from HUD-prescribed physical inspection procedures (Uniform Physical Conditions Standards) pursuant to 24 CFR 5.705.

(ix) *Capital Needs Assessments.* For multifamily rental housing projects of 26 or more total units, the grantee must determine all work that will be performed in the rehabilitation of the housing and the long-term physical needs of the project through a capital needs assessment of the project.

(2) *Construction documents and cost estimates.* The grantee must ensure that the work to be undertaken will meet the grantee’s rehabilitation standards. The construction documents (i.e., written scope of work to be performed) must be in sufficient detail to establish the basis for a uniform inspection of the housing to determine compliance with the grantee’s standards. The grantee must review and approve a written cost estimate for rehabilitation after determining that costs are reasonable.

(3) *Frequency of inspections.* The grantee must conduct an initial property inspection to identify the deficiencies that must be addressed. The grantee must conduct progress and final inspections to determine that work was done in accordance with work write-ups.

(c) *Acquisition of standard housing.*

(1) Existing housing that is acquired with HTF assistance for rental housing, and that was newly constructed or rehabilitated less than 12 months before the date of commitment of HTF funds, must meet the property standards of paragraph (a) or paragraph (b) of this section, as applicable, for new construction and rehabilitation projects. The grantee must document this compliance based upon a review of approved building plans and Certificates of Occupancy, and an inspection that is conducted no earlier than 90 calendar days before the date of commitment of HTF assistance.

(2) All other existing housing that is acquired with HTF assistance for rental housing must meet the rehabilitation property standards requirements of paragraph (b) of this section. The grantee must document this compliance based upon an inspection that is conducted no earlier than 90 calendar days before the date of commitment of HTF assistance. If the property does not meet these standards, HTF funds cannot be used to acquire the property unless it is rehabilitated to meet the standards of paragraph (b) of this section.

(3) Existing housing that is acquired for homeownership (e.g., downpayment assistance) must be decent, safe, sanitary, and in good repair. The grantee must establish standards to determine that the housing is decent, safe, sanitary, and in good repair. At minimum, the standards must provide that the housing meets all applicable State and local standards and code requirements and the housing does not contain the specific deficiencies proscribed by HUD based on the applicable inspectable items and inspected areas in HUD-prescribed physical inspection procedures (Uniform Physical Condition Standards) issued pursuant to 24 CFR 5.705. The grantee must inspect the housing and document this compliance based upon an inspection that is conducted no earlier than 90 calendar days before the date of commitment of HTF assistance. If the housing does not meet these standards, the housing must be rehabilitated to meet the standards of this paragraph (c)(3) or it cannot be assisted with HTF funds.

(d) *Manufactured housing.* Construction of all manufactured housing (including manufactured housing that replaces an existing substandard unit under the definition of "reconstruction") must meet the Manufactured Home Construction and Safety Standards codified at 24 CFR part 3280. These standards preempt State and local codes which are not identical to the Federal standards for the new construction of manufactured housing. The grantees providing HTF funds to assist manufactured housing units must comply with applicable State and local laws or codes. In the absence of such laws or codes, the installation must comply with the manufacturer's written instructions for installation of manufactured housing units. All new manufactured housing and all manufactured housing that replaces an existing substandard unit under the definition of "reconstruction" must be on a permanent foundation that meets the requirements for foundation systems as set forth in 24 CFR 203.43f(c)(i). All new manufactured housing (and all

manufactured housing that replaces an existing substandard unit under the definition of "reconstruction") must, at the time of project completion, be connected to permanent utility hook-ups and be located on land that is owned by the manufactured housing unit owner or land for which the manufactured housing owner has a lease for a period at least equal to the applicable period of affordability. In HTF-funded rehabilitation of existing manufactured housing the foundation and anchoring must meet all applicable State and local codes, ordinances, and requirements or in the absence of local or State codes, the Model Manufactured Home Installation Standards at 24 CFR part 3285. Manufactured housing that is rehabilitated using HTF funds must meet the property standards requirements in paragraph (b) of this section, as applicable. The grantee must document this compliance in accordance with inspection procedures that the grantee has established pursuant to § 92.301, as applicable.

(e) *Ongoing property condition standards: Rental housing—(1) Ongoing property standards.* The grantee must establish property standards for rental housing (including manufactured housing) that apply throughout the affordability period. The standards must ensure that owners maintain the housing as decent, safe, and sanitary housing in good repair. The grantee's description of its property standards must be in sufficient detail to establish the basis for a uniform inspection of HTF rental projects. The grantee's ongoing property standards must address each of the following:

(i) At a minimum, the grantee's ongoing property standards must include all inspectable items and inspectable areas specified by HUD based on the HUD physical inspection procedures (Uniform Physical Condition Standards (UPCS)) prescribed by HUD pursuant to 24 CFR 5.705.

(ii) *Health and safety.* The grantee's standards must require the housing to be free of all health and safety defects. The standards must identify life-threatening deficiencies that the owner must immediately correct and the time frames for addressing these deficiencies.

(iii) *Lead-based paint.* The grantee's standards must require the housing to meet the lead-based paint requirements in 24 CFR part 35.

(2) *Inspections.* The grantee must undertake ongoing property inspections, in accordance with § 93.404.

(3) *Corrective and remedial actions.* The grantee must have procedures for ensuring that timely corrective and

remedial actions are taken by the project owner to address identified deficiencies.

(4) *Inspection procedures.* The grantee must establish written inspection procedures. The procedures must include detailed inspection checklists, description of how and by whom inspections will be carried out, and procedures for training and certifying qualified inspectors. The procedures must also describe how frequently the property will be inspected, consistent with section § 93.404(d).

(f) *Environmental provisions—(1) New construction projects environmental requirements—(i) Historic preservation—(A) Standards.* The project activities (including demolition) must not be performed on properties that are either listed in or determined eligible for listing in the National Register of Historic Places, unless the project activities meet the *Secretary of the Interior's Standards for Rehabilitation*, either as certified through the Federal and/or State historic rehabilitation tax credit programs or as verified by someone that meets the relevant *Secretary of the Interior's Professional Qualification Standards*;

(B) *Archaeological resources.* If archaeological resources or human remains are discovered on the project site during construction, the grantee must consult with affected tribes and/or descendant communities and comply with the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001–3013), State law and/or local ordinance (e.g., State unmarked burial law).

(ii) *Farmland.* Project activities must not result in the conversion of unique, prime, or statewide or locally significant agricultural properties to urban uses.

(iii) *Airport zones.* Projects are not permitted within the runway protection zones of civilian airports, or the clear zones or accident potential zones of military airfields.

(iv) *Coastal Barrier Resource System.* No projects may be assisted in Coastal Barrier Resource System (CBRS) units. CBRS units are mapped and available from the U.S. Fish and Wildlife Service.

(v) *Coastal zone management.* Development must be consistent with the appropriate State coastal zone management plan. Plans are available from the local coastal zone management agency.

(vi) *Floodplains.* Except as modified below, definitions for terms used below can be found at 24 CFR part 55.

(A) Construction and other activities in the 100-year floodplain are to be avoided when practicable. If there are no practicable alternatives to new

construction or substantial improvement in the 100-year floodplain, the structure must be elevated at least the base flood elevation (BFE) or floodproofed to one foot above the BFE. Elevated and floodproofed buildings must adhere to National Flood Insurance Program standards. The primary sources of floodplain data are Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps (FIRMs). When FEMA provides interim flood hazard data, such as Advisory Base Flood Elevations (ABFE) or preliminary maps or studies, the latest of these sources shall be used.

(B) No HTF assistance may be approved with respect to:

(1) Any action, other than a functionally dependent use, located in a floodway;

(2) Any new construction critical action located in a coastal high hazard area, 100- or 500-year floodplain; or

(3) Any non-critical new construction action in a coastal high hazard area, unless the action is reconstruction following destruction caused by a disaster and is designed for location in a coastal high hazard area consistent with the FEMA National Flood Insurance Program requirements for V-Zones.

(vii) *Wetlands*. (A) No draining, dredging, channelizing, filling, diking, impounding, or related grading activities are to be performed in wetlands. No activities, structures, or facilities funded under this program are to adversely impact a wetland.

(B) A wetland means those areas that are inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances, does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds. This definition includes those wetland areas separated from their natural supply of water as a result of activities, such as the construction of structural flood protection methods or solid-fill road beds, or mineral extraction and navigation improvements. This definition is independent of the definition of jurisdictional wetland used by the U. S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*).

(viii) *Explosives and hazards*. Projects must be in compliance with the standards for acceptable separation

distance, as set forth at 24 CFR part 51, subpart C.

(ix) *Contamination*. All properties assisted with HTF funds must be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances, where a hazard could affect the health and safety of occupants or conflict with the intended use of the property.

(A) All proposed multifamily (more than four housing units) HTF projects require a Phase I Environmental Site Assessment (ESA-ASTM). If the Phase I ESA identifies recognized environmental concerns (RECs), a Phase II (ESA-ASTM) will be required. ASTM reports shall be prepared in accordance with the most current ASTM standard. Single family housing does not require a Phase I ESA.

(B) HTF projects must avoid sites located within 0.25 miles of a Superfund or CERCLIS (Comprehensive Environmental Response, Compensation, and Liability Information System) site or other contaminated site reported to Federal, State, or local authorities without a statement in writing from the U.S. Environmental Protection Agency (EPA) or the appropriate State agency that there is no hazard that could affect the health and safety of the occupants or conflict with the intended use of the property.

(x) *Noise*. (A) Internal noise levels: All activities will be developed to ensure an interior noise level of no more than 45 decibels (dB).

(B) External noise levels:

(1) Project sites exposed to less than or equal to 65 dB of environmental noise are acceptable.

(2) Sites between 65 dB and less than 75 dB are acceptable with mitigation (*e.g.*, noise walls, careful site planning) that result in an interior standard of 45 dB.

(3) Locations with environmental noise levels of 75 dB or greater may not have noise sensitive outdoor uses (*e.g.*, picnic areas, tot lots, balconies, or patios) and *require* sound attenuation in the building shell to achieve the 45 dB interior standard.

(xi) *Endangered species*. The grantee must avoid all actions which could jeopardize the continued existence of any endangered or threatened species, as designated by the U.S. Fish and Wildlife Service or National Marine Fisheries Service, or would result in the destruction or adversely modify the designated critical habitat of such species.

(xii) *Wild and scenic rivers*. The grantee must avoid activities that are inconsistent with conservation

easements, land-use protections, and restrictions adjacent to wild and scenic rivers, as designated/listed by the Departments of Agriculture or Interior. Maps for the National Wild and Scenic Rivers System are available at the governing departments.

(xiii) *Safe drinking water*. Projects with a potable water system must use only lead-free pipes, solder, and flux.

(xiv) *Sole-source aquifers*. Project activities should avoid sites and activities that have the potential to contaminate sole source aquifer areas (SSAs). EPA defines a sole or principal source aquifer as an aquifer that supplies at least 50 percent of the drinking water consumed in the area overlying the aquifer. If the project overlies an SSA, EPA must review the project. EPA review is designed to reduce the risk of ground water contamination that could pose a health hazard to those who use it.

(2) *Rehabilitation projects environmental requirements*—(i) *Historic preservation*. (A) The project activities (including demolition) must not be performed on properties that are either listed in or determined eligible for listing in the National Register of Historic Places, unless the project activities meet the *Secretary of the Interior's Standards for Rehabilitation*, either as certified through the Federal and/or State historic rehabilitation tax credit programs or as verified by someone that meets the relevant *Secretary of the Interior's Professional Qualification Standards*;

(B) *Archaeological resources*. If archaeological resources or human remains are discovered on the project site during construction or rehabilitation, the grantee must consult with affected tribes and/or descendant communities and comply with the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001–3013), State law, and/or local ordinance (*e.g.*, State unmarked burial law).

(ii) *Farmland*. Project activities must not result in the conversion of unique, prime, or locally significant agricultural properties to urban uses.

(iii) *Airport zones*. Projects are not permitted within the runway protection zones of civilian airports, or the clear zones or accident potential zones of military airfields.

(iv) *Coastal Barrier Resource System*. No projects may be assisted in Coastal Barrier Resource System (CBRS) units. CBRS units are mapped and available from the U.S. Fish and Wildlife Service.

(v) *Coastal zone management*. Development must be consistent with the appropriate State coastal zone management plan. Plans are available

from the local coastal zone management agency.

(vi) *Floodplains*. Except as modified below, definitions for terms used below can be found at 24 CFR part 55.

(A) Construction and other activities in the 100-year floodplain are to be avoided when practicable. If there are no practicable alternatives to new construction or substantial improvement in the 100-year floodplain, the structure must be elevated at least to the base flood elevation (BFE) or floodproofed to one foot above the BFE. Elevated and floodproofed buildings must adhere to National Flood Insurance Program standards. The primary sources of floodplain data are Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps (FIRMS). When FEMA provides interim flood hazard data, such as Advisory Base Flood Elevations (ABFE) or preliminary maps or studies, the latest of these sources shall be used.

(B) No HTF assistance may be approved with respect to:

(1) Any action, other than functionally dependent uses, located in a floodway;

(2) Any critical action located in a coastal high hazard area, 100- or 500-year floodplain; or

(3) Any non-critical action located in a coastal high hazard area, unless the action is designed for location in a coastal high hazard area consistent with the FEMA National Flood Insurance Program requirements for V-Zones. "Any non-critical action in a coastal high hazard area, unless the action is reconstruction following destruction caused by a disaster and is designed for location in a coastal high hazard area consistent with the FEMA National Flood Insurance Program requirements for V-Zones."

(vii) *Wetlands*. No rehabilitation of existing properties that expands the footprint into a wetland is allowed. A wetland means those areas that are inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances, does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds. This definition includes those wetland areas separated from their natural supply of water as a result of activities such as the construction of structural flood protection methods or solid-fill road beds and activities such as mineral extraction and navigation

improvements. This definition is independent of the definition of jurisdictional wetland used by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*).

(viii) *Explosives and hazards*. If the rehabilitation of the building increases the number of dwelling units, then the project must be in compliance with the standards for acceptable separation distance as set forth at 24 CFR part 51, subpart C.

(ix) *Contamination*. All properties assisted with HTF funds must be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances, where a hazard could affect the health and safety of occupants or conflict with the intended use of the property:

(A) All proposed multifamily (more than four housing units) HTF project activities require a Phase I Environmental Site Assessment (ESA—ASTM). If the Phase I ESA identifies recognized environmental concerns (RECs), a Phase II (ESA—ASTM) will be required. ASTM reports shall be prepared in accordance with the most current ASTM standard. Single family housing does not require a Phase I ESA.

(B) HTF projects must avoid sites located within 0.25 miles of a Superfund or CERCLIS (Comprehensive Environmental Response, Compensation, and Liability Information System) site or other contaminated site reported to Federal, State, or local authorities without a statement in writing from EPA or the appropriate State agency that there is no hazard that could affect the health and safety of the occupants or conflict with the intended utilization of the property.

(x) *Noise*—(A) *Internal noise levels*. All activities will be developed to ensure an interior noise level of no more than 45 decibels (dB).

(B) [Reserved].

(xi) *Endangered species*. (A) The grantee must avoid all actions that could jeopardize the continued existence of any species designated by the U.S. Fish and Wildlife Service or National Marine Fisheries Service as endangered or threatened.

(B) The grantee must avoid all actions that adversely modify the critical habitat of such species.

(xii) *Wild and scenic rivers*. The grantee must avoid activities that are inconsistent with conservation easements, land-use protections, and restrictions adjacent to wild and scenic rivers, as designated/listed by the Departments of Agriculture and Interior. Maps for the National Wild and Scenic

Rivers System are available at the governing departments.

(xiii) *Safe drinking water*. Projects with a potable water system must use only lead-free pipes, solder, and flux.

(xiv) *Sole-source aquifers*. Project activities should avoid sites and activities that have the potential to contaminate sole source aquifer areas (SSAs). The EPA defines a sole or principal source aquifer as an aquifer that supplies at least 50 percent of the drinking water consumed in the area overlying the aquifer. If the project overlies an SSA, the EPA must review the project. The EPA review is designed to reduce the risk of ground water contamination, which could pose a health hazard to those who use it.

(3) *Acquisition projects environmental requirements*. (i)(A) Existing housing that is acquired with HTF funds, and has been newly constructed or rehabilitated less than 12 months before the commitment of HTF funds must meet the property standards at paragraph (f)(1) of this section.

(B) All other existing housing that is acquired with HTF assistance must meet the property standards requirements of paragraph (f)(2) of this section.

(ii) If under paragraph (f)(3)(i)(A) or paragraph (B) of this section, the property does not meet these standards, with the exception of the noise standards in paragraph (f)(2) of this section, HTF funds cannot be used to acquire the property.

(4) *Manufactured housing environmental requirements*. Manufactured housing is subject to the environmental standards in paragraph (f)(1) of this section for new construction or paragraph (f)(2) of this section for rehabilitation, as applicable. If an existing property does not meet these standards, HTF funds cannot be used to acquire the property unless it is rehabilitated to meet the standards in paragraph (f)(2), as applicable, with the exception of noise standards in paragraph (f)(2)(x).

§ 93.302 Qualification as affordable housing: rental housing.

(a) *Eligible tenants*. The HTF-assisted units in a rental housing project must be occupied by households who are eligible families in accordance with the income targeting requirements in § 93.250.

(b) *Rent limitations*—(1)(i) *Extremely low-income tenants*. The HTF rent plus utilities of an extremely low-income tenant shall not exceed the greater of 30 percent of the federal poverty line or 30 percent of the income of a family whose annual income equals 30 percent of the median income for the area, as

determined by HUD, with adjustments for the number of bedrooms in the unit. HUD will publish the HTF rent limits on an annual basis.

(ii) *Very-low income tenants.* The HTF rent plus utilities of a very low-income tenant shall not exceed 30 percent of the income of a family whose annual income equals 50 percent of the median income for the area, as determined by HUD, with adjustments for the number of bedrooms in the unit. HUD will publish the HTF rent limits on an annual basis.

(2) If the unit receives Federal or State project-based rental subsidy, and the tenant pays as a contribution toward rent not more than 30 percent of the tenant's adjusted income, the maximum rent is the rent allowable under the Federal or State project-based rental subsidy program.

(c) *Initial rent schedule and utility allowance.* (1) The grantee must establish maximum monthly allowances for utilities and services (excluding telephone, television, and Internet service).

(2) The grantee must annually review and approve rents proposed by the owner for HTF units. For all units for which the tenant is paying utilities, the grantee must ensure that the rents do not exceed the maximum rent minus the monthly allowances for utilities.

(d) *Periods of affordability.* (1) HTF-assisted units must meet the affordability requirements for not less than 30 years, beginning after project completion. The grantee may impose longer periods.

(2) The affordability requirements apply without regard to the term of any loan or mortgage, repayment of the HTF investment, or the transfer of ownership. They must be imposed by a deed restriction, covenant running with the land, an agreement restricting the use of the property, or other mechanisms approved by HUD under which the grantee and beneficiaries have the right to require specific performance, except that the affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure. The affordability requirements must be recorded in accordance with State recordation laws.

(3) The grantee may use purchase options, rights of first refusal, or other preemptive rights to purchase the housing before foreclosure or deed in lieu of foreclosure to preserve affordability.

(4) The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the foreclosure, or deed in lieu of

foreclosure, or any entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property.

(5) The termination of the restrictions on the project does not terminate the grantee's repayment obligation under § 93.403.

(e) *Tenant income.* (1) The income of each tenant must be determined initially in accordance with § 93.151. In addition, in each year during the period of affordability, the project owner must re-examine each tenant's annual income in accordance with one of the options in § 93.151(c) selected by the grantee.

(2) An owner who re-examines a tenant's annual income through a statement and certification in accordance with § 93.151(a)(1)(iii) must examine the source documentation of the income of each tenant every 6th year of the affordability period, except that, for units that receive project-based assistance, the owner must re-examine the tenant's annual income in accordance with the project-based assistance rules. Otherwise, an owner who accepts the tenant's statement and certification in accordance with § 93.151(a)(1)(iii) is not required to examine the income of tenants, unless there is evidence that the tenant's written statement failed to completely and accurately state information about the family's size or income.

(f) *Over-income tenants.* HTF-assisted units continue to qualify as affordable housing despite a temporary noncompliance caused by increases in the incomes of existing tenants if actions satisfactory to HUD are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected.

(g) *Fixed and floating HTF units.* In a project containing HTF-assisted and other units, the grantee may designate fixed or floating HTF units. This designation must be made at the time of project commitment in the written agreement between the grantee and the recipient, and the HTF units must be identified not later than the time of project completion. Fixed units must remain the same throughout the period of affordability. Floating units must be changed to maintain conformity with the requirements of this section during the period of affordability so that the total number of housing units meeting the requirements of this section remains the same, and each substituted unit must be comparable in terms of size, features, and number of bedrooms to the originally designated HTF-assisted unit.

(h) *Tenant selection.* The tenants must be selected in accordance with § 93.303.

(i) *Onsite inspections and financial oversight.* See § 93.404(d) for the grantee's ongoing responsibilities for onsite inspections and financial oversight.

§ 93.303 Tenant protections and selection.

(a) *Lease.* There must be a written lease between the tenant and the owner of rental housing assisted with HTF funds that is for a period of not less than one year, unless by mutual agreement between the tenant and the owner a shorter period is specified.

(b) *Prohibited lease terms.* The lease may not contain any of the following provisions:

(1) *Agreement to be sued.* Agreement by the tenant to be sued, to admit guilt, or to a judgment in favor of the owner in a lawsuit brought in connection with the lease;

(2) *Treatment of property.* Agreement by the tenant that the owner may take, hold, or sell personal property of household members without notice to the tenant and a court decision on the rights of the parties. This prohibition, however, does not apply to an agreement by the tenant concerning disposition of personal property remaining in the housing unit after the tenant has moved out of the unit. The owner may dispose of this personal property in accordance with State law;

(3) *Excusing owner from responsibility.* Agreement by the tenant not to hold the owner or the owner's agents legally responsible for any action or failure to act, whether intentional or negligent;

(4) *Waiver of notice.* Agreement of the tenant that the owner may institute a lawsuit without notice to the tenant;

(5) *Waiver of legal proceedings.* Agreement by the tenant that the owner may evict the tenant or household members without instituting a civil court proceeding in which the tenant has the opportunity to present a defense, or before a court decision on the rights of the parties;

(6) *Waiver of a jury trial.* Agreement by the tenant to waive any right to a trial by jury;

(7) *Waiver of right to appeal court decision.* Agreement by the tenant to waive the tenant's right to appeal, or to otherwise challenge in court, a court decision in connection with the lease;

(8) *Tenant chargeable with cost of legal actions regardless of outcome.* Agreement by the tenant to pay attorney's fees or other legal costs even if the tenant wins in a court proceeding by the owner against the tenant. The tenant, however, may be obligated to pay costs if the tenant loses; and

(9) *Mandatory supportive services.* Agreement by the tenant to accept supportive services that are offered.

(c) *Termination of tenancy.* An owner may not terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HTF funds, except for serious or repeated violation of the terms and conditions of the lease; for violation of applicable Federal, State, or local law; or for other good cause. Good cause does not include an increase in the tenant's income. To terminate or refuse to renew tenancy, the owner must serve written notice upon the tenant specifying the grounds for the action and providing a specific period for vacating that is consistent with State or local law.

(d) *Tenant selection.* An owner of rental housing assisted with HTF funds must comply with the affirmative marketing requirements established by the grantee pursuant to § 93.350. The owner must adopt and follow written tenant selection policies and criteria that:

(1) Limit the housing to income-eligible families;

(2) Are reasonably related to the applicants' ability to perform the obligations of the lease (*i.e.*, to pay the rent, not to damage the housing; not to interfere with the rights and quiet enjoyment of other tenants);

(3) Limit eligibility or give a preference to a particular segment of the population if permitted in its written agreement with the grantee (and only if the limitation or preference is described in the grantee's consolidated plan).

(i) Any limitation or preference must not violate nondiscrimination requirements in § 93.350. A limitation or preference does not violate nondiscrimination requirements if the housing also receives funding from a Federal program that limits eligibility to a particular segment of the population (*e.g.*, the Housing Opportunity for Persons With AIDS program under 24 CFR part 574), and the limit or preference is tailored to serve that segment of the population.

(ii) If a project does not receive funding from a Federal program that limits eligibility to a particular segment of the population, the project may have a limitation or preference for persons with disabilities who need services offered at a project only if:

(A) The limitation or preference is limited to the population of families (including individuals) with disabilities that significantly interfere with their ability to obtain and maintain housing;

(B) Such families will not be able to obtain or maintain themselves in

housing without appropriate supportive services; and

(C) Such services cannot be provided in a nonsegregated setting. The families must not be required to accept the services offered at the project. In advertising the project, the owner may advertise the project as offering services for a particular type of disability; however, the project must be open to all otherwise eligible persons with disabilities who may benefit from the services provided in the project.

(4) Do not exclude an applicant with a voucher under the Section 8 Tenant-Based Assistance: Housing Choice Voucher program (24 CFR part 982) or an applicant participating in a HOME tenant-based rental assistance program (24 CFR part 92) because of the status of the prospective tenant as a holder of such voucher or comparable HOME tenant-based assistance document.

(5) Provide for the selection of tenants from a written waiting list in the chronological order of their application, insofar as is practicable; and

(6) Give prompt written notification to any rejected applicant of the grounds for any rejection.

§ 93.304 Qualification as affordable housing: Homeownership.

(a) *Homeownership activities.* Housing that is for purchase by a first-time homebuyer must meet the affordability requirements of this section.

(b) *Single family housing.* The housing must be single-family housing, as defined at § 93.2.

(c) *Modest housing.* The housing must be modest housing, in accordance with § 93.305.

(d) *First-time homebuyer and income requirements.* The housing must be acquired by a first-time homebuyer whose family qualifies as an income-eligible family in accordance with § 93.251 and the housing must be the principal residence of the family throughout the period described in paragraph (e) of this section. In determining the income eligibility of the family, the grantee must include the income of all persons living in the housing. Before purchasing the housing, the family must have completed a program of independent financial education and homeownership counseling from an eligible organization that has been certified in accordance with section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x (e)).

(e) *Period of affordability.* The HTF-assisted housing must meet the affordability requirements for not less than 30 years.

(f) *Resale or recapture requirements.* The grantee must establish the resale or recapture requirements that comply with the standards of § 93.305 and set forth the requirements in its consolidated plan. HUD must determine that they are appropriate and must specifically approve them in writing.

(g) *Special considerations for single family properties with more than one unit.* (1) If the HTF funds are used only to assist an income-eligible homebuyer in acquiring one unit in a single family property containing more than one unit and the assisted unit will be the principal residence of the homebuyer, the affordability requirements of this section apply only to the assisted unit.

(2) If HTF funds are also used to assist the income-eligible homebuyer in acquiring one or more of the rental units in the single family property, the affordability requirements of § 93.302 apply to assisted rental units, except that the grantee must impose resale restrictions on all assisted units (owner-occupied and rental units) in the single-family housing. The affordability requirements on all assisted units continue for the period of affordability. If HTF funds are used to assist only the rental units in such a property, then the requirements of § 93.302 would apply and the owner-occupied unit would not be subject to the income targeting or affordability provisions of this section.

(h) *Lease-purchase.* (1) HTF funds may be used to assist homebuyers through lease-purchase programs for existing housing and for housing to be constructed. The housing must be purchased by an eligible homebuyer within 36 months of signing the lease-purchase agreement. The homebuyer must qualify as an income-eligible family at the time the lease-purchase agreement is signed.

(2) If HTF funds are used to acquire housing that will be resold to a homebuyer through a lease-purchase program, the HTF affordability requirements for rental housing in § 93.302 shall apply if the housing is not transferred to an eligible homebuyer within 42 months after project completion.

(i) *Contract to purchase.* If HTF funds are used to assist a homebuyer who has entered into a contract to purchase housing to be constructed, the homebuyer must qualify as an income-eligible family at the time the contract is signed.

(j) If there is no ratified sales contract with an eligible homebuyer for the housing within 9 months of the date of completion of construction or rehabilitation, the housing must be

rented to an eligible tenant in accordance with § 93.301.

(k) *Preserving affordability.* (1) To preserve the affordability of housing that was previously assisted with HTF funds and subject to the requirements of this section, a grantee may use additional HTF funds to acquire the housing through a purchase option, right of first refusal, or other preemptive right before foreclosure, or to acquire the housing at the foreclosure sale, undertake any necessary rehabilitation, and provide assistance to another first-time homebuyer. The housing must be sold to a new eligible homebuyer in accordance with the requirements of this section. Additional HTF funds may not be used if the mortgage in default was funded with HTF funds.

(2) The total amount of original and additional HTF assistance may not exceed the maximum per-unit development subsidy amount established pursuant to § 93.300. As an alternative to charging the cost to the HTF program under § 93.201, the grantee may charge the cost to the HTF program under § 93.302 as a reasonable administrative cost of its HTF program, so that the additional HTF funds for the housing are not subject to the maximum per-unit subsidy amount.

(l) *Agreements with lending institutions.* (1) The grantee may provide homeownership assistance through written agreements with for-profit or nonprofit lending institutions that are providing the first mortgage loan to a family. The grantee must independently verify that the family is income-eligible and meets the definition of “first-time homebuyer,” and must inspect the housing for compliance with the applicable property standards.

(2) No fees may be charged to the family for the HTF homeownership assistance (e.g., origination fees or points, processing fees, inspection fees). The grantee must determine that the fees and other amounts charged to the family by the lender for the first mortgage financing are reasonable. Reasonable administrative costs of the HTF homeownership assistance can be charged to the HTF program as a project cost. If the grantee requires lenders to pay a fee to participate in the HTF program, the fee is program income to the HTF program.

(m) *Written policies.* The grantee must have and follow written policies for:

(1) Underwriting standards for homeownership assistance that examine the family’s housing debt, overall debt, income, and ability to maintain the housing;

(2) Anti-predatory lending; and

(3) Refinancing loans to which HTF loans are subordinated to ensure that the terms of the new loan are reasonable.

§ 93.305 Qualification as affordable housing: modest housing requirements for homeownership; resale or recapture requirements.

(a) Housing that is for acquisition by a family pursuant to § 93.304 must be modest housing.

(1) The housing must be modest housing as follows: The housing has a purchase price for the type of single family housing that does not exceed 95 percent of the median purchase price for the area for newly constructed or standard housing. The grantee must use the HTF affordable homeownership limits provided by HUD for newly constructed housing and for existing housing. HUD will provide limits for affordable newly constructed housing based on 95 percent of the median purchase price for the area using Federal Housing Administration (FHA) single family mortgage program data for newly constructed housing, with a minimum limit based on 95 percent of the U.S. median purchase price for new construction for nonmetropolitan areas. HUD will provide limits for affordable existing housing based on 95 percent of the median purchase price for the area using FHA single family mortgage program data for existing housing data and other appropriate data that are available nation-wide for sales of existing housing, with a minimum limit based on 95 percent of the state-wide nonmetropolitan area median purchase price using these data. For States with no non-metropolitan areas, the minimum purchase price is defined as the lesser of the State non-metro or the United States non-metro median.

(2) In lieu of the limits provided by HUD, the grantee may determine 95 percent of the median area purchase price for single family housing in the jurisdiction annually, as follows: The grantee must set forth the price for different types of single family housing for the jurisdiction. The grantee may determine separate limits for existing housing and newly constructed housing. For housing located outside of metropolitan areas, a grantee may aggregate sales data from more than one county, if the counties are contiguous and similarly situated. The following information must be included in the annual action plan of the consolidated plan submitted to HUD for review and updated in each action plan:

(i) The 95 percent of median area purchase price must be established in accordance with a market analysis that

ensured that a sufficient number of recent housing sales are included in the survey.

(ii) Sales must cover the requisite number of months based on volume: For 500 or more sales per month, a one-month reporting period; for 250 through 499 sales per month, a 2-month reporting period; for less than 250 sales per month, at least a 3-month reporting period. The data must be listed in ascending order of sales price.

(iii) The address of the listed properties must include the location within the grantee. Lot, square, and subdivision data may be substituted for the street address.

(iv) The housing sales data must reflect all, or nearly all, of the one-family house sales in the entire area.

(v) To determine the median, take the middle sale on the list if an odd number of sales, and if an even number, take the higher of the middle numbers and consider it the median. After identifying the median sales price, the amount should be multiplied by 0.95 to determine 95 percent of the median area purchase price.

(b) *Resale or recapture requirements.*

The grantee must establish the resale or recapture requirements that comply with the standards of this section and set forth the requirements in its consolidated plan. The HTF-assisted housing must meet the affordability requirements for not less than 30 years if resale restrictions are used. If recapture restrictions are used, the affordability periods are based on the amount of HTF funds per unit as follows:

Homeownership assistance HTF amount per-unit	Minimum period of affordability in years
Under \$30,000	10
\$30,000–\$50,000	20
Over \$50,000	30

(1) *Resale.* Resale requirements must ensure, if the housing does not continue to be the principal residence of the family for the duration of the period of affordability, that the housing is made available for subsequent purchase only to a buyer whose family qualifies as a very low-income family and will use the property as the family’s principal residence. The resale requirement must also ensure that the price at resale provides the original HTF-assisted owner a fair return on investment (including the homeowner’s investment and any capital improvement) and ensure that the housing will remain affordable to a reasonable range of income-eligible homebuyers. The grantee must specifically define “fair

return on investment” and “affordability to a reasonable range of very low-income homebuyers,” and specifically address how it will make the housing affordable to an income eligible homebuyer in the event that the resale price necessary to provide fair return is not affordable to the subsequent buyer. Deed restrictions, covenants running with the land, or other mechanisms approved by HUD must be used as the mechanism to impose the resale requirements. The affordability restrictions may terminate upon occurrence of any of the following termination events: foreclosure, transfer in lieu of foreclosure, or assignment of an FHA insured mortgage to HUD. The grantee may use purchase options, rights of first refusal or other preemptive rights to purchase the housing before foreclosure to preserve affordability. The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the termination event, obtains an ownership interest in the housing.

(2) *Recapture.* (i) Recapture provisions must ensure that the grantee recoups all or a portion of the HTF assistance to the homebuyers, if the housing does not continue to be the principal residence of the family for the duration of the period of affordability. The grantee may structure its recapture provisions based on its program design and market conditions. Recapture provisions may permit the subsequent homebuyer to assume the HTF assistance (subject to the HTF requirements for the remainder of the period of affordability) if the subsequent homebuyer is income-eligible, and no additional HTF assistance is provided.

(ii) The following options for recapture requirements are acceptable to HUD. The grantee may adopt, modify, or develop its own recapture requirements for HUD approval. In establishing its recapture requirements, the grantee is subject to the limitation that, when the recapture requirement is triggered by a sale (voluntary or involuntary) of the housing unit, the amount recaptured cannot exceed the net proceeds, if any. The net proceeds are the sales price

minus superior loan repayment (other than HTF funds) and any closing costs.

(A) *Recapture entire amount.* The grantee may recapture the entire amount of the HTF assistance from the homeowner.

(B) *Reduction during affordability period.* The grantee may reduce the HTF assistance amount to be recaptured on a prorata basis for the time the homeowner has owned and occupied the housing measured against the required affordability period.

(C) *Shared net proceeds.* If the net proceeds are not sufficient to recapture the full HTF assistance (or a reduced amount as provided for in this section) plus enable the homeowner to recover the amount of the homeowner’s downpayment and any capital improvement investment made by the owner since purchase, the grantee may share the net proceeds. The net proceeds are the sales price minus loan repayment (other than HTF funds) and closing costs. The net proceeds may be divided proportionally as set forth in the following mathematical formulas:

$$\frac{\text{HTF investment}}{\text{HTF investment} + \text{homeowner investment}} \times \text{Net proceeds} = \text{HTF amount to be recaptured}$$

$$\frac{\text{homebuyer investment}}{\text{HTF investment} + \text{homeowner investment}} \times \text{Net proceeds} = \text{amount to homeowner}$$

(D) *Owner investment returned first.* The grantee may permit the homebuyer to recover the homebuyer’s entire investment (downpayment and capital improvements made by the owner since purchase) before recapturing the HTF assistance.

(E) *Amount subject to recapture.* The HTF assistance that is subject to recapture is based on the amount of HTF assistance that enabled the homebuyer to buy the dwelling unit. This includes any HTF assistance that reduced the purchase price from fair market value to an affordable price, but excludes the amount between the cost of producing the unit and the market value of the property (*i.e.*, the development subsidy). The recaptured funds must be used to carry out HTF-eligible activities in accordance with the requirements of this part. If the HTF assistance is only used for the development subsidy and therefore not subject to recapture, the resale option must be used.

Subpart H—Other Federal Requirements

§ 93.350 Other federal requirements and nondiscrimination; affirmative marketing.

(a) *General.* The Federal requirements set forth in 24 CFR part 5, subpart A, are applicable to participants in the HTF program. The requirements of this subpart include: nondiscrimination and equal opportunity; disclosure requirements; debarred, suspended, or ineligible contractors; and drug-free workplace.

(b) *Affirmative marketing.* (1) Each grantee must adopt and follow affirmative marketing procedures and requirements for rental projects containing five or more HTF-assisted housing units and for homeownership assistance programs. Affirmative marketing steps consist of actions to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status, or disability. If a grantee’s written

agreement with the project owner permits the rental housing project to limit tenant eligibility or to have a tenant preference in accordance with § 93.303(d)(3), the grantee must have affirmative marketing procedures and requirements that apply in the context of the limited/preferred tenant eligibility for the project.

(2) The affirmative marketing requirements and procedures adopted must include:

(i) Methods for informing the public, owners, and potential tenants about Federal fair housing laws and the grantee’s affirmative marketing policy (*e.g.*, the use of the Equal Housing Opportunity logotype or slogan in press releases and solicitations for owners, and written communication to fair housing and other groups);

(ii) Requirements and practices the grantee and owner must adhere to in order to carry out the grantee’s affirmative marketing procedures and requirements (*e.g.*, use of commercial media, use of community contacts, use of the Equal Housing Opportunity

logotype or slogan, and display of fair housing poster);

(iii) Procedures to be used by the grantee and owners to inform and solicit applications from persons in the housing market area who are not likely to apply for the rental housing or homeownership assistance program without special outreach (e.g., through the use of community organizations, places of worship, employment centers, fair housing groups, or housing counseling agencies);

(iv) Records that will be kept describing actions taken by the grantee and owners to affirmatively market rental housing units and homeownership assistance program and records to assess the results of these actions; and

(v) A description of how the grantee will annually assess the success of affirmative marketing actions and what corrective actions will be taken where affirmative marketing requirements are not met.

(3) A grantee that subgrants HTF funds to subgrantees must require each subgrantee to either follow the grantee's procedures and requirements or adopt its own affirmative marketing procedures and requirements that meet this section.

§ 93.351 Lead-based paint.

Housing assisted with HTF funds is subject to the regulations at 24 CFR part 35, subparts A, B, J, K, and R.

§ 93.352 Displacement, relocation, and acquisition.

(a) *Minimizing displacement.*

Consistent with the other goals and objectives of this part, the grantee must ensure that it has taken all reasonable steps to minimize the displacement of persons (families, individuals, businesses, nonprofit organizations, and farms) as a result of a project assisted with HTF funds. To the extent feasible, displaced residential tenants must be provided a reasonable opportunity to lease and occupy a suitable, decent, safe, sanitary, and affordable dwelling unit in the building/complex upon completion of the project.

(b) *Temporary relocation.* The following policies cover residential tenants who will not be required to move permanently but who must relocate temporarily for the project. Such tenants must be provided:

(1) Reimbursement for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied housing and any increase in monthly rent/utility costs.

(2) Appropriate advisory services, including reasonable advance written notice of:

(i) The date and approximate duration of the temporary relocation;

(ii) The location of the suitable, decent, safe, and sanitary dwelling to be made available for the temporary period;

(iii) The terms and conditions under which the tenant may lease and occupy a suitable, decent, safe, and sanitary dwelling in the building/complex upon completion of the project; and

(iv) The provisions of paragraph (b)(1) of this section.

(c) *Relocation assistance for displaced persons*—(1) *General.* A displaced person (defined in paragraph (c)(2) of this section) must be provided relocation assistance at the levels described in, and in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4201–4655) and 49 CFR part 24. A “displaced person” must be advised of his or her rights under the Fair Housing Act and, if the comparable replacement dwelling used to establish the amount of the replacement housing payment to be provided to a minority person is located in an area of minority concentration, the minority person also must be given, if possible, referrals to comparable and suitable, decent, safe, and sanitary replacement dwellings not located in such areas.

(2) *Displaced person.* (i) For purposes of this paragraph (c), the term “displaced person” means a person (family individual, business, nonprofit organization, or farm, including any corporation, partnership or association) that moves from real property or moves personal property from real property, permanently, as a direct result of acquisition, rehabilitation, or demolition for a project assisted with HTF funds. This includes any permanent, involuntary move for an assisted project, including any permanent move from the real property that is made:

(A) After notice by the owner to move permanently from the property, if the move occurs on or after:

(1) The date of the submission of an application to the grantee or HUD, if the applicant has site control and the application is later approved; or

(2) The date the grantee approves the applicable site, if the applicant does not have site control at the time of the application; or

(B) Before the date described in paragraph (c)(2)(i)(A) of this section, if the grantee or HUD determines that the displacement resulted directly from

acquisition, rehabilitation, or demolition for the project; or

(C) By a tenant-occupant of a dwelling unit, if any one of the following three situations occurs:

(1) The tenant moves after execution of the agreement covering the acquisition, rehabilitation, or demolition and the move occurs before the tenant is provided written notice offering the tenant the opportunity to lease and occupy a suitable, decent, safe, and sanitary dwelling in the same building/complex upon completion of the project under reasonable terms and conditions. Such reasonable terms and conditions must include a term of at least one year at a monthly rent and estimated average monthly utility costs that do not exceed the greater of:

(i) The tenant's monthly rent before such agreement and estimated average monthly utility costs; or

(ii) The total tenant payment, as determined under 24 CFR 5.628, if the tenant is low-income, or 30 percent of gross household income, if the tenant is not low-income;

(2) The tenant is required to relocate temporarily, does not return to the building/complex, and either:

(i) The tenant is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation; or

(ii) Other conditions of the temporary relocation are not reasonable; or

(3) The tenant is required to move to another dwelling unit in the same building/complex but is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move, or other conditions of the move are not reasonable.

(ii) Notwithstanding paragraph (c)(2)(i) of this section, a person does not qualify as a “displaced person” if:

(A) The person has been evicted for cause based upon a serious or repeated violation of the terms and conditions of the lease or occupancy agreement, violation of applicable Federal, State or local law, or other good cause, and the grantee determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance. The effective date of any termination or refusal to renew must be preceded by at least 30 calendar days advance written notice to the tenant specifying the grounds for the action.

(B) The person moved into the property after the submission of the application, but before signing a lease and commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., the person may be displaced,

temporarily relocated, incur a rent increase), and the fact that the person would not qualify as a “displaced person” (or for any assistance under this section) as a result of the project;

(C) The person is ineligible under 49 CFR 24.2(g)(2); or

(D) HUD determines that the person was not displaced as a direct result of acquisition, rehabilitation, or demolition for the project.

(iii) The grantee may, at any time, ask HUD to determine whether a displacement is or would be covered by this rule.

(3) *Initiation of negotiations.* For purposes of determining the formula for computing replacement housing assistance to be provided under this paragraph (c) to a tenant displaced from a dwelling as a direct result of private-owner rehabilitation, demolition, or acquisition of the real property, the term “initiation of negotiations” means the execution of the agreement covering the acquisition, rehabilitation, or demolition.

(d) *Optional relocation assistance.* The grantee may provide relocation payments and other relocation assistance to families, individuals, businesses, nonprofit organizations, and farms displaced by a project assisted with HTF funds where the displacement is not subject to paragraph (c) of this section. The grantee may also provide relocation assistance to persons covered under paragraph (c) of this section beyond that required. For any such assistance that is not required by State or local law, the grantee must adopt a written policy available to the public that describes the optional relocation assistance that it has elected to furnish and provides for equal relocation assistance within each class of displaced persons.

(e) *Real property acquisition requirements.* The acquisition of real property for a project is subject to the URA and the requirements of 49 CFR part 24, subpart B.

(f) *Appeals.* A person who disagrees with the grantee’s determination concerning whether the person qualifies as a displaced person, or the amount of relocation assistance for which the person may be eligible, may file a written appeal of that determination with the grantee.

§ 93.353 Conflict of interest.

(a) *Applicability of 2 CFR 200.318.* In the procurement of property and services by grantees and subgrantees, the conflict of interest provisions in 2 CFR 200.318 apply. In all cases not governed by 2 CFR 200.318, the provisions of this section apply.

(b) *Conflicts prohibited.* No persons described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to activities assisted with HTF funds or who are in a position to participate in a decision-making process or gain inside information with regard to these activities may obtain a financial interest or financial benefit from a HTF-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to the HTF-assisted activity, or the proceeds from such activity, either for themselves or those with whom they have business or immediate family ties, during their tenure or for one year thereafter. Immediate family ties include (whether by blood, marriage, or adoption) the spouse, parent (including a stepparent), child (including a stepchild), brother, sister (including a stepbrother or stepsister), grandparent, grandchild, and in-laws of a covered person.

(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 grantee or subgrantee.

(d) *Exceptions: Threshold requirements.* Upon the written request of the grantee, HUD may grant an exception to the provisions of paragraph (b) of this section on a case-by-case basis when it determines that the exception will serve to further the purposes of the HTF and the effective and efficient administration of the grantee’s program or project. An exception may be considered only after the grantee has provided the following:

(1) 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

(2) An opinion of the grantee’s attorney that the interest for which the exception is sought would not violate State or local law.

(e) *Factors to be considered for exceptions.* In determining whether to grant a requested exception after the grantee has satisfactorily met the requirements of paragraph (d) of this section, HUD will consider the cumulative effect of the following factors, where applicable:

(1) Whether the exception would provide a significant cost benefit or an essential degree of expertise to the program or project which would otherwise not be available;

(2) Whether the person affected is a member of a group or class of income eligible 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;

(3) 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;

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

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

(6) Any other relevant considerations.

(f) *Recipient—(1) General.* No recipient assisted with HTF funds (or officer, employee, agent, elected or appointed official, or consultant of recipient or immediate family member or immediate family member of an officer, employee, agent, elected or appointed official, or consultant of a recipient) whether private, for-profit or nonprofit, may occupy a HTF-assisted affordable housing unit in a project during the required period of affordability specified in § 93.302(e) or § 93.304. This provision does not apply to an employee or agent of the recipient who occupies a housing unit as the project manager or maintenance worker.

(2) *Exceptions.* Upon written request of a recipient, the grantee (or subgrantee, if authorized by the grantee) may grant an exception to the provisions of paragraph (f)(1) of this section on a case-by-case basis when it determines that the exception will serve to further the purposes of the HTF program and the effective and efficient administration of the recipient’s HTF-assisted project. In determining whether to grant a requested exception, the grantee shall consider the following factors:

(i) Whether the person receiving the benefit is a member of a group or class of low-income persons intended to be the beneficiaries of the assisted housing, 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;

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

(iii) Whether the tenant protection requirements of § 93.303 are being observed;

(iv) Whether the affirmative marketing requirements of § 93.350 are being observed and followed; and

(v) Any other factor relevant to the grantee's determination, including the timing of the requested exception.

§ 93.354 Funding Accountability and Transparency Act.

The HTF grant to the grantee and all assistance provided to subgrantees and recipients shall be considered a Federal award for purposes of the Federal Funding Accountability and Transparency Act of 2006 (31 U.S.C. 6101 note).

§ 92.355 Eminent domain.

No HTF funds may be used in conjunction with property taken by eminent domain, unless eminent domain is employed only for a public use, except that, public use shall not be construed to include economic development that primarily benefits any private entity.

Subpart I—Program Administration

§ 93.400 Housing Trust Fund (HTF) accounts.

(a) *General.* HUD will establish an HTF United States Treasury account (HTF Treasury account) for each grantee. Each grantee may use either a separate HTF local account or a subsidiary account within its general fund (or other appropriate fund) as the HTF local account.

(b) *HTF Treasury account.* The HTF Treasury account includes the annual grant and funds reallocated to the State by formula.

(c) *HTF local account.* (1) The HTF local account includes deposits of HTF funds disbursed from the HTF Treasury account, any program income, and any repayments as required by § 93.403.

(2) The HTF local account must be interest-bearing.

(d) *Reductions.* HUD will reduce or recapture funds in the HTF account by the amount of:

(1) Any fiscal year grant funds in the HTF Treasury account that are not committed within 24 months after the date of HUD's execution of the HTF grant agreement;

(2) Any fiscal year grant funds in the HTF local account that are not expended within 5 years after the date of HUD's execution of the HTF grant agreement;

(3) Any amounts pursuant to § 93.453; and

(4) Amounts that the grantee fails to obtain and that were required to be reimbursed or returned under § 93.450.

§ 93.401 HTF grant agreement.

Allocated and reallocated funds will be made available pursuant to an HTF grant agreement.

§ 93.402 Program disbursement and information system.

(a) *General.* The HTF Treasury account is managed through a computerized disbursement and information system established by HUD. The system disburses HTF funds that are allocated or reallocated, and collects and reports information on the use of funds in the HTF Treasury account. The grantee must report on the receipt and use of all program income in HUD's computerized disbursement and information system. The grantee must develop and maintain a system to ensure that each recipient and subgrantee uses HTF funds in accordance with the requirements of this part and that any requirements or conditions under which the HTF funds were provided.

(b) *Project set-up.* (1) After the grantee executes the HTF grant agreement, submits the applicable banking and security documents, and commits funds to a specific local project, the grantee shall identify (set up) specific activities (*i.e.*, projects) in the disbursement and information system. Investments that require the set-up of projects in the system are the acquisition, new construction, or rehabilitation of housing, operating cost assistance, and operating cost assistance reserves. The grantee is required to enter complete project set-up information at the time of project set-up.

(2) If the project set-up information is not completed within 20 calendar days of the date of the initial project set-up, the project may be canceled by the system. In addition, a project that has been committed in the system for 12 months without an initial disbursement of funds may be canceled by the system.

(c) Disbursement of HTF Funds.

(1) After complete project set-up information is entered into the disbursement and information system, HTF funds for the project may be drawn down from the HTF Treasury account by the grantee by electronic funds transfer. Any drawdown of funds in the HTF Treasury account is conditioned upon the provision of satisfactory information by the grantee about the project and compliance with other procedures, as specified by HUD.

(2) Funds drawn from the HTF Treasury account are subject to the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and regulations at 31 CFR part 205.

(3) Funds in the HTF local account must be disbursed before requests are made for funds in the HTF Treasury account.

(d) *Project completion.* (1) Complete project completion information must be entered into the disbursement and information system, or otherwise provided, within 120 calendar days of the date of the final project drawdown. If satisfactory project completion information is not provided, HUD may suspend further project set-ups or take other corrective actions.

(2) Additional HTF funds for development-related costs may be committed to a project up to one year after project completion, but the amount of HTF funds in the project may not exceed the maximum per-unit development subsidy amount established pursuant to § 93.300.

(e) *Access by other participants.* Access to the disbursement and information system by other entities participating in the HTF program will be governed by procedures established by HUD.

§ 93.403 Program income and repayments.

(a) *Program income.* Program income must be treated as HTF funds and must be used in accordance with the requirements of this part. Program income must be deposited in the grantee's HTF local account unless the grantee permits a subgrantee to retain the program income for additional HTF projects pursuant to the written agreement required by § 93.404(b). The grantee must report the program income received as well as the use of the program income in the disbursement and information system that HUD designates for the HTF.

(b) *Repayments.* (1) Any HTF funds invested in housing that does not meet the affordability requirements for the period specified in § 93.302 or § 93.304, as applicable, must be repaid by the grantee in accordance with paragraph (b)(3) of this section.

(2) Any HTF funds invested in a project that is terminated before completion, either voluntarily or otherwise, must be repaid by the grantee, in accordance with paragraph (b)(3) of this section.

(3) HUD will instruct the grantee to either repay the funds to the HTF Treasury account or the local account. Generally, if the HTF funds were disbursed from the grantee's HTF Treasury account, they must be repaid to the HTF Treasury account. If the HTF funds were disbursed from the grantee's HTF local account, they must be repaid to the local account.

(4) If the grantee is no longer a grantee in the HTF program when the repayment is made, the funds must be remitted to HUD and reallocated in accordance with § 93.54 of this part.

§ 93.404 Grantee responsibilities; written agreements; onsite inspections; financial oversight.

(a) *Responsibilities.* The grantee is responsible for managing the day-to-day operations of its HTF program, ensuring that HTF funds are used in accordance with all program requirements and written agreements, and taking appropriate action when performance problems arise. The use of subgrantees or contractors does not relieve the grantee of this responsibility. The performance and compliance of each contractor and subgrantee must be reviewed at least annually. The grantee must have and follow written policies, procedures, and systems, including a system for assessing risk of activities and projects and a system for monitoring entities consistent with this section, to ensure that the requirements of this part are met.

(b) *Executing a written agreement.* Before disbursing any HTF funds to any entity, the grantee must enter into a written agreement with that entity. The written agreement must ensure compliance with the requirements of this part.

(c) *Provisions in written agreements.* The contents of the agreement may vary depending upon the role the entity is asked to assume or the type of project undertaken. This section details basic requirements by role and the minimum provisions that must be included in a written agreement.

(1) *Subgrantee.* The agreement must require the subgrantee to comply with the requirements applicable to the grantee under this part. The agreement between the grantee and the subgrantee must include:

(i) *Use of the HTF funds.* An HTF subgrantee that is a unit of general local government must have a consolidated plan under 24 CFR part 91, and the written agreement must require that an HTF allocation plan to be part of the subgrantee's consolidated plan (see 24 CFR 91.220(l)(5)). The HTF allocation plan of an HTF subgrantee that is a State agency is included in the grantee's HTF allocation plan. The grantee may impose restrictions on the use of funds by the subgrantee, e.g., limit to rental projects. The written agreement must require that the selection of projects by eligible recipients will be in accordance with the HTF allocation plan. The agreement must describe the tasks to be performed, a schedule for completing the tasks

(including a schedule for committing funds to projects), a budget, and the period of the agreement. These items must be in sufficient detail to provide a sound basis for the grantee to effectively monitor performance under the agreement.

(ii) *Deadlines.* The agreement must state the time requirements for the commitment and expenditure of HTF funds and specify that remaining funds will be reduced or recaptured by the grantee so that the grantee can meet its commitment and expenditure deadlines in § 93.400.

(iii) *Audit.* The agreement must state that an audit of the subgrantee must be conducted at least annually, in accordance with § 93.406.

(iv) *Program income.* The agreement must state if program income is to be remitted to the grantee or to be retained by the subgrantee for additional HTF eligible activities.

(v) *Uniform administrative requirements.* The agreement must require the subgrantee to comply with the requirements of 2 CFR part 200, as described in § 93.405. The agreement must include the information in 2 CFR 200.331.

(vi) *Other program requirements.* The agreement must require the subgrantee to carry out each project in compliance with all Federal laws and regulations described in §§ 93.350–93.354 of this part.

(vii) *Affirmative marketing.* The agreement must specify the subgrantee's affirmative marketing responsibilities, in accordance with § 93.350.

(viii) *Requests for disbursement of funds.* The agreement must specify that the subgrantee may not request disbursement of funds under the agreement until the funds are needed for payment of eligible costs. The amount of each request must be limited to the amount needed. Program income must be disbursed before the subgrantee requests grant funds from the grantee.

(ix) *Reversion of assets.* The agreement must specify that upon closeout of the subgrant agreement, the subgrantee must transfer to the grantee any HTF funds on hand and any accounts receivable attributable to the use of HTF funds.

(x) *Records and reports.* The agreement must specify the particular records that must be maintained and the information or reports that must be submitted in order to assist the grantee in meeting its recordkeeping and reporting requirements.

(xi) *Enforcement of the agreement.* The agreement must specify remedies for breach of the provisions of the agreement. The agreement must specify

that, in accordance with 2 CFR 200.338, suspension or termination may occur if the subgrantee materially fails to comply with any term of the agreement. The grantee may permit the agreement to be terminated in whole or in part, in accordance with 2 CFR 200.339.

(xii) *Written agreement.* The agreement must require that before the subgrantee provides HTF funds to eligible recipients, first-time homebuyers, or contractors, the subgrantee must have a written agreement that meets the requirements of this section.

(xiii) *Duration of the agreement.* The agreement must specify the period of performance of the agreement.

(xiv) *Fees.* The agreement must prohibit the subgrantee from charging servicing, origination, or other fees for the costs of administering the HTF program, except that:

(A) The subgrantee may charge owners of rental projects reasonable annual fees for compliance monitoring during the period of affordability. The fees must be based upon the average actual cost of performing the monitoring of HTF-assisted rental projects. The basis for determining the amount of the fee amount must be documented and the fee must be included in the costs of the project as part of the project underwriting;

(B) The subgrantee may charge nominal application fees (although these fees are not an eligible HTF cost) to discourage frivolous applications. The amount of application fees must be appropriate to the type of application and may not create an undue impediment to an income-eligible family's, or other potential recipient's participation in the HTF program; and

(C) The subgrantee may charge homebuyers a fee for housing counseling.

(2) *Eligible recipient.* The agreement between the grantee and the eligible recipient selected for funding must include:

(i) *Use of the HTF funds.* The agreement must describe the use of the HTF funds for the project, including the tasks to be performed, a schedule for completing the tasks and project (including the expenditure deadline), and a project budget. These items must be in sufficient detail to provide a sound basis for the grantee to effectively monitor performance under the agreement. If the grantee is providing operating cost assistance, the written agreement must include the provisions required by § 93.201.

(ii) *Deadlines.* The agreement must state the time requirements for the commitment and expenditure of HTF

funds and specify that remaining funds will be reduced or recaptured.

(iii) *Audit.* The agreement must specify that the recipient will submit to the grantee a cost certification performed by a certified public accountant for each project assisted with HTF funds. The agreement must specify that the recipient will submit to the grantee an annual audit performed on each project assisted with HTF funds, beginning the first year following the cost certification and with the final annual audit occurring the last year of the affordability period.

(iv) *Affordability.* The agreement must specify the affordability period, require housing assisted with HTF funds to meet the affordability requirements of § 93.302 or § 93.304, as applicable, and must require repayment of the funds if the housing does not meet the affordability requirements for the specified time period. If the recipient is undertaking a rental project, the agreement must establish the initial rents and the procedures for rent increases, the number of HTF units, the size of the HTF units, the designation of the HTF units as fixed or floating, and the requirement to provide the address (e.g., street address and apartment number) of each HTF unit no later than the time of project completion. If the recipient is undertaking homeownership projects for sale to first-time homebuyers, in accordance with § 93.304, the agreement must establish the resale or recapture requirements that must be imposed on the housing, the sales price or the basis upon which the sales price will be determined, and the disposition of the sales proceeds.

(v) *Project requirements.* The agreement must require the housing to meet the property standards in § 93.301 of this part, as applicable, and in accordance with the type of project assisted upon project completion. The agreement must also require owners of rental housing assisted with HTF funds to maintain the housing in compliance with § 93.301 of this part for the duration of the affordability period, and to comply with the requirements of § 93.303. The agreement may permit the recipient to limit eligibility or give a preference to a particular segment of the population, only if the grantee has described any such limited eligibility or preference in its consolidated plan; provided, however, that any limitation or preference cannot violate nondiscrimination requirements in § 93.350.

(vi) *Other program requirements.* The agreement must require the eligible recipient to carry out each project in compliance with all Federal laws and

regulations described in §§ 93.350 through 93.355 of this part.

(vii) *Affirmative marketing.* The agreement must specify the recipient's affirmative marketing responsibilities, as enumerated by the grantee in accordance with § 93.350.

(viii) *Requests for disbursement of funds.* The agreement must specify that the recipient may not request disbursement of funds under the agreement until the funds are needed for payment of eligible costs. The amount of each request must be limited to the amount needed.

(ix) *Records and reports.* The agreement must specify the particular records that must be maintained and the information or reports that must be submitted to assist the grantee in meeting its recordkeeping and reporting requirements. The owner of rental housing must annually provide the grantee with information on rents and occupancy of HTF-assisted units to demonstrate compliance with § 93.302. If the rental housing project has floating HTF units, the owner must provide the grantee with information regarding unit substitution and filling vacancies so that the project remains in compliance with HTF rental occupancy requirements. The agreement must specify the reporting requirements (including copies of financial statements) to enable the grantee to determine the financial condition (and continued financial viability) of the rental project.

(x) *Enforcement of the agreement.* The agreement must provide for a means of enforcement of the affordable housing requirements by the grantee and the intended beneficiaries. This means of enforcement and the affordability requirements in § 93.302 must be imposed by deed restrictions, covenants running with the land, use restrictions, or other mechanisms approved by HUD under which the grantee and beneficiaries may require specific performance. In addition, the agreement must specify remedies for breach of the provisions of the agreement.

(xi) *Duration of the agreement.* The agreement must specify the duration of the agreement. If the housing assisted under this agreement is rental housing, the agreement must be in effect through the affordability period required by the grantee under § 93.302. If the housing assisted under this agreement is homeownership housing, the agreement must be in effect at least until completion of the project and ownership by the first-time homebuyer.

(xii) *Fees.* The agreement must prohibit project owners from charging origination fees, parking fees, laundry room access fees, and other fees;

however, rental project owners may charge reasonable application fees to prospective tenants.

(3) *First-time homebuyer.* When a grantee provides assistance to a homebuyer, the written agreement must include as a minimum:

(i) *Use of the HTF funds.* The agreement must conform to the requirements in § 93.304, including the limitations on the value of the property, principal residence requirement, lease-purchase terms, if applicable, and the resale or recapture provisions. The agreement must specify the amount of HTF funds, the form of assistance (e.g., grant, amortizing loan, deferred payment loan), the use of the funds (e.g., downpayment, closing costs), and the time by which the housing must be acquired.

(ii) *Resale or recapture restrictions.* The agreement must specify the resale or recapture restrictions established under § 93.304 for the specified time period.

(iii) *Enforcement of the agreement.* The agreement must provide for a means of enforcement of the affordable housing requirements by the grantee. The means of enforcement and the affordability requirements in § 93.304 for resale restrictions must be imposed by deed restrictions, covenants running with the land, use restrictions, or other mechanisms approved by HUD under which the grantee may require specific performance. In addition, the agreement must specify remedies for breach of the provisions of the agreement.

(d) *Onsite inspections—(1) Project completion.* The grantee must perform an onsite inspection of each HTF-assisted project at project completion to determine that the housing meets the property standards of § 93.301. The inspections must be in accordance with the inspection procedures that the grantee establishes to meet the inspection requirements of § 93.301.

(2) *Period of affordability.* (i) During the period of affordability, the grantee must perform onsite inspections of HTF-assisted rental housing buildings to determine compliance with the ongoing property standards of § 93.301 and to verify the information submitted by the owners in accordance with the requirements of § 93.302. The inspections must be in accordance with the inspection procedures that the grantee establishes to meet the inspection requirements of § 93.301.

(ii) The onsite inspections must occur 12 months after project completion and at least once every 3 years thereafter during the period of affordability.

(iii) If there are observed deficiencies for any of the inspectable items

established by the grantee, in accordance with the inspection requirements of § 93.301, a follow-up onsite inspection must occur within 12 months, or within a reasonable time frame established by the grantee depending on the severity of the deficiency, to verify that all observed deficiencies have been corrected. The grantee may establish a list of non-hazardous deficiencies for which correction can be verified by third party documentation rather than reinspection. The grantee must adopt a more frequent inspection schedule for properties that have been found to have health and safety violations. Life-threatening health and safety deficiencies must be corrected immediately, in accordance with § 93.301.

(iv) The property owner must annually certify to the grantee that each building in the project is suitable for occupancy, taking into account State and local health, safety, and other applicable codes, ordinances, and requirements, and the ongoing property standards established by the grantee to meet the requirements of § 93.301.

(v) Inspections must be based on a statistically valid sample of units appropriate for the size of the HTF-assisted project, as set forth by HUD through notice. The grantee must select the sample. For projects with one to four HTF-assisted units, the inspectable items (site, building exterior, building systems, and common areas) for each building with HTF-assisted units and 100 percent of the HTF-assisted dwelling units must be inspected.

(e) *Financial oversight.* During the period of affordability, the grantee must examine regularly (at least annually) the financial condition of HTF-assisted rental projects with 10 or more HTF-assisted units to determine the continued financial viability of the housing and must take actions to correct problems.

§ 93.405 Applicability of uniform administrative requirements, cost principles, and audits.

The requirements of 2 CFR part 200 apply to the grantees and subgrantees receiving HTF funds, except for the following provisions: §§ 200.307, 200.311, 300.328(b), 200.329, and 200.333. If there is a conflict between the definitions in 2 CFR part 200 and 24 CFR part 93, the definitions in part 93 govern.

§ 93.406 Audits.

(a) Audits of the grantee and subgrantees must be conducted in accordance with 2 CFR part 200, subpart F. The use of HTF grant funds by the

grantee must be audited not less than annually to ensure compliance with this part. Any financial statement submitted by the grantee to HUD must be reviewed by an independent certified public accountant, in accordance with Statements on Standards for Accounting and Review Services, which is issued by the American Institute of Certified Public Accountants.

(b) The written agreement providing HTF assistance to the recipient must specify that the recipient will submit to the grantee a cost certification performed by a certified public accountant for each project assisted with HTF funds. The agreement must specify that the recipient will submit to the grantee an annual audit performed on each project assisted with HTF funds, beginning the first year following the cost certification and with the final annual audit occurring the last year of the affordability period.

§ 93.407 Recordkeeping.

(a) *General.* Each grantee must establish and maintain sufficient records to enable HUD to determine whether the grantee has met the requirements of this part. At a minimum, the following records are needed:

(1) *Program records.* (i) The forms of HTF assistance used in the program.

(ii) The subsidy layering guidelines adopted in accordance with § 93.300.

(iii) If HTF funds are used for housing for first-time homebuyers, the procedures used for establishing 95 percent of the median purchase price for the area in accordance with § 93.305, as set forth in the consolidated plan.

(iv) If HTF funds are used for acquisition of housing for homeownership, the resale guidelines established in accordance with § 93.304, as set forth in the consolidated plan.

(v) Records documenting compliance with the 24-month commitment deadline of § 93.400(d)(1).

(vi) Records documenting compliance with the 10 percent limitation on administrative and planning costs in accordance with § 93.202.

(2) *Project records.* (i) A full description of each project assisted with HTF funds, including the location (address of each unit), form of HTF assistance, and the units assisted with HTF funds.

(ii) The source and application of funds for each project, including supporting documentation, in accordance with 2 CFR 200.333 through 200.337, and records to document the eligibility and allowability of the project costs, including the documentation of the actual HTF-eligible development

costs of each HTF-assisted unit (through allocation of costs, if permissible under § 93.200(c)) where HTF funds are used to assist less than all of the units in a multi-unit project.

(iii) Records demonstrating that each rental housing or homeownership project meets the maximum per-unit subsidy amount established pursuant to § 93.300(a), and the subsidy layering and underwriting evaluation in accordance with § 93.300.

(iv) Records (e.g., inspection reports) demonstrating that each project meets the property standards of § 93.301 of this part at project completion. In addition, during the period of affordability, records for rental projects demonstrating compliance with the property standards, and financial reviews and actions pursuant to § 93.404(a).

(v) Records demonstrating that each family is income-eligible.

(vi) Records demonstrating that each rental housing project meets the affordability and income targeting requirements of § 93.302 for the required period. Records must be kept for each family assisted.

(vii) Records demonstrating that each lease for an assisted rental housing unit complies with the tenant and participant protections of § 93.303. Records must be kept for each family assisted.

(viii) Records demonstrating that the purchase price for each housing unit for a first-time homebuyer does not exceed 95 percent of the median purchase price for the area, in accordance with § 93.305.

(ix) Records demonstrating that each housing unit for a first-time homebuyer meets the affordability requirements of § 93.304 for the required period.

(x) Records demonstrating that a site and neighborhood standards review was conducted for each project that included new construction of rental housing assisted under this part, to determine that the site meets the requirements of § 93.150.

(xi) Records (written agreements) demonstrating compliance with the written agreements requirements in § 93.404.

(3) *Financial records.* (i) Records identifying the source and application of funds for each fiscal year, including the annual grant and any reallocation (identified by federal fiscal year).

(ii) Records concerning the HTF Treasury account and local account required to be established and maintained by § 93.400, including deposits, disbursements, balances, supporting documentation, and any other information required by the

program disbursement and information system established by HUD.

(iii) Records identifying the source and application of program income and repayments.

(iv) Records demonstrating adequate budget control, in accordance with 2 CFR part 200, including evidence of periodic account reconciliations.

(4) *Program administration records.*

(i) Written policies, procedures, and systems, including a system for assessing risk of activities and projects, and a system for monitoring entities consistent with this section, to ensure that the requirements of this part are met.

(ii) Records demonstrating compliance with the applicable uniform administrative requirements required by § 93.405.

(iii) Records documenting required inspections, monitoring reviews and audits, and the resolution of any findings or concerns.

(5) *Records concerning other Federal requirements.* (i) Equal opportunity and fair housing records, as required under 24 CFR part 121.

(A) Data on the extent to which each racial and ethnic group and single-headed households (by gender of household head) have applied for, participated in, or benefited from, any program or activity funded in whole or in part with HTF funds.

(B) Documentation of actions undertaken to meet the requirements of 24 CFR part 135, which implements section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u).

(ii) Records demonstrating compliance with the affirmative marketing procedures and requirements of § 93.350.

(iii) Records demonstrating compliance with the lead-based paint requirements of 24 part 35, subparts A, B, J, K, M, and R.

(iv) Records demonstrating compliance with requirements of § 93.352 regarding displacement, relocation, and real property acquisition.

(v) Records supporting exceptions to the conflict-of-interest prohibition pursuant to § 93.353.

(vi) Debarment and suspension certifications required by 24 CFR 5.105(c) and 2 CFR part 2424.

(vii) Records demonstrating compliance with § 93.354.

(viii) Records demonstrating compliance with 2 CFR 200.321 regarding the grantee's activities related to minority business enterprise (MBE) and women's business enterprise (WBE).

(b) *Period of record retention.* All records pertaining to each fiscal year of HTF funds must be retained in a secure location for the most recent 5-year period, except as provided below.

(1) For rental housing projects, records may be retained for 5 years after the project completion date, except that records of individual tenant income verifications, project rents, and project inspections must be retained for the most recent 5-year period, until 5 years after the affordability period terminates.

(2) For homeownership housing projects, records may be retained for 5 years after the project completion date, except for documents imposing resale or recapture restrictions that must be retained for 5 years after the affordability period terminates.

(3) Written agreements must be retained for 5 years after the agreement terminates.

(4) Records covering displacements and acquisitions must be retained for 5 years after the date by which all persons displaced from the property and all persons whose property is acquired for the project have received the final payment to which they are entitled, in accordance with § 93.352.

(5) If any litigation, claim, negotiation, audit, monitoring, inspection, or other action has been started before the expiration of the required record retention period, records must be retained until completion of the action and resolution of all issues that arise from it, or until the end of the required period, whichever is later.

(c) *Access to records.* (1) The grantee must provide citizens, public agencies, and other interested parties with reasonable access to records, consistent with applicable State and local laws regarding privacy and obligations of confidentiality.

(2) HUD and the Comptroller General of the United States, and any of their representatives, have the right of access to any pertinent books, documents, papers, or other records of the grantee, subgrantees, and recipients, to make audits, examinations, excerpts, and transcripts.

§ 93.408 Performance reports.

Each grantee must develop and maintain a system to track the use of its HTF funds, and submit annual performance and management reports on its HTF program in accordance with 24 CFR 91.520. HUD will make the performance and management reports publicly available.

Subpart J—Performance Reviews and Sanctions

§ 93.450 Accountability of recipients.

The grantee shall review each recipient to determine compliance with the requirements of this part and the terms of the written agreement in accordance with the grantee's policies, procedures, and systems established pursuant to § 93.404(a).

(a) *Misuse of funds—(1)*

Reimbursement requirement. If a recipient of HTF assistance is determined to have used HTF funds in a manner that is materially in violation of the requirements of this part or any requirements or conditions under which the funds were provided, the grantee must require that, within 12 months after the determination of such misuse, the recipient reimburse the grantee for such misused amounts and return to the grantee any such amounts that remain unused or uncommitted for use. The reimbursement is in addition to any other remedies that may be available under law.

(2) *Determination.* The grantee or HUD may make the determination, provided that:

(i) The grantee provides notification and opportunity for discretionary review to HUD; and

(ii) HUD does not subsequently reverse the determination.

(b) *Reduction for failure to obtain return of misused funds.* (1) If, in any year, a grantee fails to obtain reimbursement or return of the full amount required to be reimbursed or returned to the grantee during the year, the amount of the grant for the grantee for the succeeding year will be reduced by the amount by which the amounts required to be reimbursed or returned exceed the amount actually reimbursed or returned.

(2) In any case in which a failure to obtain reimbursement or return occurs during a year immediately preceding a year in which HTF grants will not be made, the grantee shall pay to HUD, for reallocation among the other grantees, an amount equal to the amount of the reduction for the entity that would otherwise apply.

§ 93.451 Performance reviews.

(a) *General.* HUD will review the performance of each grantee in carrying out its responsibilities under this part whenever determined necessary by HUD, but at least annually. In conducting performance reviews, HUD will rely primarily on information obtained from the grantee's records and reports, findings from onsite monitoring, audit reports, and

information generated from the disbursement and information system established by HUD. Where applicable, HUD may also consider relevant information pertaining to a grantee's performance gained from other sources, including citizen comments, complaint determinations, and litigation. Reviews to determine compliance with specific requirements of this part will be conducted as necessary, with or without prior notice to the grantee. Onsite comprehensive performance reviews under the standards in paragraph (b) of this section will be conducted after prior notice to the grantee.

(b) *Standards for comprehensive performance review.* A grantee's performance will be comprehensively reviewed periodically, as prescribed by HUD, to determine whether the grantee has committed and expended the HTF funds as required by § 93.400; has met the requirements of this part, particularly eligible activities, income targeting, affordability, and property standards; has awarded the funds in accordance with its HTF allocation plan and requirements of this part; has reviewed its subgrantees and recipients to determine whether they have satisfied the requirements of this part and the terms of their written agreements; and has met its performance measures in its consolidated plan.

§ 93.452 Corrective and remedial actions.

(a) *General.* HUD will use the procedures in this section in conducting the performance review as provided in § 93.451 and in taking corrective and remedial actions.

(b) *Performance review.* (1) If HUD determines preliminarily that the grantee has not met a requirement of this part, the grantee will be given notice of this determination and an opportunity to demonstrate, within the time prescribed by HUD (not to exceed 30 calendar days) and on the basis of substantial facts and data, that it has done so.

(2) If the grantee fails to demonstrate to HUD's satisfaction that it has met the requirement, HUD will take corrective or remedial action in accordance with this section or § 93.453.

(c) *Corrective and remedial actions.* Corrective or remedial actions for a performance deficiency (failure to meet a provision of this part) will be designed to prevent a continuation of the deficiency; mitigate, to the extent possible, its adverse effects or consequences; and prevent its recurrence.

(1) HUD may instruct the grantee to submit and comply with proposals for action to correct, mitigate, and prevent a performance deficiency, including:

(i) Preparing and following a schedule of actions for carrying out the affected activities, consisting of schedules, timetables, and milestones necessary to implement the affected activities;

(ii) Establishing and following a management plan that assigns responsibilities for carrying out the remedial actions;

(iii) Canceling or revising activities likely to be affected by the performance deficiency, before expending HTF funds for the activities;

(iv) Reprogramming HTF funds that have not yet been expended from affected activities to other eligible activities;

(v) Reimbursing its HTF account in any amount not used in accordance with the requirements of this part;

(vi) Suspending disbursement of HTF funds for affected activities; and

(vii) Establishing procedures to ensure compliance with HTF requirements;

(2) HUD may also change the method of payment from an advance to reimbursement basis and may require supporting documentation to be submitted for HUD review for each payment request before payment is made; determine the grantee to be high risk and impose special conditions or restrictions on the allocation in accordance with 2 CFR 200.207 or 200.338; and take other remedies that may be legally available.

§ 93.453 Notice and opportunity for hearing; sanctions.

(a) If HUD finds after reasonable notice and opportunity for hearing that a grantee has substantially failed to comply with any provision of this part, and until HUD is satisfied that there is no longer any such failure to comply:

(1) HUD shall reduce the funds in the grantee's HTF account by the amount of any expenditures that were not in accordance with the requirements of this part or require the grantee to repay to HUD any amount of the HTF grant that was not used in accordance with the requirements of this part; and

(2) HUD may do one or more of the following:

(i) Prevent withdrawals from the grantee's HTF account for activities affected by the failure to comply;

(ii) Restrict the grantee's activities under this part to activities or recipients not affected by the failure to comply;

(iii) Remove the State from participation in allocations or reallocations of funds made available under §§ 93.50 through 93.54 of this part; or

(iv) Terminate any HTF assistance to the grantee. HUD may, on due notice, suspend payments at any time after the issuance of a notice of opportunity for hearing pursuant to paragraph (a) of this section, pending such hearing and a final decision, to the extent that HUD determines such action to be necessary to preclude the further expenditure of funds for activities affected by the failure to comply.

(b) *Proceedings.* When HUD proposes to take action pursuant to this section, the respondent in the proceedings will be the grantee. Proceedings will be conducted in accordance with 24 CFR part 26.

Dated: January 23, 2015.

Julián Castro,
Secretary.

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