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March 2011

**National Low Income Housing Coalition
National Housing Trust Fund**
Summary of Comments Made on Proposed NHTF Rule

Eighty-four organizations, agencies, and individuals submitted comments regarding the proposed rule implementing the National Housing Trust Fund (NHTF). The top four concerns expressed by the National Housing Trust Fund Campaign are summarized here. Additional campaign concerns as well as other comments will be presented in subsequent issues of *Memo to Members*.

Income targeting. The NHTF statute requires that at least 75% of each state grant used for rental housing benefit extremely low income (ELI) households (those with incomes at or below 30% of area median income or AMI), or households with incomes below the poverty line. The statute limits the amount of NHTF money used for homeowner activities to 10%.

The proposed rule adopts the 75% ELI/poverty requirement for rental housing and adds the 75% ELI/poverty level targeting requirement to homeownership activities. The proposed rule also requires that for the first year, 100% of a grantee's rental and homeowner funds benefit ELI/poverty households. In addition, the proposed rule indicates that in subsequent years HUD will advise states whether the ELI target amount must be greater than 75%.

The National Housing Trust Fund Campaign commended HUD for the 100% ELI targeting in the first year, as well as the department's introduction of an option to apply a percentage greater than 75% in future years. Six other comments out of a total of 34 agreed. Fourteen wrote in opposition to 100% targeting in the first year; an additional five only opposed 100% ELI targeting for homeowner activities. Three objected to HUD's plan to decide from year to year whether to require an ELI benefit greater than 75%.

NLIHC supported the proposed rule's basic requirement that, after the first year, 75% of any homeowner activities benefit ELI households. Three comments suggested that HUD instead follow the statute, allowing NHTF-assisted homeowner activities to benefit households with incomes up to 50% AMI (very low income households or VLI), fearing that many ELI households might suffer foreclosure in future years.

Rent paid by beneficiaries. The statute is silent regarding the maximum rents NHTF-assisted households should pay. In November 2008, the NHTF Campaign recommended to HUD that the

regulations use the Brooke rule to establish rents such that households would not pay more than 30% of their income for rent and utilities.

Instead of the income-based Brooke rule, the proposed regulation would establish a fixed maximum rent at 30% of 30% of AMI, or 30% of the poverty level, whichever is greater.

Out of 30 comments, 17 urged the final regulation adopt the Brooke rule, while 11 endorsed the proposed rule. The Housing Trust Fund Project of the Center for Community Change noted that many state and local Housing Trust Funds apply the Brooke rule and work with developers to determine how to establish projects that are financially and operationally feasible. Several disability advocacy organizations supported Brooke, but given the shortage of vouchers to help support Brooke rents, suggested that when vouchers are not available the rule require projects to set aside 10% of Brooke rent-units for people with disabilities who have SSI-level incomes.

Period of affordability. The statute does not prescribe how long NHTF-assisted units must remain affordable. In November 2008, the NHTF Campaign urged HUD to set a 50-year affordability period and to provide preferences for projects with affordability periods greater than 50 years. The proposed regulation would require both rental and homeowner units to be affordable for at least 30 years, allowing states and any sub-grantees to establish longer affordability periods.

Out of 25 comments, 11 suggested 50 years and three recommended more than 50 years, one of which stated that the rule should give preference to projects in community land trusts providing permanent affordability. Three suggested periods ranging from 40 to 45 years. One commenter recommended that when Low Income Housing Tax Credits are in a project, the NHTF period of affordability should conform to the state's Qualified Allocation Plan. Another commenter wrote that long-term affordability ought to be contingent upon the availability of rental assistance and, in future years, financing for normal repairs.

One commenter endorsed a 30-year affordability period, while six suggested shorter affordability periods, primarily the HOME program periods, which range from five to 20 years, depending on the amount of assistance per unit.

Twenty percent cap on operating assistance. The statute makes operating cost assistance an eligible use of NHTF resources, but only in conjunction with NHTF-assisted rental housing.

The proposed rule caps at 20% the amount of a grantee's annual NHTF allocation that can be used for operating cost assistance. The NHTF Campaign recommended a 20% limit, but also suggested limiting the use of operating cost assistance to ELI units; the proposed rule merely limits use to any NHTF-assisted units. The proposed rule also limits operating cost assistance to a project during a single year's grant to two years, but does allow renewal throughout the entire affordability period. In addition, an operating cost assistance reserve can be created to cover up to a five-year period of inadequate rental income in order to ensure a project's financial feasibility.

HUD received thirty-six comments on this topic. Ten objected to any cap, six thought a cap of 25% or 30% would be reasonable, and eight suggested a cap higher than 20% without specifying how much higher (two of these would allow a higher cap only if tied to a unit assisting a disabled person with SSI-level income).

Nine urged removing the two-year limit, and another four commented that it hindered the ability to assist ELI households. One commenter wrote that over time the accumulation of obligations to renew operating assistance provided to projects would reach and exceed the 20% cap, eliminating the potential to provide operating assistance to new projects while also reducing the viability of existing affordable projects over the long term.

Five respondents specifically mentioned eliminating the five-year reserve cap. Eight letters suggested that along with removing the two-year cap, the final rule should permit one time capitalization of an operating reserve for individual projects based on the estimated operating assistance needed during the affordability period.

One national association objected to linking operating assistance to a NHTF-assisted unit, while four other comments suggested allowing the operating assistance to be used with other state or federally subsidized units not receiving NHTF dollars.

Rural areas. The NHTF statute requires each state to prepare an Allocation Plan annually, showing how it will distribute the funds based on priority housing needs. In addition, the statute requires the Allocation Plan to describe the state's process for selecting applications for NHTF money; the process must be based on six features listed in the statute, including 'geographic diversity.'

In a November 2008 letter to HUD, the NHTF Campaign requested that HUD require states to allocate NHTF dollars based on the relative need in rural areas and urban areas, but this attention to rural needs is not explicitly included in the proposed rule.

One portion of the proposed rule would require states to distribute NHTF resources throughout the state according to its assessment of priority housing needs as identified in the Consolidated Plan, while another portion echoes the statute's requirement that geographic diversity be considered as one of six priorities when awarding NHTF money to applicants.

Of the 13 comments regarding this topic, 11 urged the final rule to require allocation based on the relative need in rural and urban areas. The Housing Assistance Council refined this concept by suggesting the rule require NHTF money be distributed according to need, with need measured on a proportionate basis, rather than on an absolute basis. For example, if NHTF is used in an urban neighborhood where 5% of the extremely low income (ELI) renters (those with incomes at or below 30% of the area median income or AMI) have worst case housing needs, NHTF dollars should also be available to a rural county where 5% of the ELI renters also have worst case needs, even though the rural 5% might be relatively few households.

Two recommended that HUD establish and use the U.S. Department of Agriculture's definition of 'rural.'

Transitional housing. Although the statute is silent, the proposed rule would allow NHTF dollars to be used for transitional housing.

Nine of ten letters agreed with the NHTF Campaign that NHTF resources should not be used for transitional housing. A transitional housing organization endorsed the proposed regulation.

Public housing. The statute defines a ‘recipient’ as an organization, agency, or other entity (including nonprofits and for-profits) that receives NHTF dollars from a grantee to carry out a NHTF-assisted project as an owner or developer.

The NHTF Campaign, in its November 2008 letter to HUD, requested that public housing agencies (PHAs) be explicitly listed as potential recipients. The proposed rule does not.

Twelve of 16 responses urged that PHAs be explicitly listed as eligible recipients, and the other four implicitly agreed.

The proposed regulation also prohibits use of NHTF money for the construction or rehabilitation of public housing. The NHTF Campaign and five others endorsed this provision because use of NHTF dollars for public housing would not increase housing opportunities for ELI households, and could result in an overall loss of resources for affordable housing if Congress chose to reduce appropriations for public housing due to the availability of the NHTF. Six entities, primarily associated with public housing, objected to this prohibition. The rule would allow a project to contain both NHTF-assisted units and public housing units.

Subgrantees. The statute is silent regarding the distribution of NHTF to ‘subgrantees.’

The proposed regulation would give states the option of passing funds to subgrantees, which in turn would provide funds to ‘recipients’ to carry out projects. A subgrantee is defined as a unit of local government or state agency selected by the state to administer all or a portion of its NHTF program. Any subgrantee must have a ConPlan that includes a NHTF Allocation Plan that is consistent with the state’s NHTF requirements. Subgrantees must select projects according to their NHTF Allocation Plan.

All 13 comments supported the concept of subgrantees. Six, led by the NHTF Campaign, recommended that a state’s Allocation Plan be required to explain any decisions to use subgrantees, the means for determining which subgrantees to use, and how NHTF money will be distributed among subgrantees. Two respondents suggested expanding the roster of potential subgrantees to include nonprofit organizations and housing and redevelopment authorities, relying on the state’s ConPlan to adequately address local concerns.

Transit-oriented development. Although the statute makes no reference to transit-oriented development (TOD), the proposed regulation would allow NHTF dollars to be used by a local government to purchase land to be used for NHTF-assisted units as part of a TOD project. The proposed rule requires title to the land to be transferred to the local government within six months and then be held by it. Within 36 months from the date of transfer, the local government must commit additional NHTF money or other resources to a specific housing new construction

or rehabilitation project that can reasonably be expected to start within 12 months. If there is no commitment to a specific NHTF project within 36 months, the local government must repay the NHTF amount or the current value of the property, whichever is greater.

All 16 comments supported the use of NHTF money with TOD. However, six agreed with the NHTF Campaign's concern that, as drafted, NHTF resources could be tied up for 4.5 years without providing one ELI home. Therefore, the Campaign and others recommended reducing the 36-month holding period. By contrast, one letter preferred extending the time for committing the funds to 48 months, while another suggested stretching it to 60 months. One thought that requiring a local government to hold the property was too restrictive.

The NHTF Campaign and others also urged the final regulations to provide safeguards to ensure that affordable ELI homes are created in a timely manner. One letter, on the other hand, objected to the definition of TOD requiring that mixed-income or mixed-use projects be involved

The Center for Transit Oriented Development provided a number of ways to avoid funds being tied up without producing ELI units, including:

- Allowing property acquisition only if it can be shown that the local government has an adopted plan (such as a station area plan) that identifies the parcel as an important component.
- Requiring the local government or title holder to issue a request for proposals indicating that the property will be developed within a TOD for ELI and VLI households.
- Prohibiting grantees from using NHTF dollars to serially purchase land, hold it, convert it to non-ELI housing, and then return the funds to repeat the process.

The proposed rule cites TOD as one among other considerations that a grantee could use to judge the 'merits' of an application for NHTF dollars. Merit is one of six priority factors that must be in an Allocation Plan to guide how NHTF dollars will be awarded to applicants. To the extent a state gives TOD preference, one respondent thought that equal priority should be given to the state's rural housing needs. Another letter suggested that a minimum percentage of a state's NHTF allocation ought to be devoted to TOD. Several comments misunderstood this reference to TOD to mean that it is a required preference, and they objected to the mistaken preference.

Tenant protections. According to the NHTF statute, activities must comply with laws relating to tenant protections and tenants' rights to participate in the decision making regarding their homes. Because the proposed rule is silent on this subject, NLIHC urged that the rule add a new subsection to comply with the statute and provide for tenant protections consistent with HUD Handbook 4350.3. The National Housing Law Project provided a number of suggestions addressing tenant selection policies and lease provisions protecting ongoing tenancy. The Manufactured Home Owners Association of America wrote that there should be an explicit right for manufactured home park residents to organize.

Resident and public participation. The statute requires public participation in the development of the NHTF Allocation Plan. The proposed regulation merely requires states to submit a Consolidated Plan (ConPlan) following the ConPlan regulations, which do have public participation requirements.

NLIHC commented that in order to demonstrate the importance of public participation in the creation of an NHTF Allocation Plan, the NHTF regulations must explicitly declare, separately from the ConPlan regulations, that in order to receive NHTF money states and any subgrantees must develop their Allocation Plans using the ConPlan public participation rules.

The National Housing Law Project provided a list of specific recommendations ranging from requiring a ConPlan Annual Action Plan to identify barriers to public participation and set out a plan for addressing those barriers, to requiring owners of existing housing developments to notify residents and enable them to participate in the development of an NHTF application.

Fair housing. A number of civil rights organizations recommended that the final rule:

- Require developments over a certain size to have some reasonable mixed-income standards in order to avoid undue concentrations of extremely low income (ELI) households (those with incomes below 30% of area median, or AMI) in a given building, development, or neighborhood.
- Prohibit local residency or employment preferences.
- Select tenants by lottery, rather than by chronological selection from a waiting list.
- Adopt affirmative marketing requirements stronger than those of HOME.
- Clarify that properties should not be held to strict compliance with local zoning requirements because that affords veto power to jurisdictions that do not want affordable housing.
- Require states to certify that allocation of NHTF dollars will not be subject to state or local policies that impose local approval or contribution requirements that exceed those applicable to similar unsubsidized residential uses.

Disability. Seven organizations submitted comments touching upon serving people with disabilities. National disability rights organizations urged prohibiting segregated housing for people with disabilities, and clearly articulating the limited situations in which “single purpose” permanent supportive housing is permitted by Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. They also suggested improvements that would align tenant selection policies with supportive services financing from the U.S. Department of Health and Human Services:

- Require tenant selection preferences in general occupancy developments for people with disabilities, without regard to the category of disability. In addition, forbid segregation of people with disabilities in separate buildings, floors, or even parts of buildings.
- Offer accessible units on a preferential basis to households with members who need the features of the unit.
- Allow tenant selection preferences in permanent supportive housing to target households eligible for and able to obtain access to supportive services offered in connection with the housing.

Three California organizations suggested that all new construction and substantial rehabilitation units be “visitable” by wheelchair users, and that at least 30% of the units accessible, with the remaining portion adaptable to accessibility.

Manufactured housing. The proposed regulation would allow NHTF money to be used to buy or rehabilitate manufactured homes, or to purchase the land on which a manufactured home sits. The home must, at the time of project completion, be located on land that is owned by the home owner, or land for which the home owner has a lease for a period that at least equals the affordability period.

The Corporation for Enterprise Development provided specific recommendations which were endorsed by another commenter:

- Eligible uses related to manufactured housing should be expanded to include:
 - Removing or decommissioning substandard units.
 - Financing the purchase of land for creating a manufactured home community.
 - Converting manufactured housing communities to resident ownership where 51% of the rental sites are occupied by homes owned or rented by income-qualified households.
- Use of NHTF dollars to replace homes occupied by income-eligible households on a one-for-one basis in the wake of a community being converted to another use, should be considered an eligible “relocation cost.”

Two other comments noted that it was too difficult for manufactured housing communities and home owners to use NHTF if the assisted units must be on land for which the home owner has a lease at least as long as the period of affordability. Another organization recommended language to facilitate the purchase of land to preserve a manufactured housing community by nonprofits and home owners’ associations.

Energy efficiency. Fifteen letters responded to the proposed rule setting out ENERGY STAR and ASHRAE energy standards for various types of properties. The National Housing Trust and Enterprise Community Partners each urged a slightly reduced standard for gut rehabilitation of buildings with four or more stories, a standard exceeding ASHRAE 90.1-2007 by 15% instead of 20%.

Enterprise also noted that the Enterprise Green Communities Criteria and LEED standards include energy efficiency requirements that are substantially equivalent to ENERGY STAR and ASHRAE; therefore, the rule should simply require energy efficiency compliance with any building rating systems that are substantially equivalent to ENERGY STAR and ASHRAE. Five additional respondents offered similar suggestions.

Three comments simply endorsed use of ENERGY STAR. Two respondents wanted states to have the flexibility to devise their own energy standards. One business association objected to the ASHREA energy provisions.

Allocation Plan. The NHTF statute requires state grantees and any subgrantees to prepare an annual Allocation Plan showing how they will distribute funds based on priority housing needs. The proposed regulation merely requires states to submit a Consolidated Plan (ConPlan), but it would also amend the ConPlan regulations by adding NHTF-specific Allocation Plan requirements to the ConPlan’s Annual Plan rule. NLIHC recommends that the NHTF rule itself

(not just a modified, separate ConPlan rule) more directly articulate the requirement that states and any subgrantees must have an NHTF Allocation Plan.

In addition, the statute requires the Allocation Plan to describe the application requirements for recipients and the criteria that will be used to select applications for funding. Allocation Plans must provide priority for funding applications based on six features listed in the statute, including geographic diversity, extent to which extremely low income households benefit, the duration of a unit's affordability, and merit. The proposed rule offered examples of "merit," such as housing that serves people with special needs, green building and sustainable development, and housing accessible to transit and employment centers.

Three disability advocacy organizations recommended that HUD add as priority factors activities that address "affirmatively furthering fair housing" and universal design and visitability. One commenter suggested that the rule should require states to demonstrate the extent to which units would meet national standards for healthy, green, and sustainable development. Another urged the regulation to require priority be given to transit access, especially transit connecting people to employment centers.

Property standards. In addition to the energy efficiency standards summarized previously, the proposed regulations contain many other property standards. Eight entities wrote that the environmental standards are too prescriptive, and that the NHTF rule should instead mirror HOME's environmental rules consistent with the National Environmental Protection Act. Eight business associations objected to the definition of wetlands, urging use of the current Army Corps of Engineers definition.

Eligible uses. The proposed regulation echoes the HOME program rule, prohibiting the use of additional NHTF resources at a project one year after completion. NLIHC wrote that this may restrict access to critical rehabilitation funds, jeopardizing a project's long-term viability. NLIHC recommended allowing HUD to waive this limitation in exchange for a proportionate extension of the affordability period. Four comments mirrored this suggestion, but did not mention a waiver; two of them suggested specific time triggers of either 15 or 20 years after completion. Four state entities also want to be able to provide additional NHTF dollars, but did not suggest proportionately extending the affordability period.

Definition of "committed" funds. The statute requires NHTF money to be used or committed within 24 months. The proposed rule generally defines "committed" as having a legally binding written agreement with an eligible recipient for a specific project for which construction or rehabilitation can reasonably be expected to start within 12 months. (For transit oriented development this can stretch to 54 months.

Four comments from California urged at least 24 months to commit funds. Two of these thought 42 months necessary when providing in-home supportive services for people with disabilities.

Maximum subsidy. Although the statute is silent, the proposed rule would require grantees to establish maximum NHTF amounts that could be invested per unit, with adjustments for size and geographic location. The limits must be in the ConPlan and adjusted annually.

Three of five commenters opposed a locally established maximum per unit subsidy, fearing a large figure would lead to political opposition while an artificially small figure would undermine a project's long term viability. They suggested setting the maximum on a project basis tied to the percentage of total program costs. A fourth comment simply opposed any maximum, while another supported one but thought it should be based on the total development cost.

The proposed regulation would also require grantees to establish subsidy layering guidelines to review all forms of government assistance going into a project in order to ensure that no more government assistance is provided than necessary and to ensure no undue return to owners.

One letter recommended a schedule of subsidy layering indexed for high cost areas that reflects the combined cost of housing plus transportation. Another preferred applying a subsidy layering standard used by some existing program, while a third counseled against a detailed standard.

Resale and repayment. To ensure continuing affordability when a homeowner unit is sold during the affordability period, the statute requires the NHTF program to have the same resale and recapture provisions as the HOME program. The proposed rule does require grantees to use the HOME resale restrictions, which oblige them to ensure that subsequent buyers are NHTF-eligible and that the housing will remain affordable to a reasonable range of income-eligible households. However, the proposed rule does not have detailed recapture provisions; it merely states that repayment is required if the unit no longer meets affordability requirements during the affordability period.

NLIHC urged the NHTF rule to have recapture provisions as rigorous as those in the HOME program. Two state entities suggested that there be a recapture provision for homeowner activities. For any NHTF-assisted housing, rental or homeowner, two organizations suggested grantees be allowed to repay a prorated amount, not the entire NHTF investment. Another thought that recapture should be waived if rental assistance tied to the unit was no longer available.

Embedding the NHTF rule in the HOME regulations. HUD proposes to insert the core (non-ConPlan) provisions of the NHTF implementation regulations in the existing HOME program rule as subpart N of part 92 in the Code of Federal Regulations (CFR). While NLIHC understands HUD's reasoning, the NHTF has a different statutory basis, different purposes, and different funding sources from HOME and was created by Congress as a standalone program. Therefore, NHTF implementation regulations should be structured in a manner that protects the integrity of the NHTF as separate program. However, as proposed the regulations will not adequately identify the NHTF as a distinct program. NLIHC observed numerous instances in part 92 at which reference to the NHTF was absent. NLIHC offered simple solutions to correct for the omissions and add clarity that the NHTF is an independent program.

Four letters echoed NLIHC's comment, while three endorsed having the NHTF rule codified within the HOME regulations.

The comments submitted by the National Housing Trust Fund Campaign are available at http://www.nlihc.org/doc/NHTF_Comments_NHTF_Regs_12_28.pdf

The comments submitted by NLIHC are available at http://www.nlihc.org/doc/NLIHC_Comments_NHTF_Proposed_Rule.pdf

Copies of all comments are available at www.regulations.gov. The docket number is HUD-2010-0101.