



**NATIONAL LOW INCOME
HOUSING COALITION**

December 28, 2010

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Regulations Division,
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Re: Docket No. FR-5246-P-02, RIN 2506-AC30, Housing Trust Fund

The National Low Income Housing Coalition (NLIHC) is pleased to have the opportunity to comment on the October 29, 2010 proposed rule to establish regulations to implement the national Housing Trust Fund, hereafter referred to as NHTF.

NLIHC is a membership organization whose members include residents of public and assisted housing and their organizations, state and local housing coalitions, nonprofit housing providers, homeless service providers, fair housing organizations, housing researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. While our members include the wide spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus exclusively on what is in the best interests of people who receive and those who are in need of federal housing assistance.

The NHTF is the work of thousands of housing advocates, community leaders, elected officials, faith-based leaders and organizations, and a wide array of national organizations. These individuals and groups banded together in 2000 to form the National Housing Trust Fund Campaign (the Campaign), which is coordinated by NLIHC. The Campaign developed and refined legislative proposals for a national housing trust fund with dedicated sources of funding and worked with several Members of Congress to advance legislation. These efforts culminated in the enactment of the NHTF in July 2008 as part of the Housing and Economic Recovery Act.¹ In anticipation of this rulemaking, the Campaign sent a letter to HUD Secretary Steven Preston on November 21, 2008 addressing many

¹ The NHTF was created by §1131 of the Housing and Economic Recovery Act of 2008, P.L. 109-289, (HERA). This section added a new §1338 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, P.L. 102-550 (FHEFSSA).

Founded in 1974 by
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Dedicated solely to achieving socially just public policy that assures people with the lowest incomes in the United States have affordable and decent homes.

of the issues raised in this proposed rule. A copy of this letter is attached to these comments and incorporated by reference.

NLIHC is pleased that HUD has moved forward to implement the NHTF. As HUD notes in §92.701(a), the NHTF program is structured to increase and preserve the supply of decent, safe, sanitary and affordable housing, with primary attention to rental housing for extremely low income (ELI, households with incomes at or below 30% of area median (AMI)) and very low income (VLI, households with incomes at or below 50% of AMI) households, including homeless families. This is a much-needed program to address the critical housing shortage faced by the lowest income households in our country.

In the United States today, there are 9.2 million ELI renter households and only 6.1 million rental homes they can afford (paying no more than 30% of their income for their housing). For every 100 ELI households in the United States, there are just 37 rental homes that are affordable and available to them.² No matter their age, composition, or employment, households at the bottom of the income distribution have to pay unacceptably high portions of their meager incomes for their homes.

The consequences of this scarcity of affordable and available housing are dire for the families most directly affected. High housing cost burdens mean fewer dollars to spend on other necessities. High housing costs mean never saving money and having no cushion for emergencies. High housing cost burdens mean risk of eviction and frequent moves. The shortage of affordable rental homes for extremely low income households is the principle cause of homelessness in the United States.

Income Targeting

NLIHC commends HUD for addressing the gap in affordable and available homes for ELI households by requiring 100% of the rental and homeowner units assisted with NHTF dollars during the first year be occupied by ELI households (*see*, §§92.736 and 92.737). In addition, NLIHC applauds HUD for establishing its authority to require grantees in future years to devote more than the statutorily minimums to ELI households (*see*, §§92.736, 92.737, and 92.746). NLIHC would urge HUD to consider continuing the focus on ELI households until the shortage of units affordable to ELI households is eliminated.

NLIHC is also pleased that HUD has proposed to require that 75% of any NHTF resources used for homeownership benefit ELI households or households with incomes at or below the poverty line (*see*, §92.737). While not required by statute, this targeting requirement will focus resources on those most in need.

² Pelletiere, D. (2009). *Preliminary assessment of American Community Survey data shows housing affordability gap worsened for lowest income households from 2007 to 2008*. Washington, DC: National Low Income Housing Coalition.

In terms of the targeting provisions, NLIHC recommends that §§92.736 and 92.737 be amended to include language to make clear that any portion of NHTF resources not targeted to ELI/poverty households can only be used for the benefit of VLI households. This limitation is explicit in the statute and should be in the final regulations as well.³

Rents and Operating Assistance

NLIHC has several concerns about the proposed rule as it pertains to tenant rents and the use of NHTF for operating assistance.

Brooke NLIHC is particularly concerned about the absence of income-based rents, or the “Brooke rule,” as required for several other housing programs. The “Brooke rule” provides that assisted households should consume no more than 30% of their income for rent and utilities. The proposed rule, however, rejects this standard and at §92.746(b) would establish a threshold rent for NHTF units equal to 30% of the greater of 30% of the federal poverty line or 30% of AMI.

While the threshold rents proposed for the NHTF program will be close to the acceptable standard for housing affordability for households at or slightly below 30% of AMI or poverty (whichever is applicable), households earning substantially less than 30% of area median income will almost certainly pay more than 30% of their income for rent, unless additional subsidies are available. This will result in many people the NHTF is intended to serve not being eligible for homes built with NHTF dollars because the rents will be more than they can afford.

For the 13% of ELI renters whose sole income is from Supplemental Security Income (SSI), which is just 18.6% of the national median income, the proposed rule’s threshold rent would be particularly devastating, potentially placing NHTF units out of their reach or forcing them to pay unacceptably large amounts of their incomes for housing. The NHTF was created to provide affordable housing for these populations and creating a system that sanctions the continuation of high rent burdens for our lowest income households is unacceptable.

Operating Assistance The failure to adopt the Brooke rule is especially egregious given the proposed rule’s decision to allow NHTF funds to be used for operating subsidies. NLIHC is

³ The proposed rule at §92.746(a) would require each NHTF unit in a rental project to be occupied by an ELI household. This language would seem to contradict the earlier statement in that subsection that “not less than 75 percent of the NHTF grant amounts...be used for the benefit of only of ELI families or families at or below the poverty line, whichever is greater” as well as the provisions of §92.736. NLIHC recommends clarifying the occupancy requirement of §92.746(a) to include references to families at or below the poverty line and to be consistent with the targeting requirements of that subsection and §92.736.

encouraged by the preamble's explanation that HUD views the NHTF as primarily a production program meant to add units to the supply of affordable housing for ELI and VLI households. Also, NLIHC appreciates HUD's responsiveness at §92.730(a)(1) to the Campaign's request that the rule limit to 20% the amount of a grantee's annual grant that can be used for operating cost assistance and restricts such assistance to rental housing acquired, rehabilitated, preserved or newly constructed with NHTF funds.

However, as currently constructed the proposed rule could result in a situation where ongoing NHTF operating subsidies are provided to maintain units that are unaffordable to those residing in those units, a result completely at odds with the purpose of the NHTF.

The Campaign proposed, and NLIHC strongly suggests, that the final rule limit use of NHTF money for operating cost assistance to ELI units with rents governed by the Brooke rule. The Campaign's proposal was designed to balance the need for operating assistance for affordable ELI units (units with where tenant rent contributions are limited to 30% of income) and the need to satisfy the primary purpose of the NHTF which is to increase the supply of housing available and affordable to households with the lowest incomes. In fact, the Campaign's support for using NHTF funds to cover operating costs was based on the presumption that the Brooke rule would apply to NHTF units and, as a result, some type of ongoing assistance would be needed to maintain the financial viability of ELI units in the future.

Because project-based rental subsidies might not be available in all cases, the Campaign chose to recommend that a limited portion of NHTF funds be used for operating expenses to support affordable ELI units. By decoupling the application of the Brooke rule from the use of operating subsidies, the proposed rule fails to provide for the most efficient and effective use of NHTF resources and could create highly subsidized unaffordable NHTF units.⁴ **NLIHC urges HUD to limit the use of operating funds to ELI units with Brooke rents.**

One of the rationales put forward by HUD officials for not adopting Brooke rents is that applying Brooke to NHTF units will result in fewer households being served because a greater proportion of NHTF resources will be needed to create and operate a single NHTF

⁴The proposed rule at §92.731(e) allows states and subgrantees to provide operating cost assistance to a project for up to two years from the same fiscal year NHTF grant; and, the proposed rule adds that operating cost assistance can be renewed during the entire affordability period. The proposed rule also allows for the creation of an operating cost assistance reserve to cover up to a five-year period of inadequate rent income in order to ensure a project's financial feasibility. NLIHC is concerned that the five year limitation is too restrictive and would urge HUD to consider allowing NHTF funds to be used to create operating reserves for the entire period of affordability. The proposed rule should also be amended to address situations where NHTF operating reserves are not needed to support the on going operations of the project.

unit. NLIHC is concerned that by applying the 30% of 30% standard, the population who is both eligible and can afford NHTF units will be so small that units may go unoccupied. We would rather see fewer units that succeed at serving the intended beneficiaries than more units that fail in doing so.

NLIHC recognizes that many units will be coupled with project-based vouchers, or operating subsidies as proposed above, and in such cases Brooke will apply. NLIHC and the NHTF Campaign have pushed Congress to provide additional funding for project-based vouchers to be distributed with NHTF capital funds. However, **we must assert in the strongest possible terms the necessity of applying Brooke to all NHTF rental units, thereby requiring developers to devise new ways to operate housing for the very lowest income households who are not served by existing production models.**

Maximum Rent At §92.746(b)(2), the proposed rule states that “if a unit receives Federal or State project-based rental subsidy, the maximum rent is the rent allowable under the Federal or State project-based program.” This provision is unclear.

The preamble seems to state that the intent of the provision is to apply the rent provisions of other HUD programs, such as project-based vouchers, when that assistance is applied to a NHTF unit. Thus, if a NHTF unit were allocated a project-based voucher, a tenant would pay 30% of their income for rent. However, the provision could be read to say that in LIHTC units, the rent paid by a tenant is the LIHTC rent, which is much higher than the rent for NHTF units proposed in §92.746(b)(1). NLIHC recommends clarifying this provision to ensure that in no case would a tenant pay more than the limit established in §92.746(b)(1).

Further, the interplay between the voucher program and the NHTF needs further examination. If project-based vouchers are used with NHTF units the amount of the government contribution should be based on amount necessary to operate the NHTF unit, not on the rent for comparable non-NHTF units because NHTF units should not have associated debt. This calculation will result in a lower per unit cost for the vouchers associated with NHTF units and avoid over subsidizing NHTF units.

Period of Affordability

The proposed rule at §§92.746(d)(1) and 92.748(e) would require both rental and homeowner units to be affordable for at least 30 years, allowing states and subgrantees to establish longer affordability periods.

In the letter to Secretary Preston, the Campaign strongly urged HUD to set a 50-year affordability period and to provide preferences for projects with affordability periods greater than 50 years. NLIHC urges the final rule to require a 50-year affordability period and provide preferences for longer terms. The public investment of NHTF funds must be retained as long as possible.

NLIHC recognizes long-term affordability for ELI households is challenging without a commitment of operating subsidies of equal term. The loss of subsidies during the affordability period can jeopardize the financial viability of NHTF projects and result in a deterioration or failure of the project. If during the affordability term of a project long-term subsidies are lost, NLIHC recommends that the Secretary retain authority to take the actions needed to protect the tenants and the viability of the project.

Allocation of Funds Between Rental Activities, Homeownership Activities and Administrative Cost

Section 1338 of FHEFSSA limits the amount of NHTF grants that can be used for homeownership activities to no more than 10% of a state's annual grant (*see*, §1338(c)(10)(A)) and authorizes HUD to designate an amount not to exceed 10% of a state's grant amount for certain administrative expenses (*see*, §1338(c)(10)(D)(iii)). In the preamble to the proposed rule and on its website, HUD uses these two statutory provisions to claim that only 80% of NHTF fund dollars must be used for rental activities.

A better reading of these provisions, and one consistent with the use of administrative fees in other HUD programs, would be to apply the 10% administration and planning cap to the entire NHTF grant amount allocated to a state/grantee, and then provide that no more than 10% of the remaining grant funds can be used for homeownership activities. Consequently, the rule should explicitly provide that after administrative costs have been determined – which cannot exceed 10% of a grant amount – grantees, or subgrantees as appropriate, may not use more than 10% of the remainder for homeownership activities. The rule should then state that the remaining funds must be used for rental activities.

Public Housing

The NHTF Campaign requested that public housing agencies (PHAs) be explicitly listed as potential recipients of NHTF funds in the final rule. NLIHC recommends that PHAs be explicitly listed as eligible recipients.

NLIHC commends HUD for its determination at §92.734 that NHTF resources cannot be used in existing public housing units. While public housing is an extremely important housing resource, allowing NHTF funds to be used to rehabilitate or operate public housing units will not increase housing opportunities for those with the lowest incomes and could result in an overall loss of resources for housing if Congress were to choose to reduce the appropriated resources for public housing due to the availability of the NHTF.

However, in many communities, PHAs may be the best entity to develop and operate new units using NHTF dollars and should not be precluded from doing so.

Transitional Housing

The final rule should not allow NHTF resources to be used for transitional housing. The statute does not specifically mention transitional housing, but it does declare that the purpose of the program is to increase and preserve the supply of rental and homeowner housing, especially for ELI households, strongly implying that permanent housing is the goal. NLIHC recommends including a definition of “housing” in §92.702 that excludes “transitional housing,” and striking references to “transition housing” from §§92.730, and 92.747. **Permanent** rental homes for ELI households has been the goal of the Campaign since its inception in 2000.

Distribution of NHTF Dollars

NLIHC supports the allocation formula proposed by HUD December 4, 2009 and looks forward to the final allocation formula to be published with the final rule.⁵

Definition of Grantee In defining “state-designated entity” the proposed rule omits “housing and community development entity” from that definition even though these entities were specifically included in the statute. NLIHC recommends the final rule at §92.702(b) be amended to include “housing and community development entity” in the definition of “state-designated entity.”

Subgrantees The proposed rule at §92.725(c) would give grantees the option of passing NHTF resources to units of local government or State public agencies as “subgrantees” who would in turn provide NHTF grants to recipients to carry out projects.

While not specifically provided in statute, the use of subgrantees is voluntary, and NLIHC supports this option. However, if subgrantees are used, the state/grantee’s NHTF Allocation Plan, as established in §91.320(k)(5), should be required to do more than “reflect the decision to distribute funds through grants to subgrantees.” Based on the state’s priority housing needs, the state NHTF Allocation Plan must explain any decision to use subgrantees, the means for determining which subgrantees to use, including how the selection of subgrantees is consistent with the geographic diversity requirements of the state’s Consolidated Plan (ConPlan), and how NHTF resources are to be distributed among subgrantees.

⁵NLIHC notes that it appears that HUD has used the wrong definition for State in the allocation formula and in this proposed rule. The NHTF statute defines a state to be the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.” The proposed regulation would define a State as “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,” omitting the Palau and Micronesia.

Allocation Plans

NLIHC is pleased that the proposed rule requires states/grantees to distribute NHTF resources throughout the state according to the state's priority housing needs, and (as directed by the statute) requires grantees and subgrantees to choose applications for funding based on priorities which include geographic diversity. These provisions, however, are not sufficient to ensure that rural housing needs are proportionately addressed. The final rule should directly require states/grantees to allocate NHTF resources, including to subgrantees, based on the relative need in rural as well as urban areas.

Although the proposed rule at §92.720(b) requires states to submit a ConPlan, it does not specifically mention the statutorily required NHTF Allocation Plan. In order to highlight the need for this plan, NLIHC recommends that §92.720(b) also refer to the NHTF Allocation Plan.

If a unit of local government⁶ is to administer NHTF resources as a subgrantee then it must have an approved ConPlan containing the NHTF Allocation Plan consistent with the state's NHTF Allocation Plan (*see*, §§92.702 and 91.220(1)(4)). However, NLIHC suggests that the definition of "subgrantee" at §92.702 also include a specific reference to the NHTF Allocation Plan as a required component of the ConPlan, citing §91.220(1)(4). NLIHC also suggests §92.725(c) be amended to require the subgrantee's NHTF Allocation Plan to be consistent with the state's NHTF Allocation Plan and adding a cross reference §91.320(k)(5) in that section. Finally, NLIHC suggests that §92.725(c) be modified to echo §92.725(b) by stating that the subgrantee's ConPlan must be one that is "approved."

The proposed rule at §§91.320(k)(5)(i) and 91.220(1)(4)(i) require both grantee and subgrantee NHTF Allocation Plans to provide priority for funding applications based on six items. However, there are several language differences between these provisions for no apparent reason. For example, §91.220(1)(4)(i) requires a subgrantee's plan to establish "priority factors" based on the six items, where §91.320(k)(5)(i) requires a grantee's plan to give priority to those six items. These provisions should have identical requirements to avoid the appearance that they create different obligations.

⁶ The proposed rule at §92.702 defines subgrantees to include a "unit of local government" or a "State public agency selected by the grantee" to administer all or a portion of its NHTF program. It is not clear why a state agency would not be a "grantee" rather than a subgrantee. In addition, §92.702 would not seem to require a state entity acting as a subgrantee to have an approved ConPlan containing a fully formed NHTF Allocation Plan, since if the grantee chooses to use subgrantees, the grantee, under §91.320, does not have to have NHTF addressing the six elements of the NHTF Allocation Plan. If HUD wishes to include state public entities as subgrantees, then the State should be required to develop a complete NHTF Allocation Plan as part of its ConPlan.

In addition, the proposed rule at §§91.320(k)(5)(i) and 91.220(l)(4)(i) treats the statutory requirement that priority be given to the “extent to which rents for units in the project are affordable, especially for [ELI] families” differently for grantees and subgrantees. For grantees, the proposed rule has translated the statutory requirement into a requirement to give priority for the extent to which a project “has federal, state, or local project-based rental assistance so that rents are affordable to ELI families.” On the other hand, the proposed rule for subgrantees, i.e. local governments, more closely tracks the statutory requirement and does not include the added language regarding project-based assistance. The language for subgrantees and grantees should be consistent. The preference should be for affordable rents (rents that do not exceed 30% of a household’s income) and, as recommended by the Campaign, should give priority to projects that obtain operating assistance from non-NHTF sources, whatever they might be.

Also, §91.320(k)(5)(i) omits a colon that appears in §91.220(l)(4)(i) and as a result “priority funding [shall] be based on” in §91.320(k)(5)(i) could be misread to apply only to “geographic diversity.” NLIHC recommends the insertion of a colon in to rectify this, i.e. “The plan must provide priority for funding based on: geographic diversity...”

NLIHC would also suggest that because the NHTF Allocation Plan requirements are not in the proposed Subpart N, §§91.220 and 91.320 be amended to include a cross reference to the definition of NHTF funds provided in §92.702.

Public Participation

The statute requires public participation in the development of the NHTF Allocation Plan. The proposed rule, however, does not provide a clear and direct reference to public participation. Although the preamble declares that “...§92.720 directs states to include the NHTF Allocation Plan in the consolidated plan...and to follow the citizen participation requirements found in the ConPlan regulations at 24 CFR part 91”, the text of the proposed rule is not this direct. The proposed rule at §92.720(b) merely requires states to submit a ConPlan following the ConPlan rule (which does have public participation requirements).

To demonstrate the importance of public participation in the creation of a NHTF Allocation Plan, the NHTF regulations must explicitly declare that states and any subgrantees must, in order to receive NHTF money, develop their Allocation Plans using the ConPlan public participation rules. Therefore, NLIHC urges that the final NHTF add a §92.720(c) clearly stating that the public participation requirements of §§91.115 (for states) and 91.105 (for local jurisdictions serving as subgrantees) must be followed.

Tenant Protections and Selection

According to the NHTF statute, NHTF activities must comply with laws relating to tenant protections and tenants’ rights to participate in the decision making regarding their homes, yet the proposed rule does not address tenants’ rights to participate in decision making regarding their residences. Therefore, NLIHC urges that the rule add a new subsection to

comply with the statute and provide for tenant protections consistent with HUD handbook 4350.3. Further, NLIHC endorses the comments of the National Housing Law Project as they relate to tenant rights and protections.

The NHTF Campaign had recommended prohibiting denying access to NHTF-assisted homes to people with vouchers, which the proposed rule does in two places, §92.746(h)(i) and §92.747(d)(4); plus, the proposed rule adds HOME tenant-based assistance. NLIHC appreciates these provisions. NLIHC recommends that people with state- or locally-issued tenant-based assistance also be protected.

At §92.747(c) the proposed rule essentially prohibits owners from terminating tenancy or refusing to renew a lease, except for good cause. NLIHC recommends that VAWA, the Violence Against Women Act, protections be explicitly referenced.

Transit Oriented Development (TOD)

NLIHC supports the concept of equitable, inclusive TOD without displacement of long-time low income and extremely low income households. However, NLIHC has concerns with the TOD provisions of the proposed rule.

First, NLIHC is concerned that the proposed NHTF rule at §§92.730(a)(3) and 92.702(b)(3) could unnecessarily tie up scarce NHTF resources for up to 4.5 years without providing a single unit of ELI housing. To address this limitation, NLIHC encourages HUD to reduce the 36-month holding period and proposes that the final rule include safeguards to ensure that any NHTF resources used in connection with a TOD project result in the creation of affordable ELI units in a timely manner. Such safeguards could include

- requiring the zoning for the planned ELI housing be in place before a parcel of land can be purchased;
- requiring replacement housing in the same TOD area in cases where the original NHTF site is no longer available for ELI housing, and
- preventing local governments from using NHTF funds to serially purchase land, hold it, convert it to a non-ELI use and then return the funds and repeat the process with their next NHTF grant.

Second, the proposed rule at § 92.703 would provide that NHTF funds have been “committed” to a TOD project when there is an executed agreement between a unit of local government and an owner to purchase a property for a NHTF project, and §92.730 would permit a local government to purchase land for use for NHTF-assisted units to be part of a TOD. However, given the structure of the NHTF, in which funds flow from HUD to a grantee (then to a subgrantee in some cases), and finally to a recipient, consistent with the applicable NHTF Allocation Plans, it is not clear what role the local government is taking or how NHTF funds actually get to the local government for TOD purposes.

In the TOD context, the local government may or may not be a subgrantee, but would seem in all cases to be a recipient, and as such would have to meet the definition of recipient set forth in §92.702 and compete against other recipients for NHTF grants. In addition, the TOD provisions cannot override the NHTF Allocation process, so the proposed rule should require TOD projects to be specifically included in the grantee's or subgrantee's NHTF Allocation Plans, as appropriate, before NHTF funds can be used under the TOD provisions of §§92.730(a)(3) and 92.702(b)(3).

Administration and Planning Costs

The proposed rule, at section §92.732, lists among eligible administration and planning activities:

- Providing information to residents and community organizations participating in the planning, implementation, or assessment of NHTF project (§92.732(d)),
- Activities to affirmatively further fair housing (§92.732(e)),
- Preparation of the ConPlan, including hearings, and publication (§92.732(g)), and
- Costs of complying with other federal requirements regarding: non-discrimination, affirmative marketing, lead-based paint, displacement and relocation, conflict of interest, and fund accountability (§92.732(h)).

NLIHC recommends that the rule provide that these administration and planning costs be proportional to the degree to which NHTF units are involved in the project. Elsewhere in the proposed rule HUD is rigorous (*see*, section 92.730(c)) about requiring NHTF cost allocation to be proportional. Without a proportional allocation, a grantee could substitute NHTF money – intended to increase the supply of affordable ELI homes – for CDBG money otherwise being used for ConPlan preparation and other administrative and planning costs.

NLIHC commends HUD for recognizing that even where subgrantees are used, total administrative and planning costs for both the grantee and subgrantee cannot exceed 10% the annual grant amount (*see*, §92.732(a)).

Use of NHTF Funds in NHTF Projects

Although not in the statute, the proposed rule at §92.735(a)(1) echoes the HOME regulations, prohibiting the use of NHTF money for a project previously assisted with NHTF dollars during the period of affordability – except for the first year after completion. This provision is inconsistent with TOD provisions and the operating assistance provisions and may unduly restrict the ability of projects to access needed rehabilitation funds in the future. NLIHC recommends reconciling this limitation with the TOD and operating provisions and providing the Secretary with the ability to waive this limitation when requested by the grantee or subgrantee, as appropriate, and in exchange for a proportionate extension of the affordability period.

Monitoring Fees

The proposed rule at §92.735(b)(1) would allow grantees and subgrantees to charge annual fees to owners of NHTF-assisted rental projects to cover the cost of monitoring compliance with income and rent restrictions during the affordability period. NLIHC opposes this requirement. These monitoring funds should be covered in the 10% administrative cost set aside, unless the grantee or subgrantee requires more than the minimum affordability period.

Inconsistent Use Of The Terms “Family” And “Household”

Throughout the rule, there is not a consistent use of the terms “family” and “household”. NLIHC recommends use of the term “household” instead of “family” throughout.

Maximum Per-Unit Subsidy Amount and Subsidy Layering

Although not required by the statute, the proposed rule at §92.740(a) would require grantees to establish maximum limitations on the total dollar amount of NHTF invested per unit, with adjustments for size and geographic location. NLIHC supports having the grantee establish maximum per-unit subsidy limitations rather than those limits being imposed by HUD. Letting the grantee establish these limits will allow the limits to reflect local conditions and needs.

Performance Reports

According to proposed §92.779, HUD will make grantees’ performance reports publicly available. While a centralized source for grantee performance reports is appropriate and welcome, it is not sufficient. Residents in localities utilizing NHTF dollars are generally more familiar with their state and local government sources of information. Therefore, NLIHC urges HUD to also require grantees and subgrantees to make the required performance reports readily available at no cost when requested, and to post them prominently on the public website of the grantee or subgrantee or both, as appropriate.

Property Standards

A variety of property standards are listed from §92.741 to §92.745 covering new construction and gut rehabilitation; rehabilitation; acquisition of “standard” housing; manufactured homes; and “ongoing” for rental housing, and these standards place an emphasis on energy and water efficiency requirements.

NLIHC commends HUD for its efforts to increase the energy efficiency of NHTF units and associates itself with the comments of the National Housing Trust on these provisions.

Homeowner Provisions

According to the proposed rule at §92.748(f), affordability restrictions may terminate upon foreclosure, transfer in lieu, or assignment of an FHA-insured mortgage. NLIHC recommends that affordability restrictions continue if a mortgage is transferred to FHA. To protect the NHTF investment, the Federal government should be required to

continue to honor the affordability restrictions attached to a NHTF property even if a property is transferred to it in payment for mortgage insurance.

The HOME regulations at §92.254(a)(5)(ii) provide detailed recapture provisions, requiring grantees to ensure that they recoup all or a portion of HOME if the housing does not continue to be a homeowner's principle residence during the affordability period. The NHTF rule should require grantees to have equally rigorous provisions.

Recordkeeping

NLIHC suggests §92.778(a)(2)(i) be modified to include the project-level data items submitted by the Campaign, which includes:

- a. Unique NHTF ID
- b. Project name
- c. Address
- d. Owner name
- e. Owner contact info
- f. Minority status of owner/developer
- g. Type of owner (nonprofit, for-profit, etc.)
- h. Is there an approved affirmative marketing plan for the property? (yes/no)
- i. Manager name
- j. Manager contact info
- k. Type of structure (high-rise, townhomes, etc.)
- l. Year built
- m. Occupancy rate of assisted units
- n. Length of waiting list for assisted units, where applicable and available
- o. Start and end dates of the NHTF affordability period
- p. Income targeting of assisted units ($\leq 30\%$ AMI, $\leq 50\%$ AMI)
- q. Target population (family, elderly)
- r. Number of total units by size (studio, 1-bedroom, etc.)
- s. Number of assisted units by size
- t. Monthly rent for assisted units by size
- u. Number of assisted units accessible to disabled individuals
- v. Fields indicating the presence/absence of other project-based subsidies

Inclusion of NHTF as Part of HOME

The NHTF was created by Congress as a standalone program and not as part of the HOME program. The NHTF has a different statutory basis, different purposes and different funding sources from HOME. While NLIHC understands HUD's reason for including the NHTF regulations within the HOME regulations, so as the preamble explains, there is "a coordinated menu of [housing] production programs," this implementation strategy should be done in a manner that protects the integrity of the NHTF program as separate program.

The proposed rule does not provide adequate identification of the NHTF program as a distinct program. For example, the proposed rule fails to include mention of the NHTF in the title of 24 C.F.R. Part 92 or in the description of Part 92 found at 24 C.F.R. §92.1. NLIHC would recommend amending the title to read “Part 92 – HOME and Housing Trust Fund Programs” and include a description of the NHTF program in §92.1. In addition, the statutory authority for Part 92 should be amended to include the statutory basis for the NHTF.

The ConPlan regulations should also be amended to refer to the NHTF program as an “applicable” program at §91.2(a) and include the NHTF in §91.10(a)(consolidated program year). Further, the ConPlan regulation sections that list the general housing market characteristics that must be described in a ConPlan (§§91.210(a) and 91.310(a)) should add the market characteristics that are the foundation of the NHTF formula: shortage of rental units both affordable and available to extremely low income renter households; shortage of rental units both affordable and available to very low income renter households; the ratio of extremely low income renter households that are paying more than 50% of income for housing costs, or are overcrowded, or lack complete kitchen and plumbing facilities; and, the ratio of very low income renter households that are paying more than 50% of income for housing costs.

Other Issues

Proposed §92.702 incorporates by reference the HOME definitions found at 24 C.F.R. §92.2 except as explicitly modified by the §92.702. This construction incorporates the definitions of “adjusted income” and “annual income” from §92.2 (and by reference the provisions of 24 C.F.R. §92.203); however, Part N contains separate provisions for income determinations in §92.727. The proposed rule should be amended to make clear which set of income determination provisions apply to the NHTF.

Because the NHTF is part of FHEFSSA, the definitions of that Act are also applicable to the NHTF. Those definitions, as amended by HERA, can be found at §1303 of FHEFSSA. The proposed rule, relying on the definitions of the HOME program, incorrectly defines VLI and ELI and should be amended.

The proposed rule defines ELI as “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, *except that HUD may establish income ceilings higher or lower than 30 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes* [emphasis added].”

The definition of ELI in the NHTF statute is “(a) in the case of owner-occupied units, income not in excess of 30 percent of the area median income; and in the case rental units,

income not in excess of 30 percent of the area median income, with adjustments for smaller and larger families as determined by the Director.”

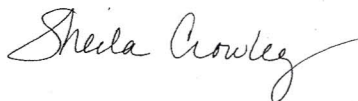
Similarly, the definition of VLI in the proposed rule reads “low-income families whose annual incomes are in excess of 30 percent but not greater than 50 percent of the median family income of a geographic area, as determined by HUD with adjustments for smaller and larger families, *except that HUD may establish income ceilings higher or lower than 30 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes*[emphasis added]. Very low income also includes any family that resides in a rural area that does not exceed the poverty line applicable to the family size involved.

The definition of VLI in the NHTF statute is “(a) in the case of owner-occupied units, income in excess of 30 percent but not greater than 50 percent of the area median income; and in the case rental units, income 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 the Director.”

HUD has included in both the ELI and VLI definitions authority to adjust these income limits based on local conditions. While this authority is in the HOME statute, it was not given to HUD in the NHTF statute. HUD’s decision to place the NHTF rule in the HOME regulatory structure appears to have confused its authority regarding the income ceilings, and NLIHC strongly recommends limiting these definitions to those in the statute and eliminating HUD’s authority to make additional adjustments.

Thank you for the opportunity to provide these comments and NLIHC looks forward to working with HUD to implement the NHTF.

Sincerely,



Sheila Crowley
President and CEO
National Low Income Housing Coalition