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November 17, 2010

**National Low Income Housing Coalition
National Housing Trust Fund**
Annotated Summary of Proposed Regulations

INTRODUCTION

This is an outline of the key features of the proposed regulations implementing the National Housing Trust Fund (NHTF).

The National Housing Trust Fund was created and an initial dedicated source of money for it was established on July 30, 2008 when the President signed into law, the Housing and Economic Recovery Act of 2008 (also known as HERA, PL 109-289). The National Housing Trust Fund is a program for collecting and distributing “dedicated” funds that are not at risk of cuts each year due to the politics of the congressional appropriations process and budget constraints.

HUD published proposed regulations implementing the NHTF on October 29, 2010. The core of the proposed regulations would be inserted into existing HOME program regulations as a new subpart N to 24 CFR part 92. In general the proposed regulations closely track the statute. Comments to HUD are due December 28, 2010.

Sections of the regulation and authorizing statute are indicated in the outline as §92 or §91 for the regulations and §1338 for the statute¹.

❖ Commentary is presented in Times New Roman

FOCUS ON EXTREMELY LOW INCOME RENTERS

Targeted to Rental Housing

The Overview section of the proposed rule declares that the NHTF program will provide grants to states to increase and preserve the supply of housing, with primary attention to rental housing for extremely low income (ELI) and very low income (VLI) families, including homeless families. (ELI households have income below 30% of area median income, AMI; VLI households have income between 30% and 50% AMI, or in rural areas, less than the poverty line.)

¹ The reference to §1338 is to §1338 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, P.L. 102-550. This §1338 was added by §1131 of HERA, P.L. 109-289. FHEFSSA is codified at 12 USC §4501 et seq. The NHTF provision is codified at 12 USC §4568.

§92.701(a)
§1338(a)(1)(A)
§1338(c)(10)(A)
§92.2, definitions
§1338(f)(1),(5),&(6), definitions

The statute limits the amount of NHTF used for homeownership activities to 10%, inferring that at least 90% of a state's annual NHTF grant must be used for rental housing activities.

§92.730(a)(1)
§1338(c)(10)(A)

- ❖ The preamble claims that only 80% of the trust fund dollars must be used for rental activities. See longer discussion as it relates to administration and planning costs (page 15).

Targeted to Extremely Low Income People

The NHTF statute requires that at least 75% of each grant to a state that is used for rental housing benefit ELI households or households with income below the poverty line.

The proposed rule adopts this requirement for rental housing and adds the 75% ELI/poverty level targeting requirement to homeownership activities.

- ❖ The statute does not require 75% ELI targeting for homeownership; it does require all homeowners have incomes below 50% AMI.
- ❖ The proposed regulation does not refer to the statute's provision that no more than 25% of the money used for rental housing can benefit very low income people; in other words, it does not mention the upper income limit of VLI.
- ❖ Because the NHTF rule is embedded in the HOME regulation, without explicit reference to an upper income limit of 50% AMI, some could mistakenly use NHTF for homeowner activity benefitting households at 80% AMI. Therefore, NLIHC will recommend that the regulations be amended to explicitly limit the use of NHTF funds to VLI and ELI.

The proposed rule requires that for the first year, 100% of a grantee's rental and homeowner funds benefit the ELI or poverty income groups.

The proposed rule indicates that in subsequent years HUD will advise states whether the ELI target amount must be greater than 75%.

§92.736 & §92.746(a), renters
§92.737, homeowners
§1338(c)(7)(A), renters
§1338(c)(7)(B)(i)(I), homeowners

The proposed rule requires each NHTF unit in a rental project to be occupied by an ELI household.

- ❖ This language is not tied to the first year of the program; therefore, the proposed rule would in essence require 100% benefit to ELI every year and ignore the statute’s leeway allowing up to 25% of the rental funds to benefit VLI households.

§92.746(a)
§1338(c)(7)(A)

DISTRIBUTION OF NHTF DOLLARS

On December 4, 2009 HUD issued a proposed rule, which NLIHC endorsed, describing the factors to be used in the formula for distributing NHTF dollars. The statute established a formula based on the number of ELI and VLI households with severe cost burden (paying more than half of their income for rent and utilities) as well as the shortage of rental properties affordable and available to ELI and VLI households, with priority for ELI households. The preamble to the October 29 proposed rule indicates that HUD intends to fold the proposed formula rule into subpart N.

§1338(c)(3)(A)&(B)

NHTF funds are distributed to states, which can choose a state-designated entity, such as a housing finance agency, housing and community development entity, tribally designated housing entity, or any other instrumentality of the state to receive and administer the program.

- ❖ The proposed rule does not include housing and community development entities in the definition of “state-designated entity”.

§92.702
§92.725(a)
§1338(c)(2)

Each state must distribute its NHTF dollars throughout the state according to the state’s assessment of priority housing needs as identified in its approved Consolidated Plan or ConPlan, (see next section “Allocation Plan”, page 5).

- ❖ The statute requires an Allocation Plan which the proposed rule creates by amending the requirements for an Annual Action Plan as part of the ConPlan. In order to help readers understand that the NHTF has specific Allocation Plan requirements, NLIHC suggests that §92.725(b) be modified to directly set forth that the Allocation Plan is to be included in the ConPlan’s Annual Action Plan:

“(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 HTF Allocation Plan component of the state’s approved consolidated plan, as required by §91.320(k)(5),...”

More about this is discussed in the “Allocation Plan” section of this summary, page 5.

The proposed rule adds that in some years HUD might direct how NHTF should be distributed by grantees. In the preamble to the rule HUD says it will issue notices to communicate any future policy priorities.

§92.725(b)

Subgrantees

The proposed regulation would give states the option of passing funds to local governments as subgrantees to in turn provide funds to recipients (defined next) to carry out projects. A subgrantee is defined as a unit of general local government or state agency selected by the grantee to administer all or a portion of its NHTF program.

Any subgrantee must have a ConPlan that includes a NHTF Allocation Plan which is consistent with the state's NHTF requirements (Allocation Plan? see next section, page 5), and must select projects according to the subgrantee's NHTF Allocation Plan.

§92.725(c)
§92.702

- ❖ The statute does not provide for the distribution of NHTF to subgrantees.
- ❖ §92.725(c) should be modified to echo §92.725(b) by stating that the subgrantee's ConPlan must be one that is "approved".
- ❖ The definition also says "A local government subgrantee must have an approved consolidated plan submitted in accordance with 24 CFR part 91." NLIHC suggests that the definition include a specific reference to the NHTF Allocation Plan as a required component of the ConPlan, citing §91.220(1)(4).

Recipients

A recipient is 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 statute does not specify that a recipient be an owner or developer.

An "eligible" recipient is one which meets four tests:

- Will comply with the program requirements during the entire affordability period.
- Has demonstrated ability and financial capacity.
- Is familiar with the requirements of other federal, state, and local housing programs.
- Has the experience and capacity to either:
 - Own, construct, or rehabilitate, and manage and operate an affordable multifamily rental development;
 - Design, construct, or rehabilitate, and market homeowner housing; or,
 - Provide down payment, closing cost, or interest rate buydown assistance for homeowners.

§92.702
§1338(c)(9)
§1338(f)(2)

- ❖ The Campaign requested that public housing agencies (PHAs) be explicitly listed as potential recipients. The proposed rule does not explicitly list PHAs as eligible recipients.

ALLOCATION PLAN

The NHTF statute requires each state to prepare an Allocation Plan every year, showing how it will distribute the funds based on priority housing needs.

The proposed regulation in subpart N requires states to submit a ConPlan.

In addition, the proposed rule would amend the ConPlan regs by adding NHTF-specific Allocation Plan requirements to the ConPlan's Annual Plan rule.

If a subgrantee is to administer NHTF, then it too must have a ConPlan containing the NHTF Allocation Plan.

- ❖ The proposed rule does not specifically mention the Allocation Plan in subpart N. NLIHC recommends that §92.720(b) also refer to the NHTF Allocation Plan and specifically cite 24 CFR 91.320(k)(5).

§92.720(b)
§91.2, §91.10, §91.215, §91.315
§91.320(k)(5), §91.220(l)(4)
§1338(c)(5)(A)(i)&(ii)

- ❖ The proposed rule does not establish clear criteria for determining how a state can choose subgrantees. However §92.725(b) says that a grantee is responsible for ensuring that NHTF funds are distributed throughout the state according to the state's assessment of priority housing needs, as identified in the state's approved ConPlan. NLIHC recommends that the language of §91.320(k)(5) be amended to require the state Allocation Plan to specify that any decision to use subgrantees, which subgrantees to use, or how to distribute funds among subgrantees be clearly done and based on the state's declared priority housing needs.

In addition to describing how NHTF dollars will be distributed to meet priority housing needs, the Allocation Plan must describe the application requirements for recipients and the criteria that will be used to select applications for funding. Applications from potential recipients must describe activities for which funds are sought.

Allocation Plans must provide priority for funding applications based on a number of features listed in the statute.

- ❖ The statute says the selection shall provide for “**priority funding to be based on:**” and lists six items. Subparagraph (5) does not precisely follow this construction. Consequently, the emphasis on “priority funding [shall] be based on” could be misread to apply only to “geographic diversity”. The simple insertion of a colon in (i) could rectify this, “The plan must provide priority for funding based on: geographic diversity...”

The key features for priority funding include:

- Geographic diversity.

- ❖ The Campaign had requested that HUD require states to allocate NHTF dollars based on the relative need in rural and urban areas, but this attention to rural needs is not directly included in the proposed rule.
- The extent to which rents are affordable, especially to ELI households. The proposed rule modifies this for states by adding the extent to which a project “has federal, state, or local project-based rental assistance” (the rule for local governments does not have the added language regarding project-based assistance).
- The duration of a unit’s affordability.
- The “merit” of the project, on which the proposed rule elaborates by providing as examples of features worthy of merit: housing accessible to transit or employment centers; housing that includes green building and sustainable development elements; and, housing that serves people with special needs.

§91.320(k)(5)(i) for states
 §91.220(l)(4)(i) for local governments
 §1338(c)(5)(A)(ii)&(C)
 §1338(g)(2)(D)(i),(iii),(iv), and (vi)

PUBLIC PARTICIPATION

The statute requires public participation in the development of the NHTF Allocation Plan. The proposed regulation merely requires states to submit a ConPlan following the ConPlan rule – which does have public participation requirements.

- ❖ The proposed rule does not provide a clear and direct reference to public participation. To demonstrate the importance of public participation in the creation of a NHTF Allocation Plan, the NHTF regulations must explicitly declare that in order to receive NHTF money states and any subgrantees must develop their Allocation Plans using the ConPlan public participation rules.
- ❖ NLIHC recommends the NHTF regulation contain a §92.720(c) clearly stating that the public participation requirements must be followed at 24 CFR 91.115 for states and 24 CFR 91.105 for local jurisdictions serving as subgrantees.

§92.720(b)
 §1338(c)(5)(B)& §1338(c)(8)(B)

The statute also requires states to follow the public participation requirements for the Public Housing Agency Plan as well as the Qualified Allocation Plan, required to receive Low Income Housing Tax Credits

- ❖ The proposed regulation does not address this statutory requirement.

§1338(c)(8)(B)

PERIOD OF AFFORDABILITY

The statute does not prescribe how long NHTF-assisted units must remain affordable.

The proposed regulation would require both rental and homeowner units to be affordable for at least 30 years, allowing states and any subgrantees to establish longer affordability periods. The preamble explains that the 30-year affordability period anticipates the NHTF being used in conjunction with the LIHTC.

- ❖ 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.

§92.746(d)(1) for rental
§92.748(e) for homeowner

For rental projects, the affordability period applies no matter the term of any loan, repayment of NHTF, or transfer of ownership. Affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure. Grantees may use purchase options, rights of first refusal, or other means to purchase housing before foreclosure. Grantees must repay NHTF even if affordability restrictions are ended. (See “Homeowner Provisions” section for details about homeowner activity continued affordability regulations.)

§92.746(d)(2),(3),&(5)

MAXIMUM RENT

Rent and utility costs is to be fixed at 30% of 30% of the area median income, or 30% of the poverty level, whichever is greater. HUD acknowledges in the preamble to the proposed rule that some tenants will be rent-burdened, but that a fixed rent is necessary for underwriting purposes.

- ❖ The Campaign recommended to HUD that the regulations establish the Brooke rule so that ELI households would not pay more than 30% of their income for rent and utilities. The proposed rule does not adopt the Brooke rule.

If an NHTF unit receives federal or state project-based rental subsidy, the maximum rent is the rent allowable under the federal or state project-based program.

§92.746(b)

- ❖ NLIHC recommends that the rule clarify that the NHTF maximum rent paid by tenants applies at other housing programs which do not provide project-based subsidies, such as the LIHTC, Section 236, and Section 221(d)(3)BMIR.

TENANT PROTECTIONS and SELECTION

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.

- ❖ The proposed rule does not address tenants' rights to participate in decision making regarding their residences.

§1338(c)(8)(A)

The proposed rule provides for a number of tenant protections such as prohibiting owners of NHTF-assisted projects from rejecting applicants who have a voucher or are using HOME tenant-based assistance.

- ❖ The Campaign recommended prohibiting denying access to NHTF-assisted homes to people with vouchers.
- ❖ NLIHC will recommend that people with state-issued tenant-based assistance also be protected.

§92.746(h)(i) & §92.747(d)(4)

Examples of tenant protection and selection features in the proposed regulation include:

- There must be a lease, generally for one year, along with a written renewal. Transitional housing leases are also described.
- Nine items that are prohibited from being in a lease are specified (eg an agreement to not hold an owner responsible for any actions or failure to act; mandatory supportive services; waiver of right to a jury trial, etc).
- Owners may only terminate tenancy or refuse to renew a lease for good cause.
 - ❖ There is no reference to VAWA, the Violence Against Women Act protections.
- Owners must have and follow tenant selection policies.
 - Tenants must be selected from a written waiting list, in chronological order, if practical.
 - Eligibility may be limited to or preference may be given to people with disabilities if the housing also receives funding from federal programs that limit eligibility (such as the Supportive Housing program); or if not tied to such federal programs or other law, as long as a project is in the most integrated setting appropriate to meet the needs of the people with disabilities.

§92.747

FAIR HOUSING AND CIVIL RIGHTS

The following apply to the NHTF: The Fair Housing Act; Title VI of the Civil Rights Act of 1964; The Age Discrimination Act of 1973; Section 504 of the Rehabilitation Act of 1973; Title II of the Americans with Disabilities Act; and, Section 3 of the Housing and Urban Development Act of 1968.

§92.760(a)
§1338(c)(8)(C)

DETERMINING TENANT INCOME

The proposed regulations for the NHTF echo the HOME regulations regarding determining tenant income. There are three ways to determine initial and subsequent income eligibility for renters; source documents (e.g. wage statement); a written statement from an administrator of a government program that already assesses income; or, a written self-certification. Homebuyers must submit source documents.

§92.727(c)&(d)

Income is to be calculated by projecting the prevailing rate of income of the “family” at the time it is determined income eligible.

§92.746(e)(1)

❖ NLIHC recommends that §727 use the term “household” instead of “family”.

Project owners must re-examine each tenant’s annual income during the affordability period. If the owner uses the method of accepting a tenant’s certification of income, then every 6th year a “source document” (e.g. a wage statement) must be examined. Units receiving federal project-based assistance must be re-examined according to the federal program rules.

§92.746(e)(2)

An NHTF-assisted unit continues to qualify as “affordable” when the income of an existing tenant increases, as long as actions are being taken to ensure that all vacancies are filled by income-eligible tenants until a project is back in compliance. As with the HOME program, the proposed rule provides for fixed and floating NHTF units.

§92.746(f)&(g)

HOMEOWNER PROVISIONS

As required by the statute, homes must be bought by income-eligible “first-time homebuyers” who have had counseling, and the home must be their principle residence.

Although not in the statute, the proposed rule requires the assisted housing to meet the HOME definition of “single family housing”, which includes one-to-four family residences, condominiums and cooperatives, a manufactured home and lot or just a manufactured home lot. As indicated earlier, the affordability period is 30 years.

Following the statute and echoing the HOME regs, an assisted home’s value must not exceed 95% of the median purchase price for the area. The proposed NHTF rule repeats the HOME regulation for optional means of determining 95%.

§92.748(d)

§92.748(b)

§92.2

§92.748(e)

§92.749

§1338(c)(7)(B)(ii)

Resale of Homeowner a Unit During Period of Affordability

As required by the statute, the proposed homeowner resale provisions echo the HOME regulations. To ensure continued affordability, grantees may use the HOME resale provisions or develop their own NHTF provisions and include such provisions in the ConPlan.

If a homeowner unit is sold during the affordability period, subsequent purchasers must be NHTF-eligible, and the sale price must provide the original owner a “fair return” (owner’s original investment plus capital improvements). The grantee must specify “fair return”. Also, if a homeowner unit is sold during the affordability period, the grantee must ensure the housing will remain affordable to a reasonable range of income-eligible homebuyers. The grantee must specify the meaning of “reasonable range”.

Affordability restrictions may terminate upon foreclosure, transfer in lieu, or assignment of an FHA-insured mortgage. The grantee may use purchase options, rights of first refusal, etc. before foreclosure to preserve affordability.

§92.748(f)
§1338(c)(7)(B)(iii)

- ❖ NLIHC will recommend that affordability restrictions continue if a mortgage is transferred to FHA.
- ❖ The HOME regs at §92.254(a)(5)(ii) provide extensive 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 have equally rigorous provisions.

Lease-Purchase

Mirroring the HOME regs, NHTF money may be used to help a homebuyer through lease-purchase as long as the home is purchased within 36 months. Also, NHTF may be used to buy an existing home with the intent to resell to a homebuyer through lease purchase; if the unit is not sold within 42 months, the rent affordability provisions apply.

§92.748(h)(3)

Preserving Affordability

As in the HOME regulations, additional NHTF resources may be used on an NHTF-assisted home in order to buy it prior to or at foreclosure. Additional NHTF money may also be used to rehabilitate such property or provide assistance to another first-time homebuyer. However, NHTF may not be used if the mortgage in default was funded with NHTF.

§92.748(j)

GENERAL ELIGIBLE ACTIVITIES

The proposed regulation echoes the statute by providing a basic list of eligible activities such as the production, preservation, and rehabilitation of affordable rental homes and homes for first-time homebuyers through new construction, reconstruction, rehabilitation, or acquisition. NHTF-assisted homes must be permanent or transitional housing.

- ❖ The statute is silent regarding “transitional” or “permanent”.

§92.730(a)(1)
§1338(c)(7)(A)&(B)

No more than 10% of a grantee’s annual grant can be used for homeownership.

§92.730(a)(1)
§1338(c)(10)(A)

Forms of Assistance

NHTF assistance can be in the form of equity investments, loans, grants, and other forms. Grantees may decide the terms of assistance.

- ❖ The Campaign recommended that the rule allow assistance to be available as grants or loans.

§92.730(b)

20% Cap on Operating Assistance

The statute makes operating cost assistance an eligible use of NHTF resources, but only in conjunction with rental housing acquired, rehabbed, preserved, or newly constructed with NHTF money.

The proposed rule caps at 20%, the amount of a grantee’s annual grant that can be used for operating cost assistance. (More at “Eligible Project Costs”, page 13)

§1338(c)(7)(A)
§92.730(a)(1)

The preamble explains 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. HUD assumes NHTF will be used in combination with other sources to produce and preserve units, mostly in mixed-income projects.

The preamble explains that grantees have discretion on how to allocate operating cost assistance. For example, grantees could decide to limit the 20% to all projects or adjust the percentage as needed – as long as no more than 20% of each annual grant received by a grantee is used for operating cost assistance.

Manufactured Housing

NHTF money can be used to buy and/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.

§92.730(a)(4)

Mixed-Unit Projects

NHTF-assisted units can be in a project that also contains non-NHTF-assisted units. After project completion, the number of NHTF-assisted units may not be reduced.

§92.730(c)

Timeframe for Demolition or Acquiring Vacant Land

Use of NHTF money for demolition or acquiring vacant land is limited to specific affordable housing projects for which construction can reasonably be expected to start within one year (or 42 months for transit oriented development).

§92.730(a)(2)

§92.702(b)

Transit Oriented Development (TOD)

NHTF dollars may be used by a local government to purchase land to be used for NHTF-assisted units as part of a transit oriented development (TOD) if title to the land will be transferred to the local government within six months and will then be held by the local government; and, if within 36 months from the date of transfer, the local government commits 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.

The preamble to the proposed rule, in the definition section regarding “commitment”, describes this as an attempt to facilitate TOD projects by enabling local governments to buy land before they even have a specific project plan.

§92.730(a)(3)

§92.702

- ❖ The relationship between the “unit of local government” and the definitions of grantee, subgrantee and recipient are unclear. For purposes of TOD, is the ULG a grantee, subgrantee or recipient?
- ❖ Under TOD, NHTF resources could be tied up for substantial periods (as long as 54 months) without single unit being built (42 months under the definition of TOD “commitment”, plus 12 months under definition of specific project “commitment”).
- ❖ The definition of “commitment” at §92.702(b)(3), which is cited, should be tightened because it could be interpreted to allow units that do not benefit ELI if “other resources” are used.

ELIGIBLE PROJECT COSTS

Eligible project costs include: acquisition; relocation; development hard costs such as construction; soft costs associated with financing and/or development; and, refinancing existing debt on rental property if NHTF is also used to for rehabilitation. Operating costs are also eligible project costs.

§92.731

Operating Costs

The statute makes the use of NHTF dollars for operating costs an eligible activity.

HUD limits operating cost assistance to 20% of a state's annual grant.

- ❖ In the preamble, HUD agrees with the Campaign that the NHTF is primarily a production program meant to add units to the supply of affordable housing.
- ❖ The Campaign recommended a 20% limit, but also recommended limiting the use of operating costs to ELI units. The proposed reg does not limit operating costs to ELI units, but does limit use to HTF-assisted units.
- ❖ The Campaign had also recommended requiring states to give priority to projects that obtained operating subsidies from sources other than the NHTF.
- ❖ The Campaign had also recommended limiting the use of operating costs to:
 - 1) provide project-based rental assistance for not more than 12 months, or
 - 2) establish a capitalized project operating reserve account in order to realize deeper affordability levels.

§1338(c)(7)(A)
§92.730(a)(1)

Operating cost assistance may only be provided if project-based assistance is not available. The preamble expresses this more clearly by saying a NHTF-assisted unit that has a Section 8 project-based voucher may not also receive NHTF operating cost assistance.

Operating costs include insurance, utilities, real property taxes, maintenance, and scheduled payments to a reserve for replacement of major systems.

States and subgrantees can provide operating cost assistance to a project for up to two years from the same fiscal year NHTF grant; the operating cost assistance can be renewed during the entire affordability period.

An operating cost assistance reserve can be created to cover up to a five-year period of inadequate rent income in order to ensure a project's financial feasibility.

§92.731(e)

- ❖ It is not clear how the two year and five year provisions can work together. How can a reserve be established for five years given the two-year limitation? For TOD, more than two years is allowed to secure a commitment.

Development Hard Costs

Development hard costs are the actual costs of constructing or rehabbing, including: costs to meet property standards set out in the proposed regulations; laundry and community facilities; utility connections; site improvements, including onsite roads, sewer, and water; and, demolition.

§92.731(a)

Related Soft Costs

Mirroring the HOME regs, other soft costs “associated with financing and/or development” include: architectural and engineering services; origination fees and credit reports; builder’s or developer’s fees; audits; affirmative marketing and fair housing information to prospective occupants; initial operating deficit reserves to meet any shortfall in project income during the first 18 months of project rent up (unexpended operating deficit reserves may be retained for project reserves); staff and overhead of the grantee directly related to carrying out the project (work specs, inspections, loan processing, etc.); impact fees; and, costs to meet environmental and historic preservation.

§92.731(d)

Other Project Costs

Refinancing: Existing debt secured by rental housing being rehabbed with NHTF can be refinanced, but only if necessary to reduce overall housing cost in order to make units more affordable. Grantees must establish refinancing guidelines that demonstrate that rehab is the primary eligible activity, and that set minimum levels of rehab. The guidelines must be presented in the ConPlan.

§92.731(b)

Acquisition: Real property may be purchased.

§92.731(c)

Relocation Costs: Eligible relocation costs include: replacement housing payments, moving expenses, temporary relocation expenses, staff and overhead directly related to providing relocation services (such as referrals to comparable homes, counseling, and inspections).

§92.731(f)

Costs Relating to Payment of Loans: Principle and interest to pay construction loans, bridge financing, a guaranteed loan, etc.

§92.731(g)

ADMINISTRATION AND PLANNING COSTS

The statute limits the amount of NHTF that can be used for general administration and planning to 10% of a state's annual grant. The proposed regulation adds that 10% of any program income can also be used for admin and planning. The rule also provides that subgrantees may use NHTF for administration and planning, but subgrantee use counts toward the state's 10% cap.

§92.732(a)
§1338(c)(10)(D)(ii)&(iii)

- ❖ The rule is silent, but the preamble to the rule and HUD's website use the 10% admin and planning cap to claim that only 80% of NHTF fund dollars must be used for rental activities. HUD explains that it intends to take the 10% allowable for administration and planning from the minimum amount available for rental projects, resulting in HUD's 80% figure.

However, the statute does not construct the minimum amount for rental activities in this fashion. The statute limits the amount that can be used for homeowner activities to 10%; therefore, 90% of the funds must be used for rental projects. The statute also limits the amount of a NHTF grant that can be used for administration and planning to 10%. The proper approach then, as has been traditionally used with the CDBG program, is to apply the 10% administration and planning cap to the entire NHTF grant amount, and then calculate 90% for rental and 10% for homeowner.

The rule should explicitly provide that after administrative costs have been determined – which cannot exceed 10% of a grant amount – grantees are required to use at least 90% of an annual NHTF grant for rental activities. The remainder can be used for homeownership activities.

General Management, Oversight, and Coordination Costs

This relates to the cost of overall program management, coordination, and monitoring. Examples include grantee staff salaries and related costs necessary for "program administration" such as ensuring compliance and preparing reports for HUD. Other eligible costs include equipment, office rental, and third party services such as accounting.

§92.732(b)

Staff and Overhead

The staff and overhead expenses of the grantee directly related to carrying out projects can be eligible admin and planning costs. Examples include loan processing, work specs, inspections, housing counseling, and relocation services. As with HOME, staff and overhead costs directly related to carrying out projects (as distinct from the NHTF "program" in general) may be charged as "project" related soft costs or relocation costs (however, housing counseling must be counted as an admin cost, as per the statute.)

§92.732(c)
§1338(c)(10)(D)(iii)

Some Other Administration and Planning Costs

- Providing information to residents and community organizations participating in the planning, implementation, or assessment of NHTF projects. §92.732(d)
 - Activities to affirmatively further fair housing (AFFH). §92.732(e)
 - Preparation of the ConPlan, including hearings, and publication. §92.732(g)
 - 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)
- ❖ The rule should provide that these administration and planning costs should be proportional to the degree to which NHTF is involved in “public information”, AFFH, ConPlan preparation, and compliance with other federal laws. Elsewhere in the proposed rule HUD is rigorous about NHTF cost allocation being proportionate. Without a proportionate allocation requirement with respect to these costs, a grantee could substitute NHTF money intended to increase the supply of affordable ELI homes for CDBG money otherwise being used for ConPlan preparation, etc.

INELIGIBLE ACTIVITIES

NHTF resources cannot be used for public housing, including HOPE VI. Nor can NHTF housing get public housing operating assistance during the period of affordability. A project may contain both NHTF-assisted units and public housing units. The preamble notes that the statute does not explicitly prohibit use of NHTF resources with public housing.

§92.734

Although not in the statute, the proposed rule echoes the HOME regulations, prohibiting the use of NHTF money for a project previously assisted with NHTF during the period of affordability – except for the first year after completion.

§92.735(a)(1)

Fees (e.g. servicing, origination) for administering the NHTF program are not eligible uses; however, annual fees may be charged to owners of NHTF-assisted rental projects to cover the cost of monitoring compliance with income and rent restrictions during the affordability period.

§92.735(b)(1)

NHTF MUST BE COMMITTED WITHIN TWO YEARS

As required by the statute, the proposed regulation requires NHTF dollars to be committed within 24 months, or HUD will reduce or recapture uncommitted NHTF dollars.

Although not required by law, the proposed rule adds that NHTF money must be spent within five years.

§92.770(d)
§1338(c)(10)(B)

Committed is defined in the proposed rule as the state or subgrantee having a legally binding agreement with a recipient owner/developer for a specific project that can reasonably be expected to begin rehabilitation or construction within 12 months; or if NHTF is used to acquire standard housing for rent or for homeownership, the property title will be transferred to a recipient or family within six months.

§92.702

MISCELLANEOUS PROVISIONS

Maximum Per-Unit Subsidy Amount and Subsidy Layering

Grantees must establish maximum limitations on the total dollar amount of NHTF invested per unit, with adjustments for size and geographic location. The limits must be in the ConPlan and adjusted annually. This is not required by the statute.

§92.740(a)

Grantees must establish and use 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.

§92.740(b)

Performance Reports

HUD will provide states and subgrantees with formats for submitting annual performance reports. HUD will make grantees' performance reports publicly available.

- ❖ The proposed regulation does not require states and subgrantees to make performance reports directly available to the public by requiring them to provide copies or by requiring them to prominently post performance reports on the state's or subgrantee's website.

§92.779

Recordkeeping

The proposed regulation presents a number of recordkeeping obligations, including actions taken to comply with Section 3 hiring and contracting goals, and the extent to which each racial and ethnic group, as well as single-heads of households, has applied for, participated in, or benefitted from the NHTF.

§92.778(a)(5)

In general records must be kept for five years after project completion. Records regarding individual tenant income verifications, project rents, and project inspections must be kept for the most recent five-year period until five years after the affordability period ends. Similar language applies to homeowner activities. Regarding displacement, the records must be kept for five years after all people displaced have received final payments.

§92.778(b)

The public must have access to the records, subject to state and local privacy laws.

§92.778(c)

❖ The Campaign submitted very detailed suggested data collection requirements, which are not included in the regs, but which could conceivably be incorporated into IDIS.

Other Federal Requirements

The Lead-Based paint requirements of 24CFR part 35, subparts A, B, J, K, and R must be followed.

§92.761

The displacement and relocation features of the HOME reg at 92.353 must be followed.

§92.762

The affirmative marketing requirements of the HOME reg at 92.351(a) must be followed.

§92.760(b)

Property Standards

A variety of property standards are listed, with separate sections for new construction and gut rehab; rehab; acquisition of “standard” housing (a term used in HOME but nowhere defined; in context it means acquisition of a home not needing rehab); manufactured homes; and “ongoing” for rental. As indicated in the preamble, there is an emphasis on energy and water efficiency requirements.

§92.741-45

Site and Neighborhood Standards

The HOME standards at §92.202 apply. According to the preamble, if Section 8 project-based vouchers are made available, the Section 8 requirements relating to site and neighborhood standards will apply to an NHTF-assisted unit that has a Section 8 project-based voucher attached to it.

§92.726

NHTF NEEDS CLEARER IDENTITY IN PART 92

As noted at the beginning of this summary, 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. The preamble explains that this is to “provide a coordinated menu of [housing] production programs”.

- ❖ It makes sense to weave the NHTF regs in with the HOME regs. However, as proposed the regs do not provide adequate identification of the NHTF program as a distinct program. There are a number of other examples of this, beginning with the title of part 92:

The title of 24 CFR part 92, is “Part 92 – HOME Investment Partnership Program”.

- ❖ The existence of the NHTF program is hidden unless there is prominent reference to it in the title. HUD’s “menu” of housing production programs would seem incomplete.
- ❖ Part 92 should be re-titled to more clearly and directly reflect the complete content of part 92, perhaps to “*Part 92 – HOME and Housing Trust Fund Programs*”.

The beginning of the existing HOME regulation, which the proposed rule would not modify, simply states “This part implements the HOME Investment Partnership Act (the HOME Investment Partnerships Program)...”, and continues with a long paragraph describing only the HOME program.

§92.1

- ❖ This further obscures the NHTF program at the start of part N.
- ❖ Another example of the potential for the NHTF program to be obscured is in the proposed rule itself which reads:

“Other subparts of part 92 are not applicable to the HTF program, except as expressly provided in subpart N. To the extent that the sections of other subparts of this part are made applicable, **references to HOME shall mean HTF** and references to participating jurisdictions shall mean grantees.”

§92.701 (c)

The proposed rule at item #8 under the current title of part 92 declares that “The authority for 24 CFR part 92 continues to read as follows: Authority: 42 USC 3535(d), 12701-12839, and 12 USC 1301 et seq.”

- ❖ The authority for the existence of the NHTF program is not included.

The proposed rule only cites the authority for the NHTF later [at §92.701(a)] as §1338 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 as amended by the Federal Housing Finance Regulatory Reform Act of 200812 (USC 4568).

- ❖ Therefore, #8 should also include the statutory authority of NHTF.
- ❖ Because the NHTF program could become eclipsed as a result of inadequate references to it in the HOME portions of part 92, those implementing the NHTF program, as well as advocates, might lose or never gain awareness that the NHTF program is a separate and distinct program, rendering it vulnerable to diminished consideration in future years. This problem is easily remedied by simply adding specific references such as “HOME and HTF” when appropriate.