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RE: [Docket No. FR-5246-N-04], RIN 2506-AC30

Housing Trust Fund: Request for Public Comment on Prior Interim Rule

Via regulations.gov

June 25, 2021

The National Low Income Housing Coalition (NLIHC) is an organization whose members include state and local affordable housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, faith-based organizations, public housing agencies, private developers and property owners, local and state government agencies, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we work on behalf of and with low-income people who receive and those who are in need of federal housing assistance, especially extremely low-income people and people who are homeless.

The national Housing Trust Fund (HTF) is the culmination of 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, which was coordinated by NLIHC. Meeting frequently, often weekly, 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 resulted in the enactment of the HTF in July 2008 as part of the Housing and Economic Recovery Act.

In response to HUD's request for feedback regarding the interim HTF rule, NLIHC urges HUD to:

- Change the rent HTF-assisted tenants pay to **the lesser** of 30% of AMI or 30% of the poverty guideline in order to minimize paying more than 30% or even 50% of their income for rent.
- Maintain the requirement that 100% of the income targeting rule requiring 100% of HTF funds be used for extremely low-income (ELI) households or households who have an income at or less than the federal poverty line (whichever is greater) when there is less than \$1 billion for the HTF.
- Increase the affordability period to 50 years.
- Maintain the limitation on the use of HTF funds for operating cost assistance (including reserves) to one-third of a state's annual grant.
- Modify the definition of operating cost assistance to include other operating costs that match industry standards.
- Modify HTF guidance to indicate that 90% of a state's annual HTF allocation must be used for rental housing activities.
- Modify the final HTF rule to establish as threshold requirements, rather than factors subject to a point system when states set priorities for awarding HTF to projects: an applicant's ability to obligate HTF funds and undertake eligible activities in a timely manner, and the extent to which an application makes use of other funding sources.
- Adopt many of the technical changes suggested by the Technical Assistance Collaborative in order to better serve people with disabilities.

This letter elaborates on these recommendations. NLIHC's main concerns are reflected in four of the five questions posed by HUD in the *Federal Register* notice requesting comments on the interim HTF rule.

RENT LIMITATIONS

The interim rule established the maximum rent (including utilities) that an ELI household should pay at 30% of the federal poverty guideline or 30% of the income of a hypothetical household whose annual income equals 30% of AMI, **whichever is greater**. Use of the "the greater of" threshold in the interim rule presents a serious, undesirable unintended consequence. **Wherever the federal poverty guideline is higher than 30% of AMI, renters with household income at 30% of AMI will be cost burdened by the maximum rent.**

Table 1 shows the HTF maximum rent standard by unit size across metropolitan and non-metropolitan HUD Fair Market Rent (FMR) areas. Maximum rents are set at 30% of the federal poverty guideline in 49.6% and 87.7% of FMR areas for one-bedroom and two-bedroom apartments, respectively. The vast majority of metropolitan and non-metropolitan FMR areas have maximum rents based on the federal poverty guideline for apartments larger than one bedroom. Maximum rents based on the federal poverty guideline, however, are even more common in non-metro FMR areas than in metro FMR areas.

Absent rental assistance, households at 30% AMI renting units with at least two bedrooms will be cost-burdened by maximum HTF rents in most HUD FMR areas. This is particularly concerning given the 30% standard of affordability already overestimates the ability of lower income and larger households to afford housing costs.

See Table 1 next page.

Table 1: Distribution of HTF Maximum Rent Standards by HUD FMR Area and Unit Size						
Unit Size	All HUD FMR Areas (2,597)		Metro HUD FMR Areas (626)		Non-Metro HUD FMR Areas (1,971)	
	Rent Set at 30% of 30% AMI*	Rent Set at 30% of Federal Poverty Guideline	Rent Set at 30% of 30% AMI*	Rent Set at 30% of Federal Poverty Guideline	Rent Set at 30% of 30% AMI*	Rent Set at 30% of Federal Poverty Guideline
0 Bedroom	67.4%	32.6%	82.6%	17.4%	62.6%	37.4%
1 Bedroom	50.4%	49.6%	69.2%	30.8%	44.4%	55.6%
2 Bedroom	12.3%	87.7%	29.9%	70.1%	6.7%	93.3%
3 Bedroom	5.2%	94.8%	15.8%	84.2%	1.9%	98.1%
4 Bedroom	3.3%	96.7%	10.5%	89.5%	1.0%	99.0%

*Note: Includes areas where rents set at 30% of 30% of AMI and 30% of the federal poverty guideline are equal.

To further illustrate the affordability challenge posed by using the federal poverty guideline to set rents, we calculated the potential cost burden for a 3-person family with income at 30% of AMI in each FMR area at the maximum HTF rent for a two-bedroom apartment. We did the same for a hypothetical 1-person household renting an efficiency unit at the maximum HTF rent. In the median FMR area where the maximum rent is based on the federal poverty guideline, the 3-person family at 30% AMI could spend 37.1% of their income on rent, while the 1-person household could spend just 32.6%. In the worst cases, it would be 50% or 38% for the hypothetical 3-person and 1-person households, respectively. The lowest income areas, where the federal poverty guideline is much higher than 30% of AMI, have the highest potential cost burdens.

Table 2: HCIRs for Example 1 and 3 Person Households Earning 30% AMI Renting HTF Units at Current Maximum Rent Based on Federal Poverty Guideline						
	All HUD FMR Areas		Metro HUD FMR Area		Non-Metro HUD FMR Areas	
	HCIR for 1p 30% AMI household Renting 0BR HTF Unit	HCIR for 3p 30% AMI household Renting 2BR HTF Unit	HCIR for 1p 30% AMI household Renting 0BR HTF Unit	HCIR for 3p 30% AMI household Renting 2BR HTF Unit	HCIR for 1p 30% AMI household Renting 0BR HTF Unit	HCIR for 3p 30% AMI household Renting 2BR HTF Unit
Mean	32.5%	37.9%	31.9%	36.3%	32.6%	38.3%
Median	32.6%	37.1%	31.5%	35.5%	32.6%	37.4%
Minimum	30.0%	30.0%	30.0%	30.0%	30.0%	30.0%
Maximum	38.0%	50.0%	38.0%	50.0%	38.0%	50.0%

Utilizing the federal poverty guideline to set maximum rents for HTF units is problematic. This policy disproportionately impacts larger, poorer households who already have greater difficulty affording rents limited to 30% of their income. The negative impacts, moreover, are most apparent in the lowest income communities where the federal poverty guideline is much higher than 30% of AMI.

NLIHC strongly recommends that HUD amend §93.302(b)(1)(i) to read:

(b) Rent limitations—(1)(i) Extremely low-income tenants. The HTF rent plus utilities of an extremely low-income tenant shall not exceed **the lesser of** 30 percent of the federal poverty line or 30 percent of the income of a family whose annual income equals 30 percent of the median income for the area, as determined by HUD, with adjustments for the number of bedrooms in the unit. HUD will publish the HTF rent limits on an annual basis.

By applying the 2014 definition of “extremely low-income” (which appropriately expanded potential eligibility for households) to maximum rents extremely low-income households pay, the interim rule leads to housing cost burden and sometimes severe housing cost burden for the very households the statute and HUD intend to benefit.

Maintaining §93.302(b)(1)(i) as is, using “the greater of” threshold and causing assisted households to endure cost burdens and severe cost burdens belies the very title of the statute authorizing the creation of the HTF and its first dedicated source of funding – “**Affordable Housing Programs.**” The formula for allocating HTF to states is also predicated to a great extent on the shortage of **affordable** rental homes and the extent to which renters suffer **severe cost burdens.** In addition, the statute requires states to give priority to projects that are **affordable, especially for extremely low-income families** and that keep those rents **affordable** for the longest period.

Section 1131 of the Housing and Economic Recovery Act of 2008 (HERA), titled “**Affordable Housing Programs**” repealed a previous version of Section 1337 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 and replaced it with Section 1337 “**Affordable Housing Allocations,**” establishing the first dedicated source of funding for the national Housing Trust Fund.

Section 1338 establishes the Housing Trust Fund. Subsection (c) paragraph (1) provides that the HUD shall distribute the amounts allocated for the Housing Trust Fund to provide **affordable** housing as described in the subsection. Paragraph (c)(3) requires HUD to establish a formula to distribute HTF amounts to each state to provide **affordable** housing to extremely low- and very low-income households. That formula is to be based in large part on:

(i) The ratio of the shortage of standard rental units both **affordable** and available to extremely low-income renter households in a state to the aggregate shortage of standard rental units both **affordable** and available to extremely low-income renter households in all states; and

(iii) The ratio of extremely low-income renter households in a state living with either:

(I) incomplete kitchen or plumbing facilities, (II) more than one person per room, or (III) **paying more than 50% of income for housing costs,** to the aggregate number of extremely low-income renter households living with either (IV) incomplete kitchen or plumbing facilities, (V) more than one person per room, or (VI) paying more than 50% of income for housing costs in all states.

In addition [at subparagraph (C)], the statute requires the formula to give priority emphasis and consideration to the first factor (i).

Section 1338(g) requires HUD to establish regulations. Among the requirements, subparagraph (D) calls for the regulations to require states to have a process that gives priority in awarding HTF funds to projects based upon six factors, including in the case of rental housing projects:

(iii) the extent to which **rents** for units in the project funded **are affordable, especially for extremely low-income families,** and

(iv) the extent of the duration for which such rents will remain **affordable.**

When NLIHC became aware of the maximum rent problem we sent a letter on April 27, 2015, signed by eight other national organizations, raising the problem to Secretary Julián Castro. The letter noted that there is no statutory basis for applying 30% of the federal poverty level to rents for HTF units. CPD Principle Deputy Assistant Secretary Harriet Tregoning replied in a letter dated August 27, 2015, stating that HUD shared our concern and indicated that the Office of Policy Development and Research would conduct an analysis similar to that NLIHC used to demonstrate the problem. NLIHC sent a letter to Secretary Castro on December 23, 2015, as a follow up to a meeting that Secretary Castro had with NLIHC board members and State Partners during which the problem was reiterated. Finally, NLIHC sent another letter to Secretary Castro on February 3, 2016, signed by an additional 15 national organizations. The letter reiterated the problem and the fact that the statute does not provide for using the federal poverty level to set rents for HTF-assisted units. That letter also quoted HUD in two places in the preamble to the interim rule stating “HTF rents include utilities and are set at 30 percent of the income of a household at either 30 percent or 50 percent of the area median income,” and “For extremely low-income households, rents are set at 30 percent for a household at 30% of the area median income.”

INCOME TARGETING

NLIHC strongly supports the income targeting rule requiring 100% of HTF funds be used for extremely low-income (ELI) households or households who have an income at or less than the federal poverty line (whichever is greater) when there is less than \$1 billion for the HTF. NLIHC urges HUD to resist any efforts to loosen this requirement.

The entire purpose for creating the HTF was to address the enormous gap in rental homes affordable and available to ELI households, which is currently at 6.8 million units. Only 37 affordable and available rental homes exist for every 100 extremely low-income renter households. Extremely low-income renters face a shortage in every state and major metropolitan area.

HUD notes that the interim rule defines ELI households as those with an annual income that does not exceed 30% of the area median income (AMI), which is consistent with the statute. However, the statute pre-dates the Consolidated Appropriations Act of 2014 that redefined the term “extremely low-income” to mean income less than the greater of 30% of AMI or the federal poverty guideline. Therefore, the final HTF rule should mirror the definition modified by the 2014 appropriations act, as well as the HTF statute provision requiring states to devote at least 75% of their annual grant amount for the benefit only of extremely low-income households or households whose income is at or less than the federal poverty guideline. The introduction of the federal poverty guideline is particularly important in rural areas where 30% of AMI is so low that many truly poor people would not otherwise be eligible for HTF assistance or counted in a states’ obligation to ensure that 100% of the beneficiaries are ELI households when there is less than \$1billion in the HTF.

THE MINIMUM 30-YEAR PERIOD OF AFFORDABILITY

NLIHC once again urges HUD to increase the affordability period to 50 years. The public investment of HTF funds must be retained as long as possible. A number of states require projects assisted with state programs (including the Low Income Housing Tax Credit, LIHTC) to be affordable for at least 50 years. **NLIHC also urges HUD to resist any pressures to shorten the HTF affordability period.**

NLIHC recognizes that 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 HTF 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.

OPERATING COST ASSISTANCE

Limit to One-Third of a State's Annual Grant

NLIHC supports the interim HTF rule's limitation on the use of HTF funds for operating cost assistance (including reserves) to one-third of a state's annual grant. As HUD noted in the preamble to the interim rule, the HTF is primarily a production program meant to add units to the supply of affordable housing for ELI households.

NLIHC understands the difficulty of operating rental units for ELI renters over the years once the capital for construction is expended; hence NLIHC respects the interim rule allowing up to one-third of a state's annual HTF grant to be used for operating cost assistance and for an operating cost reserve. Based on NLIHC's research of the 2016 and 2017 projects awarded HTF funds, we are aware of only one project using HTF funds for an operating cost reserve. Given the limited amount of HTF allocated each year since 2016, it is reasonable to maintain the one-third limit.

Definition of Operating Costs

The interim HTF rule definition of operating costs is limited to costs for insurance, utilities, real property taxes, and maintenance and scheduled payments to a reserve for replacement of major systems of an HTF-assisted unit. At first NLIHC assumed the elements of the definition were merely examples; however, we soon learned that the definition was meant to only include the listed costs. NLIHC also learned from nonprofit developers and HTF state-designated entities that the definition was far too limited and did not match industry standards. For example, it did not include property management and personnel costs associated with property maintenance and security. NLIHC also suggests adding personnel costs essential for ensuring "housing stability" for residents of projects serving special needs populations; for example, resident service coordinators and staff needed at the front desk 24/7 to help residents when they have an episode in the middle of the night. (We are not including other staff such as case workers who can be sourced from other resources or organizations). **NLIHC urges the final HTF rule to include other operating costs that we anticipate nonprofit developers and state-designated entities will offer in their comments.**

MINIMUM PERCENTAGE OF HTF TO BE USED FOR RENTAL HOUSING

NLIHC urges HUD guidance to state that 90% of a state’s annual HTF allocation must be used for rental housing activities. NLIHC disagrees with HUD’s assertion in the preamble to the HTF rule and guidance that the least amount of a state’s annual HTF allocation that must be used for rental housing is only 80%. NLIHC urges HUD to increase the percentage to 90%, following the precedent of the CDBG program. Since its inception, the CDBG program has subtracted the allowable maximum percentage of program administration (20% for CDBG) from a grantee’s annual allocation (plus program income) before considering other caps on eligible uses (such as the 15% public service cap). NLIHC urges HUD to switch to the CDBG model, thereby requiring more HTF funding to be used for rental housing – for which the need is greatest. This would entail first subtracting the maximum 10% program administration allowable use (plus any program income) from a state’s annual HTF allocation before applying the 10% limit on the amount of a state’s remaining HTF that may be used for homeowner activities.

REBALANCING PRIORITIES FOR SELECTING PROJECTS

The HTF statute and interim rule requires states to prioritize awarding HTF to projects based on six factors. Since the implementation of the HTF, NLIHC has observed that states give disproportionate emphasis (points) to two of the factors, the ability to obligate amounts and undertake activities in a timely manner and the extent to which the application makes use of other funding sources. This overemphasis diminishes the most important factors: extent to which rents are affordable to ELI households, the duration of the affordability period, and the merits of a project (for which the interim rule offers examples such as accessibility to people with special needs, use of green building and sustainable development features, and accessible to transit or employment centers).

An applicant’s ability to obligate HTF funds and undertake eligible activities in a timely manner are undoubtedly very important. However, this factor should be a threshold criteria – an applicant should not even be considered if it cannot meet this essential test.

The other factor, the extent to which an application makes use of other funding sources (which the interim rule modified from the statute to be “non-federal funding sources”) should not be subject to significant weight because given the nature of developing affordable housing, especially housing containing some units affordable to ELI renter households, other sources of funding are integral to project financing. Information NLIHC has obtained from states regarding their 2016 and 2017 HTF projects demonstrates that many other sources of funding are integral to projects with HTF assistance, including LIHTC, HOME, AHF, federal and state historic tax credits, state housing grant and loan programs, state and local housing trust funds, foundation loans and grants, private conventional loans, and deferred developer fees.

While the HTF regulation cannot ignore the statute, **NLIHC urges HUD to modify the final HTF rule to establish as threshold requirements, rather than factors subject to a point system,** the two factors of an applicant’s ability to obligate HTF funds and undertake eligible activities in a timely manner and the extent to which an application makes use of other funding sources.

TECHNICAL CHANGES SUGGESTED BY THE TECHNICAL ASSISTANCE COLLABORATIVE IN ORDER TO BETTER SERVE PEOPLE WITH DISABILITIES

NLIHC adds for emphasis, support for eight technical adjustments recommended by the Technical Assistance Collaborative (TAC) so that the HTF can better serve people with disabilities.

Definition of “Housing”

NLIHC agrees that the definition of “housing” at 24 CFR 93.2 should be modified as follows:

“Housing includes *but is not limited to* manufactured housing and manufactured housing lots, permanent housing for disabled homeless persons, single-room occupancy housing, and *other permanent housing options where the resident has the rights of tenancy and a lease of at least one year.* ~~group homes.~~ Housing does not include emergency shelters (including shelters for disaster victims) or facilities such as nursing homes, convalescent homes, hospitals, residential treatment facilities, correctional facilities, halfway houses, housing for students, or dormitories (including farmworker dormitories).”

Income Determinations

The interim rule uses annual Income as defined at 24 CFR 5.609 or adjusted gross income as defined by the IRS as options for the determining applicant income. NLIHC supports TAC’s recommendation that HUD use adjusted gross income as defined at 24 CFR 5.611 instead of annual income as defined at 24 CFR 5.609. Many people with disabilities and seniors have costs such as unreimbursed health care or other disability-related costs that are recognized by 5.611 and more realistically reflect the amount of income available to a household for housing.

Tenant Protections and Selection at 93.303(d) Tenant Selection

93.3030(d)(3)(i)

Add reference to Section 811 Project Rental Assistance (PRA) program.

93.303(d)(3)(ii)

NLIHC strongly recommends that HUD update final HTF rule to meet more current notions pertaining to the needs of and supports for people with disabilities. As TAC notes, HUD’s Office of Public and Indian Housing (PIH) uses more current terminology and practices in the Project-Based Voucher program.

- NLIHC urges HUD to substitute the phrase “persons with disabilities who qualify for services” rather than “persons with disabilities who need services.” Referring to streamlining changes in response to the Housing Opportunity Through Modernization Act of 2016 (HOTMA), PIH wrote:

“As previously implemented under the FR Implementation notice, a key component of the changes that the proposed rule provides is that the preference is for families who **qualify** [emphasis added] for the voluntary services offered at a particular project. Prior

to the effective date of this HOTMA provision on April 18, 2017, [public housing agencies] PHAs were required to provide the preference to any disabled family who **needed** [emphasis added] the voluntary supportive services, regardless of whether the family was eligible to receive the services.”

- NLIHC endorses TAC’s recommendation that the final HTF rule follow PIH and remove the following text a (3)(ii):

“(A) The limitation or preference is limited to the population of families (including individuals) with disabilities that significantly interfere with their ability to obtain and maintain housing;
(B) Such families will not be able to obtain or maintain themselves in housing without appropriate supportive services; and
(C) Such services cannot be provided in a nonsegregated setting. The families must not be required to accept the services offered at the project.”

NLIHC reiterates TAC’s rational for removing the above text:

Services are increasingly funded by a state’s Medicaid program for each qualified person on an individualized basis; therefore, the vast majority of services today are community-based, person-centered, voluntary services that can be provided to persons with disabilities in nonsegregated settings. All people with disabilities must have the option to choose to live in an integrated setting.

- NLIHC strongly supports TAC’s recommendation that 93.303(d) be augmented to add text to the final HTF rule as (d)(7) that follows the April 4, 2016 memorandum, [“Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.”](#) At a minimum, the final HTF rule should require owners to:
 - Allow only review of criminal convictions and disallow screening or review for arrest history;
 - Adopt only reasonable look back periods that limit what criminal conduct is considered during the screening process based upon when the conduct occurred and/or the type of conduct;
 - Prohibit blanket bans against people with criminal records;
 - Allow prospective tenants/applicants to address and present mitigating circumstances regarding criminal backgrounds prior to admissions decisions; and
 - Adopt admission policies that name specific factors that will be considered in evaluating the criminal record.

Reasonable Accommodations

NLIHC urges HUD to remind owners of rental housing that they are required by Section 504 to provide reasonable accommodations and reasonable modifications for people with disabilities. It is important that this reminder be included in the tenant protection portion of the final rule, perhaps as a new (c), redesignating current (c) and (d).

Affirmative Marketing

NLIHC endorses TAC's recommendation that 93.350(b) add a provision requiring owners of HTF-assisted rental housing to develop specific affirmative marketing plans for the required accessible units in order to better ensure these units are leased by households requiring those units design features. Such marketing activities could include outreach to a state's Money Follows the Person Program, any PHA's Mainstream Voucher program, or other programs specifically seeking to help persons with physical disabilities obtain housing.

CONCLUSION

Cushing Dolbeare, NLIHC's founder began advocating for a national housing trust fund in the mid-1990s and NLIHC accelerated advocacy in 2000 when we began coordinating regular meetings of a broad coalition of organizations through the National Housing Trust Fund Campaign. All of this advocacy was rewarded with the creation of the HTF in 2008. Since actual implementation of the HTF in 2016, NLIHC has monitored how states proposed to use their annual HTF allocations in 2016 and 2017, and we will continue doing so for 2018 and beyond. NLIHC has a unique perspective regarding the impact of the interim HTF regulations. The comments submitted in this letter reflect NLIHC's perspective, experience, and desire for the HTF program to continue to succeed in the future.

If there NLIHC can clarify any points raised in this comment letter, please contact Ed Gramlich, ed@nlihc.org, 202.662.1530 x 314.

Sincerely,



Diane Yentel
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