

Docket No. CI91-128-001, Cogen Energy Technology, L.P.

CAG-68.
Docket No. CP91-1117-001, Tom Brown, Inc.

CAG-67.
Docket No. CP91-2021-001, Questar Pipeline Company

CAG-68.
Docket Nos. CP89-460-009 and CP90-1-003, Pacific Gas Transmission Company

CAG-69.
Docket Nos. CP91-2126-001, CP91-2127-001, CP91-2128-001, CP91-2129-001, CP91-2615-001, CP91-2621-001, CP91-3026-001 and CP91-3027-001, Western Gas Interstate Company

CAG-70.
Docket No. CP89-634-012, Iroquois Gas Transmission System, L.P.

Docket No. CP89-629-011, Tennessee Gas Pipeline Company

CAG-71.
Docket Nos. CP91-2677-001 and CP89-634-011, Iroquois Gas Transmission System, L.P.

Docket Nos. CP89-629-007 and CP90-639-003, Tennessee Gas Pipeline Company

Docket No. CP89-661-009, Algonquin Gas Transmission Company

CAG-72.
Docket Nos. CP91-650-001, CP91-659-001, CP87-115-001, CP91-559-001, CP91-560-001, CP91-963-001, CP90-1526-001 and CP91-1082-001, Tennessee Gas Pipeline Company

CAG-73.
Docket No. CP90-2314-001, Tennessee Gas Pipeline Company

CAG-74.
Docket No. CP89-2095-001, Trunkline Gas Company

CAG-75.
Docket Nos. CP91-1186-001, CP91-2456-002, and RP91-143-000, *et al.*, Great Lakes Gas Transmission Limited Partnership

CAG-76.
Omitted.

CAG-77.
Docket No. CP89-324-001, Panhandle Eastern Pipe Line Company

CAG-78.
Docket No. CP91-3205-000, Tennessee Gas Pipeline Company

CAG-79.
Docket No. CP89-1232-001, Southern Natural Gas Company

CAG-80.
Docket Nos. CP91-350-000 and 001, Tennessee Gas Pipeline Company

CAG-81.
Docket No. CP91-1964-000 Tennessee Gas Pipeline Company

CAG-82.
Docket No. CP91-1618-000, Tennessee Gas Pipeline Company

CAG-83.
Docket No. CP91-308-000, United Gas Pipe Line Company

CAG-84.
Docket No. CP91-1616-000, ANR Pipeline Company

Docket No. CP91-1634-000, Great Lakes Gas Transmission Ltd. Partnership

CAG-85.
Docket No. CP87-536-001, High Plains Natural Gas Company

CAG-86.
Docket No. CP91-2307-000, South Penn Gas Company

CAG-87.
Docket Nos. CP91-2322-000 and 002, Paiute Pipeline Company

CAG-88.
Docket Nos. CP91-780-000, 001 and 002, Northwest Pipeline Corporation

CAG-89.
Docket No. CP91-1925-000, Southwestern Glass Company, Inc. v. Arkla Energy Resources, a division of Arkla, Inc.

CAG-90.
Docket No. CP91-50-002, Sumas Energy, Inc.

CAG-91.
Docket No. CP86-317-000, Panhandle Eastern Pipe Line Company

CAG-92.
Docket No. CP85-625-003, Northwest Pipeline Corporation

CAG-93.
Docket Nos. RP91-143-005 and RP91-231-003, Great Lakes Gas Transmission Limited Partnership

CAG-94.
Docket No. CR91-143-005, Great Lakes Gas Transmission Limited Partnership

Hydro Agenda

H-1.
Docket No. RM91-5-000, Preferences at Relicensing of Units of Development.

Electric Agenda

E-1.
Docket No. EC88-2-007, Utah Power & Light Company, PacifiCorp and PC/UP&L Merging Corporation. Order on remand.

E-2.
Docket No. RM91-17-000, Generic Determination of Rate of Return on Common Equity for Public Utilities. Final Rule.

Oil and Gas Agenda

I. Pipeline Rate Matters

PR-1.
Docket No. RM87-5-000, Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines. Order No. 497-C.

PR-2.
Docket Nos. RP86-119-000, RP88-191-000, R89-30-000, RP90-122-000, RP91-29-000, RP91-167-000, RP88-228-000, RP89-249-000, RP89-29-000, RP89-149-000, RP89-242-000, CP87-115-000, CP89-470-000, TA84-2-9-000, TA85-1-9-000, TA89-1-9-000, TA90-1-9-000, TA91-1-9-000, RP91-16-000, CP87-103-000 and CP91-3135-000, Tennessee Gas Pipeline Company. Order on settlement.

II. Producer Matters

PF-1.
Reserved

III. Pipeline Certificate Matters

PC-1.
Docket No. CP90-1391-001, Arcadian Corporation v. Southern Natural gas Company.

Lois D. Cashell,

Secretary.

[FR Doc. 91-30120 Filed 12-12-91; 3:58 pm]

BILLING CODE 6717-01-M

NATIONAL MEDIATION BOARD

TIME AND DATE: 2:30 p.m., Friday, December 20, 1991.

PLACE: Hearing Room, Suite 850, 1424 K Street, NW., Washington, DC

STATUS: Open.

MATTERS TO BE CONSIDERED:

- (1) Ratification of Board actions taken by notation voting during the months of October and November, 1991;
- (2) Mediator Training Program for Laptop Computers;
- (3) NMB Employee Assistance Program;
- (4) Projected Time Table for NMB Office Move;
- (5) NMB Sexual Harassment Policy Statement;
- (6) NMB EEO Training Program; and
- (7) Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

CONTACT PERSON FOR MORE

INFORMATION: Mr. William A. Gill, Jr., Executive Director, Tel: (202) 523-5920.

Date of Notice: December 11, 1991.

William A. Gill, Jr.,

Executive Director, National Mediation Board.

[FR Doc. 91-30027 Filed 12-11-91; 4:55 pm]

BILLING CODE 7550-01-M

RESOLUTION TRUST CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 5:03 p.m. on Tuesday, December 10, 1991, the Board of Directors of the Resolution Trust Corporation met in closed session to consider: (1) Sale of assets; (2) the early termination or renegotiation of FSLIC Assistance Agreements; and (3) contracting matters.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), and seconded by Director Robert L. Clarke (Comptroller of the Currency), and concurred in by Chairman William Taylor, Vice Chairman Andrew C. Hove, Jr., and Director T. Timothy Ryan, Jr. (Director of the Office of Thrift Supervision), that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters

in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b).

The meeting was held in the Board Room of the Federal Deposit Insurance Corporation Building located at 550-17th Street, NW., Washington, DC.

Dated: December 11, 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 91-30020 Filed 12-11-91; 4:34 pm]

BILLING CODE 6714-01-M

[The body of the page contains several columns of extremely faint, illegible text, likely bleed-through from the reverse side of the page. The text is too light to transcribe accurately.]

Register Federal

**Monday
December 16, 1991**

Part II

Department of Housing and Urban Development

24 CFR Part 92

**Home Investment Partnerships Program;
Interim Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**
Office of the Secretary
24 CFR Part 92

[Docket No. R-91-1518; FR-2937-I-02]

RIN 2501-AB12

**Home Investment Partnerships
Program**
AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This part provides the implementing regulations for the HOME Investment Partnerships Program (HOME Program). In general, under the HOME Program, HUD allocates funds by formula among eligible states and local governments to provide more affordable housing. HOME funds must be matched by non-federal resources. State and local governments that become participating jurisdictions may use HOME funds to provide affordable rental and homeownership housing through acquisition, rehabilitation, and new construction of housing, and tenant-based rental assistance. Participating jurisdictions are able to provide assistance in a number of eligible forms, including loans, advances, equity investments, interest subsidies and other forms of investment that HUD approves.

HUD may reallocate funds competitively to jurisdictions and to community housing development organizations to provide affordable housing.

The HOME Program also provides funds to Indian tribes, on a competitive

basis, to provide affordable rental and homeownership housing through acquisition, rehabilitation, and new construction of housing, and tenant-based rental assistance.

DATES: *Effective date:* This rule is effective on January 16, 1992 except for §§ 92.51, 92.152, 92.631, and 92.632, which will not be effective until approval of the information collection requirements in those sections and issuance of an approval number by the Office of Management and Budget (OMB). HUD will publish a separate document announcing the effective date of those sections and the OMB approval number.

Comment due date: May 1, 1992. The Department is providing an extended comment period in order to obtain public comment based on programmatic experience in the initial implementation of the HOME Program.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection between 7:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: With respect to Indian tribes, Dominic Nessi, Director, Office of Indian Housing, Seventh Street, SW., Washington, DC 20410, telephone (202) 708-1015, TDD (202) 708-0850. With respect to other aspects of the HOME Program, Mary Kolesar, Director,

Program Policy Division, Office of Affordable Housing, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708-2470, TDD (202) 708-2565. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:
I. Information Collections

The information collection requirements contained in this rule, for the most part, have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 and have been approved under OMB control number 2501-0013. The Department has revised or added information collection requirements in §§ 92.51, 92.152, 92.631, and 92.632, and has submitted a request for OMB approval of these requirements.

The annual public reporting burden of these requirements, including the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, is stated in the chart below. Send comments regarding burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to the Department of Housing and Urban Development Rules Docket Clerk, at the address stated above, and to the Office of Information and Regulatory Affairs, room 3001, Office of Management and Budget, Washington, DC 20503, Attention: Jennifer Main, Desk Officer for HUD. The Department may amend the information collection requirements set out in this rule to reflect public comments or OMB comments received concerning the information collections.

ANNUAL REPORTING AND RECORDKEEPING BURDEN

[Revision of previously approved burden]

Reg section and paperwork requirement	Record-keeping hours	Reporting hours	No. of juris.	Total hours
92.51—Production of Set-Aside Appeal.....		5	50	250.0
92.101—Consortia Designation.....		5	30	150.0
92.103—Notice of Intent.....		.5	330	165.0
92.104—Submission of Strategy (Information on this information collection requirement was included in the interim rule regarding Comprehensive Housing Affordability Strategies published on February 4, 1991, at 56 FR 4480.)				
92.150—Program Description, including certifications.....		10	330	3,330.0
92.200—Private-Public Partnership.....	2.0		430	860.0
92.201—Distribution of Assistance.....	2.0		430	860.0
92.202—Site and Neighborhood.....	2.0		150	300.0
92.203, 92.610—Income Determination.....	2.0		810	1,620.0
92.206, 92.216, 92.217, 92.218, 92.250, 92.620, 92.252, 92.614, 92.254, 92.615, 92.255, 92.256—Documentation required by HUD to be included in project file to determine project eligibility (i.e. eligible uses, eligible costs, income eligibility, costs limits, mixed-projects and value and type of matching contribution).....	5.0		810	4,050.0
92.209, 92.210—New Construction Determination.....	4.0		50	200.0
92.222—Reduction of Match Requirement.....		5	330	1,650.0
92.251, 92.621—Written Property Standards.....	1.0		810	810.0
92.253, 92.622—Tenant Protections (including lease requirements).....	5.0		810	4,050.0
92.300—CHDO Identification.....	2.0		330	660.0
92.301—CHDO Project Assistance.....	2.0		330	660.0

ANNUAL REPORTING AND RECORDKEEPING BURDEN—Continued

[Revision of previously approved burden]

Reg section and paperwork requirement	Record-keeping hours	Reporting hours	No. of juris.	Total hours
92.303—Tenant Participation Plan	10.0		50	500.0
92.350—Equal Opportunity (including nondiscrimination, and minority and women business enterprise and minority outreach efforts)	5.0		790	3,950.0
92.351—Affirmative Marketing	10.0		790	7,900.0
92.352, 92.634—Displacement, relocation and acquisition (including tenant assistance policy and C/MI System documentation)	5.0		810	4,050.0
92.354, 92.635—Labor	2.5		810	2,025.0
92.355, 92.636—Lead-based paint	.5		810	405.0
92.357, 92.638—Debarment and Suspension	1.0		810	810.0
92.453—Application for Direct Reallocations		3	100	300.0
92.501, 92.641—Investment Partnership Agreement	.5	.5	810	810.0
92.502, 92.642—Cash management System	10.0		810	8,100.0
The documents listed below will be submitted by program participants report data required by the Cash Management System.				
Homeownership Assistance/Rental Housing Project Set-Up Report		12.5	810	10,125.0
Tenant Based Rental Assistance Project Set-Up Report		6.25	810	5,602.5
Rental Housing Project Completion Report		7.5	810	6,075.0
Homeownership Assistance Project Completion Report		3.75	810	3,037.5
Payment Certification		2.0	810	1,620.0
Designation of Community Housing Development Organizations		1.5	290	435.0
State Designation of Local Recipients		1.5	40	60.0
92.504, 92.644—Participating Jurisdiction's (Indian tribe's) Written Agreements	10.0		810	8,100.0
92.507, 92.647—Closeout Report	Not applicable—Home Allocations Will Not Be Closed-Out for Four to Five Years After Award			
92.509, 92.649—Annual Performance Report		5	450	2,250.0
92.605—Application for Indian Program Set-Aside		5	20	100.0
The following requirements are not provisions contained in Subpart M of the Regulations which are applicable to the HOME Indian Program.				
92.631(b)(2)(i)—Preference by Tribes		1	20	20.0
92.631(b)(1), (2), (3), and (6)—Eligibility for Indian Preference		6	30	180.0
92.631(f)(1)—Review Procedures for Indian Preference Complaints		2	10	20.0
92.631(f)(4)—Indian Tribe Response to Indian Preference Complaint		1	10	10.0
92.632(a)(2)(ii)—Methods of Procurement	1.0		20	20.0
92.632(a)(2)(iii)—Contractor/Developer Statement Describing Indian Preference		2	20	40.0
92.632(a)(2)(iv)—Contractor Certification on Infeasibility of Indian Preference		1	20	20.0
92.632(b)(iii)—Small Purchase Procedures		2	20	40.0

Total Recipient Burden Hours.

Total Participant Costs:

Recordkeeping Hours: 50,335 × \$15 = \$755,025.

Reporting Hours: 35,345 × \$15 = \$530,175.

Total—85,680 × \$15 = \$1,285,200.

Summary of Home Participants

Following is a breakout of jurisdictions/entities performing specific recordkeeping and reporting requirements as described in the paperwork matrix:

1. No of Participants—810

(Allocations of \$750,000, excludes 52 state programs)	198
(Allocations of \$500,000)	50
(Consortia)	30
(Jurisdictions/non profits with direct reallocations)	100
(State recipients in 40 State decentralized programs)	400
(Centralized states programs)	12
(Indian Tribes)	20
Total	810

2. No. of Participants—330

(Allocations of \$750,000, includes 52 State Participants)	250
(Allocations of \$500,000)	50
(Consortia)	30
Total	330

3. No of Participants—430

(Allocations of \$750,000, includes 52 State Participants)	250
(Allocations of \$500,000)	50
(Consortia)	30
(Jurisdiction/non profits with direct reallocations)	100
Total	430

4. No of Participants—790

(Same as 1/ above, less 20 Indian Tribes)

5. No of Participants—450

(Same as 3/ above, plus 20 Indian Tribes)

II. Background

On March 19, 1991, the Department published a proposed rule (56 FR 11592) to implement the HOME Program, which had been enacted under title II of the Cranston-Gonzalez National Affordable Housing Act (Title II, Pub. L. 101-625, approved November 28, 1990, 104 Stat. 4094-4128, 42 U.S.C 12701-12839) (NAHA). In an attempt to meet the statutory deadline of May 28, 1991 for publishing an effective rule after notice and comment, the Department limited

the public comment period to 30 days after publication. The Department has received 119 public comments in response to the proposed rule. Commenters included 27 units of general local government (UGLG), 27 state or local community development agencies (CDA), 9 housing finance agencies (HFA), 16 public interest groups (PIG), 21 nonprofits (NP), 5 public housing agencies (PHA), two states, two housing opportunity commissions (HOC), two legal services organizations (LSO), two trade associations (TA), one congress person, one Indian tribe, one housing resource board, and one law firm.

Summary of Comments

HOME Rule Comments

Of the 119 commenters on the HOME Rule, twenty-one provided substantial general comments on the regulation. The Department was credited for its timely issuance of the proposed rule and its decision to first publish the rule, for effect, as an interim rule. Several commenters suggested extending the

review period because of the length and complexity of the rule.

The Department was criticized for its inflexibility in its interpretation of the matching contribution requirements, in limiting the definition to contributions to the program and not including debt financing, public financing, owner and sweat equity. There was some positive sentiment that the Department had provided some measure of flexibility on the matching contribution requirements with regard to the administrative cost credit, no matching contribution required on reallocations, and end of the year (not project-by-project) accounting for the matching contributions.

The Department was also criticized for suggesting that HOME funds be used to maximize the assistance to many people rather than deeply subsidizing some, with commenters citing an intrusion into local discretion and second guessing local needs which may be documented in the Comprehensive Housing Affordability Strategy (CHAS). Sentiment was expressed that the terms of affordability be minimums, and that HOME-assisted units should be made affordable for longer periods of time at local choice—or in perpetuity. One commenter suggested that the emphasis should be on rehabilitation, while another one wanted a true block grant without any restrictions on new construction.

The Department was appreciative of the number and depth of comments received on the proposed rule and has responded to the comments under the appropriate sections, attempting, within statutory constraints, to provide additional flexibility for state and local administration. With regard to extending the comment period, the Department believes that, based on the extensive comments received, sufficient time was provided. In addition, this rule is being published as an interim rule and, therefore, another comment period will be afforded before the Department issues a final rule.

Subpart A—General

Section 92.2 Definitions

There were 70 public commenters on the definitions, 38 of whom specifically addressed nonprofits and community housing development organizations while 32 commenters addressed a variety of other issues.

There were six public comments on Single Room Occupancy housing (SROs), suggesting that the definition be amended to allow both kitchen facilities and baths as well as allowing two people to occupy the unit. The Department is accommodating both

those recommendations in the revised definition.

There were two commenters who wanted low-income and very low-income to be lower than 80 and 50 percents respectively. The definitions are statutory.

There were also many comments requesting HUD to change the definition of substantial rehabilitation—apparently without realizing that the definition was statutorily based.

There were several commenters who wished HUD would change the definition of project to include scattered site locations. The Department has provided additional flexibility by allowing two or more buildings in a four-block area to be considered a project, if all are under common ownership and there is management, under a commitment by the owner, as a single undertaking under this part. The Department believes it is important to preserve the proximate or neighborhood context of a project. The reference to matching funds was also deleted to remove any ambiguity that matching funds must be used in HOME-assisted projects.

We were asked to include leasehold interest in the definition of homeownership. The Department agrees that in some circumstances homeownership may be something other than fee simple title. The regulation has been amended to recognize 99 year leases and to permit participating jurisdictions to request HUD approval of other forms of ownership.

One commenter indicated that the definition of family was different in the CHAS and HOME rules. The definitions in both regulations are based on the definition in section 104(11) of NAHA. The definition in the CHAS regulation will be revised for consistency with the HOME Program and the statute. (A final regulation for CHAS is scheduled to be developed and issued in February 1992.)

We were also asked to consider whether organized boroughs in the state of Alaska were considered units of local government. They are.

One commenter wanted the definition of project to exclude non-affordable units in a mixed-income project and to clarify that units not funded with HOME funds are completely unregulated. The Department has not adopted this comment. The non-HOME funded units must be included in the definition of project for HOME and for the participating jurisdiction to be able to determine if HOME requirements are satisfied, e.g., non-HOME funded units cannot be more than 50 percent of the units in the project for contributions to those units to be recognized as matching

contributions. In addition, non-HOME funded units are subject to the other federal requirements set forth in Subpart H.

Two commenters requested that we include both AIDS and HIV-positive individuals under the definition of persons with disabilities. Persons with AIDS or who are HIV-positive are not automatically considered to be disabled, but must qualify under the provisions of the definition.

The Department received 9 comments regarding the definition of commitment. All commenters indicated that the 90-day period for the start of construction was too short or unreasonable to allow for the leveraging of funds, working with multiple lenders, and the development of architectural plans and specifications. Commenters were particularly troubled if the project involved acquisition, demolition, or both. HOME funds will need to be committed first to obtain additional financing. The Department took into account the comments and extended the period between commitment and start of construction to six months. With the short statutory deadlines to commit funds and the emphasis on producing affordable housing, the Department is concerned that only viable, well-conceived projects are set up in the Cash and Management Information System.

Community Housing Development Organizations (CHDOs)

The Department received 49 comments from 38 commenters regarding the definition of CHDOs. Of the 49 comments received, 36 comments addressed the regulation requirement that a CHDO must maintain at least one-third of its governing board's membership for low-income community residents. Four respondents spoke to the requirement of having a one-year track record before qualifying for HOME funds. Three comments were received suggesting the expansion of the definition of CHDOs; two comments each were received on accountability and demonstrated capacity. One comment each was received on the language needed in corporate by-laws and on the definition of "community."

One-third low-income board membership: With respect to the 36 comments received on the low-income participation on the governing board, 29 disagreed with, and 7 agreed with or supported, the need for such a requirement.

The majority stated that the provision was intrusive and burdensome; would require income certification and recertification of the low-income board

members; was not reflective of the statute; was unduly restrictive, or inflexible; was only appropriate for neighborhood based organizations; should not be a requirement but rather only a consideration; and would eliminate most CHDOs from participating in HOME.

In response, the Department has expanded the regulation so that one-third of the governing board's members must be *either* low-income community residents or elected representatives of low-income neighborhood organizations. If the person is a resident of a low-income neighborhood, the person is considered to be low-income. If the person does not live in a low-income neighborhood, verification that the person is low-income is necessary. In addition, no income verification is required for persons who represent low-income neighborhood organizations. However, representatives must have received their appointments through a formal election process.

Community: Several commenters suggested that the definition of the term "community" was too restrictive in that it did not include neighborhoods and cohesive, low-income constituencies, such as ethnic, racial or special needs populations.

The Department has amended the definition so that "community" may be one or more defined neighborhoods within a city, county or metropolitan area. However, the term does not include "cohesive constituencies," but rather must be tied to a geographical area.

Accountability: One commenter expressed the view that the proposed language regarding accountability was too weak and should be revised in order to carry out the statutory intent of providing clear preference (over all other types of housing developers) for those nonprofit organizations which were created by and are accountable to low-income communities.

The Department believes that the 15 percent minimum set-aside for CHDOs adequately reflects Congressional intent to give preference to nonprofit housing developers.

Another commenter recommended that CHDOs establish a project committee composed of individuals eligible to reside in the housing developed under HOME. The CHDO would be accountable to this project committee on decisions regarding project design, site selection, marketing, management and other key issues.

The Department believes that this type of resident/beneficiary committee is envisioned in the definition of a CHDO as a means of maintaining

accountability to low-income community residents. It may be a project-specific committee or a standing committee of the CHDO; however, it must contain tenants of the building or individuals eligible to reside in the housing expected to receive HOME funds.

One-year track record: Three commenters stated that a one-year track record requirement would preclude a large CHDO from doing development in a local area where it had not worked before.

This issue hinges on the definition of the term "community." The Department believes that as long as a CHDO, large or small, has been serving some part of its "community" (neighborhood, multiple neighborhoods, city-wide or multiple county) for at least one year, it satisfies this criterion.

One commenter stated that only a one-year history of service is much too broad, if the intent is to have an organization with a meaningful track record. Consideration should be given to a record of successful projects and activity in the community.

The Department believes that this concern is satisfied by criterion three, which requires a demonstration of capacity on the part of a qualifying CHDO.

Affordability: One commenter responded that the language "the provision of decent housing that is affordable to low-income and moderate-income persons," which must be in the stated purposes of a nonprofit organization in order to qualify as a CHDO, is too specific and restrictive for broadly written by-laws of nonprofits. The commenter suggested that the language be changed to "Has among its purposes the provision of decent housing, as evidenced in its charter, articles of incorporation, resolution or by-laws."

The statute requires the CHDO to have among its purposes the provision of decent housing that is affordable to low-income and moderate-income persons. The Department has not adopted this suggestion, because the Department believes that the purpose of providing housing that is affordable to low-income and moderate-income persons must be stated in the CHDO's charter, articles of incorporation, resolutions, or by-laws.

Demonstrated capacity: One commenter suggested that the regulation should be revised to permit an organization to demonstrate capacity if it has a board member or members with experience, or a working agreement with another agency with experience. The commenter argued that although it

was the intent of the statute to assist in the capacity building of new nonprofit organizations, the proposed regulations favor those cities with established CHDOs.

The Department emphasizes in response that the nonprofit, to qualify as a CHDO, must either hire staff or contract for the development of the appropriate capacity, in order to satisfy this criterion. Part-time board members' experience does not demonstrate sufficient organizational capacity. A newly formed non-profit may contract for this experience, or be targeted for technical assistance provided under the HOME Program until it builds expert knowledge within its staff.

CHDO: One respondent suggested that limited equity cooperatives or leasehold cooperatives be included within the definition of CHDOs. The Department believes that such a limited focus organization does not satisfy the Congressional intent to foster nonprofit organizations with community-wide interests and long-term housing objectives.

Nonprofit Definition

The Department received 11 comments on the definition of nonprofit organizations. The comments generally fall in the following three categories: (1) The requirements for board membership; (2) the ability to exclude "shell" nonprofit organizations; and (3) the definition of "nonprofit."

There were seven comments dealing with board composition. Three commenters objected to having one-third of the board members be low- and moderate income persons, thereby requiring an income test for membership on the board or restricting participation by non-low- and moderate-income persons who have successfully developed significant numbers of units of housing for occupancy by this target group. Four commenters were concerned about, and objected to, the lack of inclusion or the exclusion, from the board, of public nonprofit entities which have also successfully developed significant numbers of units of housing for low- and moderate-income families. One commenter believed that the definition should require the board member to be a resident of the community, in order to address the issue of ensuring accountability to the low-income residents.

In response, the Department wishes to clarify that there is no requirement regarding governing board composition for nonprofit organizations, except for those that wish to qualify as community housing development organizations.

Nonprofits that do not qualify as CHDOs may participate in the HOME Program to the degree participating jurisdictions wish to involve them.

The Department has revised the definition "community housing development organization" to incorporate the definition of "nonprofit organization." The statutory definition of "nonprofit organization" has meaning only in the context of the definition of community housing development organization. Nonprofit organizations not meeting the statutory definition are not precluded from participating in the HOME Program; they just do not qualify as community housing development organizations.

Six commenters addressed the issue of "shell" nonprofit organizations (nonprofit organizations that are owned or sponsored by for-profit entities). The commenters suggested that the rule missed the mark because the drafters misinterpreted or did not consider the intent of Congress. Five of these commenters suggested that the rule would not achieve the intent of the statute in preventing "shell" nonprofit organizations from receiving HOME funds set aside for CHDOs. The proposed rule addresses the issue of for-profit affiliation and control by stating that for-profits may establish nonprofit organizations as long as the for-profit entity appoints no more than one-third of the nonprofit's governing board. Since the third of the board appointed by the for-profit might be empowered to appoint the remaining members of the governing body, the commenters claimed that this limitation would be of little practical value. These commenters suggested that, to prevent the control of nonprofits by for-profit entities, the language should be changed to preclude a for-profit from appointing, directly or indirectly, the governing board of a nonprofit organization. One commenter wanted stronger language to prevent "shell" nonprofit organizations from participating in the program.

The Department is sympathetic to the issue of for-profit entities (usually real estate and construction-related businesses) establishing nonprofit organizations under state law for the purposes of securing low interest, public funds. However, the Department is also aware of publicly spirited for-profit entities that have set up, or helped to set up, nonprofit organizations that sincerely serve low-income persons. The Department has revised the rule by precluding the creation of CHDOs by for-profit businesses whose primary purpose is the development or management of housing (e.g., builders,

developers and real estate property management firms). Additionally, the for-profit business may only appoint one-third of the board members and a board member who is appointed by a for-profit business that created the nonprofit may not appoint the remaining two-thirds of the board members of the organization.

Concern was expressed by several commenters regarding local government sponsorship of nonprofit organizations that would qualify for HOME funds. The claim was made that despite the restrictions in the proposed rule, local officials could appoint the entire governing board of a nonprofit organization.

The Department does not want participating jurisdictions to control CHDOs; therefore, the regulation has been revised so that although a jurisdiction can create a CHDO, it cannot appoint more than one-third of the board members, and the CHDO board cannot consist of more than one-third public officials.

One commenter wanted HUD to use a consistent definition of nonprofit organization and suggested the use of the definition of community-based nonprofit created under title VI, Preservation. The definition of nonprofit used in the rule is governed by the statute.

Section 92.3 HOME Funds for Indian Tribes

Three comments were received on this section. The commenter requested clarification on the proposed coordination of HUD funds to Indians. There were several comments requesting additional clarification on the competitive criteria for selection to receive HOME funds. The second criterion, local administrative capacity, was also called into question without HOME funds being eligible for administrative costs. With regard to the coordination of funds issue, the sentence has been deleted as not being appropriate regulatory language, although it is the Department's intention, to the extent feasible, to coordinate the distribution of resources to Indian tribes. The criteria for selection will be described in detail in the Notice of Fund Availability (NOFA). Although administrative funds are statutorily prohibited for participating jurisdictions, the Department is permitting Indian tribes to use up to 15 percent of the grant for administrative costs. Unlike units of general local government, Indian tribes have limited ability to raise resources. To assist the user, the regulation for Indian tribes has been

expanded into a separate subpart (Subpart M).

Subpart M provides more guidance on the applicability of civil rights authorities to Indian tribes. Section 92.630(a) makes it clear that section 282 of NAHA applies to all Indian tribes. Section 282 is a HOME Program-specific prohibition against being excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity funded in whole or in part with HOME funds, on the grounds of race, color, national origin, religion, or sex. Section 92.350(b) notes that Indian tribes that are subject to the Indian Civil Rights Act (Indian tribes exercising recognized powers of self-government) are not subject to title VI of the Civil Rights Act of 1964, the Fair Housing Act, or Executive Order 11063.

Sections 92.351 and 92.352 provide the regulatory framework for compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act. These sections reflect the Department's current policy in this area, and are comparable to 24 CFR 905.165 and 905.175, which were adopted for the Indian Housing Program by an interim rule published on June 18, 1990, at 55 FR 24722.

Subpart B—Allocation Formula

Section 92.50 Formula Allocation

General Comments About the Basic Formula

Two comments requested more background on how the formula factors worked to meet statutory criteria. The questions from several comments suggested more background would be helpful concerning HUD's intentions in selecting and weighting the factors.

The formula factors are intended to work together as a system of indicators to meet the statutory criteria. Criteria may be principally met by one formula factor, but in some cases they are met by two or more factors. For example, the statutory criterion for inadequate housing supply is partially reflected in low vacancy rates and partially in high rent burden. Also, the criterion for relative fiscal incapacity is reflected by a combination of high poverty and low per capita income.

The factors are generally weighted evenly, because no statutory criterion is given explicit emphasis. However, the Department has given half weight to two factors—the vacancy factor and the per capita income factor—because the data has limitations and because these formula factors are combined with others to reflect the statutory criteria.

The weights determine the portion of the funds allocated on a given factor. A jurisdiction's share of this portion is based on its share of the total of the formula values for all similar jurisdictions.

Two comments indicated that there was too much emphasis on 1980 census data. One comment recommended that HUD explore ways to marginally update the 1980 data.

Four of the six factors are based solely on 1980 census data. Data on rental vacancies, rental units with one of four problems, pre-1940 rental units occupied by the poor, and poor families are all from the 1980 census. For these factors, the 1980 census is the only standard source for data covering all units of governments. The statute requires the data to come from a standard source.

While post-1980 census estimates are not available for these four factors, they are available and are used for the per capita income and population factors. The data from the 1990 census will be available for all units of government in the fall of 1992. The Department expects to use these data in the following fiscal year.

The Department is exploring with the Census Bureau the continuance of the per capita income estimates series during the 1990s. Additionally, the Department is discussing an expansion of the small areas estimate program to include poverty and other income data.

The factor for the cost of producing housing is partially based on data from the R.S. Means Company. The Census Bureau and HUD do not have alternate data which are a direct measure for the statutory criterion.

There were three comments to the effect that the formula was too targeted to certain areas, such as older parts of the country and areas with tight housing markets. The individuals expressing these comments believed that funds should be spread more through the use of population-based adjustment or some other means. One comment noted that HUD indicated that the formula should reflect housing need in different parts of the country, but does not describe how that would be accomplished.

The factors were chosen to be responsive to the criteria established in the statute. While population is not a statutorily-mandated criterion, the statute instructed that the allocations not be excessive to a given area and should reflect the need for geographic distribution that appropriately reflects housing need in each region of the nation.

The factors do contain regional biases. Pre-1940 housing, even when

restricted to renter housing occupied by the poor, favors older regions and communities. Poverty and poverty-related data are helpful for southern regions and rural areas. High production cost and low vacancies favor coastal areas. On balance, the formula factors do reflect need for various regions.

One comment noted that the formula excludes data on homeowner units.

The formula places 70 percent of the weight on renter-based factors and 30 percent on population-based factors. The emphasis on renters is appropriate, given the expectation that most of the funds will be expended on rehabilitating rental units. The funds for homeowners will be spent primarily to help first-time homeowners—people who are for the most part current renters.

A comment was made that HUD should clarify what it means by "studying" the formula when updated Census data are available. Another comment indicates that more precise measurements need to be developed for the six factors to reflect the statutory criteria.

The formula factors are either taken directly from other formulas or are close variations of factors in other formulas. The data for the factors are generally available and have had some previous public review. On the other hand, other untested substitutes for the factors may prove to better represent the statutory criteria.

The Department intends to acquire 1990 census data which might also validly represent the need specified in the statute. Worthwhile suggestions made in the comments to the proposed regulations will be pursued. The 1990 data will first be made available in the fall of 1992. The study will be conducted in federal fiscal year 1993. Any recommendations for change will be made to Congress in the summer of 1993.

Specific Comments on Factors

Factor 1—Vacancy-adjusted Rental Units

Four comments were received on Factor 1 of the formula for allocating HOME funds. Comments questioned the definition of this factor and how well it specified the shortage of low-income housing.

This factor is computed by multiplying the ratio of the national rental vacancy rate over the jurisdiction's rate by the number of rental housing units occupied by poor persons in the jurisdiction. All the data is from the 1980 census. The factor is higher for jurisdictions with tight rental markets and a large number of rental units occupied by the poor.

Since it is difficult to measure vacancy rates with precision, the 1980 census is the only consistent nationwide source of data for all jurisdictions. Housing markets with low vacancy rate have generally remained tight throughout the decade.

The Department has placed less weight on this factor, partially as a result of the relative weakness of the data. The second factor, which identifies greater than 30 percent rent burden as a problem, also helps to reflect shortage of affordable housing for low-income renters.

Factor 2—Occupied Rental Units With at Least One of Four Problems—Overcrowding, Incomplete Kitchen Facilities, Incomplete Plumbing, or Greater Than 30 Percent Rent Burden

Four comments on this factor suggested that rent burden should not necessarily be a part of this factor (which otherwise reflects substandard or inadequate housing), but should be a separate factor. One comment recommended adding a fifth problem—deterioration—and changing the factor to occupied rental units with one of five problems.

A rent burden of more than 30 percent is the major component of the four problems for most jurisdictions. This factor is a reasonable one in this system of indicators designed to represent, collectively, the need for affordable housing. As indicated earlier, there is no intention that this factor simply correspond to the single criterion on substandard housing.

Comparison of this factor to the American Housing Survey across regions and type of jurisdiction shows that it corresponds well to worst-case housing conditions. The Census Bureau does not have a standard definition of substandard or deteriorated housing which can be used in the formula. Nevertheless, the study of 1990 census data will examine alternative ways of specifying the statutory criterion, based on analysis of housing conditions reported in the American Housing Survey.

Factor 3—Rental Units Built Before 1940 and Occupied by Poor Persons

Eight comments (including 3 UGLCs, two CDAs, and one each from a PIC, HOC, and HFA) were received on this factor and all recommended using a later year than 1940 for indicating rental units likely to be in need of rehabilitation. Most of the comments recommended using pre-1950 rental housing occupied by the poor. A number of these comments stated that using 1940

strongly biases the formula toward older cities and against areas of the country which have newer, but nonetheless, aged, housing. Further, one comment stated pre-1940 served as the basis for the funding formula for the Community Development Block Grant Program when it was developed more than ten years ago and, thus, it makes sense to move this indicator forward by ten years. Other comments indicated that surveys of their jurisdictions' deteriorated stock in need of rehabilitation show that a large part was built after 1940.

This factor derived from 1980 census data. Along with rental housing for the poor and rental housing with one of four problem conditions, it signals rental units likely to be in need of rehabilitation. It helps to reflect the type of need in older regions and jurisdictions.

In response to comments raised by some members of Congress as well as comments from many jurisdictions, the Department examined the effect of substituting the number of pre-1950 rental units occupied by poor families for this factor. In general, the effect was to shift some funds to southern and western areas at the cost of areas that did not experience relatively high housing development in the 1940s. Many of the large Northeastern and Midwestern cities are not substantially affected by this change. Since this factor is also based on poor families as compared to poor persons, there is some shift from areas with a high proportion of poor individuals, such as college towns. The use of poverty families makes this factor consistent with the poverty factor.

The Department also compared this factor to housing likely to be in need of rehabilitation as measured by the American Housing Survey. The comparison indicated that the pre-1950 data was better correlated to need across region and type of jurisdiction than the pre-1940 data. As a result of these analyses, the Department is changing the formula to use pre-1950 rental housing with poor families.

Factor 4—Cost of Producing Housing

Four comments were received on the factor proposed to reflect the cost of producing housing. One comment requested a more complete definition of the production index. Another questioned the reason for multiplying the cost of production index by a factor which identifies needs. Two comments on this factor stated that the cost of producing housing should be expanded to include a measure of land cost as well as construction cost.

This factor measures the cost of producing housing by multiplying the ratio of cost index for a given jurisdiction over the national cost index by the number of rental units with one of four problem conditions in the jurisdiction (factor 2 above). The ratio is multiplied by the need factor to yield a value which can be used to compute a share of need in determining the amount of funds a jurisdiction would receive on this factor. As discussed in response to comments about that factor, the second factor is the one most representative of rehabilitation needs.

The cost index is based on the index produced by the R.S. Means Company to adjust overall national labor and materials costs to those of local areas. The Means Company has been producing these areas adjustments on an annual basis for over 30 years to assist contractors in estimating local costs. Means provides the index for about 200 communities. HUD uses the index to reflect cost throughout the metropolitan area for areas that contain such a community. For metropolitan areas that do not contain a central city with a Means index, HUD develops an estimate of what the index would be, based on the indices for comparable jurisdictions within the same state. For states, HUD develops a cost index based on indices for the small metropolitan areas within the state. HUD estimates are reviewed with the Means Company, and adjusted as necessary based on Means' best information.

The Means index is also used in the public housing Comprehensive Modernization formula. There are no census data available to make a direct measurement of the statutory criterion. The Means index is comparable to the indices produced by other companies and is preferable to other indices because it provides direct estimates for more communities. While the index has no component for land cost, it is generally correlated to high land cost experienced in the coastal areas.

Factor 5—Number of Families at or Below the Poverty Level

Three comments suggested that HUD define poor persons as those whose incomes are at or below 30 percent of the area median income instead of at or below the poverty level. There was a comment that no definition for "poor" is provided. Related to this, the comment states that poverty is measured by families in poverty rather than families and individuals in poverty.

The definition of poor families is the definition used by the Census Bureau for the 1980 census. There are no post-1980

census estimates that are comparable for all jurisdictions. Poverty levels vary by family size and are based on the income necessary to meet basic nutrition needs.

Portions of the other factors also are correlated to low-income. Specifically, factor one is based partially on poor renters, and factors two and four are based partially on renters paying more than 30 percent of their income for rent. Limiting this factor 5 (as well as the revised factor for pre-50 rental units) to poor families helps to reduce the benefit college-dominated jurisdictions derive from low-income college students.

Factor 6—An Adjusted Net Per Capita Income (pci) Index Multiplied by Population

Six comments were received on this factor. Most indicated the per capita income was not a direct or a complete measure of fiscal incapacity. They recommended that the Department use more direct measures, such as real estate taxes or taxes relative to income, or the tax burden for families and businesses or the representative tax system (as developed by the Advisory Council on Intergovernmental Relations).

This factor is computed by multiplying the population of a jurisdiction by the ratio of a national adjusted per capita income over a jurisdiction's adjusted per capita income. The per capita income is adjusted by subtracting from both the national and the jurisdiction's per capita income the per capita income for a three-person family at the poverty level. This factor is weighted at 10 percent. A jurisdiction's share of funds on this factor is greater than its share of the population to the extent its per capita income falls below the national average.

The adjustment which subtracts the per capita income for a three-person family causes the factor to be targeted more to need. Thus, the adjustment causes the ratio for high per capita income jurisdictions to be farther apart from the ratio for jurisdictions with low per capita income than if no adjustment were made.

As noted in response to other comments, this factor is conceived as being used in conjunction with the poverty factor to identify jurisdictions that lack fiscal capacity. Poverty is related to the fiscal burden that communities must support and per capita income represents the economic well-being of jurisdictions. While neither measure directly represents fiscal incapacity, a study conducted for the Department indicates that these variables do serve as proxies for other

partially-available data that directly reflect fiscal incapacity.

The per capita income data are generally available in 1987 estimates for all jurisdictions. These data were previously a part of the revenue sharing formula. The data recommended in comments do not exist for all jurisdictions from a standard source and have not undergone thorough testing to analyze their effects in this formula. In the study of the 1990 census data, the Department will review the suggestion made in the comments to determine whether there are options that would better represent fiscal incapacity.

Section 92.51 Allocation of Funds—New Construction

Fifteen comments supported the view that HUD should be more liberal in allowing appeals for new construction eligibility. Some believed that all jurisdictions, regardless of size, should be allowed to appeal by presenting to HUD objective data on rental housing market conditions. Other commenters believed HUD should allow states to make this decision on eligibility based on the CHAS and local needs and opportunities.

The Department proposed to let all jurisdictions appeal based on errors in data used for eligibility, but only small jurisdictions (with populations under 25,000) could appeal based on alternative data on local market conditions. Given the limitations of the data available to make eligibility determinations and the restriction of the system which limits eligibility to approximately 30 percent of participating jurisdictions, the Department agrees with the commenters who recommended changing the appeals process to allow all jurisdictions to appeal, based on objective local data reflecting local market conditions. The statute requires the Department to make determinations and to provide opportunity for appeals. Therefore, the regulation could not allow states to make this decision.

One comment indicated that the rental housing production formula relies too heavily on 1980 data and that vacancy rates and turnover rates are now dramatically different in many areas. The commenter recommended that more current estimates of market conditions be used in allocating rental housing production funds.

While the Department has agreed to use more current estimates in the appeals process, it cannot use local data in the eligibility system. The statute requires the use of standard data. The data from the 1980 census are the only

data available to make eligibility determinations for all jurisdictions.

Furthermore, the Department has constructed the eligibility system to reduce the need for current data. The new construction criteria compare a jurisdiction's values against a common threshold and then require that only a limited number of thresholds be met. Thus, the precise value does not matter as long as a community is above average on at least three thresholds.

One comment recommended a new criterion be added to more directly measure the relationship between high rehabilitation cost and the cost of new construction. Two comments recommended limiting the low vacancy and low turnover factors to units that rent at below Fair Market Rent levels. Two comments recommended revising the factor which specifies one of four problems to specify separately the various problems. Other comments recommended re-weighting or eliminating other factors which were seen to be less helpful.

The factors the Department could propose were limited by the availability of standard data for all jurisdictions. The factors are reasonable choices based on the statutory criteria. When 1990 census data are examined in order to analyze alternatives for the HOME formula, the Department will also examine alternatives for the new construction formula.

Eight comments favored expanding the number of communities eligible to use HOME funds for new construction, since the statute authorizes the Secretary to qualify at least 30 percent of communities for the new construction list. This minimum should not be treated as a maximum. Comments suggested that the recommended expansion could be achieved by eliminating the requirement for the composite criterion, or by eliminating the requirement that jurisdictions pass three of five tests.

The Department believes that the need for new construction is not as prevalent as the need for rehabilitation, and that it is appropriate to limit eligibility so that it does not substantially exceed 30 percent of the jurisdictions. Furthermore, by liberalizing the appeals process, tight market areas that are not identified by the eligibility system can be added to the list.

Two comments disagreed with HUD's proposal to allocate 80 percent of the rental housing production set-aside to localities and 20 percent to states. These commenters stated that HUD should apply the rental housing production formula to states and localities in the

60/40 percent split that the basic HOME formula uses.

The Department proposed the 80/20 percent split for the rental production formula because the level of need for new construction is proportionally stronger in metropolitan cities and urban counties under the new construction formula than for the HOME basic formula funding. Under funding levels of full authorization, the level of need (as measured by formula factors) for participating metropolitan cities and urban counties is approximately 60 percent under HOME and 80 percent under new construction.

A community development agency and a public interest group recommended that the formula for determining areas that should receive a rental housing production set-aside should include a factor for homeownership. The CDA also stated that a difficulty throughout the program is the link between the CHAS, that may establish homeownership as a primary goal throughout the state (particularly in rural areas), and the lack of opportunity within the HOME Program to use funds for homeownership.

The set-aside is for rental housing production. The Department believes it is not appropriate for the formula to include a factor for homeownership. In addition, although homeownership is an eligible use of HOME funds, the HOME Program is designed primarily to expand the supply of affordable rental housing, largely through rehabilitation.

Subpart C—Participating Jurisdictions

Section 92.101 Consortia

There were five comments received on this section. The commenters sought advice on how and when a consortium should be formed. The Department has prepared and published separate guidance on this issue in the *Federal Register*. (56 FR 34094, July 25, 1991. See also extension of time for responses published on July 31, 1991, 56 FR 36163.)

In the interim rule, the Department is requiring that the term of the consortium be for three years, to demonstrate serious intent and to curtail an "in and out" approach to funding. Jurisdictions may join a consortium during the three-year period; however, none will be allowed to drop out. If the consortium contains an urban county, the period of qualification of the consortium will be coterminous with the period of qualification of the urban county. Therefore, the period of qualification may be less than three years if the consortium containing the urban county

is in the second or third year of its urban county agreement.

The Department is considering whether or not to require, in the final rule, each consortium to contain either a metropolitan city or urban county, or otherwise to limit the size of consortia. The Department is concerned that consortia have sufficient administrative capacity to administer the HOME Program. There also is concern about very large, e.g., multicounty consortia, and the effect of such large consortia on the HOME formula. Public comment is specifically invited on these issues.

Section 92.102 Participation Threshold Amount

Nine comments were received.

Four commenters suggested that to make up any shortfall of funds to reach the \$750,000 threshold, CDBG, as well as other federal funds should be permitted.

One commenter, a local government that participates in the Rental Rehabilitation Program through a state program, suggested that states be required to allocate HOME funds to it and other communities at a level proportionate to that currently used for Rental Rehabilitation Program funds.

One commenter stated that states should not be permitted to transfer new construction set-aside funds to non-eligible communities, as the regulation seems to permit.

One commenter requested clarification concerning whether state and local contributions to meet the threshold requirements would be considered matching funds.

One commenter suggested that states may not be willing to provide funds to meet the threshold, since the states would receive the funds if a local jurisdiction could not fund the shortfall. The commenter requested that HUD develop guidelines that would provide incentives to states to provide those funds.

With regard to making up the shortfall of funds to reach the \$750,000 threshold, the statute requires that state or local funds must be provided, which would exclude CDBG or other federal funds. It is the Department's hope that state and local governments will coordinate their resources to the best advantage, allowing all eligible jurisdictions to participate. The Department cannot dictate that states provide HOME funds to local jurisdictions, or specify a level of resources to be provided to local governments. Since meeting the threshold is a one-time eligibility requirement, it is anticipated that states voluntarily will provide HOME funds to local jurisdictions to meet this requirement. States may transfer rental

housing production set-aside funds to any jurisdiction; however, only jurisdictions eligible for new construction, based on a list to be published by the Department, may use the funds for new construction. Jurisdictions not on the new construction list would have to use the rental housing production set-aside funds for substantial rehabilitation. Funds provided to make up the shortfall cannot be counted as a matching contribution.

Section 92.106 Revocation of Designation

Two comments were received.

One commenter expressed concern that revocation of designation as a participating jurisdiction should be determined on annual appropriations, and not on an unchanging dollar figure.

One commenter suggested that specific expectations be developed, detailing what constitutes "unwilling or unable" to carry out the program, in order that participating jurisdictions will know how this will be measured.

The revocation funding levels are established by statute, but the authority to revoke the designation is permissive, not /mandatory. Jurisdictions falling below the \$500,000 threshold may retain the designation even when they do not receive funding. (A local jurisdiction must receive at least \$500,000 under the formula in order to receive an allocation.) With regard to revocation based on conduct or capacity, the commenter is referred to § 92.551, corrective and remedial actions.

Subpart D—Program Descriptions

Section 92.150 Submission of Program Description and Certifications

There were 16 public comments on this subpart. Three commenters objected to the background discussion of providing HOME funds to assist as many families as possible and not combining assistance to deepen subsidy for a few. The statement was seen as federal intrusion into state and local discretion, and as counter to the needs identified in the CHAS.

Three commenters requested guidance on the combination of subsidies. One commenter indicated that the language in the certification would suggest a formal request for proposals and evaluation of all proposals before committing any HOME funds to one project.

With regard to the submission of the program description, six commenters were against the requirement, citing duplication of CHAS requirements, difficulty of preparation in 45 days, and

the need to update as changes become necessary and get HUD's approval. Another commenter suggested an initial submission with yearly updates. Clarification was also requested on the contents of the HOME investment partnership agreement.

In response to the comments, it was not the Department's intention to second-guess the jurisdiction's decision on the level of subsidy, especially when making housing affordable to very low-income families. The statement in the preamble was a caution about oversubsidizing projects and a reminder of the requirement that jurisdictions must not provide more subsidy than is required when combining HOME funds with other subsidies. While the Department intends to provide further guidance on the combination of subsidies, participating jurisdictions may wish to look at the Administrative Guidelines: Limitations on Combining Other Government Assistance With HUD Housing Assistance, published in the April 9, 1991 Federal Register, Vol. 56, No. 68 and guidance currently employed by allocating agencies of low-income housing tax credits. Participating jurisdictions must adopt a procedure to evaluate projects when combining HOME funds with other subsidies.

With regard to the submission of the program description, the Department has decided to retain this requirement for many reasons. First, the statute requires participating jurisdictions to submit, and HUD to approve, forms of investment to be used by the participating jurisdictions which are not listed in the regulation, as well as the participating jurisdictions' guidelines for resale for HOME assistance to first-time homebuyers. Second, the statute requires participating jurisdictions to submit certifications to HUD. Third, the Comprehensive Housing Affordability Strategy (CHAS) does not require the level of detail on the HOME Program that the Department needs to make judgments concerning whether HOME funds are being used in a manner consistent with the jurisdiction's CHAS.

With reference to changes during the year, a participating jurisdiction is not required to submit amendments to the Department, but simply to note the changes (other than those HUD is statutorily required to approve) in its program description file. If the changes will continue for future allocations, the changes would be incorporated in the next annual submission.

Forty-five days does not appear to present a problem in the development of a program description, based on past program experience. The HOME

investment partnership agreement will be similar to the grant agreements that the Department has used for the CDBG and Rental Rehabilitation Programs.

The rule has been revised to clarify that a formal request for proposals is not required in the selection of proposals for HOME funds.

Section 92.200 Public-Private Partnership

Two public comments were received on this section. One commenter restated the housing authority's right to be involved in the implementation of a jurisdiction's CHAS, but asserted that there were no incentives, and perhaps some disincentives. The second commenter believed that the nonprofit sector should be the primary developer of affordable housing, and that nonprofits and local governments should control the real estate to ensure affordability in perpetuity.

No specific rule changes were suggested, and the Department has made no changes in this section.

Section 92.201 Distribution of Assistance

Five public comments were received on this section. One commenter was concerned that the requirement that "each participating jurisdiction must, insofar as is feasible, distribute HOME funds geographically within its boundaries and among different categories of housing need" will be strictly applied and would penalize a jurisdiction that is using other funds to meet its housing needs. HUD was asked to define its standards for determining what would constitute a disproportionate level of assistance for any one housing need.

One commenter argued that states should be required to consider local CHASs when considering projects in their areas. One urban county commenter also wanted clarification whether § 92.201(a) restricted the expenditure of HOME funds solely to the boundaries of the jurisdiction. The commenter favored a county-wide approach.

A commenting state government felt that while the funds were distributed by the state based on objective data, the state should be guided by its CHAS and its own discretion. The commenter wanted to encourage wealthier communities to embrace affordable housing projects.

Another commenter, on behalf of states, requested that the Department allow states to interpret "need" to include the necessity of enriching other areas of the state beyond those most in need—pointing out the benefit of

developing housing that would provide greater choice for residents.

Another state commenter suggested adding "insofar as is feasible" to paragraph (b), state distribution of resources, as well as substituting "nonmetropolitan" for "rural", because identification of rural need is not required by the CHAS rule or defined in the HOME rule.

The Department will take into account the distribution of HOME funds in conjunction with other resources in evaluating consistency with the priorities established in a jurisdiction's housing strategy. An evaluation of consistency with a state or local housing strategy must be done over time. It is certainly possible that a state could distribute resources equitably to all areas of the state, over time. The language on the distribution of state resources parallels the language of the statute and has not been changed. With regard to the use of funds within the jurisdiction's boundaries, the rule applies to urban counties and limits the use of funds in local governments participating in the urban county.

Section 92.202 Site and Neighborhood Standards

Two public comments were received on this section. One commenter contended that because of its unique population characteristics and unusually high land costs, the language should be modified to allow some flexibility.

Another commenter claimed that the requirement would create additional paperwork and that any jurisdiction certified by HUD to meet FHA's local area certification process should be assumed to meet HUD's siting policy.

The Department has retained this requirement and believes that there is sufficient flexibility in the process to accommodate the concerns raised by the commenters. FHA's local area certification process applies only to single family subdivisions and does not meet the requirements of this section.

Section 92.203 Income Determinations

One commenter requested that medical expense deductions, currently not allowed under 24 CFR part 813, be allowed for households with children.

While the Department appreciates the commenter's concern, the suggested change is beyond the scope of this rulemaking and has not been made.

Section 92.204 Applicability of Requirements to Entities that Receive a Reallocation of HOME Funds, Other than Participating Jurisdictions

Commenters cited the absence of matching contribution requirements on

reallocations—a feature that may cause the unintended result of states declining participation in the program and allowing reallocations to localities that would not have to meet the matching contribution requirements of the state allocation. The commenters requested that this disincentive to state participation be addressed in the interim rule.

In not requiring matching funds for reallocations, the Department's intention was to provide additional flexibility on this difficult requirement and to avoid a disincentive to state participation. States are major participants in the HOME Program, with 40 percent of HOME funds directed to states to address overall housing needs within the state, both in rural and urban areas. The Department has not changed this section, but will consider the experience of states in the period between an interim and final rule for the program, reserving the right to require a matching contribution on reallocated funds if states do not participate for this reason.

While supporting reallocation of funds, another commenter suggested that the time limits on committing and expending HOME funds must take into account the long delays inherent in large, multifamily projects. The statute sets out specific deadlines. For a full discussion of these deadlines, see § 92.500, HOME Investment Trust Fund, below.

Section 92.205 Eligible Activities

There were twelve public comments on this section. There were several comments requesting clarification on Departmental policy. Commenters asked whether a conversion is new construction or rehabilitation, whether assistance to first time homebuyers is eligible, whether HOME funds can be used to make up pool insurance reserves, and whether the certificate of occupancy for new construction must be residential.

One commenter suggested that acquisition of vacant land and demolition should not be limited to a particular affordable housing project. Instead, jurisdictions should be allowed to take advantage of particularly depressed market conditions. Another commenter indicated that allowing acquisition of vacant land but requiring commitment of construction funds within 90 days is not realistic. Twelve to 18 months would be preferable. The Department was criticized for characterizing acquisition of recently constructed, bank-owned real estate, and other distressed properties without a certificate of occupancy, as new

construction. Prohibiting turnkey projects would avoid abuses of the new construction limitations. Another commenter suggested that a certificate of occupancy as an indicator of new construction may not be applicable to all jurisdictions. The commenter suggested a substitute definition that covered housing completed within one year of commitment of funds and not previously occupied.

Several commenters recommended funding of operating reserves or project-based assistance for rental properties.

Two commenters objected to the requirement that the HOME funds must be repaid if a project is terminated before completion, while a third commenter suggested that this policy be made clearer in the regulation.

The Department has reviewed all these comments carefully, noting in certain instances that inadequate information was provided to determine whether an activity was eligible or not. Conversion of a building would be viewed as rehabilitation unless units were being constructed outside the existing structure. Clearly, assistance to first time homebuyers is eligible and has been added to the list of eligible activities. Certificates of occupancy should be for residential structures. Acquisition and demolition must be done in connection with a specific affordable housing project assisted under this part. The Department has addressed the definition of commitment in § 92.2 by extending the period between commitment and construction to six months. In distinguishing between new construction and existing housing, the Department suggested the use of a certificate of occupancy and will accept other analogous documents. The Department has determined that an initial operating deficit reserve can be an eligible soft cost.

With regard to allowing reserves for replacements or project-based tenant assistance as eligible activities, the Department has determined that although these costs are inappropriate for HOME funding, they may be funded with matching funds.

In response to the requirement that HOME funds be repaid if the project is terminated before completion, the Department believes that production of affordable housing is paramount, and that jurisdictions must evaluate projects and choose those which are most likely to meet that objective. However, the Department is relaxing this standard as it applies to loans under § 92.301, project-specific assistance to community housing development organizations. Sections 92.301(a)(3) and 92.301(b)(3) permit the jurisdictions to waive

repayment of the loans if there are impediments to project development that the participating jurisdiction determines are reasonably beyond the control of the borrower.

Section 92.206 Eligible Costs

There were ten public comments, among which two commenters supported (as those in the previous section) the inclusion of project-based rental assistance and operating reserves up to 2 percent of the total development cost as eligible costs under HOME.

One commenter stated that development soft costs should be an allowable reimbursable expense out of HOME funds. (The commenter did not understand that they were.) Another commenter recommended that nonprofits should be able to use HOME funds for development fees for the nonprofit. Also the costs of educating tenants about the work involved in managing or owning a rental project (or converting it to co-op) should be eligible.

It was recommended by two commenters that the regulation expand eligible cost to include holding costs, environmental studies, utility connections, counseling, impact fees, audits, replacement reserves, and staff time and travel directly relating to supervising or managing HOME activity.

One commenter also asked whether HUD will set limits on builders and developers fees, or whether the participating jurisdiction could exercise discretion.

In response to the comments, developer's fees within customary and reasonable limits are permitted and would certainly be permitted for all developers, whether for-profit or nonprofit. With the exceptions of utility connections, counseling related to informational service (such as affirmative marketing and fair housing as described in paragraph (b)(3) of this section), and project specific audits, the Department views the other costs as administrative and not allowed under the statute.

Section 92.207 Preference for Rehabilitation

Ten public comments were received on this section and all opposed the preference for rehabilitation determination process. Many commenters believed that the determination a participating jurisdiction must make as a requirement for doing new construction under neighborhood revitalization and special needs (namely, that (1) rehabilitation is not the most cost-effective way to meet housing supply needs and (2) housing needs cannot be met through

rehabilitation of available stock) is a restriction specifically prohibited under law. Another commenter suggested that if the rehabilitation preference must apply to the two new construction exceptions, the findings under § 92.207 should be made, not in the context of the overall housing situation in the jurisdiction, but only in relation to the specific new construction projects that meet the criteria of § 92.209 and § 92.210.

The Department agrees with the last commenter about the negative consequences of making this test jurisdiction-wide. The regulation has been revised to reserve this section and apply the "preference for rehabilitation" test specifically to new construction in the neighborhood revitalization or special needs context described in §§ 92.209 and 92.210.

One commenter argued that if new construction is proposed to affirmatively implement a fair housing plan or strategy, a jurisdiction should be exempt from the rehabilitation preference and the neighborhood revitalization factors. Such a plan or strategy should be justified in the CHAS. New construction is allowed under special needs to further desegregation or racial deconcentration of housing under the provisions cited in § 92.210.

Another commenter requested that the Department permit the public to comment on the Department's guidance when rehabilitation is not the most cost effective way to meet housing needs. The Department will consider this recommendation.

Section 92.208 New Construction: General

There were four public comments on this section. Three objected to the applicability of the "preference for rehabilitation" test, stating that it made new construction in a particular neighborhood impossible because the city could not meet a city-wide test. The Department agrees, and has revised the rule to apply the preference for rehabilitation test within the neighborhood.

A commenter objected to having to prove that 51 percent of funds has been spent on housing rehabilitation in neighborhood revitalization areas. One commenter believed that the restriction on new construction may create a lack of consistency between housing needs identified in CHAS and the use of HOME funds, especially in rural areas where owner-occupied housing is infeasible for rehabilitation. The commenter felt that the situation was worsened by not considering

homeownership in the new construction formula.

The Department does not agree with the comments, and the interim rule leaves these features unchanged.

Section 92.209 Neighborhood Revitalization

There were 15 public comments on this section, the majority of which felt, as those in the previous section, that the Department was unnecessarily making new construction difficult.

Eight commenters were opposed to the addition of the 51 percent criterion as a way to demonstrate emphasis on rehabilitation in a neighborhood revitalization area. The test was cited as too inflexible and unnecessary, especially in view of the higher matching contribution requirement for new construction. Two suggestions were made: (1) That a jurisdiction file a narrative on its revitalization plan with a focus on its rehabilitation activities; or (2) that jurisdictions provide a certification that 51 percent of funds will be spent on non-new construction activity. Another commenter was concerned that only HOME funds would be counted to meet the 51 percent standard.

Alaska found the neighborhood definition and neighborhood revitalization requirements meaningless in its state context and wants to be able to do new construction in any part of the state.

Another commenter believed that new construction should be allowed in a neighborhood revitalization area as part of a strategy to integrate a neighborhood economically.

Two commenters asserted that the requirement that new construction in a revitalization area must be produced by a CHDO or a public agency was too restrictive. The Department was requested to support a statutory amendment to eliminate this or to add nonprofits.

There was a concern that a neighborhood had to be officially designated in order to qualify under neighborhood revitalization. The commenter wanted any neighborhood targeted in the CHAS to qualify.

Concern was expressed that the definition of neighborhood would preclude designation of a portion of a city less than 25,000 population as a neighborhood. Another commenter felt that this would disqualify a city under 25,000 population which did not have 51 percent of total households with incomes less than 80 percent. The commenter wanted an exception made.

The Department believes that the statutory requirement that the

neighborhood revitalization emphasize rehabilitation requires that this emphasis be demonstrated. Therefore, the regulation maintains the provision that 51 percent of all funds (not just HOME funds), spent by the jurisdiction on the neighborhood revitalization program, be spent on rehabilitation of substandard housing.

The Department agrees with Alaska that the definition of neighborhood and the requirements of this section are meaningless in its state context, and suggests that local governments wishing to do new construction appeal to the Department to be added to the new construction list. Allowing new construction in neighborhood revitalization areas to integrate a neighborhood economically is not statutorily recognized.

The Department realizes the statute permits only community housing development organizations and public agencies to do new construction in revitalization areas, and will consider proposing a technical amendment on this provision.

With regard to officially designating a neighborhood revitalization area, the regulation is permissive and includes any neighborhood "designated in comprehensive plans, ordinances or other local documents," and could certainly include a neighborhood designated in the jurisdiction's housing strategy. A jurisdiction of less than 25,000 population may designate a smaller portion of its community as a neighborhood. The regulation has been revised to clarify this point.

Section 92.210 New Construction: Special Needs

There were twelve public comments on this section, the majority of which suggested additional categories of special need.

A commenter objected to the rule's use in this section of "five or more persons" as the measure of "large families." The Department has used "five or more persons" to conform to the definition of "large family" in the CHAS rule (see 24 CFR 91.5, published at 56 FR 4480, 4486, February 4, 1991).

Commenters suggested that the special needs categories should be expanded to include housing for: (1) Homeless persons; (2) persons with disabilities, including persons with AIDS or those testing HIV-positive; (3) single parents with children of both sexes requiring three or more bedroom units; (4) extreme rural conditions; and (5) frail elderly.

The Department is not expanding the list under special needs at this time. The Department believes that there are other

HUD programs to address the needs of the homeless and the elderly, e.g., the McKinney Act programs, HOPE for Elderly Independence, and Section 202 Supportive Housing for the Elderly. With regard to three or more bedroom units for families with children of both sexes, the statute was clear that large families receive a priority. While construction of large family units would be justified based on the needs identified in a jurisdiction's housing strategy, occupancy would not have to be limited to families of five or more.

Section 92.211 Tenant-Based Rental Assistance

Four commenters wanted to drop the requirement to use the PHA waiting list. One commenter supported the requirement. This requirement is statutory. Further, there is a PHA waiting list at the county, regional or state level which can be used.

Four commenters wanted the program to allow for project-based assistance. HUD disagrees. The statute clearly specified a tenant-based program.

Several commenters wanted more clarity in the lease and suggested adoption of a model lease. HUD does not wish to prescribe a lease because there are significant differences in state and local law that make such a lease difficult to implement.

In the proposed rule, the Department's requested comment on whether local privacy acts may pose an obstacle to the flow of information concerning waiting list information between jurisdictions and PHAs. One commenter expressed the opinion that there would be no privacy act violation if the notice of availability of the HOME-funded tenant-based assistance were sent by the PHA directly to the family. Another commenter suggested this as a reason not to use the PHA waiting list. Since use of the PHA Section 8 waiting list is statutory, this is not seen as a problem. Another commenter suggested an alternative of giving the PHA right of first refusal. The lack of a significant amount of comment on this issue suggests to the Department that local privacy acts would permit PHAs to share their waiting list information with the jurisdiction administering the HOME Program.

On the comment that the PHA be paid administrative fees, HUD assumes that appropriate administrative fees (not to exceed those already established for the voucher or certificate programs) will be included in any contractual arrangement, regardless of whether the PHA or another entity manages the

program. However, HOME funds cannot be used for administrative fees.

One commenter suggested that the language in this section be modified so that jurisdictions without PHAs could have a tenant-based program. HUD believes that most, if not all, participating jurisdictions will have a PHA. If this is not the case, then a higher-level PHA—a county or state PHA—is generally available.

One commenter wanted the term of the lease increased to 48 months. The 24-month lease (with extension possible if there are additional funds) is statutory.

One commenter wanted enforcement mechanisms added so that owners would have to comply with Section 8 HQS rather than letting contracts lapse. The enforcement mechanism is the cessation of payments and the requirement that the tenant move if the owner does not comply.

Section 92.212 REACH

Two public comments were supportive of this section. HUD will continue to provide lists of properties as they become available to jurisdictions and nonprofit organizations that submit a request to the Chief Property Officer in the local HUD Office. (In some instances, a state would need to request such a list from more than one Field Office having jurisdiction within its boundaries.)

The Single Family Property Disposition Homeless Initiative, contained in 24 CFR part 291, final rule published September 16, 1991, at 56 FR 46952 (making final an interim rule), gives priority consideration for the lease or purchase of HUD-owned properties to homeless providers for a 10-day period prior to public offering. Over 1700 properties have been leased, and 300 sold, in this program. Up to 10 percent of HUD's inventory is available for this purpose.

With regard to establishing fair market value for HUD-owned properties, the Department contracts for single family appraisal services and uses this value to establish HUD's listing price. Uniform Standards of Professional Appraisal Practice are applied. If a property does not sell within 30 days at the initial appraised value, the Chief Property Officer may adjust the asking price. Each property is re-analyzed every 30 days.

Nonprofit organizations and government agencies may purchase properties directly from the HUD inventory at any time and receive a 10 percent discount off the current asking price. This discount represents the savings to HUD where brokerage

services are not used. When such transactions occur before the property's public offering, no greater discount is permissible because of HUD's obligation to protect the value of the mortgage insurance fund.

Section 92.214 Prohibited Activities

There were 25 public comments on this section, 21 of which opposed the prohibition on operating reserves, while six commenters opposed the prohibition on project-based rental assistance. The understanding of operating reserves varied greatly, with one commenter using it interchangeably with reserves for replacement. Many saw operating reserves as a fund available during lease-up to guarantee that the project met its obligations before full occupancy, while others saw it as a longer-term capital reserve to handle unanticipated increases in operating costs. The reasons to allow operating reserves included guaranteeing very-low income occupancy, providing a cushion for nonprofits, allowing states working on preservation efforts to handle buildings that have experienced severely delayed maintenance, and to secure private lender participation. It was suggested that localities be made to justify why operating reserves make more sense than capital lending up-front, and that operating reserves be limited to new construction. One commenter suggested that matching funds be used for operating reserves as long as the project is in compliance. Another commenter asked if HUD would prohibit Section 8 project-based assistance in a HOME project.

As indicated under § 92.205, the Department has revised the regulation to make an initial operating reserve an eligible cost. The regulation has also been revised expressly to permit reserves for replacement and project-based tenant assistance as an eligible use of matching funds in HOME projects, but the regulation maintains the prohibition against the use of HOME funds for these costs. The Department does not intend to prohibit Section 8 project-based assistance if that assistance is available and a jurisdiction wishes to use that resource in a HOME assisted project.

Six commenters were very concerned about the lack of administrative funds, without seeming to realize that this restriction is statutorily required.

The Department has added a new paragraph (h) to prohibit the use of HOME funds, other than for tenant-based assistance, in a project that has been previously assisted with HOME funds while the project is subject to a period of affordability under § 92.502 or

§ 92.504. Additional HOME funds may be committed to such a project no later than one year after project completion, but the total amount of HOME funds committed to the project may not exceed the maximum per-unit subsidy amount allowed under § 92.250.

Section 92.215 Limitations on Jurisdictions under Court Order

There were several commenters on this section. One commenter asserted that the regulation, which mirrors section 224 of the statute, is against the public interest. The commenter asked HUD to seek a statutory amendment.

The other commenters thought that the regulation might have the effect of encouraging participating jurisdictions to delay or unduly limit swift and effective responses to violations of civil rights laws. These commenters suggested that the regulation clarify that if a participating jurisdiction is found to be in violation of civil rights laws, HUD is prepared to facilitate, encourage or require the use of non-HOME funds to implement effective remedies. The regulation should also specifically allow appropriate race-conscious remedies where appropriate to address or redress alleged discriminatory housing practices. The regulation should also state that HUD will provide technical and legal assistance to these jurisdictions to develop effective remedies.

The Department has decided not to accept the above-summarized suggestions. The regulation follows the statutory language in section 224. The Department is not sure what effect amending the regulation in the manner described would have; however, the Department has sufficient authority under the civil rights laws (cited in § 92.350) to take action where a participating jurisdiction has been found to violate civil rights laws.

Section 92.216 Income Targeting: Tenant-Based Rental Assistance and Rental Units.

There were 10 public comments on this section. Three commenters suggested permitting delegation of the eligibility determinations and annual reexaminations of income to project owners, sponsors, or the PHAs. While the jurisdiction may require project owners, sponsors, or subrecipients or contractors to make the determinations and re-examine incomes, the Department will hold the participating jurisdiction responsible. Three others suggested that only initial determinations were necessary, not realizing that the scope of the

requirements as stated in the rule is statutory.

One commenter cited the huge paperwork burden this requirement imposes, while another suggested that HUD specify who has this responsibility. Another commenter stated that annual reexaminations and adjustments of rents would be in conflict with the commenter's rent stabilization laws. While the Department is sympathetic with the workload considerations without HOME eligible administrative costs, the ongoing recertification requirements are statutory.

Another commenter expressed concern about the trend toward large-scale rental housing in the statute. The Department agrees that the statute appears to favor large-scale rental properties, but believes that participating jurisdictions have flexibility in the selection of projects.

Another commenter wanted to exclude current tenants in newly acquired buildings from the requirement that 90 percent of funds be spent on families below 60 percent of median income, apparently not understanding that this statutory requirement applies to the fiscal year allocation and not to specific projects.

Matching Contribution Requirements—General Comments

Probably the greatest number of comments on the proposed regulation addressed the matching fund requirements.

Many general comments were made about severe fiscal distress that states and local governments are experiencing. Commenters asked that HUD be more flexible with reference to matching contribution requirements. Many commenters wanted HUD to pursue legislative changes on all aspects of the matching contribution requirement.

Section 92.218 Amount of Matching Contribution

The Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, Public Law 101-139, 105 Stat. 736, approved October 28, contains a proviso waiving the matching contributions requirements with respect to HOME funds appropriated in that Act. The Department has added a footnote to the rule making it clear that participating jurisdictions are not required to comply with the matching contributions requirements in the rule with respect to HOME funds drawn down from amounts appropriated in the above Act,

regardless of when those funds are drawn down.

Several commenters objected to the required matching contribution percentages for the various activities. The percentages are statutory (Section 220 of NAHA).

One commenter asked that the regulations be clarified so that acquisition of standard housing (not requiring rehabilitation) has a 25 percent match. For acquisition of an existing structure without rehabilitation, the match is 25 percent, but for acquisition of housing with a certificate of occupancy within the last year, the match is 50 percent.

Several commenters addressed the calculation of the match based on project designation. HUD explained in the preamble to the proposed regulation that each project would be set up in the Cash and Management Information System and would be designated as a new construction, substantial rehabilitation, rehabilitation, or acquisition project. In the rare situation where a structure combines both rehabilitation and new construction activities (e.g., adding units outside of the existing wall of the structure), the project would be designated as new construction. Based on the project designation, the match "liability" for the participating jurisdiction's program would be calculated.

Several commenters objected that a project involving several activities would have a matching contribution based on the rate for new construction. One suggested approach would be to prorate the various activities within the project. Another suggested approach would be to designate a project as rehabilitation as long as less than 50 percent of the gross residential square footage is newly constructed. The Department has decided not to accept either suggested approach.

Both approaches would present administrative problems. Moreover, most cases involving expansion beyond existing walls will be to add rooms, rather than new units. Adding new rooms is considered rehabilitation; adding new units is new construction. The Department has revised the regulation, to add to the regulation text, information found in the preamble to the proposed rule. The regulations have been revised to reflect the requirement that projects be designated at project set-up to determine matching contribution liability for activities carried out with respect to the project.

One commenter stated that project designation is not consistent with a matching contribution requirement based on the program; it appears to

make the match project-based. The project designation is required to calculate a participating jurisdiction's matching contribution liability. The project designation will determine the required match percentage. The match liability for each fiscal year will be based on the HOME funds drawn from the Treasury account during the fiscal year for each project. The matching contribution actually made by a participating jurisdiction can vary by project, so long as the participating jurisdiction meets the overall match liability on funds drawn each fiscal year.

Another commenter supported a calculation of the match on a program (not project-by-project) basis and stated that the match is not really program-wide, since the HOME subsidy limit is based on the section 221(d)(3) maximum amount multiplied by 67 percent (See § 92.250). The Department disagrees with this comment. The match is a program match, and the actual percentage of matching contributions made by a participating jurisdiction will vary from project to project. The subsidy limit is an upper limit that will not affect most projects. (The Department expects that rehabilitation projects will typically be well below the subsidy limits.) However, even for a project with costs exceeding the HOME subsidy limit, the remainder of the costs need not be paid with matching funds (e.g., the costs could be paid from owner equity or market-rate financing), so long as the participating jurisdiction meets its overall matching contribution requirement during the fiscal year.

One commenter stated that HUD has flexibility to recognize the matching contribution at the time a binding commitment is made, the year the funds are disbursed, or to amortize the matching contribution over a number of years. The Department disagrees with this comment. A binding commitment does not constitute a contribution to the program. The Department will give credit for a matching contribution at the earliest point it can be determined that a contribution has been made. The Department will give each participating jurisdiction an administrative cost match credit equal to 7 percent of each allocation at the time each allocation is awarded. A cash contribution will be credited when matching funds are expended (for cash contributions or for infrastructure). Credit for donation of property will be given at the time property is donated (e.g., when title is transferred by the participating jurisdiction to a project owner that will rehabilitate or newly construct and

maintain the project as affordable housing). Credit for tax abatement will be given at the time the jurisdiction officially grants the tax abatement and the amount of the credit will be the present value of the tax abatement e.g., for abatement of property taxes over a specified number of years. Credit for the grant equivalent of a below-market interest rate loan will be given at the time of the loan closing.

One commenter stated that more guidance is needed regarding the timing of the match. The Department agrees and the regulation has been expanded on this point.

Several commenters objected to the requirement (in § 92.218(a)) that the matching contribution be made on a fiscal year basis. Several commenters requested that states be given six months beyond the federal fiscal year to commit match funds, because state fiscal years differ from the federal fiscal year and additional time is needed to identify and commit state resources for matching contributions. The requirement that the matching contribution requirement be met during the fiscal year is a statutory requirement (section 220(a) of the statute).

Several commenters suggested that HUD count toward the matching funds contributed to projects that do not receive HOME funds, but that serve people within HOME income limits. Section 220(a) of the statute requires matching contributions to be invested in projects assisted with HOME funds.

Section 92.219 Recognition of Matching Contribution

The Department received several comments concerning the automatic administrative cost match credit of seven percent to be given to participating jurisdictions. Several commenters expressed appreciation for the automatic 7 percent credit. One comment requested that the credit be increased to 15 percent. The 7 percent is statutory (Section 220(b)(2)). Another commenter thought that the 7 percent credit should be based on each project amount, not the HOME allocation amount. Section 220(b)(2) provides that the contribution for administrative expenses can be recognized "only up to an amount equal to 7 percent of the funds provided for investment under this title."

A commenter from California requested that HUD change the matching contribution requirement on mixed-income projects so that the minimum percent of dwelling units for low-income persons in a project is reduced from 50 to 49 percent, to accommodate a California constitution

provision that requires proposed rental housing projects that will have 50 percent or more low-income tenants to be approved by community residents in a local election. The 50 percent minimum is a statutory requirement (Section 220(b)(1)(B)).

Section 92.220 Eligible Forms of Matching Contribution

Several commenters made general observations that the statutory language on eligible forms of contribution is illustrative, not exhaustive. The Department believes that the statutory language is intended to be an exclusive list. The Senate bill provided that the match could include "such other in-kind contributions as the Secretary may approve." This language would have given the Department the ability to recognize other forms of matching contributions; however, the Senate language was dropped in conference and is not included in the statute.

A few commenters observed that state constitutional provisions (which provide that the credit of the state shall not be given or loaned in aid to any individual, association or corporation) will preclude states and local governments from using tax or general revenues as a match.

The Department understands that some state constitutions may affect the form of match that can be provided. However, the match is a statutory requirement for the HOME Program.

The Department received many comments on the forms of the match. Many of the comments were identical.

Commenters requested HUD to recognize "sweat equity" as an eligible form of matching contribution. The Department believes that sweat equity cannot qualify. The Senate bill specifically recognized sweat equity, but the Senate language was not included in the approved legislation.

Many commenters stated that the eligible forms of match should include cash raised through debt issued by a jurisdiction, without regard to source of repayment, including repayments from rents or other proceeds from HOME financed projects. The statute requires the match to be a contribution. The test, therefore, is whether a proposed form of match is a true contribution. As long as the funds are permanently dedicated to the HOME Program (regardless of the form in which matching funds are provided to a particular project), it will be a contribution. If the matching funds loaned to a project must be repaid to other than the HOME account, it is not a true contribution.

Commenters asked that debt, both taxable and tax-exempt, be recognized as a match at its full face value. The

commenters reasoned that tax-exempt debt will be a portion of a jurisdiction's private activity bond cap, which represents a commitment of local housing resources to HOME Program. The test is contribution, not commitment. If the funds raised by the debt are permanently contributed to the HOME Program, and funds other than HOME or matching funds (including repayments of HOME and matching funds loaned to a project) are used to retire the debt, it is a contribution.

Several commenters wanted HUD to clarify that proceeds from the sale of general obligation bonds (even if tax-exempt) may be used as match if sources other than HOME projects are used to repay the bonds. As stated above, if proceeds from the sale of bonds are permanently contributed, then they would qualify as matching funds.

Owner equity was another form of match suggested by many commenters. The Department believes that owner equity is not a contribution to the HOME Program; it is retained by the project owner. Moreover, it is not among the forms of match permitted by the statute.

Many commenters asked that the value of incentive zoning/density bonuses be recognized as meeting the matching funds requirement. The Department believes that any increase in property value created by incentive zoning is a benefit to the property owner (increases owner equity) and does not constitute a contribution to the HOME Program. This comment was not adopted.

The Department received many comments concerning loans. The proposed regulation recognized as a match the grant equivalent of a federally taxable, below-market interest rate loan that is not repaid to the participating jurisdiction's HOME Investment Trust Fund account. (Loans made to a project that are repayable to the HOME account are counted as matching funds for the face value amount of the loan.)

Commenters asked HUD to recognize the full value of loans, including Community Reinvestment Act loans, whether or not repaid to jurisdiction's HOME Investment Trust Fund account. A loan to a project that is not repaid to the participating jurisdiction's HOME account is not a permanent contribution to the HOME Program, and therefore, is not a match.

Commenters wanted to know whether loans to housing owners that are really grants should be counted as matching funds. They stated that the loan documents are really an enforcement device, and no repayment is expected. A

loan is only repayable if recipient fails to comply with programmatic requirements. The Department's position is that all loans, including forgivable loans and loans requiring repayment for noncompliance, are counted as a match, provided that any loan repayments are required to be made to the HOME Investment Trust Fund account.

One commenter thought that charitable deferred loans that require repayment to the charitable institution when the housing project is no longer affordable should count as matching funds. The Department disagrees. Loans that are not repayable to the HOME Investment Trust Fund account are not permanent contributions to the HOME Program.

The Department received a number of comments concerning the calculation of the grant equivalent of below-market interest rate loans not repayable to the participating jurisdiction's HOME account. One commenter suggested that if a local government issues tax-exempt bonds and then loans the proceeds to a HOME project at a lower interest rate, the amount of the match should be based on the present value of the difference between payments to be made on the bonds and payments to be received from the loan. The interest rate on the bonds should be used as the discount rate. The Department agrees, and has adopted this comment and eliminated the requirement that below-market rate loans must be federally taxable.

One commenter argued that the present value of a below-market interest rate loan that is not repayable to the HOME Program should be based on interest rate (not yield) forgone. The Department disagrees. A loan may have an interest rate that is below-market, but prepaid interest (paid as points) could mean that the loan is not actually below-market rate.

Several commenters wrote that the below-market interest rate benchmarks in the regulations are too low, and suggested other benchmarks. The suggestions ranged from a low of 175 basis points above the 10-year Treasury note rate to a high of 300 basis points above the 10-year Treasury note rate. Another suggestion was to use 250 basis points over the GNMA coupon rate, with provision for higher rates depending on loan to value ratios and debt service coverage. Another commenter suggested the use of the Applicable Federal Rate set monthly by the Treasury for short-term and long-term obligations, because this is the rate used for the low-income housing tax credit program. The Department has agreed to increase the benchmarks. The Department is using

interest rates for 10-year Treasury notes for all types of projects, so that the rates are readily available to participating jurisdictions. (See § 92.220(a)(ii)(B).)

Several commenters stated that repayment of loans should not have to be made to the HOME Investment Trust Fund account if the matching funds come from (and will be repaid to) a state program fund for affordable housing—especially if the state program is more targeted than the HOME Program.

The Department has tried to accommodate these comments. The regulation has been revised to permit participating jurisdictions to establish a second local account for the HOME Investment Trust Fund within an existing state or local government affordable housing program, to enable the state or local government to use its existing affordable housing program as a match. This regulatory change will permit the state or local program funds to be used as matching funds and will assure that any repayment of the matching funds is subject to all HOME requirements. As with funds in the regular local HOME account, the repayments are not required to be matched and cannot be used to provide matching funds.

One commenter suggested that proceeds from the sale of loans made with HOME funds to Neighborhood Housing Services of America should be allowed to be counted as a match. Loans made with HOME funds can be sold in the secondary market. However, the proceeds are considered to be HOME funds and cannot be used as a source of matching funds.

A commenter thought that direct subsidies or subsidized advances received under the Federal Home Loan Bank System's Affordable Housing Program should be counted as matching funds. The advances are provided to the member banks, not to the HOME Program. The advances will enable the member banks to make below-market interest rate loans. The grant equivalent of the below-market interest rate loans can be counted as a match.

Another suggestion was that Neighborhood Reinvestment funds should count as a match. The commenter stated that these funds are used by local Neighborhood Housing Services organizations for both project-specific purposes and for local administrative cost. Neighborhood Reinvestment funds are not an eligible form of matching funds because they are federal funds and the statute requires that cash contribution to be from non-federal resources.

The Department received several comments concerning tax abatements.

One commenter suggested that the regulations should specify the discount rate for determining the value of tax reductions or abatements and that the regulations use the Applicable Federal Rate set monthly by the Treasury for short-term and long-term obligations, because this is the rate that is used for the low-income housing tax credit program and it approximates the interest rate that would be earned on capital if it were invested to generate subsidies equivalent to those provided by below market rate loans. The discount rate for valuing property tax abatement should not reflect any premium for risk or for transaction costs. The Department agrees that the regulation should specify a discount rate for determining the value of tax reductions and abatements. The regulation (§ 92.219(a)(2)) has been revised to specify a discount rate based upon the Treasury security with a maturity closest to the number of years the taxes are waived, foregone, or deferred.

Another commenter stated that the value of property tax abatements should be based on either (1) post-improvement values if they are based on construction costs, or (2) the post-improvement value assuming highest and best use, if the income approach is used. The Department expects that the value of property tax abatements will be based on state or local law governing property tax assessment.

Many commenters requested that match credit be given for the full appraised value of RTC, FHA, VA or other foreclosed property, regardless of the amount paid by the jurisdiction. The proposed regulation specifically permits as matching funds the value of land and other real property, not acquired with federal resources, as appraised in conformance with established and generally recognized appraisal practice and procedures. The amount the participating jurisdiction pays for the property is not relevant in determining the value of property donated.

Another commenter suggested that the appraisal of property should be based on value at the highest and best use. This comment is consistent with the regulation, which requires that the appraisal be in conformance with established and generally recognized appraisal practice and procedures.

One commenter asked HUD, instead of requiring an appraisal of each building, to develop a vacant building index as a method of determining value and give the local government the option to do an appraisal on specific properties if it thinks the value of the property

exceeds the index. The commenter suggested the same type of index for determining the value of vacant land, e.g., using figures in Olcott's Book of Land Values. The Department has not adopted this suggestion.

One commenter asked that HUD recognize the value of vacant land and real property acquired with federal funds. The Department has not adopted this suggestion. Because the statute specifically prohibits cash contributions from federal resources, the Department believes that this prohibition cannot be circumvented by using federal resources to acquire property (or to pay for infrastructure) which is then contributed to the HOME Program.

The Department received a comment concerning investment in on-site and off-site infrastructure. The commenter stated that the infrastructure may be the first stage in the revitalization plan and may precede, by several years, significant housing development or rehabilitation. Therefore, the commenter suggested that the one-year time limit in the regulation be changed. The Department has not accepted this comment. The Department believes that the 12-month rule for completion of the infrastructure is reasonable, and is one indication that the infrastructure is directly required for the affordable housing assisted with HOME funds.

Several commenters argued that contributions should be required only for the period of affordability of the project, not permanently for the HOME Program. The Department disagrees with this comment. For a contribution to be a true contribution, it must be permanent.

The Department was asked to permit carryover of "excess" match. The Department agrees with this comment and will permit the carryover of match made in excess of the amount required, including automatically credited administrative cost amounts not needed to meet the match liability in a given fiscal year.

Commenters requested that HUD count a jurisdiction's contribution for reserves for replacement and project-based tenant assistance (operating reserves) as a match. The Department agrees, and the rule (§ 92.219(b)) has been amended to permit this use of matching funds and to clarify how matching funds may be used.

Several commenters suggested that supportive services should be recognized as a match, especially for special needs housing projects. The Department does not accept this suggestion.

Several comments were received concerning community housing

development organizations and the matching funds requirements. One commenter asked that the administrative expenses of community housing development organizations should count as a match. The Department is already permitting the maximum statutory amount of matching funds for administrative expenses.

Commenters suggested that predevelopment contributions to community housing development organizations (seed money, project planning funds, and costs related to site identification and control), as well as capacity grants, should count as matching funds. Contributions may be spent by community housing development organizations on eligible HOME costs (see §§ 92.206 and 92.301) and count as matching funds. Grants to community housing development organizations to build capacity are not contributions to affordable housing assisted with HOME funds, and cannot be counted as match.

One commenter stated that interest earned on HOME funds before disbursement should not require a commensurate increase in matching funds. The Department agrees that any investment of HOME funds during the permissible 15 days before disbursements (see § 92.502(c)(2)) does not increase the matching amount required. The regulation calculates the match based on the amount of funds drawn from the participating jurisdiction's Treasury account of the HOME Investment Trust Fund. No regulatory change is needed.

The Department received several comments regarding program income. Several commenters wanted Community Development Block Grant (CDBG) program income to be eligible for matching purposes. The regulation permits cash contributions to be made from program income from a federal grant earned after the end of the award period if no federal requirements govern the disposition of the program income. The regulation reflects the Department's position that program income that is not subject to federal requirements is unrestricted money that a participating jurisdiction could provide as a cash match. The CDBG statute and regulations require CDBG program income to be used in accordance with all requirements applicable to CDBG grant funds, as long as the CDBG grantee is participating in the CDBG program. Therefore, this program income is not eligible as a cash match.

Similarly, commenters asked that Rental Rehabilitation Program loan repayments be eligible as match. The Rental Rehabilitation regulation imposes

requirements on the use of program income until the grantee's program is completely closed out for all years. After that point, Rental Rehabilitation loan repayments or other program income could be eligible as a cash match.

One commenter stated that contributions from private foundations should be considered as matching funds. The regulation provides that a cash contribution may be made by the participating jurisdiction, private entities, or individuals. Thus, the regulation recognizes contributions from private foundations as a cash match.

The Department received other suggestions on forms of eligible matching funds. However, the commenters did not provide sufficient information for HUD to respond to the specific suggestions. HUD intends to provide notices or other guidelines on matching-funds issues.

Section 92.221 Match Credit

To provide additional clarification on the match, the Department has added a section that states when the participating jurisdiction will be credited for the various types of matching contributions.

Section 92.221 Reduction of the Match (Renumbered as § 92.222)

Several commenters asked for guidelines describing the basis for granting reduction of the match. One commenter wrote that HUD should identify economic and fiscal factors as grounds for reduction and a state should be given an automatic reduction (for 3 years) if the state meets fiscal or economic measures established by HUD. Another commenter asked HUD to develop reasonable and objective standards for determining which jurisdictions qualify for the reduction of match that recognize the acute fiscal distress facing most jurisdictions and publish the list; if a jurisdiction falls within the standards, its request for relief would be granted upon request.

The Department believes that, because the statute imposes the match requirement, any jurisdiction that decides to participate in the HOME Program should be prepared to meet this statutory obligation. The Department recognizes that some jurisdictions may be facing severe fiscal conditions; however, the amount of match required in the first year or two of the program should be minimal because it will take some time to move projects from commitment to the point of expenditure of HOME funds—the point at which the match liability is incurred. Moreover, the Department will credit the match at

the earliest possible point. Each participating jurisdiction will be credited with seven percent of its allocation amount at the time the funds are awarded for administrative expenses. Credit for tax abatement will be given at the time the jurisdiction grants the abatement, and credit for donation of property will be given at the time of transfer of the property.

Local participating jurisdictions that are experiencing both serious fiscal distress and lack of fiscal capacity (poverty and low per capita income) and that are planning activities that will result in heavy match liability in the first three years of the HOME Program may request a reduction of the match. The request for a reduction may be made in the program description and requested for the three-year period, if required.

Subpart F—Project Requirements

Section 92.250 Maximum Per-Unit Subsidy Amount

There were 29 comments on this section. Seven commenters felt that HUD should not establish any cost limits—that the amount of HOME funds should be established locally, based on the production costs of non-luxury housing in that market. Twelve commenters favored increasing the cost limits, and the following discussion will summarize the proposals that were offered. Eleven commenters objected to the deduction of tax credits from the amount of HOME subsidy, stating that this feature of the rule was without statutory basis. Three of those commenters suggested that it should be net proceeds which should be deducted from the subsidy amount, not gross. Two commenters mentioned that the deduction of the credit posed timing problems between the allocation of the credits and the approval of projects. One commenter suggested that HUD establish a national value for the credit to overcome this problem.

The proposals on increasing the subsidy amount included the following: Three commenters suggested project-by-project approvals by HUD up to 240 percent of the limits, and a blanket program-wide increase for high-cost areas up to 140 percent of the limits. Two commenters wanted the 67 percent multiplier increased to 75 percent; another to 80 percent; and two others to 100 percent.

Another pair of commenters suggested the allowance of additional HOME subsidy up to 40 percent of the additional cost above the cap, while another suggested that the difference between costs and the limit be equally shared by HOME and matching funds.

Another commenter suggested an additional 10 percent to reflect development costs. The commenter also noted that the FHA limits have only been sporadically adjusted and suggested that, once pegged, they should be adjusted annually using a reliable cost index.

Another commenter suggested that the Total Development Cost Limits of the public housing program be used. A commenter felt that the subsidy limits should not be applied to the set-aside for Indian tribes. Another commenter asked that tenant assistance be outside the per-unit subsidy amount.

One commenter thought the subsidy scheme adequate for its purposes.

The Department believes that the per-unit subsidy proposal described in the rule provides a substantial amount of HOME funds for development, and the Department is not prepared to change it at this time. As clarification, the Department agrees that net proceeds (if the proceeds are syndicated, or, if they are not, the present value of the stream of tax credits) should be subtracted from the per-unit subsidy amount, and that the amount of tenant assistance is outside the maximum per-unit subsidy limit. For projects funded under the competitive award process for Indian tribes, Total Development Costs for public housing authorities will be applied as the per-unit subsidy limits.

Section 92.251 Property Standards

There were 14 comments on this section. Five commenters liked the rule language allowing first-time homebuyers two years to bring their units up to standard; one commenter suggested three years. One commenter suggested that HUD change the requirement of property standards to say that the unit will meet applicable codes, rehabilitation standards, or ordinances and, that, if they do not exist, then Housing Quality Standards (HQS) would apply. The commenter also raised the issue whether emergency repair programs would be precluded if all HQS violations were not corrected.

Another comment suggested that HUD should require all units to be maintained in accordance with applicable Housing Quality Standards by specifically citing HQS in § 92.504(c)(6).

In response to the comments, the Department has retained the provision in (§ 92.251) that allows first-time homebuyers to bring their properties up to standard within two years of purchase. The Department believes that the Section 8 Housing Quality Standards (HQS) are minimal standards and that HOME-assisted units should meet this standard initially and should continue to

meet this standard for the period of affordability for rental housing.

In recognition of the impact of utility costs on housing affordability, HUD requested comments on the possible use of the Cost Effective Energy Conservation and Effectiveness Standards (CEECS) (24 CFR part 39) for property rehabilitation carried out with HOME funds. These standards were mandated by Congress and have been in use since 1979 for the Section 312 Property Rehabilitation Loan Program and several other HUD programs for assisting rehabilitation. They allow the owner to determine whether the cost of an energy improvement can be recovered through savings in fuel costs over a reasonable period of time.

Five commenters recommended that they be required for all property rehabilitation. Two commenters opposed requiring their use, and one of these recommended that their use be encouraged. Four other opposing commenters appear to have confused the CEECS with the energy efficiency standards to be promulgated for new construction under section 109 of NAHA. The Department does not propose applying new construction standards to property rehabilitation.

In light of these comments, the Department will require the use of the CEECS for all substantial rehabilitation (defined as \$25,000 or more) assisted by HOME. It will encourage localities to address the need for energy efficiency standards for moderate property rehabilitation. Some will use the CEECS. Others may develop their own standards. The Department will study this experience and use it to decide whether to require, in the final rule, use of the CEECS for all or a portion of the remaining rehabilitation.

Section 92.252 Qualification as Affordable Housing: Rental

There were 48 public comments on this section. The majority of the comments focused on the length of the periods of affordability. One commenter suggested shorter terms than the proposed rule, nine commenters supported the periods that were proposed, 22 recommended longer terms, and two wanted affordability in perpetuity. Fifteen commenters requested that the Department make clear that the terms proposed were minimums which could be increased by the jurisdiction. One commenter wanted the terms established locally. Another commenter objected to the 20-year term for new construction and said the term should be based on the level of subsidy, as had the terms for rehabilitation.

Among those commenters suggesting longer terms, the recommendations included: The period required for tax credits, 30 years, if the project received more than \$15,000 of HOME funds; 40 years (one commenter); and 50 years, or, if the project received under \$5,000 of HOME funds, 10 years (8 commenters). Another commenter suggested a 99-year ground lease.

Five commenters expressed concern about very low-income tenants paying rents based upon 30 percent of gross income of a family whose income equals 60 percent of area median—which means that even those families that are right at the income limit will be paying more than 30 percent of income for rent. It was suggested that HUD use 30 percent of 50 percent.

On this section, three commenters suggested that HUD adopt the tax credit program approach, which establishes maximum rents based on unit size, but derived from an appropriate family size and income.

A comment suggested that utility allowances should be included in the rent structure. One commenter wanted clarification on monthly adjusted income in § 92.252(a)(2)(i) and gross income in § 92.252(a)(2)(ii).

Several commenters suggested eliminating the requirement that tenants over 80 percent of median pay not less than 30 percent of income. (This is a statutory requirement.) Commenters wanted their payment capped at Fair Market Rents (FMRs), modified to include state and local rent regulations or market rent established by locality. It was also suggested that units occupied by families having federal or state rental assistance should be excluded from rent limitations.

Other commenters had the following suggestions: increase the 20 percent of very low-income requirement to 40–60 percent; 20 percent very low-income is not feasible for small projects; lower 90 percent to 50 percent of rental units for families below 60 percent; allow jurisdictions to use HOME funds for administrative fees, or to charge owners a fee to do annual rent recertifications.

Another series of comments included the following: FMRs should be eliminated as a limit on rents, project-based assistance should be allowed with higher rent levels than specified, and higher rent levels should be allowed to ensure project feasibility.

The Department was asked to clarify that only HOME-assisted units must be occupied by low-income families, and to create program-wide waivers to the 100 percent low-income housing requirement

(flexibility in the Rental Rehabilitation Program was cited).

Two different views were suggested in the following comments: allow rental units to be converted to tenant ownership after 15 years, and then apply the 15-year ownership requirements; no conversion to ownership should be allowed except to limited equity coops, and then use restrictions would begin again, as for the initial rental housing.

The following recommendations were offered by one commenter: HUD should aggressively pursue an earmark of Section 8 rental assistance for HOME projects to ensure very low-income participation; the rule should be revised to prohibit any discrimination against applicants based upon the amount or source of income; and HUD should establish binding useful life restrictions on affordability and require that owners cannot benefit financially from violation of these provisions, i.e. any proceeds in excess of the project's bona fide debt must be repaid to a local trust fund, in addition to the repayment of any HOME Investment.

The Department has decided to maintain the periods of affordability in the proposed rule; however, the final rule has been revised to clarify that the periods are minimum terms which may be extended at state or local discretion.

The Department agrees with the recommendation that it must establish maximum rents based on unit size derived from an appropriate family size and income, and has adopted such an approach in the final rule.

With regard to changing the percent of low-income or very-low income families expected to reside at the established rent levels, the regulation mirrors the statutory requirements. The statute also requires that families who no longer qualify as low-income must pay 30 percent of the family's adjusted monthly income for rent.

The Department has revised the rule to lower the rent level for very low-income families from 30 percent of 60 percent of area median to 30 percent of 50 percent of area median. In addition, the regulation has been revised to cover utilities in the rent structure.

Section 92.253 Tenant Participation Plan

There were eight comments on this section. Three commenters suggested that CHDOs should be able to give preference to neighborhood residents and interview prospective tenants to see if they will be good tenants. One comment recommended that the requirement for the owner to maintain a written waiting list be eliminated. The commenter believed that the

requirement would be burdensome, and that following an approved affirmative marketing strategy would serve a similar purpose to the waiting list.

On giving preference to neighborhood residents, we assume that mostly neighborhood residents will apply. However, a specific preference to neighborhood residents is not possible because the federal preferences must be applied.

On interviewing prospective tenants to see if they will be good tenants, it is expected that owners do this as good business practice.

The comment to eliminate waiting lists cannot be adopted. Use of a waiting list is required by section 225(d) of NAHA.

The commenter wanted more tenant protection in case of termination of tenancy—to be locally adopted. The Department requires the minimum set forth in the regulations. If localities want more tenant protections, they are free to adopt them as long as they do not conflict with these regulations.

Several commenters wanted model leases. HUD believes that because of the wide variations in state and local law it is better to state our requirements and prohibitions and allow localities and owners to use their own leases.

One commenter suggested the two-year lease term under statute should be extendable if a jurisdiction puts in other funds. This is already the case. They went on to say that the tenant could only be evicted for cause. This also is already the case.

One commenter said a one-year lease does not work for special needs. The regulation as written provides flexibility in this regard.

One commenter suggested locally designed tenant assistance programs are not sufficiently defined in the regulation and suggested that HUD require that either a voucher or a certificate model be followed. HUD has decided to give jurisdictions flexibility in this regard.

Another commenter said that tenants should not be denied admission to HOME projects because of bad credit or rent payment problems. Criteria for admission should be related to the ability to pay HOME subsidized rents, not market rate rents, but CHDOs should interview prospective tenants to see whether they will be good tenants.

One commenter said there was no basis for HUD to establish a minimum rent standard under tenant assistance. The rent should be based on income. HUD disagrees and believes that tenants have a responsibility to pay some portion of income towards housing costs. If there is zero income, as may be

the case with homeless persons, then the minimum contribution is also zero.

One comment pointed out that HUD neglected to include utility allowances in the definition of reasonable rent. The regulation has been revised to be more specific in this regard. One commenter suggested that a tenant participation plan (such as that required for CHDOs) should be required of all owners. HUD does not wish to impose additional requirements where they are not required.

Section 92.254 Qualification as Affordable Housing: Homeownership

The Department received 46 comments on this section.

Purchase With or Without Rehabilitation—Period to Ensure Affordability

Five comments supported the proposed regulation regarding the assurance that the housing will remain affordable for a long period; these commenters did not suggest changing the proposed rule. Five others proposed that the period to ensure that housing remains affordable to low-income buyers be made longer. Two of them suggested that the period be the longer of 50 years or the "remaining useful life," while two other commenters suggested it be "perpetual" or for a very long time (50 years). The other commenter proposed that the term be increased to equal the term offered by FHA insured loans.

There were four other commenters who believed that the period (20 years for newly constructed housing or 15 years for other housing) required for low-income affordability was too long; two commenters suggested that the period should be only five years. Two of the commenters did not offer a specific period, but related the period to the period it takes to recover the participating jurisdiction's HOME investment.

Two other commenters, while not commenting on the actual periods in the proposed rule, suggested that the residence requirement apply only to the initial homeowner. Another commenter indicated that the state courts had found that requiring a recipient to remain for a specific period is unenforceable if Community Development Block Grant funds had been used to assist in the acquisition of the unit.

The Department has decided, given the balanced responses it received to the provisions of this section, not to extend or shorten the terms of affordability for homeownership. The rule has not been revised. The period of affordability is not tied to the

homeowner, but rather to the unit. The period of affordability does not require the homeowner to remain in the property. However, the terms of affordability (20 years for new construction and 15 years for rehabilitated housing) are minimums, and participating jurisdictions have authority to lengthen these terms if they desire.

Fair Return on Investment (Equity) and Return of HOME Investment to the Participating Jurisdiction

The seven comments about the amount of equity that the initial homeowner could retain varied between permitting more equity to limiting the amount of it. Two of the latter comments proposed that a lien on the property in the amount of assistance would provide the locality with its return while still permitting a fair return to the original buyer.

Five commenters offered reasons for providing the initial homeowners more of the equity, such as returning to the homebuyer inflation-adjusted costs of buying, improving, and financing the acquisition of the property; or, permitting the homeowner to retain more of the equity in areas where successor homeowners are difficult to find.

Two of the commenters stated that the proposed rule is a disincentive for low-income persons who "want to participate in the free market with a minimum of restrictions." Another stated that homebuyers should not be made "second class homeowners" who can only sell to other low-income buyers.

The comments about the return of the initial homebuyer's equity are also related to the participating jurisdiction's recovering its initial investment. Two commenters suggest that any gain or equity increase be apportioned between the HOME fund and the homebuyer in proportion to their contributions. One of these commenters suggested that the public subsidy should not be forgiven over time in advance of the expiration of the final use restriction that is adopted.

One of the comments questioned whether the public should pay twice for the same project, once when it is built and once when the binding commitments expire.

One of the commenters proposed that if the subsequent purchaser is a low-income person, then the amount of the forgivable loan could be passed on to the second owner; and if the next purchaser was not low-income, the forgivable loan amount would be paid back to the jurisdiction in full. Another two commenters expressed the view

that determining the amount of the related increase to the HOME assistance would be difficult, particularly over the period of time in the proposed rule.

The statute and the proposed rule provided participating jurisdictions maximum flexibility to develop guidelines for determining the amount of equity returned to the initial homebuyer upon sale of the HOME assisted house. The Department sees no reason to restrict that flexibility beyond that required by the statute.

Resale Price and Appraised Value

There were eight comments on the method or means to establish the value and price at the time of resale. Four of the comments supported giving the locality more latitude to set resale terms other than just the price. Three of the commenters suggested that each jurisdiction could control affordable housing provisions better than the federal government.

The Department agrees that the regulation need not restrict the resale price to ensure continued affordability. The regulation has been revised to provide for affordability in terms of monthly housing payments.

Two of the commenters suggested that the purchase price at resale be governed by the same requirements as are set out in section 215(b)(1) of NAHA. This suggestion does not meet the test in the statute.

Monitoring the Resale Provisions and Administrative Costs

There were five comments to the effect that the rule did not mention administrative costs or long-term monitoring responsibilities. These commenters stated that this section assumed that either the locality would do the monitoring or, additionally, that lenders may have to enforce the provisions. All five were concerned that there is no provision for administrative costs in the proposed rule for those responsibilities.

Although the Department is sympathetic to this concern, the payment of administrative costs with HOME funds is not permitted by the statute.

Participation by Private Lenders, FNMA and Community Land Trusts

There were seven comments about broadening the involvement of private lenders, FNMA, and community land trusts. Notably, most of these commenters supported the proposed rule; however, two suggested that HUD should permit increased participation in

the development of this rule from the providers of funding for projects and properties for low-income persons and families.

The Department intends to explore cooperation with FNMA and other organizations with sources of funds for affordable housing.

Two commenters suggested using the model of community land trusts (CLT). That is, the CLT purchases the land and sells only the building (improvement) to the eligible family. One of the commenters stated that this model involves a community-based nonprofit and should result in perpetual affordability.

The Department has been in contact with community land trust organizations regarding their efforts to maintain the long-term affordability of assisted housing and will develop information for participating jurisdictions and nonprofits in the future.

One responder did not comment, but questioned at what future time the resale requirements would terminate for a first-time homebuyer.

The resale requirements apply to all sales of the property during the period of affordability.

Section 92.255 Mixed-Income Project

The two commenters on this section objected to the limitation that HOME funds be spent only on units occupied by low-income families, suggesting instead that as long as a project had a majority of low-income tenants, HOME funds could be spent on the entire projects. Concern was voiced about the concentration of low-income families.

The statute requires that HOME funds be spent only on units occupied by low-income families.

Section 92.256 Mixed-Use Project

There were five commenters on this section, all of whom objected to the 51 percent requirement for residential space in a building. Two commenters also objected to requiring that each building in a project contain residential living space.

The intent of the statute is to create affordable housing and, in keeping with this purpose, the Department has retained both requirements.

Section 92.257 Religious Organizations

There were three commenters on this section. One commenter was concerned that YMCAs or other such nonprofits would be excluded from receiving HOME funds. Two other commenters voiced a similar concern about the current wording of the rule, which seemed to preclude acquisition or leasing of property from religious

organizations. It was recommended that clarification be provided to indicate that property purchased or leased from religious organizations by secular organizations is eligible for HOME funding.

The Department has made the clarification with regard to the purchase of property from a religious organization.

The Department has determined that YMCAs, YWCAs, YMHAs, and YWHAs are not primarily religious organizations and, therefore, are not prohibited from receiving HOME funds for eligible activities.

Section 92.258 Limitation of Use of HOME Funds with FHA Insurance

All sixteen commenters indicated that this provision should be eliminated. All believed that tying the FHA mortgage term to the affordability term did not make sense and would have the opposite effect on HOME intent, by increasing monthly costs of the mortgage and making units less affordable. Other commenters claimed that the practical intent of the rule was to eliminate the use of FHA mortgage insurance with HOME funds which was not, the commenters said, the Congressional intent. It was recommended that this provision be stricken and that HOME projects be underwritten for FHA insurance on their merits alone.

The commenters read this provision as limiting the term of FHA mortgages to the applicable minimum affordability periods set out in §§ 92.252(a)(5) and 92.254(a)(4)(ii). Under this reading, for example, an FHA mortgage on a rental project that was rehabilitated with under \$15,000 per unit of HOME funds would be limited to a term of five years. The proposed rule provision, however, would have limited the FHA mortgage to whatever period of affordability participating jurisdiction required for the project, not to the minimum affordability period. The Department has revised § 92.258 (and has added a comparable provision at § 92.624 for the Indian tribe component of the Program) to restate the requirement in a way that avoids the impression that an FHA mortgage is limited to the applicable minimum affordability period. This section now provides that the affordability period for the project must be equal to the term of the FHA mortgage.

Subpart G—Community Housing Development Organizations

The Department received a total of 39 comments on §§ 92.300, 92.301, and 92.302.

Section 92.300 Set-Aside for Community Housing Development Organizations

Five commenters suggested that the regulations provide for a waiver of the 18-month period within which HOME funds must be reserved for nonprofit projects, since 18 months may not be enough time for those communities that do not currently have CHDOs. One commenter suggested that a commensurate level of administrative funds should be provided out of the 15 percent set-aside to these organizations, to facilitate capacity development.

The 18-month period is statutory and cannot be increased in the regulations. The statute does not permit the use of the 15 percent set-aside for administrative costs.

Four commenters indicated that the requirement that a CHDO that owns a project in partnership must be the managing general partner is too restrictive. New York, for example, prohibits nonprofit corporations from acting in the capacity of general partner in business partnerships, and therefore, nonprofit organizations in New York would be unable to use low-income tax credits in conjunction with the set-aside of HOME funds. Clarifying language was recommended to identify "general partner" as the "1 percent interest" in the limited partnership arrangement. It was also suggested that the CHDO definition be broadened to include a wholly-owned, for-profit subsidiary of the CHDO.

In response, the Department wants to ensure that the CHDO controls the project, irrespective of the title it holds or the percentage of ownership it possesses. Therefore § 92.300 has been revised to state that if a CHDO or its wholly owned, for-profit subsidiary owns the project in partnership, the CHDO or the subsidiary must be the managing general partner. The CHDO could establish a wholly owned subsidiary to own the project along with limited partners, but the CHDO must control the project in order for it to qualify for investment of HOME funds under the 15 percent set-aside. A wholly owned for-profit subsidiary of a CHDO does not qualify as a CHDO under the statutory definition, and the regulation has not been revised on this point.

One commenter stated that the regulations are not clear whether a local match is required for the 15 percent set-aside or, if required, is it based upon how the CHDO uses the set-aside, i.e., for new construction or for rehabilitation.

In response, matching contributions are required for HOME funds that are drawn down by a participating jurisdiction, including funds invested in CHDO projects. The participating jurisdiction is responsible for meeting the matching requirements and the match, while calculated on a project basis, is not required to be made on a project-by-project basis, but rather on a program-wide basis.

Section 92.301 Project-Specific Assistance to Community Housing Development Organizations

The statute permits a participating jurisdiction to use 10 percent of its 15 percent CHDO set-aside for pre-development loans. One commenter recommended that the 10 percent be a minimum standard, with jurisdictions being able to reserve up to 20 percent at their discretion. Another commenter encouraged the use of "grants" instead of "loans" to facilitate sound project feasibility studies and engagement of a development team. Another commenter asserted that state programs would benefit from being able to use a portion of the 10 percent for technical assistance and capacity building activities with CHDOs related to HOME activities.

In response, it should be noted that the statute provides that "amounts not to exceed 10 percent" may be used for project-specific loans to CHDOs. In addition, participating jurisdictions may waive repayment of the loans if there are impediments beyond the control of the CHDO. Finally, the rule is very clear that these loans are for project-specific activities, and are not to be loaned to CHDOs for general technical assistance and capacity building.

One commenter recommended that the role of CHDOs as a developer, sponsor, or owner be further defined in order to ensure that their participation in a project is significant and long-term. The concern is that a CHDO could be used to obtain reserved funds by acting as a "sponsor" or "developer" without any substantial involvement in the project. The jurisdictions, it was suggested, should be allowed to make a determination that a CHDO obtaining reserved funds is in fact acting in such a substantial role.

The Department believes that further definition is not required because the requirements contained in the definition of a CHDO virtually mandate long-term association with funded projects. Further, the regulation makes clear that the HOME funds invested in projects affiliated with CHDOs must be awarded to the CHDOs thereby, requiring their active participation.

One commenter noted that the proposed rule does not state specifically enough the circumstances under which seed loans can be waived.

The Department assumed that participating jurisdictions would husband well their HOME funds invested in CHDO projects and that they did not require any further guidance. Statements of specific circumstances would serve only to restrict participating jurisdictions unnecessarily.

Section 93.302 Housing Education and Organizational Support

The proposed rule states that an organization, in order to contract with HUD to provide housing and organizational support, must serve more than one community. One commenter indicated that there are organizations that handle a number of communities in the same city. Therefore, the definition of community should be expanded to include "neighborhoods."

The expansion of the definition of "community" contained in the CHDO criteria addressed this comment.

One commenter recommended that HUD consult with states in the selection of nonprofit intermediary organizations, in order to take advantage of the states' extensive experience with these issues. The Department intends to take such action.

Section 234(b) of NAHA provides that a CHDO may not receive assistance under the HOME Program in an amount that, together with other federal assistance, provides more than 50 percent of an organization's total operating budget in a given year. Section 92.302(d)(1) implements this limitation. HUD received nine comments on this issue. Each commenter stated that the 50 percent limitation restricts participation by many CHDOs particularly by new or small CHDOs. Commenters suggested: Limiting the 50 percent restriction only to funds under section 233 of the statute; waiving the restriction for the first two years of a CHDO's existence; raising the limitation to 75 percent of operating budget for small CHDOs (\$500,000 annually and under); and applying the limit only to operating expenses for housing development activities or defining "operating funds" to exclude project and program-related funds.

Section 92.302(d)(1) applies the limitation only to HOME funds received by a CHDO for organizational support and for housing education, the forms of HOME assistance that may be a part of a CHDO's operating budget. The Department believes that its interpretation of the limitation in the statute provides flexibility in its application as much as possible and still

remains true to the letter and intent of the statutory limitation. The Department's interpretation permits the largest number of CHDOs to qualify for HOME funds.

Three commenters recognized the heavy use of CDBG funds by CHDOs and recommended that CDBG funds should not be considered federal funds for the purpose of calculating this restriction.

The Department construes "other federal assistance" to include federal grants, such as CDBG, that are awarded to states and local governments and subgranted to community housing development organizations. The regulation has not been revised.

Section 92.303—Tenant Participation Plan

HUD received four comments on this section. The first commenter stated that HUD should define standards and procedures that would constitute adequate and appropriate tenant participation in management decisions in such a way as to avoid diminishing control of organizations acting as general partners.

The rule gives great flexibility to participating jurisdictions to approve a broad range of tenant participation plans. Some may give significant powers to the tenants, while others may provide them an advisory role only. The Department did not want to be unduly prescriptive in this area, especially in light of the variations in tenant law throughout the country.

A second commenter expressed resistance to tenants' involvement in management decisions and stated that tenant plans for special needs populations are not practical or appropriate.

The Department agrees that the appropriate amount of tenant involvement may vary, and has permitted wide flexibility within the letter of the Act.

Another commenter stated that HUD should give guidance to participating jurisdictions on their discretionary power to evaluate a CHDO's tenant participation plan, particularly on frequency of submission, i.e., annual submission.

The Department chooses not to be overly prescriptive regarding these issues.

A final commenter recommended that the requirement for a tenant participation plan is a mechanism for substantive community involvement without HUD dictating the composition of the CHDO's governing board.

The Department disagrees that a plan for participation of tenants is a mechanism for community involvement. No change has been made to the rule.

Subpart H—Other Federal Requirements

Section 92.351 Affirmative Marketing

Two comments were received. One commenter suggested that affirmative marketing should apply when common ownership of assisted units within the jurisdiction is five or more, rather than to projects with five or more assisted units.

One commenter suggested that a formal, regulatory connection be made requiring participating jurisdictions and PHAs to coordinate programs.

No change has been made in this section.

Section 92.352 Environmental Review

Ten comments were received.

Two commenters stated their belief that the cost of performing environmental reviews should be passed on to the project developer, and another commenter requested clarification whether this would be allowable. Commenters also asked for clarification whether states could pass the environmental review responsibilities onto the state recipients and subrecipients.

One commenter asked whether an environmental review must be performed on each individual dwelling unit of a scattered-site project.

One commenter suggested that, rather than having to perform a review, a jurisdiction be allowed to rely upon an indemnification against losses as a result of environmental hazards, from the project owners.

One commenter suggested that environmental reviews be performed by HUD staff, as is now the case in some other HUD programs.

One commenter expressed concern that environmental review requirements will add to administrative costs and burden because additional staff will be needed to carry out these requirements.

The requirement to perform an environmental review is statutory, although certain activities that do not have the potential for significant physical impact and do not trigger environmental laws are exempt from review under 24 CFR part 58. The statute provides for assumption of environmental review responsibilities by participating jurisdictions, but not by other recipients or subrecipients, such as Indian tribes. The cost of reviews for which participating jurisdictions are responsible could be passed on to

developers, but these costs would nevertheless remain administrative costs that are not eligible costs under the HOME Program.

The Department has not made any change in this section although it has prepared a technical amendment to the statute that would allow state recipients to assume responsibility for the environmental review.

Section 92.353 Displacement, Relocation and Acquisition Residential Antidisplacement and Relocation Assistance Plan

In the proposed rule preamble, the Department invited public comment on whether it should, by regulation, extend the requirements of section 104(d) of the Housing and Community Development Act of 1974 to the HOME Program. Section 104(d) requires grantees to have a Residential Antidisplacement and Relocation Assistance Plan (Plan) that requires the replacement of low- and moderate-income dwelling units that are demolished or converted to another use in connection with a Community Development Block Grant (CDBG) activity. It also requires the provision of certain relocation assistance to lower-income persons displaced by such conversion or by any CDBG-assisted demolition.

Five commenters supported the imposition by regulation of this requirement to cover activities carried out in connection with HOME-assisted activities. Two commenters specified that the Plan should be required only if those displaced by a HOME Program are given preference for Section 8 assistance and Section 8 set-asides are provided for this purpose. Nine commenters were opposed to imposing the requirement.

Those supporting imposition of the requirement contended that HOME-assisted projects should not reduce the already-limited supply of low- and moderate-income housing available to lower-income persons.

Those commenters who opposed the adoption of the requirement contended that if Congress had wanted these requirements to apply to the HOME Program, it would have included them in the statute. One commenter noted that since HOME activities increase the supply of affordable housing, no need exists for such a requirement. Another commenter observed that the requirement would increase administrative costs in a program that provides no administrative funds. Several others expressed a general concern that imposition of the requirement would increase costs. Three commenters suggested that changes in

the Section 8 rules should be made to provide persons displaced by a HOME Program with Section 8 assistance before other preference families. This comment on Section 8 rules was outside the scope of this proposed rulemaking.

The Department has decided not to extend by regulation the Plan requirement to the HOME Program, since the requirement is not included in the Act. However, the HOME projects of many participating jurisdictions are likely to be subject to the Plan requirements. Section 92.353 of this rule has been revised to reflect how that could occur.

Participating jurisdictions that choose to use CDBG funds on a HOME project to pay for such project-specific administrative costs as work write-ups, inspections, and loan originations will make such projects subject to CDBG requirements, including the Plan requirement. Thus, while the use of HOME funds will not trigger Plan requirements, use of CDBG funds for a HOME project may. Since HOME funds may not be used for administrative costs, the Department expects that there will be many instances where participating jurisdictions will use CDBG funds for project-specific administrative costs, thereby making many HOME projects subject to the Plan and other CDBG requirements.

Section 92.354 Labor

Five comments were received concerning the labor requirements.

Two commenters suggested that the threshold at which Davis-Bacon requirements become applicable be raised from 12 or more units to 40 or more units. The reason for this, the commenters said, was that cost and market constraints will otherwise curtail the development of smaller projects.

Two comments suggest that the threshold of 12 or more units be applied to "buildings with 12 or more units" rather than the more restrictive "contract (project) with 12 or more units," which would affect the development of scattered-site projects.

One comment asked whether the Davis-Bacon Act would apply to "homeownership programs of less than 12 units."

The application of Davis-Bacon requirements to contracts for the construction of 12 or more units of HOME-assisted affordable housing is a statutory requirement. The Department has implemented the statute as written and has not made any changes in this section.

Section 92.355 Lead Based Paint

Three comments were received.

Two commenters were concerned about the cost of lead based paint removal, with one suggesting that the cost be explicitly identified as eligible under § 92.206, and the other suggesting that a specific HOME grant program be established to fund lead based paint removal.

One commenter suggested that the "HUD Guide to Lead Paint Abatement at Public and Indian Housing" guidelines be adopted for the HOME Program.

Lead based abatement is specifically listed as an eligible cost under § 92.206. The Department will soon be issuing a new, comprehensive rule for lead-based paint which would apply to the HOME Program. It will incorporate, in part, provisions in the "Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing Programs" (see 55 FR 14555, April 18, 1990 and 55 FR 39874, September 28, 1990.)

Section 92.356 Conflict of Interest

Two comments were received.

One commenter suggests that an exemption to this section be included for Indian Tribes, similar to the Indian CDBG program. The Department has revised the regulations to set forth a separate conflict of interest provision for Indian tribes.

The second commenter noted and agreed with a difference in the definition of "conflict of interest" between the HOME and the CDBG regulations; that is, the HOME rule leaves out the word "personal" used in the CDBG wording of "personal and financial interest or benefit."

Section 92.358 Flood Insurance

The one comment received was concerned that an increased administrative burden will result from having to monitor the maintenance of flood insurance.

No change has been made in this section.

Subpart J—Reallocations**Section 92.451 Reallocation**

A comment asserted that a local jurisdiction should be able to affirmatively join with a state applicant. The commenter stated that the proposed regulations have a procedure in which a local jurisdiction's funds revert to a participating state if the jurisdiction fails to participate. The commenter believes that state and local governments should be able to submit a single application, without the local jurisdiction first failing to participate. The Department has not

modified the rule based on this comment. This section is intended to cover the reallocations of funds that become available because a jurisdiction either fails to become a participating jurisdiction or has that designation revoked. Sections 216(6) and 216(8) of NAHA expressly provide for reallocations under these circumstances.

Section 92.452 Reallocation of CHDO Set-Aside

A comment was received stating that the first reallocation of HOME funds should always be within the state or participating jurisdiction. This comment was not adopted. The manner in which funds are reallocated is statutory.

Section 92.453 Criteria for Competitive Reallocation

Five comments strongly objected to the threshold factor at § 92.453(b)(2)(i), which states that a jurisdiction will only be eligible to receive HOME funds through the competitive reallocation process if "the jurisdiction is implementing, or has plans to implement, a strategy to remove or ameliorate negative effects of public policies which raise the cost of housing or constrain incentives to develop, maintain, or improve affordable housing, or demonstrates the absence of these policies." Some of the commenters stated that they found this threshold factor to be in conflict with the statute and Congressional intent.

The proposed rule on reallocation closely mirrored the statutory requirements in terms of which entities were eligible to receive reallocated funds. With reference to the criteria for reallocation, the Department examined the statute and found that it was permissible to establish a threshold factor relating to whether a jurisdiction is implementing, or planning to implement, a strategy to remove or ameliorate negative effects of public policy which raise the costs of housing or constrain incentives to develop, maintain, or improve affordable housing.

Subpart K—Program Administration

The Department received one general comment that the administrative requirements in subpart K impose burdensome and duplicative requirements on states, and that the requirements exceed the statute. However, comments concerning specific regulatory provisions frequently did not recognize that regulatory requirements arose directly out of requirements in the HOME legislation.

Section 92.500 HOME Investment Trust Fund

Several commenters had concerns about requiring repayment of the matching funds into the local account of the HOME Investment Trust Fund. One commenter wanted HUD to clarify whether matching contributions and any payment of interest or other returns on matching contributions will be subsequently considered local matching funds. Another commenter stated that the regulatory requirement for two HOME accounts makes it possible to avoid match requirements for repayment of HOME funds and interest on HOME investments, and questioned whether that was permitted by the statute. Another commenter wrote that the regulation should not require the repayment of the match to be deposited in the HOME Investment Trust Fund.

Section 218 requires HUD to establish a HOME Investment Trust Fund account for each participating jurisdiction, and section 219(c) permits the establishment of a HOME Investment Trust Fund account outside of the federal government. The regulation provides for the establishment of two accounts (U.S. Treasury account and local account), and together the accounts are the HOME Investment Trust Fund and may only be used for affordable housing in accordance with all HOME program requirements. Section 220 of the statute requires a participating jurisdiction to match funds drawn from its HOME Investment Trust Fund. Instead of requiring all funds drawn from the HOME Investment Trust Fund (two accounts) to be matched, the regulation requires repayments of HOME funds and matching funds and any interest or other return of investment of the funds to be deposited in the local account. Because repayment of match funds must be paid into the local account, in effect, the HOME funds in the local account are permanently matched and therefore funds drawn from the local account do not have to be matched again. This arrangement also permits a loan by a participating jurisdiction to a project to be counted as a match (permanent contribution to the HOME Program) because repayments are deposited into the local account and used for additional HOME projects.

As noted above in the discussion of the matching fund requirements, the regulation has been revised to permit a second local account under certain circumstances.

The Department received several comments concerning the deadlines for commitment of HOME funds and for

expenditure of HOME funds. Commenters requested that the regulation provide for extensions to the 24-month commitment and five-year expenditure deadlines, an additional 12 months and 24 months respectively, upon application to the local HUD field office. Another commenter suggested that states should get three years in which to commit all HOME funds before recapture provisions take effect.

Section 218(g) of the statute provides that (except in the case of rental housing production set-aside funds) if HOME funds available to a participating jurisdiction are not placed under binding commitments to affordable housing within 24 months, the participating jurisdiction's right to draw the money from the HOME Investment Trust Fund shall expire and HUD must recapture and reallocate the funds. Therefore, the Department has no discretion to extend the time period for commitment of the funds.

The Department believes that the five-year period for expenditure of the funds is a reasonable amount of time. The Department expects the funds to be used expeditiously for affordable housing. In addition, 31 U.S.C. 1552, as amended by Public Law 101-510, approved November 5, 1990, generally provides that federal funds must be expended within five years after the appropriation expires. The regulatory requirement to spend the HOME funds within five years will meet this statutory requirement. A waiver of the regulatory requirement may be sought, in a particular case, for good cause, to extend the time to up to that permitted by Public Law 101-510.

Section 92.502 Cash and Management Information System; Disbursement of HOME Funds

The Department received a number of comments concerning the Cash and Management Information System (C/MI system). Some commenters supported the C/MI system. Others stated that the C/MI system is adequate, especially because state recipients are allowed access to the system.

Others wrote that the C/MI system should be revised to accommodate HOME. Although the system works for the Rental Rehabilitation Program, HOME is a more complex program. One commenter suggested that HOME funds should be handled in a manner similar to CDBG grants, whereby local governments make certifications to receive the grant and are held accountable for the use of the funds at the time of annual monitoring. Another commenter thought that the C/MI system imposes administrative burdens on participating jurisdictions—too much

paperwork and forms. A couple of commenters were particularly concerned about the project deadlines now used for the Rental Rehabilitation Program.

The basic C/MI system in the regulation has not been revised. Section 218(h) of the statute requires HUD to keep each participating jurisdiction informed of the status of its HOME Investment Trust Fund, including the status of amounts under various stages of commitment. Therefore, the Department must have information on commitments of HOME funds; the system used for the CDBG program will not satisfy the statutory requirement.

The Department has accepted comments concerning the project deadlines. The definition of "commitment" has been revised to permit construction to start within six months (instead of 90 days) after the agreement has been signed between the participating jurisdiction and the project owner. In addition, the automatic cancellation of the project in the C/MI system will not occur unless the project has not had an initial disbursement within one year (instead of six months) of project set-up.

One commenter suggested that HOME fund draws should be made by the telephone, the same as for CDBG. The Department will use the Voice Response System (the system used for the CDBG and Rental Rehabilitation programs) for the HOME Program, so that funds may be drawn down pursuant to a telephone call.

Section 92.504 Participating Jurisdiction Responsibilities; Written Agreements; Monitoring

One commenter suggested that the regulation should clarify that the local government subrecipient, designated by the state to administer all or a portion of the HOME funds, may take on the responsibility for executing written agreements with project owners, at the state's discretion. The Department agrees that the state may permit or require its local governments to perform these functions. The regulation at § 92.201(b)(3) has been modified to make clear that, while the state has the ultimate responsibility, the state may require the local governments receiving HOME funds from the state to perform program functions.

Section 92.505 Applicability of Uniform Administrative Requirements

One commenter complained that the requirement for annual onsite monitoring is excessive; adequate monitoring can be performed through review of records, reports, and audits.

The Department cannot accommodate this requested change. The regulatory requirement is based upon section 226(b) of the statute, which requires annual on-site monitoring of HOME rental affordable housing.

Another commenter stated that annual review by the participating jurisdiction of contractors and subrecipients exceeds the statute. The Department believes this requirement is reasonable and is consistent with the requirements in 24 CFR part 85, Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally Recognized Indian Tribal Governments.

Two commenters suggested that the regulation permit the local governments receiving funds from the state to do the annual review of owners of rental housing, with oversight by the state. The Department agrees with this comment and the regulation at § 92.201(b)(3) has been modified to permit this.

The Department was asked by a commenter to establish annual compliance monitoring guidelines (handbook, forms, technical assistance) to assist participating jurisdictions in their monitoring responsibility. The Department intends to establish monitoring guidelines.

Three commenters wrote about special procedures for monitoring that is permitted by section 226(c) of the statute. One commenter stated that the regulation does not provide for special streamlined procedures for small-scale or scattered site housing projects, and that the regulation should have special procedures to accommodate state development of this type of projects. The Department believes that this subject matter is covered in proposed § 92.504(d)(1), and it remains unchanged in this final rule.

Another commenter thought that the streamlined monitoring procedure in the regulation should give more relief; site visits should only be required for a random sample of all projects each year (10-20%); on-site visits should not be required for projects with less than 20 units. The third commenter suggested that one-to-four unit properties should be inspected every five years and multifamily projects every two years. These suggestions have not been adopted because they go beyond what is statutorily permissible. Streamlined procedures are only permitted for small-scale or scattered housing; all other rental housing must be inspected on-site annually. The regulation does permit on-site inspection of rental housing containing one-to-four units every two years, instead of every year.

The Department received a comment that the written agreement should state, in accordance with section 226(a) of the statute, that the agreement may be enforced by the jurisdiction or by intended beneficiaries. This comment is correct and the regulation has been modified to reflect it.

Another commenter stated that repayment of HOME funds should not be the sole remedy for housing that fails to meet affordability requirements, and that the regulation should make clear that seeking compliance should be an option. The Department agrees with this comment and encourages the use of other measures, including liens on the HOME-assisted property, to ensure that the housing remains affordable. The regulation has been revised.

Section 92.508 Recordkeeping

One commenter asked that the regulation clarify that records for items required under the state CHAS or CHAS performance reports need not be maintained in two or more separate places. The Department agrees that CHAS records or reports need not be also kept in HOME files. The regulation does not set out requirements on how records are to be kept.

Another commenter wrote that states should not be required to maintain all records at the state level; states should have flexibility to impose record keeping responsibilities to local government sub-recipients. The Department agrees and the regulation has been revised.

One commenter made the general comment that the record keeping requirements are excessive. The Department believes that the record keeping requirements set forth in the regulation are the minimum required to show that the funds have been used in accordance with all HOME requirements. Section 284 of the statute requires HUD to establish uniform recordkeeping requirements.

The Department received a few comments concerning record retention. One commenter wanted clarification on how long records must be maintained by the jurisdiction. Another commenter wrote that it is unreasonable to require records to be kept by states for three years past the occupancy compliance period; many records should be able to be discarded three years after the activity has been completed or three years after all project activities except final occupancy compliance for the period of affordability have been completed.

The Department agrees that the regulation setting forth the record retention requirements should be clarified. Consistent with 24 CFR 85.42

(except in the case of disputes or displacement and acquisition) basic records must be kept for three years after closeout of the funds. However, because the housing must remain affordable for the required period of time, some project records must be kept for three years beyond the required period of affordability. These project records include records on: the amount of HOME funds spent on the project; tenant information (including yearly income verification); rents charged; annual on-site inspections; and resale, if any.

One commenter requested that community groups and intended beneficiaries have access to data used by HUD to track a jurisdiction's compliance with HOME requirements. The regulation at § 92.508(c)(1) requires access to the jurisdiction's records, subject to state and local privacy laws.

Section 92.509 Performance Reports

The Department received several comments concerning performance reports. Under section 284(a) of the statute, the Department is required to establish uniform performance reporting requirements. The report must include information on the actions required by section 281(a) of the statute on the minority outreach program regarding contracting.

One commenter made the general plea to keep the reporting requirements simple to reduce costs of administering the program.

Two comments concern overlap with the CHAS report. One commenter wrote that many elements of the annual performance report must be provided in the CHAS performance reports and that states should have the option of including some additional specific discussion of the HOME Program in the CHAS report rather than submitting two separate reports. Another commenter said that the HOME performance report is too burdensome and duplicates elements required under the CHAS report. The Department acknowledges that there may be some overlap with the CHAS report; however, the level of detail necessary for the reports is likely to be different. (HUD is in the process of developing the CHAS report forms.) The HOME report and the information in the C/MI System will serve as the basis of the information on the HOME Program in the CHAS report. It is not the Department's intention to require any additional information concerning the HOME Program in the CHAS report which is not already included in the HOME report or C/MI System.

One commenter argued that reporting on repayments, interest, and other

returns on HOME investments is too onerous. The Department believes that this information is essential, because the statute requires these funds to be used for affordable housing in accordance with all HOME requirements.

Subpart L—Performance Reviews and Sanctions

Section 92.550 Performance Reviews

The Department received one comment on performance reviews. The commenter stated that outside parties, such as community groups and intended program beneficiaries, should be able to participate in the review process by triggering a HUD review. The Department believes that the regulation permits participation by outside parties. The regulations require the participating jurisdiction to provide citizens with access to HOME program records. The regulation provides that performance reviews will be conducted annually and HUD will consider relevant information concerning the participating jurisdiction's performance, including citizen comments. If the particular facts (including information provided by citizens) warrant investigation, HUD has the right to conduct additional reviews.

III. Findings and Certifications

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the above address.

Impact on the Economy

This rule constitutes a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it would, as defined by that order, have an annual effect on the economy of \$100 million or more. Accordingly, a regulatory impact analysis (RIA) has been prepared and is available for review and inspection in room 10276, Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, 451 7th St., SW., Washington, DC 20410.

The major costs identified in the RIA for the HOME Program were the appropriated funds, administrative costs, and State and local matching contributions. Some of the costs

included in the appropriation (now set at \$1.5 billion in FY 1992), are not social costs, i.e., costs to society as a whole, but are transfers, or reallocations of resources without producing goods or services. For example, tenant-based rental assistance is a transfer, while new construction is a cost and produces a benefit. The RIA estimated that the Department would require 257 staff years in FY 1992. The benefits of the HOME Program identified in the RIA included development and support for affordable rental housing and homeownership through acquisition, new construction, and rehabilitation of affordable housing and creating incentives to provide tenant-based rental assistance. There were also a number of the intangible benefits attributable to the HOME Program identified in the RIA, including the reduction of drug abuse and crime, improved mental and physical health, improved education, and others.

Impact on Small Entities

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities, because jurisdictions that are statutorily eligible to receive formula allocations are relatively larger cities, urban counties, or states.

Regulatory Agenda

This rule was listed as sequence number 1344 in the Department's Semiannual Agenda of Regulations published on October 21, 1991 (56 FR 53380, 53395) pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

Federalism Impact

The General Counsel has determined, as the Designated Official for HUD under section 6(a) of Executive Order 12612, Federalism, that this proposed rule has federalism implications concerning the division of local, state, and federal responsibilities. The Department has submitted to OMB a Federalism Assessment, containing a certification that the policies in this rulemaking have been assessed in light of the Executive Order's fundamental federalism principles. Among other matters, the Federalism Assessment identifies provisions in the rule that raise federalism implications, considers alternative ways of structuring these provisions, and identifies the extent to which the provisions of the rule impose costs or burdens on the states, including the likely source of funding for the

states, and the ability of the states to fulfill the purposes of the policy. The Federalism Assessment is available for review and inspection in room 10276, Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, 451 7th St., SW., Washington, DC 20410.

Impact on the Family

The General Counsel, as the designated official under Executive Order 12606, The Family, has determined that this rule would not have significant impact on family formation, maintenance, and general well-being. Assistance provided under the rule can be expected to support family values, by helping families achieve security and independence; by enabling them to live in decent, safe, and sanitary housing; and by giving them the means to live independently in mainstream American society. The rule would not, however, affect the institution of the family, which is requisite to coverage by the Order. Even if the rule had the necessary family impact, it would not be subject to further review under the Order, since the provision of assistance under the rule is required by statute, and is not subject to agency discretion.

List of Subjects in 24 CFR Part 92

Grant programs—housing and community development, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, a new part 92 is added to subtitle A of title 24 of the Code of Federal Regulations, to read as follows:

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

Subpart A—General

- Sec.
- 92.1 Overview and purpose.
- 92.2 Definitions.
- 92.3 Waivers.

Subpart B—Allocation Formula

- 92.50 Formula allocation.
- 92.51 Establishing list of participating jurisdictions that may use funds for new construction and rental housing production set-aside.
- 92.52 Publishing formula allocation, rental housing production set-aside and list of new construction-eligible participating jurisdictions.

Subpart C—Participating Jurisdiction: Designation and Revocation of Designation—Consortia

- 92.100 General.
- 92.101 Consortia.
- 92.102 Participation threshold amount.
- 92.103 Notification of intent to participate.
- 92.104 Submission of housing strategy.
- 92.105 Designation as a participating jurisdiction.

- 92.106 Continuous designation as a participating jurisdiction.
- 92.107 Revocation of designation as a participating jurisdiction.

Subpart D—Program Description

- 92.150 Submission of program description and certifications.
- 92.151 Review of program description and certifications.
- 92.152 Amendments to program description.

Subpart E—Program Requirements

- 92.200 Private-public partnership.
- 92.201 Distribution of assistance.
- 92.202 Site and neighborhood standards.
- 92.203 Income determinations.
- 92.204 Applicability of requirements to entities that receive a reallocation of HOME funds, other than participating jurisdictions.

Eligible and Prohibited Activities

- 92.205 Eligible activities: General.
- 92.206 Eligible costs.
- 92.207 [Reserved].
- 92.208 New construction: HUD-authorized.
- 92.209 New construction: Neighborhood revitalization.
- 92.210 New construction: Special needs.
- 92.211 Tenant-based rental assistance.
- 92.212 REACH: Asset recycling information dissemination.
- 92.213 Development of model programs.
- 92.214 Prohibited activities.
- 92.215 Limitation on jurisdictions under court order.

Income Targeting

- 92.216 Income targeting: Tenant-based rental assistance and rental units—Initial eligibility determination and reexamination.
- 92.217 Income targeting: Homeownership.

Matching Contribution Requirement

- 92.218 Amount of matching contribution.
- 92.219 Recognition of matching contribution.
- 92.220 Form of matching contribution.
- 92.221 Match credit.
- 92.222 Reduction of matching contribution requirement.

Subpart F—Project Requirements

- 92.250 Maximum per-unit subsidy amount.
- 92.251 Property standards.
- 92.252 Qualification as affordable housing and income targeting: Rental housing.
- 92.253 Tenant and participant protections.
- 92.254 Qualification as affordable housing: Homeownership.
- 92.255 Mixed-income project.
- 92.256 Mixed-use project.
- 92.257 Religious organizations.
- 92.258 Limitation on the use of HOME funds with FHA mortgage insurance.

Subpart G—Community Housing Development Organizations

- 92.300 Set-aside for community housing development organizations.
- 92.301 Project-specific assistance to community housing development organizations.
- 92.302 Housing education and organizational support.

92.303 Tenant participation plan.

Subpart H—Other Federal Requirements

- 92.350 Equal opportunity and fair housing.
- 92.351 Affirmative marketing.
- 92.352 Environmental review.
- 92.353 Displacement, relocation, and acquisition.
- 92.354 Labor.
- 92.355 Lead-based paint.
- 92.356 Conflict of interest.
- 92.357 Debarment and suspension.
- 92.358 Flood insurance.
- 92.359 Executive Order 12372.

Subpart I—Technical Assistance

- 92.400 Coordinated federal support for housing strategies.

Subpart J—Reallocations

- 92.450 General.
- 92.451 Reallocation of HOME funds from a jurisdiction that is not designated a participating jurisdiction or has its designation revoked.
- 92.452 Reallocation of community housing development organization set-aside.
- 92.453 Criteria for competitive reallocations.
- 92.454 Reallocations by formula.

Subpart K—Program Administration

- 92.500 The HOME Investment Trust Fund.
- 92.501 HOME Investment Partnership Agreement.
- 92.502 Cash and Management Information System; Disbursement of HOME funds.
- 92.503 Repayment of investment.
- 92.504 Participating jurisdiction responsibilities; written agreements; monitoring.
- 92.505 Applicability of uniform administrative requirements.
- 92.506 Audit.
- 92.507 Closeout.
- 92.508 Recordkeeping.
- 92.509 Performance reports.

Subpart L—Performance Reviews and Sanctions

- 92.550 Performance reviews.
- 92.551 Corrective and remedial actions.
- 92.552 Notice and opportunity for hearing; sanctions.

Subpart M—Home Funds for Indian Tribes

- 92.600 General.
- 92.601 Regional allocation of funds.
- 92.602 Competition.
- 92.603 Housing strategy.
- 92.604 Criteria for selection.
- 92.605 Deadline and other information.
- 92.606 Certifications.

Eligible Activities and Affordability

- 92.610 Income determinations.
- 92.611 Eligible activities.
- 92.612 Eligible costs.
- 92.613 Tenant-based rental assistance.
- 92.614 Qualification as affordable housing and income targeting: Rental housing.
- 92.615 Qualification as affordable housing: Homeownership.

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Authority: 42 U.S.C. 3535(d) and 12701-12839.

Subpart A—General

§ 92.1 Overview and purpose.

(a) *Overview.* This part implements the HOME Investment Partnerships Act (the HOME Investment Partnerships Program). In general, under the HOME Investment Partnerships Program, HUD allocates funds by formula among eligible state and local governments to strengthen public-private partnerships to provide more affordable housing. Generally, HOME funds must be matched by nonfederal resources. State and local governments that become participating jurisdictions may use HOME funds to carry out multiyear housing strategies through acquisition, rehabilitation, and new construction of housing, and tenant-based rental assistance. Participating jurisdictions are able to provide assistance in a number of eligible forms, including loans, advances, equity investments, interest subsidies and other forms of investment that HUD approves.

(b) *Purpose.* The purposes of the HOME Program are:

(1) To expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing,

for very low-income and low-income Americans;

(2) To mobilize and strengthen the abilities of states and units of general local government throughout the United States to design and implement strategies for achieving an adequate supply of decent, safe, sanitary, and affordable housing;

(3) To provide participating jurisdictions, on a coordinated basis, with the various forms of federal housing assistance, including capital investment, mortgage insurance, rental assistance, and other federal assistance, needed—

(i) To expand the supply of decent, safe, sanitary, and affordable housing;

(ii) To make new construction, rehabilitation, substantial rehabilitation, and acquisition of such housing feasible; and

(iii) To promote the development of partnerships among the federal government, states and units of general local government, private industry, and nonprofit organizations able to utilize effectively all available resources to provide more of such housing;

(iv) To make housing more affordable for very low-income and low-income families through the use of tenant-based rental assistance;

(v) To develop and refine, on an ongoing basis, a selection of model programs incorporating the most effective methods for providing decent, safe, sanitary, and affordable housing, and accelerate the application of such methods where appropriate throughout the United States to achieve the prudent and efficient use of HOME funds;

(vi) To expand the capacity of nonprofit community housing development organizations to develop and manage decent, safe, sanitary, and affordable housing;

(vii) To ensure that federal investment produces housing stock that is available and affordable to low-income families for the property's remaining useful life, is appropriate to the neighborhood surroundings, and, wherever appropriate, is mixed income housing;

(viii) To increase the investment of private capital and the use of private sector resources in the provision of decent, safe, sanitary, and affordable housing;

(ix) To allocate federal funds for investment in affordable housing among participating jurisdictions by formula allocation;

(x) To leverage HOME funds insofar as practicable with state and local matching contributions and private investment;

(xi) To establish for each participating jurisdiction a HOME Investment Trust Fund with a line of credit for investment in affordable housing, with repayments back to its HOME Investment Trust Fund being made available for reinvestment by the jurisdiction;

(xii) To provide credit enhancement for affordable housing by utilizing the capacities of existing agencies and mortgage finance institutions when most efficient and supplementing their activities when appropriate; and

(xiii) To assist very low-income and low-income families to obtain the skills and knowledge necessary to become responsible homeowners and tenants.

§ 92.2 Definitions.

Adjusted income. See §§ 92.203 and 92.610.

Administrative costs means reasonable and necessary costs, as described in OMB Circular A-87,¹ incurred by the participating jurisdiction in carrying out its eligible program activities in accordance with prescribed regulations. Administrative costs include any cost equivalent to the costs described in § 570.206 of this title (program administration costs for the CDBG Program) and project delivery costs, such as new construction and rehabilitation counseling, preparing work specifications, loan processing, inspections, and other services related to assisting owners, tenants, contractors, and other entities applying for or receiving HOME funds. Administrative costs do not include eligible project-related costs that are incurred by and charged to project owners.

Annual income. See §§ 92.203 and 92.610.

Certification means a written assertion, based on supporting evidence, which must be kept available for inspection by HUD, the Inspector General and the public, which assertion is deemed to be accurate for purposes of this part, unless HUD determines otherwise after inspecting the evidence and providing due notice and opportunity for comment.

Commit to a specific local project or commitment means:

(1) For a project which is privately owned when the commitment is made:

(i) If the project is for rehabilitation or new construction, a written legally binding agreement between the participating jurisdiction and the project owner under which the participating jurisdiction (or other entity receiving HOME funds directly from HUD, state

recipient, or subrecipient) agrees to provide HOME assistance to the owner for an identifiable project as defined in this regulation that can reasonably be expected to start construction within six months of the agreement and in which the owner agrees to start construction within that period.

(ii) If funds are used for tenant-based rental assistance, the participating jurisdiction (or other entity receiving HOME funds directly from HUD, state recipient, or subrecipient) has entered into a rental assistance contract with the owner or the tenant in accordance with the provisions of § 92.211.

(iii) If the project is for acquisition, a written legally binding agreement, i.e., contract for sale, between the participating jurisdiction (or other entity receiving HOME funds directly from HUD, state recipient, or subrecipient) and the project owner under which the participating jurisdiction (or other entity receiving HOME funds directly from HUD, state recipient, or subrecipient) agrees to provide HOME assistance to the owner for purchase of the project that can reasonably be expected to be accomplished within six months of the agreement and in which the owner agrees to transfer title within that period.

(2) For a project that is publicly owned when the commitment is made, the Project Set-Up Report submitted under the Cash and Management Information System which identifies a specific project that will start construction within six months of receipt of the Project Set-Up Report. Under both paragraphs (1) and (2) of this definition, the date HUD enters into the Cash and Management Information System (§ 92.502) an acceptable Project Set-Up Report for a project is deemed to be the date of project commitment.

Community housing development organization means a private nonprofit organization that—

(1) Is organized under state or local laws;

(2) Has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

(3) Is neither controlled by, nor under the direction of, individuals or entities seeking to derive profit or gain from the organization. A community housing development organization may be sponsored or created by a for-profit entity, but:

(i) The for-profit entity may not be an entity whose primary purpose is the development or management of housing, such as a builder, developer, or real estate management firm.

(ii) The for-profit entity may not have the right to appoint more than one-third

of the membership of the organization's governing body. Board members appointed by the for-profit entity may not appoint the remaining two-thirds of the board members; and

(iii) The community housing development organization must be free to contract for goods and services from vendors of its own choosing;

(4) Has a tax exemption ruling from the Internal Revenue Service under section 501(c) of the Internal Revenue Code of 1986;

(5) Does not include a public body (including the participating jurisdiction) or an instrumentality of a public body. An organization that is state or locally chartered may qualify as a community housing development organization; however, the state or local government may not have the right to appoint more than one-third of the membership of the organization's governing body and no more than one-third of the board members can be public official;

(6) Has standards of financial accountability that conform to Attachment F of OMB Circular No. A-110 (Rev.) "Standards for Financial Management Systems,"²

(7) Has among its purposes the provision of decent housing that is affordable to low-income and moderate-income persons, as evidenced in its charter, articles of incorporation, resolutions or by-laws;

(8) Maintains accountability to low-income community residents by—

(i) Maintaining at least one-third of its governing board's membership for residents of low-income neighborhoods, other low-income community residents, or elected representatives of low-income neighborhood organizations. For urban areas, "community" may be a neighborhood or neighborhoods, city, county, or metropolitan area; for rural areas, it may be a neighborhood or neighborhoods, town, village, county, or multi-county area (but not the entire state), provided the governing board contains low-income residents from each county of the multi-county area; and

(ii) Providing a formal process for low-income, program beneficiaries to advise the organization in its decisions regarding the design, siting, development, and management of affordable housing;

(9) Has a demonstrated capacity for carrying out activities assisted with HOME funds. An organization may satisfy this requirement by hiring experienced accomplished key staff

¹ See § 92.505 concerning the availability of OMB Circulars.

² See § 92.505 concerning the availability of OMB Circulars.

members who have successfully completed similar projects, or a consultant with the same type of experience and a plan to train appropriate key staff members of the organization; and

(10) Has a history of serving the community within which housing to be assisted with HOME funds is to be located. In general, an organization must be able to show one year of serving the community (from the date the participating jurisdiction provides HOME funds to the organization). However, a newly created organization formed by local churches, service organizations or neighborhood organizations may meet this requirement by demonstrating that its parent organization has at least a year of serving the community.

Displaced homemaker means an individual who—

(1) Is an adult;

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

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

Family has the same meaning given that term by part 812 of this title.

First-time homebuyer means an individual and his or her spouse who have not owned a home during the 3-year period before the purchase of a home with HOME funds, except that—

(1) Any individual who is a displaced homemaker (as defined in this section) may not be excluded from consideration as a first-time homebuyer under this paragraph on the basis that the individual, while a homemaker, owned a home with his or her spouse or resided in a home owned by the spouse; and

(2) Any individual who is a single parent (as defined in this section) may not be excluded from consideration as a first-time homebuyer under this paragraph on the basis that the individual, while married, owned a home with his or her spouse or resided in a home owned by the spouse.

Government-sponsored mortgage finance corporations means the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Agricultural Mortgage Corporation.

HOME funds means funds made available under this part through allocations and reallocations, plus all repayments and interest or other return on the investment of these funds.

Homeownership means ownership in fee simple title or a 99 year leasehold interest in a one- to four-unit dwelling or

in a condominium unit, ownership or membership in a cooperative, or equivalent form of ownership approved by HUD. The ownership interest may be subject only to the restrictions on resale required under § 92.254(a); mortgages, deeds of trust, or other liens or instruments securing debt on the property as approved by the participating jurisdiction; or any other restrictions or encumbrances that do not impair the good and marketable nature of title to the ownership interest.

Household means one or more persons occupying a housing unit.

Housing includes manufactured housing and manufactured housing lots.

Housing strategy means a comprehensive housing affordability strategy prepared in accordance with part 91 of this title, consisting of either a complete submission or an annual update. *Approved housing strategy* means a housing strategy that has been approved by HUD in accordance with part 91 of this chapter.

HUD means the United States Department of Housing and Urban Development.

Indian Housing Authority means any entity that is authorized to engage in or assist in the development or operation of low-income housing for Indians that is established either by exercise of the power of self-government of an Indian tribe independent of state law; or by operation of state law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

Indian tribe means any Indian Tribe, band, group, or nation, including Alaskan Indians, Aleuts, and Eskimos, and any Alaskan Native Village of the United States that is considered an eligible recipient under Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450) or was considered an eligible recipient under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221) before repeal of that Act. Eligible recipients under the Indian Self-Determination and Education Assistance Act are determined by the Bureau of Indian Affairs.

Jurisdiction means a state or unit of general local government.

Low-income families means families whose annual incomes do not exceed 80 percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 80 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.

Metropolitan city has the meaning given the term in § 570.3 of this title.

Monthly adjusted income. See §§ 92.203 and 92.610.

Monthly income. See §§ 92.203 and 92.610.

Low-income neighborhood means a neighborhood that has at least 51 percent of its households at or below 80 percent of median income for the area.

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

Participating jurisdiction means any jurisdiction (as defined in this section) that has been so designated by HUD in accordance with § 92.105.

Person with disabilities means a household composed of one or more persons, at least one of whom is an adult, who has a disability.

(1) A person is considered to have a disability if the person has a physical, mental, or emotional impairment that—

(i) Is expected to be of long-continued and indefinite duration;

(ii) Substantially impedes his or her ability to live independently; and

(iii) Is of such a nature that such ability could be improved by more suitable housing conditions.

(2) A person will also be considered to have a disability if he or she has a developmental disability, which is a severe, chronic disability that—

(i) Is attributable to a mental or physical impairment or combination of mental and physical impairments;

(ii) Is manifested before the person attains age 22;

(iii) Is likely to continue indefinitely;

(iv) Results in substantial functional limitations in three or more of the following areas of major life activity: Self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and

(v) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated. Notwithstanding the preceding

provisions of this definition, the term "person with disabilities" includes two or more persons with disabilities living together, one or more such persons living with another person who is determined to be important to their care or well-being, and the surviving member or members of any household described in the first sentence of this definition who were living, in a unit assisted with HOME funds, with the deceased member of the household at the time of his or her death.

Project means a site or an entire building (including a manufactured housing unit), or two or more buildings, together with the site or sites on which the building or buildings is located, that are under common ownership, management, and financing and are to be assisted with HOME funds, under a commitment by the owner, as a single undertaking under this part. Project includes all the activities associated with the site and building. If there is more than one site associated with a project, the sites must be within a four block area.

Project completion means that all necessary title transfer requirements and construction work have been performed and the project in HUD's judgement complies with the requirements of this part (including the property standards adopted under § 92.251); the final drawdown has been disbursed for the project; and a Project Completion Report has been submitted and processed in the Cash and Management Information System (§ 92.502) as prescribed by HUD. For tenant-based rental assistance, the final drawdown has been disbursed for the project and the final payment certification has been submitted and processed in the Cash and Management Information System as prescribed by HUD.

Public housing agency (PHA) means any state, county, municipality or other governmental entity or public body (or its agency or instrumentality) that is authorized to engage in or assist in the development or operation of low-income housing. The term includes any Indian Housing Authority.

Reconstruction means the rebuilding of housing on the same foundation. Reconstruction is rehabilitation for purposes of this part.

Secretary means the Secretary of Housing and Urban Development.

Single parent means an individual who—

- (1) Is unmarried or legally separated from a spouse; and
- (2)(i) Has one or more minor children for whom the individual has custody or joint custody; or

(ii) Is pregnant.

Single room occupancy (SRO) housing means housing consisting of single room dwelling units that is the primary residence of its occupant or occupants. The unit may contain either food preparation facilities or sanitary facilities, or both. Alternatively, sanitary facilities may be located outside the unit and be shared by tenants in the project. SRO does not include facilities for students.

State means any state of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

State recipient. See § 92.201(b)(2).

Subrecipient means a public agency or nonprofit organization selected by the participating jurisdiction to administer all or a portion of the participating jurisdiction's HOME program. A public agency or nonprofit organization that receives HOME funds solely as a developer or owner of housing is not a subrecipient. The participating jurisdiction's selection of a subrecipient is not subject to the procurement procedures and requirements.

Substantial rehabilitation means the rehabilitation of residential property at an average cost for the project in excess of \$25,000 per dwelling unit.

Tenant-based rental assistance is a form of rental assistance in which the assisted tenant may move from a dwelling unit with a right to continued assistance.

Unit of general local government means a city, town, township, county, parish, village, or other general purpose political subdivision of a state; Guam, the Northern Mariana Islands, the Virgin Islands, American Samoa, the Federated States of Micronesia and Palau, the Marshall Islands, or a general purpose political subdivision thereof; a consortium of such political subdivisions recognized by HUD in accordance with § 92.101; and any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive to act on behalf of the jurisdiction with regard to provisions of this part. When a county is an urban county, the urban county is the unit of general local government for purposes of the HOME Investment Partnerships Program.

Urban county has the meaning given the term in § 570.3 of this title.

Very low-income families means low-income families whose annual incomes do not exceed 50 percent of the median family income for the area, as determined by HUD with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 50 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.

§ 92.3 Waivers.

Upon determination of good cause, the Secretary may waive any provision of this part not required by statute. Each waiver must be in writing and must be supported by documentation of the pertinent facts and grounds.

Subpart B—Allocation Formula

§ 92.50 Formula allocation.

(a) **Jurisdictions eligible for a formula allocation.** HUD will provide allocations of funds in amounts determined by the formula described in this section to—

(1) Units of general local governments that, as of the end of the previous fiscal year, are metropolitan cities, urban counties, or consortia approved under § 92.101; and

(2) States.

(b) **Amounts available for allocation; state and local share.** The amount of funds that are available for allocation by the formula under this section is equal to the balance of funds remaining after reserving for grants to Indian tribes one percent (or such other percentage or amount, as authorized by Congress) of the total funds appropriated and after reserving up to such amounts as may be authorized by law for housing education and organization support and for coordinated federal support activities.

(c) **Formula factors.** The formula for determining allocations uses the following factors. The first and sixth factors are weighted 0.1; the other four factors are weighted 0.2.

(1) **Vacancy-adjusted rental units** where the household head is at or below the poverty level. These rental units are multiplied by the ratio of the national rental vacancy rate over a jurisdiction's rental vacancy rate.

(2) **Occupied rental units with at least one of four problems (overcrowding, incomplete kitchen facilities, incomplete plumbing, or high rent costs).** **Overcrowding** is a condition that exists if there is more than one person per room occupying the unit. **Incomplete kitchen facilities** means the unit lacks sink with running water, a range, or a refrigerator. **Incomplete plumbing** means the unit lacks hot and cold piped water, a flush toilet, or a bathtub or shower inside the unit for the exclusive use of the occupants of the unit. **High rent costs** occur when more than 30 percent of household income is used for rent.

(3) Rental units built before 1950 occupied by poor families.

(4) Rental units described in paragraph (c)(2) of this section multiplied by the ratio of the cost of producing housing for a jurisdiction divided by the national cost.

(5) Number of families at or below the poverty level.

(6) Population of a jurisdiction multiplied by a net per capita income (pci). To compute net pci for a jurisdiction or for the nation, the pci of a three person family at the poverty threshold is subtracted from the pci of the jurisdiction or of the nation. The index is constructed by dividing the national net pci by the net pci of a jurisdiction.

(d) *Calculating formula allocations for units of general local government.* (1) Initial allocation amounts for units of general local government described in paragraph (a)(1) of this section are determined by multiplying the sum of the shares of the six factors in paragraph (c) of this section by 60 percent of the amount available under paragraph (b) of this section for formula allocation. The shares are the ratio of the weighted factor for each jurisdiction over the corresponding factor for the total for all of these units of general local government.

(2) If any of the initial amounts for such units of general local government in Puerto Rico exceeds twice the national average, on a per rental unit basis, that amount is capped at twice the national average.

(3) The initial amounts are revised by taking amounts of less than \$250,000 that were initially distributed to units of general local government and redistributing these amounts to units of general local government that had initial distribution amounts of \$250,000 or more. This redistribution calculation is repeated until 95 percent of the funds have been distributed among units of general local government in amounts of \$500,000 or more. On each repetition of the calculation, the threshold, which initially was \$250,000, is raised by half the difference between the previous threshold and \$500,000. Any amounts under \$500,000 that, on the last recalculation, were distributed to units of general local government are redistributed to units of general local government that have distribution amounts of \$500,000 or more.

(4) The allocation amounts determined under paragraph (d)(3) of this section are reduced by any amounts that are necessary to provide increased allocations to states that have no unit of general local government receiving a formula allocation (see paragraph (e)(4)

of this section). These reductions are made on a pro rata basis, except that no unit of general local government allocation is reduced below \$500,000.

(e) *Calculating formula allocations for states.* (1) Forty percent of the funds available for allocation under paragraph (b) of this section are allocated to states. The allocation amounts for states are calculated by determining initial amounts for each state, based on the sum of the shares of the six factors. For 20 percent of the funds to be allocated to states, the shares are the ratio of the weighted factor for the entire state over the corresponding factor for the total for all states. For 80 percent of the funds to be allocated to states, the shares are the ratio of the weighted factor for all units of general local government within the state that do not receive a formula allocation over the corresponding factor for the total for all states.

(2) If the initial amounts for Puerto Rico (based on either or both the 80 percent of funds or 20 percent of funds calculation) exceed twice the national average, on a per rental unit basis, each amount that exceeds the national average is capped at twice the national average, and the resultant funds are reallocated to other states on a pro rata basis.

(3) If the initial amounts when combined for any state are less than the \$3,000,000, the allocation to that state is increased to the \$3,000,000 and all other state allocations are reduced by an equal amount on a pro rata basis, except that no state allocation is reduced below \$3,000,000.

(4) The allocation amount for each state that has no unit of general local government within the state receiving an allocation under paragraph (d) of this section is increased by \$500,000. Funds for this increase are derived from the funds available for units of general local government, in accordance with paragraph (d)(4) of this section.

§ 92.51 Establishing list of participating jurisdictions that may use funds for new construction and rental housing production set-aside.

(a) *General.* HUD will identify each jurisdiction receiving a formula allocation under § 92.50 that is authorized by HUD to use its formula allocation for new construction, without the jurisdiction having to qualify under § 92.209 or § 92.210. HUD will also identify areas not receiving a formula allocation, as areas in which HOME funds may be used for new construction. Areas which HUD reviews for eligibility for new construction are metropolitan cities, urban counties, consortia, counties not containing these three

groups, and the balance of counties after having excluded these three groups. The list of areas eligible for new construction does not include areas with populations under 25,000. A state that is authorized by HUD to use its HOME funds for new construction may do so only within the boundaries of an area that HUD has identified as an area where new construction is authorized.

(b) *Eligibility criteria.* (1) HUD determines the local jurisdictions and areas in which new construction is authorized based on the following factors:

(i) *Low vacancy.* The national rental vacancy rate divided by the corresponding vacancy rate for a local jurisdiction or area.

(ii) *Low turnover.* The national rate at which renter families moved in year and months preceding the decennial census divided by the corresponding turnover rate for a local jurisdiction or area.

(iii) *High proportion of substandard housing.* The percent of rental units with at least one of four problem conditions as of the most recent decennial census divided by the corresponding national rate. The four problem conditions are: lack of plumbing, lack of kitchen facilities, overcrowding, and 30 percent rent burden, as described in § 92.50(c)(2).

(iv) *High fair market rent.* The most recently available two-bedroom Section 8 Existing Housing fair market rent for a local jurisdiction or area divided by the national two-bedroom Section 8 Existing Housing fair market rent.

(v) *High population growth.* The population growth rate from 1980 to the latest population estimate or count for a local jurisdiction or area divided by the corresponding national rate.

(2) A jurisdiction or an area is placed on the list of jurisdictions and areas where new construction is authorized if it has above-average values for at least three of the five eligibility factors and more than a specified value on a composite of the five factors. The ratio for each of the five factors is set up so that above-average need is always expressed as a value greater than one. The composite factor is an average of the five factors. In computing the composite factor, component factors are capped for the most extreme high and low of values for metropolitan cities and urban counties.

(c) *Data used to identify eligible jurisdictions.* Jurisdictions are identified as eligible based on the latest data available 90 days before the beginning of a fiscal year. The data are derived for each jurisdiction, by comparable

methods and for the same period of time.

(d) *Requests for review of eligibility determinations.* (1) A unit of general local government receiving a formula allocation under § 92.50 but not on the list of jurisdictions in which new construction is authorized may request HUD to reconsider its eligibility. A state may request HUD to consider its eligibility to use HOME funds for new construction with respect to a jurisdiction that does not receive a formula allocation and has a population of 25,000 or more. A state also may request HUD to consider its eligibility to use HOME funds for new construction in an area with a population less than 25,000.

(2) The requesting jurisdiction must submit: Information described in paragraph (d)(3) of this section; an explanation of how the information submitted supports the conclusion that the supply of available rental housing is not sufficient to meet the demand arising from the growth of households and turnover of units in the housing market; a description of the data sources, including the methods for obtaining survey data; and documentation that the survey data are statistically representative of conditions within the housing market area. Requests under paragraph (d) of this section must be submitted to the appropriate HUD field office.

(3) HUD will evaluate the information submitted and, based on a decision that it is reasonably accurate and representative of local market conditions, will make the eligibility determination. In making this determination, HUD will consider information that demonstrates:

(i) The current rental housing vacancy rate is at a low level relative to the rate required for a balanced market. Typically, a rental housing vacancy rate below four percent would be considered low unless the housing market area is not growing or experiencing low rates of household growth. The analysis of vacancy data should also consider the direction the market is moving. For example, a significant increase in rental housing production or a decline in population growth would indicate that the housing shortage will be a short term condition.

(ii) The growth rate of renter households is larger than average and the number of rental housing units being produced on an annual basis is not large enough to satisfy demand arising from the increase in households. An annual increase in rental households of two percent or more for a sustained period of

several years generally would be considered a rapid rate of growth.

(iii) The shortage of housing is resulting in rent increases that exceed normal increases commensurate with the costs of operating rental housing.

(iv) A significant number or proportion of the households holding Section 8 Certificates or Housing Vouchers are unable to find adequate housing because of the shortage of rental housing, including PHA data showing a lower than average percentage of units under lease and a longer than average time is required to find units.

(4) A decision by HUD, under this paragraph (d), to authorize the use of HOME funds for new construction in an area does not alter the rental housing production set-asides that HUD has made under paragraph (e) of this section.

(e) *Formula for determining the rental housing production set-aside.* (1) For each jurisdiction receiving a formula allocation that HUD identifies, under paragraph (a) of this section, as being authorized to use HOME funds for new construction, HUD, to the extent required by statute, will also specify the amount of the jurisdiction's respective formula allocation that it must use, for a period ending 24 months after the allocation amounts are deposited in the jurisdiction's HOME Investment Trust Fund, only to produce affordable rental housing through new construction or substantial rehabilitation (rental housing production set-aside). Any of these funds that the jurisdiction does not so commit within the 24-month period remains available for an additional 12-month period for commitment to any eligible activity permitted by subpart E of this part.

(2) If there is a statutory directive to set aside a specified percentage of the total formula allocation to be used for new construction or substantial rehabilitation, HUD determines the amount of each jurisdiction's rental housing production set-aside as follows. Of the amount that must be set aside, 80 percent is allocated to units of general local government and 20 percent is allocated to states. A state or local jurisdiction's share of the amount set aside is based on the share of its need relative to the need in all such jurisdictions. The need in a local jurisdiction is determined by subtracting one from the jurisdiction's composite factor and multiplying the difference by the jurisdiction's formula allocation. A state's need is determined by summing the need as calculated for all areas within the state. Each area's need is calculated by subtracting one from the

area's composite factor and multiplying the difference by the area's population.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.52 Publishing formula allocation, rental housing production set-aside and list of new construction-eligible participating jurisdictions.

Not later than 20 days after funds become available to HUD, HUD will allocate HOME funds and will then promptly publish a **Federal Register** notice listing all jurisdictions receiving a formula allocation and the amount of each jurisdiction's formula allocation, all jurisdictions determined by HUD to be authorized to use their formula allocation for new construction and the amount of each such jurisdiction's rental housing production set-aside, and all other areas in which HUD has determined HOME funds may be used for new construction.

Subpart C—Participating Jurisdiction: Designation and Revocation of Designation—Consortia

§ 92.100 General.

This subpart C sets out the requirements for a jurisdiction to be designated a participating jurisdiction, including the requirements for local jurisdictions to form consortia. It also sets out the conditions and procedures under which HUD may revoke a jurisdiction's designation as a participating jurisdiction.

§ 92.101 Consortia.

(a) A consortium of geographically contiguous units of general local government is a unit of general local government for purposes of this part if—

(1) By March 31 of the fiscal year before the start of the fiscal year (by September 3, 1991, for fiscal year 1992), the consortium:

(i) Notifies HUD of its intention to be considered a consortium for purposes of this section;

(ii) Submits a written certification by the state that the consortium will direct its activities to alleviation of housing problems within the state; and

(iii) Advises HUD that the consortium has executed a legally binding cooperation agreement among its members authorizing one member unit of general local government to act in a representative capacity for all member units of general local government for the purposes of this part and providing that the representative member assumes overall responsibility for ensuring that the consortium's HOME program is

carried out in compliance with the requirements of this part; and

(2) Before the end of the fiscal year in which the notice is submitted, HUD determines that the consortium has sufficient authority and administrative capability to carry out the purposes of this part on behalf of its member jurisdictions. HUD will endeavor to make this determination as quickly as practicable after receiving the consortium's notice in order to provide the consortium an opportunity to correct its submission, if necessary. If the submission is deficient, HUD will work with the consortium to resolve the issue, but will not delay the formula allocations.

(b) A metropolitan city or an urban county may be part of a consortium. A unit of general local government that is included in an urban county may be part of a consortium, only through the urban county, regardless of whether the urban county receives a formula allocation.

(c) The consortium's status as a unit of general local government continues for three successive fiscal years or until HUD revokes its designation as a participating jurisdiction, whichever is shorter. If the consortium contains an urban county, the consortium's status as a unit of general local government is coterminous with the period of qualification of the urban county. During the period of qualification, additional units of general local government may join the consortium, but no included unit of general local government may withdraw from the consortium.

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§ 92.102 Participation threshold amount.

(a) A unit of general local government must have a formula allocation under § 92.50 that is equal to or greater than \$750,000; or

(b) If a unit of general local government's formula allocation is less than \$750,000:

(1) HUD finds that the unit of general local government has a local PHA and has demonstrated a capacity to carry out the provisions of this part, as evidenced by satisfactory performance under one or more HUD-administered programs that provide assistance for activities comparable to the eligible activities under this part; and

(2) The state has authorized HUD to transfer to the unit of general local government a portion of the state's allocation or the state, the unit of general local government, or both, has made available its own resources such that the sum of the amounts transferred or made available are equal to or

greater than the difference between the unit of general local government's formula allocation and \$750,000. A state, subject to the distribution of assistance requirements in § 92.201, may authorize such a transfer even if the state is not designated a participating jurisdiction. If the state is not designated a participating jurisdiction or does not receive an allocation, it may only make transfers to units of general local government in amount necessary for the respective units of general local government to meet the \$750,000 participation threshold. When a state that has received a rental housing production set-aside under § 92.51 transfers a portion of its allocation to a unit of general local government, the state may specify that the transfer includes a part of the state's set-aside. A unit of general local government that is on the list of new construction-eligible participating jurisdictions published by HUD under § 92.52 must use funds transferred to it from a state's rental housing production set-aside for new construction or for substantial rehabilitation of rental housing, for the period specified in § 92.51(e). A unit of general local government that is not on the list of new construction-eligible participating jurisdictions published by HUD under § 92.52 must use funds transferred to it from a state's rental housing production set-aside only for substantial rehabilitation of rental housing, for the period specified in § 92.51(e).

§ 92.103 Notification of intent to participate.

(a) A jurisdiction must notify HUD in writing, not later than 30 days after publication of the formula allocation notice under § 92.52, of its intention to become a participating jurisdiction.

(b) A unit of general local government that has a formula allocation of less than \$750,000 must submit, with its notice, one or more of the following, as appropriate, as evidence that it has met the threshold allocation requirements in § 92.102(b):

(1) Authorization from the state to transfer a portion of its allocation to the unit of general local government;

(2) A letter from the governor or designee indicating that the required funds have been approved and budgeted for the unit of general local government;

(3) A letter from the chief executive officer of the unit of general local government indicating that the required funds have been approved and budgeted.

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§ 92.104 Submission of housing strategy.

A jurisdiction that has not submitted a housing strategy to HUD or has submitted an abbreviated housing strategy (as provided for in § 91.25 of this title) must submit to HUD, not later than 90 days after providing notification under § 92.103, a housing strategy in accordance with part 91 of this title.

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§ 92.105 Designation as a participating jurisdiction.

When a jurisdiction has complied with the requirements of §§ 92.102 through 92.104 and HUD has approved the jurisdiction's housing strategy in accordance with part 91 of this title, HUD will designate the jurisdiction as a participating jurisdiction.

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§ 92.106 Continuous designation as a participating jurisdiction.

Once a state or unit of general local government is designated a participating jurisdiction, it remains a participating jurisdiction for subsequent fiscal years and the requirements of §§ 92.102 through 92.105 do not apply, unless HUD revokes the designation in accordance with § 92.107.

§ 92.107 Revocation of designation as a participating jurisdiction.

HUD may revoke a jurisdiction's designation as a participating jurisdiction if—

(a) HUD finds, after reasonable notice and opportunity for hearing as provided in § 92.552(b) that the jurisdiction is unwilling or unable to carry out the provisions of this part, including failure to meet matching contribution requirements; or

(b) The jurisdiction's formula allocation, plus funds provided under § 92.102(b), falls below \$750,000 for three consecutive years, below \$625,000 for two consecutive years, or the jurisdiction does not receive a formula allocation in any one year.

(c) When HUD revokes a participating jurisdiction's designation as a participating jurisdiction, HUD will reallocate any remaining funds in the jurisdiction's HOME Investment Trust Fund established under § 92.500 in accordance with § 92.451.

Subpart D—Program Description**§ 92.150 Submission of program description and certifications.**

(a) *Submitting a program description.* A participating jurisdiction must submit a program description each fiscal year within 45 days of the date of publication of the formula allocations under § 92.52. A jurisdiction that has not yet been designated as a participating jurisdiction must submit a program description within 45 days of designation.

(b) *Content of program description.* The program description must provide the following information:

- (1) An executed Standard Form 424;
- (2) For a local participating jurisdiction, the estimated use of HOME funds and of matching contributions (consistent with needs identified in its approved housing strategy) for each of the following categories of eligible activities: new construction, substantial rehabilitation, other rehabilitation, acquisition (not involving new construction or rehabilitation), tenant-based rental assistance and an estimate of whether units assisted will be rental or owner-occupied;
- (3) For a state, a description of how the state will distribute funds (consistent with needs identified in its approved housing strategy) i.e. transferring funds to other participating jurisdictions that do not meet the participation threshold allocation level in § 92.102, administering a competitive process, or directly administering HOME funds. To the extent known, states should identify the areas in which HOME funds will be used.
- (4) The amount of HOME funds that the participating jurisdiction is reserving for community housing development organizations. An explanation of how the participating jurisdiction will work with community housing development organizations and a description of the activities (type of activity and level of funds) that community housing development organizations will be undertaking for the participating jurisdiction;
- (5) If the participating jurisdiction intends to use HOME funds for first-time homebuyers, the guidelines for resale should be described as required in § 92.254(a)(4);
- (6) If the participating jurisdiction intends to use HOME funds for tenant-based rental assistance, a description of how the program will be administered consistent with the minimum guidelines described in § 92.211.
- (7) If a participating jurisdiction intends to use other forms of investment not described in § 92.205(b), a

description of the other forms of investment.

(8) A statement of the policy and procedures to be followed by the participating jurisdiction to meet the requirements for affirmative marketing, and establishing and overseeing a minority and women business outreach program under §§ 92.350 and 92.351, respectively.

(c) The following certifications must accompany the program description:

(1) A certification that, before committing funds to a project, the participating jurisdiction will evaluate the project in accordance with guidelines that it adopts for this purpose and will not invest any more HOME funds in combination with other federal assistance than is necessary to provide affordable housing;

(2) If applicable, the certifications required, by § 92.209 for a participating jurisdiction that is not on the list published under § 92.51, to do new construction to facilitate a neighborhood revitalization program;

(3) If applicable, the certifications required, by § 92.210 for a participating jurisdiction that is not on the list published under § 92.51, to do new construction on the basis of special needs;

(4) If the participating jurisdiction intends to provide tenant-based assistance, the certification required by § 92.211;

(5) A certification that the submission of the program description is authorized under state and local law (as applicable), and the participating jurisdiction possesses the legal authority to carry out the HOME Investment Partnerships Program, in accordance with the HOME regulations;

(6) A certification that it will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, implementing regulations at 49 CFR part 24 and the requirements of § 92.353;

(7) A certification that the participating jurisdiction and, if applicable, state recipients, will use HOME funds pursuant to the participating jurisdiction's approved housing strategy and in compliance with all requirements of this part;

(8) The certification with regard to the drug-free workplace required by 24 CFR part 24, subpart F; and

(9) The certification required with regard to lobbying required by 24 CFR part 87, together with disclosure forms, if required by 24 CFR part 87.

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§ 92.151 Review of program description and certifications.

(a) *Review of program description.* The responsible HUD Field Office will review a participating jurisdiction's program description and will approve the description unless it is not consistent with its approved housing strategy or if the participating jurisdiction has failed to submit information sufficient to allow HUD to make the necessary determinations required by § 92.150 (b)(5), (b)(7), and (b)(8), if applicable. If the information submitted is not consistent with the approved housing strategy and the participating jurisdiction has not submitted information on § 92.150 (b)(5), (b)(7), and (b)(8), if applicable, the participating jurisdiction may be required to furnish such further information or assurances as HUD may consider necessary to find the program description and certifications satisfactory.

(b) *Review period.* The HUD Field Office will notify the participating jurisdiction if its program description is not consistent with its approved housing strategy or determinations cannot be made under § 92.150 (b)(5), (b)(7), or (b)(8) within 30 days of receipt and the participating jurisdiction will have a reasonable period of time, agreed upon mutually, to submit the necessary supporting information to show it is consistent or to revise the activities in its program description.

(c) *Conditional approval of program description.* If the participating jurisdiction does not submit the supporting information under § 92.150 (b)(5) or (b)(7) sufficient to show consistency with its approved housing strategy or to allow the required HUD determinations or HUD disapproves the guidelines under § 92.150(b)(5) or the form of investment under § 92.150(b)(7), the Field Office may approve the program description conditionally excepting those activities covered by those sections until such time as the necessary information is submitted.

(d) *HOME Investment Partnership Agreement.* After Field Office approval under this section, a HOME funds allocation is made by HUD execution of the agreement, subject to execution by the participating jurisdiction. The funds are obligated on the date HUD notifies the participating jurisdiction of HUD's execution of the agreement in accordance with this section and § 92.501.

§ 92.152 Amendments to program description.

In general, a participating jurisdiction is not required to submit to HUD amendments to its program description that it makes during the fiscal year. The participating jurisdiction must document amendments in its file, and if the amendments affect future allocations, must include these amendments in the program description for the following fiscal year. However, a participating jurisdiction must submit any amendments to the following for HUD approval: guidelines for resale (see 92.150(b)(6)); other forms of investment (see § 92.150(b)(7)); and minority and women business outreach program (§ 92.150(b)(8)).

Subpart E—Program Requirements**§ 92.200 Private-public partnership.**

Each participating jurisdiction must make all reasonable efforts, consistent with the purposes of this part, to maximize participation by the private sector, including nonprofit organizations and for-profit entities, in the implementation of the jurisdiction's approved housing strategy, including participation in the financing, development, rehabilitation and management of affordable housing. Nothing in the previous sentence shall preclude public housing authorities from fully participating in the implementation of a jurisdiction's approved housing strategy.

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§ 92.201 Distribution of assistance.

(a) *Local.* Each participating jurisdiction must, insofar as is feasible, distribute HOME funds geographically within its boundaries and among different categories of housing need, according to the priorities of housing need identified in its approved housing strategy.

(b) *State.* (1) Each participating state is responsible for distributing HOME funds throughout the state according to the state's assessment of the geographical distribution of the housing need within the state, as identified in the state's approved housing strategy. The state must distribute HOME funds to rural areas in amounts that take into account the nonmetropolitan share of the state's total population and objective measures of rural housing need, such as poverty and substandard housing, as set forth in the state's approved housing strategy. To the extent the need is within the boundaries of a participating unit of general local government, the

state and the unit of general local government shall coordinate activities to address that need.

(2) A state may carry out its own HOME program without active participation of units of general local government or may distribute HOME funds to units of general local government to carry out HOME programs in which both the state and all or some of the units of general local government perform specified program functions. A unit of general local government designated by a state to receive HOME funds from a state is a state recipient.

(3)(i) A state that uses state recipients to perform program functions shall ensure that the state recipients use HOME funds in accordance with the requirements of this part and other applicable laws. A state shall include in its written agreement with its state recipients such additional provisions (including provisions permitting the state to withdraw or reduce HOME funds or take other actions based on noncompliance by the state recipient) as may be appropriate to ensure compliance and to enable the state to carry out its responsibilities under this part.

(ii) The state shall conduct such reviews and audit of its state recipients as may be necessary or appropriate to determine whether the state recipient has committed the HOME funds in the United States Treasury account as required by § 92.500 and expended the funds in the United States Treasury account as required by § 92.500, and has met the requirements of this part, particularly eligible activities, income targeting, affordability, and matching contribution requirement.

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§ 92.202 Site and neighborhood standards.

A participating jurisdiction must administer its HOME program in a manner that provides housing that:

(a) Is suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of title VI of the Civil Rights Act of 1964, the Fair Housing Act, E.O. 11063, and HUD regulations issued pursuant thereto; and

(b) Promotes greater choice of housing opportunities.

(c) In carrying out these requirements with respect to new construction, a participating jurisdiction must follow § 882.708(c) of the title.

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§ 92.203 Income determinations.

Whenever a participating jurisdiction makes a determination under this part based on family income or adjusted family income, it must use the definitions of *annual income*, *adjusted income*, *monthly income*, and *monthly adjusted income*, as those terms are defined in part 813 of this title.

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§ 92.204 Applicability of requirements to entities that receive a reallocation of HOME funds, other than participating jurisdictions.

(a) Jurisdictions that are not participating jurisdictions and community housing development organizations receiving competitive reallocations from HUD are subject to the same requirements in subpart E (Program Requirements), subpart F (Project Requirements), subpart K (Program Administration), and subpart L (Performance Reviews and Sanctions) of this part as participating jurisdictions, except for the following.

(1) Subpart E (Program Requirements) of this part: Sections 92.208 through 210 do not apply. The matching contribution requirements in §§ 92.218 through 92.221 do not apply.

(2) Subpart K (Program Administration) of this part:

(i) Section 92.500 (The HOME Investment Trust Fund) does not apply. HUD will establish a HOME account in the United States Treasury and the HOME funds must be used for approved activities. A local account must be established for repayment, interest and other return of investment of HOME funds. HUD will recapture HOME funds in the HOME Treasury account by the amount of:

(A) Any funds that are not committed within 24 months after the last day of the month in which the funds were deposited in the account;

(B) Any funds that are not expended within five years after the last day of the month in which the funds were deposited in the account; and

(C) Any penalties assessed by HUD under § 92.552.

(ii) Section 92.502 (Cash and Management Information System) applies, except that references to the HOME Investment Trust Fund mean HOME account and the reference to 24 CFR part 58 does not apply. In addition, § 92.502(c) does not apply, and compliance with Treasury Circular No. 1075 (31 CFR part 205) is required.

(iii) Section 92.503 (Repayment of investment) applies, except that repayments, interest and other return on investment of HOME funds may be retained provided the funds are used for eligible activities in accordance with the requirements of this section.

(3) Section 92.504 (Participating jurisdiction responsibilities; written agreements; monitoring) applies, except that the written agreement must ensure compliance with the requirements in this section.

(4) Section 92.508 (Recordkeeping) applies with respect to the records that relate to the requirements of this section.

(5) Section 92.509 (Performance reports) applies, except that a performance report is required only after completion of the approved projects.

(b) The requirements in subpart H (Other Federal Requirements) of this part apply, except that jurisdictions and community housing development organizations receiving reallocations from HUD must comply with affirmative marketing requirements, the flood insurance requirements labor requirements, and lead-based paint requirements, applicable to participating jurisdictions.

(c) Subpart B (Allocation Formula), subpart C (Participating Jurisdiction: Designation and Revocation of Designation—Consortia), subpart D (Program Description), and subpart G (Community Housing Development Organizations) of this part do not apply.

Eligible and Prohibited Activities

§ 92.205 Eligible activities: General.

(a) *Eligible activities.* (1) HOME funds may be used by a participating jurisdiction to provide incentives to develop and support affordable rental housing and homeownership affordability through the acquisition (including assistance to first-time homebuyers), new construction, reconstruction, or moderate or substantial rehabilitation of nonluxury housing with suitable amenities, including real property acquisition, site improvement, conversion, demolition, and other expenses, including financing costs, relocation expenses of any displaced persons, families, businesses, or organizations; and to provide tenant-based rental assistance. The specific eligible costs for these activities are set forth in § 92.206.

(2) Acquisition of vacant land or demolition must be undertaken only with respect to a particular housing project intended to provide affordable housing, and for which funds for construction have been committed.

(3) Housing that has received an initial certificate of occupancy or equivalent document within a one-year period before a participating jurisdiction commits HOME funds to the project is new construction for purposes of this part.

(4) Conversion of an existing structure to affordable housing is rehabilitation, unless the conversion entails adding one or more units beyond the existing walls, in which case, the project is new construction for purposes of this part.

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

(c) *Minimum amount of assistance.* The minimum amount of HOME funds that must be invested in a project involving rental housing or homeownership is \$1,000 times the number of affordable units in the project. The minimum amount of HOME funds that must be invested in tenant-based rental assistance is \$1,000 times the average number of families assisted each year.

(d) *Termination before completion.* If HOME funds are spent on a project that is terminated before completion, the funds must be repaid to the participating jurisdiction's HOME Investment Trust Fund (except as provided in § 92.301(a)(3) and 92.301(b)(3) for project-specific assistance to community housing development organizations).

§ 92.206 Eligible costs.

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

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

(1) For new construction, costs to meet the applicable new construction standards of the participating jurisdiction and the Model Energy Code referred to in § 92.251;

(2) For rehabilitation, costs to meet the applicable rehabilitation standards of the participating jurisdiction or correcting substandard conditions (minimally the housing quality standards at § 882.109 of this title), to make essential improvements including energy-related repairs or improvements, improvements necessary to permit the

use by handicapped persons, and the abatement of lead-based paint hazards, as required by § 92.355, and to repair or replace major housing systems in danger of failure; and

(3) For both new construction and rehabilitation, costs to demolish existing structures and for improvements to the project site that are in keeping with improvements of surrounding, standard projects, and costs to make utility connections.

(4) For new construction, the cost of funding an initial operating deficit reserve, which is a reserve to meet any shortfall in project income during the period of project rent-up (not to exceed 18 months) and which may only be used to pay operating expenses, reserve for replacement payments, and debt service. Any HOME funds placed in an operating deficit reserve that remain unexpended when the reserve terminates must be returned to the participating jurisdiction's local HOME Investment Trust Fund account.

(b) *Acquisition costs.* Costs of acquiring improved or unimproved real property.

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

(1) Architectural, engineering or related professional services required to prepare plans, drawings, specifications, or work write-ups;

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

(3) Costs of a project audit that the participating jurisdiction may require with respect to the development of the project; and

(4) Costs to provide information services such as affirmative marketing and fair housing information to prospective homeowners and tenants as required by § 92.351.

(d) *Relocation costs.* Costs of relocation payments and other relocation assistance for permanently and temporarily relocated individuals, families, businesses, nonprofit organizations, and farm operations where assistance is required under § 92.353 (b) or (c) or determined by the

participating jurisdiction to be appropriate under § 92.353(d).

(e) *Costs related to tenant-based rental assistance.* Eligible costs are the rental assistance payments made to provide tenant-based rental assistance for a family.

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§ 92.207 [Reserved]

§ 92.208 New construction: HUD-authorized.

A participating jurisdiction may use HOME funds for new construction of affordable housing if the participating jurisdiction is on the list of jurisdictions authorized to use HOME funds for new construction published by HUD under § 92.52 or successfully appeals its omission from that list. A state participating jurisdiction that is authorized by HUD to use HOME funds for new construction may use HOME funds for new construction only in those areas of the state that are on the list published by HUD under § 92.52.

§ 92.209 New construction: Neighborhood revitalization.

A participating jurisdiction that does not meet the requirements of § 92.208 (including a state with respect to areas not on the list published by HUD under § 92.52) may nonetheless use HOME funds for new construction of affordable housing on the basis of a neighborhood revitalization program, if—

(a) The participating jurisdiction determines and certifies that rehabilitation is not the most cost-effective way to meet the participating jurisdiction's need to expand the supply of affordable housing within the neighborhood and the participating jurisdiction's housing needs, within the neighborhood, cannot be met through rehabilitation of the available housing stock; and

(b) Certifies that—

(1) The program of new construction is needed to facilitate a neighborhood revitalization program that emphasizes rehabilitation of substandard housing for rental or homeownership opportunities by low-income and moderate-income families in an area designated by the jurisdiction. The participating jurisdiction must document this element of its certification with quantitative evidence demonstrating that the neighborhood revitalization program has emphasized the rehabilitation of substandard housing. Evidence that at least 51 percent of all funds spent by the participating jurisdiction on the neighborhood

revitalization program (within at least a one-year period before the certification is made) was spent for rehabilitation of substandard housing will meet this test;

(2) The housing is to be located in a low-income neighborhood;

(3) The housing is to be developed, owned, or sponsored by a community housing development organization or a public agency; and

(4)(i) The number of housing units to be constructed with HOME funds does not exceed 20 percent of the total number of housing units in the neighborhood revitalization program that are assisted with HOME funds; or

(ii)(A) The housing is to be located in a severely distressed area within the neighborhood with large tracts of vacant land and abandoned buildings;

(B) The housing is to be located in an area within the neighborhood with an inadequate supply of existing housing that can economically be rehabilitated to meet identified housing needs; or

(C) The new construction is required to accomplish the neighborhood revitalization program.

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§ 92.210 New construction: Special needs.

A participating jurisdiction that does not meet the requirements of § 92.208 (including a state with respect to areas not on the list published by HUD under § 92.52) may nonetheless still use HOME funds for new construction of affordable housing on the basis of special needs, if—

(a) The participating jurisdiction determines and certifies that rehabilitation is not the most cost-effective way to expand the supply of affordable housing for the special need and the special need cannot be met through rehabilitation of the available housing stock;

(b) The HOME funds are used for new construction of one or more of the following:

(1) Housing for families of five or more persons;

(2) Housing for persons with disabilities;

(3) Single room occupancy housing;

(4) Housing that is necessary to further the desegregation or racial deconcentration of housing within the jurisdiction pursuant to a court-approved settlement agreement, compliance agreement, or voluntary plan approved by HUD if tenant-based assistance is not sufficient to meet the specified need within a reasonable time; and

(c) The participating jurisdiction certifies on the basis of objective data in

its annual approved housing strategy: that a high priority need for such housing exists in the jurisdiction; and that there is not a supply of vacant, habitable, public housing units in excess of normal vacancies resulting from turnovers that could meet the specified need.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.211 Tenant-based rental assistance.

(a) *General.* A participating jurisdiction may use HOME funds for tenant-based rental assistance only if—

(1) The participating jurisdiction certifies that the use of HOME funds for tenant-based rental assistance is an essential element of the participating jurisdiction's annual approved housing strategy for expanding the supply, affordability, and availability of decent, safe, sanitary, and affordable housing, and specifies the local market conditions that lead to the choice of this option; and

(2) The participating jurisdiction selects families from the Section 8 waiting list of a PHA operating within the jurisdiction of the participating jurisdiction, in accordance with the PHA's preferences established under 24 CFR 882.219. The participating jurisdiction may select eligible families currently residing in units that are designated for rehabilitation under the participating jurisdiction's HOME program without requiring that the family be placed on the PHA's Section 8 waiting list. Families so selected may use the tenant-based assistance in the rehabilitated unit or in other qualified housing. A participating jurisdiction may require the family to use the tenant-based assistance within the participating jurisdiction's boundaries or may permit the family to use the assistance outside its boundaries.

(b) *Program operation.* A tenant-based rental assistance program must be operated consistently with the requirements of this section. The participating jurisdiction may operate the program, itself, or may contract with a PHA or other entity with the capacity to operate a rental assistance program. The tenant-based rental assistance may be provided through an assistance contract to an owner that leases a unit to an assisted family or directly to the family.

(c) *Term of rental assistance contract.* The term of the rental assistance contract providing assistance with HOME funds may not exceed 24 months, but may be renewed, subject to the availability of HOME funds. The term of

the rental assistance contract must begin on the first day of the term of the lease. For a rental assistance contract between a participating jurisdiction and an owner, the term of the contract must terminate on termination of the lease. For a rental assistance contract between a participating jurisdiction and a family, the term of the contract need not end on termination of the lease, but no payments may be made after termination of the lease until a family enters into a new lease.

(d) *Rent reasonableness.* The participating jurisdiction must disapprove a lease if the rent is not reasonable, based on rents that are charged for comparable unassisted rental units.

(e) *Lease requirements.* The lease must comply with the requirements in § 92.253 (a) and (b).

(f) *Maximum subsidy.* (1) The amount of the monthly assistance that a participating jurisdiction may pay to, or on behalf of, a family may not exceed the difference between a rent standard for the unit size established by the participating jurisdiction and 30 percent of the family's monthly adjusted income.

(2) The participating jurisdiction must establish a minimum tenant contribution to rent.

(3) The participating jurisdiction's rent standard for a unit size may not be less than 80 percent of the published section 8 Existing Housing fair market rent (in effect when the payment standard amount is adopted) for the unit size, nor more than the fair market rent or HUD-approved community-wide exception rent (in effect when the participating jurisdiction adopts its rent standard amount) for the unit size. (Community-wide exception rents are maximum gross rents approved by HUD for the Rental Certificate Program under § 882.106(a)(3) of this title for a designated municipality, county, or similar locality, which apply to the whole PHA jurisdiction.) A participating jurisdiction may approve on a unit-by-unit basis a subsidy based on a rent standard that exceeds the applicable fair market rent by up to 10 percent for 20 percent of units assisted.

(g) *Housing quality standards.* Housing occupied by a family receiving tenant-based assistance under this section must meet the performance requirements set forth in § 882.109 of this title. In addition, the housing must meet the acceptability criteria set forth in § 882.109 of this title, except for such variations, as are proposed by the participating jurisdiction and approved by HUD. Local climatic or geological conditions or local codes are examples which may justify such variations.

(h) *Use of Section 8 assistance.* In any case where assistance under section 8 of the United States Housing Act of 1937 becomes available to a participating jurisdiction, recipients of tenant-based rental assistance under this part will qualify for tenant selection preferences to the same extent as when they received the tenant-based rental assistance under this part.

§ 92.212 REACH: Asset recycling information dissemination.

(a) *General.* HUD will make available upon request by any participating jurisdiction a list of eligible properties that are located within the jurisdiction and that are owned or controlled by HUD to facilitate their purchase, development, or rehabilitation with HOME funds.

(b) *Eligible properties.* An eligible property under this section must:

(1) Be an unoccupied single-family or multifamily dwelling, such that acquisition and rehabilitation of the dwelling would not result in the displacement of any residents of the dwelling; and

(2) Have an appraised value that does not exceed:

(i) In the case of a 1- to 4-family dwelling, the mortgage limit for the type of single family housing (1- to 4-family residence, condominium unit, combination manufactured home and lot, or manufactured home lot) for the area (including any applicable high-cost mortgage limit published by HUD in the Federal Register) under HUD's single family insuring authority under the National Housing Act. For a cooperative unit, the appraised value for a cooperative share may not exceed the balance remaining after subtracting from the 1-family mortgage limit an amount equal to the blanket mortgage covering the cooperative development which is attributable to this cooperative unit; or

(ii) In the case of a dwelling with more than 4 units, the applicable maximum dollar amount limitation, as determined under § 221.514 (b)(1) and (c) of this title that would apply to a mortgage insured under section 221(d)(3)(ii) of the National Housing Act for elevator-type structures, involving a nonprofit mortgagor.

§ 92.213 Development of model programs.

HUD will develop and make available from time to time model programs that have been developed in cooperation with participating jurisdictions, government-sponsored mortgage finance corporations, nonprofit organizations, the private sector, and other appropriate

parties and that are designed to carry out the purposes of this part.

§ 92.214 Prohibited activities.

HOME funds may not be used to—

(a) Defray any administrative cost of a participating jurisdiction. Administrative costs include any cost equivalent to the costs described in § 570.206 of this title (program administration costs for the CDBG Program) and project delivery costs, such as new construction and rehabilitation counseling, preparing work specifications, loan processing, inspections, and other services related to assisting owners, tenants, contractors, and other entities applying for or receiving HOME funds;

(b) Provide a project reserve account for replacements, a project reserve account for unanticipated increases in operating costs, or operating subsidies;

(c) Provide tenant-based rental assistance for the special purposes of the existing section 8 program, including the activities specified in § 791.403(b)(1) of this title, or preventing displacement from projects assisted with rental rehabilitation grants under part 511 of this title.

(d) Provide nonfederal matching contributions required under any other federal program;

(e) Provide assistance authorized under part 965 (PHA-Owned or Leased Projects—Maintenance and Operation) of this title;

(f) Carry out activities authorized under part 968 (Public Housing Modernization) of this title; or

(g) Provide assistance to eligible low-income housing under part 248 (Prepayment of Low Income Housing Mortgages) of this title.

(h) Provide assistance (other than tenant-based rental assistance or assistance to a first-time homebuyer to acquire housing previously assisted with HOME funds) to a project previously assisted with HOME funds during the period of affordability established by the participating jurisdiction under § 92.502 or § 92.504. However, additional HOME funds may be committed to a project up to one year after project completion (see § 92.502), but the amount of HOME funds in the project may not exceed the maximum per-unit subsidy amount established under § 92.250.

§ 92.215 Limitation on jurisdictions under court order.

(a) HOME funds may not be used to carry out housing remedies or to pay fines, penalties, or costs associated with an action in which a participating

jurisdiction has been adjudicated, by a federal, state, or local court, to be in violation of title VI of the Civil Rights Act of 1964, the Fair Housing Act, or any other federal, state, or local law promoting fair housing or prohibiting discrimination.

(b) HOME funds may be used in connection with a settlement that has been entered into in any case where claims of violations described in paragraph (a) of this section have been asserted against a participating jurisdiction only to carry out housing remedies with eligible activities.

Income Targeting

§ 92.216 Income targeting: Tenant-based rental assistance and rental units—Initial eligibility determination and reexamination.

(a) Each participating jurisdiction must invest HOME funds made available during a fiscal year so that, with respect to tenant-based rental assistance and rental units:

(1) Not less than 90 percent of such funds are invested with respect to dwelling units that are occupied by families whose annual incomes do not exceed 60 percent of the median family income for the area, as determined and made available by HUD with adjustments for smaller and larger families (except that HUD may establish income ceilings higher or lower than 60 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction cost or fair market rent, or unusually high or low family income) at the time of occupancy or at the time funds are invested, whichever is later; and

(2) The remainder of these funds are invested with respect to dwelling units that are occupied by households that qualify as low-income families (other than families described in paragraph (a)(1) of this section) at the time of occupancy or at the time funds are invested, whichever is later.

(b) The participating jurisdiction must determine an applicant's income eligibility and eligibility as a family at the time the applicant receives assistance, and must reexamine family income and family size and composition, at least annually.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.217 Income targeting: Homeownership.

Each participating jurisdiction must invest HOME funds made available during a fiscal year so that with respect to homeownership assistance, 100 percent of these funds are invested with

respect to dwelling units that are occupied by households that qualify as low-income families at the time of occupancy or at the time funds are invested, whichever is later.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.217 Income targeting: Homeownership.

Each participating jurisdiction must invest HOME funds made available during a fiscal year so that with respect to homeownership assistance, 100 percent of these funds are invested with respect to dwelling units that are occupied by households that qualify as low-income families at the time of occupancy or at the time funds are invested, whichever is later.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

Matching Contribution Requirement³

§ 92.218 Amount of matching contribution.

(a) Each participating jurisdiction must make contributions to affordable housing assisted with HOME funds, throughout a fiscal year. The contributions must total not less than:

(1) Fifty percent of the total funds drawn from the jurisdiction's HOME Investment Trust Fund Treasury account in that fiscal year for new construction projects; plus

(2) Thirty-three percent of the total funds drawn from the jurisdiction's HOME Investment Trust Fund Treasury account in that fiscal year for substantial rehabilitation projects; and

(3) Twenty-five percent of the total funds drawn from the jurisdiction's HOME Investment Trust Fund Treasury account in that fiscal year for tenant-based rental assistance, housing rehabilitation projects other than substantial rehabilitation projects, and acquisition projects of standard housing that does not constitute new construction.

³ The Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, Public Law 101-139, 105 Stat. 736, approved October 26, 1991 (FY 1992 Appropriations Act) contained a proviso, concerning amounts appropriated for the HOME Program for fiscal year 1992, which prohibits the Department from requiring any contributions by or in behalf of a participating jurisdiction, notwithstanding section 220 of the HOME Investment Partnership Act. Accordingly, participating jurisdictions are not required to comply with the matching contributions requirements in §§ 92.218 through 92.222 for HOME funds drawn down from accounts provided in the FY 1992 Appropriations Act, regardless of the fiscal year in which the FY 1992 HOME funds are drawn down.

(b) Amounts made available under § 92.102(b)(2) from the resources of a state (other than a transfer of the state's formula allocation), the local participating jurisdiction, or both, to enable the local participating jurisdiction to meet the participation threshold amount are not required to be matched and do not constitute matching contributions.

(c) All eligible activities carried out with respect to a project carry with them the matching contribution requirements associated with the project designation. A project consisting of one structure which combines new construction and rehabilitation activities (e.g., adding one or more units outside of the existing walls of a structure) is designated as a new construction project, irrespective of costs attributable to each activity. For purposes of project designation, projects involving the following activities are designated as rehabilitation projects: Reconfiguring a structure to reduce the number of total units in order to increase the number of large family units; adding one or more rooms (e.g., bedroom or bathroom) outside of the existing walls for purposes of meeting occupancy or code standards; adding one or more units within the existing structure, such as in an existing basement.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.219 Recognition of matching contribution.

(a) A contribution is recognized as a matching contribution only if it is made with respect to a tenant who is assisted with HOME funds or it is made with respect to housing that is assisted with HOME funds, and it:

(1) Is made with respect to housing that qualifies as affordable housing under § 92.252 or § 92.254; or

(2) Is made with respect to any portion of a project (including a mixed-use project under § 92.256) not less than 50 percent of the dwelling units of which qualify as affordable housing under § 92.252 or § 92.254.

(b) In addition to the requirements of paragraph (a) of this section, a cash contribution is recognized as a matching contribution only if it is used for costs eligible under § 92.206 or § 92.301, or for the following costs (which are not eligible costs for HOME funds): a project reserve account for replacements, a project reserve account for unanticipated increases in operating costs, operating subsidies, or costs relating to the portion of a mixed-

income or mixed-use project not related to the affordable housing units.

§ 92.220 Form of matching contribution.

(a) *Eligible forms.* Matching contributions must be made from nonfederal resources and may be in the form of one or more of the following:

(1) Cash contributions from nonfederal resources. To be a cash contribution, funds must be contributed permanently to the HOME program, regardless of the form of investment the jurisdiction provides to a project. Therefore all repayment, interest, or other return on investment of the contribution must be deposited in the local account of the participating jurisdiction's HOME Investment Trust Fund to be used for eligible HOME activities in accordance with the requirements of this part.

(i) A cash contribution may be made by the participating jurisdiction, nonfederal public entities, private entities, or individuals. A cash contribution may be made from program income (as defined by § 85.25(b) of this title) from a federal grant earned after the end of the award period if no federal requirements govern the disposition of the program income. Included in this category are repayments from closed out grants under the Urban Development Action Grant Program (24 CFR part 570, subpart G), and the Housing Development Grant Program (24 CFR part 850).

(ii) The grant equivalent of a below-market interest rate loan to the project that is not repayable to the participating jurisdiction's HOME Investment Trust Fund may be counted as a cash contribution.

(A) If the loan is made from funds borrowed by a jurisdiction or public agency or corporation, the contribution is the present discounted cash value of the difference between payments to be made on the borrowed funds and payments to be received from the loan to the project, based on a discount rate equal to the interest rate on the borrowed funds.

(B) If the loan is made from funds other than funds borrowed by a jurisdiction or public agency or corporation, the contribution is the present discounted cash value of the yield foregone. In determining the yield foregone, the participating jurisdiction must use as a measure of a market rate yield one of the following, as appropriate:

(1) With respect to one- to four-unit housing financed with a fixed interest rate mortgage, a rate equal to the 10-year Treasury note rate plus 200 basis points;

(2) With respect to one- to four-unit housing financed with an adjustable interest rate mortgage, a rate equal to the one-year Treasury bill rate plus 250 basis points; or

(3) With respect to a multifamily project, a rate equal to the 10-year Treasury note rate plus 300 basis points.

(2) The value, based on customary and reasonable means for establishing value, of state or local taxes, fees, or other charges that are normally and customarily imposed but are waived, foregone, or deferred (including state low-income housing tax credits) in a manner that achieves affordability of housing assisted with HOME funds. The amount of any such real estate taxes may be based on post-improvement property value, using customary and reasonable means of establishing value. For taxes, fees, or charges that are given for future years, the value is the present discounted cash value, based on a rate equal to the rate for the Treasury security with a maturity closest to the number of years for which the taxes, fees, or charges are waived, foregone, or deferred.

(3) The value of land or other real property, not acquired with federal resources, as appraised in conformance with established and generally recognized appraisal practice and procedures in common use by professional appraisers. Opinions of value must be based on the best available data properly analyzed and interpreted. The appraisal of land and structures must be performed by an independent, certified appraiser; and

(4) The cost of investment, not made with federal resources, in on-site and off-site infrastructure that the participating jurisdiction documents are directly required for affordable housing assisted with HOME funds. The infrastructure investment must have been completed no earlier than 12 months before HOME funds are committed to such affordable housing.

(5) The payment of administrative expenses from nonfederal resources (which may include CDBG funds as defined in 24 CFR 570.3) in an amount equal to 7 percent of the HOME allocation and reallocated funds provided to the participating jurisdiction during the fiscal year.

(b) *Ineligible forms.* The following are examples of forms of contributions that do not meet the requirements of paragraph (a) of this section and do not count toward meeting a participating jurisdiction's matching contribution requirement:

(1) Contributions made with or derived from federal resources or funds, regardless of when the federal resources

or funds were received or expended. CDBG funds (defined in § 570.3 of this title) are federal funds for this purpose;

(2) The interest rate subsidy attributable to the federal tax-exemption on financing or the value attributable to federal tax credits;

(3) Owner equity or investment in a project; and

(4) Sweat equity.

§ 92.221 Match credit.

(a) *Administrative expenses.* Each participating jurisdiction will be credited with a matching contribution for administrative expenses in an amount equal to 7 percent of the HOME allocation and reallocated funds provided to the participating jurisdiction during the fiscal year. The credit will be given when the funds are awarded.

(b) *Matching contributions other than administrative expenses.* Contributions are credited at time the contribution is made, as follows:

(1) A cash contribution is credited when the funds are expended.

(2) The grant equivalent of a below-market interest rate loan is credited at the time of the loan closing.

(3) The value of state or local taxes, fees, or other charges that are normally and customarily imposed but are waived, foregone, or deferred is credited at the time the state or local government officially waives, forgoes, or defers the taxes, fees, or other charges and notifies the project owner.

(4) The value of land or other real property is credited at the time ownership of the property is transferred.

(5) The cost of investment in infrastructure directly required for affordable housing assisted with HOME funds is credited at the time funds are expended for the infrastructure or at the time the HOME funds are committed to the affordable housing if the infrastructure was completed before the commitment of HOME funds.

(c) *Excess match.* Contributions made in a fiscal year that exceed the participating jurisdiction's match liability for the fiscal year in which they were made will be carried over and applied to future fiscal years match liability.

§ 92.222 Reduction of matching contribution requirement.

(a) If a local participating jurisdiction demonstrates to the satisfaction of HUD that a reduction of the matching requirement specified in § 92.218 is necessary to permit the jurisdiction to carry out the purposes of this part, HUD may reduce the matching contribution requirement during a period not to

exceed three years after the jurisdiction is first designated as a participating jurisdiction. The reduction may not be more than 75 percent in the first year, not more than 50 percent in the second year, and not more than 25 percent in the third year.

(b) A participating jurisdiction must submit any request for a reduction in its matching contribution requirement with its program description. HUD will consider granting a reduction only in those cases where a participating jurisdiction demonstrates that each of the following conditions exist:

(1) The participating jurisdiction has low fiscal capacity as measured by poverty and capita income;

(2) The participating jurisdiction has an immediate and serious fiscal problem; and

(3) The participating jurisdiction will have a high matching contribution liability for the years for which the reduction is sought based on activities identified in its program description and planned activities for future fiscal years (e.g., activities such as tenant-based rental assistance or moderate rehabilitation that will result in expenditure of HOME funds during the period for which the reduction is requested) and the matching contribution liability will exceed the match credit for administrative costs.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

Subpart F—Project Requirements

§ 92.250 Maximum per-unit subsidy amount.

The amount of HOME funds that a participating jurisdiction may invest on a per-unit basis in affordable housing may not exceed 67 percent of the per-unit dollar limits established by HUD under § 221.514(b)(1) and (c) of this title for elevator-type projects, involving nonprofit mortgagors, insured under section 221(d)(3) of the National Housing Act that apply to the area in which the housing is located. These limits are available from HUD. For a project using a combination of HOME and the federal low-income tax credit, the applicable section 221(d)(3) per unit dollar limits are reduced by the per unit net proceeds from any sale of the tax credit or by the per unit present discounted cash value of the stream of the project owner's share of the tax credit based on a discount rate equal to the 10-year Treasury note rate.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.251 Property standards.

Housing that is assisted with HOME funds, at a minimum, must meet the housing quality standards in § 882.109 of this title. In addition, housing that is newly constructed or substantially rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances. The participating jurisdiction must have written standards for rehabilitation. Newly constructed housing must meet the current edition of the Model Energy Code published by the Council of American Building Officials. Substantially rehabilitated housing must meet the cost-effective energy conservation and effectiveness standards in 24 CFR part 39. Housing for homeownership that is to be rehabilitated after transfer of the ownership interest must be free from any defects that pose a danger to health or safety before transfer of the ownership interest, and must meet the applicable property standards not later than 2 years after the transfer.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.252 Qualification as affordable housing and income targeting: Rental housing.

(a) *Rent limitation.* A rental housing project (including the non-owner-occupied units in housing purchased with HOME funds in accordance with § 92.254) qualifies as affordable housing under this part only if the project:

(1) Bears rents not greater than the lesser of—

(i) The fair market rent for existing housing for comparable units in the area as established by HUD under § 888.111 of this title, less the monthly allowance for the utilities and services (excluding telephone) to be paid by the tenant; or

(ii) A rent that does not exceed 30 percent of the adjusted income of a family whose gross income equals 65 percent of the median income for the area, as determined by HUD, with adjustment for smaller and larger families, except that HUD may establish income ceilings higher or lower than 65 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. In determining the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or participating jurisdiction must subtract a monthly allowance for any utilities and services (excluding telephone) to be paid by the

tenant. HUD will provide average occupancy per unit and adjusted income assumptions to be used in calculating the maximum rent allowed under this paragraph (a)(1)(ii) of this section;

(2) Has not less than 20 percent of the units—

(i) Occupied by very low-income families who pay as a contribution toward rent (excluding any federal or state rental subsidy provided on behalf of the family) not more than 30 percent of the family's monthly adjusted income as determined by HUD. To obtain the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or participating jurisdiction multiplies the annual adjusted income of the tenant family by 30 percent and divides by 12 and, if applicable, subtracts a monthly allowance for any utilities and services (excluding telephone) to be paid by the tenant; or

(ii) Occupied by very low-income families and bearing rents not greater than 30 percent of the gross income of a family whose income equals 50 percent of the median income for the area, as determined by HUD, with adjustment for smaller and larger families, except that HUD may establish income ceilings higher or lower than 50 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. In determining the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or participating jurisdiction must subtract a monthly allowance for any utilities and services (excluding telephone) to be paid by the tenant. HUD will provide average occupancy per unit assumptions to be used in calculating the maximum rent allowed under paragraph (a)(2)(ii) of this section;

(3) Is occupied only by households that qualify as low-income families;

(4) Is not refused for leasing to a holder of a certificate of family participation under 24 CFR part 882 (Rental Certificate Program) or a rental voucher under 24 CFR part 887 (Rental Voucher Program) or to the holder of a comparable document evidencing participation in a HOME tenant-based assistance program because of the status of the prospective tenant as a holder of such certificate of family participation, rental voucher, or comparable HOME tenant-based assistance document; and

(5) Will remain affordable, pursuant to deed restrictions, for not less than the appropriate period, beginning after

project completion, as specified in the following table, without regard to the term of the mortgage or to transfer of ownership.

Activity	Minimum period of affordability in years
Rehabilitation or acquisition of existing housing per unit amount of HOME funds:	
Under \$15,000	5
\$15,000 to \$40,000	10
Over \$40,000	15
New construction or acquisition of newly constructed housing	20

(b) *Rent schedule and utility allowances.* The participating jurisdiction must review and approve rents proposed by the owner for units with "flat rents," i.e., units subject to the maximum rent limitations in paragraph (a)(1)(i), (a)(1)(ii), or (a)(2)(ii) of this section, and, if applicable, must review and approve, for all units subject to the maximum rent limitations paragraph (a) of this section, the monthly allowances, proposed by the owner, for utilities and services to be paid by the tenant. The owner must reexamine the income of each tenant household living in low-income units at least annually. The maximum monthly rent must be recalculated by the owner and reviewed and approved by the participating jurisdiction annually, and may change as changes in the applicable gross rent amounts, the income adjustments, or the monthly allowance for utilities and services warrant. Any increase in rents for lower income units is subject to the provisions of outstanding leases, in any event, the owner must provide tenants of those units not less than 30 days prior written notice before implementing any increase in rents.

(c) *Increases in tenant income.* Rental housing qualifies as affordable housing despite a temporary noncompliance with paragraph (a)(2) or (a)(3) of this section, if the noncompliance is caused by increases in the incomes of existing tenants and if actions satisfactory to HUD are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected. Tenants who no longer qualify as low-income families must pay as rent not less than 30 percent of the family's adjusted monthly income, as recertified annually.

(d) *Adjustment of qualifying rent.* HUD may adjust the qualifying rent established for a project under paragraph (a)(1) of this section, only if HUD finds that an adjustment is necessary to support the continued

financial viability of the project and only by an amount that HUD determines is necessary to maintain continued financial viability of the project. HUD expects that this authority will be used sparingly. Adjustments in fair market rents and in median income over time should help maintain the financial viability of a project within the qualifying rent standard in paragraph (a)(1) of this section.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.253 Tenant and participant protections.

(a) *Lease.* The lease between a tenant and an owner of rental housing assisted with HOME funds must be for not less than one year, unless by mutual agreement between the tenant and the owner.

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

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

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

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

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

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

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

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

decision in connection with the lease; and

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

(c) *Termination of tenancy.* An owner may not terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HOME funds except for serious or repeated violation of the terms and conditions of the lease; for violation of applicable federal, state, or local law; or for other good cause. Any termination or refusal to renew must be preceded by not less than 30 days by the owner's service upon the tenant of a written notice specifying the grounds for the action.

(d) *Maintenance and replacement.* An owner of rental housing assisted with HOME funds must maintain the premises in compliance with all applicable housing quality standards and local code requirements.

(e) *Tenant selection.* An owner of rental housing assisted with HOME funds must adopt written tenant selection policies and criteria that—

(1) Are consistent with the purpose of providing housing for very low-income and low-income families;

(2) Are reasonably related to program eligibility and the applicants' ability to perform the obligations of the lease;

(3) Give reasonable consideration to the housing needs of families that would have a preference under § 960.211 (Federal selection preferences for admission to Public Housing) of this title; and

(4) Provide for—

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

(ii) The prompt written notification to any rejected applicant of the grounds for any rejection.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.254 Qualification as affordable housing: homeownership.

(a) *Purchase with or without rehabilitation.* Housing that is for purchase by a family qualifies as affordable housing only if the housing:

(1)(i) Has an initial purchase price that does not exceed the mortgage limit for the type of single family housing (1- to 4-family residence, condominium unit, combination manufactured home and

lot, or manufactured home lot) for the area (including any applicable high-cost mortgage limit published by HUD in the *Federal Register*) under HUD's single family insuring authority under the National Housing Act. For a cooperative unit, the purchase price for a cooperative share may not exceed the balance remaining after subtracting from the 1-family mortgage limit an amount equal to the blanket mortgage covering the cooperative development which is attributable to this cooperative unit; and

(ii) Has an estimated appraised value after any repair needed to meet property standards in § 92.251 that does not exceed the appropriate mortgage limit described in paragraph (a)(1)(i) of this section;

(2) Is the principal residence of an owner whose family qualifies as a low-income family at the time of purchase;

(3) Is made available for initial purchase only to first-time homebuyers; and

(4) Is made available for subsequent purchase only—

(i) To a low-income family that will use the property as its principal residence; and

(ii) At a price consistent with guidelines that are established by the participating jurisdiction and determined by HUD to be appropriate—

(A) To provide the owner with a fair return on investment, including any improvements, and

(B) To ensure that the housing will remain affordable to a reasonable range of low-income homebuyers for a period of 20 years for newly constructed housing or otherwise for 15 years. Housing remains affordable if the subsequent purchaser's monthly payments of principal, interest, taxes, and insurance do not exceed 30 percent of the gross income of a family with an income equal to 75 percent of median income for the area, as determined by HUD with adjustments for smaller and larger families.

(b) *Rehabilitation not involving purchase.* Housing that is currently owned by a family qualifies as affordable housing only if—

(1) The value of the property, after rehabilitation, does not exceed the mortgage limit for the type of single family housing (1- to 4-family residence, condominium unit, combination manufactured home and lot, or manufactured home lot) for the area (including any applicable high-cost mortgage limit published by HUD in the *Federal Register*) under HUD's single family insuring authority under the National Housing Act (see 24 CFR

201.10, 203.18, 203.18a, 203.18b, and 234.27); and

(2) The housing is the principal residence of an owner whose family qualifies as a low-income family at the time HOME funds are committed to the housing.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.255 Mixed-income project.

Housing that accounts for less than 100 percent of the dwelling units in a project qualifies as affordable housing if the housing meets the criteria of § 92.252 or § 92.254. Each building in the project must contain housing that meets the requirements of § 92.252 or § 92.254. See § 92.219 for matching contribution requirements concerning mixed-income projects.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.256 Mixed-use project.

Housing in a project that is designed in part for uses other than residential use qualifies as affordable housing if such housing meets the criteria of § 92.252 or § 92.254. A project that contains, in addition to dwelling unit, laundry and community facilities for the exclusive use of the project residents and their guests, does not constitute a project that is designed in part for uses other than residential use. Residential living space must constitute at least 51 percent of the project space. Each building within the project must contain residential living space. See § 92.219 for matching contribution requirements concerning mixed-use projects.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.257 Religious organizations.

HOME funds may not be provided to primarily religious organizations, such as churches, for any activity including secular activities. In addition, HOME funds may not be used to rehabilitate or construct housing owned by primarily religious organizations or to assist primarily religious organizations in acquiring housing. However, HOME funds may be used by a secular entity to acquire housing from a primarily religious organization, and a primarily religious entity may transfer title to property to a wholly secular entity and the entity may participate in the HOME program in accordance with the requirements of this part. The entity may be an existing or newly established entity (which may be an entity established, but not controlled, by the

religious organization. The completed housing project must be used exclusively by the owner entity for secular purposes, available to all persons regardless of religion. In particular, there must be no religious or membership criteria for tenants of the property.

§ 92.258 Limitation on the use of HOME funds with FHA mortgage insurance.

When HOME funds are to be used in connection with housing in which acquisition, new construction, or rehabilitation is financed with a mortgage insured by HUD under chapter II of this title, then, for rental housing, the period that the project must remain affordable as provided in binding commitments meeting the requirements of by § 92.252(a)(5) or, for homeownership, the applicable period specified in the participating jurisdiction's guidelines established under § 92.254(a)(4)(ii), must be equal to the term of the HUD-insured mortgage.

Subpart G—Community Housing Development Organizations

§ 92.300 Set-aside for community housing development organizations.

(a) For a period of 18 months after the allocation (including, for a state, funds reallocated under § 92.451(c)(2)(i) and, for a unit of general local government, an allocation transferred from a state under § 92.102(b)) is made available to a participating jurisdiction, the participating jurisdiction must reserve not less than 15 percent of these funds for investment only in housing to be developed, sponsored, or owned by community housing development organizations. The funds must be provided to a community housing development organization and the funds are reserved when a participating jurisdiction enters into a written agreement with the community housing development organization. If a community housing development organization's involvement in a project is as an owner it must have control of the project, as evidenced by legal title or a valid contract of sale. If it owns the project in partnership, it or its wholly owned for-profit subsidiary must be the managing general partner. In acting in any of the capacities specified, the community housing development organization must have effective management control.

(b) Each participating jurisdiction must make reasonable efforts to identify community housing development organizations that are capable, or can reasonably be expected to become capable, of carrying out elements of the

jurisdiction's approved housing strategy and to encourage such community housing development organizations to do so.

(c) HOME funds reserved under paragraph (a) of this section may be used for activities eligible under § 92.205. Up to 10 percent of the HOME funds so reserved may be used for activities specified under § 92.301.

(d) These HOME funds are subject to reduction, as provided in § 92.500(d).

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.301 Project-specific assistance to community housing development organizations.

(a) *Project-specific technical assistance and site control loans*—(1) *General.* Within the percentage specified in § 92.300(c), HOME funds may be used by a participating jurisdiction to provide technical assistance and site control loans to community housing development organizations in the early stages of site development for an eligible project. These loans may not exceed amounts that the participating jurisdiction determines to be customary and reasonable project preparation costs allowable under paragraph (a)(2) of this section. All costs must be related to a specific eligible project or projects.

(2) *Allowable expenses.* A loan under this paragraph (a) of this section may be provided to cover project expenses necessary to determine project feasibility (including costs of an initial feasibility study), consulting fees, costs of preliminary financial applications, legal fees, architectural fees, engineering fees, engagement of a development team, site control and title clearance. General operational expenses of the community housing development organization are not allowable expenses.

(3) *Repayment.* A community housing development organization that receives a loan under paragraph (a) of this section must repay the loan to the participating jurisdiction from construction loan proceeds or other project income. The participating jurisdiction may waive repayment of the loan, in part or in whole, if there are impediments to project development that the participating jurisdiction determines are reasonably beyond the control of the borrower.

(b) *Project-specific seed money loans*—(1) *General.* Within the limit specified in paragraph (a) of this section, HOME funds may be used to provide loans to community housing development organizations to cover

preconstruction project costs that the participating jurisdiction determines to be customary and reasonable, including, but not limited to the costs of obtaining firm construction loan commitments, architectural plans and specifications, zoning approvals, engineering studies, and legal fees.

(2) *Eligible sponsors.* A loan under paragraph (b) of this section may be provided only to a community housing development organization that has, with respect to the project concerned, site control (evidenced by a deed, a sales contract, or an option contract to buy the property), a preliminary financial commitment, and a capable development team.

(3) *Repayment.* A community housing development organization that receives a loan under paragraph (b) of this section must repay the loan to the participating jurisdiction from construction loan proceeds or other project income. The participating jurisdiction may waive repayment of the loan, in whole or in part, if there are impediments to project development that the participating jurisdiction determines are reasonably beyond the control of the community housing development organization.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.302 Housing education and organizational support.

(a) *General.* HUD is authorized to provide education and organizational support assistance, in conjunction with HOME funds made available to community housing development organizations:

(1) To facilitate the education of low-income homeowners and tenants; and

(2) To promote the ability of community housing development organizations to maintain, rehabilitate and construct housing for low-income and moderate-income families in conformance with the requirements of this part.

(b) *Delivery of assistance.* HUD will provide assistance under this section only through contract—

(1) With a nonprofit intermediary organization that, in the determination of HUD—

(i) Customarily provides, in more than one community, services related to the provision of decent housing that is affordable to low-income and moderate-income persons or the revitalization of deteriorating neighborhoods;

(ii) Has demonstrated experience in providing a range of assistance (such as financing, technical assistance, construction and property management

assistance, capacity building, and training) to community housing development organizations or similar organizations that engage in community revitalization;

(iii) Has demonstrated the ability to provide technical assistance and training for community-based developers of affordable housing; and

(iv) Has described the uses to which such assistance will be put and the intended beneficiaries of the assistance; or

(2) With another organization, if a participating jurisdiction demonstrates that the organization is qualified to carry out eligible activities and that the jurisdiction would not be served in a timely manner by intermediaries specified under paragraph (b)(1) of this section. Contracts under paragraph (b)(2) of this section must be for activities specified in an application from the participating jurisdiction. The application must include a certification that the activities are necessary to the effective implementation of the participating jurisdiction's approved housing strategy.

(c) *Eligible activities.* Assistance under this section may be used only for the following eligible activities:

(1) *Organizational support.* Organizational support assistance may be made available to community housing development organizations to cover operational expenses and to cover expenses for training and technical, legal, engineering and other assistance to the board of directors, staff, and members of the community housing development organization.

(2) *Housing education.* Housing education assistance may be made available to community housing development organizations to cover expenses for providing or administering programs for educating, counseling, or organizing homeowners and tenants who are eligible to receive assistance under other provisions of this part.

(3) *Program-wide support of nonprofit development and management.* Technical assistance, training, and continuing support may be made available to eligible community housing development organizations for managing and conserving properties developed under this part.

(4) *Benevolent loan funds.* Technical assistance may be made available to increase the investment of private capital in housing for very low-income families, particularly by encouraging the establishment of benevolent loan funds through which private financial institutions will accept deposits at below-market interest rates and make

those funds available at favorable rates to developers of low-income housing and to low-income homebuyers.

(5) *Community development banks and credit unions.* Technical assistance may be made available to establish privately owned, local community development banks and credit unions to finance affordable housing.

(d) *Limitations.* (1) A community housing development organization may not receive assistance under paragraphs (c)(1) (organizational support) and (c)(2) (housing education) of this section for any fiscal year in an amount that, together with other federal assistance, provides more than 50 percent of the organization's total operating budget in the fiscal year.

(2) Contracts under this section with any one contractor for a fiscal year may not—

(i) Exceed 20 percent of the amount appropriated for this section for such fiscal year; or

(ii) Provide more than 20 percent of the operating budget (which may not include funds that are passed through to community housing development organizations) of the contracting organization for any one year.

(e) *Single-state contractors.* Not less than 40 percent of the funds made available for this section in an appropriations Act in any fiscal year must be made available for eligible contractors that have worked primarily in one state.

(f) *Notice of funding.* HUD will publish a notice in the *Federal Register* announcing the availability of funding under this section, as appropriate.

§ 92.303 Tenant participation plan.

A community housing development organization that receives assistance under this part must adhere to a fair lease and grievance procedure approved by the participating jurisdiction and provide a plan for and follow a program of tenant participation in management decisions.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

Subpart H—Other Federal Requirements

§ 92.350 Equal opportunity and fair housing.

(a) *Equal opportunity.* No person in the United States shall on the grounds of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with HOME funds. In addition,

HOME funds must be made available in accordance with the following:

(1) The requirements of the Fair Housing Act (42 U.S.C. 3601-20) and implementing regulations at 24 CFR part 100; Executive Order 11063, as amended by Executive Order 12259 (3 CFR, 1958-1963 Comp., p. 652 and 3 CFR, 1960 Comp., p. 307) (Equal Opportunity in Housing) and implementing regulations at 24 CFR part 107; and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (Nondiscrimination in Federally Assisted Programs) and implementing regulations issued at 24 CFR part 1;

(2) The prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101-07) and implementing regulations at 24 CFR part 146, and the prohibitions against discrimination against handicapped individuals under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8;

(3) The requirements of Executive Order 11246 (3 CFR 1964-65, Comp., p. 339) (Equal Employment Opportunity) and the implementing regulations issued at 41 CFR chapter 60;

(4) The requirements of section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) that—

(i) To the greatest extent feasible, opportunities for training and employment arising in connection with the planning and carrying out of any project assisted with HOME funds be given to low-income persons residing within the unit of general local government or the metropolitan area (or nonmetropolitan county) as determined by HUD, in which the project is located; and

(ii) To the greatest extent feasible, contracts for work to be performed in connection with any such project be awarded to business concerns, including but not limited to individuals or firms doing business in the field of planning, consulting, design, architecture, building construction, rehabilitation, maintenance, or repair, which are located in or owned in substantial part by persons residing in the same metropolitan area (or nonmetropolitan county) as the project; and

(5) The requirements of Executive Orders 11625 and 12432 (concerning Minority Business Enterprise), and 12138 (concerning Women's Business Enterprise). Consistent with HUD's responsibilities under these Orders, each participating jurisdiction must make efforts to encourage the use of minority and women's business enterprises in connection with HOME-funded activities. A participating jurisdiction must prescribe procedures

acceptable to HUD to establish and oversee a minority outreach program within its jurisdiction to ensure the inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women, including, without limitation, real estate firms, construction firms, appraisal firms, management firms, financial institutions, investment banking firms, underwriters, accountants, and providers of legal services, in all contracts entered into by the participating jurisdiction with such persons or entities, public and private, in order to facilitate the activities of the participating jurisdiction to provide affordable housing authorized under this Act or any other federal housing law applicable to such jurisdiction. Section 85.36(e) of this title describes actions to be taken by a participating jurisdiction to assure that minority business enterprises and women business enterprises are used when possible in the procurement of property and services.

(b) *Fair housing.* In accordance with the certification made with its housing strategy, each participating jurisdiction must affirmatively further fair housing. Actions described in § 570.904(c) of this title will satisfy this requirement.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.351 Affirmative marketing.

(a) Each participating jurisdiction must adopt affirmative marketing procedures and requirements for HOME-assisted housing containing 5 or more housing units. Affirmative marketing steps consist of actions to provide information and otherwise attract eligible persons from all racial, ethnic, and gender groups in the housing market area to the available housing. (The affirmative marketing procedures do not apply to families with housing assistance provided by the PHA or families with tenant based rental assistance provided with HOME funds.) The participating jurisdiction must annually assess the affirmative marketing program to determine the success of affirmative marketing actions and any necessary corrective actions. (These requirements and procedures are comparable to the affirmative marketing requirements and procedures for the Rental Rehabilitation Program (24 CFR part 511), and jurisdictions that have participated in that program should consider basing their requirements and procedures on their existing Rental Rehabilitation Program requirements and procedures.)

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

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

(2) Requirements and practices each owner must adhere to in order to carry out the participating jurisdiction's affirmative marketing procedures and requirements (e.g., use of commercial media, use of community contacts, use of the Equal Housing Opportunity logotype or slogan, and display of fair housing poster);

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

(4) Records that will be kept describing actions taken by the participating jurisdiction and by owners to affirmatively market units and records to assess the results of these actions; and

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

(c) A state that distributes HOME funds to units of general local government must require each unit of general local government to adopt affirmative marketing procedures and requirements that meet the requirement in paragraphs (a) and (b) of this section.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.352 Environmental review.

(a) *General.* The environmental effects of each activity carried out with HOME funds must be assessed in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA) and the related authorities listed in HUD's implementing regulations at 24 CFR parts 50 and 58.

(b) *Responsibility for review.* (1) A participating jurisdiction must assume responsibility for environmental review, decisionmaking, and action for each activity that it carries out with HOME funds, in accordance with the

requirements imposed on a recipient under 24 CFR part 58. In accordance with part 58, the participating jurisdiction must carry out the environmental review of an activity and obtain approval of its request for release of funds before HOME funds are committed for the activity.

(2) A state participating jurisdiction must also assume responsibility for approval of requests for release of its HOME funds.

(3) HUD will perform the environmental review, in accordance with 24 CFR part 50, for a competitively awarded application for HOME funds submitted by an entity that is not a participating jurisdiction.

§ 92.353 Displacement, relocation, and acquisition.

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

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

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

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

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

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

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

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

(c) *Relocation assistance for displaced persons.* (1) *General.* A displaced person (defined in paragraph (c)(2) of this section) must be provided

relocation assistance at the levels described in, and in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4201-4855) and 49 CFR part 24. A "displaced person" must be advised of his or her rights under the Fair Housing Act (42 U.S.C. 3601-19) and, if the comparable replacement dwelling used to establish the amount of the replacement housing payment to be provided to a minority person is located in an area of minority concentration, the minority person also must be given, if possible, referrals to comparable and suitable, decent, safe, and sanitary replacement dwellings not located in such areas.

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

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

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

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

(B) Before the date described in paragraph (c)(2)(i)(A) of this section, if the jurisdiction or HUD determines that the displacement resulted directly from acquisition, rehabilitation, or demolition for the project; or

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

(1) The tenant moves after execution of the agreement covering the acquisition, rehabilitation, or demolition and the move occurs before the tenant is provided written notice offering the tenant the opportunity to lease and occupy a suitable, decent, safe, and sanitary dwelling in the same building/complex upon completion of the project under reasonable terms and conditions. Such reasonable terms and conditions must include a term of at least one year at a monthly rent and estimated average

monthly utility costs that do not exceed the greater of—

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

(ii) The total tenant payment, as determined under 24 CFR 813.107, if the tenant is low-income, or 30 percent of gross household income, if the tenant is not low-income; or

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

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

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

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

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

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

(B) The person moved into the property after the submission of the application but, before signing a lease and commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., the person may be displaced, temporarily relocated, incur a rent increase), and the fact that the person would not qualify as a "displaced person" (or for any assistance under this section) as a result of the project;

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

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

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

(3) *Initiation of negotiations.* For purposes of determining the formula for computing replacement housing

assistance to be provided under paragraph (c) of this section to a tenant displaced from a dwelling as a direct result of private-owner rehabilitation, demolition or acquisition of the real property, the term *initiation of negotiations* means the execution of the agreement covering the acquisition, rehabilitation, or demolition.

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

(e) *Block Grant funds.* If Community Development Block Grant funds are used to pay part of the cost of a HOME project other than the general planning and administrative costs eligible under 24 CFR 570.205 and 570.206, or optional relocation costs eligible under 24 CFR 570.201(i)(2), the project is subject to the requirements of the Housing and Community Development Act of 1974. (This includes the section 104(d) requirements to provide relocation assistance and replace low/moderate-income housing as described at 24 CFR 570.606(c) (Entitlement Program and HUD-Administered Small Cities Program) and 24 CFR 570.496a(c) (State CDBG Program).)

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

(g) *Appeals.* A person who disagrees with the participating jurisdiction's determination concerning whether the person qualifies as a *displaced person*, or the amount of relocation assistance for which the person may be eligible, may file a written appeal of that determination with the jurisdiction. A low-income person who is dissatisfied with the jurisdiction's determination on his or her appeal may submit a written request for review of that determination to the HUD Field Office.

(h) *Responsibility of participation jurisdiction.* (1) The jurisdiction must certify that it will comply with the URA, the regulations at 49 CFR part 24, and

the requirements of this section, and must ensure such compliance notwithstanding any third party's contractual obligation to the jurisdiction to comply.

(2) The cost of required relocation assistance is an eligible project cost. This cost also may be paid from state or local funds, or funds available from other sources.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.354 Labor.

(a) *General.* Any contract for the construction (rehabilitation or new construction) of affordable housing with 12 or more units assisted with funds made available under this part must contain a provision requiring that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a-5), will be paid to all laborers and mechanics employed in the development of affordable housing involved, and such contracts must also be subject to the overtime provisions, as applicable, of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332). Participating jurisdictions, contractors, subcontractors, and other participants must comply with regulations issued under these Acts and with other federal laws and regulations pertaining to labor standards and HUD Handbook 1344.1 (Federal Labor Standards Compliance in Housing and Community Development Programs), as applicable. Participating jurisdictions must require certification as to compliance with the provisions of this section before making any payment under such contract.

(b) *Volunteers.* The prevailing wage provisions of paragraph (a) of this section do not apply to an individual who receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered and who is not otherwise employed at any time in the construction work.

(c) *Sweat equity.* The prevailing wage provisions of paragraph (a) of this section do not apply to members of an eligible family who provide labor in exchange for acquisition of a property for homeownership or provide labor in lieu of, or as a supplement to, rent payments.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.355 Lead-based paint.

Housing assisted with HOME funds constitutes HUD-associated housing for the purpose of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821, *et seq.*) and is, therefore, subject to 24 CFR part 35. Unless otherwise provided, participating jurisdictions are responsible for testing and abatement activities.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.356 Conflict of interest.

(a) *Applicability.* (1) In the procurement of property and services by participating jurisdictions, state recipients, and subrecipients, the conflict of interest provisions in 24 CFR 85.36 and OMB Circular A-110, respectively, apply.

(2) In all cases not governed by 24 CFR 85.36 and OMB Circular A-110, the provisions of this section apply. These cases include the acquisition and disposition of real property and the provision of assistance by the participating jurisdiction, by the state recipient, by subrecipients, or to individuals, housing developers, and other private entities under eligible activities which authorize such assistance (e.g., rehabilitation of housing).⁴

(b) *Conflicts prohibited.* No persons described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to activities assisted with HOME funds or who are in a position to participate in a decisionmaking process or gain inside information with regard to these activities, may obtain a financial interest or benefit from a HOME assisted activity, or have an interest in any contract, subcontract or agreement with respect thereto, or the proceeds thereunder, either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter.

(c) *Persons covered.* The conflict of interest provisions of paragraph (b) of this section apply to any person who is an employee, agent, consultant, officer, or elected official or appointed official of the participating jurisdiction, state recipient, or subrecipient which are receiving HOME funds.

(d) *Exceptions: Threshold requirements.* Upon the written request of the participating jurisdiction, HUD may grant an exception to the provisions of paragraph (b) of this section on a case-by-case basis when it

determines that the exception will serve to further the purposes of the HOME Investment Partnerships Program and the effective and efficient administration of the participating jurisdiction's program or project. An exception may be considered only after the participating jurisdiction has provided the following:

(1) A disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made; and

(2) An opinion of the participating jurisdiction's attorney that the interest for which the exception is sought would not violate state or local law.

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

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

(2) Whether the person affected is a member of a group or class of low-income persons intended to be the beneficiaries of the assisted activity, and the exception will permit such person to receive generally the same interests or benefits as are being made available or provided to the group or class;

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

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

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

(6) Any other relevant considerations.

§ 92.357 Debarment and suspension.

As required by 24 CFR part 24, each participating jurisdiction must require participants in lower tier covered transactions to include the certification in appendix B of 24 CFR part 24 (that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation from the covered transaction) in any proposal submitted in connection with

the lower tier transactions. A participating jurisdiction may rely on the certification, unless it knows the certification is erroneous.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.358 Flood insurance.

(a) Under the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001-4128), HOME funds may not be used with respect to the acquisition, new construction, or rehabilitation of a project located in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless:

(1) The community in which the area is situated is participating in the National Flood Insurance Program (see 44 CFR parts 59 through 79), or less than a year has passed since FEMA notification regarding such hazards; and

(2) Flood insurance is obtained as a condition of approval of the commitment.

(b) Participating jurisdictions located in an area identified by FEMA as having special flood hazards are responsible for assuring that flood insurance under the National Flood Insurance Program is obtained and maintained.

(c) This section does not apply to HOME funds provided to a state.

§ 92.359 Executive Order 12372.

(a) *General.* Executive Order 12372, as amended by Executive Order 12416 (3 CFR, 1982 Comp., p. 197 and 3 CFR, 1983 Comp., p. 186) (Intergovernmental Review of Federal Programs) and the Department's implementing regulations at 24 CFR part 52, allow each state to establish its own process for review and comment on proposed federal financial assistance programs.

(b) *Applicability.* Executive Order 12372 applies to applications submitted with respect to HOME funds being competitively reallocated under subpart J of this part to units of general local government.

Subpart I—Technical Assistance**§ 92.400 Coordinated federal support for housing strategies.**

(a) *General.* HUD will provide assistance under this subpart I to—

(1) Facilitate the exchange of information that would help participating jurisdictions carry out the purposes of this part, including information on program design, housing finance, land use controls, and building construction techniques;

(2) Improve the ability of states and units of general local government to

⁴ See § 92.505 concerning the availability of OMB Circulars.

design and implement housing strategies, particularly those states and units of general local government that are relatively inexperienced in the development of affordable housing;

(3) Encourage private lenders and for-profit developers of low-income housing to participate in public-private partnerships to achieve the purposes of this part;

(4) Improve the ability of states and units of general local government, community housing development organizations, private lenders, and for-profit developers of low-income housing to incorporate energy efficiency into the planning, design, financing, construction, and operation of affordable housing; and

(5) Facilitate the establishment and efficient operation of employer-assisted housing programs through research, technical assistance, and demonstration projects.

(b) *Conditions of contracts*—(1) *Eligible organizations.* HUD will carry out subpart I of this part insofar as is practicable through contract with—

(i) A participating jurisdiction or agency thereof;

(ii) A public purpose organization established pursuant to state or local legislation and responsible to the chief elected official of a participating jurisdiction;

(iii) An agency or authority established by two or more participating jurisdictions to carry out activities consistent with the purposes of this part;

(iv) A national or regional nonprofit organization that has a membership comprised predominantly of entities or officials of entities that qualify under paragraph (b)(1)(i), (b)(1)(ii), or (b)(1)(iii) of this section; or

(v) A professional and technical services company or firm that has demonstrated capacity to provide services under subpart I of this part.

(2) *Contract terms.* Contracts under subpart I of this part must be for not more than 3 years and must not provide more than 20 percent of the operating budget of the contracting organization in any one year. Within any fiscal year, contracts with any one organization may not be entered into for a total of more than 20 percent of the funds available under subpart I of this part in that fiscal year.

(c) *Notice of funding.* HUD will publish a notice in the *Federal Register* announcing the availability of funding under this section as appropriate.

Subpart J—Reallocations

§ 92.450 General.

(a) This subpart J sets out the conditions under which HUD reallocates HOME funds that have been allocated, reserved, or placed in a HOME Investment Trust Fund.

(b) A jurisdiction that is not a participating jurisdiction but is meeting the requirements of §§ 92.102, 92.103, and 92.104, (participation threshold, notice of intent, and submission of housing strategy) is treated as a participating jurisdiction for purposes of receiving a reallocation under subpart J of this part.

§ 92.451 *Reallocation of HOME funds from a jurisdiction that is not designated a participating jurisdiction or has its designation revoked.*

(a) *Failure to be designated a participating jurisdiction.* HUD will reallocate, under this section, any HOME funds allocated to or reserved for a jurisdiction that is not a participating jurisdiction if—

(1) HUD determines that the jurisdiction has failed to:

(i) Meet the participation threshold amount in § 92.102;

(ii) Provide notice of its intent to become a participating jurisdiction in accordance with § 92.103; or

(iii) Submit its housing strategy in accordance with § 92.104; or

(2) HUD after providing for amendments and resubmissions in accordance with § 91.70 of this title, disapproves the jurisdiction's housing strategy.

(b) *Designation revoked.* HUD will reallocate, under this section, any funds remaining in a jurisdiction's HOME Investment Trust Fund after HUD has revoked the jurisdiction's designation as a participating jurisdiction under § 92.107.

(c) *Manner of reallocation.* HUD will reallocate funds that are subject to reallocation under this section in the following manner:

(1) If the funds to be reallocated under this section are from a state, HUD will:

(i) Make the funds available by competition in accordance with criteria in § 92.453 among applications submitted by units of general local government within the state and with preference being given to applications from units of general local government that are not participating jurisdictions, and

(ii) Reallocate the remainder by formula in accordance with § 92.454.

(2) If the funds to be reallocated are from a unit of general local government:

(i) Located in a state that is a participating jurisdiction, HUD will reallocate the funds to that state. The state, in distributing these funds, must give preference to the provision of affordable housing within the unit of general local government; or

(ii) Located in a state that is not a participating jurisdiction, HUD will:

(A) Reallocate the funds by competition among units of general local government and community housing development organizations within the state, with priority going to applications for affordable housing within the unit of general local government; and

(B) Reallocate the remainder by formula in accordance with § 92.454.

§ 92.452 *Reallocation of community housing development organization set-aside.*

(a) HUD will reallocate, under this section, any HOME funds reduced or recaptured by HUD from a participating jurisdiction's HOME Investment Trust Fund under § 92.300(d).

(b) HUD will reallocate these funds by competition in accordance with criteria in § 92.453 to other participating jurisdictions for affordable housing developed, sponsored, or owned by community housing development organizations.

§ 92.453 *Criteria for competitive reallocations.*

(a) *General.* HUD will invite applications through *Federal Register* notice for HOME funds that become available for competitive reallocation under § 92.451 or § 92.452, or both. HUD will publish one or more such notices throughout a fiscal year, as warranted by the source and amount of the HOME funds available for competitive reallocation. The notice will describe the application requirements and procedures, including the deadline for the submission of applications of at least 30 days, the total funding available for the competition and any maximum amount of individual awards. The notice will describe the selection criteria and any special factors to be evaluated in awarding points under the selection criteria. The selection criteria are those set forth in this section and any additional requirements in §§ 92.451 and 452. The notice will also state whether HUD will make selections based on the application for a project or activities.

(b) *Threshold factors.* To be considered for a competitive reallocation, an application submitted by a jurisdiction must demonstrate to the satisfaction of HUD that—

(1) *Cooperative efforts.* The jurisdiction is engaged, or has made good faith efforts to engage, in cooperative efforts between the state and appropriate participating jurisdictions within the state to develop, coordinate, and implement housing strategies under the HOME Investment Partnerships Act; and

(2) *Barrier removal.* (i) The jurisdiction is implementing, or has plans to implement, a strategy to remove or ameliorate negative effects of public policies which raise the cost of housing or constrain incentives to develop, maintain, or improve affordable housing; or demonstrate the absence of these policies.

(ii) A local jurisdiction must provide a satisfactory explanation—based on its approved housing strategy, or based on the state's approved housing strategy, if the jurisdiction is not required to submit a housing strategy—of whether the cost of housing or the incentives to develop, maintain, or improve affordable housing in the jurisdiction are affected by state and local policies, statutes, ordinances, regulations, and administrative procedures and processes. Of particular concern are policies such as tax policies affecting land and other property, land use controls, zoning ordinances, building codes, fees and charges, growth limits, and policies that affect the return on residential investment. The jurisdiction must also provide a satisfactory description of its strategy to remove or ameliorate negative effects, if any, of such policies.

(iii) A state must provide a satisfactory explanation of whether the cost of housing or the incentives to develop, maintain, or improve affordable housing in the state are affected by state, as well as local policies, statutes, ordinances, regulations, and administrative procedures and processes. Of particular concern are policies such as tax policies affecting land and other property, land use controls, zoning ordinances, building codes, fees and charges, growth limits, and policies that affect the return on residential investment. A state must also provide a satisfactory description of its strategy to remove or ameliorate directly any negative effects, as well as to work with units of general local government involved to remove or ameliorate such negative effects of such policies. The strategy should propose, as appropriate, a program of state enabling reforms, direct state action as well as model codes, standards, and technical assistance for local governments.

(c) *Evaluation criteria.* Each applicant jurisdiction meeting the threshold factors in paragraph (b) of this section

and each applicant that is not a jurisdiction will be evaluated and ranked in accordance with criteria contained in the notice that are consistent with the following factors and take into account selection preferences and other requirements in §§ 92.450 through 92.452 that may apply, based on the source of the HOME funds being competitively reallocated.

(1) *Policies (25 Points).* The degree to which the applicant is pursuing policies that:

(i) Make existing housing more affordable;

(ii) Preserve the affordability of privately owned housing that is vulnerable to conversion, demolition, disinvestment, or abandonment;

(iii) Increase the supply of housing that is affordable to very low-income and low-income persons, particularly in areas that are accessible to expanding job opportunities; and,

(iv) Remedy the effects of discrimination and improve the housing opportunities for disadvantaged minorities.

(2) *Actions (50 points).* The applicant's actions that—

(i) Direct HOME funds to benefit very low-income families, to a greater extent than required by § 92.252(a). Extra consideration will be given for activities that expand the supply of affordable housing for very low-income families whose annual incomes do not exceed 30 percent of the median family income for the area;

(ii) Apply the tenant selection preference categories applicable under section 8 of the United States Housing Act of 1937 to the selection of tenants for housing assisted with HOME funds;

(iii) Provide matching resources in excess of funds required under § 92.218; and

(iv) Stimulate a high degree of investment and participation by the private sector, including nonprofit organizations.

(3) *Commitment (25 points).* The applicant's demonstrated commitment to expand the supply of affordable rental housing, including units developed by public housing agencies, as indicated by the additional number of units of affordable housing made available through the new construction or rehabilitation within the previous two years, making adjustments for regional variations in construction and rehabilitation costs and giving special consideration to the number of additional units made available under this part through new construction or rehabilitation, including units developed by public housing agencies, in relation

to the amounts made available under this program.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.454 Reallocations by formula.

(a) HUD will reallocate under this section:

(1) Any HOME funds remaining available for reallocation after HUD has made competitive reallocations under §§ 92.451 and 92.452;

(2) Any HOME funds available for reallocation because HUD reduced or recaptured funds from participating jurisdiction under § 92.500(d) for failure to commit the funds within the time specified;

(3) Any HOME funds withdrawn by HUD from a participating jurisdiction under § 91.75(c)(2) of this title for failure to submit in a timely manner a performance report required by § 91.75 of this title that is satisfactory to HUD; and

(4) Any HOME funds remitted to HUD under § 92.503(b) when a jurisdiction ceases to be a participating jurisdiction.

(b) Any reallocation of funds from a state must be made only among all participating states, and any reallocation of funds from units of general local government must be made only among all participating units of general local government, except those participating jurisdictions that HUD has removed from participating in reallocations under § 92.552.

(c) A local participating jurisdiction's share of a reallocation is calculated by multiplying the amount available for reallocation to units of general local government by a factor that is that ratio of the participating jurisdiction's formula allocation provided under § 92.50 to the total of the formula allocations provided for all local participating jurisdictions sharing in the reallocation. A state participating jurisdiction's share is comparably determined using the amount available for reallocation to states.

(d) HUD will make reallocations under this section quarterly, unless the amount available for such reallocation is insufficient to warrant making a reallocation. In any event, HUD will make a reallocation under this section at least once a year. The minimum amount of a reallocation is \$1000.

Subpart K—Program Administration

§ 92.500 The HOME Investment Trust Fund.

(a) *General.* A HOME Investment Trust Fund consists of the accounts

described in this section solely for investment in eligible activities within the participating jurisdiction's boundaries in accordance with the provisions of this part. HUD will establish a HOME Investment Trust Fund United States Treasury account for each participating jurisdiction. Each participating jurisdiction must establish a local HOME Investment Trust Fund account.

(b) *Treasury Account.* The United States Treasury account of the HOME Investment Trust Fund includes funds allocated to the participating jurisdiction under § 92.50 (including for a local participating jurisdiction, any transfer of the state's allocation pursuant to § 92.102(b)(2)) and funds reallocated to the participating jurisdiction, either by formula or by competition, under subpart J of this part; and

(c) *Local Account.* (1) The local account of the HOME Investment Trust Fund includes repayments of HOME funds and matching contributions and any payment of interest or other return on the investment of HOME funds and matching contributions.

(2) The participating jurisdiction may establish a second local account of the HOME Investment Trust Funds if—

(i) The participating jurisdiction has its own affordable housing trust fund that the participating jurisdiction will use for matching contributions to the HOME program;

(ii) State statute or local ordinance requires repayments from its own trust fund to be made to the trust fund;

(iii) The participating jurisdiction establishes a separate account within its own trust fund for repayments of the matching contributions and any payment of interest or other return on investment of the matching contributions; and

(iv) The funds in the account are used solely for investment in eligible activities within the participating jurisdiction's boundaries in accordance with the provisions of this part.

(3) The funds in the local account cannot be used for the matching contribution and do not need to be matched.

(d) *Reductions.* HUD will reduce or recapture HOME funds in the HOME Investment Trust Fund by the amount of—

(1) Any funds in the United States Treasury account that are required to be reserved (i.e., 15 percent of the funds) by a participating jurisdiction under § 92.300 that are not awarded to a community housing development organization pursuant to a written agreement within 18 months after the

funds were deposited in the United States Treasury account;

(2) Any funds in the United States Treasury account (except rental housing production set-aside funds under § 92.51) that are not committed within 24 months after the last day of the month in which the funds were deposited in the United States Treasury account;

(3) Any rental housing production set-aside funds under § 92.51 that are not committed within 36 months after the last day of the month in which the funds were deposited in the United States Treasury account;

(4) Any funds in the United States Treasury account that are not expended within five years after the last day of the month in which the funds were deposited in the United States Treasury account; and

(5) Any penalties assessed by HUD under § 92.551.

§ 92.501 HOME Investment Partnership Agreement.

Allocated and reallocated funds will be made available pursuant to a HOME Investment Partnership Agreement. The agreement must ensure that HOME funds invested in affordable housing are repayable if the housing ceases to qualify as affordable housing before the period of affordability expires.

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§ 92.502 Cash and Management Information System; disbursement of HOME funds.

(a) *General.* The Home Investment Trust Fund account established in the United States Treasury is managed through HUD's Cash and Management Information (C/MI) System for the HOME Investment Partnerships Program. The C/MI System is a computerized system which manages, disburses, collects, and reports information on the use of HOME funds in the United States Treasury account.

(b) *Project set-up.* (1) After the participating jurisdiction executes the HOME Investment Partnership Agreement, complies with the environmental requirements under part 58 of this title for release of funds, and submits the appropriate banking and security documents, the participating jurisdiction may identify (set up) specific investments in the C/MI System. Investments that require the set-up of projects in the C/MI System are the acquisition, new construction, or moderate or substantial rehabilitation of real property, and investments of HOME funds to provide tenant-based rental assistance. Within 12 calendar days of

project set-up, the participating jurisdiction is required to submit a Project Set-Up Report to HUD for each project set up in the C/MI System. Until an acceptable Project Set-Up Report is received and entered in the C/MI System, HOME funds for the project are not considered committed (as defined in § 92.2), and, therefore, are subject to recapture and reallocation to the extent authorized by § 92.500.

(2) If the Project Set-Up Report is not received within 20 days of the project set-up call, the project will be cancelled automatically by the C/MI System. In addition, a project which has been committed in the C/MI System for 12 months without an initial disbursement of funds will be automatically cancelled by the C/MI System.

(c) *Disbursement of HOME funds.* (1) After information from an acceptable Project Set-Up report is entered into the C/MI System, HOME funds may be drawn down from the United States Treasury account for the project by the participating jurisdiction by electronic funds transfer. The funds will be deposited in the local account of the HOME Investment Trust Fund of the participating jurisdiction within 48 to 72 hours of the disbursement request. Any drawdown of HOME funds from the United States Treasury account is conditioned upon the submission of satisfactory information by the participating jurisdiction about the project or tenant-based rental assistance and compliance with other procedures specified by HUD in HUD's forms and issuances concerning the Cash and Management Information System. Copies of these forms and issuances may be obtained from HUD Field Offices.

(2) HOME funds drawn from the United States Treasury account must be expended for eligible costs within 15 days. Any interest earned within the 15 day period may be retained by the participating jurisdiction as HOME funds. Any funds that are drawn down and not expended for eligible costs within 15 days of the disbursement must be returned to the C/MI System for deposit by HUD in the participating jurisdiction's United States Treasury account of the Home Investment Trust Fund. Except for states as provided by the Intergovernmental Cooperation act (31 U.S.C. 6501 et seq.), interest earned after 15 days belongs to the United States and must be remitted promptly, but at least quarterly, to HUD, except that the participating jurisdiction may retain interest amounts up to \$100 per year for administrative expenses.

(3) HOME funds in the local account of the HOME Investment Trust Fund must be disbursed before requests are made for HOME funds in the United States Treasury account.

(4) A participating jurisdiction will be paid on an advance basis provided it complies with the requirements of this part.

(5) Except as provided in §§ 92.301(a)(3) and 92.301(b)(3), if a project is terminated before its completion, whether voluntarily by the participating jurisdiction or otherwise, an amount equal to the HOME funds disbursed for the project must be paid by the participating jurisdiction to its HOME Investment Trust Fund. If the HOME funds were disbursed from the Treasury account, the amount must be paid to the Treasury account; if the HOME funds were disbursed from the local account, the amount must be paid to the local account. If the amount is not repaid, the participating jurisdiction will be subject to actions under subpart L of this part.

(d) *Pavement certification.* As post-documentation of each drawdown of funds from the United States Treasury account, a participating jurisdiction must submit to HUD a payment certification, for each drawdown, in the form required by HUD. If the payment certification is not received within 10 calendar days of the drawdown, the participating jurisdiction will be suspended from setting up new projects until the payment certification is received by HUD.

(e) *Submission of project completion reports.* A Project Completion Report must be submitted to HUD within 120 days of the final drawdown request for the project. If a satisfactory Project Completion Report is not submitted by the due date, HUD will suspend further project set-ups for the participating jurisdiction. Project set-ups will remain suspended until a satisfactory Project Completion Report is received and entered into the C/MI System.

(f) *State recipients.* State recipients are also given access to the C/MI System for investment of HOME funds upon designation by the state and submission of the appropriate banking and security documents.

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§ 92.503 Repayment of investment.

(a) Housing assisted with HOME funds that does not meet the affordability requirements for the period specified in § 92.252 or § 92.254, as applicable, must be repaid in

accordance with paragraph (b) of this section.

(b) Any repayment of HOME funds (including repayment required if the housing no longer qualifies as affordable housing), and any payment of interest or other return on the investment of HOME funds, must be deposited in the jurisdiction's HOME Investment Trust Fund local account, except that if the jurisdiction is not a participating jurisdiction when the payment or repayment is made, the funds must be remitted to HUD and reallocated in accordance with § 92.454.

§ 92.504 Participating jurisdiction responsibilities; written agreements; monitoring.

(a) *Responsibilities.* The participating jurisdiction is responsible for ensuring that HOME funds are used in accordance with all program requirements. The use of state recipients, subrecipients, or contractors does not relieve the participating jurisdiction of this responsibility.

(b) *Executing a written agreement.* Before disbursing any HOME funds to any entity (e.g., state recipient, for-profit housing developer, nonprofit organization, homeowner, contractor, community housing development organization, or PHA) the participating jurisdiction must enter into a written agreement with the entity ensuring compliance with the requirements of this part. A state recipient, subrecipient, or contractor must also enter into a written agreement before it disburses funds to any entity. The agreement remains in effect during the period for affordability under § 92.252 or § 92.254, as applicable, or if the entity is a subrecipient, during any period that the entity has control over HOME funds.

(c) *Provisions in written agreement.* At a minimum, the written agreement must include provisions concerning the following items:

(1) *Use of the HOME funds.* The agreement must describe the use of the HOME funds, including the tasks to be performed, a schedule for completing the tasks, and a budget. These items must be in sufficient detail to provide a sound basis for the participating jurisdiction effectively to monitor performance under the agreement.

(2) *Affordability.* The agreement must require housing assisted with HOME funds to meet the affordability requirements of § 92.252 or § 92.254, as applicable, and must require repayment of the funds if the housing does not meet the affordability requirements for the specified time period.

(3) *Repayments.* If the entity is a contractor, subrecipient, or state

recipient, the agreement must state if repayment, interest, and other return on the investment of HOME funds are to be remitted to the participating jurisdiction or are to be retained for additional eligible activities by the entity.

(4) *Uniform administrative requirements.* If the entity is a subrecipient or state recipient, the agreement must require the entity to comply with applicable uniform administrative requirements, as described in § 92.505.

(5) *Project requirement.* The agreement must require compliance with project requirements in subpart F of this part, as applicable in accordance with the type of project assisted.

(6) *Housing quality standard.* The agreement must require owners of rental housing assisted with HOME funds to maintain the housing in compliance with applicable Housing Quality Standards and local housing code requirements for the duration of the agreement.

(7) *Other program requirements.* The agreement must require the entity to carry out each activity in compliance with all federal laws and regulations described in subpart H of this part, except that the entity does not assume the participating jurisdiction's responsibilities for environmental review in § 92.352 or the intergovernmental review process in § 92.359.

(8) *Affirmative marketing.* The agreement must specify the entity's affirmative marketing responsibilities in accordance with § 92.351.

(9) *Conditions for religious organizations.* Where applicable, the agreement must include the conditions prescribed in § 92.257 for the use of HOME funds by religious organizations.

(10) *Requests for disbursements of funds.* The agreement must specify that the entity may not request disbursement of funds under the agreement until the funds are needed for payment of eligible costs. The amount of each request must be limited to the amount needed.

(11) *Reversion of assets.* If the entity is a subrecipient, the agreement must specify that upon expiration of the agreement, the entity must transfer to the participating jurisdiction any HOME funds on hand at the time of expiration and any accounts receivable attributable to the use of HOME funds.

(12) *Records and reports.* The agreement must specify the particular records that must be maintained and any information or reports that must be submitted in order to assist the participating jurisdiction in meeting its recordkeeping and reporting requirements.

(13) *Enforcement of the agreement.* The agreement must provide for a means of enforcement by the participating jurisdiction or the intended beneficiaries. The means of enforcement may include liens on real property, deed restrictions, or other provisions. The affordability requirements in § 92.252 must be enforced by deed restriction. In addition, the agreement must specify remedies for breach of the provisions of the agreement. If the entity is a subrecipient or state recipient, the agreement must specify that, in accordance with 24 CFR 85.43, suspension or termination may occur if the entity materially fails to comply with any term of the agreement, and that the agreement may be terminated for convenience in accordance with 24 CFR 85.44.

(14) *Duration of the agreement.* The agreement must specify that the agreement is in effect for the period of affordability required by the participating jurisdiction under § 92.252 or § 92.254.

(d) *Monitoring.* The participating jurisdiction is responsible for managing the day-to-day operations of its HOME program, for monitoring the performance of all entities receiving HOME funds from the participating jurisdiction to assure compliance with the requirements of this part, and for taking appropriate action when performance problems arise.

(1) Not less than annually, the participating jurisdiction must review the activities of owners of rental housing assisted with HOME funds to assess compliance with the requirement of this part, as set forth in the written agreement under paragraphs (b) and (c) of this section. For multifamily housing, each review must include on-site inspection to determine compliance with housing codes and the requirements of this part. For rental housing containing one- to four-dwelling units, an on-site review must be made once within each two-year period. The results of each review must be included in the participating jurisdiction's performance report required by part 91 of this title and must be made available to the public.

(2) Not less than annually, the participating jurisdiction must review the performance of each contractor and subrecipient.

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§ 92.505 Applicability of uniform administrative requirements.

(a) *Governmental entities.* The requirements of OMB Circular No. A-87

and the following requirements of 24 CFR part 85 apply to the participating jurisdiction, state recipients, and any governmental subrecipient receiving HOME funds: §§ 85.8, 85.12, 85.20, 85.22, 85.26, 85.35, 85.36, 85.44, 85.51, and 85.52.

(b) *Non-profit organizations.* The requirements of OMB Circular No. A-122 and the following requirements of OMB Circular No. A-110 apply to subrecipients receiving HOME funds that are private nonprofit organizations: Attachment B; attachment F; attachment H, paragraph 2; and attachment O. (Copies of OMB Circulars may be obtained from E.O.P. Publications, room 2200, New Executive Office Building, Washington, DC 20503, telephone (202) 395-7332. (This is not a toll-free number.) There is a limit of two free copies.))

§ 92.506 Audit.

Audits must be conducted in accordance with 24 CFR part 44 and OMB Circular A-133.⁵

§ 92.507 Closeout.

(a) HOME funds from each individual federal fiscal year (i.e., the allocation and any reallocated funds from the particular federal fiscal year appropriation) will be closed out when all the following criteria have been met:

(1) All funds to be closed out have been drawn down and expended for completed project costs, or funds not drawn down and expended have been deobligated by HUD;

(2) The matching requirements in § 92.218 have been met;

(3) Project Completion Reports for all projects using funds to be closed out have been submitted and entered into the C/MI System. (Based on the data in the C/MI System, HUD will prepare the Closeout Report.);

(4) The participating jurisdiction has been reviewed and audited and HUD has determined that all requirements, except for affordability, have been met or all monitoring and audit findings have been resolved.

(i) The participating jurisdiction's most recent audit report and audit reports of state recipients, where applicable, must be received by HUD. If the audit does not cover all funds to be closed out, the closeout may proceed, provided the participating jurisdiction agrees in the Closeout Report that any costs paid with the funds that were not audited must be subject to the participating jurisdiction's next single audit and that the participating jurisdiction may be required to repay to

⁵ See § 92.505 concerning the availability of OMB Circulars.

HUD any disallowed costs based on the results of the audit.

(ii) The on-site monitoring of the participating jurisdiction by the HUD Field Office must include verification of C/MI System data reflected in the Closeout Report and reconciliation of any discrepancies which may exist between C/MI System data and participating jurisdiction or state recipient records.

(b) The Closeout Report contains the final data on the funds and must be signed by the participating jurisdiction and HUD. In addition, the report must contain:

(1) A provision regarding unaudited funds, required by paragraph (a)(4)(i) of this section; and

(2) A provision requiring the participating jurisdiction to continue to meet the requirements applicable to housing projects for the period of affordability specified in § 92.252 or § 92.254, to keep records demonstrating that the requirements have been met and to repay the HOME funds, as required by § 92.503, if the housing fails to remain affordable for the required period.

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§ 92.508 Recordkeeping.

(a) *General.* Each participating jurisdiction must establish and maintain sufficient records to enable HUD to determine whether the participating jurisdiction has met the requirements of this part. Records must be kept in a manner that identifies the source of funds of each project (e.g., allocation and reallocation identified by federal fiscal year appropriation and funds in the local account of the HOME Investment Trust Fund and state or local funds provided under § 92.102(b)). At a minimum, the following records are needed:

(1) Requirements for designation as a participating jurisdiction:

(i) Records for a consortium of the agreement among the participating member units of general local government required by § 92.101.

(ii) Records for a unit of general local government receiving a formula allocation of less than \$750,000 that demonstrate that funds have been made available (either by the state or the unit of general local government, or both) equal to or greater than the difference between its formula allocation and \$750,000 as required by § 92.102.

(2) Program requirements:

(i) Records of the efforts to maximize participation by the private sector as required by § 92.200.

(ii) Records providing a full description of each activity assisted with HOME funds, including its census tract location (if the activity has a geographical locus), the amount of HOME funds budgeted, committed, and expended for the activity.

(iii) Records supporting the participating jurisdiction's determination and certifications under § 92.209 (new construction: Neighborhood revitalization), including a description of how the neighborhood revitalization program emphasizes rehabilitation and the time period of the neighborhood revitalization program; a description of the neighborhood and percentage of households at or below 80 percent of median income.

(iv) Records supporting the participating jurisdiction's determination and certifications under § 92.210 (new construction: Special needs).

(v) Records supporting the participating jurisdiction's certification under § 92.211 (tenant-based rental assistance; the waiting list; determinations of rent reasonableness; calculations of HOME subsidy for each tenant assisted).

(vi) Records for income targeting required by §§ 92.216 and 92.217.

(vii) Records, including individual project records and a running log, demonstrating compliance with the matching requirements in §§ 92.218 through 92.221 including the type and amount of contributions by project.

(3) Project records:

(i) Records that demonstrate that each project meets the property standards in § 92.251.

(ii) Records that demonstrate that each rental housing project meets the requirements of § 92.252 for the required period of affordability. Records must be kept for each family assisted.

(iii) Records that demonstrate compliance with the requirements of § 92.253 for tenant and participant protections.

(iv) Records that demonstrate compliance with the requirements in § 92.254 for affordable housing: homeownership, including the initial purchase price and appraised value (after rehabilitation, if required) of the property. Records must be kept for each family assisted.

(v) Records that indicate whether the project is mixed-income, mixed-use, or both, in accordance with § 92.255 or § 92.256.

(vi) Records evidencing the guidelines adopted by the participating jurisdiction

and supporting the certification for each housing project that the combination of federal assistance to the project is not any more than is necessary to provide affordable housing, as required by § 92.150(c)(1).

(4) Community Housing Development Organization set-aside records:

(i) Records indicating the name and qualifications of each community housing development organization and amount of HOME funds awarded.

(ii) Records setting forth the efforts made to identify and encourage community housing development organizations, as required by § 92.300.

(iii) Records supporting project-specific assistance to community housing development organizations under § 92.301, including the impediments to repayment, if repayment is waived.

(5) Other federal requirements records:

(i) Equal opportunity and fair housing records containing:

(A) Data on the extent to which each racial and ethnic group and single-headed households (by gender of household head) have applied for, participated in, or benefited from, any program or activity funded in whole or in part with HOME funds.

(B) Documentation of actions undertaken to meet the requirements of § 92.350, which implements section 3 of the Housing Development Act of 1968, as amended (12 U.S.C. 1701u).

(C) Documentation and data on the steps taken to implement the jurisdiction's outreach programs to minority-owned and female-owned businesses including data indicating the racial/ethnic or gender character of each business entity receiving a contract or subcontract of \$25,000 or more paid, or to be paid, with HOME funds; the amount of the contract or subcontract, and documentation of participating jurisdiction's affirmative steps to assure that minority business and women's business enterprises have an equal opportunity to obtain or compete for contracts and subcontracts as sources of supplies, equipment, construction, and services.

(D) Documentation of the actions the participating jurisdiction has taken to affirmatively further fair housing;

(ii) Records indicating the affirmative marketing procedures and requirements under § 92.351

(iii) Records that demonstrate compliance with environmental review requirements in § 92.352 (and part 58 of this title).

(iv) Records which demonstrate compliance with the requirements in § 92.353 regarding displacement,

relocation, and real property acquisition, including project occupancy lists identifying the name and address of all persons occupying the real property on the date described in § 92.353(c)(2)(i)(A), moving into the property on or after the date described in § 92.353(c)(2)(i)(A), and occupying the property upon completion of the project.

(v) Records demonstrating compliance with labor requirements in § 92.354, including contract provisions and payroll records.

(vi) Records concerning lead-based paint under § 92.355.

(vii) Records supporting requests for waivers of the conflict of interest prohibition in § 92.356.

(viii) Records of certifications concerning debarment and suspension required by § 92.357 (and 24 CFR part 24).

(ix) Records demonstrating compliance with flood insurance requirements under § 92.358.

(x) Records concerning intergovernmental review, as required by § 92.359.

(6) Program administration records:

(i) Records concerning the local account of the HOME Investment Trust Fund, required to be established and maintained by § 92.500, including deposits, disbursements, and balances.

(ii) Records supporting requests for disbursements of HOME funds from the Treasury account and the local account, and other information required for the C/MI System under § 92.502.

(iii) Records indicating source and amounts of repayments, interest, and other return of investment of HOME funds.

(iv) Records of written agreements and monitoring required by § 92.504.

(v) Financial and related records required by § 92.505.

(vi) Records of audits and resolution of audit findings.

(b) A state that distributes HOME funds to state recipients must require state recipients to keep the records required by paragraphs (a)(2), (a)(3), (a)(5), and (a)(6) this section, and such other records as the state determines to be necessary to enable the state to carry out its responsibilities under this part. The state need not duplicate the records kept by the state recipients. The state must keep records concerning its review of state recipients required under § 92.201(b)(3).

(c) *Period of record retention.* (1) Except as provided in paragraph (c)(2), (c)(3), or (c)(4) of this section, records must be retained for three years after closeout of the funds.

(2) If any litigation, claim, negotiation, audit, or other action has been started before the expiration of the regular period specified in paragraph (c)(2) of this section, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular period, whichever is later.

(3) Records regarding project requirements (subpart F) and subpart H requirements that apply for the duration of the period of affordability (§§ 92.350, 92.351, and 92.358), as well as the written agreement and inspection and monitoring reports must be retained for three years after the required period of affordability specified in § 92.252 or § 92.254, as applicable.

(4) Records covering displacements and acquisition must be retained for at least three years after the date by which all persons displaced from the property and all persons whose property is acquired for the project have received the final payment to which they are entitled in accordance with § 92.353.

(d) *Access to record.* (1) The participating jurisdiction must provide citizens, public agencies, and other interested parties with reasonable access to records, consistent with applicable state and local laws regarding privacy and obligations of confidentiality.

(2) HUD and the Comptroller General of the United States, or any of their representatives, have the right of access to any pertinent books, documents, papers or other records of the participating jurisdiction, state recipients, and subrecipients, in order to make audits, examinations, excerpts, and transcripts.

§ 92.509 performance reports.

(a) *Management reports.* Each participating jurisdiction must submit management reports on its HOME Investment Partnerships Program in such format and at such time as HUD may prescribe.

(b) *Annual performance report—(1) Submission.* A participating jurisdiction must submit an annual performance report on its HOME activities to the responsible HUD Field Office at such time as HUD may prescribe. Single copies of the report must be provided to the public upon request at no charge.

(2) *Elements of the annual performance report.* The report must contain such information and be in such form as HUD may prescribe, and must include at least the following:

(i) An assessment by the participating jurisdiction of the relationship of the activities carried out under its HOME Investment Partnerships Program to the

objectives in its approved housing strategy;

(ii) An analysis of the participating jurisdiction's efforts to maximize participation by the private sector;

(iii) An analysis of the extent to which HOME funds were distributed among different categories of housing needs identified in its approved housing strategy;

(iv) An assessment of the participating jurisdiction's efforts to identify community development housing organizations for participation in its HOME program;

(v) An assessment of the effectiveness of the affirmative marketing actions prescribed in § 92.351;

(vi) An assessment of the effectiveness of the participating jurisdiction's minority outreach program, including an analysis of participation by minorities and women and entities owned by minorities and women in its HOME program and, where appropriate, a statement of additional actions planned to improve performance in the use of minority- and women-owned businesses;

(vii) Data on the total number of households (families and individuals) and business and nonprofit organizations displaced as a result of investments of HOME funds, including the cost of relocation payments (moving expenses and replacement housing), and the number and cost of real property acquisitions; and

(viii) Data on the amount of repayments, interest, and other return on investment of HOME funds and state or local funds provided under § 92.102(b) and the use of the funds for projects, including number of projects assisted, and characteristics of tenants and owners.

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Subpart L—Performance Reviews and Sanctions

§ 92.550 Performance reviews.

(a) *General.* HUD will review the performance of each participating jurisdiction in carrying out its responsibilities under this part whenever determined necessary by HUD, but at least annually. In conducting performance reviews, HUD will rely primarily on information obtained from the participating jurisdiction's and, as appropriate, the state recipient's records and reports, findings from on-site monitoring, audit reports, and information generated from the C/MI System. Where applicable, HUD may also consider relevant

information pertaining to a participating jurisdiction's or state recipient's performance gained from other sources, including citizen comments, complaint determinations, and litigation. Reviews to determine compliance with specific requirements of this part will be conducted as necessary, with or without prior notice to the participating jurisdiction or state recipient.

Comprehensive performance reviews under the standards in paragraph (b) of this section will be conducted after prior notice to the participating jurisdiction.

(b) *Standards for comprehensive performance review.* A participating jurisdiction's performance will be comprehensively reviewed periodically, as prescribed by HUD, to determine:

(1) For local participating jurisdictions and state participating jurisdictions administering their own HOME programs, whether the participating jurisdiction:

(i) Has committed the HOME funds in the United States Treasury account as required by § 92.500 and expended the funds in the United States Treasury account as required by § 92.500, and

(ii) Has met the requirements of this part, particularly eligible activities, income targeting, affordability, and matching requirement; or

(2) For state participating jurisdictions distributing HOME funds to state recipients, whether the state:

(i) Has met the matching contribution and other requirements of this part;

(ii) Has distributed the funds in accordance with the requirements of this part; and

(iii) Has made such reviews and audits of its recipients as may be appropriate to determine whether they have satisfied the requirements of paragraphs (b)(1)(i) and (b)(1)(ii) of this section.

§ 92.551 Corrective and remedial actions.

(a) *General.* HUD will use the procedures in this section in conducting the performance review as provided in § 92.550 and in taking corrective and remedial actions.

(b) *Performance review.* (1) If HUD determines preliminarily that the participating jurisdiction has not met a requirement of this part, the participating jurisdiction will be given notice of this determination and an opportunity to demonstrate, within the time prescribed by HUD (not to exceed 30 days) and on the basis of substantial facts and data, that it has done so.

(2) If the participating jurisdiction fails to demonstrate to HUD's satisfaction that it has met the requirement, HUD

will take corrective or remedial action in accordance with this section or § 92.552.

(c) *Corrective and remedial actions.*

Corrective or remedial actions for a performance deficiency (failure to meet a provision of this part) will be designed to prevent a continuation of the deficiency; mitigate, to the extent possible, its adverse effects or consequences; and prevent its recurrence.

(1) HUD may instruct the participating jurisdiction to submit and comply with proposals for action to correct, mitigate and prevent a performance deficiency, including:

(i) Preparing and following a schedule of actions for carrying out the affected activities, consisting of schedules, timetables, and milestones necessary to implement the affected activities;

(ii) Establishing and following a management plan that assigns responsibilities for carrying out the remedial actions;

(iii) Canceling or revising activities likely to be affected by the performance deficiency, before expending HOME funds for the activities;

(iv) Reprogramming HOME funds that have not yet been expended from affected activities to other eligible activities;

(v) Reimbursing its HOME Investment Trust Fund in any amount not used in accordance with the requirements of this part;

(vi) Suspending disbursement of HOME funds for affected activities; and

(vii) Making matching contributions as draws are made from the participating jurisdiction's HOME Investment Trust Fund United States Treasury Account.

(2) HUD may also—

(i) Change the method of payment from an advance to reimbursement basis; and

(ii) Take other remedies that may be legally available.

§ 92.552 Notice and opportunity for hearing; sanctions.

(a) If HUD finds after reasonable notice and opportunity for hearing that a participating jurisdiction has failed to comply with any provision of this part and until HUD is satisfied that there is no longer any such failure to comply:

(1) HUD shall reduce the funds in the participating jurisdiction's HOME Investment Trust Fund by the amount of any expenditures that were not in accordance with the requirements of this part; and

(2) HUD may do one or more of the following:

(i) Prevent withdrawals from the participating jurisdiction's HOME

Investment Trust Fund for activities affected by the failure to comply;

(ii) Restrict the participating jurisdiction's activities under this part to activities that conform to one or more model programs made available under § 92.213;

(iii) Remove the participating jurisdiction from participation in allocations or reallocations of funds made available under subpart A or J of this part;

(iv) Require the participating jurisdiction to make matching contributions in amounts required by §§ 92.218(a)(1) through 92.218(3) as HOME funds are drawn from the participating jurisdiction's HOME Investment Trust Fund United States Treasury Account; *Provided, however,* That HUD may on due notice suspend payments at any time after the issuance of a notice of opportunity for hearing pursuant to paragraph (b)(1) of this section, pending such hearing and a final decision, to the extent HUD determines such action necessary to preclude the further expenditure of funds for activities affected by the failure to comply.

(b) *Proceedings.* When HUD proposes to take action pursuant to this section, the respondent in the proceedings will be the participating jurisdiction, or at HUD's option, the state recipient.

(1) *Notice of opportunity for hearing.* HUD shall notify the respondent in writing of the proposed action and of the opportunity for a hearing. The notice shall be sent by first class mail. The notice shall specify:

(i) In a manner which is adequate to allow the respondent to prepare its response, the basis upon which HUD determined that the respondent failed to comply with a provision of this part;

(ii) That the hearing procedures are governed by these rules;

(iii) That the respondent has 14 days from receipt of the notice within which to provide a written request for a hearing to the Chief Docket Clerk, Office of Administrative Law Judges, and the address and telephone number of the Chief Docket Clerk;

(iv) The action HUD proposes to take and that the authority for this action is § 92.552; and

(v) That if the respondent fails to request a hearing within the time specified, HUD's determination that the respondent failed to comply with a provision of this part shall be final and HUD may proceed to take the proposed action.

(2) *Initiation of hearing.* The respondent shall be allowed 14 days from receipt of the notice within which to notify the Chief Docket Clerk, Office

of Administrative Law Judges, of its request for a hearing. If no request is received within the time specified, HUD's determination that the respondent failed to comply with a provision of this part shall be final and HUD may proceed to take the proposed action.

(3) *Administrative Law Judge.* Proceedings conducted under these rules shall be presided over by an Administrative Law Judge (ALJ), appointed as provided by section 11 of the Administrative Procedures Act (5 U.S.C. 3105). The case shall be referred to the ALJ at the time a hearing is requested. The ALJ shall promptly notify the parties of the time and place at which the hearing will be held. The ALJ shall conduct a fair and impartial hearing and take all action necessary to avoid delay in the disposition of proceedings and to maintain order. The ALJ shall have all powers necessary to those ends, including but not limited to the power to:

(i) Administer oaths and affirmations;

(ii) Issue subpoenas as authorized by law;

(iii) Rule upon offers of proof and receive relevant evidence;

(iv) Order or limit discovery before the hearing as the interests of justice may require;

(v) Regulate the course of the hearing and the conduct of the parties and their counsel;

(vi) Hold conferences for the settlement or simplification of the issues by consent of the parties;

(vii) Consider and rule upon all procedural and other motions appropriate in adjudicative proceedings; and

(viii) Make and file initial determinations.

(4) *Ex parte communications.* An *ex parte* communication is any communication with an ALJ, direct or indirect, oral or written, concerning the merits or procedures of any pending proceeding which is made by a party in the absence of any other party. *Ex parte* communications are prohibited except where the purpose and content of the communication have been disclosed in advance or simultaneously to all parties, or the communication is a request for information concerning the status of the case. Any ALJ who receives an *ex parte* communication which the ALJ knows or has reason to believe is unauthorized shall promptly place the communication, or its substance, in all files and shall furnish copies to all parties. Unauthorized *ex parte* communications shall not be taken into consideration in deciding any matter in issue.

(5) *The hearing.* All parties shall have the right to be represented at the hearing by counsel. The ALJ shall conduct the proceedings in an expeditious manner while allowing the parties to present all oral and written evidence which tends to support their respective positions, but the ALJ shall exclude irrelevant, immaterial or unduly repetitious evidence. HUD has the burden of proof in showing by a preponderance of the evidence that the respondent failed to comply with a provision of this part. Each party shall be allowed to cross-examine adverse witnesses and to rebut and comment upon evidence presented by the other party. Hearings shall be open to the public. So far as the orderly conduct of the hearing permits, interested persons other than the parties may appear and participate in the hearing.

(6) *Transcripts.* Hearings shall be recorded and transcribed only by a reporter under the supervision of the ALJ. The original transcript shall be a part of the record and shall constitute the sole official transcript. Respondents and the public, at their own expense, may obtain copies of the transcript.

(7) *The ALJ's decision.* At the conclusion of the hearing, the ALJ shall give the parties a reasonable opportunity to submit proposed findings and conclusions and supporting reasons therefor. Generally within 60 days after the conclusion of the hearing, the ALJ shall prepare a written decision which includes a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record and the appropriate sanction or denial thereof. The decision shall be based on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A copy of the decision shall be furnished to the parties immediately by first class mail and shall include a notice that any requests for review by the Secretary must be made in writing to the Secretary within 30 days of the receipt of the decision.

(8) *The record.* The transcript of testimony and exhibits, together with the decision of the ALJ and all papers and requests filed in the proceeding, constitutes the exclusive record for decision and, on payment of its reasonable cost, shall be made available to the parties. After reaching the initial decision, the ALJ shall certify to the complete record and forward the record to the Secretary.

(9) *Review by the Secretary.* The decision by the ALJ shall constitute the final decision of the Secretary unless,

within 30 days after the receipt of the decision, either the respondent or the Assistant Secretary files an exception and request for review by the Secretary. The excepting party must transmit simultaneously to the Secretary and the other party the request for review and the basis of the party's exceptions to the findings of the ALJ. The other party shall be allowed 30 days from receipt of the exception to provide the Secretary and the excepting party with a written reply. The Secretary shall then review the record of the case, including the exceptions and the reply. On the basis of such review, the Secretary shall issue a written determination, including a statement of the rationale therefor, affirming, modifying or revoking the decision of the ALJ. The Secretary's decision shall be made and transmitted to the parties within 60 days after the decision of the ALJ was furnished to the parties.

Subpart M—Home Funds for Indian Tribes

§ 92.600 General.

For each fiscal year, HUD will provide funds to Indian tribes, totaling one percent (or such other percentage or amount as authorized by Congress) of the amount appropriated for the HOME program to expand the supply of affordable housing. The funds will be awarded competitively by HUD Field Offices that have responsibility for the HOME Indian program and will be made available each fiscal year pursuant to a notice of funding availability (NOFA) published in the *Federal Register*, in accordance with the requirements of subpart M of this part.

§ 92.601 Regional allocation of funds.

Unless HUD determines for administrative convenience based on the amount of HOME funds available to hold a nationwide competition, HOME funds will be allocated to the HUD Field Offices responsible for the HOME Indian program on the following basis:

(a) Each Field Office will be allocated a minimum of \$250,000 as a base amount.

(b) HOME funds remaining after the base amount is subtracted will be allocated to each Field Office as follows:

(1) Forty percent of the funds will be allocated based upon each Field Office's share of the total eligible Indian population;

(2) Forty percent of the funds will be allocated based upon each Field Office's share of the total extent of poverty among the eligible Indian population; and

(3) Twenty percent of the funds will be allocated based upon each Field Office's share of the total extent of overcrowded housing among the eligible population.

(c) Data used for allocation of funds will be based upon the eligible Indian population of Indian tribes that are determined to be eligible 90 days before the beginning of each fiscal year. The data must be the most recent data available from sources referable to the same point or period in time.

§ 92.602 Competition.

The selection of projects for funding will be based on the relative adequacy of applications in addressing locally determined need. Applicants must have the administrative capacity to undertake the project proposed, including systems of internal control necessary to administer these projects effectively. The requirements applicable to HOME funds awarded to Indian tribes are identified below.

§ 92.603 Housing strategy.

Indian tribes are not required to submit a housing strategy to receive HOME funds. However, the application must demonstrate how the proposed project(s) will contribute to a comprehensive approach for expanding the supply of affordable housing for members of the Indian tribe.

§ 92.604 Criteria for selection.

There are four categories of projects that may be funded under the HOME Indian program: housing rehabilitation (moderate and substantial), acquisition of housing, new housing construction, and tenant-based rental assistance. Each project must be evaluated using the following three criteria:

(a) *Project need and design.* The degree to which the proposed project addresses the housing need(s) of the Indian tribe as identified in the application and through other information available to HUD, and the degree to which the proposed project is feasible while maximizing benefits to low income families.

(b) *Planning and implementation.* The degree to which the financial, administrative, and legal actions necessary to undertake the proposed project have been considered and addressed in the application, and the degree to which the Indian tribe has the administrative staff to successfully carry out the project.

(c) *Leveraging.* The degree to which other sources of assistance, including mortgage insurance, state funds, and private contributions, are used in

conjunction with HOME funds to carry out the proposed project.

§ 92.605 Deadline and other information.

The NOFA will describe the maximum points for each of the selection criteria and any special factors to be evaluated in awarding points under the selection criteria. The NOFA will also state the deadline for the submission of applications, the total funding available for the competition and any maximum amount of individual awards.

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§ 92.606 Certifications.

The following certifications must accompany an application submitted in response to a NOFA:

(a) A certification that it will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, implementing regulations at 49 CFR part 24 and the requirements of § 92.634;

(b) A certification that the Indian tribe will use HOME funds in compliance with all requirements of this part;

(c) The certification with regard to the drug-free workplace required by 24 CFR part 24, subpart F; and

(d) The certification required with regard to lobbying required by 24 CFR part 87, together with disclosure forms, if required by 24 CFR part 87.

(e) The certification with regard to debarment and suspension required by 24 CFR part 24, appendix A.

Eligible Activities and Affordability

§ 92.610 Income determinations.

Whenever an Indian tribe makes a determination under this part based on family income or adjusted family income, it must use the definitions of *annual income*, *adjusted income*, *monthly income*, and *monthly adjusted income*, as those terms are defined in part 913 of this title.

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§ 92.611 Eligible activities.

(a) *Eligible activities.* (1) HOME funds may be used by an Indian tribe to provide incentives to develop and support affordable rental housing and homeownership affordability through the acquisition (including assistance to first-time homebuyers), new construction, reconstruction, or moderate or substantial rehabilitation of nonluxury housing with suitable amenities, including real property

acquisition, site improvement, conversion, demolition, and other expenses, including financing costs, relocation expenses of any displaced persons, families, businesses, or organizations; to provide tenant-based rental assistance; and to pay administrative costs. The specific eligible costs for these activities are set forth in § 92.612.

(2) Acquisition of vacant land or demolition must be undertaken only with respect to a particular housing project intended to provide affordable housing, and for which funds for construction have been committed.

(3) Housing that has received an initial certificate of occupancy or equivalent document within a one-year period before an Indian tribe commits HOME funds to the project is new construction for purposes of this part.

(4) Conversion of an existing structure to affordable housing is rehabilitation, unless the conversion entails adding a unit beyond the existing walls, in which case, the project is new construction for purposes of this part.

(b) *Forms of assistance.* An Indian tribe may invest HOME funds as equity investments, interest-bearing loans or advances, noninterest-bearing loans or advances, interest subsidies consistent with the purposes of this part, deferred payment loans, grants, or other forms of assistance that HUD determines to be consistent with the purposes of this part. Each Indian tribe has the right to establish the terms of assistance, subject to the requirements of this part.

(c) *Termination before completion.* If HOME funds are spent on a project that is terminated before completion, the funds must be repaid to the Indian tribe's HOME account.

§ 92.612 Eligible costs.

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

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

(1) For new construction, costs to meet the applicable new construction standards of the Indian tribe and the Model Energy Code referred to in § 92.621;

(2) For rehabilitation, costs to meet the applicable rehabilitation standards of the Indian tribe or correcting substandard conditions (minimally the housing quality standards at § 882.109 of this title), to make essential improvements including energy-related repairs or improvements, improvements necessary to permit the use by handicapped persons, and the abatement of lead-based paint hazards,

as required by § 92.636, and to repair or replace major housing systems in danger of failure; and

(3) For both new construction and rehabilitation, costs to demolish existing structures and for improvements to the project site that are in keeping with improvements of surrounding, standard projects, and costs to make utility connections.

(4) For new construction the cost of funding an initial operating deficit reserve, which is a reserve to meet any shortfall in project income during the period of project rent-up (not to exceed 18 months) and which may only be used to pay operating expenses, reserve for replacement payments, and debt service. Any HOME funds placed in an operating deficit reserve that remain unexpended when the reserve terminates must be returned to the Indian tribe's local HOME account.

(b) *Acquisition costs.* Costs of acquiring improved or unimproved real property.

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

(1) Architectural, engineering or related professional services required to prepare plans, drawings, specifications, or work write-ups;

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

(3) Costs of a project audit that the Indian tribe may require with respect to the development of a specific project; and

(4) Costs to provide information services.

(d) *Relocation costs.* Costs of relocation payments and other relocation assistance for permanently and temporarily relocated individuals, families, businesses, private nonprofit organizations, and farm operations where assistance is required under § 92.634 (b) or (c) or determined by the Indian tribe to be appropriate under § 92.634(d).

(e) *Costs related to tenant-based rental assistance.* Eligible costs are the rental assistance payments made to provide tenant-based rental assistance for a family.

(f) Administrative costs.

Administrative costs of the Indian tribe not to exceed 15 percent of the HOME funds provide to the Indian tribe.

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§ 92.613 Tenant-based rental assistance.

(a) *General.* An Indian tribe may use HOME funds for tenant-based rental assistance only if the Indian tribe selects families from the waiting list of an IHA operating within the jurisdiction of the Indian tribe, in accordance with the IHA's preferences established under § 905.313 of this title. The Indian tribe may select eligible families currently residing in units that are designated for rehabilitation under the Indian tribe's HOME program without requiring that the family be placed on the waiting list. Families so selected may use the tenant-based assistance in the rehabilitated unit or in other qualified housing.

(b) *Program operation.* A tenant-based rental assistance program must be operated consistently with the requirements of this section. The Indian tribe may operate the program, itself, or may contract with an IHA or other entity with the capacity to operate a rental assistance program. The tenant-based rental assistance may be provided through an assistance contract to an owner that leases a unit to an assisted family or directly to the family.

(c) *Term of rental assistance contract.* The term of the rental assistance contract providing assistance with HOME funds may not exceed 24 months, but may be renewed, subject to the availability of HOME funds. The term of the rental assistance contract must begin on the first day of the term of the lease. For a rental assistance contract between an Indian tribe and an owner, the term of the contract must terminate on termination of the lease. For a rental assistance contract between an Indian tribe and a family, the term of the contract need not end on termination of the lease, but no payments may be made after termination of the lease until a family enters into a new lease.

(d) *Rent reasonableness.* The Indian tribe must disapprove a lease if the rent is not reasonable, based on rents that are charged for comparable unassisted rental units.

(e) *Lease requirements.* The lease must comply with the requirements in § 92.622 (a) and (b) of this part.

(f) *Maximum subsidy.* (1) The amount of the monthly assistance that an Indian tribe may pay to, or on behalf of, a family may not exceed the difference between a rent standard for the unit size established by the Indian tribe and 30

percent of the family's monthly adjusted income.

(2) The Indian tribe must establish a minimum tenant contribution to rent.

(3) The Indian tribe's rent standard for a unit size may not be less than 80 percent of the published Section 8 Existing Housing fair market rent (in effect when the payment standard amount is adopted) for the unit size, nor more than the fair market rent or HUD-approved community-wide exception rent (in effect when the Indian tribe adopts its rent standard amount) for the unit size. (Community-wide exception rents are maximum gross rents approved by HUD for the Rental Certificate Program under § 882.106(a)(3) of this title for a designated municipality, county, or similar locality, which apply to the whole IHA jurisdiction.) An Indian tribe may approve on a unit-by-unit basis a subsidy based on a rent standard that exceeds the applicable fair market rent by up to 10 percent for 20 percent of units assisted.

(g) *Housing quality standards.* Housing occupied by a family receiving tenant-based assistance under this section must meet the performance requirements set forth in § 882.109 of this title. In addition, the housing must meet the acceptability criteria set forth in § 882.109 of this title, except for such variations, as are proposed by the Indian tribe and approved by HUD. Local climatic or geological conditions or local codes are examples which may justify such variations.

(h) *Use of Section 8 assistance.* In any case where assistance under section 8 of the United States Housing Act of 1937 becomes available to an Indian tribe, recipients of tenant-based rental assistance under this part will qualify for tenant selection preferences to the same extent as when they received the tenant-based rental assistance under this part.

§ 92.614 Qualification as affordable housing and income targeting: Rental housing.

(a) *Rent limitation.* A rental housing project (including the non-owner-occupied units in housing purchased with HOME funds in accordance with § 92.611) qualifies as affordable housing under this part only if the project:

(1) Bears rents not greater than the lesser of—

(i) The fair market rent for existing housing for comparable units in the area as established by HUD under § 888.111 of this title, less the monthly allowance for the utilities and services (excluding telephone) to be paid by the tenant; or

(ii) A rent that does not exceed 30 percent of the adjusted income of a

family whose gross income equals 65 percent of the median income for the area, as determined by HUD, with adjustment for smaller and larger families, except that HUD may establish income ceilings higher or lower than 65 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. In determining the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or Indian tribe must subtract a monthly allowance for any utilities and services (excluding telephone) to be paid by the tenant. HUD will provide average occupancy per unit and adjusted income assumptions to be used in calculating the maximum rent allowed under paragraph (a)(1)(ii) of this section;

(2) Has not less than 20 percent of the units—

(i) Occupied by very low-income families who pay as a contribution toward rent (excluding any federal, state, or tribal rental subsidy provided on behalf of the family) not more than 30 percent of the family's monthly adjusted income as determined by HUD. To obtain the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or Indian tribe multiplies the annual adjusted income of the tenant family by 30 percent and divides by 12 and, if applicable, subtracts a monthly allowance for the utilities and services (excluding telephone) to be paid by the tenant, or

(ii) Occupied by very low-income families and bearing rents not greater than 30 percent of the gross income of a family whose income equals 50 percent of the median income for the area, as determined by HUD, with adjustment for smaller and larger families, except that HUD may establish income ceilings higher or lower than 50 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes. In determining the maximum monthly rent that may be charged for a unit that is subject to this limitation, the owner or Indian tribe must subtract a monthly allowance for any utilities and services (excluding telephone) to be paid by the tenant. HUD will provide average occupancy per unit assumptions to be used in calculating the maximum rent allowed under paragraph (a)(2)(ii) of this section;

(3) Is occupied only by households that qualify as low-income families;

(4) Is not refused for leasing to a holder of a certificate of family participation under 24 CFR part 882 (Rental Certificate Program) or a rental voucher under 24 CFR part 887 (Rental Voucher Program) or to the holder of a comparable document evidencing participation in a HOME tenant-based assistance program because of the status of the prospective tenant as a holder of such certificate of family participation, rental voucher, or comparable HOME tenant-based assistance document; and

(5) Will remain affordable, according to binding commitments satisfactory to HUD, for not less than the appropriate period, beginning after project completion, as specified in the following table, without regard to the term of the mortgage or to transfer of ownership.

Activity	Minimum period of affordability in years
Rehabilitation or acquisition of existing housing per unit amount of HOME funds:	
Under \$15,000	5
\$15,000 to \$40,000	10
Over \$40,000	15
New construction or acquisition of newly constructed housing	20

(b) *Rent schedule and utility allowances.* The Indian tribe must review and approve rents proposed by the owner for units with "flat rents," i.e., units subject to the maximum rent limitations in paragraph (a)(1)(i), (a)(1)(ii), or (a)(2)(ii) of this section, and, if applicable, must review and approve, for all units subject to the maximum rent limitations paragraph (a) of this section, the monthly allowances, proposed by the owner, for utilities and services to be paid by the tenant. The owner must reexamine the income of each tenant household living in low-income units at least annually. The maximum monthly rent must be recalculated by the owner and reviewed and approved by the Indian tribe annually, and may change as changes in the applicable gross rent amounts, the income adjustments, or the monthly allowance for utilities and services warrant. Any increase in rents for low-income units is subject to the provisions of outstanding leases; in any event, the owner must provide tenants of those units not less than 30 days prior written notice before implementing any increase in rents.

(c) *Increases in tenant income.* Rental housing qualifies as affordable housing despite a temporary noncompliance

with paragraph (a)(2) or (a)(3) of this section, if the noncompliance is caused by increases in the incomes of existing tenants and if actions satisfactory to HUD are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected. Tenants who no longer qualify as low-income families must pay as rent not less than 30 percent of the family's adjusted monthly income, as recertified annually.

(d) *Adjustment of qualifying rent.* HUD may adjust the qualifying rent established for a project under paragraph (a)(1) of this section, only if HUD finds that an adjustment is necessary to support the continued financial viability of the project and only by an amount that HUD determines is necessary to maintain continued financial viability of the project. HUD expects that this authority will be used sparingly. Adjustments in fair market rents and in median income over time should help maintain the financial viability of a project within the qualifying rent standard in paragraph (a)(1) of this section.

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§ 92.615 Qualification as affordable housing: Homeownership.

(a) *Purchase with or without rehabilitation.* Housing that is for purchase by a family qualifies as affordable housing only if the housing:

(1)(i) Has an initial purchase price that does not exceed the mortgage limit for the type of single family housing (1- to 4-family residence, condominium unit, combination manufactured home and lot, or manufactured home lot) for the area (including any applicable high-cost mortgage limit published by HUD in the *Federal Register*) under HUD's single family insuring authority under the National Housing Act. For a cooperative unit, the purchase price for a cooperative share may not exceed the balance remaining after subtracting from the 1-family mortgage limit an amount equal to the blanket mortgage covering the cooperative development which is attributable to this cooperative unit; and

(ii) Has an estimated appraised value after repair needed to meet property standards in § 92.621 that does not exceed the appropriate mortgage limit described in paragraph (a)(1)(i) of this section;

(2) Is the principal residence of an owner whose family qualifies as a low-income family at the time of purchase;

(3) Is made available for initial purchase only to first-time homebuyers; and

(4) Is made available for subsequent purchase only—

(i) To a low-income family that will use the property as its principal residence; and

(ii) At a price consistent with guidelines that are established by the Indian tribe and determined by HUD to be appropriate—

(A) To provide the owner with a fair return on investment, including any improvements, and

(B) To ensure that the housing will remain affordable to a reasonable range of low-income homebuyers for a period of 20 years for newly constructed housing or otherwise for 15 years. Housing remains affordable if the subsequent purchaser's monthly payments of principal, interest, taxes, and insurance do not exceed 30 percent of the gross income of a family with an income equal to 75 percent of median income for the area, as determined by HUD with adjustments for smaller and larger families.

(b) *Rehabilitation not involving purchase.* Housing that is currently owned by a family qualifies as affordable housing only if—

(1) The value of the property, after rehabilitation, does not exceed the mortgage limit for the type of single family housing (1- to 4-family residence, condominium unit, combination manufactured home and lot, or manufactured home lot) for the area (including any applicable high-cost mortgage limit published by HUD in the *Federal Register*) under HUD's single family insuring authority under the National Housing Act (see 24 CFR 201.10, 203.18, 203.18a, 203.18b, and 234.27); and

(2) The housing is the principal residence of an owner whose family qualifies as a low-income family at the time HOME funds are committed to the housing.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

Project Requirements

§ 92.620 Maximum per-unit subsidy amount.

The amount of HOME funds that an Indian tribe may invest on a per-unit basis in affordable housing may not exceed the total development cost standard for the area, as issued by HUD under 24 CFR 905.213. These total development cost standards are available from HUD Indian Field

Offices. For a project using a combination of HOME and the federal low-income tax credit, the applicable total development cost standards are reduced by the per unit net proceeds from any sale of the tax credit and by the per unit present discounted cash value of the stream of the project owner's share of the tax credit based on a discount rate equal to the 10-year Treasury note rate.

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§ 92.621 Property standards.

Housing that is assisted with HOME funds, at a minimum, must meet the housing quality standards in § 882.109 of this title. In addition, housing that is newly constructed or substantially rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances. The Indian tribe must have written standards for rehabilitation. Newly constructed housing must meet the current edition of the Model Energy Code published by the Council of American Building Officials. Substantially rehabilitated housing must meet the cost-effective energy conservation and effectiveness standards in 24 CFR part 39. Housing for homeownership that is to be rehabilitated after transfer of an ownership interest must be free from any defects that pose a danger to health or safety before transfer of the ownership interest, and must meet the applicable property standards not later than 2 years after the transfer.

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§ 92.622 Tenant and participant protections.

(a) *Lease.* The lease between a tenant and an owner of rental housing assisted with HOME funds must be for not less than one year, unless by mutual agreement between the tenant and the owner.

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

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

(2) *Treatment of property.* Agreement by the tenant that the owner may take, hold, or sell personal property of household members without notice to the tenant and a court decision on the rights of the parties. This prohibition, however, does not apply to an

agreement by the tenant concerning disposition of personal property remaining in the housing unit after the tenant has moved out of the unit. The owner may dispose of this personal property in accordance with tribal law (or state law, which may apply if the Indian tribe is not exercising recognized powers of self-government);

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

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

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

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

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

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

(c) *Termination of tenancy.* An owner may not terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HOME funds except for serious or repeated violation of the terms and conditions of the lease; for violation of applicable federal, or tribal law (or state law, which may apply if the Indian tribe is not exercising recognized powers of self-government); or for other good cause. Any termination or refusal to renew must be preceded by not less than 30 days by the owner's service upon the tenant of a written notice specifying the grounds for the action.

(d) *Maintenance and replacement.* An owner of rental housing assisted with HOME funds must maintain the premises in compliance with all applicable housing quality standards and local code requirements.

(e) *Tenants selection.* An owner of rental housing assisted with HOME funds must adopt written tenant selection policies and criteria that—

(1) Are consistent with the purpose of providing housing for very low-income and low-income families,

(2) Are reasonably related to program eligibility and the applicant's ability to perform the obligations of the lease,

(3) Give reasonable consideration to the housing needs of families that would have a preference under § 960.211 (Federal selection preferences for admission to Public Housing) of this title; and

(4) Provide for—

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

(ii) The prompt written notification to any rejected applicant of the grounds for any rejection.

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§ 92.623 Religious organizations.

HOME funds may not be provided to primarily religious organizations, such as churches, for any activity including secular activities. In addition, HOME funds may not be used to rehabilitate or construct housing owned by primarily religious organizations or to assist primarily religious organizations in acquiring housing. However, HOME funds may be used by a secular entity to acquire housing from a primarily religious organization, and a primarily religious entity may transfer title to property to a wholly secular entity and the entity may participate in the HOME program in accordance with the requirements of this part. The entity may be an existing or newly established entity (which may be an entity established, but not controlled, by the religious organization). The completed housing project must be used exclusively by the owner entity for secular purposes, available to all persons regardless of religion. In particular, there must be no religious or membership criteria for tenants of the property.

§ 92.624 Limitation on the use of HOME funds with FHA mortgage insurance.

When HOME funds are to be used in connection with housing in which acquisition, new construction, or rehabilitation is financed with a mortgage insured by HUD under chapter II of this title, then, for rental housing, the period that the project must remain affordable as provided in binding commitments meeting the requirements of by § 92.614(a)(5) or, for homeownership, the applicable period specified in the Indian tribe's guidelines

established under § 92.615(a)(4)(ii), must be equal to the term of the HUD-insured mortgage.

Other Federal Requirements

§ 92.630 Equal opportunity.

(a) *General.* No person in the United States shall on the grounds of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with HOME funds. In addition, HOME funds must be made available in accordance with the prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101-07) and implementing regulations at 24 CFR part 146, and the prohibitions against discrimination against handicapped individuals under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8.

(b) *Indian Civil Rights Act.* The Indian Civil Rights Act (title II of the Civil Rights Act of 1968, 25 U.S.C. 1301-1303) provides, among other things, that no Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. The Indian Civil Rights Act (ICRA) applies to any tribe, band, or other group of Indians subject to the jurisdiction of the United States in the exercise of recognized powers of self-government. In addition, title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4), which prohibits discrimination on the basis of race, color or national origin in federally assisted programs, the Fair Housing Act (42 U.S.C. 3601-3620), which prohibits discrimination based on race, color, religion, sex, or national origin in the sale or rental of housing, and Executive Order 11063, as amended by Executive Order 12259 (3 CFR, 1958-1963 Comp., p. 652 and 3 CFR, 1980 Comp., p. 307) (Equal Opportunity in Housing), which provides for equal opportunity in housing, do not apply to Indian tribes exercising recognized powers of self-government. Indian tribes that do not exercise recognized powers of self-government must make HOME funds available in accordance with title VI of the Civil Rights Act of 1964, the Fair Housing Act, and Executive Order 11063.

§ 92.631 Indian preference.

(a) *Applicability.* HUD has determined that projects under subpart M of this part are subject to section 7(b)

of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). Section 7(b) provides that any contract, subcontract, grant or subgrant entered into for the benefit of Indians shall require that, to the greatest extent feasible—

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or subcontracts be given to "Indians." That Act defines "Indians" to mean persons who are members of an Indian tribe, and defines "Indian tribe" to mean any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(2) Preference in the award of contracts or subcontracts in connection with the administration of contracts be given to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452). That Act defines "economic enterprise" to mean any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that the Indian ownership must constitute not less than 51 percent of the enterprise; "Indian organization" to mean the governing body of any Indian tribe or entity established or recognized by such governing body; "Indian" to mean any person who is a member of any tribe, band, group, pueblo, or community which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs and any "Native" as defined in the Alaska Native Claims Settlement Act; and Indian "tribe" to mean any Indian tribe, band, group, pueblo, or community including Native villages and Native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs.

(b) *Preference requirements in procurement.*—(1) *Preference by contractors and subcontractors.* The methods of procurement set forth in § 92.632 incorporate procedures for implementing preference for Indians, Indian-owned economic enterprises, and Indian organizations in contracting,

subcontracting, training, and employment.

(2) *Preference by Indian tribes.* (i) To the greatest extent feasible, Indian tribes shall, in the conduct of their own operations, adhere to the requirements regarding preference in contracting. Where the provision of preference is determined by an Indian tribe to be infeasible, the Indian tribe shall document in writing the basis for its findings, shall maintain for three years the documentation in its files for HUD review, and shall provide HUD with a copy of the determination within 20 days of its issuance.

(ii) To the greatest extent feasible, preference shall be given to qualified Indians for employment or training for Indian tribe staff positions. Each Indian tribe shall document the method and justification used in selecting individuals for employment or training. A finding by HUD that an Indian tribe has not provided preference to the greatest extent feasible to Indians in selecting individuals for employment or training shall be grounds for HUD to invoke its remedies under this.

(c) *Other preference requirements.*—(1) *Use of nonfederal funds.* When both HOME and nonfederal funds are used for a project, the work to be accomplished with the funds should be separately identified, and HUD's Indian preference regulations must be applied to the work financed by HUD. If the funds cannot be separated, these Indian preference regulations will apply to the total project.

(2) *Monitoring.* Each Indian tribe shall be responsible for monitoring Indian preference implementation in its contracting, subcontracting, employment, and training. Should incidents of noncompliance be found to exist, the Indian tribe shall take appropriate remedial action.

(3) *Off-site activities.* Preference in contracting, subcontracting, employment, and training applies regardless of where the contract work is performed.

(4) *Locally-imposed requirements.* Each Indian tribe should include in the Invitation For Bids (IFB) or Request For Proposals (RFP) any applicable locally imposed preference requirements properly enacted by the tribal governing body, as adopted by the Indian tribe and approved by HUD, or should advise bidders to contact the tribal governing body to determine any applicable preference requirements. However, in no case may an Indian tribe authorize or provide a preference for Indians, Indian-owned economic enterprises, or Indian

organizations, based on particular tribal affiliation or membership.

(d) *Required contract clause.* The following language shall be included in any contracts or subcontracts in connection with housing assisted with HOME funds:

Section 7(b) Clause

(i) The work to be performed under this contract is on a project subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises.

(ii) The parties to this contract shall comply with the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) and all HUD requirements adopted pursuant section 7(b).

(iii) In connection with this contract, the parties shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned Economic Enterprises, and preferences and opportunities for training and employment to Indians.

(iv) This section 7(b) clause shall be incorporated into every subcontract in connection with the project.

(v) Upon a finding by the Indian tribe or HUD that any party to this contract is in violation of the section 7(b) clause, the party shall at the direction of the Indian tribe, take appropriate remedial action pursuant to the contract.

(e) Eligibility for Indian preference.

(1) An applicant seeking to qualify for preference in contracting or subcontracting shall submit proof of Indian ownership to the Indian tribe or contractor. Proof of Indian ownership shall include, but shall not be limited to:

(i) Certification by a tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. Indian tribes shall accept the certification of a tribe that an individual is a member.

(ii) Evidence such as stock ownership, structure, management, control, financing and salary or profit sharing arrangements of the enterprise.

(2) An applicant seeking to qualify for preference in employment and training shall submit, to the Indian tribe or contractor, certification by a tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. Indian tribes and contractors shall accept the certification of a tribe that an individual is a member.

(3) An applicant seeking a contract or a subcontract shall submit evidence sufficient to demonstrate to the satisfaction of the Indian tribe or the

contractor, as appropriate, that the applicant has the technical, administrative, and financial capability to perform contract work of the size and type involved, and within the time provided, under the proposed contract. An applicant seeking employment and training shall submit evidence sufficient to demonstrate to the satisfaction of the Indian tribe or the contractor, as appropriate, that the applicant possesses the qualifications required for employment or training.

(4) An Indian tribe may state in its solicitation that bidders must submit evidence of eligibility within a specified time period before a scheduled bid opening.

(5) An Indian tribe may use lists of pre-qualified Indians, Indian enterprises, or Indian organizations, provided that the Indian tribe does not preclude potential bidders from qualifying during the solicitation period.

(6) If an Indian tribe or contractor determines that an applicant is ineligible for Indian preference, the Indian tribe or contractor shall so notify the applicant in writing before the award of the contract or before filling the position or providing the training sought by the applicant.

(f) *Review procedures for complaints alleging inadequate or inappropriate provision of preference.* The following complaint procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this subpart, including alternate methods enacted and approved in the manner described in this subpart.

(1) Each complaint (including complaints against an Indian tribe) shall be in writing, signed, and filed with the Indian tribe. Complaints may be filed only by a person or business entity claiming to have been adversely affected by the actions or inactions of an Indian tribe, a contractor or subcontractor in connection with the provision of preference to Indians in contracting, subcontracting employment or training.

(2) A complaint must be filed with the Indian tribe no later than 20 days from the date of the action (or omission) upon which the complaint is based.

(3) Upon receipt of a complaint, the Indian tribe shall promptly stamp the date and time of receipt upon the complaint, acknowledge its receipt in writing to the complainant within five (5) days, and shall investigate, and within 15 days shall either meet, or communicate by mail or telephone, with the complaining party in an effort to resolve the matter. In all cases, but especially where the complaint

indicates that expeditious action is required to preserve the rights of the complaining party, the Indian tribe shall endeavor to resolve the matter as expeditiously as possible. If noncompliance with Indian preference requirements is found to exist, the Indian tribe shall take appropriate steps to remedy the noncompliance and, if necessary, to amend its procedures so as to be in compliance. If the matter is not resolved to the satisfaction of the complaining party, or if the Indian tribe has failed to communicate with the complaining party in an effort to resolve the complaint within 15 days following the Indian tribe's receipt of a complaint, the complaining party may file a written complaint with the appropriate Indian Field Office of HUD. In any event, complaints filed with HUD must be received within six months after the occurrence of the alleged adverse action by the Indian tribe, contractor or subcontractor. The address of the Indian Field Office and the name of the appropriate Indian program officer shall be included in the initial communication from the Indian tribe acknowledging receipt of the complaint.

(4) Upon receipt of a written complaint, the HUD Indian Field Office will request that the Indian tribe provide a written report setting forth all relevant facts, including, but not limited to:

(i) The date the complaint was filed with the Indian tribe;

(ii) The name of the complainant;

(iii) The nature of the complaint, including the manner in which Indian preference was or was not provided; and

(iv) Actions taken by the Indian tribe in addressing or resolving the complaint. The Indian tribe shall provide copies of its report and all relevant documents concerning the complaint to HUD within ten days after receipt of the HUD request.

(5) Upon receipt of the Indian tribe's report, the HUD Indian Field Office will determine whether the actions taken by the Indian tribe comply with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act, and with Indian preference requirements under this subpart. Notification of the Field Office's determination shall be provided to the Indian tribe and to the complaining party, orally or in writing, no later than 30 days following HUD's receipt of the complaint. If the notice is oral, it shall be promptly confirmed in writing. If the complaining party's alleged injury will occur during this 30-day period, the HUD Indian Field Office will make a good faith effort to make its

determination before the occurrence of such injury (e.g., contract award).

(6) Where the HUD Indian Field Office determines on the basis of the facts provided by the Indian tribe and on the basis of other available information that there has been noncompliance with Indian preference requirements, the Field Office shall instruct the Indian tribe to take appropriate steps to remedy the noncompliance and to amend its procedures so as to be in compliance.

(7) The decision of the HUD Indian Field Office may be appealed to the Assistant Secretary for Public and Indian Housing. The decision of the Assistant Secretary for Public and Indian Housing shall constitute final agency action for purposes of the Administrative Procedure Act.

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§ 92.632 Methods of procurement.

(a) *General*—(1) *Method of providing Indian preference.* This section outlines specific methods an Indian tribe must follow in the procurement of services and property. These methods provide, to the greatest extent feasible, preference to Indian organizations and Indian-owned economic enterprises in contracting and subcontracting, and to Indians in employment and training. An Indian tribe that exercising recognized powers of self-government that enacts an alternate method of providing Indian preference within its jurisdiction may request HUD to approve the alternate method as meeting the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act for use in the HUD-assisted Indian housing program. Alternate methods that provide for a tribal preference will not be approved. HUD's review of alternate methods of providing preference will include the extent to which the proposed method minimizes the risk of nonperformance, promotes competition, assures cost containment, reduces administrative burdens and furthers local priorities and objectives while providing effective Indian preference.

(2) *Requirements applicable to all contracting.* (i) In all cases, the Indian tribe shall include in the Invitation For Bids (IFB) or Request For Proposals (RFP) a description of the contract and subcontract selection procedures which are to be employed. A finding by an Indian tribe either that a subcontract was awarded without using the procedure required by the Indian tribe, or that the contractor falsely represented that subcontracts would be awarded to Indian enterprises or

organizations, shall be grounds for termination of the contract between the Indian tribe and its contractor, or for other penalties as appropriate. These grounds for termination of the contract or for the imposition of other penalties shall be set out in the IFB or RFP and shall be included in each contract and subcontract.

(ii) Each IFB and RFP shall state whether the Indian tribe maintains lists of Indian-owned economic enterprises and Indian organizations by specialty (e.g., plumbing, electrical, foundations), which are available to developers, contractors, and subcontractors to assist them in meeting their responsibility to provide preference in connection with the administration of contracts and subcontracts.

(iii) The Indian tribe shall require a statement from all prospective contractors or developers describing how they will provide Indian preference in the award of subcontracts. Each Indian tribe shall describe in its IFB or RFP:

(A) what provisions each prospective developer or contractor must include in its statement; and

(B) The factors that will be used by the Indian tribe in judging the statement's adequacy.

Any bid or proposal that fails to include the required statement shall be rejected as nonresponsive. An Indian tribe may require that a comparable statement be provided by subcontractors to their contractors, and may require a contractor to reject any bid or proposal by a subcontractor that fails to include the statement, as specified by the Indian tribe in the IFB or RFP.

(iv) Each contractor or subcontractor shall submit a certification (supported by credible evidence) to the Indian tribe in any instance where the contractor or subcontractor believes it is infeasible to provide Indian preference in subcontracting. The Indian tribe may examine the evidence submitted and may accept or reject the certification.

(b) *Small purchase procedures*—(1) *General.* As an alternative to the procurement procedures specified in paragraphs (c) and (d) of this section, this paragraph provides for simplified, informal procurement methods applicable to an Indian tribe's procurement of services or property that do not cost more than \$25,000 in the aggregate (paragraph (b)(2) of this section) or for procurement of services or property that does not cost more than \$2,000 (paragraph (b)(3) of this section).

(i) The provisions of § 92.631 concerning Indian preference apply to small purchase procedures, except as

otherwise specified in this section. In providing preference, an Indian tribe shall seek maximum participation by Indian-owned economic enterprises and Indian organizations and shall to the extent available, refer to lists of qualified Indian supply sources.

(ii) The Indian tribe shall require a statement from all contractors agreeing to provide Indian preference in subcontracting, training and employment and shall specify the method to be used.

(iii) An Indian tribe must document its efforts in providing Indian preference. If no quotations are solicited or received from Indian-owned economic enterprises or Indian organizations, the Indian tribe must also include as part of its documentation a statement explaining the reasons for the lack of Indian participation.

(2) *Methods of procurement—\$25,000 or less.* For purchases aggregating no more than \$25,000, an Indian tribe may use the methods set forth in this paragraph or the more formal procedures set forth in paragraphs (c) and (d) of this section.

(i) *Solicitation.* (A) An Indian tribe may solicit quotations by telephone, letter or other informal procedure provided that the manner of solicitation provides for participation by a reasonable number of competitive sources. At the time of solicitation, the parties must be informed of the item to be procured with sufficient specificity, of the time within which quotations must be submitted, and of the information that must be submitted with each quotation. Quotations must be obtained in writing. A written quotation may include a confirmation of a previous oral quotation only if it is submitted within ten days of the oral quotation, or by the closing date for submitting quotations, as determined by the Indian tribe.

(B) An Indian tribe shall attempt to obtain quotations from a minimum of three qualified sources in order to promote competition to the maximum extent practicable. Fewer than three quotations is acceptable when the Indian tribe has attempted but has been unable to obtain a sufficient amount of competitive quotations. In unusual circumstances, the Indian tribe may accept the sole quotation received in response to a solicitation. In all cases, an Indian tribe shall document the circumstances when it has been unable to obtain at least three quotations.

(ii) *Award.* (A) Where the contract is to be awarded based upon price and fixed specifications, the Indian tribe shall award the contract to the qualified

Indian-owned economic enterprise or organization with the lowest responsive quotation if it is reasonable and no more than 10 percent higher than the quotation of the lowest responsive quotation from any qualified source. If no responsive quotation by a qualified Indian-owned economic enterprise or organization is within 10 percent of the quotation of the lowest responsive quotation from any qualified source, award shall be made to the source with the lowest quotation.

(B) Where the contract is to be awarded based on factors other than price alone, the Indian tribe shall issue a request for proposals/quotation by developing the particulars of the solicitation, including a rating system for the assignment of points to evaluate the merits of each proposal/quotation. The solicitation shall identify all factors to be considered, including price or cost. The Indian tribe shall set aside 15 percent of the total number of available rating points for the provision of Indian preference. Award shall be made to the best proposal/quotation, as determined under the rating system.

(3) *Methods of procurement—\$2,000 or less.* For purchases aggregating \$2000.00 or less, an Indian tribe shall follow the procedures under paragraph (b)(2) of this section (methods of procurement—\$25,000 or less), except that:

(i) Oral quotations are acceptable, subject to documentation by the Indian tribe; and

(ii) The Indian tribe may develop alternative methods of providing Indian preference, which must be in writing, must promote maximum participation by Indian organizations and Indian-owned economic enterprises, and must be approved by HUD.

(c) *Procurement by sealed bids (Invitations for Bid).* (1) Preference in the award of contracts and subcontracts that are let under a sealed bid/ Invitation for Bids (IFB) process (e.g., construction contracts, material supply contracts) shall be provided as follows:

(i) The IFB may be restricted to qualified Indian-owned economic enterprises and Indian organizations. The IFB should, however, not be so restricted unless the Indian tribe has a reasonable expectation that the required minimum number of qualified Indian-owned economic enterprises or organizations are likely to submit responsive bids. If two or more (or at the Indian tribe's option, a number greater than two specified in the IFB) qualified Indian-owned economic enterprises or organizations submit responsive bids, award shall be made to the qualified enterprise or organization with the

lowest responsive bid. If fewer than the minimum required number of qualified Indian-owned economic enterprises or organizations submit responsive bids, the Indian tribe shall reject all bids, and shall readvertise the IFB in accordance with paragraph (c)(1)(ii) of this section. In unusual circumstances and subject to HUD approval, the Indian tribe may accept a single bid, e.g., the Indian tribe determines that the single bid received is of a fair and reasonable price, or the Indian tribe determines that delays caused by readvertising would subject the project to higher construction costs, or the Indian tribe determines that the bid is fair and reasonable.

(ii) If the Indian tribe prefers not to restrict the IFB as described in paragraph (c)(1)(i) of this section; or if an insufficient number of qualified Indian-owned economic enterprises or organizations submit responsive bids in response to an IFB under paragraph (c)(1)(i) of this section; or if a single bid is not accepted and approved; the Indian tribe or contractor shall advertise for bids inviting responses from non-Indian as well as Indian-owned economic enterprises and Indian organizations. Award shall be made to the qualified Indian-owned economic enterprise or organization with the lowest responsive bid if that bid:

(A) Is within the maximum total contract price established for the specific project or activity for which bids are being taken and

(B) Is no more than "X" higher than the total bid price of the lowest responsive bid from any qualified bidder.

"X" is determined as follows:

	X=lesser of
When the lowest responsive bid is less than \$100,000.	10% of that bid, or \$9,000.
When the lowest responsive bid is:	
At least \$100,000, but less than \$200,000.	9% of that bid, or \$16,000.
At least \$200,000, but less than \$300,000.	8% of that bid, or \$21,000.
At least \$300,000, but less than \$400,000.	7% of that bid, or \$24,000.
At least \$400,000, but less than \$500,000.	6% of that bid, or \$25,000.
At least \$500,000, but less than \$1 million.	5% of that bid, or \$40,000.
At least \$1 million, but less than \$2 million.	4% of that bid, or \$60,000.
At least \$2 million, but less than \$4 million.	3% of that bid, or \$80,000.
At least \$4 million, but less than \$7 million.	2% of that bid, or \$105,000.
\$7 million or more	1½% of the lowest responsive bid, with no dollar limit.

If no responsive bid by a qualified Indian-owned economic enterprise or organization is within the stated range of the total bid price of the lowest responsive bid from any qualified enterprise, award shall be made to the bidder with the lowest bid.

(2) [Reserved]

(d) *Procurement by competitive proposals (Request for Proposals).* (1) Preference in the award of contracts and subcontracts that are let under competitive proposals/Request for Proposals (RFP) process (e.g., professional service contracts) shall be provided as follows:

(i) The RFP may be restricted to qualified Indian-owned economic enterprises and Indian organizations. The RFP should, however, not be so restricted unless the Indian tribe has a reasonable expectation that the required minimum number of qualified Indian-owned economic enterprises or Indian organizations are likely to submit responsive proposals. If two (or, at the Indian tribe's option, a number greater than two specified in the RFP) qualified Indian-owned economic enterprises or Indian organizations submit responsive proposals, award shall be made to the qualified Indian-owned economic enterprise or Indian organization with the best proposal. If fewer than the minimum required number of qualified Indian-owned economic enterprises or Indian organizations submit responsive proposals, the Indian tribe shall reject all proposals and shall readvertise the RFP in accordance with paragraph (d)(1)(ii) of this section. In unusual circumstances and subject to HUD approval, the Indian tribe may accept a proposal that is the only one received, e.g., where the Indian tribe determines that delays caused by readvertising would cause higher costs, or where the Indian tribe determines that the proposal is fair and reasonable. The Indian tribe shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance the Indian tribe places on each evaluation factor and subfactor. The award shall be made to the qualified Indian-owned economic enterprise or Indian organization that has submitted the most responsible proposal if the proposal is within the maximum total contract price established for the specific project or activity.

(ii) If the Indian tribe prefers not to restrict the RFP solicitation as described in paragraph (d)(1)(i) of this section; or if an insufficient number of qualified Indian enterprises or organizations satisfactorily respond under that procedure; or if a single proposal is not accepted and approved; the Indian tribe or contractor shall advertise for proposals inviting responses from non-Indian as well as Indian-owned economic enterprises and Indian organizations. The Indian tribe shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance an Indian tribe places on each evaluation factor and subfactor. Notification that Indian preference is applicable to this procurement shall be included in the RFP solicitation. The award shall be made to the most responsive proposal if the proposal is within the maximum total contract price established for the specific project or activity.

(2) An Indian tribe shall set aside 15 percent of the total number of available rating points for the provision of Indian preference in the award of contracts and subcontracts. The percentage or number of points set aside for preference and the method for allocating these points shall be specified in the RFP.

(3) An Indian tribe may require that contractors solicit subcontractors by using a RFP based on a point system, and that contractors set aside 15 percent of the available rating points for the provision of Indian preference in subcontracting. The RFP shall explain the criteria to be used by the contractor in evaluating proposals submitted by subcontractors.

(e) *Procurement by non-competitive proposals.* An Indian tribe may award a contract without satisfying the small purchase, sealed bids or competitive proposals requirements for competition only if award under these methods of procurement is infeasible, and one of the following applies:

(1) The exigencies require immediate delivery of the articles or performance of the service;

(2) Only one source of supply is available and the purchasing or contracting officer of the Indian tribe has so certified;

(3) After solicitation of a number of sources, competition is determined inadequate; or

(4) HUD has specifically authorized this method.

Cost analysis, i.e., verifying the proposed cost data, and the evaluation of the specific elements of costs and profits, is required.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.633 Environmental review.

The environmental effects of each activity carried out with HOME funds must be assessed in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA) and the related authorities listed in HUD's implementing regulations at 24 CFR part 50. That assessment or review will be performed by HUD in accordance with 24 CFR part 50.

§ 92.634 Displacement, relocation, and acquisition.

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

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

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

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

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

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

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

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

(c) *Relocation assistance for displaced persons.* (1) *General.* A displaced person (defined in paragraph (c)(2) of this section) must be provided relocation assistance at the levels described in, and in accordance with the requirements of, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4201-4655) and 49 CFR part 24.

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

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

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

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

(B) Before the date described in paragraph (c)(2)(i)(A) of this section, if the Indian tribe or HUD determines that the displacement resulted directly from acquisition, rehabilitation, or demolition for the project; or

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

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

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

(ii) The total tenant payment, as determined under 24 CFR 813.107, if the tenant is low-income, or 30 percent of

gross household income, if the tenant is not low-income; or

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

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

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

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

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

(A) The person has been evicted for cause based upon a serious or repeated violation of the terms and conditions of the lease or occupancy agreement, violation of applicable federal or tribal law (or state law, which may apply if the Indian tribe is not exercising recognized powers of self-government), or other good cause, and the Indian tribe determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance. The effective date of any termination or refusal to renew must be preceded by at least 30 days advance written notice to the tenant specifying the grounds for the action.

(B) The person moved into the property after the submission of the application but, before signing a lease and commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., the person may be displaced, temporarily relocated, incur a rent increase), and the fact that the person would not qualify as a "displaced person" (or for any assistance under this section) as a result of the project;

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

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

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

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

negotiations means the execution of the agreement covering the acquisition, rehabilitation, or demolition.

(d) *Optional relocation assistance.* The Indian tribe may provide relocation payments and other relocation assistance to families, individuals, businesses, nonprofit organizations, and farms displaced by a project assisted with HOME funds where the displacement is not subject to paragraph (c) of this section. The Indian tribe may also provide relocation assistance to persons covered under paragraph (c) of this section beyond that required. For any such assistance that is not required by tribal law (or state law, which may apply if the Indian tribe is not exercising recognized powers of self-government), the Indian tribe must adopt a written policy available to the public that describes the optional relocation assistance that it has elected to furnish and provides for equal relocation assistance within each class of displaced persons.

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

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

(g) *Responsibility of Indian tribe.* (1) The Indian tribe must certify that it will comply with the URA, the regulations at 49 CFR part 24, and the requirements of this section, and must ensure such compliance notwithstanding any third party's contractual obligation to the Indian tribe to comply.

(2) The cost of required relocation assistance is an eligible project cost. This cost also may be paid from tribal funds, or funds available from other sources.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.635 Labor.

(a) *General.* Any contract for the construction (rehabilitation or new construction) of affordable housing with 12 or more units assisted with funds made available under this part must contain a provision requiring that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a-276a-5), will be paid to all laborers and mechanics employed in the development

of affordable housing involved, and such contracts must also be subject to the overtime provisions, as applicable, of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332).

Indian tribes, contractors, subcontractors, and other participants must comply with regulations issued under these Acts and with other federal laws and regulations pertaining to labor standards and HUD Handbook 1344.1 (Federal Labor Standards Compliance in Housing and Community Development Programs), as applicable. Indian tribes must require certification as to compliance with the provisions of this section before making any payment under such contract.

(b) *Volunteers.* The prevailing wage provisions of paragraph (a) of this section do not apply to an individual who receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered and who is not otherwise employed at any time in the construction work.

(c) *Sweat equity.* The prevailing wage provisions of paragraph (a) of this section do not apply to members of an eligible family who provide labor in exchange for acquisition of a property for homeownership or provide labor in lieu of, or as a supplement to, rent payments.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.636 Lead-based paint.

Housing assisted with HOME funds constitutes HUD-associated housing for the purpose of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821, *et seq.*) and is, therefore, subject to 24 CFR part 35. Unless otherwise provided, Indian tribes are responsible for testing and abatement activities.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.637 Conflict of interest.

(a) *Applicability.* (1) The conflict of interest provisions in 24 CFR 85.36 and OMB Circular A-110 apply to the procurement of supplies, equipment, construction, and services by Indian tribes and their subrecipients.

(2) The provisions of this section apply to all cases not governed by 24 CFR 85.36 and OMB Circular A-110. These cases include the acquisition and disposition of real property and the provision of assistance by the Indian tribe, by subrecipients, or to individuals, housing developers, and other private entities under eligible activities which

authorize such assistance (e.g., rehabilitation of housing).⁶

(b) *Conflicts Prohibited.* The general rule is that no persons described in paragraph (c) of this section who have or had any functions or responsibilities with respect to activities assisted under this part, or who are in a position to participate in a decision, or gain inside information about such activities, may obtain a financial interest or benefit from these activities. Further, these persons may not have an interest in any contract, subcontract, or agreement concerning such activities; and these persons may not, during their employment or tenure in office and for one year thereafter, have an interest in the proceeds from these activities, either for themselves or for those with whom they have family or business ties. This paragraph does not apply to approved eligible administrative or personnel costs.

(c) *Persons covered.* The conflict of interest provisions of paragraph (b) of this section apply to any person who is an employee, agent, consultant, officer, or elected or appointed official of the Indian tribe, or of any designated public agency, or subrecipient of the Indian tribe, receiving HOME funds.

(d) *Exceptions requiring HUD approval—(1) Threshold requirements.* Upon the written request of an Indian tribe, HUD may grant an exception to the provisions of paragraph (b) of this section on a case-by-case basis, when it determines that such an exception will serve to further the purposes of the HOME Investment Partnerships Program and the effective and efficient administration of the Indian tribe's program or project. An exception may be considered only after the Indian tribe has provided the following:

(i) A disclosure of the nature of the possible conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made; and

(ii) An opinion of the Indian tribe's attorney that the interest for which the exception is sought would not violate tribal laws on conflict of interest (or state law on conflict of interest, which may apply if the Indian tribe is not exercising recognized powers of self-government).

(2) *Factors to be considered for exceptions.* In determining whether to grant a requested exception after the Indian tribe has satisfactorily met the requirements of paragraph (d)(1) of this section, HUD shall consider the

cumulative effect of the following factors, where applicable:

(i) Whether the exception would provide a significant cost benefit or essential expert knowledge to the program or project which would otherwise not be available;

(ii) Whether the affected person has withdrawn from his or her functions or responsibilities, or from the decision-making process, with reference to the specific assisted activity in question;

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

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

(v) Any other relevant considerations.

(e) *Circumstances under which the conflict prohibition does not apply.* In instances where a person who might otherwise be deemed to be included under the conflict prohibition is a member of a group or class of beneficiaries of the assisted activity and receives generally the same interest or benefits as are being made available or provided to the group or class, the prohibition does not apply, except that if, by not applying the prohibition against conflict of interest, a violation of tribal (or state) laws on conflict of interest would result, the prohibition does apply.

§ 92.638 Debarment and suspension.

As required by 24 CFR part 24, each Indian tribe must require participants in lower tier covered transactions to include the certification in appendix B of 24 CFR part 24 (that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation from the covered transaction) in any proposal submitted in connection with the lower tier transactions. An Indian tribe may rely on the certification, unless it knows the certification is erroneous.

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§ 92.639 Flood insurance.

(a) Under the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001-4128), HOME funds may not be used with respect to the acquisition, new construction, or rehabilitation of a project located in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless:

(1) The community in which the area is situated is participating in the National Flood Insurance Program (see 44 CFR parts 59 through 79), or less than a year has passed since FEMA notification regarding such hazards; and

(2) Flood insurance is obtained as a condition of approval of the commitment.

(b) Indian tribes located in an area identified by FEMA as having special flood hazards are responsible for assuring that flood insurance under the National Flood Insurance Program is obtained and maintained.

Program Administration

§ 92.640 HOME account.

HUD will establish a HOME account in the United States Treasury and the HOME funds must be used for approved activities. The Indian tribe must establish a local account for repayment, interest and other return of investment of HOME funds. HUD will recapture HOME funds in the HOME account by the amount of:

(a) Any funds that are not committed within 24 months after the last day of the month in which the funds were deposited in the account;

(b) Any funds that are not expended within five years after the last day of the month in which the funds were deposited in the account; and

(c) Any penalties assessed by HUD under § 92.652.

§ 92.641 HOME investment partnership agreement.

HOME funds will be made available pursuant to a HOME Investment Partnership Agreement. The agreement must ensure that HOME funds invested in affordable housing are repayable if the housing ceases to qualify as affordable housing before the period of affordability expires.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.642 Cash and Management Information System; disbursement of HOME funds.

(a) *General.* The Home account established in the United States Treasury is managed through HUD's Cash and Management Information (C/MI) System for the HOME Investment Partnerships Program. The C/MI System is a computerized system which manages, disburses, collects, and reports information on the use of HOME funds in the United States Treasury account.

(b) *Project set-up.* (1) After HUD completes any environmental review

⁶ See § 92.645 concerning the availability of OMB Circulars.

required by part 50 of this title and the Indian tribe executes the HOME Investment Partnership Agreement and submits the appropriate banking and security documents, the Indian tribe may identify (set up) specific investments in the C/MI System. Investments that require the set-up of projects in the C/MI System are the acquisition, new construction, or moderate or substantial rehabilitation of real property, and investments of HOME funds to provide tenant-based rental assistance. Within 12 calendar days of project set-up, the Indian tribe is required to submit a Project Set-Up Report to HUD for each project set up in the C/MI System. Until an acceptable Project Set-Up Report is received and entered in the C/MI System, HOME funds for the project are not considered committed (as defined in § 92.2), and, therefore, are subject to recapture and reallocation to the extent authorized by § 92.644.

(2) If the Project Set-Up Report is not received within 20 days of the project set-up call, the project will be cancelled automatically by the C/MI System. In addition, a project which has been committed in the C/MI System for 12 months without an initial disbursement of funds will be automatically cancelled by the C/MI System.

(c) *Disbursement of HOME funds.* (1) After information from an acceptable Project Set-Up report is entered into the C/MI System, HOME funds may be drawn down from the United States Treasury account for the project by the Indian tribe by electronic funds transfer. The funds will be deposited in the local account of the HOME account of the Indian tribe within 48 to 72 hours of the disbursement request. Any drawdown of HOME funds from the United States Treasury account is conditioned upon the submission of satisfactory information by the Indian tribe about the project or tenant-based rental assistance and compliance with other procedures specified by HUD in HUD's forms and issuances concerning the Cash and Management Information System. Copies of these forms and issuances may be obtained from HUD Field Offices.

(2) The Indian tribe must comply with Treasury Circular No. 1075 (31 CFR part 205). Interest earned on grant advances belongs to the United States Treasury and must be remitted promptly, but at least quarterly, to HUD, except that the Indian tribe may retain interest amounts up to \$100 a quarter for administrative expenses.

(3) HOME funds in the local account of the HOME account must be disbursed before requests are made for HOME

funds in the United States Treasury account.

(4) An Indian tribe will be paid on an advance basis provided it complies with the requirements of this part.

(5) If a project is terminated before its completion, whether voluntarily by the Indian tribe or otherwise, an amount equal to the HOME funds disbursed for the project must be paid by the Indian tribe to its HOME account. If the HOME funds were disbursed from the Treasury account, the amount must be paid to the Treasury account; if the HOME funds were disbursed from the local account, the amount must be paid to the local account. If the amount is not repaid, the Indian tribe will be subject to actions under §§ 92.650 to 92.652.

(d) *Payment certification.* As post-documentation of each drawdown of funds from the United States Treasury account, an Indian tribe must submit to HUD a payment certification, for each drawdown, in the form required by HUD. If the payment certification is not received within 10 calendar days of the drawdown, the Indian tribe will be suspended from setting up new projects until the payment certification is received by HUD.

(e) *Submission of project completion reports.* A Project Completion Report must be submitted to HUD within 120 days of the final drawdown request for the project. If a satisfactory Project Completion Report is not submitted by the due date, HUD will suspend further project set-ups for the Indian tribe. Project set-ups will remain suspended until a satisfactory Project Completion Report is received and entered into the C/MI System.

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§ 92.643 Repayment of investment.

(a) Housing assisted with HOME funds that does not meet the affordability requirements for the period specified in § 92.614 or § 92.615, as applicable, must be repaid in accordance with paragraph (b) of this section.

(b) Any repayment of HOME funds (including repayment required if the housing no longer qualifies as affordable housing), and any payment of interest or other return on the investment of HOME funds, that is made before grant close out must be deposited in the Indian tribe's HOME account and used in accordance with the requirements of this subpart. An Indian tribe may retain repayments, interest, and other return on investment of HOME funds that are made after grant closeout if the Indian

tribe agrees to use the funds for eligible activities.

§ 92.644 Indian tribe responsibilities; written agreements; monitoring.

(a) *Responsibilities.* The Indian tribe is responsible for ensuring that HOME funds are used in accordance with all program requirements. The use of subrecipients, or contractors does not relieve the Indian tribe of this responsibility.

(b) *Executing a written agreement.* Before disbursing any HOME funds to any entity (e.g., for-profit housing developer, nonprofit organization, homeowner, contractor, or IHA) the Indian tribe must enter into a written agreement with the entity ensuring compliance with the requirements of this part. A subrecipient or contractor must also enter into a written agreement before it disburses funds to any entity. The agreement remains in effect during the period for affordability under § 92.614 or § 92.615, as applicable, or if the entity is a subrecipient, during any period that the entity has control over HOME funds.

(c) *Provisions in written agreement.* At a minimum, the written agreement must include provisions concerning the following items:

(1) *Use of the HOME funds.* The agreement must describe the use of the HOME funds, including the tasks to be performed, a schedule for completing the tasks, and a budget. These items must be in sufficient detail to provide a sound basis for the Indian tribe effectively to monitor performance under the agreement.

(2) *Affordability.* The agreement must require housing assisted with HOME funds to meet the affordability requirements of § 92.614 or § 92.615, as applicable, and must require repayment of the funds if the housing does not meet the affordability requirements for the specified time period.

(3) *Repayments.* If the entity is a contractor or subrecipient, the agreement must state if repayment, interest, and other return on the investment of HOME funds are to be remitted to the Indian tribe or are to be retained for additional eligible activities by the entity.

(4) *Uniform administrative requirements.* If the entity is a subrecipient, the agreement must require the entity to comply with applicable uniform administrative requirements, as described in § 92.645.

(5) *Project requirement.* The agreement must require compliance with project requirements in §§ 92.620 through 92.623 of this part, as applicable

in accordance with the type of project assisted.

(6) *Housing quality standard.* The agreement must require owners of rental housing assisted with HOME funds to maintain the housing in compliance with applicable Housing Quality Standards and local housing code requirements for the duration of the agreement.

(7) *Other program requirements.* The agreement must require the entity to carry out each activity in compliance with all federal laws and regulations described in §§ 92.630 through 92.639.

(8) *Conditions for religious organizations.* Where applicable, the agreement must include the conditions prescribed in § 92.623 for the use of HOME funds by religious organizations.

(9) *Requests for disbursements of funds.* The agreement must specify that the entity may not request disbursement of funds under the agreement until the funds are needed for payment of eligible costs. The amount of each request must be limited to the amount needed.

(10) *Reversion of assets.* If the entity is a subrecipient, the agreement must specify that upon expiration of the agreement, the entity must transfer to the Indian tribe any HOME funds on hand at the time of expiration and any accounts receivable attributable to the use of HOME funds.

(11) *Records and reports.* The agreement must specify the particular records that must be maintained and any information or reports that must be submitted in order to assist the Indian tribe in meeting its recordkeeping and reporting requirements.

(12) *Enforcement of the agreement.* The agreement must provide for a means of enforcement by the Indian tribe or the intended beneficiaries. In addition, the agreement must specify remedies for breach of the provisions of the agreement. If the entity is a subrecipient, the agreement must specify that, in accordance with 24 CFR 85.43, suspension or termination may occur if the entity materially fails to comply with any term of the agreement, and that the agreement may be terminated for convenience in accordance with 24 CFR 85.44.

(13) *Duration of the agreement.* The agreement must specify that the agreement is in effect for the period of affordability required by the Indian tribe under § 92.614 or § 92.615.

(d) *Monitoring.* The Indian tribe is responsible for managing the day-to-day operations of its HOME program, for monitoring the performance of all entities receiving HOME funds from the Indian tribe to assure compliance with the requirements of this part, and for

taking appropriate action when performance problems arise.

(1) Not less than annually, the Indian tribe must review the activities of owners of rental housing assisted with HOME funds to assess compliance with the requirement of this part, as set forth in the written agreement under paragraphs (b) and (c) of this section. For multifamily housing, each review must include on-site inspection to determine compliance with housing codes and the requirements of this part. For rental housing containing one- to four-dwelling units, an on-site review must be made once within each two-year period. The results of each review must be included in the Indian tribe's performance report.

(2) Not less than annually, the Indian tribe must review the performance of each contractor and subrecipient.

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§ 92.645 Applicability of uniform administrative requirements.

(a) *Governmental entities.* The requirements of OMB Circular No. A-87 and the following requirements of 24 CFR part 85 apply to the Indian tribe and any governmental subrecipient receiving HOME funds: §§ 85.6, 85.12, 85.20, 85.22, 85.26, 85.35, 85.36, 85.43, 85.44, 85.51, and 85.52.

(b) *Non-profit organizations.* The requirements of OMB Circular No. A-122 and the following requirements of OMB Circular No. A-110 apply to subrecipients receiving HOME funds that are private nonprofit organizations: Attachment B; attachment F; attachment H, paragraph 2; and attachment O.

(Copies of OMB Circulars may be obtained from E.O.P. Publications, room 2200, New Executive Office Building, Washington, DC 20503, telephone (202) 395-7332. (This is not a toll-free number. There is a limit of two free copies.))

§ 92.646 Audit.

Audits must be conducted in accordance with 24 CFR part 44 and OMB Circular A-133.⁷

§ 92.647 Closeout.

(a) A grant will be closed out when all the following criteria have been met:

(1) All funds to be closed out have been drawn down and expended for completed project costs, or funds not drawn down and expended have been debilitated by HUD;

(2) Project Completion Reports for all projects using funds to be closed out

have been submitted and entered into the C/MI System. (Based on the data in the C/MI System, HUD will prepare the Closeout Report.);

(3) The Indian tribe has been reviewed and audited and HUD has determined that all requirements, except for affordability, have been met or all monitoring and audit findings have been resolved.

(i) The Indian tribe's most recent audit report must be received by HUD. If the audit does not cover all funds to be closed out, the closeout may proceed, provided the Indian tribe agrees in the Closeout Report that any costs paid with the funds that were not audited must be subject to the Indian tribe's next single audit and that the Indian tribe may be required to repay to HUD any disallowed costs based on the results of the audit.

(ii) The on-site monitoring of the Indian tribe by the HUD Field Office must include verification of C/MI System data reflected in the Closeout Report and reconciliation of any discrepancies which may exist between C/MI System data and Indian tribe records.

(b) The Closeout Report contains the final data on the funds and must be signed by the Indian tribe and HUD. In addition, the report must contain:

(1) A provision regarding unaudited funds, required by paragraph (a)(4)(i) of this section; and

(2) A provision requiring the Indian tribe to continue to meet the requirements applicable to housing projects for the period of affordability specified in § 92.614 or § 92.615, to keep records demonstrating that the requirements have been met and to repay the HOME funds, as required by § 92.643, if the housing fails to remain affordable for the required period.

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§ 92.648 Recordkeeping.

(a) *General.* Each Indian tribe must establish and maintain sufficient records to enable HUD to determine whether the Indian tribe has met the requirements of this part. Records must be kept in a manner that identifies the source of funds of each project. At a minimum, the following records are needed:

(1) Program requirements:

(i) Records providing a full description of each activity assisted with HOME funds, including its census tract location (if the activity has a geographical locus), the amount of HOME funds budgeted,

⁷ See § 92.645 concerning the availability of OMB Circulars.

committed, and expended for the activity.

(ii) Records supporting the Indian tribe's certification under § 92.613 (tenant-based rental assistance; the waiting list; determinations of rent reasonableness; calculations of HOME subsidy for each tenant assisted).

(2) Project records:

(i) Records that demonstrate that each project meets the property standards in § 92.621.

(ii) Records that demonstrate that each rental housing project meets the requirements of § 92.614 for the required period of affordability. Records must be kept for each family assisted.

(iii) Records that demonstrate compliance with the requirements of § 92.622 for tenant and participant protections.

(iv) Records that demonstrate compliance with the requirements in § 92.615 for affordable housing: homeownership, including the initial purchase price and appraised value (after rehabilitation, if required) of the property. Records must be kept for each family assisted.

(3) Other federal requirements records:

(i) Records that demonstrate compliance with the Indian preference and methods of procurement requirements in §§ 92.631 and 92.632.

(ii) Records which demonstrate compliance with the requirements in § 92.634 regarding displacement, relocation, and real property acquisition, including project occupancy lists identifying the name and address of all persons occupying the real property on the date described in § 92.634(c)(2)(i)(A), moving into the property on or after the date described in § 92.634(c)(2)(i)(A), and occupying the property upon completion of the project.

(iii) Records demonstrating compliance with labor requirements in § 92.635, including contract provisions and payroll records.

(iv) Records concerning lead-based paint under § 92.636.

(v) Records supporting requests for waivers of the conflict of interest prohibition in § 92.637.

(vi) Records of certifications concerning debarment and suspension required by § 92.638 and 24 CFR part 24.

(vii) Records demonstrating compliance with flood insurance requirements under § 92.639.

(4) Program administration records:

(i) Records concerning the local account of the HOME account, required to be established and maintained by § 92.640, including deposits, disbursements, and balances.

(ii) Records supporting requests for disbursements of HOME funds from the Treasury account and the local account, and other information required for the C/MI System under § 92.642.

(iii) Records indicating source and amounts of repayments, interest, and other return of investment of HOME funds.

(iv) Records of written agreements and monitoring required by § 92.644.

(v) Financial and related records required by § 92.645.

(vi) Records of audits and resolution of audit findings.

(b) *Period of record retention.* (1) Except as provided in paragraph (b)(2), (b)(3), or (b)(4) of this section, records must be retained for three years after closeout of the funds.

(2) If any litigation, claim, negotiation, audit, or other action has been started before the expiration of the regular period specified in paragraph (b)(2) of this section, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular period, whichever is later.

(3) Records regarding project requirements (§§ 92.620 to 92.623) and other federal requirements that apply for the duration of the period of affordability (§§ 92.630 and 92.639), as well as the written agreement and inspection and monitoring reports must be retained for three years after the required period of affordability specified in § 92.614 or § 92.615, as applicable.

(4) Records covering displacements and acquisition must be retained for at least three years after the date by which all persons displaced from the property and all persons whose property is acquired for the project have received the final payment to which they are entitled in accordance with § 92.634.

(c) *Access to record.* (1) The Indian tribe must provide citizens, public agencies, and other interested parties with reasonable access to records, consistent with applicable tribal laws (or state law, which may apply if the Indian tribe is not exercising recognized powers of self-government) regarding privacy and obligations of confidentiality.

(2) HUD and the Comptroller General of the United States, or any of their representatives, have the right of access to any pertinent books, documents, papers or other records of the Indian tribes and subrecipients, in order to make audits, examinations, excerpts, and transcripts.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

§ 92.649 Performance reports.

(a) *Management reports.* Each Indian tribe must submit management reports on its HOME Investment Partnerships Program in such format and at such time as HUD may prescribe.

(b) *Annual performance report—(1) Submission.* An Indian tribe must submit an annual performance report on its HOME activities to the responsible HUD Field Office at such time as HUD may prescribe. Single copies of the report must be provided to the public upon request at no charge.

(2) *Elements of the annual performance report.* The report must contain such information and be in such form as HUD may prescribe, and must include at least the following:

(i) An assessment by the Indian tribe of the relationship of the activities carried out under its HOME Investment Partnerships Program to the objectives in its application;

(ii) An analysis of the extent to which HOME funds were distributed among different categories of housing needs identified in its application;

(iii) An assessment of the effectiveness of the efforts in providing the preferences and opportunities under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b));

(iv) Data on the total number of households (families and individuals) and business and nonprofit organizations displaced as a result of investments of HOME funds, including the cost of relocation payments (moving expenses and replacement housing), and the number and cost of real property acquisitions; and

(v) Data on the amount of repayments, interest, and other return on investment of HOME funds and the use of the funds for projects, including number of projects assisted, and characteristics of tenants and owners.

(Approved by the Office of Management and Budget under OMB control number 2501-0013)

Performance Reviews and Sanctions

§ 92.650 Performance reviews.

(a) *General.* HUD will review the performance of each Indian tribe in carrying out its responsibilities under this part whenever determined necessary by HUD, but at least annually. In conducting performance reviews, HUD will rely primarily on information obtained from the Indian tribe's records and reports, findings from on-site monitoring, audit reports, and information generated from the C/MI System. Where applicable, HUD may

also consider relevant information pertaining to an Indian tribe's performance gained from other sources, including citizen comments, complaint determinations, and litigation. Reviews to determine compliance with specific requirements of this part will be conducted as necessary, with or without prior notice to the Indian tribe. Comprehensive performance reviews under the standards in paragraph (b) of this section will be conducted after prior notice to the Indian tribe.

(b) *Standards for comprehensive performance review.* An Indian tribe's performance will be comprehensively reviewed periodically, as prescribed by HUD, to determine whether the Indian tribe:

(1) Has committed the HOME funds in the United States Treasury account as required by § 92.640 and expended the funds in the United States Treasury account as required by § 92.640, and

(2) Has met the requirements of this part, particularly eligible activities and affordability.

§ 92.651 Corrective and remedial actions.

(a) *General.* HUD will use the procedures in this section in conducting the performance review as provided in § 92.650 and in taking corrective and remedial actions.

(b) *Performance review.* (1) If HUD determines preliminarily that the Indian tribe has not met a requirement of this part, the Indian tribe will be given notice of this determination and an opportunity to demonstrate, within the time prescribed by HUD (not to exceed 30 days) and on the basis of substantial facts and data, that it has done so.

(2) If the Indian tribe fails to demonstrate to HUD's satisfaction that it has met the requirement, HUD will take corrective or remedial action in accordance with this section or § 92.652.

(c) *Corrective and remedial actions.* Corrective or remedial actions for a performance deficiency (failure to meet a provision of this part) will be designed to prevent a continuation of the deficiency; mitigate, to the extent possible, its adverse effects or consequences; and prevent its recurrence.

(1) HUD may instruct the Indian tribe to submit and comply with proposals for action to correct, mitigate and prevent a performance deficiency, including:

(i) Preparing and following a schedule of actions for carrying out the affected activities, consisting of schedules, timetables, and milestones necessary to implement the affected activities;

(ii) Establishing and following a management plan that assigns

responsibilities for carrying out the remedial actions;

(iii) Canceling or revising activities likely to be affected by the performance deficiency, before expending HOME funds for the activities;

(iv) Reprogramming HOME funds that have not yet been expended from affected activities to other eligible activities;

(v) Reimbursing its HOME account in any amount not used in accordance with the requirements of this part; and

(vi) Suspending disbursement of HOME funds for affected activities.

(2) HUD may also—

(i) Change the method of payment from an advance to reimbursement basis; and

(ii) Take other remedies that may be legally available.

§ 92.652 Notice and opportunity for hearing; sanctions.

(a) If HUD finds after reasonable notice and opportunity for hearing that an Indian tribe has failed to comply with any provision of this part and until HUD is satisfied that there is no longer any such failure to comply:

(1) HUD shall reduce the funds in the Indian tribe's HOME account by the amount of any expenditures that were not in accordance with the requirements of this part; and

(2) HUD may do one or more of the following:

(i) Prevent withdrawals from the Indian tribe's HOME account for activities affected by the failure to comply; or

(ii) Prohibit the Indian tribe from competing for HOME funds under § 92.604; *Provided, however,* That HUD may on due notice suspend payments at any time after the issuance of a notice of opportunity for hearing pursuant to paragraph (b)(1) of this section, pending such hearing and a final decision, to the extent HUD determines such action necessary to preclude the further expenditure of funds for activities affected by the failure to comply.

(b) *Proceedings.* When HUD proposes to take action pursuant to this section, the respondent in the proceedings will be the Indian tribe.

(1) *Notice of opportunity for hearing.* HUD shall notify the respondent in writing of the proposed action and of the opportunity for a hearing. The notice shall be sent by first class mail. The notice shall specify:

(i) In a manner which is adequate to allow the respondent to prepare its response, the basis upon which HUD determined that the respondent failed to comply with a provision of this part;

(ii) That the hearing procedures are governed by these rules;

(iii) That the respondent has 14 days from receipt of the notice within which to provide a written request for a hearing to the Chief Docket Clerk, Office of Administrative Law Judges, and the address and telephone number of the Chief Docket Clerk;

(iv) The action HUD proposes to take and that the authority for this action is § 92.652; and

(v) That if the respondent fails to request a hearing within the time specified, HUD's determination that the respondent failed to comply with a provision of this part shall be final and HUD may proceed to take the proposed action.

(2) *Initiation of hearing.* The respondent shall be allowed 14 days from receipt of the notice within which to notify the Chief Docket Clerk, Office of Administrative Law Judges, of its request for a hearing. If no request is received within the time specified, HUD's determination that the respondent failed to comply with a provision of this part shall be final and HUD may proceed to take the proposed action.

(3) *Administrative Law Judge.* Proceedings conducted under these rules shall be presided over by an Administrative Law Judge (ALJ), appointed as provided by section 11 of the Administrative Procedures Act (5 U.S.C. 3105). The case shall be referred to the ALJ at the time a hearing is requested. The ALJ shall promptly notify the parties of the time and place at which the hearing will be held. The ALJ shall conduct a fair and impartial hearing and take all action necessary to avoid delay in the disposition of proceedings and to maintain order. The ALJ shall have all powers necessary to those ends, including but not limited to the power to:

(i) Administer oaths and affirmations;

(ii) Issue subpoenas as authorized by law;

(iii) Rule upon offers of proof and receive relevant evidence;

(iv) Order or limit discovery before the hearing as the interests of justice may require;

(v) Regulate the course of the hearing and the conduct of the parties and their counsel;

(vi) Hold conferences for the settlement or simplification of the issues by consent of the parties;

(vii) Consider and rule upon all procedural and other motions appropriate in adjudicative proceedings; and

(viii) Make and file initial determinations.

(4) *Ex parte communications.* An *ex parte* communication is any communication with an ALJ, direct or indirect, oral or written, concerning the merits or procedures of any pending proceeding which is made by a party in the absence of any other party. *Ex parte* communications are prohibited except where the purpose and content of the communication have been disclosed in advance or simultaneously to all parties, or the communication is a request for information concerning the status of the case. Any ALJ who receives an *ex parte* communication which the ALJ knows or has reason to believe is unauthorized shall promptly place the communication, or its substance, in all files and shall furnish copies to all parties. Unauthorized *ex parte* communications shall not be taken into consideration in deciding any matter in issue.

(5) *The hearing.* All parties shall have the right to be represented at the hearing by counsel. The ALJ shall conduct the proceedings in an expeditious manner while allowing the parties to present all oral and written evidence which tends to support their respective positions, but the ALJ shall exclude irrelevant, immaterial or unduly repetitious evidence. HUD has the burden of proof in showing by a preponderance of the evidence that the respondent failed to comply with a provision of this part. Each party shall be allowed to cross-examine adverse witnesses and to rebut and comment upon evidence presented by the other party. Hearings shall be

open to the public. So far as the orderly conduct of the hearing permits, interested persons other than the parties may appear and participate in the hearing.

(6) *Transcripts.* Hearings shall be recorded and transcribed only by a reporter under the supervision of the ALJ. The original transcript shall be a part of the record and shall constitute the sole official transcript. Respondents and the public, at their own expense, may obtain copies of the transcript.

(7) *The ALJ's decision.* At the conclusion of the hearing, the ALJ shall give the parties a reasonable opportunity to submit proposed findings and conclusions and supporting reasons therefor. Generally within 60 days after the conclusion of the hearing, the ALJ shall prepare a written decision which includes a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record and the appropriate sanction or denial thereof. The decision shall be based on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A copy of the decision shall be furnished to the parties immediately by first class mail and shall include a notice that any requests for review by the Secretary must be made in writing to the Secretary within 30 days of the receipt of the decision.

(8) *The record.* The transcript of testimony and exhibits, together with the decision of the ALJ and all papers

and requests filed in the proceeding, constitutes the exclusive record for decision and, on payment of its reasonable cost, shall be made available to the parties. After reaching the initial decision, the ALJ shall certify to the complete record and forward the record to the Secretary.

(9) *Review by the Secretary.* The decision by the ALJ shall constitute the final decision of the Secretary unless, within 30 days after the receipt of the decision, either the respondent or the Assistant Secretary files an exception and request for review by the Secretary. The excepting party must transmit simultaneously to the Secretary and the other party the request for review and the basis of the party's exceptions to the findings of the ALJ. The other party shall be allowed 30 days from receipt of the exception to provide the Secretary and the excepting party with a written reply. The Secretary shall then review the record of the case, including the exceptions and the reply. On the basis of such review, the Secretary shall issue a written determination, including a statement of the rationale therefor, affirming, modifying or revoking the decision of the ALJ. The Secretary's decision shall be made and transmitted to the parties within 60 days after the decision of the ALJ was furnished to the parties.

Dated: November 12, 1991.

Jack Kemp,
Secretary.

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