

Sunshine Act Meetings

Federal Register

Vol. 57, No. 68

Wednesday, April 8, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:45 a.m., Tuesday, March 31, 1992.

PLACE: 2033 K St., N.W., Washington, D.C., 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Rule enforcement review.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.
Jean A. Webb,
Secretary of the Commission.

[FR Doc. 92-8232 Filed 4-6-92; 11:48 am]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Tuesday, April 21, 1992.

PLACE: 2033 K St., N.W., Washington, DC, Lower Lobby Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

- Application of the Commodity Exchange Inc. for contract designation in Dubai Sour Crude Oil Futures
- Application of the Chicago Board of Trade for contract designation in Clean Air Futures
- Application of the New York Cotton Exchange for contract designation in Cotton No. 2 Straddle Options
- Program Review, 2nd quarter, FY 1992

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.
Jean A. Webb,
Secretary of the Commission.
[FR Doc. 92-8233 Filed 4-6-92; 11:48 am]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Friday, April 24, 1992.

PLACE: 2033 K St., N.W., Washington, D.C., 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Objectives.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.
Jean A. Webb,
Secretary of the Commission.

[FR Doc. 92-8234 Filed 4-6-92; 11:48 am]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:30 a.m., Friday, April 24, 1992.

PLACE: 2033 K St., N.W., Washington, D.C., 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.
Jean A. Webb,
Secretary of the Commission.

[FR Doc. 92-8235 Filed 4-6-92; 11:48 am]
BILLING CODE 6351-01-M

FEDERAL HOUSING FINANCE BOARD

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 53 FR 9471, March 18, 1992.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 9:00 a.m. Wednesday, March 25, 1992.

CHANGES IN THE MEETING: The following topic was added to the agenda during the closed portion of the meeting.

FHLBank of Des Moines' Benefits Equalization Plan. The above matter is exempt under one or more of subsections (c)(6) and (c)(9)(B) of title 5 of the United States Code, 5 U.S.C. (c)(6) and (c)(9)(B).

CONTACT PERSON FOR MORE INFORMATION: Elaine L. Baker, Executive Secretary to the Board, (202) 408-2837.
J. Stephen Britt,
Executive Director.

[FR Doc. 92-8230 Filed 4-6-92; 11:47 am]
BILLING CODE 6725-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of April 6, 13, 20, and 27, 1992.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Weeks of April 6

Friday, April 10

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting)

a. Safety Light Corporation, *et al.* (Bloomsburg, Pennsylvania, site decontamination)

Week of April 13—Tentative

Thursday, April 16

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of April 20—Tentative

Monday, April 20

10:00 a.m.

Briefing on Proposed Update of Source Term, Release Timing, Definition of Releases into Containment, and TID-14844 (Public Meeting)

Tuesday, April 21

1:30 a.m.

Briefing on Progress of Design Certification Review and Implementation (Public Meeting)

Wednesday, April 22

10:00 a.m.

Briefing on NRC Activities Regarding Nuclear Safety and Safeguards in the Former Soviet Union and Eastern Europe (Public Meeting)

Friday, April 24

10:00 a.m.

Periodic Briefing on Progress of Resolution of Generic Safety Issues (Public Meeting)

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

1:30 p.m.

Periodic Meeting with Advisory Committee on Nuclear Waste (ACNW) (Public Meeting)

Week of April 27—Tentative

Wednesday, April 29

11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has at yet been identified as requiring any Commission vote on this date.

To verify the Status of Meeting Call (Recording)—(301) 504-1292.

CONTACT PERSON FOR MORE

INFORMATION: William Hill (301)
504-1661.

Dated: April 3, 1992.

William M. Hill, Jr.,

Office of the Secretary.

[FR Doc. 92-8243 Filed 4-6-92; 11:48 pm]

BILLING CODE 7590-01-M

OVERSEAS PRIVATE INVESTMENT CORPORATION

Meeting of the Board of Directors

TIME AND DATE: 1:00 p.m. (closed portion), 2:30 p.m. (open portion), Tuesday, April 21, 1992.

PLACE: Offices of the Corporation, Fourth Floor Board Room, 1615 M Street, N.W., Washington, D.C.

STATUS: The first part of the meeting from 1:00 p.m. to 2:30 p.m. will be closed to the public. The open portion of the meeting will commence at 2:30 p.m. (approximately).

MATTERS TO BE CONSIDERED: (Closed to the public 1:00 p.m. to 2:20 p.m.):

1. President's Report.
2. Insurance Project in Poland.
3. Insurance Project in Saudi Arabia.
4. Claims Report.
5. Information Reports.
6. Approval of 2/18/92 Minutes (Closed Portion).

FURTHER MATTERS TO BE CONSIDERED
(Open to the public 2:30 p.m.).

1. Approval of 2/18/92 Minutes (Open Portion).

2. Notice to Board of Changes to OPIC Country List.

3. Information Reports.

4. Recommendation for meeting through end of September 1992.

CONTACT PERSON FOR INFORMATION:

Information with regard to the meeting may be obtained from the Corporation Secretary on (202) 457-7007.

Dated: April 3, 1992.

Dennis K. Dolan,

OPIC Corporate Secretary.

[FR Doc. 92-8191 Filed 4-6-92; 8:56 am]

BILLING CODE 3210-01-M

SECURITIES AND EXCHANGE COMMISSION Agency Meeting

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: [To be published on April 7, 1992].

STATUS: Open meeting.

PLACE: 450 Fifth Street, N.W., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: Thursday, April 2, 1992.

CHANGE IN THE MEETING: Additional items.

The following additional item will be considered at an open meeting on Friday, April 10, 1992, at 9:00 a.m.

Consideration of whether to issue a release adopting Rule 419, which governs securities

offerings registered under the Securities Act of 1933 by blank check companies, including the requirement to place offering proceeds and securities in an escrow or trust account until a business or merger prospect meeting specified criteria is located and identified, provide complete information about such acquisition to prospective investors, and provide investors with the right to obtain a refund of deposited funds; (2) the adoption of Rule 15g-8, which prohibits any trading transactions in securities in a Rule 419 escrow or trust account; and (3) the amendment of Rule 174 to require prospectus delivery by dealers for 90 days following release of the Rule 419 escrow or trust account. For further information, please contact, Richard P. Konrath at (202) 272-2589.

Commissioner Schapiro, as duty officer, determined that Commission business required the above change and that no earlier notice thereof was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Steve Luparello at (202) 272-2100.

Dated: April 6, 1992.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-8284 Filed 4-6-92 3:50 pm]

BILLING CODE 8010-01-M

44 CFR Part 248

Wednesday
April 8, 1992

Part II

Department of Housing and Urban Development

Office of the Secretary

24 CFR Parts 50, 219, 221, 236, 241, and 248

**Prepayment of a HUD-Insured Mortgage
by an Owner of Low Income Housing;
Interim Rule**

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

Office of the Secretary

24 CFR Parts 50, 219, 221, 236, 241, and
248

[Docket No. R-92-1513; FR-2978-I-02]

RIN 2501-AB14

Prepayment of a HUD-Insured
Mortgage by an Owner of Low Income
Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule implements and makes effective HUD's procedures and standards for administering subtitle A of title VI of the Cranston-Gonzalez National Affordable Housing Act, entitled the "Low Income Housing Preservation and Resident Homeownership Act of 1990" ("LIHPHA"), which repeals and replaces the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"). This rule creates a permanent and comprehensive program which preserves privately-owned low income housing projects while not unduly restricting the owners, mortgage prepayment rights. In localities where there is an adequate supply of low income housing, prepayment of the mortgage would not otherwise undermine public policy objectives set forth in the statute, and prepayment would not result in a material increase in the economic hardship of the current tenants, owners of projects subject to low income affordability restrictions may terminate these restrictions and prepay their HUD-insured mortgages or terminate their mortgage insurance contracts. In areas where the supply of low income housing is inadequate, the low income affordability restrictions must be maintained on the projects for their remaining useful life, but owners may receive a fair market return on their investment through the receipt of incentives provided by HUD or through the transfer of the property to other entities which agree to continue the low income affordability restrictions. This rule provides an opportunity for homeownership of eligible low income housing projects by the tenants through resident homeownership programs. It also encourages the transfer of low income housing projects to nonprofit organizations and State and local government entities, by giving these entities the first opportunity to purchase available projects.

DATES: *Effective date:* May 8, 1992. The effective date of this interim rule may be postponed if the Department is unable, on or before that date, to publish a companion document, the final Guidelines for Determining Appraisals of Preservation Value under the Low Income Housing Preservation and Resident Homeownership Act of 1990.

Comment due date: All written comments must be received on or before June 8, 1992.

ADDRESSES: Submit written comments to the Office of the General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m.-5:30 p.m. Eastern Standard Time) at the above address.

FOR FURTHER INFORMATION CONTACT: Kevin J. East, Office of Multifamily Housing Preservation and Property Disposition, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. Telephone, voice (202) 708-2300; TDD, (202) 708-4594. (These are not toll-free numbers).

SUPPLEMENTARY INFORMATION: The information collection requirements contained in the interim rule have been submitted to the Office of Management and Budget for review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3502). No person may be subject to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

On May 2, 1991, the Department of Housing and Urban Development (the "Department" or "HUD") published a proposed rule at 56 FR 20262. The purpose of the proposed rule was to establish policies and procedures for implementing LIHPHA and to solicit public comments in response to the Department's proposal. This interim rule responds to the public comments received by the Department in reaction to the proposed rule. The interim rule, as published herein, is made effective as of the date indicated.

Discussion of Public Comments and
Changes Made in the Interim Rule

A discussion of the public comments and modifications made in response to the public comments and as a result of additional HUD consideration, follows.

General Overview of Commenters and
the Major Issues

During the sixty-day public comment period for the proposed rule, 256 sets of comments, comprising approximately 1,500 pages, were received from 185 different commenters. Approximately 23% of the commenters were nonprofit organizations. The nonprofits were composed of local groups, national foundations, lobbying organizations, and trade associations. Approximately 38% of the nonprofits submitting comments are organized on the national level. The response received from State and local governments was also large, with these entities representing about 16% of the commenters. Another 10% of the commenters were tenants, both individual tenants and tenant organizations, while owners made up 6% of the total commenters. Attorneys representing owners, tenants, developers, governments and nonprofits, made up approximately 11% of the commenters. Forty percent of the comments received from attorneys were from legal aid organizations. The remaining comments were submitted by management organizations, housing advocates, brokers, lenders, investors, consultants, developers and an accountant. Comments were also received from members of Congress. Many of the sets of comments were submitted jointly by a number of different individuals and/or organizations. The Department has not included in the foregoing breakdown each of the entities and individuals who jointly submitted comments; in most instances the joint commenters consisted of entities or individuals of the same type and with the same interests as the entity or individual under whose name the comments were submitted.

The following is a list of the primary issues raised by the commenters:

(1) Section 241.1060—Whether the section 241(f) equity and acquisition loan terms and amortization periods should be extended to 40 years or remain at 20 years;

(2) Section 248.101—Whether projects receiving flexible subsidy or rent supplement assistance should be included in the definition of eligible low income housing;

(3) Section 248.101—Whether the related party rule was interpreted too broadly so as to exclude a number of relationships between buyers and sellers, thus unduly restricting the transfer of projects;

(4) Section 248.157—Regarding the appropriate level and timing for an earnest money deposit;

(5) Section 248.157—How priority purchasers should be ranked, if at all;

(6) Section 248.157—Whether imposition of a twelve month marketing period for certain priority purchasers is proper; and

(7) Section 248.121—Whether owners are guaranteed an eight percent annual authorized return.

The Department's resolution of each of these significant issues, as well as other issues identified by the public commenters, is addressed in the following discussion.

Section 248.1 (Purpose)

Three commenters, a non-profit organization, a State government, and a law firm objected to the purposes of LIHPHA, as stated in this section of the proposed rule. The primary objection made by the commenters concerned including the facilitation of resident homeownership as the fourth purpose of the rule. One commenter also submitted its own list of objectives and suggested that these be substituted for those of the Department. Upon considering these comments, HUD has decided that this section of the rule should remain unchanged.

The primary objection raised by one of the commenters was that Congress considered and rejected HUD's proposal promoting conversion to resident homeownership as the principal means of preserving low income housing and therefore homeownership should not be listed as an objective of the preservation program. Another commenter stated that resident homeownership should be promoted only in certain markets and circumstances and should not be the key purpose of the rule.

HUD recognizes that Congress did not intend that homeownership be the only means of preservation, but also believes that tenant empowerment through homeownership is a viable preservation alternative. This alternative was recognized by Congress when it named the authorizing legislation the "Low Income Housing Preservation and Resident Homeownership Act of 1990," and, therefore, the Department believes that homeownership should be listed as one of the four purposes referenced in this provision. The preamble to the proposed rule recognizes that the "basic purpose" of the rule is to balance low income housing preservation with the right of owners to prepay their mortgages. Minimizing tenant displacement and facilitating resident homeownership are additional purposes listed in this section. The Department's position is that adding resident homeownership as one of four objectives of the rule does not

circumvent Congress, intent. Additionally, by stating that homeownership is one of the objectives, HUD is by no means declaring that homeownership is the only means of preservation or that it is suitable in all situations. The Department acknowledges that resident homeownership is not workable in all cases.

The commenter, who provided its own list of objectives, suggested that the goals of the rule should be to: (1) Permanently preserve eligible low income housing; (2) maximize tenant participation in preservation; (3) encourage the sale of housing to nonprofits; and (4) ensure full participation by local governments. While the rule is clearly designed to promote all of the foregoing, HUD believes that the purposes, as stated in the proposed rule, provide a more balanced view of the rule's intentions than do those proposed by the commenter. Therefore, this section of the proposed rule has not been amended.

Section 248.5 (Election to Proceed Under Subpart B or C)

Eleven comments were received by the Department regarding the right of owners to preserve their choice of proceeding under either subpart B or subpart C of this rule. The two primary issues raised by these comments concerned the increase in size of the eligible low income housing universe that could opt to file a plan of action under subpart C and the time frame in which owners have to exercise their option.

Paragraph (c) of this section permits owners of projects which became eligible low income housing prior to January 1, 1991, and who submitted a notice of intent to the Department prior to that date, to elect which subpart they wish to proceed under. To determine which projects may exercise this option, HUD uses the definition of eligible low income housing found in subpart B of the proposed rule, which includes projects within two years of being eligible to prepay. Four commenters challenge the use of this definition, contending that HUD's interpretation expands the number of projects which can choose to file a plan of action under subpart C, by providing the option to projects which previously would have been ineligible under subpart C, i.e., those projects more than one year away from being eligible to prepay.

The Department disagrees with the commenters' position and has not amended the proposed rule to incorporate those comments. LIHPHA

clearly is intended to supersede ELIHPA and ELIHPA was effectively repealed upon the enactment of LIHPHA. Therefore, the definition of eligible low income housing which must be employed in connection with section 604(a) of LIHPHA is the definition set forth in section 229 of LIHPHA. This position is supported by the statutory language in section 604(c) which states that the repealed provisions of ELIHPA are applicable to those projects which, under section 604(a), have opted to be subject to ELIHPA. This language implies that the election occurs first, and the ELIHPA provisions are then applied to those projects electing ELIHPA. Hence, the subpart B provisions, including the definition of eligible low income housing, are applied until an owner chooses to be subject to subpart C. This conclusion is also supported by the fact that, under section 604(a), an owner may file a notice of intent "under" LIHPHA and thereby preserve its right to be subject to ELIHPA. The Department recognizes that using the more liberal subpart B definition of eligible low income housing in administering this section of the rule has the potential to increase the population of projects proceeding under subpart C; however, there is no indication that Congress intended that HUD use the repealed definition and not the new one in administering this section of the rule.

Another concern raised by two commenters was that sixty days from the effective date of this rule is not sufficient time for an owner to make its election to proceed under subpart B or subpart C. In response to these concerns, the Department recognizes and agrees that this time frame may not be adequate to allow an owner to make an informed decision and has amended paragraph (c) of this section of the proposed rule by permitting an owner to change its election within thirty days after receiving the valuation information from the Secretary under § 248.131. This will provide the owner with more information to make an informed choice, based on appraisals to be conducted on the project pursuant to § 248.111. It should be noted that the proposed rule has also been amended to require owners who choose to proceed under subpart C to reimburse the Department for the cost of HUD's appraisal, and the third appraisal, if one is conducted. This reimbursement is required since the Department does not have the authority or appropriations to expend funds for appraisals under ELIHPA.

A suggestion was made by another commenter that paragraph (c) be amended to permit owners to convert to

subpart B if a plan of action submitted under subpart C is approved before the effective date of this rule. The Department believes, however, that Congress did not authorize HUD to extend the right of conversion as the commenter suggests. Section 604(b) of LIHPHA explicitly grants the right of conversion to owners who have submitted a plan of action on or before October 11, 1990, and states that owners filing plans after such date shall not have any right of conversion under that subsection. Therefore, HUD concludes that Congress, by its express language, intended to give the right of conversion only to those owners specified in section 604(b) and that its failure to include any other class of owners was intentional. In accordance with this position, paragraph (c) of the proposed rule has not been amended to expand the right of conversion.

Paragraph (b) of this section permits an owner who has filed a plan of action under subpart C on or before October 11, 1990 to convert to subpart B by filing a notice of intent prior to February 5, 1992 or within thirty days of approval of the plan of action, whichever is later. Two commenters stated that the February 5, 1992 and thirty-day deadlines should be extended. One commenter was concerned that owners may have to make the decision to convert without adequate information, the other felt that this would not give nonprofit organizations sufficient opportunity to explore the possibility of purchasing the project. Given the fact that this rule was not made effective by February 5, 1992, the Department has decided to amend this paragraph to extend the time period for conversion to thirty days after the effective date of the rule.

The conversion deadline will have no impact on any nonprofit organizations or other potential purchasers of the project. At the time that an owner exercises its right to convert, it shall notify the Department of its intention by filing a notice of intent pursuant to § 248.105 and proceeding under subpart B in exactly the same manner as any other owner of eligible low income housing. Prospective purchasers will learn of the availability of the project for sale at the same time and by the same method as all other potential purchasers who are interested in buying housing subject to the provisions of subpart B.

Paragraph (d) of this section prohibits an owner who filed a subpart C plan of action after October 11, 1990 from changing its mind and filing a plan under subpart B. On fairness grounds, one commenter objected to this

prohibition and argued that if a plan of action is rejected by HUD under subpart C, the owner should be permitted to file a notice of intent under subpart B. The Department has rejected this recommendation. Under both subparts B and C, if a plan of action submitted by an owner is unacceptable to the Department, the owner has the opportunity to revise it. If, after revision, it is still rejected by the Department either because the Department has not made the required findings under § 248.221 or because the project is not eligible for incentives under § 248.231, then the plan of action would also be unapprovable under the relevant provisions of subpart B since the same standards would be applied by the Department under both subparts.

Section 248.7 (Waivers).

Three commenters stated that, when the Department permits a waiver of any provision of this part, the tenants, State and local government, and the public should receive notice of the waiver. One of these commenters also suggested the opportunity for a thirty-day comment period for tenants and the State and local government. The Department recognizes that a waiver under this program could have an impact on the tenants of the eligible low income housing and on the State and local government. In order to accommodate their interests, HUD has amended §§ 248.135(d) and (e) to require owners to submit with their plans of action a list of all waivers which they have requested. This information will be available to the tenants and State and local government as part of the plan of action package submitted to them under § 248.135(h) of subpart B and §§ 248.213 and 248.218 of subpart C and they will have the same opportunity to comment on the request for waivers as they do on the plan of action itself. Also, pursuant to the requirements of section 106 of the Housing and Urban Development Reform Act of 1989, any waivers granted by HUD will be published in the Federal Register on a quarterly basis.

Section 248.183 (Preemption of State and Local Laws)

In accordance with one commenter's suggestion, this section of the rule has been renumbered as § 248.183 and made part of subpart B in order to demonstrate its applicability to State and local laws which conflict with subpart B, and not those that conflict with subpart C. Twelve commenters, consisting of State and local governments, national foundations, nonprofit organizations, and attorneys requested further clarification and

guidance as to what types of State and local laws would be preempted by this section of the proposed rule.

In examining the legislative history concerning this provision, the Department has noted an inconsistency between the language of section 232(a) of LIHPHA and the House Conference Report to the Cranston-Gonzalez National Affordable Housing Act, Conf. Rep. No. 101-943, 101st Cong., 2d Sess. (the "Conference Report"). The statute grants the Department authority to preempt State and local laws which restrict or inhibit the prepayment of eligible low income housing, restrict or inhibit an owner of such housing from receiving the authorized annual return, are inconsistent with LIHPHA or are limited in their applicability to eligible low income housing for which the mortgage has been prepaid or the insurance contract terminated. The Conference Report, however, at page 460, indicates an intention to preempt only those State and local laws which target "prepayment projects for special treatment." A circumstance may arise where a law of general applicability is inconsistent with LIHPHA. If the Conference Report language is adopted in the rule, then that law could not be preempted. However, if the statutory language is followed, LIHPHA would supersede the inconsistent State or local law. Since the statutory language is clear on its face, the Department has no basis to resort to the contrary discussion contained in the Conference Report.

The language of subparagraph (a)(3) authorizes the Department to preempt State and local laws which are "inconsistent with any provision of this subtitle, including any law, regulation, or other restriction that limits or impairs the ability of any owner of eligible low income housing to receive incentives, * * *." Even though subparagraph (a)(3) explicitly permits preemption of only those laws which interfere with the receipt of incentives, HUD has construed the reference to this category of laws to be illustrative, and not complete. Congress' use of the word "includes" in subparagraph (a)(3) implies that laws interfering with incentives are only one type of legislation which comes within the bounds of that subparagraph. The Department, therefore, interprets subparagraph (a)(3) as authorizing it to preempt any State or local law which is inconsistent with subpart B and LIHPHA.

In order to clarify how preemption will work in practice, one commenter suggested that a statement be included in the regulation to the effect that State

and local laws of general applicability which are more onerous to eligible low income housing are discriminatory, and hence are preempted under this section. The Department agrees that if a statute establishes different standards, requirements or restrictions with respect to eligible low income housing than it does for other categories of housing, section 232(a)(4) of LIHPHA would preempt the statute as to the disparity in treatment. Another commenter suggested that State and local governments be given clear guidance that laws which assist the implementation of this subpart are not subject to preemption under this section. The statute does not distinguish between State and local laws that assist in implementing LIHPHA and those which impede the statute. However, as a general matter, any State or local law which does not materially affect the timetable for approval of a plan of action under subpart B and which does not impose substantive restrictions on prepayment would not be deemed by HUD to be "inconsistent" with LIHPHA.

A commenter questioned whether, given HUD's interpretation of the statute, State and local governments can enact legislation to fill gaps in LIHPHA and this subpart. State and local governments may enact legislation concerning the preservation of low income housing as long as the legislation does not violate any of the four conditions set forth in section 232(a). For example, one commenter suggested that the proposed rule be amended to allow a State or local law which limits owners, rate of return and applies generally to both federally-assisted and unsubsidized projects. HUD would preempt such a law, finding it to be in violation of subparagraph (a)(2) of this section. While the law is of general applicability, it restricts and inhibits owners from receiving the annual rate of return to which they are entitled under § 248.121 of this subpart. However, it should be noted that the law would be taken into consideration in appraising the project under § 248.111.

Certain commenters expressed concern that, in implementing this provision HUD may not recognize the historical deference given to State and local governments in the regulation of real property, land use and landlord-tenant relations. For instance, many communities have laws restricting conversion of rental housing to cooperatives and condominiums. These laws will be preempted only if they fall into one of the four categories listed in paragraph (a) of this section.

Additionally, HUD acknowledges that this provision applies only to State and local laws affecting eligible low income housing, as that term is defined in § 248.101, and not to FmHA projects, projects with expiring HAP contracts, or section 8 nonrenewals.

Section 232(b) of the statute lists those State and local laws which are not preempted by the Department to the extent that such laws are of general applicability and are not inconsistent with this subpart. The list consists of laws concerning building standards, zoning limitations, health, safety and habitability standards, rent control and condominium and cooperative conversion. One commenter stated that the regulation should indicate that this list is merely illustrative, and not exhaustive. The Department disagrees with this interpretation and takes the position that this list is inclusive. The statutory language, which was tracked in the proposed regulation, does not indicate in any way that it is meant only to be exemplary. In the absence of any direction to the contrary, the Department presumes that Congress only meant to exclude the preemption of those types of legislation specifically enumerated in section 232(b). Furthermore, this position is supported by the fact that the types of laws listed in paragraph (b) of the statute are those concerning the health and safety powers, which are generally retained by the States without Federal government interference.

The Department has chosen not to amend the proposed regulatory language to address specific legislation commenters have brought to the Department's attention. In the course of implementing this subpart, HUD will determine on a case-by-case basis, based on the language of this section, whether specific State or local laws should be preempted. The Department believes that it is impractical to make any preemption determination at this time, prior to the existence of a conflict. This section was amended, however, at one commenter's suggestion, to include the phrase, "under this subtitle including authorization" in paragraph (a)(3), in order to conform to the statutory language.

In response to a recommendation from another commenter, paragraph (c), which states that contracts entered into by an owner prior to November 28, 1990 and which restrict the owner's right to prepay the mortgage or terminate the mortgage insurance contract are not preempted, has been amended to include any contracts which are voluntarily entered into by the owner,

on or after the enactment of LIHPHA. The Department has decided to make this revision because owners of eligible low income housing have constructive notice of LIHPHA and its impact on prepayment and termination of insurance contracts. If an owner wants to restrict its rights under LIHPHA by entering into a contract, it is free to do so.

Subpart B—Prepayments and Plans of Action Under the 1990 Act

Section 248.101 (Definitions)

Aggregate Preservation Rent

A recommendation was made by three commenters that the definition of "aggregate preservation rent" be amended to include asset management fees, standard debt service coverage, vacancy underwriting allowances, and debt service for third party acquisition or rehabilitation financing. The definitions of extension and transfer preservation rents in the proposed rule already include debt service on any rehabilitation financing, which includes loans made by third parties. Debt service on any acquisition loans is included in the proposed definition of transfer preservation rent, and again, includes third party financing. Sections 214(b) (1) and (2) of the statute, which define extension and transfer preservation rents, do not include asset management fees as one of the costs to be supported by the preservation rents, and the Department has concluded that asset management fees are not an appropriate component of preservation rents.

Two commenters suggested that the debt service on federally-assisted mortgages be included in the calculation of extension preservation rent. The proposed rule already includes debt service on the federally-assisted mortgage as a component of both extension and transfer preservation rents.

The Department has decided to include vacancy underwriting allowances in the calculation of preservation rents. The need for a vacancy allowance is implied by the building block preservation rent approach, the statute's use of the term "gross potential income," in section 214 and the comparison of preservation rents to the income the property would produce if each unit charged 120% of the FMR, i.e., assuming full occupancy. In short, the aggregate preservation rent could not support the costs that the statute requires it to support unless some allowance is made for vacancy loss. Consistent with underwriting

practices for assisted properties, the Department will assume a three percent vacancy cost. For similar reasons, the Department will include standard debt service coverage allowances in the calculation of aggregate preservation rents. Consistent with its underwriting practices, the Department will assume a 1.11 debt service coverage ratio in figuring the preservation rents needed to support debt service on the existing mortgage, the rehabilitation loan, and the acquisition loan in the case of a transfer. Debt service coverage will only add to extension preservation rents if the required 8 percent return on preservation equity is inadequate to provide the required income cushion.

Bona fide Offer

The Department received 19 comments regarding its proposed definition of bona fide offer. The commenters requested further clarification of this definition. The Department has retained its original definition, but included a cross-reference to § 248.157(g), which sets forth the contents of a bona fide offer. The Department will consider an offer bona fide if the purchaser submitting the offer submits it within the applicable marketing period, under § 248.157(c), for that particular purchaser and if the offer contains a contract of sale acceptable to the Department and the appropriate earnest money deposit. Also, for an offer submitted under § 248.161 to be bona fide, the contract of sale must include a purchase price equal to the transfer preservation value of the project. The Department will include in its administrative guidelines language which will be required in the contract of sale.

Community-Based Nonprofit Organization

The Department has amended its proposed definition of community-based nonprofit organization in response to changes made in the regulatory definition of "community-based nonprofit organization" under the HOME program, title II of the Cranston-Gonzalez National Affordable Housing Act. However, the definition of community-based nonprofit organization does not require that the organization have a demonstrated capacity to carry out housing activities or a history of local community service, as is required in the HOME definition, and as one commenter requested. The reason for this difference is that HUD expects many community-based nonprofit organizations to be established as a result of the preservation program, and such newly-created organizations will

not have any demonstrated capacity, as organizations, in these areas.

Default

The way the term "default" is defined in this section differs from the definition applicable to multifamily mortgage insurance claims. For claims purposes, a mortgage is considered in default as soon as a mortgagor fails to make a payment under the mortgage. However, for purposes of filing a notice of intent, a 30-day grace period is provided for making any payments under the mortgage. A default does not occur, for purposes of this subpart, unless an owner fails to make a payment within 30 days after it becomes due. The rationale for this distinction, as noted in the preamble to the proposed rule, is to recognize that an owner's failure to make a mortgage payment on the first day of the month does not necessarily mean that a project is in financial jeopardy.

Six commenters suggested that the definition of the term "default" be amended to include covenant, as well as monetary, defaults. When a covenant default occurs, a mortgagee may accelerate the mortgage debt. The mortgagor's failure to pay the accelerated debt would convert the covenant default into a monetary default. (The Department would view an attempt by the owner to pay the accelerated debt as tantamount to a prepayment, which would thus be barred by LIHPHA.) Thus, there is no reason to amend the definition since a covenant default may lead to a monetary default, which falls within the proposed definition of "default." Under this subpart, a default is relevant in determining an owner's eligibility to file a notice of intent and in approving a plan of action. In either of these instances, it is irrelevant whether the default was precipitated by a covenant default or a failure to make a monthly payment under the mortgage.

One commenter stated that an owner should not be barred from filing a notice of intent if a default was caused by HUD's abuse of discretion, such as by improperly denying a rent increase, thereby making the owner unable to make its mortgage payments. Under the terms of the mortgage contract, a mortgagor is required, to make its payments in a timely manner (unless the actions of the mortgagee have excused performance, for example, by waiving timely payment). This contractual obligation exists without regard to the actions of the Department. Therefore, the Department has not amended this definition as the commenter has suggested.

Eligible Low Income Housing

The Department received thirty comments concerning its definition of "eligible low income housing." The proposed rule excludes from this definition those projects which are subject to a use restriction imposed by the Department to maintain the low and moderate income use of the project for the remaining term of the mortgage. This exclusion primarily affects those projects which have received flexible subsidy assistance, as authorized by section 201 of the Housing and Community Development Amendments of 1978, as amended, and 24 CFR part 219. Fourteen owners, developers, national nonprofit organizations, management entities, lenders, and an accounting firm, contested the Department's exclusion of projects receiving flexible subsidy assistance. Eight tenant organizations, legal aid services, nonprofit organizations, and State and local governments agreed with the Department's interpretation.

The Department notes that section 201 of the Housing and Community Development Amendments of 1978, as amended by section 211(c) of the Housing and Community Development Amendments of 1979, provides that HUD may provide flexible subsidy assistance only if the owner agrees to maintain the low and moderate income character of the project for the remaining term of the mortgage; HUD has implemented this requirement by obtaining the owner's agreement to prohibit prepayment of the mortgage or by execution of a use agreement. Only those projects which first received flexible subsidy assistance after the enactment of section 211(c) on December 21, 1979 are excluded from the definition of eligible low income housing. Projects which received flexible subsidy prior to that date are eligible low income housing and may proceed under this subpart.

The preamble to the proposed rule provides that the Department's rationale for excluding from ELIHPA flexible subsidy projects subject to use restrictions is principally because projects subject to a use agreement have no "higher and better use," as required by § 248.233, for the purpose of receiving incentives under that subpart. The same rationale supports excluding from this subpart those flexible subsidy projects subject to use restrictions.

Three commenters disputed this explanation, claiming that, while a use restriction could significantly decrease a project's appraised value, it may not preclude a higher or better use for the project. These commenters suggested

that this determination is one which should be made by an appraiser and not by HUD before the project is appraised.

The Department does not agree with this point of view, believing instead that Congress never intended to include projects with use restrictions in the eligible low income housing inventory. The purpose of LIHPHA, as noted at page 457 of the Conference Report, is to preserve low income housing which could be lost if an owner exercises its right to prepay the mortgage or terminate the mortgage insurance contract, resulting in the termination of the Federal use restrictions. Since those projects receiving flexible subsidy assistance are subject to use restrictions for the remaining term of their mortgages, it is irrelevant whether the mortgage is prepaid or the insurance contract is terminated. Hence, providing Federal incentives to these projects would not further the purpose of the statute. Congress has also tacitly acknowledged that projects receiving flexible subsidy assistance are excluded from this definition, for purposes of LIHPHA, by adopting HUD's numerical estimate of eligible low income housing, which has never included projects receiving flexible subsidy assistance.

Although, as pointed out by two commenters, the inclusion of projects with flexible subsidy assistance would increase the period of time during which use restrictions will be maintained on the projects, from the end of the term of the original mortgage until the end of the projects' remaining useful life, the Department's position is that this consideration does not have any bearing on the issue of eligibility under the statute. The preservation of these projects as low and moderate income housing will be addressed at the expiration of the mortgage term.

Eleven commenters, mostly State and local governments and nonprofit organizations, stated that if the Department takes the position that projects receiving flexible subsidy assistance are not eligible low income housing, and hence the owners of such projects may prepay their mortgages or terminate the mortgage insurance contracts without complying with the provisions of this subpart, the use restrictions on the projects must still remain in place until the date the mortgage would have been paid, in the absence of prepayment. The Department reiterates here the language contained in the preamble to the proposed rule. Projects encumbered with use restrictions under the flexible subsidy program are not deemed eligible low income housing and are therefore not

precluded by this subpart from prepaying their mortgages. However, even if the mortgage on such a project were prepaid, the owner would still be required to comply with the use restrictions for the duration of the term of the mortgage. Additionally, if the project was sold to another owner during the term of the mortgage, the purchaser would take the property subject to the use restrictions on the project.

Two commenters stated that where HUD has failed, in connection with the provision of flexible subsidy assistance, to require the execution of a use agreement to maintain the affordability restrictions for the remaining term of the project's mortgage, those projects should not be excluded from the definition of eligible low income housing. As previously noted, the requirement of use restrictions in conjunction with flexible subsidy was incorporated into the statute on December 21, 1979, so that projects which received flexible subsidy before that date were not required to have an executed use agreement to maintain affordability restrictions on the project for the term of the mortgage, and hence would be considered eligible low income housing. Projects receiving flexible subsidy after that date are required to have a use agreement in effect or otherwise ensure that the low and moderate income requirement be fulfilled (such as by agreeing to prepay the mortgage debt only with HUD's consent for the full term of the mortgage). While the Department is unaware of any cases, since December 21, 1979, where a use agreement or prepayment prohibition has not been executed as a condition of receiving flexible subsidy assistance, if such a case surfaces, the failure to execute a use agreement or to agree to a prepayment prohibition will not qualify the project as eligible low income housing. The requirement that an owner may receive flexible subsidy assistance only upon its agreement to maintain the affordability restrictions on the project for the mortgage's remaining term is statutory. The Department cannot waive this requirement, and if this statutory requirement has not been implemented due to an administrative error, the Department's position is that the owner nevertheless accepted the flexible subsidy assistance with constructive knowledge of the condition that the use restrictions be maintained on the project, and therefore, that the owner is bound by these restrictions.

One commenter asked for clarification as to what restrictions and obligations are imposed for projects receiving

flexible subsidy assistance. This issue is one which need not be addressed in this rulemaking. The commenter may refer to 24 CFR part 219 or the use agreement on a specific project to obtain this information.

Another commenter questioned whether projects which originally received rent supplement assistance which was later converted to section 8 assistance would be excluded from the definition of eligible low income housing. Sections 221.524 and 236.30 of HUD's regulations prohibit the prepayment of mortgages on projects receiving rent supplement assistance without the Department's consent. Section 229(1)(B) of LIHPHA provides that only projects which are eligible to prepay without the Department's prior approval are deemed eligible low income housing. Thus, projects receiving rent supplement assistance are clearly not eligible to proceed under this subpart. However, a project whose rent supplement assistance was converted to section 8 assistance is no longer subject to the regulations concerning rent supplement assistance. These projects would be governed by the section 8 regulations once the conversion took place. Since projects receiving section 8 assistance are not subject to a prepayment prohibition based on the receipt of such assistance, these projects can qualify as eligible low income housing.

Fair Market Rent

One commenter recommended that this definition state that the fair market rent is adjusted for utilities. As noted in this section of the proposed rule, the fair market rent is the section 8 published existing fair market rent which is adjusted for utilities, where appropriate. The utility adjustment is equal to the personal benefit expense for each unit in a project, as of the most recent HUD-approved rent increase. While no amendment is needed on this point, the definition has been amended to clarify that the fair market rent is not adjusted for utilities for the purpose of determining whether preservation rents exceed the Federal cost limit under § 248.123.

Low Vacancy Area

In response to one comment, the Department has amended the definition of "low vacancy area" to ensure that in measuring the number of vacant units only units in standard condition, which are "decent, safe and sanitary," will be included in the survey. The Department has decided not to accept two comments suggesting that HUD determine that the

vacant units are actually available to tenants who are likely to be displaced. The proposed definition already requires the units to be "vacant available rental units." It would be too cumbersome to require the Department to ascertain for each market area that the units will be vacant at some future time for tenants who will potentially be displaced due to prepayment. Additionally, HUD has rejected the comment recommending that a specific vacancy rate, such as 2-3%, be adopted to determine whether a particular market area qualifies as a low vacancy area. Because market conditions will vary in different areas, this type of threshold has a high potential for inaccuracy. For example, in an expanding market area, 7% vacancy may be considered low, while in a stagnant market, 6% vacancy may be very high. The Department believes that a more reliable estimate could be made by examining the market conditions in each area, rather than by adopting a vacancy rate which would be applicable across the nation.

Nonprofit Organization

A suggestion was made by thirteen commenters that limited partnerships be included in the definition of "nonprofit organization" on the condition that no profits inure to the benefit of the partnership or any member, founder, contributor, partner or individual associated with the partnership. The commenters suggesting this amendment consisted of State agencies, national and regional nonprofits, and a legal services organization. The rationale for including limited partnerships would be to permit these entities to utilize tax credits when purchasing eligible low income housing. The Department's position is that a limited partnership does not satisfy the definition of a nonprofit organization. Any limited partner, regardless of the legal composition of the managing general partners, is still by definition profit-motivated and, therefore, cannot be considered a priority purchaser for purposes of this subpart. It is irrelevant whether the general partner of the partnership is a nonprofit entity or whether there is only one limited dividend or for-profit partner in the partnership. This interpretation does not exclude limited partnerships from eligibility to purchase projects under this subpart. However, they will not have the priority status granted to nonprofit organizations.

Preservation Equity

Several commenters questioned the elements included in the definition of extension preservation equity. One

suggested that the amount of funds in the residual receipts account as of the effective date of the plan of action should be included as part of the owner's equity. Residual receipts belong to the owner of a project, but are not considered part of the project itself for purposes of determining equity. This conclusion is supported by the fact that residual receipts are not normally included in the calculation of the project's value under standard appraisal practices. Extension preservation equity is the value on which an owner's annual rate of return is based, and the Department believes that an owner is not entitled to a return under LIHPHA on the funds deposited in this account.

Another commenter contested the fact that outstanding balances on non-federally-assisted mortgages are deducted from extension preservation equity, resulting in a possible reduction in the annual return to an owner who retains the project and receives incentives. Section 229(8)(A) of the statute requires that all debt secured by the property be deducted from extension preservation equity. The Department recognizes that this differs from the statute's definition of transfer preservation equity, which only requires the outstanding balance of the federally-assisted mortgage to be subtracted. However, since the statute unambiguously makes this distinction between extension and transfer preservation equity, the Department believes that it is left with no authority to alter it and, hence, has not amended either definition.

Preservation Value

The Department does not agree with the comment that extension and transfer preservation value should both be based on the highest and best use of the eligible low income housing. The statutory language, at section 213(b), expressly provides that the extension preservation value is to be based on the highest and best use of the project as residential rental housing, while the transfer preservation value is based on its highest and best use. HUD has no justification for ignoring this statutory distinction.

Priority Purchaser

According to one commenter, the definition of priority purchaser should be modified to give priority to the purchaser who is most qualified to preserve the property, even if this purchaser is a for-profit entity. The definition of "priority purchaser" in the proposed rule tracks the statutory language, which gives priority to resident councils organized to acquire a

project under a HUD-approved homeownership program, and nonprofit organizations and State and local government agencies agreeing to maintain the low income affordability restrictions for the remaining useful life of the project. For-profit entities are not included in the statutory definition of priority purchasers, but are explicitly classified as qualified purchasers in section 231 of the statute. In the Conference Report, at page 464, Congress explained that the reason for this distinction between priority and qualified purchasers is to "establish a genuine advantage for priority purchasers." Therefore, a for-profit organization will not be deemed a priority purchaser.

Additionally, HUD will not give preference to the priority purchaser which is most qualified. Attempting to ascertain which of the priority purchasers is most qualified would entail subjective judgments. The Department will not compare each potential purchaser's qualifications, but rather, will determine whether the potential purchaser has met the minimum standards of a priority purchaser and has submitted an offer which is bona fide. A priority purchaser will be chosen by the owner in accordance with the procedures set forth in § 248.157 of this subpart. If an owner receives more than one bona fide offer from priority purchasers, the owner may accept the highest bid which does not exceed the transfer preservation value. In a mandatory sale, the owner must accept the first bona fide offer at a sale price that is not less than the transfer preservation value.

Related Party

One hundred comments were received by the Department concerning its implementation of the related party rule. The overwhelming response was that the Department's interpretation of "related party" is too broad. The major issues addressed by the comments concerned seller financing, owners, membership on the board of directors of nonprofit purchasers, and nonprofits buying out the interest of their for-profit partners.

Fifty-seven commenters spoke out in favor of seller financing, with none opposed. The main argument they advanced was that the limitation on acquisition loans in § 241.1067(b), stating that the maximum amount of the loan may not exceed 95% of the project's transfer preservation equity, plus, in the case of priority purchasers, any expenses associated with the acquisition, loan closing, and

implementation of the plan of action, would make it difficult for priority purchasers to raise the remaining 5% if sellers were not allowed to lend them the money to complete the transaction. The Department acknowledges that this is an important concern and one which may impede sales to priority purchasers. Therefore, the Department has decided to amend this definition to permit seller financing as long as (1) only take-back financing, and not a grant, is provided by the seller; (2) the maximum amount of the financing is limited to 5% of the project's transfer preservation equity; (3) the financing is not a condition of accepting a bona fide offer or entering into a sales contract; and (4) the financing is provided through an arms-length transaction where the seller has no input in the continued operation of the project. Under this interpretation, a management company that is affiliated with the seller may also provide financing to a purchaser; however, the terms of the loan must meet the four conditions required for seller financing, and in addition, the financing must not be conditioned on the retention of the management company to manage the project.

The Department notes that even though the acquisition loan is limited to 95% of transfer preservation equity, plus, for priority purchasers, any expenses associated with the acquisition, loan closing, and implementation of the plan of action, the Department may provide a grant to a priority purchaser, pursuant to § 248.157(o), to cover the remaining 5% of the sales price. If the Department provides a grant equal to, or more than, 5% of transfer preservation equity, then no seller financing will be needed and, therefore, will not be permitted.

According to thirteen commenters (eight national or regional nonprofit foundations or organizations, three State or local government agencies, one tenant, and one attorney), owners or former owners should be permitted membership on the boards of nonprofit purchasers. In addition, members of Congress cited the Conference Report as evidence of their intent that owners be permitted to sit on nonprofit boards. The Conference Report, at page 469, states that if "an individual is involved in the ownership of an assisted project and also participates, on the board of directors of a nonprofit organization that seeks to acquire a project from the owner, this participation alone should not trigger the application of the related party rule." This view was also expressed by members of Congress in the Congressional Record, on October 26, 1990, at page S.17137. In the face of

this expression of legislative intent, despite the fact that this intent is not demonstrated in the statute itself, and because of the strong public support evidenced in the comments, the Department has amended the definition of related party to permit owners, and former owners, to be members of the board of directors of nonprofit purchasers, as long as the owners and former owners are nonvoting members, sit in their personal capacity and do not receive any compensation for their board membership.

Eighteen comments were received by the Department suggesting that nonprofit organizations should be permitted to buy out the interest of their limited dividend and for-profit partners. These comments were made by seven nonprofit organizations, four of which are organized on the national level, five State and local government agencies, three tenants, an attorney, and members of Congress (See colloquy between Senators Kerry and Cranston at Congressional Record, October 26, 1990, p. S.17137). As long as the transaction is at arm's length, the Department has decided to permit nonprofit organizations to buy out their partners, interest in eligible low income housing pursuant to the provisions of this subpart. The definition of related party has been revised accordingly.

Remaining Useful Life

One commenter suggested that a remaining useful life of 50 years may be unrealistic for some projects. LIHPRIA requires that in order to receive incentives the owner or purchaser of eligible low income housing must agree to retain the low income affordability restrictions on the project for its remaining useful life. The determination of when the remaining useful life of a particular project terminates is left to the Department's discretion. However, the owner is entitled to petition the Department for a determination that the project's useful life has expired. Since, pursuant to section 222(c) of the statute, owners are not permitted to exercise their right to petition for 50 years from the date of approval of a plan of action, the Department has assumed that Congress expects the remaining useful life of eligible low income housing to be at least 50 years from the date of plan of action approval.

Another commenter questioned what happens to rent levels if a project's remaining useful life exceeds the mortgage period. The Department has concluded that once the mortgage on a project has been paid in full, whether through prepayment, or at the end of the original amortization period, rents will

be lowered commensurate with the decrease in debt service on the property. The decrease in rent will not affect an owner's rate of return, but may decrease the amount of Federal subsidy provided to the project, and at the same time protect the affordability of the units for low and moderate income families.

One commenter questioned what the Department's policy would be if a project covered under a plan of action is destroyed or demolished during the project's remaining useful life and the insurance proceeds are insufficient to rebuild the project. There are three options which could be considered. The owner could be required to rehabilitate the project to its original condition through the use of the insurance proceeds and subsidies provided by HUD and other sources; the owner could be required to pay-off the remaining balance of the mortgage with the insurance proceeds without rebuilding the project; or if there is no mortgage on the project at the time of the destruction, the owner could be permitted to retain the insurance proceeds without rebuilding the project. Many factors could influence this decision, such as the number of years that would have been left of a project's remaining useful life if the destruction had not occurred, the extent of the destruction, the cost of rebuilding the project, the need for low income housing in that particular locality at the time of the destruction, etc. At this time, the Department declines to make a fixed policy concerning the impact of destruction or demolition on a project whose useful life has not ended, and intends to examine this issue on a case-by-case basis as the need arises.

Resident Council

A commenter recommended that the definition of "resident council" should be amended to state that it is an organization open to all residents and only to residents. In response to this recommendation, the Department has amended the definition accordingly. The Department has declined, however, to require that a resident council represent a minimum proportion of the tenants, as suggested by the same commenter. The Department feels that there is no need to require a certain level of representation for the formation of a resident council. If tenants wish to organize a resident council, they may do so even if only a minority of the tenants participate. If the resident council intends to purchase the project under a resident homeownership program, then a minimum indication of support is required under § 248.173(c), in connection with submitting a bona fide

offer. Additionally, if the resident council submits a bona fide offer under § 248.157 or § 248.161, then it must provide an earnest money deposit, which will also demonstrate tenant support of the council's actions.

Special Needs Tenants

In order to provide additional protection to tenants who may be unable to find vacant affordable housing in the event of prepayment, the Department has expanded the definition of "special needs tenants" in response to the suggestion made by two commenters. The interim rule provides that, in addition to those who are elderly (at least 62 years of age) and/or disabled, special needs tenants include families of five or more persons which require units containing three or more bedrooms. The Department has added large families to this definition due to the shortage of large multifamily rental units in many market areas, making it difficult for these families to find suitable replacement housing. However, contrary to one commenter's suggestion, the Department has declined to expand this definition to include minority households and single parent families. Title VI of the Civil Rights Act of 1964, the Fair Housing Act, Executive Order 11063, section 504 of the Rehabilitation Act of 1973, as well as 24 CFR parts 1, 100, 107, 110 and subparts I and M of part 200, should provide sufficient protection to minority families and single parent families seeking replacement housing. Additionally, inclusion of these household types in the definition of special needs tenants would make this classification almost meaningless, given the large number of these household types which reside in eligible low income housing.

Tenant Representative

Twelve comments were received concerning the definition of "tenant representative." Several commenters sought clarification as to the difference between a resident council and a tenant representative. For purposes of this subpart, a tenant representative is an individual or organization who represents some or all of the tenants, for purposes of receiving information under § 248.181. A tenant representative could be a tenant, a housing advocate, legal aid, or a nonprofit organization. A "tenant representative" is not necessarily designated to represent tenants in negotiations between the owner and/or HUD or in purchasing the project. The tenant representative represents the tenants for purposes of receiving notifications and information under this subpart.

In comparison, a resident council is an organization composed solely of tenants, whose function is to serve as the governing body of a tenant association; it represents the tenants in negotiations on purchasing the project on behalf of the tenants.

The proposed rule requires that tenant representatives represent at least 50% of the occupied units of a project. The Department received seven comments claiming that this number is too high and one comment supporting this percentage. Those against the 50% limit were State and local government agencies, nonprofit organizations and an attorney, while the commenter in favor was a State agency. No response was received from any tenants. Upon reconsidering the issue, the Department has decided to omit the requirement that a tenant representative must represent a certain minimum percentage of the tenants. Since, as previously noted, a tenant representative's function under the regulation is purely informational, the Department feels that there is no need to require a minimum showing of support by the tenants. While this may mean that more than one tenant representative will exist for each project, this should not put a substantial burden on the Department or owners who are required to provide copies of documents to those tenant representatives. In order to identify these representatives, tenants are instructed, in the notice of intent, submitted pursuant to § 248.105, to provide the owner and HUD with the name(s), address(es), and telephone number(s) of their representative(s).

The Department notes that a tenant representative, whose function is to supply tenants with the information it receives pursuant to this subpart, must make available this information to all tenants who request it.

Section 248.103 (General Prepayment Limitation)

A comment was received suggesting that a list be compiled of all insured projects falling within the scope of paragraph (c) of this section, which restricts mortgagees from foreclosing the mortgage on, or acquiring by deed in lieu of foreclosure, eligible low income housing. The Department has compiled a list of eligible low income housing as a result of a survey of local field offices conducted earlier this year. Mortgagees may contact the field offices to request a copy of this list.

Another comment was received suggesting that a mortgagee letter should be issued by the Department, and that such a mortgagee letter should instruct the mortgagee on how to correctly

proceed under this subpart and should constitute a defense against any charge of improper action directed at a mortgagee. The Department issued Mortgagee Letter 91-25 on May 28, 1991 which indicates the mortgagee actions which would constitute a violation under this subpart. This letter will not constitute a defense to any wrongdoing on the part of the mortgagee. Furthermore, administrative action may be taken by the Department, pursuant to paragraph (e) of this section in the event of any violation.

Section 248.105 (Notice of Intent)

Management organizations and national nonprofit foundations submitted seven comments regarding the prohibition of certain projects with mortgages which are, or have been, in default, from filing a notice of intent under this section. One commenter suggested that the Department accept notices of intent filed by owners whose mortgages are in default at the time of filing, as long as the default can be cured by the receipt of incentives. Section 212(c) of LIHPHA precludes owners from submitting a notice of intent if the mortgage fell into default after the enactment date of the statute or if the mortgage fell into default prior to the enactment date and the owner does not agree to recompense the appropriate Insurance Fund in the amount of any loss. For those mortgages which are insured and that have fallen into default on or after the enactment date, the Department has determined they are not in default for purposes of filing a notice of intent unless the mortgages have been assigned to the Commissioner as a result of the default. Hence, certain owners with insured mortgages may be able to file a notice of intent under this section while in default. However, pursuant to § 248.145(a)(11), the owner must cure the default as a condition of the Department's approval of a plan of action. Since the default must be cured prior to plan of action approval and incentives will not be provided until after the plan of action is approved, incentives may not be used to cure the default.

The proposed rule provided that an owner of a project whose mortgage was in default prior to November 28, 1990 and continued in default past that date would be ineligible to file a notice of intent if the mortgage has been assigned to the Commissioner as a result of the default or if the default occurred while the mortgage was held by the Commissioner. One commenter questioned HUD's statutory authority

for treating projects whose mortgages continued in default past the date of enactment in the same manner as projects whose mortgages first fell into default after the date of enactment. HUD believes that statutory authority for its position lies in section 212(c)(2) of the statute, which provides in part that an owner shall not be eligible to file a notice of intent if the mortgage covering the housing—

(A) fell into default before, but is current as of, [November 28, 1990]; and (B) the owner does not agree to recompense the appropriate Insurance Fund, in the amount the Secretary determines appropriate * * *.

HUD construes this provision as establishing that owners of projects whose mortgages fell into default prior to November 28, 1990 are ineligible to file a notice of intent, except in cases where the owner brings the loan current by November 30, 1990 and agrees to recompense the Secretary for losses to the Insurance Fund. Under an alternative reading of the statute, the quoted language would be applicable only to loans which fell into default prior to November 30, 1990 but were current as of such date. If this interpretation were correct, there would be no provision in section 212(c) addressing projects whose mortgages coo that the workout agreement itself is not current, the impact on HUD is the same as a default under the mortgage. Therefore, if an owner is ineligible to file a notice of intent under subparagraph (a)(3) of this section, because it has failed to keep the workout agreement current as of the enactment date, then the owner is also ineligible under section 212(c)(2) of the statute because the mortgage has not been current as of that date.

Under subparagraph (a)(4) of this section, an owner whose mortgage fell into default prior to the enactment date and which has been current as of that date may submit a notice of intent if the owner agrees to recompense the insurance fund for any losses. One commenter suggested that the owner reimburse the fund for lost interest due to the default. There should not be any lost interest due to a default. While a loan is in default, interest is still charged against the unpaid principal balance of the mortgage. The owner will be required to pay this accrued interest under the terms of a workout agreement. The commenter also suggested that the owner reimburse HUD for any costs involved in recasting the delinquent principal and interest, as well as requiring the owner to replenish reserves or escrows for which deposits were waived as a result of the default.

Any cost involved in recasting principal and interest is an administrative cost to the Department, not a cost to the insurance fund, and HUD does not have the statutory authority to require the owner to reimburse the Department for any costs which are not losses to the insurance fund. The waiver of any deposits to reserves and escrows because of a default likewise does not constitute a loss to the insurance fund. Again, the Department does not have the authority to require an owner to make these deposits as a condition to filing a notice of intent.

Another commenter suggested that the Department and the owner jointly determine the amount which needs to be reimbursed to the insurance fund. Section 212(c)(2)(B) of the statute states that to be eligible to file a notice of intent, the owner shall agree to recompense the insurance fund "in the amount the Secretary determines appropriate." Thus Congress gave HUD the discretion to determine this amount. The Department has, however, decided to permit the owner more latitude in the timing of the reimbursement. The preamble to the proposed rule requires that the reimbursement occur prior to filing a notice of intent. The Department has extended this to permit the owner to reimburse the insurance fund at any time prior to the date a plan of action is approved. If reimbursement does not occur prior to this time, the plan of action will not be approved. No changes to the proposed rule are needed in order to implement this procedure.

A commenter inquired whether an owner must file a notice of intent upon reaching the project's eligibility date under LIHPHA, or else lose its eligibility to proceed under this subpart. Pursuant to this section, a notice of intent may be submitted by the owner within 24 months of the 20th anniversary date of the final endorsement of the mortgage. The owner has no obligation to file at this time and may file at any time during the remaining term of the mortgage.

Paragraph (b) of this section of the proposed rule states that a notice of intent must include the name, number and location of the project, a brief latitude in the timing of the reimbursement. The preamble to the proposed rule requires that the reimbursement occur prior to filing a notice of intent. The Department has extended this to permit the owner to reimburse the insurance fund at any time prior to the date a plan of action is approved. If reimbursement does not occur prior to this time, the plan of action will not be approved. No changes

to the proposed rule are needed in order to implement this procedure.

A commenter inquired whether an owner must file a notice of intent upon reaching the project's eligibility date under LIHPHA, or else lose its eligibility to proceed under this subpart. Pursuant to this section, a notice of intent may be submitted by the owner within 24 months of the 20th anniversary date of the final endorsement of the mortgage. The owner has no obligation to file at this time and may file at any time during the remaining term of the mortgage.

Paragraph (b) of this section of the proposed rule states that a notice of intent must include the name, number and location of the project, a brief description of the owner's plans for the project, the reason the owner intends to prepay the mortgage, terminate the insurance contract, or extend the affordability restrictions, and a request to tenants that they notify the Department and the owner of the existence of any tenant representatives. The Department received four comments requesting that this language be modified. Two commenters requested that State or local governments also be notified by the tenants of the existence of any tenant representatives. The Department has amended this paragraph of the proposed regulation to request tenants to provide the State or local government official to whom the owner sent a copy of the notice of intent with the names of any tenant representatives.

One commenter suggested that the Department eliminate the requirement that an owner must state its intentions for the project under the preservation program. While the notice of intent is not meant to bind an owner to a particular course of action, the Department believes that a statement of an owner's intentions with regard to the preservation of the project is relevant to the prepayment process. It will provide HUD with some indication of the time and financial resources which will be required to process the plan of action. Tenants, State and local agencies and other interested parties will also be able to become aware of an owner's preliminary intentions if this information is included in the notice of intent. Therefore, the Department has retained this requirement.

One commenter recommended that an occupancy profile be included in the notice of intent. The proposed rule requires submission of the profile as part of the plan of action under § 248.135 and the Department sees no reason for requiring the submission of an occupancy profile at the time a notice of

intent is filed. An occupancy profile is required only if the owner extends the use restrictions on the project, either by retaining the project or transferring it to a qualified purchaser. At the time a notice of intent is submitted the owner may be uncertain as to whether it will extend the restrictions, and if a profile is required at that time, it may be prepared needlessly. Additionally, because an occupancy profile must reflect the project occupancy as of the date a plan of action is approved, the profile will tend to be more accurate if it is submitted closer to that date. If it is submitted with the notice of intent, it is more likely that another profile will need to be compiled later in the process.

Other commenters suggested that the notice of intent be written comprehensibly, in plain English, so it is understandable by relatively uneducated tenants and recommended that the Department consult with tenants or nonprofit organizations for assistance in preparing the notice. The Department acknowledges the importance of submitting notices to the tenants which are understandable and will not cause alarm. The Department has drafted the language for the notice, which will be included in the Department's administrative guidelines, and has taken this concern into account by listing all of the possible outcomes for the project, but also reassuring tenants that the Department wants to work with the owner in preserving the project. If tenants or nonprofit organizations are still concerned about this matter, they are welcome to provide the Department with their specific comments on how the notice can be clarified and made easier to understand.

Paragraph (c) of this section of the proposed rule requires that the notice of intent be simultaneously submitted to the State or local government, the mortgagee, the tenants, and any tenant representatives known to the owner. Fifty-six comments were received by the Department concerning this provision. The majority of these comments addressed the issue of translating the notice of intent for non-English-speaking tenants. The proposed rule states that the notice of intent shall be translated if a substantial number of the tenants in the project do not speak English. Commenters questioned the meaning of "a substantial number" and suggested amounts, such as five or ten percent of the total number of tenants. Others stated that translation should be required upon the request of any tenant or group of tenants. Also, commenters suggested that translations be posted in the affected buildings and that HUD

should do the translating rather than require owners to take on this responsibility. The Department has decided to resolve this issue by adopting the suggestion of one commenter. The Department will provide owners with a cover sheet to be attached to the notices of intent delivered to the tenants. The cover sheet shall instruct tenants, in the necessary languages, that if they require a translated copy of the notice of intent, they may contact the owner of the project who will request an appropriate translation from the local field office. The owner's address and telephone number will be indicated on this sheet. The owner will tabulate the number of translated copies needed and request them from the local field office, which will prepare the translations. The owner will be responsible for making the translated copies provided available to the tenants. This resolution will ensure that all tenants have the opportunity to receive an accurately translated copy of the notice of intent and will keep the burden of preparing the translation from falling on the owners.

A large number of the commenters on this section were concerned with the method of delivery of the notice of intent to the tenants. Three commenters suggested that the proposed rule's requirement that notices of intent be sent to each tenant and any tenant representative imposes an additional burden not required by the statute. Fourteen other commenters, however, suggested strengthening the proposed rule's standard by requiring that the notices of intent be sent by certified mail or by the local HUD field office to ensure their receipt by each tenant. Another commenter stated that sending the notices of intent to tenants will only confuse them, and they should not be sent at all.

Section 230 of LIHPHA requires that all notices to the tenants be posted in the affected buildings and sent to any tenant representatives. As noted in the preamble to the proposed rule, the Department interprets this as a minimal standard of notice. For purposes of notifying tenants of the submission of a notice of intent, an additional requirement was adopted in the proposed rule requiring submission of the notice to each tenant in order to identify tenant representatives who may not be known to the owner. The purpose of this requirement is to ensure that all tenants are made aware of the owner's submission and to request tenants to provide the names and addresses of all tenant representatives to HUD and the owner. At this stage in the preservation process, it is very likely that the

Department and the owner are unaware of the existence of any tenant representatives and without requesting this information from the tenants, HUD and the owner may unintentionally fail to fulfill the statutory requirement by not sending notices to these representatives. Requesting this information in the first notice will resolve this problem.

In response to the comments, the Department has decided to clarify the language in the proposed rule by requiring that the notice be sent to each "occupied unit," rather than each tenant. The Department does not wish to adopt a specific standard for delivery, however. The statute puts the responsibility of notifying the tenants on the owners, and the owner must certify that it has complied with the notice requirements when submitting the notice of intent. The manner in which the requirements are fulfilled, whether by sending the notice certified mail, regular mail, or hand delivery to each unit, or unit's mailbox, is left to the owner's discretion. The owner should be aware, however, that if it fails to comply with the notice requirements, the notice will be deemed invalid, and the owner will have to resubmit a new notice in order to proceed under this subpart. The Department believes that this is a sufficient enforcement mechanism, making it unnecessary for HUD to impose a stricter delivery standard.

Four commenters were concerned about delivery of the notice of intent to State and local governments. Section 212 of LIHPHA requires the owner to simultaneously submit the notice of intent to "the appropriate State or local government for the jurisdiction in which the housing is located * * *." Three comments were received suggesting that in the proposed rule, the term "State or local" should be replaced with "State and local." The statute provides the owner with the option of sending the notice to either the State or the local government. It does not require notification of both, and the Department has decided not to restrict this option. Another commenter suggested that the language of the proposed rule be amended to state that not only the chief executive officer, but also any officer designated by executive order or State or local law, should be sent a copy of the notice. This would ensure that the proper individual is made aware of the notice. The Department has added this requirement to the rule.

Other commenters suggested that the notice should also be sent to tenant advocacy groups, legal services organizations, holders of seller

financing, and limited partners of the owner. Tenant advocacy and legal services groups would be sent copies of the notice of intent only if they are designated tenant representatives, as that term is defined under § 248.101, otherwise an owner is not required to send them copies of the notice of intent. Additionally, with regard to limited partners, the Department presumes that an owner is acting within its authority by submitting a notice of intent and has notified any interested parties of its submission. The Department cannot enforce a requirement that partners be notified of the notice of intent since HUD may not have knowledge of the existence of these parties. This section of the proposed rule does require notification of mortgagees. Therefore, the proposed rule has not been amended in response to these comments.

Notices of intent will not be considered properly filed for purposes of this subpart unless the notification requirements specified in paragraph (c) of the rule are fulfilled. However, the failure of an owner to comply with any non-federal notification requirements will not invalidate a notice of intent. In the case of owners who filed notices of intent pursuant to section 604 of the statute and § 248.5 of subpart A, in order to preserve the option of proceeding under either this subpart or subpart C, the notification requirements in the transition notice issued by the Department on December 11, 1990, as Notice 90-88, "Transition Rule for Filing Notices of Intent Pursuant to Section 604(a) of the Cranston-Gonzalez National Affordable Housing Act of 1990," must have been complied with. If an owner failed to comply with the notice requirements set forth in the transition notice, the owner will have failed to preserve its option of proceeding under ELIHPA. An owner who properly filed a notice of intent under the transition provisions must comply with the notice requirements of this section or § 248.211 upon making its election to proceed under this subpart or subpart C in order to maintain the validity of the notice of intent.

If an owner files a notice of intent under this section and the Department determines that the owner is not eligible to proceed under this subpart, then HUD will notify those persons and entities listed in paragraph (c) of this section of the interim rule that the notice is invalid. The purpose of this requirement is to ensure that tenants and State or local governments do not needlessly expend time and resources in anticipation of purchasing the project or providing financial assistance to the project.

Section 248.111 (Appraisal and Preservation Value of Eligible Low Income Housing)

This section of the proposed rule establishes the appraisal process for valuing eligible low income housing under this subpart. Two commenters took issue with the need for the preservation process to include appraisals at all. However, since the performance of appraisals is mandated in section 213 of the statute, the Department has no authority to omit this requirement.

One commenter stated that the appraisal process is expensive for both the owner and HUD and is very time-consuming and imprecise. This commenter requested that section 8 fair market rents (the "FMRs") should be used instead of appraisals. The Department sees no reason to supplant the appraisal with FMRs. While FMRs are a good measure of rents in a metropolitan area, they are not generally an acceptable measure of value. The most accurate manner to determine a project's value is through independent and professional appraisals.

The second commenter asked that owners be permitted to sell their projects for what a willing buyer will pay a willing seller, and not be limited to the transfer preservation value. By statute, the appraisal process determines fair market value and appropriate compensation for an owner. Under a voluntary sale an owner may sell its project for no more than the transfer preservation value. The appraisal is central to the LIHPHA preservation strategy because it fairly establishes the preservation value upon which the Department will base incentives and compensation.

Two commenters said that tenants should be allowed to perform their own appraisal. The Department will not consider such tenant appraisals in determining preservation value since it does not have the authority to do so under LIHPHA. HUD is confident that the process of reconciling HUD's and the owner's appraisals, possibly with a third appraisal, will objectively establish preservation value. As is discussed in response to related comments, the separately published Appraisal Guidelines do provide tenants with opportunities for appropriate input into the appraisal process.

One commenter recommended that HUD permit qualified appraisers to determine the fair market value of the property without further guidance from the Department. The Department notes that the statute requires it to publish

appraisal guidelines to implement assumptions and procedures mandated by statute and the preservation program process.

The Department received 19 comments asking that these Appraisal Guidelines be published for notice and comment. These guidelines were published for notice and comment on December 12, 1991 at 56 FR 64932. One commenter said that the lack of defined appraisal standards made it appear less likely that owners will realize their equity. Appraisal standards have been defined in the published Appraisal Guidelines.

We received approximately two dozen additional comments that dealt with issues specific to the Appraisal Guidelines. These comments were forwarded to HUD staff preparing the Appraisal Guidelines. They have been taken into consideration and are not discussed here. Comments that apply both to this regulation and the Appraisal Guidelines are considered here.

One commenter suggested that among the qualifications for an appraiser should be that it not be affiliated with the original mortgage lender or the lender that will be used for the section 241(f) loan. The Department agrees that the appraiser should not be involved in a situation that may constitute a conflict of interest. At the time of the appraisals, however, no mortgagee for the rehabilitation, equity take-out, or acquisition loans will have been identified. Thus, the Department has amended § 248.111(c)(1) of the regulations to require that appraisers not be affiliated with the current mortgage holder.

A commenter said that it may be an undue burden to have the requirement that the appraiser be certified or licensed in states where certification is not required. The Department declines to change this requirement since under title 11 of the Federal Financial Institutions Reform, Recovery and Enforcement Act of 1989, Public Law 101-73, 12 U.S.C. 3310 *et seq.*, appraisals performed in connection with federally-related transactions must be conducted by individuals certified or licensed by the State in accordance with the Act's requirements. States are required to have licensing procedures and standards in place by December 31, 1992.

Two commenters said that the assessment of rehabilitation costs, or capital needs assessment, should be done by a competent estimator with experience in multi-unit construction. Similarly, five commenters said that HUD should require an independent

engineering survey and a capital needs assessment. Another suggested that the analysis of replacement reserves be done by professional architects or engineers. These arguments, among others, persuaded the Department to have its own Architectural and Engineering staff or contractor undertake the capital needs assessment and reserves analysis instead of leaving these to each appraiser. The joint inspection format, discussed in the separately published Appraisal Guidelines, ensures that all concerned and knowledgeable parties have input to the capital needs assessment. At the same time, having a single, experienced estimator ensures that appraisers have in common a realistic, professional rehabilitation cost estimate and that eventual rehabilitation costs do not differ radically from those used at this stage to determine preservation value. It should be noted that, after initial reserve funding requirements are set by a formula described in the Appraisal Guidelines, future annual contributions will be determined periodically by HUD upon request of the owner.

Three commenters said that the Department should consider in its guidelines those applicable regulations and covenants that affect value, and that these should be furnished by owners' lawyers and appraisers. One commenter asked that the analysis of laws and contracts that affect value be done by lawyers. The Department agrees that such analyses should be done by competent professionals, but believes that it is the appraisers' responsibility as part of the appraisal assignment to collect such input from the appropriate sources and, using the Appraisal Guidelines provided by the Department, determine the effect of any covenants or use restrictions on value.

Two comments suggested that the appraisal guidelines contain specific instructions for estimating "conversion costs" and conducting capital needs assessments. The Department has published specific instructions regarding conversion costs and capital needs in the Appraisal Guidelines. The Department will conduct a capital needs assessment as part of the appraisal that will determine the costs of bringing the property back to original physical standards. This assessment will be provided to the appraisers.

A commenter recommended that the determination of operating expenses, reserve requirements, and rehabilitation needs in conjunction with HUD's review and approval of a plan of action be separate from the determinations made at the appraisal stage. Operating

expense estimates and rehabilitation needs identified in the plan of action will receive a separate review and are expected to be more detailed than those conducted as part of the appraisal.

Three commenters suggested that HUD needs to distinguish between rehabilitation costs that an owner would incur to convert the project to a higher and better use for purposes of preservation value as opposed to rehabilitation costs necessary to preserve the project as low income housing for its remaining useful life. Another commenter questioned why, since the appraised value can be used to determine the amount of market rents, section 241 loans, etc., the proposed regulations say that the amenities and upgrades necessary to bring the project to its highest and best use will not be financed as part of the plan of action. Although fair market value is estimated as if the amenities and upgrades required to attract a market rate tenancy are added, they are not actually added since the project is not converted to market rate rental. These upgrades influence actual rents and equity or acquisition loan amounts only because the owner must be fairly compensated for preserving the housing for a low income tenancy. The rehabilitation necessary for the preservation of the affordable housing as decent, safe, and sanitary housing is independent of the upgrades necessary to attract a market-rate tenancy, and will be determined by the Department after a joint inspection conducted by HUD and the purchaser or owner during the preparation and review of the plan of action.

Two commenters recommended that the appraisal process include input from or participation of resident councils. Another commenter asked that tenants be permitted to submit information to HUD on the physical condition of the project. In response, the Department has provided in the Appraisal Guidelines opportunities for appropriate input before and during the project's inspection for capital needs. Two additional commenters suggested that HUD add a provision to the regulations to require that HUD consider any information submitted by a resident council. The Department will consider comments from resident councils prior to the inspection, but due to the statutory time frames established in section 213, it cannot lengthen the appraisal process in order to provide a formal comment period.

A similar comment asked that the appraisal process include input from the State housing finance agency. The Appraisal Guidelines provide that

appraisers may place reliance upon the assessment of conversion costs (over and above the capital needs assessment) determined by an appropriate State agency, if such an agency has been approved by the Secretary.

Three commenters suggested that the Appraisal Guidelines should require the consideration of local ordinances or restrictions. Reflecting the statute, the Appraisal Guidelines will require the consideration of local ordinances and use restrictions. The same three commenters said that the guidelines should allow some opportunity for local government or tenant input into the appraisal instructions. Since the Appraisal Guidelines are being published for comment, local and tenant groups have an opportunity to comment on them. If the commenters intended that these groups have the opportunity to comment on the appraisal instructions sent out to the appraisers of each project, the Department feels that this would be unnecessary and would lengthen the process without justification. As discussed earlier, the Department has provided for appropriate participation of State and local government entities and tenant groups prior to and during the inspection of the property.

A commenter stated that the estimator who will calculate the rehabilitation costs should obtain and consider any inspection reports issued by the State or local government or by HUD. The Appraisal Guidelines clarify that HUD Architectural and Engineering staff or contractors will determine rehabilitation costs. The Department would expect State and local government to provide any such input at or prior to the time of the joint inspection.

The Department received three comments recommending that the appraisal take into account as conversion costs restrictions imposed by LIHPHA itself on projects that prepay their mortgage or voluntarily terminate their mortgage insurance. Examples would include relocation costs for tenants, continued occupancy, etc. The Department has not accepted the recommendation, since the essential purpose of the LIHPHA appraisal process is to determine the value of the project in the absence of the constraints imposed by LIHPHA itself. However, State or local restrictions on conversion will be taken into account in the appraisal.

A commenter stated that the regulations do not take into account the fact that historical operating expenses may include extraordinary nonrecurring

expenses and that an owner's accountants may characterize some capital expenditures as operating expenses in order to avoid phantom income. The Appraisal Guidelines will instruct appraisers to eliminate extraordinary or nonrecurring expenses from the operating expense analysis. In cases where capital expenditures have been allowed by auditors as operating expenses, the Department will assume the allowance is valid.

The Department received two comments stating that the three year rule on operating expenses should be a guide only and that HUD should instruct appraisers to look at the real operating expenses expected after conversion. Since the three year rule on operating expenses is a statutory provision, the Department lacks the authority under LIHPHA to change this rule. Again, in the interests of determining "real operating expenses," the Department instructs appraisers in the Appraisal Guidelines to identify extraordinary or nonrecurring expenses. Section 248.111(e) has also been revised to clarify when and for what purposes appraisers may use the most recent year's operating expenses instead of the three year historical average.

A commenter also pointed out that in cases where the project's highest and best use is something other than residential rental use or cooperative ownership, it makes little sense to require a comparison to the three year average operating expenses of the property as a rental. The Department has accordingly revised the regulation to allow for the use of projected operating expenses alone in such cases.

The Department received three comments stating that if the cost of rehabilitation is to be deducted from value, then the replacement reserve funds available to be applied towards that cost must be offset against the deduction. The commenters suggest that the amount of the replacement reserves be included in the calculation of preservation value. The Department has decided not to include replacement reserves in the calculation of preservation value. As in other sales, upon the transfer of a property under LIHPHA, reserve for replacement and other escrows are either purchased or retained by the owner and thus not included as part of the value of the property.

One commenter suggested that special rehabilitation needs be considered when computing the preservation value. The need to pay for seismic reinforcement or removal of toxic materials, such as asbestos, are among the most critical examples. Lead-based paint and

asbestos abatement are included in the capital needs assessment performed by the Department. Other toxic material removal and seismic reinforcements will be included in the capital needs assessment if specified by State or local laws or codes.

One commenter stated that if the appraisal demonstrates that there is no preservation equity in the project, HUD's regulations do not specify the result. The Department has determined that if a project has no preservation equity, it cannot prepay, except pursuant to approval of a plan of action filed under § 248.141, nor is it eligible for any incentives under LIHPHA. LIHPHA is designed to provide owners with a fair market return on their investment through the receipt of incentives provided by HUD in exchange for maintaining low income affordability restrictions for the project's remaining useful life. If a project has no preservation equity, there is no basis on which to increase an owner's return. In these cases, if calculated, the new annual authorized return would be less than the current allowable distributions. Since owners have no preservation equity, permissible incentives under section 220(b) are, therefore, not necessary to provide owners with a fair market return on their investment. Owners, of course, could apply for such "incentives" as additional section 8 assistance or capital improvement loans under other program authorities designed to maintain the stock of HUD-assisted or insured loans.

Two commenters were concerned that priority purchasers were precluded from any involvement in setting the preservation value of a project. There is no provision in the statute for priority purchasers to be involved in setting the preservation value. The preservation value is established objectively in the appraisal process. Any purchaser in a voluntary or mandatory sale may submit an offer at less than the preservation value. Further, since HUD, with the possible exception of the five percent equity requirement, will provide insured financing and support the debt service on acquisitions, purchasers have less interest in the purchase price than they would in an ordinary transaction. Thus, the Department has decided not to accept the commenters' recommendation.

One commenter said that using the highest and best use appraisal for transfer preservation value, but the highest and best use as market rate rental for extension preservation value, will make selling the property more attractive to owners. Fair market values for transfer and extension are explicitly

defined by LIHPHA, and the Department has no authority to change them. In most situations, the highest and best use of a property will be market rate rental housing, so that the extension and transfer value will in fact be identical. It should be noted that other differences between the transfer and extension options will also influence owner decisions, e.g., tax consequences, processing times, and section 241(f) loan amounts.

Two commenters suggested that the owner should receive a copy of HUD's appraisal. The Department agrees, and has amended the regulation accordingly.

Fifteen comments requested that tenants should have the right to comment on the appraisals before they become final. The Department disagrees since this would make the appraisal process too burdensome and time-consuming. Furthermore, the determination of appraised value is best handled neither by HUD, nor the owner, nor the tenants, but by independent, professional appraisers. Tenants will be invited to HUD's inspection of the property for the capital needs assessment and may provide useful information about the physical condition and rehabilitation needs of the property, which will help the appraisers make accurate value determinations.

Section 213(a)(3) of the statute provides that the Secretary may approve an "extension" or "transfer" plan of action to receive incentives only based upon an appraisal that is not more than 30 months old. Five commenters were concerned that the appraisals could not be updated or adjusted during their thirty-month lifespan. Property values may change in this time period and owners could receive incentives based on an outdated property value. The Department recognizes the commenters' concerns but has been unable to formulate a workable and statutorily permissible mechanism to alleviate them. Preservation values drive the preservation process from the start. The resulting aggregate preservation rents are compared to the Federal cost limit to provide project-specific information to owners on their options. The property may be offered for sale for up to 15 months, and potential purchasers are informed of available assistance based on the preservation value and Federal cost limit. Reestimating value late in the process would change the ground rules for all parties concerned and unnecessarily lengthen the process. Adjusting preservation value would mean adjusting aggregate preservation rents and recomparing them to the Federal cost limit, which would also

have changed since the original analysis. Moreover, property values are not subject to simple inflation factors that could be applied to all properties. An attempt to reach agreement on reevaluation might require multiple appraisals. Finally, the Department believes that the language of section 213(a)(3) implies an assumption on the part of Congress that no readjustment of preservation values is warranted as long as the plan of action is approved within 30 months from the date of the appraisal.

Section 243.121 (Annual Authorized Return and Aggregate Preservation Rents)

Fifteen commenters, composed of six national and regional nonprofit organizations, two State agencies, three law firms representing owners, two owners, one consultant, and members of Congress contested the Department's position concerning the annual authorized return which an owner may receive on its equity in the project. Paragraph (a) of this section of the proposed rule sets an annual authorized return of 8% for owners who retain the project and receive incentives in exchange for extending the project's affordability restrictions. This provision repeats, almost verbatim, the language of section 214 of the statute. In addition, § 248.153(a)(1), which is based on section 219 of the statute, provides that the Commissioner shall "enter into such agreements as are necessary to enable the owner to receive the annual authorized return." The commenters have taken issue with the Department's interpretation of these provisions.

As noted in the preamble to the proposed rule, the Department's interpretation of the statute is that an owner is authorized to receive an 8% return, but is not guaranteed that return on an annual basis. The Department intends to set an annual authorized return of 8%, as mandated in section 214 of the statute, but cannot ensure that an owner will receive that level of return annually. The Department has not changed its position in the interim rule. The language of the statute, and the Conference Report at page 464, support the Department's interpretation by stating in section 219 that after HUD approves a plan of action, it should enter into such agreements so as to "enable" an owner to receive the annual authorized return. The common meaning of the term "enable" is to provide with a means, give an opportunity, make possible, or provide the capacity; it does not mean guarantee.

The Department, as set forth in paragraph (a) of this section, will set the

annual authorized return equal to 8% and will provide incentives sufficient to enable an owner to receive that return. Because the statute requires, in section 222, that rent increases be phased-in when the increase is substantial, over a minimum three-year period, it is expected that some owners, especially those with a large proportion of non-section 8 units or vacant units, or those which own projects requiring substantial rehabilitation, will not receive the full 8% return in the first three years after approval of the plan of action. The Department intends to mitigate this effect as much as possible by permitting owners who fall short of the 8% to withdraw funds from the project's residual receipts account and, for those projects with a mortgage insured or assisted under section 236 of the National Housing Act, by permitting a temporary deferral in remitting excess income until such time as the phased-in rents allow the owner to receive an 8% return.

Another commenter questioned whether an owner who has deferred its distributions prior to approval of the plan of action may realize those distributions under this subpart. The commenter proposed a system for permitting an owner to receive accrued distributions by excluding them from the rent stream established under the plan of action. HUD's response is that an owner may receive its accrued, unpaid distributions by withdrawing funds from the residual receipts account or from surplus cash with HUD approval.

One commenter expressed concern that the preamble to the proposed rule indicated that the annual authorized return would be funded from the residual receipts account. The commenter claimed that at the conclusion of the preservation process, there would not be any residual receipts. The Department expects that the residual receipts account will continue to be funded after preservation. The annual authorized return will primarily come out of the rent stream for the project. It is anticipated that residual receipts funds will be utilized to enable an owner to receive its return only when the rent stream is insufficient to provide an adequate return, such as during the phase-in period required for rent increases under § 248.145.

A commenter questioned which rent levels would be used in the underwriting of section 241 acquisition and equity loans. The Department would like to clarify that the two rent levels established under this section, extension preservation rents and transfer preservation rents, are hypothetical

estimates created by statute for the sole purpose, as noted in section 214(b) of LIHPHA, of comparison to the Federal cost limit. Extension and transfer preservation rents are not determinative of the actual rents established under § 248.145. Rents will include debt service on the section 241 acquisition or equity loan. However, the total gross rents for the project cannot exceed 120% of the existing FMR. Extension and transfer preservation rents bear no relationship to the underwriting of any loans. Underwriting will be based on the actual rents for the project which will be established in accordance with § 248.145.

With regard to subparagraphs (c)(2) and (d)(2), a commenter requested more specificity on how HUD will determine the amount of the rehabilitation loan. The amount of the loans will depend on the rehabilitation which is needed, based on a physical inspection of the project at the time the plan of action is approved. If a project proceeding under this subpart requires rehabilitation, an owner or purchaser may receive financing under the rehabilitation loan program in part 241 of this title, or through the capital improvements loan program set forth in part 219 of this title. Section 219.305 of title 24 of the CFR lists the rehabilitation expenses and energy improvements which may be covered by the capital improvements loan program.

The same commenter also suggested that the rehabilitation loan should include a one-time deposit to the project's replacement reserve fund as a sinking fund to protect against future rehabilitation costs. The Department expects that the monthly deposits made to the reserve for replacements fund will be sufficient to cover future project maintenance and the rehabilitation items, making the sinking fund unnecessary.

One commenter requested that the definition of adequate reserves in paragraph (e) be clarified in order to prevent arbitrary determinations. Adequate reserves will be determined in the same manner as in subpart C. The level of reserves is based on the amount of funds needed on a monthly basis to maintain the project in accordance with the housing quality standards of § 248.147.

Section 248.123 (Determination of Federal Cost Limit)

Section 215(a)(1) of LIHPHA mandates that the Department separate high cost projects from the remainder of the eligible low income housing inventory by using a Federal cost limit.

Twenty comments were received by the Department concerning the determination of relevant local markets, prevailing rents, and the Federal cost limit.

The term "relevant local market" is defined in both § 248.101 of this subpart and in the Appraisal Guidelines. The determination of what constitutes the relevant local market in which a specific eligible low income housing project is located is left up to the professional judgment of the appraiser retained by the Department under § 248.111. Section 248.101 of the proposed regulation defines a relevant local market as "identifiable as a distinct market area in which similar projects and units would effectively compete with the subject project, for potential tenants." It is expected that this market area will be smaller than that established by the Department to determine the section 8 existing fair market rents. This definition is expanded upon in the Appraisal Guidelines, which state that the relevant local market is a geographic area in which similar properties effectively compete with the subject project in the minds of probable, potential purchasers and users. In nonmetropolitan areas, if the appraiser ascertains that there is a lack of comparable rental housing, the appraiser may use comparables from noncontiguous localities as long as they are in the same county or parish and have similar demographics and market characteristics. If there are no comparables in the local market or noncontiguous areas, the appraiser will document that fact in his/her report.

One commenter suggested that paragraph (b) of this section be amended to delete the sentence permitting section 8 existing fair market rents to be the sole measure of the Federal cost limit if the appraiser determines that there are no comparables. HUD included this statement in the proposed rule in anticipation of situations where no comparables exist and where it is impossible to define a relevant local market and its prevailing rents. The Department sees no reason for amending this provision.

Two commenters questioned whether rent-controlled properties would be considered comparables for purposes of determining the prevailing rents for a relevant local market. The Department has decided that rent-controlled properties will be included as comparables to determine prevailing rents. Rent-controlled properties and eligible low income housing located in the same relevant local market area are

very likely to compete with each other for tenants, supporting the position that they are similar properties, and hence, comparable. Also, it is expected that the inclusion of rent-controlled properties will not have a substantial impact on prevailing rents in most metropolitan areas.

However, rent-controlled properties will only be included as comparables in the determination of a project's fair market value if the appraised project would be subject to rent control in the event of prepayment. It is the responsibility of the appraisers retained by HUD and the owner to determine whether a project would fall within the scope of a locality's rent control laws.

To assist in determining prevailing rents for a particular relevant local market, the Department will instruct appraisers to consult with the State and local governments in order to take advantage of any information they are able to provide. However, the Department has declined to make consultation with State and local governments over the appraisals mandatory, as six commenters suggested. HUD has also decided not to accept the suggestion that if a local government ascertains that there are no comparables for calculating prevailing rents, then only the section 8 existing fair market rents would be used to determine the Federal cost limit. The statutory language of section 215 leaves the determination of relevant local markets and prevailing rents up to HUD's discretion and, as the language of this section indicates, the Department will use information acquired by its appraiser and any other appropriate information in order to make the necessary calculations. HUD recognizes that State and local governments, as well as comments from community organizations and residents, may be a valuable source of information. HUD will take into consideration any information provided by the State and local government indicating the absence of comparables in a particular relevant local market; however, the State and local governments' determination will not be binding for purposes of determining the Federal cost limit.

In response to one comment, HUD believes that it is not necessary for the owner's appraiser to do a second relevant local market study to assist HUD in its determination of prevailing rents. A second study would be duplicative and would cause the owner to pay for additional work not required for determining the appraised value of the project. However, HUD will utilize, as appropriate, any information in the

owner's appraisal or data submitted by interested parties in addition to the relevant local market study done by the HUD-retained appraiser.

A concern was raised by two commenters that the section 8 existing fair market rents which are used to determine the Federal cost limit would erroneously be adjusted for utilities. Utilities will not be deducted from the published fair market rents which are used for purposes of calculating the Federal cost limit. It should be noted, however, that for other purposes in this subpart, including the calculation of the actual rents to be paid by the tenants, the fair market rents will be adjusted by a utility allowance. To avoid confusion, the definition of fair market rent in § 248.101 has been amended to clarify that for Federal cost limit purposes utilities will not be deducted. For consistency, the Appraisal Guidelines will also instruct the HUD appraiser to use gross rents, i.e., contract rent plus all tenant-paid utilities, in determining the relevant local market rents. Section 248.121(e)(2) has also been modified to clarify that, for purposes of comparison to the gross rents used in determining the Federal cost limit, project operating expenses in aggregate preservation rents must include the cost of utilities paid by the residents.

The Department acknowledges one commenter's concern that underestimated rehabilitation costs may artificially inflate a project's preservation value, but disagrees with the conclusion that this will cause the Federal cost limit to be exceeded and lead to conversion to market rate housing and displacement of low income tenants. In determining whether or not the Federal cost limit is exceeded, HUD will compare a project's preservation rents to 120% of the section 8 existing fair market rents and 120% of the prevailing rents. One component of preservation rents is debt service on a rehabilitation loan. If rehabilitation is underestimated, the loan amount will be lower, leading to a corresponding decrease in the preservation rents. This decrease should offset any increase in the preservation rent resulting from a potentially overestimated preservation value. Moreover, regardless of how preservation rents are calculated, conversion to market rate housing would result only pursuant to § 248.169, either because of a lack of appropriated funds or because a bona fide offer is not made, or under § 248.141.

Section 248.127 (Limitations on Action Pursuant to Federal Cost Limit)

The discussion in the preamble of the proposed rule, regarding limitations on action pursuant to the Federal cost limit, states that where an owner intends to retain a project whose extension preservation rent exceeds the Federal cost limit, that owner may receive incentives only up to an amount that can be supported by a projected income stream equal to the Federal cost limit. Three commenters disagree with this position, asserting that the Conference Report, at page 464, states that section 8 assistance could be set at more than 120%. The Department's position is that section 8 rents can exceed 120% of the fair market rent; however, the income stream under the plan of action may not exceed the Federal cost limit.

Section 248.131 (Information From the Commissioner)

The Department received sixteen comments concerning this provision of the proposed rule which sets forth the information the Department is required to send to an owner and the tenants of a project for which a notice of intent has been submitted under this subpart. Section 216 of LHPHA requires that the Department supply the owner with any information necessary for preparation of a plan of action, including preservation values, preservation rents and a statement as to whether the aggregate preservation rents exceed the Federal cost limit. Two commenters noted that this information should be more extensive and should include audited financial statements, a current approved rent schedule and operating budget, a statement as to mortgage status, rent roll, physical inspection reports, and management reviews. The additional data mentioned by the commenters is already in the possession of the owner and will be made available to potential purchasers at the time they submit an expression of interest. The Department feels that it is not necessary to make this information available at an earlier stage in the process. For this reason, the Department declines to supply information which is not statutorily required.

Four commenters criticized the proposed rule's ambiguity in stating that this information shall be made "available to the tenants." In response to these comments, the Department has amended the proposed rule to state that information to be provided under this section will be sent to any tenant representatives who are known to the Department and if none exist, the information will be available from the

local HUD field office. Notices will also be posted in each affected building apprising tenants of the information and explaining from whom, and where, that information can be obtained. The Department has also decided, in response to four additional comments, to provide this information to that officer in the State or local government to whom the owner sent a notice of intent, in order to fulfill the requirement of § 248.179 that HUD consult with other interested parties prior to approving a plan of action under this subpart.

Section 248.133 (Second Notice of Intent)

The Department received twenty-four comments regarding the submission by owners of a second notice of intent to the Secretary. Four of these comments concerned notification of the tenants, with three of the four commenters suggesting that the Department adopt the stricter notice requirements set forth in § 248.105, governing the original notice of intent, and requiring that all tenants and each tenant representative receive a copy of the second notice of intent. The fourth commenter suggested that the second notice of intent be posted in the affected buildings and be delivered to any tenant representatives. The Department has determined that it would be appropriate to require that the second notice of intent be delivered to each tenant representative, and if no tenant representative is known to the owner, then to each occupied unit. HUD has determined that it is unnecessary to send the second notice of intent to each of the tenants if a tenant representative exists since the tenants have already received the original notice of intent and it is presumed that the representative will act on the tenants' behalf and disseminate this information for them. The rule has been amended accordingly.

One commenter recommended that the Department require an owner submitting a second notice of intent to provide evidence of the consent of its general and/or limited partners to the submission. The Department has decided not to accept this proposition. It is presumed that an owner taking action under this rule has the authority to do so and has the consent and agreement of its partners.

Seventeen commenters suggested that the second notice of intent to transfer the project be binding on an owner. Commenters also noted that if an owner does change its mind after submitting a second notice of intent, it should have to face financial penalties, pay the costs incurred by potential purchasers, or be prohibited from prepaying the mortgage or terminating the mortgage insurance

contract for a reasonable period of time. The concern raised by most of the commenters was that resident groups and nonprofit organizations would expend valuable time and funds attempting to put together a bona fide offer, and if an owner then decided not to sell the project, then these groups would needlessly lose that money.

The Department acknowledges the validity of this concern; however, there is no statutory basis for requiring that a second notice of intent be binding and the Department has no authority to impose financial penalties on owners who change their minds after submitting a second notice of intent. Since the statute does not require an owner who receives a bona fide offer under § 248.157 to accept that offer, HUD cannot add the additional requirement that the second notice of intent be binding in that circumstance. Under the mandatory sale provisions of § 248.161, however, once an owner who has submitted a second notice of intent receives a bona fide offer for sale at a price equal at least to the transfer preservation value, the owner is bound to accept that offer, but prior to receipt of an offer under § 248.161, an owner is free to change its mind.

It should be noted that if an owner proceeding under § 248.157 or § 248.161 changes its mind after filing the second notice of intent, and in the case of § 248.161, before receiving a bona fide offer, and decides to retain the project and seek incentives, then the owner must comply with the statutory requirement that a plan of action be submitted within six months of receiving the information provided by the Secretary pursuant to § 248.131. If the owner fails to submit a plan of action for incentives within that six-month period, then it must begin the process over again by submitting a new notice of intent under § 248.105. Owners should also be aware that § 248.135(g), which bars an owner from resubmitting a notice of intent for six months from the date the process is aborted, is also applicable to owners who decide to pursue incentives after filing a second notice of intent and then fail to submit a plan of action for incentives within the applicable time frame.

This section of the proposed rule has been amended to delete subparagraph (a)(2), which requires the submission of a second notice of intent if an owner plans to prepay the mortgage or terminate the mortgage insurance contract under § 248.141. As a commenter pointed out, this is not required under section 216(d) of the statute. HUD has determined that this

submission is not necessary since the tenants will be notified of this development when the plan of action is submitted.

Section 248.135 (Plans of Action)

This section discusses the submission of the plan of action. With respect to paragraph (b), which governs a joint submission by an owner and purchaser, the Department received six comments. Four commenters pointed out that if an owner terminates the use restrictions or retains the project with use restrictions in exchange for incentives, it has six months from receipt of the information provided by the Department under § 248.131 to submit a plan of action, but if the owner transfers the project under § 248.157 or § 248.161, it only has 90 days after accepting a bona fide offer in which to jointly submit a plan of action with the purchaser. The commenters claimed that the proposed timeframe for the joint submission is unreasonable and suggested extending it to six months. In order to treat owners equitably, regardless of whether they retain or sell the project, and in recognition of the fact that a joint submission may be difficult to prepare, the Department has amended paragraph (b) to provide the same six month period for submission of a plan of action to owners who retain the project and to those who sell.

Owner and purchasers should note that if a plan of action is not submitted within the applicable six month period, the notice of intent filed under § 248.105 becomes ineffective and the owner must wait six months before being eligible to resubmit the notice. Although one commenter claims that this result is inequitable if the failure to submit the plan of action was due to the fault of the purchaser or circumstances beyond the owner's control, this penalty is one that is statutorily imposed under section 217(a)(3) of LIHPHA and the Department does not have the discretion to waive it. Owners and purchasers are also cautioned that if a bona fide offer to purchase the project is accepted late in the 15 month marketing period, it would be in the best interests of both parties to submit a plan of action as soon as possible during the six month submission period, given the fact that LIHPHA authorizes the Department to accept only plans of action based on appraisals which are not more than thirty months old.

One commenter suggested that if an owner and purchaser cannot jointly agree on a plan of action, the owner should have the right to submit the plan alone and control the plan of action process. If an owner is selling a project,

the owner's primary interest in the transaction will be its return on the sale, which is established through the appraisal process; the owner's interest in the aspects of the plan of action which affect the operation of the project after the sale is minimal. Therefore, Department has decided to retain the requirement that the plan of action be jointly submitted. If the owner and purchaser are unable to submit a plan of action within the applicable time period, then the transaction will not be completed and the owner will be forced to file a new notice of intent after waiting the six months specified in paragraph (g) of this section.

One commenter recommended that procedures be established that ensure the purchaser's role in selecting professionals to prepare the plan of action. Another suggested that primary responsibility for demonstrating the feasibility of the sales transaction should rest with the purchaser, but the owner would ultimately control the contents of the submission. Still another commenter recommended that the plan of action be submitted by a qualified housing counseling agency that serves a low income clientele, rather than by the owner's staff or a housing consultant. The statute, under section 217, places the responsibility of submitting a plan of action with the owner, or in the case of a transfer, with the owner and the purchaser. The Department sees no need to further regulate the manner in which the plan of action is prepared. If an owner and purchaser are unable to submit a plan of action, the owner, as previously noted, will be forced to begin the process again by submitting a new notice of intent. The purchaser will be unable to purchase the project for at least another year and a half, until the six month waiting period, under paragraph (g), for submitting a new notice of intent expires, new appraisals are conducted, and the project is again offered for sale. This, in itself, should be a sufficient inducement to ensure cooperation by both parties.

Paragraph (c) of the proposed rule requires that the plan of action be submitted to the chief executive officer of the appropriate State or local government. This paragraph has been amended to conform to the changes made in §§ 248.131 and 248.133, which require that the information from the Commissioner and the second notice of intent be submitted to that officer of the appropriate State or local government entity to whom the notice of intent was submitted under § 248.105. A commenter also proposed that an owner should provide certified documentation that the

plan of action has been reviewed by a unit of local government. Section 217(a)(2) requires the appropriate State or local government entity to review any plans of action which are submitted by an owner and this requirement has been included in this paragraph. The Department has declined to require a certification, however, since it does not have the authority under LIHPHA to enforce this requirement and because the Department believes that an owner should not be penalized for another party's failure to comply with the statute. As long as the owner properly submits the plan of action to the specified parties, the owner has fulfilled its obligations under this paragraph.

Three commenters requested that State or local governments be notified if a plan of action submitted to HUD will not maintain the use restrictions on the project for its remaining useful life or if the plan contemplates the resale of the project by tenants for a profit. With the exception of projects purchased by tenants pursuant to a resident homeownership program under § 248.173, all plans of action to extend affordability restrictions must provide that the restrictions will remain in place for the project's remaining useful life. Additionally, under § 248.173(h)(3)(ii) a resident may not receive a profit from the resale of its unit for at least six years from the time it purchases the unit. In light of the foregoing, and since the State or local government will receive a copy of the plan of action upon its submission to HUD and the appropriate State or local government agency must review the plan of action, the Department sees no need to impose an additional notification burden under this section.

Paragraph (c) reiterates the statutory language of section 217(a)(2), requiring the "appropriate" State or local government agency to review any plans of action submitted to the Department. One commenter requested guidance in determining the appropriate agency. The notification requirements under LIHPHA require submissions to be made to the State or local government in whose jurisdiction the project is located. The Department recognizes that delivering the plan of action to the State or local government in the jurisdiction in which the project is located may not ensure that the "appropriate" agency is provided with the plan of action for review. In order to ensure that the statutory purpose is carried out, the Department itself will forward copies of the plans of action to the appropriate State or local government agency if that

agency did not receive a copy from the owner.

The Department received eleven comments contending that tenants and the State or local governments should have the right to comment on any plans of action submitted to the Department. In response to these comments, the Department has amended the proposed rule to provide a sixty-day comment period for tenants and State and local governments. This period will begin on the date of HUD's receipt of the plan of action, which should be sent simultaneously to the tenants and the State or local government. This comment period will not extend the processing time under this subpart because the sixty-day comment period will begin on the same date as the six-month period, provided under § 248.149(b), for Departmental approval of the plan of action. If the plan of action is revised, the tenants and the State or local government will be provided with a copy of the changes, pursuant to paragraph (c), and will be given a reasonable opportunity to comment on the revision. The Department will not approve a plan of action before the end of the sixty-day comment period, and in making its determination, the Department will take into account any comments received during that period. Findings made by the State or local government will be considered in accordance with section 228 of the statute, but they will not be binding on HUD; decisions made by State agencies may be binding, under the statute, only when the Department has delegated authority to that State pursuant to section 227 of LIHPHA. Similarly, tenant approval of the plan of action is not required under the statute and it is impractical for the Department to respond to each tenant comment, but these comments will be given serious consideration in the Department's examination of the plan of action.

Tenant representatives may take part in negotiations between the owner and HUD on the plan of action, if the plan of action is jointly submitted by the owner and the tenants in connection with a sale of the project to the tenants. If the tenants are not purchasing the project, the Department sees no justification for participation by tenant representatives, especially since tenants, as well as tenant representatives, have the opportunity to comment on the plan of action.

Seventeen commenters advocated that HUD provide tenants with access to the plan of action. Comments ranged from requesting that each tenant be given a copy of the full plan of action to

recommending that the plan be available on site and copying permitted free of charge. The proposed rule provides that the owner shall post a summary of the plan of action in each occupied building, provide the full plan to any tenant representatives, and make a copy available in a convenient location, as well as provide a copy to the chief executive officer of the State or local government. The Department has amended this provision to require that the posted summary indicate the name, address and telephone number of any tenant representatives and personnel in the local HUD field office who possess a copy of the plan of action, and a statement that tenants may contact these persons to obtain or review a copy of the plan. In addition to sending the plan to any tenant representatives and the State or local government, the owner must make a copy of the plan, with revisions, available to tenants for copying in the on-site office, or if an office is not available, in the location where rents are collected, during normal business hours. Owners shall permit tenants to photocopy the plan of action, or shall provide copies at a reasonable cost. Any revisions made to the plan of action, including any deficiency letters issued by the Department under § 248.149(a), shall be submitted to the tenants and State or local government in the same manner as the original plan of action. The Department will not require copies of the plan of action to be given to every tenant, or require posting of the entire plan of action, since plans of action are generally quite lengthy and the interim rule provides sufficient opportunity for tenant access to the plan of action.

According to four commenters, tenants should have the right to inspect and copy all supporting documentation to the plan of action. The plan of action is intended to be a complete, self-contained document, containing all of the information necessary for the Department to make its determinations under this subpart. All supporting documentation is included in the plan of action itself and is available to the tenants in the manner provided under paragraph (c).

One commenter suggested that if an owner submits a plan of action to terminate the affordability restrictions, given the fact that the purpose of the statute is to restrict terminations, the contents of the plan should include more detailed documentation than that required under paragraph (d) of this section. The commenter did not specify what type of documentation should be required, but the Department believes

that the information requested in this paragraph of the proposed rule is sufficient to enable HUD to determine whether or not the owner is eligible to prepay the mortgage or terminate the mortgage insurance contract pursuant to § 248.141. The same commenter also recommended that someone other than the owner, its staff, or consultant, such as a State or local government, submit the assessment, under subparagraph (d)(4), of the effect the prepayment or termination will have on existing tenants. Section 228 of LIHPHA requires the Department to confer with, and give consideration to, the views of any State or local government agency when making determinations under the statute. The Department recognizes that State and local governments are valuable sources of information concerning housing located in their jurisdictions and the Department encourages the submission of relevant data, as well as comments, regarding any plans of action submitted under this subpart. The Department fully intends to consult with these agencies prior to approving any plans of action to prepay the mortgage or terminate the mortgage insurance contract.

Subparagraph (e)(2) of this section requires an owner to submit in its plan of action package a description of the Federal incentives requested to address any physical deficiencies of the project. Three commenters expressed concern that the rehabilitation costs for the project should not be based on the costs determined in the appraisal process under § 248.111, but should be based on information contained in the plan of action and on current cost considerations. In response, the Department notes that the rehabilitation costs determined in the capital needs assessment utilized in the appraisals, while intended to be a fair assessment of rehabilitation costs, are for the purpose of calculating preservation rents and preservation equity, and not for the purpose of actually funding rehabilitation as part of a plan of action. The scope of the capital needs assessment may not always be sufficient to reveal the actual costs necessary to rehabilitate the project to conform with housing quality standards or to estimate the actual operating costs of the project after rehabilitation. The Department recognizes that these costs may be underestimated in the assessment or the estimates may be outdated by the time of plan of action approval. For these reasons, the initial determination made in the appraisals will be an initial basis for estimating rehabilitation needs and costs, but will

not be binding for purposes of funding rehabilitation and supporting operating expenses under a plan of action.

Nine commenters questioned the requirement in subparagraph (e)(5) of this section, that an owner submit as part of the plan of action an income profile of the tenants as of January 1, 1987 and as of the date of filing of the plan of action. The reason for this submission is to fulfill the statutory directive of section 222(a)(2)(F)(i) which authorizes the Department to approve plans of action extending affordability restrictions only if the project maintains the same proportions of very low, low and moderate income families or persons as resided in the project as of January 1, 1987 or as of the date of plan of action approval, whichever date results in the highest proportion of very low income families. As these commenters pointed out, however, the Department only requires that income profiles be retained by owners for a period of three years, so it is very likely that many owners have disposed of the January 1, 1987 profile, making it impossible for them to submit this information as part of the plan of action. It is impossible for the Department to reconstruct the missing income profiles since HUD does not keep data on all tenants.

One commenter suggested that to remedy this problem, for those projects where an income profile for January 1, 1987 is unavailable, HUD should set the proportion of very low income tenants, as of that date, at fifty percent. Another commenter suggested assuming a one hundred percent very low income tenancy. The Department believes, however, that the implementation of these suggestions would be contrary to the intent of the statute. Instead, where an owner certifies that the January 1, 1987 tenant income profile is unavailable, the Department will require that the owner submit an income profile for January 1, 1988, and if that is unavailable, for January 1, 1989. The affordability restrictions will then be maintained on the project in the same proportions of very low, low and moderate income tenants as resided in the project as of the date the plan of action is approved or the date of the earlier profile, whichever has the greatest number of very low income tenants. In order to minimize the need for this policy, the Department will include a directive in its administrative guidance requiring owners who still possess the January 1, 1987, the January 1, 1988 or the January 1, 1989 profiles to retain them for purposes of submitting a plan of action.

The Department received one comment encouraging HUD to examine whether or not project management caused distortion of the tenant income profiles by engaging in illegal tenant selection practices. The Department's position is that this type of review is not germane to the preservation process and HUD presumes that its customary management reviews will reveal any irregularities on the part of project management. In response to another comment, the Department is unable to internally examine the authenticity of an owner's submissions under this section since HUD does not have the necessary data for comparison. However, pursuant to the statute's directive in section 228, the Department will consider any data submitted by State or local governments which supports or conflicts with the owner's submissions.

For purposes of maximizing the number of eligible low income housing units which are preserved for the use of very low income families and persons, four commenters suggested that any units which were vacant on January 1, 1987 and on the date of submission of the plan of action should be deemed very low income units. The Department has decided to adhere to its practice in implementing ELIHPA of allocating vacant units in proportion to the share of very low, low and moderate income tenants residing in the occupied units as of the date of the profile. In filling these vacancies, owners must rent the units in a manner that will maintain the tenant income profile for the remaining useful life of the project. This method of filling vacancies represents a deviation from the Department's usual policy governing tenant selection for units receiving section 8 assistance, because under this subpart a vacated section 8 unit may not be filled with a section 8 recipient if it is necessary to place a tenant who is ineligible for section 8 assistance in the unit in order to maintain the project's proportionality.

One commenter noted that section 222(a)(2)(F)(i) tracks the language in ELIHPA, requiring that the profile used with the plan of action be the one which has the highest proportion of very low income tenants. The commenter argues that the apparent purpose for this requirement under ELIHPA is to maximize the amount of section 8 assistance provided to the owner under a plan of action. However, under LIHPA, the Department is authorized to provide section 8 assistance to low income tenants as well as very low income residents. In some circumstances, this may result in less section 8 assistance being provided to a

particular project than would be the case if the profile with a higher number of low income tenants is used. The commenter claims that Congress overlooked this result in drafting the statute. However, this outcome may indicate that the purpose of choosing the profile with the most very low income tenants is not to maximize section 8 assistance, but to preserve the greatest number of units for the tenants with the lowest incomes, i.e., those who are most in need. Regardless of congressional intent, the statute is clear that the profile to be used in the plan of action is the one with the highest proportion of very low income tenants and the Department perceives no justification for deviating from this standard.

As part of the plan of action submission under paragraph (e), one commenter suggested that a nonprofit or resident council purchaser should certify that it has retained an experienced management agent who has successfully managed low and moderate income housing, is familiar with HUD procedures and has the capacity to manage the rehabilitation, marketing and relocation contemplated under this subpart. The Department has determined that it is not necessary to include this requirement in the regulation since the regulatory agreement which a nonprofit or resident council purchaser will be required to execute as part of the transfer already states that any management agent must be acceptable to the Department.

Paragraph (h) of this section has been amended in response to two comments recommending that the State or local government be notified of the approval of a plan of action. The Department will notify the appropriate agency at the same time, and in the same manner, that it notifies the tenants of such approval.

Section 248.141 (Criteria for Approval of a Plan of Action Involving Prepayment or Voluntary Termination)

This section requires the Department to decide whether prepayment of the mortgage or termination of the mortgage insurance contract would create hardship for current tenants, whether other affordable housing is readily available, and whether the general supply of low income housing will be materially affected by such prepayment or termination. One commenter requested guidance as to how the Department would make these determinations. The written findings which this section mandates are identical to the findings the Department must make in § 248.221, pursuant to subpart C, and the Department will use

the same methods and procedures in both subparts. HUD's administrative guidelines will elaborate upon the regulatory criterion.

Pursuant to this section, the Department may have to determine whether there is comparable, affordable housing for tenants who may be displaced if a plan of action is approved. If an owner agrees to comply with the requirements of section 218(a)(1)(A), including the maintenance of rent restrictions and continued occupancy for current tenants, then the Department does not have to make this finding. One commenter stated that when determining whether housing is "comparable," the Department should take into consideration the special needs of the tenants, such as elderly residents, and include as comparable housing only those projects which can meet the tenants' needs and are suitable to the tenants' particular situation. The Department acknowledges that, for purposes of this section, "comparable" means more than just affordable. When determining whether there is adequate, comparable housing, under paragraph (a) of this section, the Department will take into consideration the requirements of special needs tenants, as that term is defined in § 248.101, who reside in the affected project. Housing will be deemed comparable only if the Department determines it to be suitable for those tenants who would be displaced if a plan of action involving prepayment or termination is approved.

The Department's position in the proposed rule, that tenants of projects for which the mortgage is prepaid or the insurance terminated under this section are not entitled to the tenant protections set forth in § 248.165, was contested by three commenters. As the Department explained in the preamble to the proposed rule, once the Department makes the findings required under this section, an owner is permitted to terminate the affordability restrictions on the project and further compliance with this subpart by the owner is not required. The Department's approval of a plan of action under this section signifies that the owner has demonstrated that its prepayment or termination will not create a significant hardship on current tenants; that there is a sufficient supply of readily available comparable housing; that low income families will be able to find affordable, decent, safe and sanitary housing near employment opportunities; and that housing opportunities for minorities in the community will not be adversely affected by the prepayment or termination. Approval of the plan

implies that the protections provided for displaced tenants under § 248.165 are not necessary for the tenants residing in the affected project.

It should be noted that income eligible tenants residing in a project which is the subject of a prepayment or termination may receive section 8 certificates or vouchers to enable them to continue residing in the project or to relocate to other suitable housing. If these tenants are displaced, they have priority for receiving section 8 assistance pursuant to § 886.132 of this title.

If necessary to protect current tenants, the Department will require the execution by the owner of a use agreement, containing restrictions enabling current tenants to continue living at the project at rents set forth in section 218(a)(1)(A). This use agreement is enforceable by the tenants, as well as by the Department. While local governments and fair housing groups would not have standing to enforce the use agreement, they may bring violations of the agreement to the attention of the Department. A suggestion was received from one commenter that HUD should perform audits regularly and provide tenants, local fair housing groups and the local government with the right to notice and comment on the audit process in order to enforce such use restrictions. No scheduled audits will be performed to enforce the use restrictions on projects for which the mortgage is prepaid or the insurance terminated.

A commenter suggested that HUD work closely with, and obtain data from, local governments, where HUD is considering permitting an owner to terminate the affordability restrictions on the project. Another commenter stated that data received from an owner should be verified as to its accuracy and it should be determined whether the owner's submission is consistent with the community's perception of its needs. As noted in the previous section, the owner will provide the State or local government with a copy of the plan of action and the Department will provide the appropriate reviewing agency with a copy. These entities will then have sixty days in which to submit comments and any additional data to the Department for consideration. Also, the Department will confer with State and local government agencies, in accordance with section 228 of LIHPHA, prior to making any determinations under this section.

A commenter claimed that the Department has no statutory basis for conditioning approval of a plan of action, under this section or § 248.145,

on the absence of open findings of noncompliance with title VI of the Civil Rights Act of 1964, the Fair Housing Act, Executive Order 11063, the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973 and all regulations promulgated under these statutes. While there is no explicit authority in LIHPHA permitting the Department to deny approval of a plan of action if an owner is found to be in noncompliance with any of the foregoing statutes, this requirement is consistent with the Department's obligations under the authorities cited above to affirmatively further fair housing. Furthermore, the Department cannot approve a plan of action permitting prepayment of the mortgage or termination of the mortgage insurance contract unless it finds that such prepayment or termination will not adversely affect the housing opportunities of minorities. An owner's failure to comply with the civil rights legislation listed above may support an inference that the prepayment or termination will produce a negative impact on minorities.

It should be noted owners of eligible low income housing must continue to comply with the Fair Housing Act and implementing regulations regardless of whether or not they prepay the mortgage or terminate the mortgage insurance contract on the project.

Section 248.145 (Criteria for Approval of a Plan of Action Involving Incentives)

Section 222(e) of LIHPHA directs the Department, if feasible, to provide incentives only to owners of projects in those rental markets where there is an inadequate supply of decent, affordable housing, in order to prevent owners from receiving "windfall profits." The Department submitted a report to Congress on April 4, 1991 containing its findings and concluding that a windfall profits test is feasible. The Department intends to implement the windfall profits test in a separate issuance which will be published for notice and comment. In response to the proposed rule, the Department received forty-three comments concerning windfall profits and these comments have been given full consideration in developing the windfall profits test.

A commenter suggested that the Department abandon the "fair market rent" standard set forth in subparagraph (a)(5) and instead require that tenants pay the lesser of 30% of adjusted income or the preservation rent. The statute at section 222(a)(2)(D) explicitly requires that current tenants not pay more than 30% of their adjusted income or the

published existing fair market rent. Additionally, the statute provides in section 214(b) that preservation rents are aggregate rents, not unit rents, and are used solely for the purpose of comparison with the Federal cost limit, implying that Congress did not intend the preservation rents to be the actual rents paid by the tenants. At the time of plan of action approval, the Department will determine the actual rents needed to support operating expenses, adequate reserves and rehabilitation needs.

The Department received eighteen comments concerning the phasing-in of rents for current tenants under subparagraph (a)(6) of this section. The most frequent responses were that the phase-in period should be extended, and that rent increases in any given year should be capped.

The proposed rule tracks the statutory language of section 222(a)(2)(E), which provides that rent increases of 10 to 30% will be phased in at not more than 10% per year and rent increases of more than 30% will be phased in equally over not less than three years. The statute clearly defines the parameters for the rent phase-in, providing the Department with no discretion to limit annual increases to 5% or 8%, or 10% in the case of very low income tenants, or 15% for increases greater than 30%, as commenters suggested. The statute places a cap of 10% on yearly increases if the total rent increase does not exceed 30%, but implicitly contemplates that if the total rent increase is greater than 30%, tenants may be faced with an annual increase of more than 10%. In order to decrease the burden on the tenants, an owner or purchaser may agree to phase in a rent increase over a period of more than three years, at its option. The Department also notes, in response to another comment, that all current tenants, including those of moderate income, will be subject to the phase-in provisions of this section.

Seven comments were received regarding subparagraph (a)(7) of this section, which authorizes the Department to provide section 8 assistance, if available, to current very low and low income tenants not already receiving section 8 assistance, who otherwise may experience adverse effects due to the implementation of a plan of action. To carry out this section, the Department will execute a section 8 housing assistance payments contract providing subsidy sufficient to cover the number of very low and low income tenants residing in the project at the time of plan of action approval or at the time of the tenant income profile submitted under § 248.135(e)(5),

whichever is higher. If the number of very low income tenants was higher at the time of the earlier profile, then the owner will be required to replace low and moderate income tenants who move out with very low income tenants. There is no need to reserve additional section 8 certificates, as one commenter suggested, since the assistance provided under this section is project-based.

Two commenters stated that there is no justification for restricting section 8 assistance to the amount established at the time of plan of action approval and that owners who wish to rent to additional very low and low income tenants should be entitled to a proportionate increase in section 8 assistance. Section 222(a)(2)(E)(ii) directs that section 8 assistance be provided to current tenants. At the time the plan of action is approved, if section 8 assistance is needed and is available, the Department will execute a housing assistance payments contract for the provision of this assistance. If a section 8 contract already exists, but is inadequate to meet the project's needs, the Department will also amend this contract in order to implement the plan of action. The statute does not obligate the Department to provide additional section 8 assistance to future very low and low income tenants. Future very low or low income tenants not covered by the new or amended section 8 housing assistance payments contract may apply for section 8 certificates or vouchers to subsidize its rent payments.

A commenter suggested that section 8 assistance should be provided to subsidize all of the units in a project in order to ensure sufficient rental income to support all acquisition costs. The statute only authorizes the Department to provide section 8 assistance to very low and low income tenants; therefore units occupied by moderate income and market-rate tenants will not be eligible for this assistance. However, the Department can provide section 8 assistance in excess of the section 8 existing fair market rent, as long as the total rent stream for the project does not exceed the Federal cost limit. If the rental income is still inadequate to pay for acquisition costs, the Department may provide grants to priority purchasers under § 248.157 and to qualified purchasers under § 248.161. The Department expects that the section 8 assistance provided to very low and low income tenants, along with the rents paid by moderate income and market rate tenants, will be sufficient to support the costs of the entire project since, for eligible low income housing, on average,

an estimated 93% of the tenants currently residing in eligible low income housing are eligible for project-based section 8 assistance pursuant to this section.

Paragraph (a)(8) of the proposed rule permits the Department to approve rent levels for future tenants, including moderate income tenants. One commenter objected to providing future tenants with the same protections given to current tenants, claiming that this would make the project financially infeasible. Section 612 of the National Affordable Housing Act restricts the rents which can be charged to moderate income and market-rate tenants, capping rents at 30% of the adjusted income or the section 8 fair market rent, whichever is lower. This restriction applies to projects insured or assisted under section 236 and section 221(d)(3) of the National Housing Act, and, while independent of the preservation program, also applies to moderate income and market-rate tenants of eligible low income housing, which is financed by section 221 or section 236. Thus, the rent caps established by HUD for future tenants are consistent with section 612.

Section 222(a)(2)(G) of LIHPHA requires that future rent adjustments for projects receiving incentives under a plan of action be made by applying an annual factor, to be determined by the Secretary, to the portion of rent attributable to operating expenses for the project. The Department received seventeen comments concerning the implementation of the annual adjustment factor under paragraph (a)(9) of this section. Four commenters merely requested further guidance, while others suggested specific methodology for determining the factor. The annual adjustment factor and the methodology for determining the factor will be issued by the Department as a separate administrative guidance.

The Department has decided to rely on the Consumer Price Index-Urban ("CPI-U") data collected by the Bureau of Labor Statistics, United States Department of Labor, to implement the annual adjustment factor method of adjusting the operating cost component of rents. These data are available on a reasonably current basis for the four census regions and for 74 metropolitan areas and the State of Hawaii, covering about two-thirds of the nation's population. Both national data for the four census regions and metropolitan data are usually available within three months of the most recent survey period. The national sample for the four census regions is done on a monthly basis, and

the metropolitan samples are done every three or four months. Regional factors will be used only if a project is not covered by one of the 74 CPI local data areas.

This approach provides for operating cost increases using factors that reflect changes in the underlying components of operating costs. The two major components of operating costs are utility and non-utility costs. These components are available on both regional and metropolitan levels. Non-utility costs include administrative expenses, operating and maintenance expenses, and taxes and insurance. The non-utility operating cost increase will be set equal to the overall change in the cost of all goods and services during the past year, as measured by the CPI-U "All Items" factor for the region or metropolitan area, less the weight for the utility change component for the area. The utility change component will be based on changes in the residential energy cost CPI-U factor for the region or metropolitan area (i.e., the CPI-U "Housing, Fuel and Other Utilities" factor). Both the utility and non-utility factors will be separately applied to the project's utility and non-utility operating cost components. Consumer Price Index data may be found in the "CPI Detailed Report(s)" published by the Bureau of Labor Statistics, U.S. Department of Labor.

In order to take extraordinary operating expenses into account, the Department has provided for an appeals mechanism. Appeals may be made by owners for the utility or non-utility change factors provided. Owners wishing to appeal must submit their entire project budgets to the Department for review. Documentation showing that a single component of operating expenses, such as insurance or taxes, increased faster than the CPI non-utility factor would not, of itself, be considered a basis for approving a higher annual adjustment factor. The Department will grant an owner a higher factor only if the total amount of all actual costs and expenses of the project exceed the aggregate change provided by the CPI-U urban factors.

A commenter stated that until HUD develops an annual adjustment system, it should use a property-specific budget-based rent increase. The Department will have in place an annual adjustment factor system by the time that it is needed for the first plans of action approved under LIHPHA, so there is no need for any interim budget-based system for rent increases.

Three commenters were concerned that the regulation did not contain a mechanism for determining rent

increases for purchasers. The annual adjustment factor will apply to purchasers as well as to owners extending the use of eligible low income housing.

Two commenters asked that HUD develop a project-based cost approach for making operating cost annual adjustment factors to section 8 rents. The Department declines to use such an approach, except on an appeals basis, since it has no authority to do so under LIHPHA.

The Department received three comments stating that HUD should publish the methodology utilized in determining the rent adjustment factor so that underwriters can adjust their underwriting procedures. The commenters recommended that this method should be flexible and responsive to changing circumstances. The determination of the rent adjustment factor is flexible since it provides an owner with an appeals process based on a project budget review if it believes it has incurred extraordinary expenses. Three other commenters indicated their preference for budget-based operating expense increases. The Department can only respond, however, that the combination of the statutorily required annual adjustment factor and the opportunity for budget-based appeals will fairly address all their concerns.

A commenter suggested that the annual adjustment factor for rents should be based on the current section 8 annual adjustment factor. The Department rejects this suggestion because section 8 annual adjustment factors reflect changes in the rental market supply and demand conditions, and have no necessary relationship to changes in operating costs. For instance, in a depressed market, operating costs often continue to increase even though rents are stable or decreasing.

The Department received one comment asking whether, if an annual adjustment factor is used, the rent increase will be processed in the same manner as the existing section 8 special adjustments, i.e., only for taxes, utilities, and insurance. As discussed, the annual adjustment factor is applied to operating expenses as a whole.

Three commenters suggested that any annual adjustment factor also be applied to replacement reserve contributions. Replacement reserve contributions are not included as operating expenses and thus are not subject to the annual adjustment factor. Changes to replacement reserve contributions may be requested of the local HUD field office which will review

the adequacy of the existing level of contribution.

Three commenters asked that the annual adjustment factor be determined for geographic regions. As described above, the Department has decided to use data for the adjustment factor that is available on a fairly current basis for the four census regions and for 72 metropolitan areas that cover about two-thirds of the nation's population. Another commenter suggested that in developing an annual adjustment factor, HUD should allow each area office to modify the factor to reflect unusual operating costs in a particular geographic region. The Department has decided to handle geographic variations with the consistently available CPI data described earlier. Again, an owner who has experienced unusual operating costs may use the appeals process that the Department has created for this purpose.

Five commenters requested clarification of paragraph (a)(10) of this section, which permits any savings from reductions in operating expenses due to management efficiencies to be deposited in the project's reserve for replacements account, and then distributed to the owner with HUD approval. The commenters wondered how savings from reductions in operating expenses would be calculated. The Department believes that this provision, set forth in section 222(a)(2)(H) of LIHPHA, is a remnant from an earlier version of the statute, which provided for budget-based rent increases. With the budget method, it would be simple to determine reductions in operating expenses and decide how much of the reduction was due to management efficiencies. However, the use of an annual adjustment factor to increase operating expenses, makes it difficult to determine what portion of any savings are due to management efficiencies. For this reason, the Department will not make the determination required under this section and will seek a technical amendment of this section of the statute. Such savings instead will go into the residual receipts account.

One commenter objected to, and one commenter approved of, the requirement that in order for the Department to approve a plan of action for a project, there must be no open findings of noncompliance with the fair housing and civil rights legislation and regulations listed in paragraph (a)(12). The Department has retained this requirement, for the reasons noted in the previous section, discussing § 248.141. The Department reiterates that owners of eligible low income housing must continue to comply with the civil rights

legislation and regulations listed in this paragraph of the interim rule after approval of a plan of action.

One commenter stated that the proposed rule did not make it clear under what circumstances a prepayment or termination could occur in connection with a plan of action for incentives and recommended that paragraph (c), which refers to prepayments and terminations, be deleted. Pursuant to section 211(a) of LIHPHA, an owner of eligible low income housing may prepay its mortgage or terminate the mortgage insurance contract only in accordance with a plan of action which has been approved by the Department. When the Department approves a plan of action for incentives, it does not prohibit mortgage prepayment or insurance termination, but in exchange for providing incentives, places restrictions on the use of the property in the event of prepayment or termination. This is the purpose of the agreements referred to in paragraph (c) of this section, which are executed at the time of approval of the plan of action. If an owner prepays or terminates after a plan of action for incentives has been approved, the regulatory agreement on the project will no longer be effective, but a use agreement, containing the affordability restrictions approved in the plan of action as well as other tenant protections, will continue to bind the project for its remaining useful life. Although prepayment occurs, the project will still be preserved for low income use, in accordance with the purpose of LIHPHA.

A commenter requested that paragraph (d) permit State or local governments, as well as owners, to appeal a determination of remaining useful life. Section 222(c)(3) of LIHPHA specifically provides for an owner's appeal of the Department's determination of the project's remaining useful life. However, the owner may not exercise this appeal right until fifty years after approval of the plan of action. Because an appeals mechanism is not needed at this time, the Department will delay formulating such a system until a later date. At that time, HUD will consider extending this right to State and local governments.

Section 248.147 (Housing Standards)

A commenter suggested that this section, requiring an owner to "maintain the project in accordance with local codes or housing quality standards, whichever is stricter," is too permissive and that the owner must not merely agree to maintain the project, but must also demonstrate that the project is in compliance with the housing standards

as a condition of receiving incentives. LIHPHA assumes that a project will be in compliance with housing standards as part of the rehabilitation plan required for approval of a plan of action involving incentives. It is the intent of the Department to examine projects that are in violation of housing code standards at the time of plan of action review and to require owners to accept incentives such as a section 241 rehabilitation loan or a flexible subsidy capital improvements loan in order to cure these violations and secure approval of the plan of action. Pursuant to § 248.145(b), an owner who retains the project under this subpart may not receive any incentives or distributions, except those designed to correct the project's deficiencies, until the project is in accord with the housing quality standards. This should provide sufficient assurance that an owner will bring the project up to the standards required under this section. If the owner fails to do so, several sanctions are available. The owner's annual distribution can be denied or limited and the disbursements from an equity take-out loan can be withheld and used for repair of the project.

Two commenters wanted to allow tenants and State or local governments the opportunity to trigger sanctions against an owner if it fails to comply with the housing quality standards. The Department will receive complaints from tenants or governmental entities of building deficiencies and violations of building codes and will then impose sanctions where warranted.

The question of whether sanctions will be effective against nonprofit purchasers was raised by one commenter. Sanctions could trigger a default on the section 241(f) acquisition loan and on the original project mortgage. While discretion will be exercised, HUD will use whatever sanctions it considers appropriate to enforce the housing quality standards. HUD recognizes that its sanctions could trigger a loan default and cause a mortgage assignment, yet HUD would carry out such a sanction if it determined that this would be the only method for maintaining the quality of the property.

A suggestion was made by two commenters that tenants should be directly involved in the annual inspection and have input on the project's condition. In response to these comments, HUD has agreed to notify the tenant representative 30 days prior to the annual inspection, and in the absence of a tenant representative, HUD will require the owner to post a 30-day

notice of the annual inspection, inviting tenants and their representatives to participate in the inspection with Departmental personnel and to submit comments regarding the physical condition of the project. Two commenters also recommended that local city code enforcement officials should be contacted to obtain the history of enforcement actions against the project and to cooperate in the enforcement of housing standards. State and local officials carry out their own project inspections and the Department believes that it is not necessary to formally obtain their input. HUD encourages local housing code officials, tenants and the tenant representatives to submit any comments concerning the past history and current physical condition of the project.

Two commenters recommended that potential purchasers be given the results of HUD's annual inspection, particularly if deficiencies are found. The annual inspection is performed by the Department after approval of the plan of action and after rehabilitation has been completed. Prospective purchasers are allowed, pursuant to § 248.157(f), to inspect the property after filing an expression of interest. Another commenter proposed that tenants be given up to 30 days to comment on the results of HUD's annual inspection. The Department intends to fully enforce housing quality standards and tenants are encouraged to submit complaints of deficiencies at any time, but a 30-day comment period would serve only to delay the Department's orders to make repairs. The results of an annual physical inspection are available to tenants and other interested parties through the submission of a Freedom of Information Act request.

One commenter asked for clarification as to the sanctions available to HUD if an owner fails to comply with the terms of the use agreement or the Plan of Action. The sanctions listed in § 248.147 pertain only to violations of housing standards. In cases where the requirements of the plan of action are imposed through the execution of a regulatory agreement or amendment of the existing regulatory agreement, the sanctions available to HUD are those stated in the regulatory agreement, i.e., chiefly, requesting the insured mortgagee to declare a default and accelerate the debt, foreclosure (in the case of a HUD-held mortgage), taking possession of the project, or injunctive or other judicial relief or remedies. If the plan of action's requirements are implemented through a use agreement,

the primary method of enforcement would be judicial relief.

Section 248.149 (Timetable for Approval of a Plan of Action)

Six comments were received regarding the amount of time the Department has in which to approve a plan of action, once submitted. Two commenters suggested that the Department's deadline for approval be shortened to 90 days from 180. The 180-day period is derived from section 225 of the statute and is necessary to provide the Department with adequate processing time. This time frame allows 60 days for HUD to review the plan and notify the owner of any deficiencies, 60 days for the owner to respond, and another 60 days for HUD to review any revisions.

Another commenter requested that the processing clock be interrupted during any period where the owner has been asked to submit additional information or remedy deficiencies. The 180-day time limit applies only to the Department and is applicable in cases where the owner (and purchaser, in the case of a plan of action involving a transfer) have adequately addressed all issues related to the plan of action. If plan of action revisions are not received within that time frame, the statute does not require Departmental approval of the plan within this time frame.

The 180-day deadline does not apply to plans of action that are not approved because of deficiencies. One commenter suggests this should only be the case if there are material deficiencies. Section 225 of LIHPHA, from which this provision of the rule is derived, does not distinguish between material and nonmaterial deficiencies, and thus the interim rule likewise makes no such distinction.

The rule provides that if the Department does not act within the time constraints of this section, the owner will receive incentives and assistance in an amount that the owner would have received if the Department had complied with the time limitations. One commenter questioned whether the owner will be permitted to accrue interest on the amount it would have received if the plan of action was approved in a timely manner. The Department will pay the owner retroactively for incentives delayed due to HUD's failure to meet processing deadlines, but will not pay interest on any late payment of incentives.

Another commenter recommended that the rule be changed so that State or local governments receive all deficiency letters from the Department regarding plans of action. This change is not

necessary because any revisions submitted by the owner to the Department must also be submitted to the State or local agency. As part of the requirement that owners give plans of action to State or local agencies, owners are also responsible for keeping those agencies informed about any changes or revisions to those plans.

Section 248.153 (Incentives to Extend Low Income Use)

The Department received eleven comments concerning the provision of incentives to retain the affordability restrictions on eligible low income housing. A commenter recommended that paragraph (b)(1) of this section be amended to authorize release of all residual receipts as of the plan of action approval date. The commenter stated that the release of residual receipts should be automatic and should be in addition to the annual authorized return because residual receipts belong to the owner and the owner paid taxes on this money. The Department declines to make the release of residual receipts automatic since it does not have the authority to do so under LIHPHA. Section 219(a) of the statute only authorizes the Department to provide incentives necessary "to enable the owner to receive the annual authorized return for the housing determined under section 214(a), pay debt service on the federally-assisted mortgage covering the housing, pay debt service on any loan for rehabilitation of the housing, and meet project operating expenses and establish adequate reserves." Thus, the owner can access the residual receipts account only when it has unpaid distributions accruing prior to implementation of the plan of action, or to realize the 8% annual authorized return under the plan of action.

A commenter also suggested that the regulations should authorize release of land owned by the owner and currently included as security under the mortgage, if such land is not an integral part of the housing. The Department will consider allowing a partial release of security on a case-by-case basis as part of the plan of action in accordance with the administrative requirements applicable to FHA programs generally. Partial releases of security require mortgagee consent. Owners are advised to request the release at the time of their first notice of intent so that appraisers can be instructed to make separate value determinations. If a partial release of security is requested after this point, the owner would be required to obtain another appraisal and to pay for HUD's new appraisal and any third appraisal, if necessary.

A commenter recommended that sufficient section 8 assistance should be provided to cover all the units occupied by tenants with income at or below 80% of the area median income. The Department reaffirms that it intends to provide section 8 assistance to all current low and very-low income tenants. Additional assistance may also be reserved based on the tenant income profile required in § 248.135(e).

A commenter stated that the Department should accept rehabilitation, equity and acquisition financing from any source, public or private, without necessarily using section 241 mortgage insurance. The Department's position is that the plan of action may include an uninsured rehabilitation loan provided that the terms of the loan, including monitoring of rehabilitation, and default acceleration and foreclosure provisions are acceptable to the Department.

A commenter asked about the impact to the debt service on the section 236 mortgage if the interest reduction payment is redirected to the second mortgage. The Department has determined that redirection of the interest reduction payment ("IRP") will have no effect on the project's total debt service. Instead, the IRP will be redirected to service the debt on the second mortgage and the first loan will be fully serviced from project rental income. Two commenters also pointed out that a redirection of the section 236 interest reduction payment has no effect as an incentive. The Department agrees but will still allow the redirection to be requested as part of the plan of action since it is authorized by statute as an incentive. Mortgagee consent would also be required in this case.

A commenter asked how the owner is guaranteed the income reflected in the section 236 basic rents if the rents of moderate income residents are limited to the lower of 30% of the adjusted gross income or the section 8 existing FMR. The Department has determined that section 8 contract rents may go over 120% of the FMR as long as the gross potential income for the project does not exceed the Federal cost limit. Where necessary, section 8 rents in effect will subsidize market rents in order to ensure that the project remains affordable and that the owner has enough income to operate the project and receive an adequate return on preservation equity. If the rent stream in the future were to fall short of the amount needed to provide the owner with an 8 percent return, access to residual receipts could be provided or

the shortfall accrued for distribution in a future year.

Section 248.157 (Voluntary Sale for Projects Not Exceeding the Federal Cost Limit)

The Department received 397 comments concerning this section of the proposed rule. The majority of the comments focused on three major issues: The ranking of priority purchasers, the twelve-month priority purchaser marketing period, and the level and timing of the earnest money deposit.

The Department received 86 comments concerning the earnest money deposit which must be submitted by qualified purchasers as part of a bona fide offer to purchase eligible low income housing pursuant to this subpart. The issues raised by the commenters concerned the amount of the earnest money deposit, specifically whether it would be feasible for priority purchasers to raise the money; the timing of the deposit, along with the concern that the funds could be tied up for a year; and the waiver of the deposit by an owner or the Department. The proposed rule, in paragraph (g) of this section, requires that a bona fide offer include an earnest money deposit equal to one percent of the transfer preservation value of the project. While the statute does not expressly require such a deposit, the Department believes that an earnest money deposit is a reasonable means of ensuring that a purchaser is making a good faith offer. The purpose of the earnest money deposit is not to decrease an owner's risk or to ensure that a purchaser has the financial capacity to complete the transfer, as two commenters suggested, but to prevent sham offers which could result in an owner prepaying the mortgage or terminating the insurance contract in contravention of the purposes of this subpart. One commenter suggested that a more appropriate requirement for preventing sham offers would be to require HUD review of corporate documents, the history of the organization, and previous HUD participation information. The Department intends to review a purchaser's corporate documents when an expression of interest is submitted and will look at its previous participation information when approving a plan of action. However, the Department believes that an earnest money deposit is necessary at the time of submission of a bona fide offer in order to deter sham offers and to fulfill the requirements of LIHPHA. Therefore, the Department has retained the concept of an earnest money deposit

with the following modifications made in response to public comments.

Commenters suggested a range of alternatives to the amount of the earnest money deposit established in the proposed rule. All of the commenters who raised a concern as to the amount of the deposit, except for two, claimed that the proposed amount was excessive. Commenters protested that many priority purchasers would not be able to raise the predevelopment funds for the deposit, and that the deposit would limit the participation of many nonprofit organizations in the preservation program. In order to mitigate these effects, commenters suggested that the earnest money deposit be eliminated, or decreased to anywhere from \$100 per unit, to \$50,000 per project. Many commenters suggested a range for the deposit, such as the lesser of \$400 per unit or \$40,000 for the project.

The Department acknowledges that a large earnest money deposit may be prohibitive to many priority purchasers. In response to the reactions of the commenters, the Department has amended paragraph (g)(1)(ii) of this section to require an earnest money deposit equal to the lesser of one percent of the transfer preservation value of the project, \$50,000, or \$500 per unit. Resident councils intending to purchase a project pursuant to a resident homeownership plan under § 248.173 or § 248.175 must submit an earnest money deposit equal to \$200 per unit for 75% of the occupied units. The rationale for the lower amount of the deposit under a resident homeownership plan is that the purpose of the earnest money deposit is different. It is not to deter sham offers, but to ensure sufficient tenant support to make the homeownership plan successful. Paragraph (f) of the proposed rule, which lists the information the Department must provide to a purchaser who has submitted an expression of interest, has also been amended to include a worksheet which will indicate the level of the earnest money deposit required of the purchaser.

One commenter questioned what source could be used to raise the earnest money deposit. The statute and the proposed rule are both silent on this matter. The Department is not authorized to provide funds to a purchaser except in connection with an approved plan of action. The Department defers to the purchaser to choose the source of the deposit, whether from the purchaser's own funds, loans or grants. With regard to resident councils who intend to

purchase the project under a homeownership plan under § 248.173 or § 248.175, the earnest money could come from a pledge of the tenants' security deposits as long as this pledge would not violate any State or local laws and the owner has given its agreement to the pledge.

The earnest money deposit may not, in any transfer under this subpart, be provided by the owner, or by any entity affiliated with the owner. However, an owner may waive the requirement of an earnest money deposit or decrease the amount of the deposit. Paragraph (g)(2) has been amended to provide for this waiver or decrease. In order to waive or lower the deposit, an owner must state in its second notice of intent, submitted under § 248.133, that it intends to waive or accept a lower earnest money deposit, and that the waiver or decrease will apply to all qualified purchasers. If an owner fails to declare its intent to waive or decrease the deposit in the second notice of intent, the deposit may be waived or decreased during the time the project is held out for sale through written notice to the Secretary. The Secretary will then notify all purchasers which have submitted an expression of interest of the owner's decision to waive the deposit or accept a lower deposit. A waiver of or decrease in the earnest money deposit applies to all qualified purchasers who submit a bona fide offer for a particular project, except for resident councils who intend to purchase the project under a homeownership plan pursuant to § 248.173 or § 248.175. Resident councils will still be required to provide an earnest money deposit, despite an owner's waiver or decrease, because, in the case of resident homeownership, the purpose of the deposit is to ensure sufficient tenant support to make such an undertaking successful, not to avoid sham offers.

With regard to the timing of the deposit, comments ranged from suggesting that the deposit be tied to site control to requiring that the deposit be due 45 days after HUD approval of the bona fide offer. The Department concedes that there is a concern among purchasers that under the proposed rule the earnest money could be tied up for a year without acceptance of the offer, making it difficult for purchasers to obtain predevelopment funding and preventing purchasers from putting the money to use elsewhere. In response to public comments, the Department, while still requiring the earnest money deposit at the time a bona fide offer is submitted, has amended paragraph (h) of this section to require an owner to

accept or reject a bona fide offer, which has been made during the appropriate purchase period, within 30 days from the receipt of the offer. If the owner rejects an offer, the earnest money deposit must be returned to the purchaser; however, the offer will still be deemed a bona fide offer which an owner may later accept. If the owner accepts an offer at a later date, after first rejecting it and returning the earnest money deposit, the purchaser, if still interested in buying the project, must redeposit the earnest money within 30 days from receipt of the owner's acceptance of the offer.

Five commenters stated that while an earnest money deposit is held by an owner, it should be deposited in a HUD-supervised escrow account, earning interest to the benefit of the purchaser. The Department will defer to State and local law on this issue. The earnest money deposit must be held in accordance with the laws of the jurisdiction in which the project is located.

The Department received 89 comments concerning the ranking of priority purchasers under paragraph (h) of this section. Twenty-nine of these comments suggested abolishing any type of ranking among priority purchasers, while 60 comments expressed agreement with the concept, but suggested expanding the first priority beyond resident councils who intend to purchase the project pursuant to a homeownership plan under § 248.173 or § 248.175. Commenters claimed that expanding the ranking system would acknowledge tenant preferences for rental housing and would permit nonprofit organizations with experience in owning and operating low income housing more opportunity for purchasing projects under this subpart. Commenters wishing expansion of the ranking system suggested that first priority be given to any resident council, regardless of the type of ownership it seeks, to community-based nonprofit organizations, or at least those community-based nonprofits with tenant-endorsement, or to any priority purchaser with tenant endorsement.

The Department acknowledges that resident homeownership will account for only a small portion of all preservation plans of action for eligible low income housing. In most cases the projects will remain as low income housing and in this situation tenants may support a tenants association or a community-based nonprofit organization to own and manage the project. In order to accommodate these preferences and to provide community-based nonprofit organizations with the maximum

opportunity to purchase eligible low income housing, the Department has decided to expand the groups who are eligible to purchase a project during the first priority purchaser marketing period to include resident councils purchasing a project as rental housing and community-based nonprofit organizations with tenant endorsement.

In order for a community-based nonprofit organization or a resident council intending to purchase a project and maintain it as rental housing to be among the first of priority purchasers, the organization or council must demonstrate that it has the support of a majority of the tenants of the project. This support can be demonstrated by a resolution of the resident council or by a petition signed by tenants representing a majority of the occupied units. A resident council intending to purchase the project under a resident homeownership plan must demonstrate that it has the tenant support required under § 248.173(c). The proposed ranking system in paragraph (h) has been omitted from the regulation, paragraph (c) has been amended to change the priorities during the lock-out period, and paragraph (g) has been amended to require that evidence of tenant support be submitted as part of the bona fide offer, if the offer is made during the first priority purchaser marketing period.

The Department received 68 comments contesting the 12-month marketing period for resident councils under paragraph (h) of this section of the proposed rule. All of the commenters preferred a shorter marketing period; many advocated two, three or six month periods for priority purchasers, while others suggested permitting an owner to negotiate a sale at any time with any priority purchaser, giving tenants a right of first refusal, or allowing known priority purchasers to certify that they do not want to make an offer. The commenters expressed concern that owners may be reluctant to sell if they have to wait 12 months before accepting an offer and hence, may decide to retain the project instead. Also, there was a concern that purchasers may find it difficult to obtain funding and might be hesitant to invest time and resources in an offer which could be held for a year before acceptance or rejection. In recognition of these concerns, the Department has amended paragraph (c) to shorten the marketing period.

Beginning on the date of receipt of the second notice of intent, resident councils and community-based nonprofits, with the requisite tenant support, will have six months in which

to make a bona fide offer without competition from any other priority or qualified purchasers. During this six-month period, an owner may accept a bona fide offer from a resident council or community-based nonprofit organization with tenant endorsement, within 30 days of receiving the offer. Any acceptance by an owner is conditioned on HUD's approval that the offer meets the requirements of a bona fide offer. From the end of this six-month period, until 12 months after receipt of the second notice of intent, any priority purchaser may submit a bona fide offer, and an owner may accept an offer from any priority purchaser it chooses, conditioned on HUD's determination that the offer is bona fide. Once the 12-month period has expired, all qualified purchasers will have the opportunity to submit bona fide offers during the next three months.

Twenty comments were received regarding the language in paragraph (a) of the proposed rule which states that an owner is not obligated to accept a bona fide offer under this section, but may elect to retain the project and request incentives. The commenters expressed concern that permitting an owner to change its mind about selling the project after receipt and acceptance of a bona fide offer would result in the loss of time and resources by priority purchasers who go to the trouble of obtaining tenant endorsement and raising an earnest money deposit. Some commenters suggested that to deter owners from changing their minds, there should be a penalty, such as a five year period from the date of rejection of an offer which was previously accepted, in which an owner may not submit another notice of intent or prepay the mortgage or terminate the mortgage insurance contract.

The Department recognizes the concern raised by potential purchasers with regard to this issue. However, section 220 of LIHPHA imposes no obligation on an owner to accept a bona fide offer. LIHPHA creates two separate types of sales transactions; those under section 220 for sales of property within the Federal cost limit, where an owner "may" accept a bona fide offer from a qualified purchaser, and those under section 221, where the property exceeds the Federal cost limit, and an owner must accept the first bona fide offer it receives at a price that is not less than the transfer preservation value. The establishment of this dichotomy illustrates Congress' intent that the provisions of section 220 be voluntary, as opposed to the mandatory provisions of section 221. To impose an

obligation on an owner to accept a bona fide offer under this section would be contrary to standard real estate practice, where an owner may change its mind and take a property off the market, and in the absence of any indication to the contrary in the statute, the Department does not have the authority to create such an obligation. A purchaser whose bona fide offer has been accepted by an owner who later withdraws its acceptance may seek remedies under State and local law. Also, there are certain restrictions built into the statute and the regulation which should have the effect of deterring an owner from changing its mind once it has accepted a bona fide offer. For instance, if an owner changes its mind and fails to submit a plan of action within six months after receiving the information from the Department in § 248.131, the waiting period of § 248.135(h) applies, precluding the filing of another initial notice of intent for six months.

One commenter suggested, that in carrying out its responsibilities under paragraph (b) of this section, the Department solicit and maintain a list of priority purchasers who will be notified when purchasing opportunities are available. The Department intends to create such a list, including qualified, non-priority purchasers, in order to streamline its informational duties under this paragraph, and requests that any potential purchasers who wish to be part of this list contact the local HUD office with their request.

One commenter contested that the three-month qualified purchaser period in paragraph (c) of this section is inadequate since it would not give priority purchasers who are unsuccessful in the priority purchaser period sufficient time to seek a partner and restructure a deal. The three-month period in paragraph (c) is derived from the statutory language of section 220(c), and hence cannot be modified by the Department. Also, the Department sees no reason why a bona fide offer by a priority purchaser would not be accepted, unless an owner accepts another offer or changes its mind about selling the project in which case, extending the three-month period would not benefit the failed purchaser. If an offer is not accepted because it is not bona fide, a purchaser may resubmit an acceptable contract of sale and earnest money deposit.

Three commenters stated that in cases where an owner receives more than one bona fide offer from priority purchasers, the owner should be required to accept the offer from the priority purchaser

which has the highest ranking in paragraph (h) of the proposed rule, provided that the offer is at least 80% of the project's transfer preservation value. As previously noted, paragraph (h) has been amended to omit the ranking system contemplated in the proposed rule. If an owner receives more than one offer, it may choose which one it wishes to accept; the only requirement being that the offer is bona fide. Section 220 of the statute states that the purchase price of a project sold under that section may not exceed the preservation value of the project and paragraph (d) of this section repeats that language. The statute does not establish a minimum purchase price for the voluntary sale of a project under this section and, in the absence of any statutory direction, the Department has decided not to impose such a requirement.

The Department received two comments questioning whether community-based nonprofit organizations will be required to establish a separate nonprofit subsidiary to purchase a project under this section, as is required for projects constructed under section 202. Most eligible low income housing is covered by a regulatory agreement which requires an owner to be a single asset mortgagor. The Department, therefore, expects that separate subsidiaries will be established in order to meet this regulatory requirement. It is expected that State and local governments shall also establish separate mortgagor entities for the purpose of purchasing eligible low income housing. If a separate subsidiary is established or being established, the purchaser should notify HUD of this fact when submitting an expression of interest under paragraph (e) of this section.

One commenter requested that the State or local government be informed of all expressions of interest received by the Department, while another asked for notification at the time a bona fide offer is submitted. The State or local government will receive a copy of the second notice of intent submitted by the owner, and will be made aware at that time that the project is up for sale. A copy of the plan of action will also be submitted to the State or local government, which will then have a 60-day comment period. These requirements provide sufficient notice to these entities.

One commenter stated that in order to estimate the expenses involved in acquiring the project, the purchaser must have access to any expense analyses, operating income, and rehabilitation estimates for the project. This

information shall be provided to any purchasers under paragraph (f) of this section who have submitted an expression of interest.

Eleven comments were received by the Department concerning the fact that a bona fide offer, as set forth in paragraph (g) of this section, must contain a contract of sale as well as an earnest money deposit. The primary concern was that priority purchasers may not have the sophistication and experience necessary to draft an acceptable contract, and this could lead to rejection of their offer. The commenters suggested that HUD prepare draft contracts of sale to be used by purchasers under this subpart. The Department will provide some guidance as to required or prohibited language for the contract in its administrative guidance, but sees no need to prescribe an entire model contract.

Paragraph (g) of this section of the proposed rule has been amended to explicitly state that a bona fide offer must be for a purchase price which does not exceed the transfer preservation value of the project. This limitation applies to voluntary sales under this section, as well as to mandatory sales under § 248.161. It is equally applicable regardless of whether the transfer is financed solely through HUD assistance or through other sources.

Five commenters stated that an owner should have the sole responsibility of deciding whether an offer is bona fide, and HUD should not have to review each offer. The Department agrees that reviewing each offer is not necessary. Therefore, paragraph (i) has been amended to require HUD review only of the offer which is accepted by the owner, rather than of all of the offers which are submitted. Departmental review of the accepted offer is necessary to ensure compliance with the statutory requirement that a project can be sold only to a qualified purchaser which has made a bona fide offer. While HUD will not review all offers to ensure that they are bona fide, all offers which are received by an owner must still be submitted to the Department in case a review is required to ensure that an owner has not received any bona fide offers and thus, is entitled to prepay or terminate the insurance contract under § 248.169.

Another commenter stated that the contract of sale and earnest money deposit should be a minimum standard and that an owner should be entitled to conduct further investigation before determining that an offer is bona fide. Paragraph (h) has been amended to

require an owner to accept or reject a bona fide offer within 30 days of receipt. During that 30-day period an owner may conduct any investigation it desires prior to accepting or rejecting the offer.

Paragraph (I) of this section permits an owner to prepay or voluntarily terminate the insurance contract if a sales transaction, for which a bona fide offer was accepted and approved by HUD, is not consummated within 90 days of approval of the plan of action and if the failure to complete the transaction was for reasons not attributable in whole or in part to the owner. One commenter stated that the proposed rule should be clarified to show that prepayment would not be allowed if a bona fide offer is made and rejected; if the purchaser is unable to complete the sale for reasons within the owner's control; or if HUD fails to act in a timely fashion. Under section 220 of the statute, an owner is not required to accept a bona fide offer. If it rejects all of the offers it receives, an owner may not prepay, but must continue the affordability restrictions in place and may submit a plan of action for incentives, if it can meet the time requirements of § 248.135(a), or file a new notice of intent under § 248.105 to receive incentives. If an owner attempts to sell the project under the mandatory sale provisions of § 248.161, it must accept the first bona fide offer it receives, in accordance with the priority purchaser marketing period established in this section. If an owner rejects any offers under § 248.161, it will not be permitted to prepay or terminate under this paragraph. Paragraph (I) clearly encompasses the commenter's second concern; if a purchaser cannot consummate a sales transaction, for which a bona fide offer has been accepted and approved by HUD, and the owner is to blame, the owner will not be permitted to prepay or terminate. If the Department does not meet the time requirements for providing assistance under an approved plan of action, an owner is eligible to prepay or terminate, pursuant to § 248.169. Sanctions are not imposed if the Department misses any other time constraints.

Three commenters contested the additional 60-day lock-in period set forth in paragraph (I)(2) of this section, which requires an owner, if a transfer falls through after the conclusion of the 15-month sales period, to contact those qualified purchasers whose bona fide offers were not accepted, to invite them to renew their offers and purchase the project. The commenters claimed that the statute does not provide any authority for this extension of the sales

period. The Department acknowledges that there is no express authority in LIHPHA for this requirement; however, the primary intent of the statute is to preserve eligible low income housing and this one-time window would fulfill the statute's intent without unduly restricting an owner's rights. If an offer is made and accepted during the 60-day period, the owner would be in the same position as if the first transaction had been consummated. If an offer is not made or accepted, an owner will be eligible to prepay only two months after it would have in the absence of this requirement. The Department believes that the benefit of this 60-day period, the purpose of which is in part to ensure that an owner does not accept an offer it knows will fail in order to thwart the purpose of the statute, far outweighs any cost.

One commenter suggested that the proposed rule be amended to provide that an owner would not be required to wait longer than 12 months before receiving incentives or opening the sale period to qualified purchasers and that an owner would not be required to wait more than 15 months before gaining the unencumbered right to prepay. Pursuant to section 220 of the statute, as long as an owner has not accepted a bona fide offer from a priority purchaser, the sales period for qualified purchasers will begin automatically 12 months after submission of the second notice of intent. However, an owner will not be guaranteed the receipt of incentives within this 12-month period or eligibility to prepay within 15 months. Section 224 of LIHPHA, implemented in § 248.169 of the proposed rule, sets forth the period of time an owner must wait before being eligible to prepay due to the failure of HUD to provide the agreed upon incentives in a timely manner because of the failure of a sales transaction for which the owner was not to blame, or because no bona fide offers were received. These time constraints were established in the statute and the Department has no authority to override them.

Sixty-three comments were received by the Department concerning paragraph (m) of this section, which limits the Federal financial assistance provided to qualified purchasers to that needed to cover certain enumerated project costs. Two commenters stated that the assistance provided under this section should be the same for both priority and qualified purchasers. Three commenters stated that technical assistance funds should be available to all tenant groups, regardless of the form of ownership they choose. In addition to

the assistance and incentives given to all qualified purchasers, priority purchasers may be reimbursed, under paragraph (m)(6), for transaction expenses incurred in acquiring the project, and may receive a grant under paragraph (o) of this section. Also, pursuant to paragraph (m)(7), those resident councils who are purchasing a project in accordance with a resident homeownership plan under § 248.173 or § 248.175 may receive financial assistance to cover the costs of training for the tenants, the resident council and for homeownership counseling. The additional assistance for priority purchasers and resident councils under the homeownership program is specifically authorized in section 220(d) of LIHPHA. HUD cannot exceed its statutory authority by providing funding in excess of that designated in the statute for each type of purchaser.

Another commenter stated that the Federal assistance provided to a purchaser should be sufficient to cover the debt service on all of the federally-assisted mortgages on the project. This section of the rule has been amended accordingly.

Ten commenters were concerned that sufficient assistance be provided under paragraph (m)(4) to ensure that all project operating costs will be supported by the project's rental income. The commenters suggested that the organizational and overhead costs of ongoing ownership and operation, including management oversight, financial monitoring, inspections, budget preparation, and audit oversight should be expenses which will be paid out of project income. The Department will include as project operating expenses those reasonable expenses which are ordinarily covered in the program under which the project is insured.

One commenter stated that an owner should earn interest on reserve for replacement deposits. All reserve for replacement accounts may be invested and earn interest at the request of the owner to the mortgagee. Under Mortgagee Letter 83-24, mortgagees may not refuse such requests, provided the requested investment is eligible and the owner agrees to pay a reasonable fee to compensate the mortgagee for expenses.

The Department received 23 comments stating that priority purchasers should be entitled to a return on equity, pursuant to paragraph (m)(5). The definition of priority purchaser, in § 248.101, requires that the purchaser be a nonprofit organization. A nonprofit organization is not normally entitled to a return on its investment. However, the Department acknowledges that virtually

all priority purchasers will be dependent on Federal assistance in order to consummate a transfer under this section and will need an acquisition loan under section 241(f). An acquisition loan may only cover 95% of the transfer preservation equity of the project, plus, in the case of priority purchasers, expenses associated with the acquisition, loan closing and implementation of the plan of action, and the remaining 5% must come from the purchaser's own funds or other financing sources. The Department recognizes that priority purchasers may need to borrow the 5%. Therefore, the Department will build into the rent stream a return on any actual cash investment by the purchaser and debt service on any gap financing. The extra income must be allocated towards debt service payments on the non-federal loan, and if there is no non-federal loan, or if the return exceeds the debt service on the loan, then the surplus cash must be deposited in the residual receipts account for the project. For priority purchasers, HUD may also provide a grant to cover the 5% equity requirement.

Sixteen commenters asked for more clarification as to what transaction costs will be reimbursed to priority purchasers under paragraph (m)(6). The Department will provide a one-time grant to priority purchasers on a case-by-case basis in an amount not in excess of 5% of the project's transfer preservation equity. The purchaser should list those costs for which it is seeking reimbursement in the plan of action. At the time of plan of action approval, the Department will determine the amount of the grant. As noted in the preamble to the proposed rule, organizational costs incurred in establishing the nonprofit purchasing organization are reimbursable. Tenant training and education costs incurred by a priority purchaser which is not a resident council purchasing the project under a homeownership plan, may be reimbursed depending on the need for the training and the reasonableness of the costs. In response to one commenter's request, brokers fees are not a reimbursable expense. Seller financing will not be permitted to cover transaction costs.

Fifteen commenters stated that resident councils and other priority purchasers should be permitted to receive the assistance set forth in paragraphs (m)(6) and (7) to cover transaction, training, and counseling costs, on an up-front basis, rather than being reimbursed after the fact. These commenters asserted that resident

councils and other priority purchasers require seed money for predevelopment costs to assist in the preparation of a bona fide offer and the plan of action and for tenant education. The Department recognizes the need for financial backing early in the prepayment process. However, statutory constraints prohibit the Department from expending funds prior to approval of a plan of action. Section 220(d)(2), from which paragraph (m) of this section is derived, authorizes the Department to provide assistance only for approvable plans of action. The same constraint exists for mandatory sales under section 221(d)(1). Therefore, the Department is not able to provide any of the assistance authorized under paragraph (m) prior to approving a plan of action. The plan of action should include the transaction and training expenses which the resident council or other priority purchaser incurred or will incur with regard to the transfer of the project. HUD will reimburse the purchaser for those expenses covered under this section at the time of the transfer.

Two commenters suggested that HUD have a specific technical assistance pool for resident groups who require such assistance and a standard set of curricula for training which will be covered under paragraph (m)(7). Resident councils purchasing under a resident homeownership plan must include in their plan a description of the scope of any training they intend to undertake. The council must work with a nonprofit organization, approved by HUD, to develop the tenants' capacity for homeownership. These requirements are stringent enough to ensure that any training program is acceptable to the Department, while leaving resident councils with sufficient flexibility to tailor any training program to their particular needs. For these reasons, the Department believes that it is unnecessary for it to establish training criteria or to preapprove trainers.

The Department received 11 comments concerning paragraph (n) of this section, which requires that the amount of any residual receipts transferred to the selling owner be deducted from the sale price of the project. This language is derived from section 220(d)(3) of the statute. As noted in the preamble to the proposed rule, this provision poses a problem since residual receipts are not included in the sale price of the project, which is capped at the project's transfer preservation value. Therefore, deducting the amount of the residual receipts from the sale price will result in owners realizing less than the full amount of the project's

transfer preservation value. In the proposed rule, the Department specifically requested comments as to how this inconsistency should be dealt with. Two commenters expressed agreement with the statutory language; one commenter responded by suggesting that the purchaser buy the residual receipts from the owner; and eight commenters asserted that an owner should be permitted to receive the full transfer preservation value of the project and suggested that residual receipts be added to transfer preservation value in the appraisals and then deducted pursuant to this section. The Department has considered this problem and feels that adding residual receipts to preservation value would be inconsistent with customary appraisal standards, which section 213(c) of the statute instructs HUD to implement. Since the statute and its legislative history give no indication that this provision was a drafting error, the Department must assume that Congress intended that HUD deduct residual receipts from transfer preservation value. Therefore, the rule continues to track the language of the statute. Purchasers may buy the residual receipts from the owner as part of the sales transaction; however, the Department will not subsidize this purchase.

Three commenters raised concerns regarding paragraph (o) of this section, which authorizes grant assistance for priority purchasers. The assistance may not be in excess of the present value of the total projected fair market rent for the next ten years, or such longer period if necessary to cover the costs listed in paragraph (m). One commenter questioned whether the grant would be available concurrently with section 8 assistance. Another commenter asked whether the grant can be provided for more than ten years and if there is a limit on the amount of the grant. As the proposed rule indicates, a grant under this paragraph is a one-time grant. The reference to the ten year or longer period of time is to compare the grant to the present value of the fair market rents over time. The purpose of the grants is to provide HUD with more flexibility to work with priority purchasers to determine the most appropriate mix of subsidies, i.e., grants and incentives. Grant funds could, therefore, be made available in conjunction with section 8 assistance. There is no cap on the grant; however, the amount will depend on the costs listed in paragraph (m) and will be limited to what is necessary to cover those costs for each particular project. Another commenter stated that HUD

should develop guidelines for allocating these grants. As noted above, the purpose of providing assistance in the form of grants is to give HUD flexibility in financing specific projects. The Department will review plans of action to assure that the mix of proposed subsidies is appropriate and is the least costly alternative to the Federal government.

Three comments were received concerning paragraph (p) of this section, which states that the Department shall be entitled to seek reimbursement for any assistance provided under this subpart to a priority purchaser who becomes affiliated with, or sells the project to, a non-priority purchaser who would not otherwise be eligible for such assistance. One commenter claimed that the language of this paragraph should be amended to state that HUD "may under some circumstances" be reimbursed in order to permit a nonprofit to affiliate with a for-profit organization and not be penalized. This type of affiliation is exactly what this paragraph is intended to discourage. If a nonprofit and for-profit jointly own the project, the ownership entity would no longer meet the definition of a priority purchaser, and hence should not have access to the additional assistance available only to priority purchasers. Another commenter stated that if a priority purchaser sells the project to a qualified purchaser, HUD should modify the plan of action and only seek reimbursement of the grant on a prorated basis and reimbursement of the transaction expenses which have not already been used. The Department has decided not to prorate the grant. The grant is provided in one lump sum and the Department may seek reimbursement in the full amount. This paragraph requires reimbursement of assistance which is in excess of that to which a nonpriority purchaser is entitled. Since Federal reimbursement of transaction expenses is assistance which is only provided to priority purchasers, the entire amount of the assistance must be returned if the owner is no longer a priority purchaser. Another commenter suggested that this paragraph set a time limit on reimbursements to the Department. The Department believes that a time limit of ten years from the date of approval of the plan of action would be sufficient to serve the purpose of this provision, while providing HUD with adequate reimbursement. The rule has been amended to permit HUD to seek reimbursement for assistance if a priority purchaser affiliates with, or sells the project to, a for-profit organization

within ten years of approval of the plan of action.

Section 248.161 (Mandatory Sale for Housing Exceeding Federal Cost Limit)

In the proposed rule, the Department requested comments concerning how the Federal grants provided to qualified purchasers under paragraph (d) should be allocated if there are insufficient appropriations to fund all the requests. The Department received nineteen comments in response to this request. Many commenters suggested that in allocating insufficient grant money, priority be given to projects with the greatest amount of tenant involvement, the highest percentage of very low income tenants and those which will remain permanently affordable to low income tenants. Others recommended that preference be given according to when the projects are eligible to prepay, with those being eligible within twelve months given priority over those which are eligible within twenty-four months. Some commenters stated that there should be equal access to the grants and suggested that State and local governments be required to pay the shortfall that cannot be covered by Federal funds. Another commenter recommended that preferences be based on a demonstrated need for low income housing or on a showing that minority housing opportunities and racial integration would be adversely affected if the mortgage is prepaid. One commenter also recommended that first priority for grant assistance should be provided to projects located in areas with low income housing shortages.

Allocating grants according to the need for the housing may be unrealistic since it is expected that there is a need for each project being sold under the mandatory sale provisions of this section and that its prepayment may affect minorities; otherwise the owner most likely would be eligible to prepay the mortgage or terminate the insurance contract under § 248.141 and would not be selling the project under this section. Additionally, the Department does not have the authority to require a State or local government to provide grants to make up for the shortfall in Federal funds.

The statutory restrictions governing the manner in which plans of action are submitted and the time frames for their approval make the rest of these suggestions infeasible. LIHPHA establishes a specific time in which the Department must approve a plan of action and provide the agreed-upon funding. If the assistance is not provided within the statutory time frames, as set

forth in § 248.169, then an owner may prepay the mortgage or terminate the insurance contract and the project will be lost from the low income housing inventory. In order to implement the allocation processes suggested by the commenters, the Department would be required to withhold its approval of a plan of action until it received other plans and could then compare them to determine which have the most tenant involvement or the most very low income tenants. Since owners and purchasers will be submitting their plans of action at different times, withholding approval of the plans could result in more prepayments and terminations due to the delay caused by this process.

The alternative would be to provide grants to only a certain class of projects, such as those that are only twelve months away from prepayment; however, if there are few projects in this class in a particular year, funds which could have been provided to other projects would be withheld, resulting in needless losses to the low income housing inventory. The Department has decided to continue considering this matter in the event that it receives inadequate funding in the future.

In response to internal discussions, the Department has amended § 248.161 of the proposed rule to permit an owner, at its option, to accept an offer to purchase eligible low income housing at a sale price less than the transfer preservation value of the project. Sections 221 (b)(1) and (c) of LIHPHA require an owner, under the mandatory sale provisions, to accept a bona fide offer to purchase the housing for a sale price not less than the transfer preservation value. While the Department recognizes that an offer to purchase the housing at a price less than the transfer preservation value does not meet the definition of bona fide offer, there is no language in the legislation prohibiting an owner from accepting an offer other than a bona fide offer. Since LIHPHA does not prohibit an owner from voluntarily accepting an offer for a lower sale price, the Department has revised the rule to allow an owner to accept such an offer.

Permitting an owner to accept an offer at a lower sale price could avert unnecessary prepayments under section 224 of the statute in the event no bona fide offers are received. Additionally, a lower sale price would most likely require less Federal subsidy, in furtherance of section 221(a)(1) of LIHPHA, which requires that the Department employ the least costly alternative to the Federal government in achieving the purposes of the legislation.

Under the mandatory sale provisions of this section, if an owner receives an offer at a sale price less than the project's transfer preservation value, the offer may be accepted as long as it is submitted by a qualified purchaser within the appropriate sales periods set forth in § 248.157(c) and as long as the offer meets all of the requirements of a bona fide offer in § 248.157(g), except for the amount of the sale price.

Section 248.165 (Assistance for Displaced Tenants)

Fourteen comments were received by the Department regarding this section of the proposed rule. The most frequently made comment concerned relocation expenses. One commenter asserted that owners should not have to pay fifty percent of the relocation costs incurred by displaced tenants plus additional costs imposed by State or local laws. Two commenters expressed the view that owners should be required to pay more than fifty percent of the relocation expenses incurred by displaced tenants. Three commenters stated that if an owner pays fifty percent of the relocation expenses, HUD should pay the rest.

Section 223(b) of the statute states that the Secretary shall require the owner to "pay fifty percent of the moving expenses of each family relocated, except that such percentage shall be increased to the extent that State or local law of general applicability requires a higher payment by the owner." Therefore owners must pay at least fifty percent of the relocation costs of displaced tenants.

However, it would clearly be inconsistent with this statutory limit for the Department to impose a financial burden on owners in excess of fifty percent of the costs, in the absence of a State or local law directing a higher payment. As one commenter pointed out, those expenses which must be paid by the owner must be actual and reasonable relocation expenses, as defined in § 248.101 of this section. The Department will not require an owner to pay unreasonable relocation expenses or expenses which were not actually incurred by the tenants. Additionally, the statute does not impose any burden on HUD to pay relocation expenses. Those relocation expenses which are not paid by the owner must be borne by the tenants.

According to one commenter, tenants who voluntarily move in response to a notice of intent to prepay, and tenants who pay rents beyond the regulated levels after prepayment, should be included in the definition of displaced tenant and should be entitled to the

protections of this section. Section 223 of the statute applies only to tenants who are displaced as a result of prepayment of the mortgage or termination of the mortgage insurance under § 248.169 of this subpart. Tenants who voluntarily leave when a notice of intent is submitted are not leaving due to prepayment or termination, for at that point, an owner would not know that it could prepay under § 248.169, which only applies in extenuating circumstances. If an owner prepays or terminates under § 248.169, the Department no longer regulates rents except for special needs tenants who continue to reside in the project and for current tenants if the project is located in a low-vacancy area. If, in these cases, a tenant is paying more than the regulated rents, he or she should notify the Department and HUD will enforce the lower rent, but any such tenant would not be considered displaced for purposes of this section.

One commenter requested clarification as to the assistance to be provided by the Department in paragraph (a) of this section. This paragraph refers to the section 8 certificates and vouchers which will be provided by the Department to any low and very low, income tenants who are displaced as a result of a mortgage prepayment or insurance termination under § 248.169 of this subpart. This section 8 assistance will be provided pursuant to 24 CFR parts 882 and 887.

As one commenter noted, the Conference Report at page 467 indicates that HUD is authorized to set section 8 existing fair market rents at the "exception rent," i.e., 120% of the fair market rent, so that tenants who receive the assistance provided in paragraph (a) may use section 8 certificates or vouchers at the project even if the project's rents exceed the section 8 existing fair market rent. In order to implement this, the Department has amended § 882.106(a) and § 887.351(b) of this title, to permit approval of the exception rent on a case-by-case basis, as the Secretary deems appropriate. Paragraph (a) of this section has also been amended accordingly.

Special needs tenants, and, if the project is located in a low vacancy area, all current tenants, may accept the section 8 assistance provided in paragraph (a) in addition to the protections set forth in paragraphs (e) and (f), which permit special needs tenants and those who reside in a low vacancy area to continue to occupy their unit in the project or receive a replacement unit at the same rent levels, for three years after the date of approval of the plan of action. If these tenants

initially refuse the section 8 assistance provided in paragraph (a), they may apply for section 8 certificates or vouchers during or after the three-year protection period; as displaced tenants, they will be given priority for receiving section 8 assistance.

Paragraph (f) of this section provides that in order for the owner to fulfill its obligations with respect to a tenant by providing assistance enabling the tenant to occupy a replacement unit, rather than continued occupancy, the tenant must freely waive its right to continued occupancy in the project. A commenter suggested that for tenants who are 60 years or older, the rights which they would be waiving should be explained to them by an appropriate community services group. The Department concedes that special needs tenants may not be aware that they are entitled to continued occupancy in the project or a replacement unit. For this reason, the Department will notify special needs tenants, which includes tenants 62 years of age, or older, of their status and of the protections they can receive under this section at the same time they are notified of approval of the plan of action under § 248.169. The Department does not find that there is a justification for mandating that the owner arrange to have a community services group advise the tenants.

Two commenters suggested that the three year continued occupancy period should be applicable to all current tenants who are displaced. However, section 223(c) of the statute expressly states that the continued occupancy and replacement unit provisions "shall only apply" to special needs tenants or tenants residing in a low vacancy area. In the face of this clear statutory limitation, the Department cannot extend these protections to cover all displaced tenants. However, as previously noted, any displaced low income tenant may receive section 8 certificates or vouchers. Also, as one commenter pointed out, under paragraph (d) of section 223 of the statute and paragraph (i) of the proposed regulation, an owner cannot refuse to rent to tenants because they receive section 8 assistance.

The Department received a suggestion from one commenter that upon being notified that tenants will be displaced, HUD should request vacancy information from the local public housing agency in order to locate suitable housing for elderly and disabled tenants. Paragraph (c) of the proposed rule already requires the Department to consult with public housing agencies to ensure that any very low and low

income families which are displaced are able to find suitable replacement housing. Therefore, the proposed regulation need not be amended to accommodate this comment.

Section 248.169 (Permissible Prepayment, Voluntary Termination or Modification of Commitments)

The Department received one comment stating that an owner should not be permitted to prepay its mortgage or terminate the mortgage insurance contract under any condition if it would mean that low income tenants are displaced and if the prepayment or termination would result in a loss of affordable housing. Section 224 of the statute, however, authorizes prepayments and/or terminations if the Department approves a plan of action and then fails to provide the agreed upon incentives within a specified time period; if an owner offers the project for sale in accordance with the voluntary or mandatory sale provisions and no bona fide offers are received; or if an owner accepts a bona fide offer, but the sales transaction fails through no fault of the owner. Also, an owner may be permitted to prepay under this section at a later date if HUD is unable to renew a section 8 housing assistance payments contract due to the lack of funding and cannot modify the commitments or revise the incentive package to compensate the owner for the lack of section 8 assistance.

Another commenter suggested that in order to minimize prepayments and terminations under this section, if a resident council makes a bona fide offer to purchase the project and the offer is dependent upon Federal funding which is not forthcoming, the residents should have time to seek alternative financing before an owner is permitted to terminate the affordability restrictions. Section 224(a) of the statute states that an owner may prepay or terminate if any of the enumerated circumstances occur. The statute does not provide any extra time period in order to secure other assistance. The Department interprets this to mean that an owner has the option to prepay or terminate as soon as the Department fails to meet the time periods for the provision of assistance set forth in paragraph (a)(1) of the statute, or as soon as the fifteen-month purchase period ends and the owner fails to receive a bona fide offer. The Department acknowledges that an owner is not required to exercise its option to prepay or terminate, and if an owner, or owner and purchaser, decide to extend the time in which HUD can provide assistance, the Department will recognize this extension and make every

effort to provide the agreed upon incentives. Likewise, if an owner wishes to hold the project for sale past the purchase period, the Department will recognize a plan of action submitted by the owner and a qualified purchaser, subject to the restriction in § 248.111, which prohibits HUD from approving a plan of action with an appraisal which is more than thirty months old.

A commenter expressed concern that it is likely that many owners with projects in rural areas or small municipalities will be entitled to prepay the mortgage or terminate the insurance contract under this section. The commenter suggested that, in order to minimize this possibility, the preservation program should be flexible and encourage broad participation of potential purchasers. The Department recognizes the commenter's concern, and intends to minimize this outcome by notifying as many potential purchasers as possible about the project under § 248.157(b) and by providing incentive packages which are attractive to qualified purchasers and will enable them to meet the costs of owning and operating the project.

Paragraph (a)(4)(i) permits an owner to prepay the mortgage or terminate the insurance contract if the owner receives and accepts a bona fide offer, but the sales contract falls through for reasons not attributable in whole or in part to the owner. One commenter stated that title defects or covenants on the property which run with the land and housing violations which can be cured by making repairs should not be considered attributable to the owner. The Department disagrees, with one exception. Covenants that run with the land, such as utility easements, should not affect an owner's title to the property to the extent that it would preclude completing a sales transfer, but if they do, and the owner has acted diligently to have the covenants or easements removed and has failed to do so, the owner would not be penalized and could take action under this section. However, if there are defects in an owner's title to the property, such as mechanics liens or liens resulting from unpaid taxes, it is the owner's responsibility to clear up these defects and if it fails to do so and the sale falls through as a result, the owner will not be entitled to prepay or terminate the mortgage contract. Likewise, if the project has been cited for housing code violations, it is the owner's responsibility to bring the project up to code. A housing code violation is not the same as not meeting the housing standards. If a project does not meet

housing standards, the owner may still transfer the project and the Department will make a rehabilitation loan available to a qualified purchaser, but the purchaser must agree to maintain the project in accordance with the housing standards upon completion of the rehabilitation.

One commenter requested clarification as to what happens if the Department is unable to provide the section 8 assistance required under an approved plan of action. If section 8 assistance is not available to a project for which a plan of action has been approved and, as a result, the Department fails to meet the deadline for providing assistance under paragraph (a), the owner has the option of prepaying the mortgage or terminating the mortgage insurance contract. If section 8 assistance is unavailable at the time of renewal of the housing assistance payments contract, the provisions of paragraph (b) of this section are applicable.

Pursuant to paragraph (b), if HUD is unable to extend the term of the section 8 assistance, it may attempt to revise the package of incentives provided to the owner under the plan of action and provide benefits which are comparable to those the owner had been receiving. If HUD is unable to create a comparable incentive package, the owner may request that the commitments it made pursuant to § 248.145(a) (2) through (10) be modified or that the plan of action be terminated, which would result in termination of the affordability restrictions on the project. If the owner intends to request a modification of commitments or termination of the plan of action, it must first send a notice to HUD stating this intention. The Department then has ninety days from the date of receipt of this notice to extend the section 8 assistance or comparable incentives and to continue the binding commitments on the project. If the Department is unable to do either of the foregoing within the ninety-day period, HUD may modify the commitments, and if this fails, permit termination of the plan of action. If an owner does not request a modification of commitments or termination of the plan of action, the Department is not bound to the ninety-day period.

Section 248.173 (Resident Homeownership Program)

The Department received comments from 46 individuals and groups on this section. The most significant issue expressed by commenters was their concern that the Department had not given sufficient priority to forms of

homeownership that involved continuing restrictions to assure that units remained affordable to low income families. This concern was raised in several different contexts.

Most directly, 12 comments stated that too much emphasis was placed on resident homeownership programs where there was no requirement for permanent affordability restrictions and no additional limitations on resale profits beyond the 20 year phase-out required by statute and described in paragraphs (i)-(k). Thirteen comments advocated the inclusion of a requirement that all resident homeownership programs be subject to the continuing affordability restrictions for the remaining useful life of the project under § 248.145. Four comments recommended or asked whether a resident council could impose more stringent resale restrictions than those included in paragraphs (i)-(k).

An additional 15 comments specifically recommended that limited equity cooperatives with continuing income affordability restrictions be considered an eligible form of homeownership. These comments were received despite the fact that proposed paragraph (f) explicitly includes such entities as an eligible form of homeownership.

Similarly, 20 comments requested that the Department allow limited equity cooperatives to assume the existing federally-assisted mortgage. By statute, the assumption of such a mortgage would also require the limited equity cooperative to comply with the continuing low-income affordability restrictions under § 248.145.

Lastly, in regard to funding resident homeownership programs, 10 commenters recommended that limited equity cooperatives be eligible to receive continuing project-based section 8 assistance to assure that the housing remains affordable to low-income purchasers. This assistance would be in place of, or as a supplement to, the grants provided for resident homeownership programs. Five of these commenters pointed out that section 220(d)(3)(A) of the statute expressly authorizes the provision of incentives (including section 8) under section 219(b) to all qualified purchasers, which includes resident councils proposing homeownership programs. This set of comments went on to note that the Conference Report at page 465 indicates that HUD should work with priority purchasers to determine the most appropriate mix of subsidies, i.e., grants and incentives.

The Department attributes the number of comments raising these concerns to

the structure of § 248.173, which attempted to cover various types of homeownership programs, and which did not highlight the fact that this section includes limited equity cooperatives as an eligible form of homeownership.

The lack of requirements to retain affordability restrictions beyond the initial purchaser and the phaseout of restrictions on resale profits are designed to provide current low-income tenants and other initial low-income purchasers with an opportunity to become homeowners in the fullest sense of the term. This goal includes the ability over time to fully benefit, like any other homeowner, from making a profit at resale. However, the Department has long recognized that homeownership can take a variety of forms. This is implicitly recognized in paragraph (d)(xii) of this section, which requires that resident councils include with their homeownership plan any restrictions on resales beyond those imposed by the statute.

In order to fully respond to this overall concern, the Department has decided to add a new § 248.175, entitled "Resident homeownership program—limited equity cooperatives." Resident councils seeking to convert the ownership form of their project to a limited equity cooperative would be subject to the requirements of this new section.

These limited equity cooperatives would be operated very much like those currently assisted by the Department under the section 236 and section 221(d)(3) BMIR programs. These entities would be eligible to assume the existing federally-assisted mortgage and, therefore, be subject to the continuing low-income affordability restrictions under § 248.145. With respect to restrictions on resale profits, sellers would be subject to the limitations described in the preamble discussion of § 248.175.

With respect to providing section 8 assistance and, as appropriate, other incentives, the Department agrees that such assistance is authorized and can be used for resident homeownership plans submitted under § 248.175. Limited equity cooperatives receiving incentives will be subject to the continuing low-income affordability restrictions under § 248.145.

Since grants will not be the sole source of HUD funding under § 248.175, the Department anticipates that the amount of grant funding will be less than for a similar project submitted under § 248.173. This expectation is based on the "due diligence" that the Department must provide to assure that

the funding will result in a homeownership program that is both financially feasible and is the least costly alternative that is consistent with establishing a viable homeownership program.

The Department received a number of comments on more specific aspects of resident homeownership programs. Six comments were received on paragraph (a) of this section. Two commenters recommended that tenant-controlled nonprofits, in addition to resident councils, be eligible to develop and implement a resident homeownership plan. By statute, tenants seeking to purchase a project to develop a resident homeownership plan must form a resident council, which is a tenant-controlled nonprofit. A tenant-controlled nonprofit that is not a resident council may, however, be a priority purchaser eligible to acquire a project and receive assistance to maintain it as affordable rental housing under § 248.157 or § 248.161.

Three commenters endorsed the use of public-spirited for-profit organizations to assist resident councils and tenants to consider their options and develop the capacity necessary to own and manage a project. The statute requires resident councils to work exclusively with public or private nonprofit organizations for these purposes. However, such nonprofit organizations may subcontract with for-profit entities.

The last comment on this paragraph stated that a resident council should be required to be incorporated under State law. The statute and the proposed rule require a resident council to be both incorporated and to be a nonprofit, and require a nonprofit to be organized or chartered under State or local law. To make this linkage more directly, the rule will change the definition of "nonprofit organization" in § 248.101 to say that it must be incorporated under State or local law.

Seven comments were submitted in reference to requirements for "bona fide offers" for resident councils under both paragraph (c) of this section and § 248.157(g). Three commenters, two local community service agencies and a national housing trade association, stated that a resident council should be required to demonstrate that a simple majority of the tenants should have expressed an interest in participating in a resident homeownership program. Two other commenters, a law firm and a national tenant's organization, felt that a simple majority was too onerous and recommended that the Department establish procedural standards to ensure legitimate tenant representation rather

than using an arbitrary percentage of residents.

The remaining two comments were directed at the amount of the earnest money deposit required to be made as part of a resident council's bona fide offer. These comments are in addition to those discussed under § 248.157(g). Both commenters felt that one percent of the transfer preservation value was too high an amount and one comment went on to suggest that \$200 for each interested tenant was an appropriate amount. The latter commenter also urged that security deposits pledged by tenants interested in becoming homeowners be counted as part of the earnest money deposit.

The proposed rule required that the resident council demonstrate that at least 75 percent of all families, representing at least 50 percent of all the units, express an interest in participating in a homeownership program at the time an offer is made. The Department strongly believes that a substantial interest, as described in the proposed rule, has to be shown by the tenants to realize a viable homeownership program. This is particularly important given the time frames involved in having the resident council prepare and submit a detailed homeownership plan to HUD for approval and acquire ownership of the project upon HUD's approval of the plan. If the resident council is unable to meet these time frames, the owner may be able to prepay the mortgage and convert the project to a market-rate rental property or to other uses.

The Department, therefore, will maintain the current requirement in terms of the percentage of tenants needed to express an interest in participating in a homeownership program. In light of the comments on earnest money deposits above and the changes made in regard to comments received in response to § 248.157(g), the Department will make the following adjustment with respect to bona fide offers submitted by resident councils pursuing a homeownership plan under this section or § 248.175. Resident councils will be required to submit as an earnest money deposit \$200 from each interested tenant (i.e., \$200 x the number of units that constitute 75 percent of the occupied units). This requirement cannot be waived or reduced by the current owner under § 248.157(g). However, the tenants will be allowed to pledge their security deposits if the owner agrees and such a pledge is permitted under applicable State and local law. The Department feels that this change is responsive to legitimate

concerns about the amount of the earnest money deposit and that this expression of support from a very substantial portion of the tenants is a good indicator of the likelihood of realizing a viable homeownership program.

Seven comments were received on requirements for submitting a homeownership plan under paragraph (d) of this section in relation to activities and costs eligible for funding under paragraph (e) of this section. One comment recommended that repairs as well as rehabilitation activities be included as an eligible item. Paragraph (d)(iii) already requires a resident council to indicate as part of its description of rehabilitation activities what major types of repairs will be undertaken. A second commenter urged that a reserve for unforeseen replacements for a period of at least five years be included in the homeownership plan submitted to HUD. The proposed rule requires that the project be brought up to the housing standards set forth in § 248.147 and provides funding for an adequate reserve for replacements (both an initial contribution as well as monthly contribution from occupancy charges). The Department, therefore, does not feel that a special reserve for "unforeseen replacements" is needed. However, the Department will carefully review homeownership plans to assure that replacement needs are fully addressed through the proposed rehabilitation activities and reserve for replacements account.

The remaining five comments asked what types of activities and costs are allowable for technical assistance, training, and counseling. One commenter suggested that continuing homeownership training provided by staff or on a contractual basis be included, another stressed the need for legal and organizational assistance, and two other commenters simply asked for more clarification. The fifth commenter stated that funding should be at a sufficient level to enable resident councils to seek services at prevailing rates rather than requiring the use of the lowest cost services in a local area. The need for assistance will vary considerably from project to project and, therefore, the Department feels that the language in the rule should remain unchanged and inclusive. This will permit HUD to fund a wide range of activities if they are justified in the homeownership plan and come within the overall cost limits established in § 248.157(m)(7). With respect to allowable cost rates, there is no requirement that the costs be the lowest

in the area. The Department will review the proposed costs to determine if they are reasonable.

In addition to the comments discussed above regarding limited equity cooperatives, the Department received 6 comments on eligible forms of homeownership under paragraph (f) of this section. Four comments urged that mutual housing associations be included as a separate and distinct form of homeownership. One commenter provided the following definition for a mutual housing association:

A private, section 501(c)(3) non-profit organization organized under state law, which owns, manages and continuously develops affordable housing by providing resident involvement in the provision of such housing, long-term housing for low and moderate income families in which residents participate in the ongoing management of such housing, through membership in the association, and have the right to continue residing in such housing as long as they remain members of the association.

This definition indicates that members of a mutual housing association do not have any ownership or equity interest in their units and, therefore, such an ownership form would not be approvable. The proposed rule follows the statutory language in allowing a broad range of ownership forms including cooperatives, limited equity cooperatives, condominiums and fee simple ownership as long as ownership interests or shares are transferred to individual purchasers. Insofar as ownership or equity interests are to be held by the individual purchasers and a mutual housing association meets the other requirements of the rule then such an ownership form could be approved. The Department believes that this determination is best made on an administrative, case-by-case basis rather than through a change in the rule. It should also be noted that a mutual housing association may qualify as a priority purchaser eligible to acquire a project and receive assistance to maintain it as affordable rental housing under § 248.157 or § 248.161.

The two remaining comments on this subsection recommended that condominium arrangements not be allowed as an eligible form of homeownership. Both of these commenters are tenant organizations and they described their own adverse experience in getting condominium associations to enforce use agreements and other restrictions vis-a-vis individual association homeowners. The Department recognizes that a condominium association may have more difficulty enforcing use agreements

than a cooperative corporation. Nevertheless, the statute specifically authorizes condominium ownership and HUD feels that a broad range of ownership forms should be allowed. In approving homeownership plans, the Department will review the resident council's capacity to own and manage a project, including its ability to meet the various ongoing compliance requirements specified in this section.

Three comments took issue with the requirement in paragraph (g) of this section; that the initial owners must occupy their units for at least the initial 15 years of ownership. The comments felt that this requirement was too long and would discourage tenant interest in purchasing, and did not accommodate changes in employment or emergencies. This requirement was included in the proposed rule for two reasons. The first reason was to assure that the units remained owner occupied rather than having the units revert to a primarily rental status, although with no continuing affordability restrictions and potentially with significantly higher rents. The second reason was to keep homeowners from effectively evading the minimum 20 year phase-out on limitations on resale profits by renting out their units at rents considerably higher than their occupancy charges. The Department feels that these reasons continue to be legitimate. With respect to accommodating employment changes or an emergency situation, this subsection explicitly allows resident councils to make such determinations and allow owners to rent out their units.

The Department is removing the owner-occupancy requirement for homeownership plans submitted under the new § 248.175. This occupancy requirement is not needed for a limited equity cooperative with continuing affordability restrictions and limitations on resale profits. Furthermore, most of the limited equity cooperatives will assume the existing federally-assisted mortgage or receive section 8 assistance. As a result, they will be subject to other HUD program regulations restricting the ability of the initial owners to rent out their units.

Three commenters objected to the recapture requirements in paragraphs (h) and (i). One commenter stated that returning 50 percent of any net sales proceeds from the sale of the units to HUD is unnecessary and that these proceeds should have been reflected in funding for the resident council's homeownership plan. This requirement is statutory and is directed at the situation where there may be unexpected proceeds from the initial

sale of the units. Two commenters stated that the requirement that any net proceeds from resale not retained by the homeowner at resale be paid into a local HOME Investment Trust Fund was wrong in principle and should be restructured. This requirement is also statutory. The Department, therefore, has not made any changes to these recapture provisions.

Two comments were received on paragraph (o) concerning qualified management. The first commenter stated that resident councils should be required to use professional management to operate the project after conversion. This subsection, in fact, already establishes this requirement. Resident councils will either have to demonstrate their management experience and ability or enter into a contract with a qualified management firm approved by HUD.

The second comment urged that HUD establish a process to regain control of a unit if the individual unit owner leaves or if the unit becomes uninhabitable. The Department expects that the resident council will have primary responsibility for dealing with the types of situations described by the commenter. In approving homeownership plans, the Department will pay very close attention to the resident council's capacity to own and manage a project. Limited equity cooperatives approved under § 248.175 are also likely to be subject to other HUD program regulations covering vacated or uninhabitable units. This will occur because most limited equity cooperatives will assume the existing federally-assisted mortgage.

Five comments were submitted on the timely homeownership provisions of paragraph (o) of this section. One commenter stated that since the transfer of ownership has to be approved as part of the homeownership plan, resident councils should be required to acquire ownership of the project immediately rather than within six months after approval, as included in the proposed rule. Three other commenters felt that six months was too short a period and suggested that this period be extended for good cause or be at least one year.

The proposed rule, in fact, contained an inconsistency with respect to this issue. Section 248.135(1) of the proposed rule required qualified purchasers, a term that includes resident councils, to close transactions within 90 days of HUD's approval. Paragraph (o) has been changed to conform to this overall requirement. The Department believes that all qualified purchasers, as well as sellers, are likely to need a reasonable

period of time to actually close on a sales transaction after the date of HUD's approval. It is only after HUD's approval of a plan that both the buyer and the seller may be able to complete such closing requirements, among others, as finalizing financing arrangements (e.g. the precise amount of principal) or obtaining the consent of the partners to the terms approved by HUD. The Department believes that 90 days is fair to both the buyer and the seller.

The Department is sensitive to the concerns that resident councils will not have sufficient time to complete a transaction. This concern applies to all purchasers, but may have particular relevance for resident councils and community-based nonprofits. The process of transferring a property set forth in the statute for either continued rental use or for resident homeownership under the best circumstances is a very long procedure and the Department is hesitant to further lengthen the time periods. As noted in the discussion of § 248.135(b), the Department has, in part, addressed this issue by extending the period for submitting plans of action after the owner has accepted an offer from 90 days in the proposed rule to six months. This additional time should enable purchasers to develop better plans of action that most often lead to closing transactions within 90 days of HUD's approval. The rule also does not preclude a buyer and seller from agreeing to extend this period as long as the owner waives its right to prepay during this extension.

Finally, one commenter felt that the resident council should be required to transfer ownership of the units to individual purchasers within one year of its acquisition of the project rather than the four year period provided for in the proposed rule. The Department agrees with the basic thrust of this comment, i.e., ownership interests should be transferred to individual purchasers as quickly as possible. The four year period was intended to account for a variety of contingencies that might reasonably delay this transfer, such as making sales contingent on the completion of rehabilitation activities. The Department believes that this intent remains valid and has not shortened the maximum transfer period to individual purchasers.

Section 248.175 (Resident Homeownership Program—Limited Equity Cooperative)

As discussed above with respect to § 248.173, the Department has included in the interim rule a new provision setting forth the requirements applicable

to the purchase and operation of an eligible low income housing project by a limited equity cooperative. The limited equity cooperative model includes the procedures and requirements otherwise applicable to the purchase and operation of projects with continued low income affordability restrictions. Although certain provisions of § 248.173 which ensure the feasibility of the resident homeownership program and do not conflict with such procedures and requirements or with the nature of a limited equity cooperative have been incorporated by reference into § 248.175, the Department does not view § 248.175 as being based solely on the statutory authority of section 226; instead, it is a variation of the "transfer" plan of action authorized under LIHPHA generally.

Paragraph (b) lists those paragraphs of § 248.173 which are incorporated by reference into § 248.175. Paragraph (d)(i) of § 248.173 states that the homeownership program shall include a statement of the amount of grant funds requested. Under § 248.175 the limited equity cooperative will be eligible for both grants and for any incentives otherwise available to nonprofit purchasers. The "type of homeownership contemplated," for purposes of § 248.173(d)(ix), would be a limited equity cooperative, and the "restrictions on resale" referred to in § 248.173(d)(xii) would be those restrictions on resale required by HUD in FHA multifamily programs for limited equity cooperatives. HUD's Model Form of By-Laws, Form No. 3245, for limited equity cooperatives, imposes restrictions on the amount of equity which a cooperative shareholder may realize; those restrictions provide that memberships may be sold at no more than the "transfer value," which generally equals the sum of the down payment paid by the first occupant, the value of improvements installed by the selling member, the amount of principal amortized by the selling member and previous members, and, with HUD's approval, an amount corresponding to an increase in the cost of living.

Section 248.173(f) is not cross-referenced in paragraph (b), since the Department has determined that a limited equity cooperative is an acceptable form of homeownership. Of course, the specific features of the resident homeownership program must nevertheless be approved by HUD in accordance with § 248.175. Paragraphs (g)(2) and (g)(4) have also not been incorporated by reference. The former establishes a standard for affordability which is inapplicable to limited equity cooperatives; instead, the affordability

requirements under § 248.145 shall be applicable. Likewise, paragraph (g)(4) would not be applicable, since such restrictions are not needed for projects where availability and affordability restrictions will continue for the full term of the plan of action and HUD program regulations restrict the ability of tenants to rent out their units.

Section 248.175 also does not cross-reference paragraphs (i) (1) and (3), (j), (k) and (l) of § 248.175. These provisions require the execution of a promissory note payable to HUD, establish formulas for the amount of equity which a cooperative shareholder may retain from sales proceeds and provide for the use of recaptured funds. These provisions would overlap with and conflict with the provisions applicable under HUD's program requirements for section 236 and section 221(d)(3) limited equity cooperatives. Paragraphs (p), (q) and (r) have not been cross-referenced, because housing standards, audit and reporting requirements in those paragraphs would likewise overlap HUD's analogous program requirements for limited equity cooperatives and requirements under the plan of action. Paragraph (s) is not cross-referenced because the limited equity cooperative would have continued low income affordability restrictions that are consistent with those applicable under the section 236 or section 221(d)(3) mortgage and its regulatory agreement, as modified pursuant to subpart B.

Paragraph (c) provides that the purchase and operation of eligible low income housing by a limited equity cooperative under this section shall be carried out in accordance with all provisions of subpart B that are otherwise applicable to the transfer and operation of a project with continued low income affordability restrictions, except as otherwise provided in § 248.175. Thus, for example, the total charges for housing costs (i.e., principal and interest, taxes, insurance, occupancy charges and utilities) for current tenants that become cooperative share holders may not exceed 30% of the adjusted income of the tenant, or the fair market rent, whichever is lower, in accordance with § 248.145(a)(5).

Section 248.177 (Delegated Responsibility to State Agencies)

The Department received six comments regarding this section, two from State housing agencies, two from trade organizations or lobbyists, and one from a consultant and one from an advocacy organization. Two commenters suggested that HUD expand on the regulation by publishing the implementing instructions normally

reserved for administrative guidance. As stated in the preamble to the proposed rule, the Department will publish its application and approval procedures in its administrative guidance. The rule has not been changed to reflect these comments. Two comments stated that the Department should employ State agencies as "processors" without regard to State preservation plans approved under this section. The Department will contract for technical assistance with State agencies as the need arises. Such contracting will be done through established contracting and bidding procedures, such as those used for HUD's multifamily program, Delegated Processing, which do not necessitate a change to the proposed rule.

Two comments were received regarding the ability of State agencies to charge fees for processing notices of intent and plans of action as part of an approved State preservation plan under this subpart; one commenter was in favor of such fees and one opposed. The Department does not believe that State agencies should charge owners of eligible low income housing fees for processing notices of intent or plans of action where the owner, absent an approved State preservation plan, would be able to file such notices of intent or plans of action with Department at no charge. Accordingly, paragraph (d) has been added to the rule, prohibiting a State agency from charging owners fees for processing any notice of intent or plan of action or taking other action under an approved State preservation plan.

Three commenters suggested that the Department entertain proposals for various levels of delegated authority under this section. The proposed rule stated that the Department would "delegate some or all responsibility" to a State agency as part of a delegation plan approved under this section. The administrative instructions will allow State agencies to specify those activities for which they desire delegated responsibility. The rule has not been changed to reflect these comments.

One commenter suggested that the Department use Standard and Poor's "top tier" bond rating certification as satisfaction of the "independent analysis" requirement. The Department will adopt this standard as well as others in its administrative instructions.

Three comments were received regarding the lack of regulations implementing a portion of section 602(a) of the statute, amending section 241(f)(1) of the National Housing Act, regarding risk sharing arrangements with State agencies for the insurance of section

241(f) equity and acquisition loans. The three commenters all proposed some modified form of State agency coinsurance. The proposals conform with the Department's interpretation of the statutory language. State agency coinsurance, the Department's only coinsurance program that has not been formally terminated, is administratively inactive at this time. If the Department decides to implement section 602(a) as a form of coinsurance for section 241(f) loans, it will do so through separate rulemaking.

Section 248.179 (Consultation With Other Interested Parties)

The Department received two comments on this section expressing the importance of communication between HUD and State and local governments and suggesting that HUD identify contact persons from these entities, permit the submission of comments on notices of intent and plans of action, and give State and local governments the opportunity to provide economic data and other information relevant to the preservation process. One commenter suggested that this section of the proposed regulation be expanded to identify specific responsibilities that State and local governments should be expected to undertake.

The Department intends to implement fully this section of the regulation and is currently meeting with State and local governments to formulate criteria for consultation and to identify specific contact persons in State and local governments where eligible low income housing is located. The Department has also expanded the role of State and local governments in the preservation program by providing them with a sixty-day comment period on plans of action submitted for projects within their jurisdiction, as set forth in § 248.135. While the State or local government will also receive copies of notices of intent submitted in their jurisdiction, no comment period has been established for notices of intent since the Department sees no need for comments at that stage in the process. State and local governments are encouraged to submit comments or any relevant data they may possess to the Department at any time during the preservation process. The Department declines, however, to impose any responsibility on State and local governments under this section. The Department assumes that these entities are familiar with the preservation program and will act accordingly.

Section 248.181 (Notice to Tenants)

Nineteen comments were received by the Department concerning the notification of tenants affected by owners' actions under this subpart. The comments suggested that tenants be notified at every stage in the preservation process and that they receive copies of all correspondence between owners and the Department.

Under the provisions of this rule, tenants residing in projects subject to this subpart will receive copies of the first and second notices of intent, under §§ 248.105 and 248.133, including a summary of possible outcomes for the project. Tenant representatives will also receive the valuation information provided to the owner under § 248.131. A summary of the plan of action, along with any revisions, will be posted, in accordance with § 248.135, in accessible places in all affected buildings with the name, address and telephone numbers of any tenant representatives, or if none are known, of the local HUD field office, where tenants may obtain a complete copy of the plan of action. The plan of action will also be available at the on-site office for tenant inspection and copying. The tenants are entitled to a 60-day comment period on the plan of action. After taking into consideration the tenant comments, the Department will notify the tenants as to whether the plan is approved. Tenants will also have the opportunity to submit comments and participate in the annual HUD inspections of the project under § 248.147. Any tenants who are eligible for relocation assistance under § 248.185 will be notified of their status. If the tenants submit an expression of interest to purchase the project under § 248.157, they will be entitled to receive all the information which is made available to other qualified purchasers. The Department believes that these provisions provide sufficient notice and comment to all affected tenants of the various stages of the preservation process. Also, there is no need to supply tenants with all of the correspondence between the Department and the owner, since the Department expects that the outcome of any correspondence pertaining to the preservation program will be reflected in the plan of action.

Four commenters raised the concern of enforceability of the notice provisions and suggested that if an owner fails to notify the tenants in accordance with this subpart, that the notice of intent submitted by the owner should be considered void. These comments are in accord with the Department's position. If an owner fails to notify the tenants, in violation of this subpart or of LIHPHA,

then the notice of intent will be invalidated and the owner will be required to submit a new notice of intent under § 248.105.

Four commenters suggested that HUD designate a contact person for arranging meetings, answering questions, and generally assisting tenants who are affected by this subpart. The Department recognizes the need for tenant support. Field office staff will be available to help tenants in understanding the preservation process and to aid them in identifying nonprofit organizations who can help them to promote greater tenant participation and possibly to work towards homeownership under § 248.173 or § 248.175. Also, informational meetings for the tenants may be held by the Department at the discretion of personnel in the local field office. Tenants are welcome to request such meetings.

Another commenter suggested that the Department provide tenants with a list of all properties in the area, designating which are eligible to prepay. The Department intends to distribute a list of eligible low income housing which has been compiled from a survey conducted earlier this year of the local HUD field offices. The field offices shall make this list available to the public upon request.

Subpart C

Section 248.213 (Plan of Action)

One commenter suggested that this section of subpart C be amended to provide the same notice requirements for tenants and State and local governments as is set forth in § 248.135(c) of subpart B. The Department does not have the statutory authority to impose this notification burden on owners proceeding under ELIHPA and has declined to amend this section of the rule.

Section 248.218 (Tenant Notice and Opportunity to Comment)

One commenter recommended that tenants should have the same right to receive information and make comments as provided under § 248.181 of subpart B. The Department believes that this section provides sufficient opportunity for tenant notice and comment and has not amended it as suggested.

Section 248.221 (Approval of a Plan of Action That Involves Termination of Low Income Affordability Restrictions) and Section 248.233 (Approval of a Plan of Action That Includes Incentives)

Two commenters contested the Department's basis for requiring that there be no outstanding findings of

noncompliance with the civil rights legislation enumerated in these sections of the proposed rule prior to approving any plan of action submitted pursuant to this subpart. For the reasons previously stated in the discussion concerning § 248.141(a)(3), the Department has determined that this requirement will remain in the rule.

Subpart D

In response to concerns raised by a State agency and a member of Congress, the Department is implementing section 613(b) of the statute by adding subpart D to the interim rule.

General. Section 613(b) directs the Department to offer incentives to owners of low income housing developed under a State (i.e., non-Federal) housing program, upon application of a State agency, where an owner is able to prepay the State assisted or subsidized mortgage on the housing. The statute states that the level of incentives to be provided under this section should conform to the incentives provided to a similarly situated project under subtitle B of title II of the Housing and Community Development Act of 1987. Since LIHPHA repeals and replaces ELIHPA (except for those owners which elect to proceed under ELIHPA), the reference to title II of the 1987 Act is presumed to mean LIHPHA. Therefore, in implementing section 613(b), this subpart refers to subpart B rather than subpart C.

Although Congress did not specifically define the term "State assisted or subsidized mortgage," the Department construes section 613(b) as being inapplicable to any project that would constitute eligible low income housing under subpart B, such as a section 236 non-insured mortgage.

The Department interprets the statutory language "State assisted or subsidized mortgage" as meaning that the State program must entail a form of mortgage assistance or subsidy. This interpretation of "assisted or subsidized" precludes other forms of housing assistance, such as rental assistance or tax abatement programs, in which there is no direct mortgage subsidy.

In order to implement this provision, the Department will require a two-phase application process. The first will qualify the State's mortgage subsidy program as conforming to the requirements of the statute. The second will require owners of such housing, in order to avail themselves of the incentives, to submit a notice of intent and plan of action similar to that for eligible low income housing under subpart B. Processing of such projects

will, however, be done by the State agency or a designated local housing authority, which will then make application to the Department for the incentives. The costs of appraisals and capital needs assessments will be borne by the State agency. The State agency will review and approve the notice of intent, plan of action and all other submitted documents. The State agency's application for assistance must demonstrate that the amount of incentives, pursuant to subpart B, required to induce the owner to preserve the housing for low and moderate income families, does not exceed that available for housing otherwise designated as "eligible low income housing" under subpart B.

Because prepayment of the State-assisted or subsidized mortgage is a matter of State law and regulation, this subpart does not incorporate the provisions of subpart B regarding the prepayment of such mortgages and the termination of affordability restrictions. Similarly, the rule does not address tenant protections in the event of termination of the affordability restrictions, either in the event of a prepayment or the inability of the Department to provide funding for incentives. With respect to the latter event, section 613(b) requires only that the Department "may" provide incentives upon application of the State agency or a local housing authority. This language contrasts with the Department's obligation to provide incentives pursuant to a plan of action approved for eligible low income housing under subpart B, the lack of funding for which may entitle an owner to prepay and terminate the affordability restrictions. Although the Department, therefore, views its funding obligations under section 613(b) as discretionary, as opposed to its funding of approved Plans of Action for otherwise eligible low income housing which is solely subject to funding availability, it will fund such applications by a State agency or local housing authority so long as such funding will not interfere with the funding of an approved plan of action for eligible low income housing under subparts B or C.

The statutory language presents some interpretive difficulties by generally requiring, as noted above, that incentives made available to owners under State assisted programs conform with those made available to owners of eligible low income housing. However, with two exceptions discussed below, the statute is silent with respect to the terms and conditions for rendering assistance and incentives. The

Department believes that since the amount of incentives is inextricably bound to the determinations of value, it would be incongruous to require a less rigorous determination of value for State assisted mortgages. Further, since the amount and type of incentives in subpart B is dependent on an owner's decision to maintain or transfer ownership in the housing, the Department believes that the same requirements should apply to State assisted mortgages and owners. Thus, the rule requires owners of State assisted projects to follow the process for notices of intent and plans of action required for owners subject to subpart B in order to receive incentives.

Section 8 assistance. The statute generally requires that section 8 assistance, awarded as an incentive under an approved plan of action, conform to the requirements for such assistance made available under subpart B; that is, it is available for all very low and lower income families; rent levels reflect those necessary to implement an approved plan of action; and no tenant shall pay in excess of the lesser of 30% of adjusted gross income or the fair market rent for rent. The rule, by incorporating the corresponding provisions of subpart B, reflects these statutory requirements.

The statute further specifies in section 613(b)(2) that if the owner receives section 8 assistance, the project will be subject to the standards for maintenance and sanctions in "Section 224(e) of the Housing and Community Development Act of 1987." Since LIHPHA has replaced the 1987 Act in its entirety with the instant statute and since neither statute contains a provision at section 224(e), the Department believes that this language is a vestigial reference to a former version of LIHPHA. It is intended to refer to section 222(d) ("Housing Standards") of the LIHPHA. The rule reflects this interpretation.

Restrictions. Section 613(b)(3) requires an owner of housing awarded incentives under this subpart to maintain the housing as affordable to low and moderate income tenants for the period for which the assistance is received. This section departs from § 248.145(d) of subpart B which requires maintenance of the affordability restrictions for the remaining useful life of the project, such determination of which may not be appealed by the owner for 50 years following the agreement to maintain the affordability restrictions. Section 248.169(b) further prescribes remedies available to the owner if the Department fails to renew

the contract for the assistance for the term of the plan of action. While subpart D generally conforms with the applicable requirements of subpart B, the rule requires maintenance of the affordability restrictions for State assisted mortgages only if the contract for assistance is renewed timely. The statute is silent with respect to a State's option to provide its own substitute assistance, in the absence of Federal assistance, in order to insure extension of the preservation agreement. While States may include such a provision in their preservation agreements, the rule tracks the statutory language.

Preemption. The Department has not incorporated § 248.7 into subpart D. The references in section 232(a)(3) and 232(b) to loans which are inconsistent with the provisions of "this subtitle" (i.e., subtitle A of title VI) indicate that section 232 is not intended to apply to subtitle B, of which section 613(b) is a part.

PART 241—SUPPLEMENTARY FINANCING FOR INSURED PROJECT MORTGAGES

Subpart A

Two commenters suggested that HUD waive the equity requirements for rehabilitation loans insured under this subpart. There is no statutory basis for the Department to consider such a proposal. Further, prudent underwriting practices demand an equity requirement. The rule has not been changed to reflect this comment. The commenter further suggests that owners receive an 8 percent return on the equity requirement for a rehabilitation loan. There is no statutory language in support of this suggestion, and it has not been adopted. Another suggestion by the same commenter would permit seller financing of the equity requirement for rehabilitation loans with the seller receiving "market return" on the loan. The Department has no objection to a seller providing take back financing for the equity requirements on rehabilitation loans. However, the seller may not charge interest at a rate in excess of that of the rehabilitation loan. The related party rule has been amended to reflect this change.

One commenter suggested that the Department use its housing standards when underwriting a rehabilitation loan insured under this subpart. The Department intends that rehabilitation activities under this program bring the project back to its original physical standard for occupancy.

Another comment stated that improvements financed through rehabilitation loans should include

health and safety features for the elderly and disabled, including alarm systems, grab bars, sprinkler systems, etc. For projects constructed originally for the benefit of the elderly and disabled where these features were not included, the Department will permit them in the rehabilitation loan. In some jurisdictions retrofitted sprinkler systems are being required for high-rise structures regardless of the target tenant population. The Department will recognize these costs as well. These items will be handled administratively and do not require a change in the rule.

Another commenter suggested that the Department underwrite rehabilitation loans at 100 percent of required repairs and administer loan draws using the Flexible Subsidy program methodology. The Department intends to maintain the distinction between section 241(a) rehabilitation loans and Flexible Subsidy Capital Improvement Loans. Section 241(a) loans will be administered by the mortgagee on a draw basis like any insured rehabilitation or new construction loan program. Flexible Subsidy Capital Improvement Loans will be administered by the Department utilizing the program's disbursement procedures. The rule has not been changed to reflect this comment.

Subpart E

Section 241.1000 Purpose and Scope

The Department received eighteen comments suggesting that section 241(f) equity and acquisition loans be combined with section 241(a) rehabilitation loans. Most of the commenters were concerned with the financing costs associated with two loans versus one loan. With the exception of any ancillary fees charged by commercial mortgagees, financing fees for insured mortgages are based on the mortgage amount. It is doubtful, therefore, that two loans would be any more costly to the transaction than one. One commenter stated that separate rehabilitation loans and equity or acquisition loans would be difficult to sell on the secondary mortgage market. However, all forms of HUD-insured mortgages have been accepted in the secondary mortgage market and HUD does not foresee any reason to believe that these loans would not also be acceptable. Another commenter suggested that in combining the two loan programs, the Department waive its review and inspection requirements for section 241(a) rehabilitation loans.

The Department believes that the statute (see sections 214(b) and 219(b)) specifically contemplates and authorizes

separate loans for rehabilitation and equity or acquisition, as stated in § 241.1067 of the proposed rule; however, HUD will consider combining the two programs to facilitate processing of loans pursuant to approved plans of action. (See also the comments on § 241.1067 below.) However, the Department will not waive its review and inspection requirements, pursuant to section 241(a) for the rehabilitation component of the loan.

Section 241.1010 Feasibility Letters

One comment requested that the Department make a feasibility letter for a section 241(f) acquisition loan available to priority purchasers who have submitted an expression of interest pursuant to § 248.157(f). This comment confuses the different processes designed in the part 248 rule for accepting expressions of interest and processing plans of action pursuant to an owner's acceptance of a bona fide offer. An owner's decision to offer the project for sale does not contain an application for a section 241(f) acquisition loan. That application is made when the purchaser and the seller jointly file the plan of action to transfer the project. However, purchasers will be advised pursuant to § 248.157(f) of the amount of the preservation equity and the maximum amount of a section 241(f) acquisition loan.

Another commenter suggested that the need for feasibility and conditional commitment letters are obviated by the identification of project income, expenses and required repairs in the appraisal. The income, expenses and repairs identified in the appraisal are for the purpose of determining a project's values in accordance with section 213 of the statute. The actual project income, expenses and required repairs will be identified in the plan of action. The Department will accept applications for rehabilitation and acquisition loans with the filing of a plan of action to transfer the project to a qualified purchaser. Similarly, the Department will accept applications for rehabilitation loans and equity loans with a plan of action to extend the affordability restrictions.

Section 241.1015 Application and Commitment Fees

One comment suggested that the Department authorize the use of proceeds of an acquisition loan insured under this part to pay financing and application fees. The statute, in section 241(f)(3)(B), specifically limits the maximum insurable acquisition loan under this subpart to 95 percent of the preservation equity except, in the case

of priority purchasers, any expenses associated with the acquisition, loan closing and implementation of plans of action may also be included. The Department is authorized, however, under sections 220(d)(2)(F) and 221(d)(2) to provide capital grants to priority purchasers in order to reimburse them for expenses incurred in the transfer of the project which are not included in an acquisition loan. Therefore, the Department will include the reasonable costs of applications and financing in a capital grant as part of its approval of a plan of action to transfer the project to a priority purchaser under a voluntary sale and any qualified purchaser under a mandatory sale. (See further discussions at § 241.1067 below.)

Section 241.1020 Commitments

One commenter requested that the Department combine conditional and firm commitment applications and lower the fees charged for making the application. The Department is considering bypassing the conditional commitment stage; however, it does not contemplate lowering its application fees.

Section 241.1035 Charges by Lender

One commenter asserted that the limitation on the initial service charge in § 241.1035(b) conflicted with the debt service coverage requirements of § 241.1067. The Department does not see any conflict between the two provisions, and the rule has not been changed to reflect the comment. Another comment requested that provisions regarding mortgagee consent to section 241(f) loans be clearly stated in the rule. The proposed rule did so at § 241.1120.

Section 241.1046 Rental Assistance

Three comments stated that the term of section 8 housing assistance payments contracts offered as an incentive to an owner or purchaser to support section 241(f) equity or acquisition loans should be coincidental with the term of the mortgage. Section 8 contract terms are limited to those provided for in appropriations acts. However, section 241(f)(7) requires the Department, when underwriting the mortgage insurance, to assume that the assistance will be available for the full period of time during which the plan of action is in effect. The proposed rule at § 241.1046(a) reflects this statutory intent. Further, § 248.169(b) of the interim rule prescribes the actions the Department must take to protect the owner and tenants should an assistance contract not be renewed.

Two commenters objected to the acceleration provision of § 241.1046(b),

stating that it would make loans unmarketable, presumably on the secondary market. This provision reflects the language of the statute at section 241(f)(7), and will protect the mortgagee in case there are insufficient appropriations to fund a renewal of an assistance contract to support an equity or acquisition loan insured under this subpart. The provision does not affect the mortgage insurance or compromise a mortgagee's ability to file a claim in the event of a default. Indeed, its probable intention is to allow the Department the option of immediately causing a default, and subsequent assignment of the mortgage in exchange for insurance benefits, instead of having the mortgagee wait for a monetary default and then proceeding to an assignment. The last comment suggested that the Department clarify that it will accept an insurance claim in the event that an assistance contract is not renewed. While section 241(f)(8) directs the Department to "take actions * * * to avoid default," the Department acknowledges its obligation under the mortgage insurance contract to pay insurance claims upon proper notification and assignment by the mortgagee.

Section 241.1060 Maturity

The Department received 86 comments objecting to the 20-year term for loans insured under this subpart for a variety of reasons: (1) The 20-year term would increase the likelihood of preservation rents exceeding the Federal cost limit, enabling more owners to prepay their mortgages and terminate the affordability restrictions; (2) the 20-year term is more costly to the Federal government than a 40-year term because of the assistance which must be provided to support increased debt service costs; (3) a 20-year term would make purchase of the loan for the Government National Mortgage Association's mortgage backed securities (MBS) program infeasible; and (4) a 20-year term would limit an owner's opportunity to realize the full 70 percent of preservation equity under an equity loan.

While it is true that the increased debt service associated with a shorter term loan might in some instances cause a project's aggregate preservation rents to exceed the Federal cost limit, the Department does not view this as impacting on the likelihood that an owner will prepay the mortgage and terminate the affordability restrictions. If the transfer preservation rents exceed the Federal cost limits, an owner may elect to prepay subject to the mandatory sales provisions of § 248.161 of this title.

An owner may prepay only if it does not receive a bona fide offer at the preservation value. This is in effect identical to a voluntarily sales offer under § 248.157, where the owner may also prepay only if it does not receive a bona fide offer to purchase. Since the opportunity to prepay is a direct result of the lack of a purchaser available or willing to make a bona fide offer, the Department is not persuaded that an increase in the term of an acquisition loan would have any effect on prepayment.

While it is true that a shorter term loan would carry higher amortization costs, it is not true that a longer term loan would, therefore, be less costly to the government. The extra subsidy assistance necessary to support a longer term loan is greater than the reduction in annual debt service costs attendant to a longer term loan. The Department is, therefore, reluctant to support a loan program with inherently higher costs, the benefits of which have not been demonstrated.

The Department does not ordinarily structure program regulations around the potential for third parties to create investment opportunities. The Department's multifamily insured loan programs have traditionally carried 40-year terms, which have most likely been a contributing factor to the terms of various MBS programs. The Department is confident that the market can adjust to an insured mortgage of a lesser term.

Section 241.1067 Maximum Loan Amount

Fifteen commenters offered various suggestions for nonprofit purchasers to include soft costs and transaction costs in acquisition loans in addition to the maximum loan amount. As previously discussed in the comments to § 241.1015, the Department will include such costs which are not covered in the acquisition loan in a capital grant for priority purchasers in all sales and qualified purchasers in mandatory sales.

One comment stated that the Department should accept rehabilitation, equity and acquisition financing from any source, public or private, without necessarily using section 241 mortgage insurance. The Department's position is that the plan of action may include an uninsured rehabilitation, equity or acquisition loan provided that the terms of the loan, including monitoring of rehabilitation, and default acceleration and foreclosure provisions are acceptable to the Department.

The Department recognizes that purchasers may have difficulty

obtaining the additional 5% of transfer preservation equity which may not be financed through an acquisition loan under this section. In order to make financing more accessible, seller financing will be permitted as long as it meets the requirements of the related party rule in § 248.101. Any seller financing must be in the form of a loan, not a grant, and the total amount of the financing, including the acquisition loan provided under this subpart, may not exceed the project's transfer preservation equity, plus in the case of a priority purchaser, any expenses associated with the acquisition, loan closing, and implementation of the plan of action. Also, the interest rate charged by a seller on any financing may not be in excess of the interest rate imposed on the acquisition loan under this subpart. A new § 248.157(q) has been added to part 248 to provide for seller financing.

A commenter suggested that the 30 percent equity requirement for equity loans be construed as not requiring the owner to post any further equity to obtain the loan.

The Department concurs with the commenter. However, owners may have to pay loan fees and other transaction costs incidental to receiving such loans. The Department will not provide additional incentives for this purpose. A commenter suggested that priority purchasers be subject only to a 5 percent holdback. The 5 percent holdback pertains to equity loans. Only owners who extend low income affordability restrictions, and not purchasers, are eligible for equity loans, and the holdback requirement does not apply to purchasers. Another comment suggested that standard debt service coverage and vacancy allowance practices be used in setting the actual rents for servicing acquisition loans. The Department intends to assume a 3% vacancy cost in approving acquisition loans.

One comment asked why mortgagees, and in particular servicing mortgagees, were prohibited from charging transaction fees for consenting to secondary financing insured under this subpart. The mortgagee is prohibited from withholding consent to an equity or acquisition loan or an insured rehabilitation loan. HUD considers the imposition of a substantial transaction fee to be tantamount to the withholding of consent to the second mortgage. Moreover, since the mortgagee is prohibited from withholding consent, the servicer would undertake only a very limited review of the secondary financing. Therefore, the Department

sees no basis for the mortgagee to charge a transaction fee.

One commenter inquired whether a mortgagee could withhold consent to a section 241(a) rehabilitation loan. Section 241.1661(c) of the proposed rule prohibited the holder of an insured mortgage from withholding its consent to a rehabilitation loan insured under section 241(a) with respect to "eligible multifamily housing," as defined in that section. This provision implements section 204(b) of the Department of Housing and Urban Development Reform Act. The interim rule retains the language of the proposed rule.

Section 241.1069 Escrow Requirements

One comment objected to HUD or a State housing finance agency controlling the disbursement of the 10 percent holdback from equity loans. The rule tracks the statutory language at section 241(f)(2)(B)(ii) and has not been changed.

One commenter noted that the language of this section suggested the possible use of insured advances with respect to equity and acquisition loans and further suggested a methodology similar to that used in the section 223(f) program. The Department interprets the statute as requiring disbursement of section 241(f) loan proceeds in full at loan closing, except to account for any phase-in of rents, and except for the 10 percent holdback on equity loans.

Therefore, the rule has not been changed to reflect this comment. Another commenter suggested that insured advances be deleted entirely, the Department also waiving its review and inspection requirements under section 241(a). As stated above (see § 241.1000), the Department will continue to review and inspect rehabilitation work performed under section 241(a).

Another commenter suggested that insured equity loans be fully disbursed at closing with the 10 percent holdback considered "subject to escrow." The statute at section 241(f)(2)(B)(ii) conditions the issuing of insurance on the holdback, held by the mortgagee for a period of not less than five years, to ensure compliance with the maintenance standards at section 222(d) of LIHPHA. The rule reflects the statutory provisions.

With respect to the phase-in provisions in § 241.1069(b), another commenter stated that it was unlikely that any operating deficit would be required, and that a letter of credit posted by the borrower would offer the mortgagee sufficient protection in case a deficit actually occurred. While the

Department generally agrees that operating deficits during the rent phase-in period will be exceptional, it sees no reason to amend this protection. Moreover, the phase-in provision is specifically contemplated by section 241(f)(5)(B).

Section 241.1100 Prepayment Privileges and Charges

One comment suggested that the Department include the provisions of Mortgagee Letter 87-9 to loans insured under this subpart. Mortgagee Letter 87-9 addresses prepayment lock-outs and prepayment charges imposed by lenders in bond-financed and other investor-financed transactions. Section 241.1100 provides the regulatory basis for HUD's approval of such lock-outs and charges. There is no need to include the provisions of the Mortgagee Letter in the regulation itself.

Section 241.1120 Mortgagee's Consent

One commenter suggested that the Department expand the coverage of this section by prohibiting a mortgagee from withholding its consent on any noninsured secondary financing pursuant to an approved plan of action. The Department has revised the language of this section to clarify that the prohibition on withholding consent to an equity loan is applicable with respect to both insured and noninsured equity loans. In addition, the prohibition has been expanded to include a prohibition on withholding consent to insured or noninsured acquisition loans. Sections 241(f)(2)(A) and (3)(A) define the terms "equity loan" and "acquisition loan" respectively without regard to whether the loan is insured by HUD. Section 241(f)(9) prohibits a HUD-approved mortgagee from withholding consent to an "equity loan" or "acquisition loan" on a property on which that mortgagee holds a mortgage. Thus, on the basis of the literal statutory language, HUD believes that the prohibition on withholding consent is applicable to both insured and noninsured equity and acquisition loans. (By contrast, the prohibition on withholding consent to a rehabilitation loan is restricted to loans insured under section 241; see section 241(g)(2) of the National Housing Act, as added by section 204(b) of the Department of HUD Reform Act of 1989.)

Subpart F—Insurance for Equity Loans—Contract Rights and Obligations

Section 241.1210 Condition for Payment of Insurance Benefits

One comment stated that this section should be clarified to ensure that all

regulatory requirements regarding timely notice and other actions would also apply to an application for insurance benefits under this section. The proposed rule incorporated such regulatory requirements by cross-referencing the provisions of § 207.258 of this title. Further clarification is not deemed necessary.

Section 241.1235 Cross Default

One comment requested that the phrase "and the holder thereof initiates a foreclosure proceeding" be deleted from this section. The Department has retained the quoted language. In cases where the holder elects to assign the loan to HUD rather than foreclosing, there is no need to protect HUD's interests by creating a cross-default.

Another commenter stated that a mortgagee should only be obligated to inform the Department of defaults of which the mortgagee is aware. There is no expectation that a mortgagee be obligated to inform the Department of mortgage violations of which it does not have knowledge.

Section 241.1245 Insurance Endorsement

One commenter suggested that secondary market lenders be consulted when loans under this subpart are endorsed to avoid any secondary market problems. HUD presumes that primary lenders intending to sell their loans on the secondary market will consult with secondary lenders to ensure the marketability of their loans. The Department sees no need to amend the rule to address what is essentially a market transaction.

Part 219—Flexible Subsidy Program for Troubled Projects

Subpart C

The Department received one comment concerning part 219 of this title. The commenter suggested waiving any equity requirements for capital improvement loans provided to priority purchasers. Pursuant to § 219.305(c), an owner must contribute 25 percent of the total estimated cost of the needed capital improvements; however, if the owner is a nonprofit organization other than a cooperative association, it is exempt from this requirement. Therefore, cooperative associations, are subject to an equity requirement when applying for a capital improvement loan.

Part 236—Mortgage Insurance and Interest Reduction Payment for Rental Projects

Section 236.60 and paragraph (b) of § 236.55 have been restated in this

interim rule to correct an error in the publication of the April 1, 1991 revised version of title 24 of the CFR in which language from both sections was inadvertently omitted.

Miscellaneous Comments

Thirty-four miscellaneous comments were received regarding a variety of issues that were not covered within any specific section of the rule.

A concern was raised by three commenters that an owner may attempt to interfere with the tenants right to organize or participate in the prepayment process. The commenter requested that a penalty be imposed or a warning clearly stated in the regulations in order to preclude any owner interference. The Department does not have express authority to impose a penalty on owners. If tenants feel that their right to organize has been violated, they may seek redress through any State or local tenant/landlord institutions or State or local law.

Three commenters want the Department to designate a contact person that will provide tenants with access to information and general planning assistance throughout the preservation process. The Department has already designated personnel in the regional and field offices whose primary responsibilities are providing information and guidance to the tenants and acting as facilitators between tenant groups, mortgage companies and non-profit organizations.

Another commenter requested that it be notified of all elderly projects that have submitted their second notice of intent. The Department has compiled a list of eligible low income housing and this information may be obtained from local field offices upon request.

Two commenters stated that the regulation should be neutral concerning an owner's choice of retaining or selling its property and should not undermine an owner's right to choose, as the commenters claim the sales provisions in the proposed rule do. The regulation reflects the statutory requirements relative to retaining or selling a project.

A commenter requested that a distinction be made between large and small projects (under 100 units) so that profit motivated developers could more easily purchase small projects. The same commenter stated that the regulations should specifically enable individual owners, who are disabled, over 65 or financially stressed to be able to sell their property outright and receive cash. The implication is that such owners should not have to follow the regulatory process. The statute does not distinguish between small and large

projects. A profit-motivated purchaser may buy projects so long as it meets the requirements of a qualified purchaser.

There was a concern by a commenter that the provision of financial incentives under a plan of action may be hampered by subsidy layering reviews. Pursuant to section 102(d) of the Housing and Urban Development Reform Act of 1989, the Department must perform a subsidy layering analysis to ensure that HUD funds are expended in the least costly manner, while assuring project feasibility. However, the overall preservation process, including approval of the plan of action, should not be materially affected by this requirement in terms of time delay.

Four commenters asked about advances to the owners to finance capital improvements, annual increases to section 8 and moderate income rents, and assistance to state-assisted or subsidized projects to prevent prepayment. The questions concerning advances pertain to section 611(b) of the statute and are not germane to this regulation; a rule implementing section 611(b) will be published separately for comment. While this rule does not implement section 612, which governs rent increases for moderate income and market-rate tenants, its impact on tenant rents has been explained in the discussion concerning § 248.145 of this subpart. Section 613(b), relating to the state mortgage programs, is implemented as subpart D herein.

Findings and Other Matters

This rule constitutes a major rule, as determined by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the authority of Executive Order 12291 on Federal Regulations issued on February 17, 1981. A copy of the Regulatory Impact Analysis has been transmitted to the Office of Management and Budget, and is available for public inspection during regular business hours in the Office of General Counsel, Rules Docket Clerk, room 10276, 451 Seventh Street SW., Washington, DC 20410.

This rule was listed as item 1349 in the Department's Semiannual Agenda of Regulations published on October 21, 1991 (56 FR 53380, 53396), under Executive Order 12291 and the Regulatory Flexibility Act.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public

inspection during regular business hours in the Office of General Counsel, Rules Docket Clerk, room 10276, 451 Seventh Street, SW., Washington, DC 20410.

Under section 605 of the Regulatory Flexibility Act (5 U.S.C. 601), HUD certifies that this rule does not have a significant economic impact on a substantial number of small entities, because it carries out statutorily-mandated limitations on prepayment of

the affected mortgages. Any economic impact is a direct consequence of the statute and is not separately imposed by this rule.

The Information collection requirements contained in the rule have been submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, HUD Desk Officer, room 3001, New Executive Office Building, Washington,

DC 20503, for review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3502). No person may be subject to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

TABULATION OF ANNUAL REPORTING BURDEN

Description of information collection and applicable program reference	Number of respondents 17.1x	Number of responses per respo 17.2=	Total annual responses 17.3x
A. First notice of intent 1990 statute: Section 248.105	509.00	1.00	509.00
B. Election to proceed under 1987 statute: 248.5	120.00	1.00	120.00
C. Appraisal: 248.111			
D. Second notice of intent: 248.133	283.00	1.00	283.00
E. Plans of action:			
1. Termination of Affordability: 248.141	4.00	1.00	4.00
2. Extension of Affordability/Transfer of Project: 248.145	465.00	1.00	465.00
(Resident councils plans included in L)			
F. Expression of interest from potential purchasers: 248.157(e)	283.00	1.00	283.00
Additional information from resident councils: 248.173(b)	39.00	1.00	39.00
G. Owner provides potential purchaser information on housing: 248.157(b)	283.00	1.00	283.00
H. Bona fide offers	283.00	1.00	283.00
Additional information from resident councils	39.00	1.00	39.00
I. Owner provides information on displaced tenants: 248.165(b)	4.00	1.00	4.00
J. Notices of vacancies from public housing agencies: 248.165(c)	4.00	1.00	4.00
K. Owner notifies HUD of expiring section 8 contracts: 248.169 ¹	0.00	1.00	0.00
L. Resident homeownership plan: 248.173(d)	39.00	1.00	39.00
M. State preservation plan: 248.177(d) ²	6.00	1.00	6.00
N. State insurance program application, ² 1990 statute: Section 248.301	1.00	1.00	1.00
O. Application for project assistance statute: 248.319	3.00	1.00	3.00
Totals	2,365.00		

¹ See item 13 of supporting statement.

² These items will be reported only in first year of program.

The Department specifically requests comments on how the paperwork burden on the public resulting from the interim rule may be reduced.

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order.

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that some of the policies in this rule will have a significant impact on the formation, maintenance and general well-being of the family. Achievement of homeownership by low income families under the regulation can be expected to support family values, by helping families to achieve security and

independence, by enabling them to live in decent, safe and sanitary housing, and by giving them the skills and means to live independently in mainstream American society. Since the impact on the family is beneficial, no further review is necessary.

The General Counsel, as Designated Official under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights, has determined that this interim rule does not have "takings implications," as defined in HUD's "Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings." The interim rule does not deny the owner an economically viable use for the project. Instead, the owner will, at a minimum, maintain ownership of the project with the below market rate mortgage or rental subsidies in place and with greatly enhanced access to the full equity in the project as residential rental housing; alternatively, the owner may transfer the project under a plan of action in which the Secretary will

provide incentives that will enable the owner to realize the full value of the project at its highest and best use, or may be entitled to prepay the mortgage.

The Catalog of Federal Domestic Assistance program number for this rule is 14.137 (Mortgage Insurance—Rental and Cooperative Housing for Low and Moderate Income Families).

List of Subjects

24 CFR Part 50

Environmental assessments, Environmental impact statements, Environmental policies and review procedures.

24 CFR Part 219

Loan programs—housing and community development, Low and moderate income housing.

24 CFR Part 221

Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 236

Grant programs—housing and community development, Low and moderate income housing, Mortgage insurance, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 241

Energy conservation, Home improvement, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 248

Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

Accordingly, the Department amends title 24 of the Code of Federal Regulations as follows:

PART 50—PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

1. The authority citation for part 50 is revised to read as follows:

Authority: 42 U.S.C. 4332, 42 U.S.C. 3535(d).

2. In § 50.20, paragraph (n) is revised to read as follows:

§ 50.20 Categorical exclusions.

(n) Approval of mortgage prepayments or plans of action (including incentives) under the Emergency Low Income Housing Preservation Act of 1987 or the Low Income Housing Preservation and Resident Homeownership Act of 1990, and approval of mortgage prepayments under other statutes or authorities, when the proposal does not involve demolition of any buildings, or parts of any building, containing the primary use served by the project.

PART 219—FLEXIBLE SUBSIDY PROGRAM FOR TROUBLED PROJECTS

3. The authority citation for part 219 is revised to read as follows:

Authority: 12 U.S.C. 1715z-1a; 42 U.S.C. 3535(d).

4. In § 219.325, the introductory text of paragraph (b) and paragraph (b)(3) are revised and a new paragraph (b)(5) is added to read as follows:

§ 219.325 Effect on rental rates.

(b) If rent increases that would result from the debt service and other expenses of a capital improvement loan

under subpart C of this part for a project would cause the rents of lower income residents of the project to be higher than the amount that would be allowed for eligible families under 24 CFR 813.107, or where appropriate to implement a plan of action under part 248 of this chapter, the Secretary may consider taking any or all of the following actions:

(3) Notwithstanding § 219.320(b), reduce the rate of interest on the capital improvement loan to a rate not lower than one percent.

(5) Permit repayment of the debt service to be deferred as long as the low and moderate income character of the project is maintained in accordance with § 219.110(b).

PART 221—LOW COST AND MODERATE INCOME MORTGAGE INSURANCE

5. The authority citation for part 221 is revised to read as follows:

Authority: 12 U.S.C. 1707(a), 1715(b), 1715f, 42 U.S.C. 3535(d).

6. In § 221.524, paragraph (e) is revised to read as follows:

§ 221.524 Prepayment privileges.

(e) *Prepayment of mortgages subject to part 248.* Where the mortgage described in paragraph (a)(1) of this section is, or prior to assignment to the Commissioner was, insured under section 221(d)(3) of the Act and the mortgagor receives project-based assistance under parts 880, 881 or 886 of this title, or where the mortgage is, or prior to assignment to the Commissioner was, insured under section 221(d)(5) of the Act, the mortgage may be prepaid in full only in accordance with a plan of action approved by the Commissioner under part 248 of this chapter.

PART 236—MORTGAGE INSURANCE AND INTEREST REDUCTION PAYMENT FOR RENTAL PROJECTS

7. The authority for part 236 is revised to read as follows:

Authority: 12 U.S.C. 1715b and 1715z-1; 42 U.S.C. 3535(d).

8. In § 236.55, paragraph (b) is revised to read as follows:

§ 236.55 Rental charges.

(b) *Monthly rental charge.* Except as agreed to by the Commissioner pursuant to a plan of action approved under part 248 of this chapter, monthly rental charges shall be calculated as follows:

(1) *Tenant Rent for qualified tenants whose initial lease is effective on or after May 1, 1983.* The Tenant Rent payable by a Qualified Tenant shall be the greater of the Basic Rent or 30 percent of the tenant's Adjusted Monthly Income, but not more than the Market Rent. In the case of tenant paid utilities, the Utility Allowance may not reduce the Tenant Rent below 25 percent of Adjusted Monthly Income.

(2) *Tenant Rent for qualified tenants whose initial lease was effective before May 1, 1983.* The Tenant Rent shall be calculated in accordance with paragraph (b)(1) of this section, except that instead of 30 percent, the percentage applied to Adjusted Monthly Income shall be as follows:

Effective date of recertification	Percentage
May 1, 1983 to Sept. 30, 1983.....	27
Oct. 1, 1983 to Sept. 30, 1984.....	28
Oct. 1, 1984 to Sept. 30, 1985.....	29
Oct. 1, 1985 and after	30

(3) *Limitation on tenant's monthly rental payment.* In no event shall the monthly rental exceed the HUD-approved market rental.

9. Section 236.60 is revised to read as follows:

§ 236.60 Excess rental charges.

Except as agreed to by the Commissioner pursuant to a plan of action approved under part 248 of this chapter or in connection with an adjustment of contract rents under section 8(c)(10) of the United States Housing Act of 1937, the mortgagor shall agree to pay monthly to the Secretary the total of all rental charges collected in excess of the Basic Rent in accordance with the instructions prescribed by the Secretary.

PART 241—SUPPLEMENTARY FINANCING FOR INSURED PROJECT MORTGAGES

10. The authority for part 241 is revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715z-6, 42 U.S.C. 3535(d).

11. Section 241.166 is added to subpart A to read as follows:

§ 241.166 Special underwriting standards for eligible multifamily housing.

(a) For purposes of this section, the term "eligible multifamily housing" means any housing financed by a loan or mortgage that is—

(1) Insured or held by the Commissioner under section 221(d)(3) of

the National Housing Act and assisted under section 101 of the Housing and Urban Development Act of 1965 or section 8 of the United States Housing Act of 1937;

(2) Insured or held by the Secretary and bears interest at a rate determined under the proviso of section 221(d)(5) of the National Housing Act; or

(3) Insured, assisted or held by the Secretary under section 236 of the National Housing Act.

(b) When underwriting a loan under subpart A of this part in connection with eligible multifamily housing, the Commissioner may assume that any rental assistance provided for purposes of servicing the additional debt will be extended for the term of the rehabilitation loan. The Commissioner shall exercise prudent underwriting practices in insuring rehabilitation loans under subpart A of this part.

(c) The holder of an insured mortgage which is recorded prior to the rehabilitation loan covering eligible multifamily housing may not withhold its consent to the rehabilitation loan or the security instrument executed in connection with the rehabilitation loan, and may not charge a fee as a condition to its consent to such loan or security instrument.

12. Section 241.251 is amended by adding a paragraph heading to paragraph (a) and by adding a new paragraph (c) to read as follows:

§ 241.251 Cross-reference.

(a) *Projects with a HUD-insured or HUD-held mortgage.* * * *

(c) *Projects without a HUD-insured or HUD-held mortgage.* The provisions of subpart D of this part shall be applicable to a project without a HUD-insured or HUD-held mortgage that is receiving a loan insured under subpart A of this part in connection with a plan of action approved by the Commissioner under part 248 of this chapter.

13. Subpart E (consisting of §§ 241.1000 through 241.1120) and subpart F (consisting of §§ 241.1200 through 241.1250), are revised to read as follows:

Subpart E—Insurance for Equity Loans and Acquisition Loans—Eligibility Requirements

Sec.	
241.1000	Purpose and scope.
241.1005	Definitions.
241.1010	Feasibility letter.
241.1015	Application and commitment fees.
241.1020	Commitments.
241.1025	Refund of fees.
241.1030	Mortgage insurance premiums.
241.1035	Charges by lender.
241.1040	Eligible lenders.

Sec.	
241.1045	Note and security form.
241.1046	Rental assistance.
241.1050	Method of loan payment.
241.1055	Date of first payment to principal.
241.1060	Maturity.
241.1065	Maximum loan amount—loans insured in connection with a plan of action under subpart C of part 248 of this chapter.
241.1067	Maximum loan amount—loans insured in connection with a plan of action under subpart B of part 248 of this chapter.
241.1069	Escrow requirements.
241.1070	Agreed interest rate.
241.1080	Eligibility of title.
241.1085	Title evidence.
241.1090	Accumulation of next premium.
241.1095	Application of payments.
241.1100	Prepayment privilege and charges.
241.1105	Late charges.
241.1120	Mortgagee's consent.

Subpart F—Insurance for Equity Loans and Acquisition Loans—Contract Rights and Obligations

Sec.	
241.1200	Cross-references.
241.1205	Payment of insurance benefits.
241.1210	Condition for payment of insurance benefits.
241.1215	Calculation of insurance benefits.
241.1220	Termination of insurance benefits.
241.1230	No vested right in fund.
241.1235	Cross default.
241.1245	Insurance endorsement.
241.1250	Effect of endorsement.

Subpart E—Insurance for Equity Loans and Acquisition Loans—Eligibility Requirements

§ 241.1000 Purpose and scope.

(a) Section 231 of the Emergency Low Income Housing Preservation Act of 1989 ("ELIHPA") amended the National Housing Act by adding a new subsection (f) to section 241. This section authorizes the Secretary to provide insurance for an equity loan as a vehicle for the owner of an eligible multifamily project to capture a portion of the project's equity, in connection with a plan of action approved by the Commissioner under ELIHPA.

(b) Section 602 of the Low-Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA") amended section 241 by expanding its scope to include both equity loans for owners, and acquisition loans for purchasers, under a plan of action approved under the provisions of the 1990 Act, and by making other changes. The provisions of section 241(f) as amended by LIHPRHA are applicable to owners with plans of action being processed under part 248, subpart B of this chapter, which implements LIHPRHA.

(c) The provisions of section 241(f) of the Act as they were in effect prior to LIHPRHA remain in effect for owners with plans of action being processed

under part 248, subpart C of this chapter, which implements ELIHPA.

(d) The insurance of an equity loan or acquisition loan under subpart E of this part may be provided only as a specific element of a plan of action approved by the Commissioner under part 248 of this chapter and is not available under any other departmental program.

(e) Unless otherwise indicated, the provisions of subparts E and F of this part are applicable to loans insured in connection with plans of action being processed under either subpart B or C of part 248 of this chapter.

(f) An owner or purchaser may obtain both a rehabilitation loan under subpart A of this part and an equity loan or acquisition loan under subpart E of this part.

§ 241.1005 Definitions.

(a) All of the definitions of § 241.1 apply to equity and acquisition loans insured under subpart E of this part except the following definitions:

§ 241.1(i)—Borrower;
§ 241.1(k)—Energy conserving improvements;
§ 241.1(l)—Solar energy system.

(b) As used in subpart E of this part, the following terms have the meaning indicated:

Acquisition loan means a loan or advance of credit made to a purchaser of eligible low income housing which is made for the purpose of implementing a plan of action approved in accordance with part 248 of this chapter.

Borrower means the owner or qualified purchaser of an eligible low income housing project, which owner receives and becomes primarily obligated for the repayment of an equity loan. With respect to loans insured in connection with a plan of action under part 248, subpart C of this chapter, the term includes a public entity, a nonprofit organization or a limited equity cooperative, which entity is purchasing an eligible low income housing project by means of an equity loan and is obligated for the payment of the equity loan.

Eligible low income housing has the same meaning as provided at § 248.101 or § 248.201 of this chapter, with respect to loans insured in connection with plans of action under subparts B or C of part 248 of this chapter.

Equity means, for purpose of subparts E and F of this part only, the difference between the fair market value of the project as determined by the Commissioner and the outstanding indebtedness relating to the property.

Equity Loan means a loan or advance of credit to the owner of an eligible low

income housing project which is made for the purpose of implementing a plan of action approved in accordance with part 248 of this chapter.

Extension preservation equity has the same meaning as provided at § 248.101 of this chapter.

Limited equity cooperative means a tenant cooperative corporation which, in a manner acceptable to the Commissioner, restricts the initial and resale price of the shares of stock in the cooperative corporation so that the shares remain affordable to lower income families and moderate income families.

Low income families has the same meaning as provided at § 248.101 of this chapter.

Moderate income families has the same meaning as provided at § 248.101 of this chapter.

Plan of action has the same meaning as provided at § 248.101 or § 248.201 of this chapter.

Preservation equity has the same meaning as provided at § 248.101 of this chapter.

Priority purchaser has the same meaning as provided at § 248.101 of this chapter.

Qualified Purchaser has the same meaning as provided at § 248.101 of this chapter.

§ 241.1010 Feasibility letter.

(a) *Request for study.* The owner may request the Commissioner to undertake a feasibility analysis of an equity or acquisition loan, and issue a feasibility letter. At the discretion of the Commissioner the feasibility analysis may be undertaken or denied.

(b) *Findings.* The issuance of a feasibility letter indicates completion of the Commissioner's preliminary analysis for the insurance of an equity or acquisition loan. The feasibility letter shall contain the Commissioner's estimate of the supportable loan amount, based upon the project's equity in the case of an equity loan and based on the project's purchase price in the case of an acquisition loan, but such feasibility letter shall neither constitute a commitment to insure nor bind the Commissioner in any other manner.

(c) *Fee.* The Commissioner shall not charge a fee for undertaking a feasibility analysis or for the issuance of a feasibility letter.

§ 241.1015 Application and commitment fees.

(a) *Application.* An application for the issuance of either a conditional or firm commitment for insurance of an equity or acquisition loan on a project shall be submitted by an approved lender and by

the owner or purchaser of the project to the Commissioner on a form prescribed by the Commissioner. No application shall be considered unless the exhibits called for by such forms are furnished.

(b) *Application and commitment fees—(1) Application for conditional commitment.* An application commitment fee of \$2.00 per thousand dollars of the amount of the loan applied for shall accompany the application for a conditional commitment.

(2) *Application for firm commitment.* An application for a firm commitment shall be accompanied by the payment of an application-commitment fee in an amount which, when added to any prior fee received in connection with a conditional commitment application, will aggregate \$3.00 per thousand dollars of the loan applied for.

§ 241.1020 Commitments.

(a) *Conditional commitment.* The issuance of a conditional commitment constitutes an agreement by the Commissioner, subject to specified terms and conditions, to accept an application for a firm commitment.

(b) *Firm Commitment.* The issuance of a firm commitment indicates the Commissioner's approval of the application for insurance and sets forth the terms and conditions upon which the equity or acquisition loan will be insured. The firm commitment may provide for the insurance of advances of equity or acquisition loan immediately upon endorsement of the note.

(c) *Term of commitment.* (1) A conditional commitment is effective for whatever term is specified in the text of the commitment.

(2) A firm commitment is effective for whatever term is specified in the text of the commitment.

(3) The term of either a conditional or firm commitment may be extended in such manner as the Commissioner may prescribe.

(d) *Reopening of expired commitments.* An expired conditional or firm commitment may be reopened if a request for reopening is received by the Commissioner within 90 days of the expiration of the commitment. The reopening request shall be accompanied by a fee of 50 cents per thousand dollars of the amount of the expired commitment. If the reopening request is not received by the Commissioner within the required 90-day period, a new application, accompanied by the required application and commitment fee, must be submitted.

§ 241.1025 Refund of fees.

If the amount of the commitment issued is less than the amount applied

for, the Commissioner shall refund the excess amount of the application and commitment fees submitted by the applicant. If an application is rejected before it is assigned for processing, or in such other instances as the Commissioner may determine, the entire application and commitment fees or any portion thereof may be returned to the applicant. Commitment and reopening fees may also be refunded to the applicant, in whole or in part, in such other instances as the Commissioner may determine.

§ 241.1030 Mortgage insurance premiums.

The lender, upon endorsement of the note, shall pay the Commissioner a first mortgage insurance premium equal to 0.5 percent of the original face amount of the equity or acquisition loan.

(a) If the date of the first principal payment is more than one year following the date of endorsement, the lender upon each anniversary of such endorsement date, shall pay a premium equal to 0.5 percent of the original face amount of the loan. On the date of the first principal payment, the lender shall pay another premium equal to 0.5 percent of the average outstanding principal obligation of the loan for the following year which shall be adjusted so as to accord with such date and so that the aggregate of said premiums shall equal the sum of:

(1) 0.5 percent of the average outstanding principal obligation of the loan for the year following the date of endorsement; and

(2) 0.5 percent per annum of the average outstanding principal obligation of the loan for the period from the first anniversary of the date of endorsement to one year following the date of the first principal payment.

(b) If the date of the first principal payment is one year or less than one year following the date of endorsement, the lender, upon such first principal payment date, shall pay a second premium equal to 0.5 percent of the average outstanding principal obligation of the loan for the following year which shall be adjusted so as to accord with such date and so that the aggregate of the said two premiums shall equal the sum of:

(1) 0.5 percent per annum of the average outstanding principal obligation of the loan for the period from the date of endorsement to the date of the first principal payment; and

(2) 0.5 percent of the average outstanding principal obligation of the loan for the year following the date of the first payment following the date of the first principal payment.

(c) Until the equity or acquisition loan is paid in full or until receipt by the Commissioner of an application for insurance benefits, or until the contract of insurance is otherwise terminated with the consent of the Commissioner, the lender on each anniversary date of the first principal payment, shall pay an annual insurance premium equal to 0.5 percent of the average outstanding principal obligation of the loan for the year following the date on which such premium becomes payable.

(d) The premiums payable on or after the date of the first principal payment shall be calculated in accordance with the amortizing provisions without taking into account delinquent payments or prepayments.

(e) Premiums shall be payable in cash or in debentures at par plus accrued interest. All premiums are payable in advance and no refund can be made of any portion thereof except as hereinafter provided in subpart E of this part.

§ 241.1035 Charges by lender.

(a) The lender may collect from the borrower the amount of the fees provided for by subpart E of this part.

(b) The lender may also collect from the borrower an initial service charge, as reimbursement for the cost of closing the transaction, in an amount not to exceed 2 percent of the original principal amount of the loan.

(c) Any charges to be collected by the lender in addition to those prescribed in paragraphs (a) and (b) of this section, shall be subject to the prior approval of the Commissioner.

§ 241.1040 Eligible lenders.

Lenders meeting the applicable eligibility qualifications and requirements contained in § 203.4 or § 203.6 of this chapter are eligible for insurance of equity or acquisition loans under subpart E of this part.

§ 241.1045 Note and security form.

The lender shall present for insurance a note and security instrument on forms approved by the Commissioner for use in the jurisdiction in which the property is located, which shall not be changed without the prior approval of the Commissioner. The security instrument shall provide for accelerated repayment at the request of the Commissioner pursuant to § 241.1046(b).

§ 241.1046 Rental assistance.

(a) When underwriting an equity or acquisition loan under subpart E of this part, the Commissioner may assume that the rental assistance provided in accordance with a plan of action

approved under subparts B or C of part 248 of this chapter will be extended for the full term of the contract entered into under the plan of action.

(b) In the event that rental assistance is not extended under part 248 of this chapter, or the Commissioner is unable to develop a revised package of incentives to the owner comparable to those received under the original approved plan of action, the Commissioner may require the mortgagee to accelerate the debt of the equity or acquisition loan.

(c) If the Commissioner is unable to extend the term of rental assistance for the full term of the contract entered into under part 248 of this chapter, the Commissioner is authorized to take such actions as the Commissioner deems appropriate to avoid default, avoid disruption of the sound ownership and management of the property or otherwise minimize the cost to the Federal Government.

§ 241.1050 Method of loan payment.

The loan shall provide for monthly payments on the first day of each month on account of interest and principal and shall provide for payments in accordance with the amortization plan as agreed upon by the borrower, the lender, and the Commissioner.

§ 241.1055 Date of first payment to principal.

The date for first payment to principal shall be established by the Commissioner.

§ 241.1060 Maturity.

Acquisition loans and equity loans insured under subpart E of this part shall have a maturity equal to the remaining term of the first insured mortgage, or 20 years, whichever is longer.

§ 241.1065 Maximum loan amount—loans insured in connection with a plan of action under subpart C of part 248 of this chapter.

The amount of the equity loan shall not exceed ninety percent of the owner's equity in the project, as determined by the Commissioner. Notwithstanding the above, the equity loan shall not exceed an amount which, when added to the existing indebtedness on the property, can be supported by 90 percent of the projected net operating income of the project, as determined by the Commissioner. The Commissioner, in making a determination regarding the amount of an equity loan and sums available to service said loan, shall take into account the fact that the project's income may increase within the limits established by § 248.233(d) of this chapter.

§ 241.1067 Maximum loan amount—loans insured in connection with a plan of action under subpart B of part 248 of this chapter.

(a) The amount of the equity loan shall not exceed the lesser of 70 percent of the extension preservation equity of the project or the amount the Commissioner determines can be supported by the project on the basis of an 8 percent return on extension preservation equity, assuming normal debt service coverage.

(b) The amount of the acquisition loan shall not exceed 95 percent of the transfer preservation equity of the project, except that, if the purchaser is a priority purchaser, the loan may include any expenses associated with the acquisition, loan closing, and implementation of the plan of action, subject to the approval of the Commissioner.

(c) The owner or purchaser may receive an equity or acquisition loan pursuant to subpart E of this part in combination with a rehabilitation loan insured under subpart A of this part, subject to the approval of the Commissioner.

§ 241.1069 Escrow requirements.

(a) An equity loan provided in connection with a plan of action under subpart B of part 248 of this chapter shall provide for the lender to deposit, on behalf of the borrower, 10 percent of the loan amount in an escrow account, controlled by the Commissioner or a State housing finance agency approved by the Commissioner, which shall be made available to the borrower upon the expiration of the 5-year period beginning on the date the loan is made, subject to compliance with § 248.147 of this chapter.

(b) An equity loan provided in connection with a plan of action under either subpart B or subpart C of part 248 of this chapter shall provide for the lender to phase in advances to reflect project rent levels.

§ 241.1070 Agreed interest rate.

The equity or acquisition loan shall bear interest at the rate agreed upon by the borrower and the lender.

§ 241.1080 Eligibility of title.

In order for the project to be eligible for insurance, the Commissioner shall determine that the title to the property is vested in the borrower as of the date the security instrument is filed for record. The title evidence will be examined by the Commissioner and the endorsement of the credit instrument for insurance shall be evidence of its acceptability.

§ 241.1085 Title evidence.

(a) Upon insurance of the loan, the lender shall furnish to the Commissioner a policy of title insurance as provided in paragraph (a)(1) of this section. If the lender is unable to furnish such policy for reasons satisfactory to the Commissioner, the lender shall furnish such evidence of title as provided in paragraphs (a)(2), (3) or (4) of this section as the Commissioner may require. Any policy of title insurance, or evidence of title required under this section shall be furnished without expense to the Commissioner. The acceptable types of title evidence are:

(1) A policy of title insurance issued by a company satisfactory to the Commissioner. Such policy shall comply with the "L.I.C. Standard Mortgage Form," or such other form as may be approved by the Commissioner; shall name the lender and the Secretary of Housing and Urban Development, as their respective interests may appear, as the insured; and shall become an owner's policy, running to the lender as owner upon its acquisition of the property in extinguishment of the debt, and to the Secretary as owner upon his acquisition of the property pursuant to the loan insurance contract;

(2) An abstract of title satisfactory to the Commissioner, prepared by an abstract company or individual engaged in the business of preparing abstracts of title, accompanied by a legal opinion satisfactory to the Commissioner, as to the quality of such title, signed by an attorney at law experienced in the examination of titles;

(3) A Torrens or similar title certification; or

(4) Evidence of title conforming to the standards of a supervising branch of the Government of the United States of America, or of any State or territory thereof.

§ 241.1090 Accumulation of next premium.

The security instrument shall provide for payments by the borrower to the lender on each interest payment date of an amount sufficient to accumulate in the hands of the lender one payment period prior to its due date the next annual insurance premium payable by the lender to the Commissioner. These payments shall continue only as long as the contract of insurance remains in effect.

§ 241.1095 Application of payments.

(a) The security instrument shall provide that all monthly payments to be made by the borrower shall be added together and the aggregate amount shall be paid by the borrower upon each monthly payment date in a single

payment. The lender shall apply the payment in the following order:

- (1) Premium charges under the contract of insurance;
- (2) Interest on the loan; and
- (3) Amortization of the principal of the loan.

(b) Any deficiency in the amount of any monthly payments required under paragraph (a) of this section shall constitute a default. The security instrument shall provide for a grace period of 30 days within which time the default must be cured.

§ 241.1100 Prepayment privilege and charges.

(a) *Prepayment privilege.* (1) Except as otherwise provided in paragraph (b) of this section, the security instrument shall contain a provision permitting the borrower to prepay the loan, in whole or in part, upon any interest payment date after giving to the lender 30 days advance notice of its intention to prepay.

(2) If the loan exceeds \$200,000, the security instrument may contain a provision for an additional charge in the event of prepayment of principal as may be agreed upon between the borrower and lender. These charges shall not be imposed if the loan is accelerated at the request of the Commissioner, pursuant to § 241.1046(b). The borrower shall be permitted to prepay up to 15 percent of the original principal amount of the loan in any one calendar year without any additional charge. A provision for an additional charge in the event of prepayment may not be included in a loan of \$200,000 or less.

(b) *Prepayment of bond-financed loan.* Where the lender has obtained the funds for the loan by the issuance and sale of bonds or bond anticipation notes, or both, the loan may contain a prepayment restriction and prepayment penalty charges acceptable to the Commissioner as to term, amount, and conditions.

§ 241.1105 Late charges.

The note and security instrument may provide for the lender's collection of a late charge, not to exceed 2 cents for each dollar of each payment to interest or principal more than 15 days in arrears, to cover the expense involved in handling delinquent payments. Late charges shall be separately charged to and collected from the borrower and shall not be deducted from any aggregate monthly payment.

§ 241.1120 Mortgagee's consent.

The holder of an insured mortgage which is recorded prior to the equity or acquisition loan shall not withhold its

consent to the equity or acquisition loan (whether or not such equity or acquisition loan is insured by the Commissioner) or the security instrument executed in connection therewith, and may not charge a fee as a condition to its consent to such loan or security instrument.

Subpart F—Insurance for Equity Loans and Acquisition Loans—Contract Rights and Obligations**§ 241.1200 Cross-references.**

(a) *Projects with a HUD-insured or HUD-held mortgage.* (1) All the provisions of part 207, subpart B of this chapter, covering mortgages insured under section 207 of the Act, apply to equity loans or acquisition loans on a project insured under section 241(f) of the Act, except the following provisions:

- Sec.
- 207.251 Definitions.
 - 207.252 First, second and third premium.
 - 207.252a Premiums—operating loss loans.
 - 207.252b Premiums—mortgages insured pursuant to section 223(f) of the Act.
 - 207.252c Premiums—mortgages insured pursuant to section 238(c) of the Act.
 - 207.254 Insurance endorsement.

(2) For the purposes of subpart F of this part, all references in part 207 of this chapter to section 207 of the Act and to the term "mortgage" shall be construed to refer to section 241(f) of the Act and "equity or acquisition loan," respectively.

(b) *Projects without a HUD-insured or HUD-held mortgage.* The provisions of subpart D of this part shall be applicable to a project without a HUD-insured or HUD-held mortgage that is receiving an equity loan or acquisition loan under subpart E of this part in connection with a plan of action approved by the Commissioner under part 248 of this chapter.

(c) All of the definitions in § 241.1005 apply to subpart F of this part. In addition, as used in subpart F of this part, the term "contract of insurance" means the agreement evidenced by the Commissioner's insurance endorsement and includes the provisions of subpart F of this part and of the Act.

§ 241.1205 Payment of insurance benefits.

All the provisions of § 207.259 of this chapter relating to insurance benefits shall apply to an equity or acquisition loan insured under subpart F of this part, except that insurance benefits shall be payable in cash if the insurance benefits under the senior insured mortgage are payable in cash, unless the lender files a written request for payment in debentures. If such a request

is made, payment shall be made in debentures with a cash payment to adjust for any difference between the total amount of the insurance payment and the amount of the debentures issued.

§ 241.1210 Condition for payment of insurance benefits.

(a) All of the provisions of § 207.258 of this chapter apply to subpart F of this part, except that, if the holder of the senior insured mortgage institutes a foreclosure action, the lender shall notify the Commissioner in a timely manner of such action. The Commissioner, at its option, may then direct the lender to assign the equity or acquisition loan to the Commissioner, or bid an amount necessary to acquire the project and convey the project to the Commissioner.

(b) If the equity loan or acquisition loan is assigned in accordance with this section, the Commissioner at a foreclosure sale may bid, in addition to amounts otherwise authorized, any sum not in excess of the aggregate unpaid indebtedness secured by the senior insured mortgage and equity or acquisition loan, plus taxes, insurance, foreclosure costs, fees and other expenses.

§ 241.1215 Calculation of insurance benefits.

All of the provisions of § 207.259 of this chapter apply to subpart F of this part, except that if the lender, at the direction of the Commissioner, acquires title to the project at a foreclosure sale instituted by the holder of the senior insured mortgage, the amount of the claim determined under § 207.259(c) of this chapter shall also include an amount bid by the lender to satisfy the senior insured mortgage at the foreclosure sale.

§ 241.1220 Termination of insurance benefits.

All of the provisions of § 207.253a of this chapter apply to subpart F of this part, except that the following shall also constitute grounds for terminating the contract of insurance:

(a) The failure of the lender to notify the Commissioner in a timely manner of a foreclosure action initiated by the holder of the senior insured mortgage; and

(b) The failure of the lender when directed by the Commissioner to assign the equity or acquisition loan or bid an amount necessary to acquire title to the project and convey the project to the Commissioner, in accordance with § 241.1210.

§ 241.1230 No vested right in fund.

Neither the lender nor the borrower shall have any vested or other right in the insurance fund under which the loan is insured.

§ 241.1235 Cross default.

In the event the borrower commits a default under a prior recorded insured mortgage and the holder thereof initiates a foreclosure proceeding, said default under the prior recorded insured mortgage shall constitute a default under the equity or acquisition loan.

§ 241.1245 Insurance endorsement.

(a) *Endorsement.* The Commissioner shall indicate his insurance of the equity loan or acquisition loan by endorsing the original credit instrument and identifying the section of the Act and the regulations under which the loan is insured and the date of the insurance.

(b) *Endorsement of phased loan.* In the event the loan is phased, the Commissioner shall indicate his insurance of each amount by endorsing the original credit instrument and identifying the section of the Act and the regulations under which such amount is insured and the date of the insurance.

(c) *Final advance of phased loan.* When all advances of a phased loan have been made and the terms and conditions of the commitment have been complied with to the satisfaction of the Commissioner, the Commissioner shall indicate on the original credit instrument the total of all advances the Commissioner has approved for insurance and again endorse such instrument.

§ 241.1250 Effect of endorsement.

From the date that the equity or acquisition loan is endorsed, the Commissioner and the lender shall be bound by the provisions of subpart F of this part to the same extent as if they had executed a contract including the provisions of subpart F of this part and the applicable sections of the Act.

PART 248—PREPAYMENT OF LOW INCOME HOUSING MORTGAGES

14. The authority citation for part 248 is revised to read as follows:

Authority: 12 U.S.C. 1715 *et seq.*, 42 U.S.C. 3535(d).

15. In chapter II, part 248, subpart A is revised, subpart B is redesignated as subpart C, and a new subpart B (consisting of §§ 248.101 through 248.183) is added to read as follows:

Subpart A—General

Sec.

- 248.1 Purpose.
- 248.3 Applicability.
- 248.5 Election to proceed under subpart B or subpart C of this part.
- 248.7 Waivers.

Subpart B—Prepayments and Plans of Action Under the Low Income Housing Preservation and Resident Homeownership Act of 1990

Sec.

- 248.101 Definitions.
- 248.103 General prepayment limitation.
- 248.105 Notice of intent.
- 248.111 Appraisal and preservation value of eligible low income housing.
- 248.121 Annual authorized return and aggregate preservation rents.
- 248.123 Determination of Federal cost limit.
- 248.127 Limitations on action pursuant to Federal cost limit.
- 248.131 Information from the Commissioner.
- 248.133 Second notice of intent.
- 248.135 Plans of action.
- 248.141 Criteria for approval of a plan of action involving prepayment and voluntary termination.
- 248.145 Criteria for approval of a plan of action involving incentives.
- 248.147 Housing standards.
- 248.149 Timetable for approval of a plan of action.
- 248.153 Incentives to extend low income use.
- 248.157 Voluntary sale of housing not in excess of Federal cost limit.
- 248.161 Mandatory sale of housing in excess of the Federal cost limit.
- 248.165 Assistance for displaced tenants.
- 248.169 Permissible prepayment or voluntary termination and modification of commitments.
- 248.173 Resident homeownership program.
- 248.175 Resident homeownership program—limited equity cooperative.
- 248.177 Delegated responsibility to state agencies.
- 248.179 Consultation with other interested parties.
- 248.181 Notice to tenants.
- 248.183 Preemption of State and local laws.

Subpart A—General

§ 248.1 Purpose.

The purpose of this part is to—

(a) Preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance, without unduly restricting the owners' prepayment rights;

(b) Minimize the involuntary displacement of tenants currently residing in such housing;

(c) Work in partnership with State and local government and the private sector in the provision and operation of

housing that is affordable to very low, low and moderate income families; and

(d) Facilitate the sale of housing to residents under a resident homeownership program.

§ 248.3 Applicability.

The requirements of subparts B and C of this part apply to any project that is eligible low income housing, as defined in subparts B and C of this part respectively, on or after November 1, 1987, except that such requirements shall not apply to a project which receives assistance under title IV, subtitle B of the Cranston-Gonzalez National Affordable Housing Act in connection with a homeownership program approved by the Commissioner thereunder.

§ 248.5 Election to proceed under subpart B or subpart C of this part.

(a) Any owner who has not submitted a notice of intent prior to January 1, 1991, pursuant to either § 248.211 or § 248.105, shall proceed under subpart B of this part.

(b) Any owner who has filed a plan of action with the Commissioner on or before October 11, 1990 pursuant to subpart C of this part, regardless of whether or not the Commissioner has approved such plan of action or whether the owner has received incentives thereunder, may proceed under subpart B of this part by submitting a notice of intent to the Commissioner in accordance with § 248.105 within 30 days after publication of revised Appraisal Guidelines or within thirty days after the Commissioner notifies the owner of HUD's final approval of the plan of action, whichever is later. The notice of intent shall state that the owner is exercising its conversion right pursuant to this section. If the owner fails to file a notice of intent within that period, the owner forfeits its right of conversion. In awarding incentives to an owner who elects to proceed under subpart B of this part in accordance with this section, the Commissioner shall take into consideration any incentives which the owner has already received under subpart C of this part.

(c) Any owner of housing that becomes eligible low income housing, as defined in subpart B of this part, before January 1, 1991, and who before such date, filed a notice of intent under § 248.211 of subpart C of this part, may, unless a plan of action was submitted after October 11, 1990, elect to proceed under subpart B or under subpart C of this part. An owner must indicate its election by submitting to the

Commissioner, within 30 days of the effective date of this part, a notice of election to proceed indicating whether it wishes to proceed under subpart B or subpart C of this part, or proceed under subpart B of this part until completion of the appraisals and then elect either subpart B or subpart C of this part. An owner who chooses to retain its option until after the completion of the appraisals under § 248.111 must submit a new notice of intent to the Commissioner within 30 days after receipt of the information provided by the Commissioner under § 248.131. The notice of intent shall be submitted in accordance with either § 248.105 (for owners electing to proceed under subpart B of this part) or § 248.211 (for owners electing to proceed under subpart C of this part). Any owner who fails to file a notice of intent within the 30-day period may not proceed under subpart C of this part, but may proceed under subpart B of this part by filing a new notice of intent thereafter. If an owner who has filed a notice of intent before January 1, 1991 elects under this paragraph to proceed under subpart C of this part, it may change its election within 30 days after receipt of the information provided by the Commissioner under § 248.131 by filing a new notice of intent under § 248.211. For purposes of calculating any time periods or deadlines under this part for actions following the filing of the notice of intent, the date on which the owner submits the new notice of intent under this paragraph shall be deemed the date of the filing of the notice of intent. Any owner who, exercising its option under paragraph (c) of this section, submits a notice of intent under § 248.211 after the Commissioner has incurred the cost of having an appraisal, or appraisals, performed pursuant to § 248.111 of subpart A of this part, shall reimburse the Commissioner for these expenses within 30 days of receipt of a bill covering these expenses.

(d) An owner who has filed a plan of action after October 11, 1990, pursuant to § 248.213, may not elect to proceed under subpart B of this part.

§ 248.7 Waivers.

Upon making a determination and finding of good cause, the Commissioner may waive any provision of this part, subject to statutory limitations. Each waiver shall be in writing and shall be supported by documentation of the facts and reasons which form the basis for the waiver.

Subpart B—Prepayments and Plans of Action under the Low Income Housing Preservation and Resident Homeownership Act of 1990

§ 248.101 Definitions.

Acquisition Loan. A loan or advance of credit made to a qualified purchaser of eligible low income housing and insured by the Commissioner under part 241, subpart E of this chapter.

Adjusted Income. Annual income, as specified in § 813.106 of this title, less allowances specified in the definition of "Adjusted Income" in § 813.102 of this title.

Aggregate Preservation Rent. The extension preservation rent or transfer preservation rent, as defined under this section.

Annual Authorized Return. That amount an owner of an eligible low income housing project may receive in distributions from the project each year, plus debt service payments payable each year attributable to the equity take-out portion of any loan approved under the plan of action, expressed as a percentage of the project's extension preservation equity.

Bona Fide Offer. A certain and unambiguous offer to purchase an eligible low income housing project pursuant to subpart B of this part made in good faith by a qualified purchaser with the intent that such offer result in the execution of an enforceable, valid and binding contract. A bona fide offer shall include, for purposes of subpart B of this part, a contract of sale and an earnest money deposit, as set forth in § 248.157(g). For mandatory sales under § 248.161, the offer must include a contract of sale, an earnest money deposit and also be for a purchase price which equals the transfer preservation value.

Capital Improvement Loan. A direct loan originated by the Commissioner under part 219, subpart C of this chapter.

Community-Based Nonprofit Organization. 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.
- (4) Has applied for, or 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-based nonprofit 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 officials;

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

(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 low income neighborhood residents, 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 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 on its decisions regarding the acquisition, rehabilitation and management of affordable housing.

Default. For purposes of § 248.105(a), the failure of the owner to make any payment due under the mortgage (including the full amount of the debt if the mortgagee has accelerated the debt on the basis of a non-monetary default) within 30 days after such payment becomes due.

Eligible Low Income Housing. Any project that is not subject to a use restriction imposed by the Commissioner that restricts the project to low and moderate income use for a period at least equal to the remaining term of the mortgage, and that is financed by a loan or mortgage—

(1) That is—

(i) Insured or held by the Commissioner under section 221(d)(3) of the National Housing Act and assisted under part 215 of this chapter or project-based assistance under parts 880, 881 or 886 of this title;

(ii) Insured or held by the Commissioner under part 221 of this

chapter and bearing a below market interest rate as provided under § 221.518(b) of this chapter;

(iii) Insured, assisted, or held by the Commissioner or a State or State agency under part 236 of this chapter; or

(iv) A purchase money mortgage held by the Commissioner with respect to a project which, immediately prior to HUD's acquisition, would have been classified under paragraphs (1)(i), (ii), or (iii) of this definition; and

(2) That, under regulation or contract in effect before February 5, 1988, is or will within 24 months become eligible for prepayment without prior approval of the Commissioner.

Equity Loan. A loan or advance of credit to the owner of eligible low income housing and insured by the Commissioner under part 241, subpart E of this chapter.

Extension Preservation Equity. The extension preservation equity of a project is:

(1) The extension preservation value of the project determined under § 248.111; less

(2) The outstanding balance of any debt secured by the property.

Extension Preservation Rent. The extension preservation rent is the gross potential income for the project that would be required to support:

(1) The annual authorized return;

(2) Debt service on any rehabilitation loan for the project;

(3) Debt service on the federally-assisted mortgage(s) for the project;

(4) Project operating expenses; and

(5) Adequate reserves.

Extension Preservation Value. The fair market value of the project based on the highest and best use of the project as multifamily market-rate rental housing.

Fair market rent. The section 8 existing fair market rent published for effect and as defined under § 882.102 of this title, applicable to the jurisdiction in which the project is located, with adjustments, where appropriate, for projects in which tenants pay their own utilities. (No utility adjustments will be made to the fair market rent for purposes of determining the Federal cost limit.)

Federal Cost Limit. The greater of 120 percent of the section 8 existing fair market rent for the market area in which the project is located or 120 percent of the prevailing rents in the relevant local market area in which the project is located.

Federally-assisted Mortgage. Any mortgage as defined in this section, any insured operating loss loan secured by the project and any loan insured by the Commissioner under part 241 of this chapter.

Good Cause. With respect to displacement, the temporary or permanent uninhabitability of the project justifying relocation of all or some of the project's tenants (except where such uninhabitability is caused by the actions or inaction of the owner), or actions of the tenant that, under the terms of the tenant's lease and applicable regulations, constitute a basis for eviction.

HOME Investment Trust Fund. A public fund established in the general local or State government in which a project is located pursuant to title II of the Cranston-Gonzalez National Affordable Housing Act.

Homeownership Program. A program developed by a resident council for the sale of an eligible low income housing project to the tenants in accordance with the standards in § 248.173 or § 248.175.

Interest Reduction Payments.

Payments made by the Commissioner pursuant to a contract to reduce the interest costs on a mortgage insured under part 236 of this chapter, as provided under subpart C of part 236 of this chapter.

Limited Equity Cooperative. A tenant cooperative corporation which, in a manner acceptable to the Secretary, restricts the initial and resale price of the shares of stock in the cooperative corporation so that the shares remain affordable to low income families and moderate income families.

Low Income Affordability Restrictions. Limits imposed by regulation or regulatory agreement on tenant rents, rent contributions, or income eligibility with respect to eligible low income housing.

Low Income Families. Families or persons whose incomes do not exceed the levels established for low income families under part 813 of this title.

Low Vacancy Area. A market area in which the current supply of decent, safe and sanitary, vacant, available rental units, as a proportion of the total overall rental inventory in the area is not sufficient to allow for normal growth and mobility, taking into account the need for vacancies resulting from turnover and to meet growth in renter households. The determination of a low vacancy area, as set forth in § 248.165(h), will be made by the Commissioner, utilizing the most recent available data for the market area on the rental inventory, renter households, rental vacancy rates and other factors as appropriate.

Moderate Income Families. Families or persons whose incomes are between 80 percent and 95 percent of median

area income, as determined by the Commissioner, with adjustments for smaller and larger families.

Mortgage. The mortgage or deed of trust insured or held by the Commissioner or a State or State agency under parts 221 or 236 of this title or the purchase money mortgage taken back by the Commissioner in connection with the sale of a HUD-owned project and held by the Commissioner, where such mortgage, deed or trust or purchase money mortgage is secured by eligible low income housing.

Nonprofit Organization. Any private, nonprofit organization or association that—

(1) Is incorporated under State or local law;

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

(3) Complies with standards of financial accountability acceptable to the Commissioner; and

(4) Has among its principal purposes significant activities related to the provision of decent housing that is affordable to very low, low, and moderate income families.

Notice of Intent. An owner's notification to the Commissioner of its intention to terminate the low income affordability restrictions on the project through prepayment of the mortgage or voluntary termination of the insurance contract, to extend the low income affordability restrictions on the project, or to transfer the project to a qualified purchaser.

Owner. The mortgagor or trustor under the mortgage secured by eligible low income housing.

Participating Jurisdiction. For purposes of the resident homeownership program established in § 248.173, any State or unit of general local government that has been so designated in accordance with section 216 of the Cranston-Gonzalez National Affordable Housing Act of 1990 (42 U.S.C. 12746).

Plan of Action. A plan providing for the termination of the low income affordability restrictions on the project through prepayment of the mortgage or voluntary termination of the insurance contract, for extension of the low income affordability restrictions on the project, or for the transfer of the project to a qualified purchaser. A homeownership program constitutes a plan of action for purposes of subpart B of this part.

Prepayment. Prepayment in full of a mortgage, or a partial prepayment or series of partial prepayments that reduces the mortgage term by at least six months, except where the prepayment in full or partial prepayment results from

the application of condemnation proceeds.

Preservation Equity. The extension preservation equity or transfer preservation equity, as defined under this section.

Preservation Value. The extension preservation value or transfer preservation value, as defined under this section.

Priority Purchaser. Any entity that is not a related party to the owner and that is either—

(1) A resident council organized to acquire the project in accordance with a resident homeownership program that meets the requirements of subpart B of this part; or

(2) Any nonprofit organization or State or local agency that agrees to maintain low income affordability restrictions for the remaining useful life of the project. A nonprofit organization or State or local agency that is affiliated with a for-profit entity for purposes of purchasing a project under subpart B of this part shall not be considered a priority purchaser.

Public Housing Agency. A public housing agency, as defined in section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)).

Qualified Purchaser. Any entity that is not a related party to the owner and that agrees to maintain low income affordability restrictions for the remaining useful life of the project, and includes for-profit entities and priority purchasers.

Regulatory Agreement. The agreement executed by the owner and the Commissioner or a State agency providing for the regulation of the operation of the project.

Related Party. An entity that, either directly or indirectly, is wholly or partially owned or controlled by the owner of the project being transferred under subpart B of this part, is under whole or partial common control with such owner, or has any financial interest in such owner or in which such owner has any financial interest. However, this shall not prohibit a nonprofit organization from buying out the interest of its limited dividend or for-profit partners in connection with the sale of eligible low income housing under subpart B of this part, as long as the sale is made on an arm's length basis and the partners who sell their interest completely divest themselves of any input in the continued operation of the project. The purchaser and the owner shall not be deemed related parties on the basis that financing is provided to the purchaser by the seller, or a management company affiliated with the seller, as long as:

(1) Only a loan, and not a grant, is provided;

(2) The financing is provided for the acquisition of the project, the rehabilitation of the project, or both;

(3) In the case of financing for the acquisition of the project, the sum of the principal amount of the loan, plus the amount of the acquisition loan under section 241(f) of the National Housing Act (12 U.S.C. 1715z-6(f)), and any Federal grant to cover acquisition of the project, does not exceed the sum of the sales price and the expenses associated with the acquisition, loan closing and implementation of the plan of action; and in the case of financing for the rehabilitation of the project, the principal amount of the loan does not exceed the equity requirements applicable to the rehabilitation loan or capital improvement loan obtained by the purchaser under part 241 or part 219 of this chapter;

(4) The loan is not a condition of accepting a bona fide offer or entering into a sales contract;

(5) The seller has no input in the continued operation of the project as a result of the loan; and

(6) In the case of a loan provided by a management company that is affiliated with the seller, the execution of a management contract between the purchaser and the management company is not a condition of the loan. This rule does not bar an owner, or former owner, from membership on a nonprofit organization's board of directors, as long as the owner, or former owner, participates only in his or her personal capacity, without compensation, and holds a nonvoting membership. The purchaser and the owner shall not be deemed related parties solely by reason of the purchaser's retention of a property management entity of a company that is owned or controlled by the owner or a principal thereof, if retention of the management company is neither a condition of sale nor part of consideration paid for the project and the property management contract is negotiated by the qualified purchaser on an arm's length basis.

Relevant Local Market. An area geographically smaller than the market area established by the Commissioner for purposes of determining the section 8 existing fair market rent, that is identifiable as a distinct rental market area in which similar projects and units would effectively compete with the subject project, for potential tenants.

Relocation Expenses. Relocation expenses shall consist of payment for—

(1) Advisory services, including timely information, counseling (including the provision of information on a resident's rights under the Fair Housing Act (42 U.S.C. 3601-3619)), and referrals to suitable, affordable, decent, safe and sanitary alternative housing; and

(2) Payment for actual, reasonable moving expenses.

Remaining Useful Life. With respect to eligible low income housing, the period during which the physical characteristics of the project remain in a condition suitable for occupancy, assuming normal maintenance and repairs are made and major systems and capital components are replaced as becomes necessary.

Reserve for Replacements. The escrow fund established under the regulatory agreement for the purpose of ensuring the availability of funds for needed repair and replacement costs.

Resident Council. Any incorporated nonprofit organization or association in which membership is available to all the tenants, and only the tenants, of a particular project and—

(1) Is representative of the residents of the project;

(2) Adopts written procedures providing for the election of officers on a regular basis; and

(3) Has a democratically elected governing board, elected by the residents of the project.

Residual Receipt Fund. The fund established under the regulatory agreement for holding cash remaining after deducting from the surplus cash, as defined by the regulatory agreement, the amount of all allowable distributions.

Return on Investment. The amount of allowable distributions that a purchaser of a project may receive under a plan of action under § 248.157 or § 248.161.

Section 8 Assistance. Assistance provided under parts 880 through 887 of this title.

Special Needs Tenants. Those "elderly persons," 62 years of age or older, "elderly families," or families that include "disabled persons," as such terms are defined in § 812.2 of this title, or large families of five or more persons and requiring units with three or more bedrooms.

State assisted or subsidized mortgage. A mortgage which is assisted or subsidized by an agency of a State government without any Federal mortgage subsidy.

Tenant Representative. A designated officer of an organization of the project's tenants, a tenant who has been elected to represent the tenants of the project with respect to subpart B of this part, or a person or organization that has been formally designated or retained by an

organization of the project's tenants to represent the tenants with respect to subpart B of this part.

Termination of Low Income Affordability Restrictions. The elimination of low income affordability restrictions under the regulatory agreement through termination of mortgage insurance or prepayment of the mortgage.

Transfer Preservation Equity. The transfer preservation equity of a project is:

(1) The transfer preservation value of the project determined under § 248.111; less

(2) The outstanding balance of the federally-assisted mortgage(s) for the project.

Transfer Preservation Rent. For purposes of receiving incentives pursuant to a sale of the project, transfer preservation rent shall be the gross income for the project that would be required to support:

(1) Debt service on the loan for acquisition of the project;

(2) Debt service on any rehabilitation loan for the project;

(3) Debt service on the federally-assisted mortgage(s) for the housing;

(4) Project operating expenses; and

(5) Adequate reserves.

Transfer Preservation Value. The fair market value of the project based on its highest and best use.

Very Low Income Families. Families or persons whose incomes do not exceed the level established for very low income families under § 813.102 of this title.

Voluntary Termination of Mortgage Insurance. The termination of all rights under the mortgage insurance contract and of all obligations to pay future insurance premiums.

§ 248.103 General prepayment limitation.

(a) **Prepayment.** An owner of eligible low income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such project only in accordance with a plan of action approved by the Commissioner.

(b) **Termination.** A mortgage insurance contract with respect to eligible low income housing may be terminated pursuant to § 207.253 of this chapter only in accordance with a plan of action approved by the Commissioner.

(c) **Foreclosure.** A mortgagee of a mortgage insured by the Commissioner may foreclose the mortgage on, or acquire by deed in lieu of foreclosure, any eligible low income housing only if the mortgagee also conveys title to the project to the Commissioner in

connection with a claim for insurance benefits.

(d) **Effect of unauthorized prepayment.** A mortgagee's acceptance of a prepayment in violation of paragraph (a) of this section, or the voluntary termination of a mortgage insurance contract in violation of paragraph (b) of this section, shall be null and void and any low income affordability restrictions on the project shall continue to apply to the project.

(e) **Remedies for unauthorized prepayment.** A mortgagee's acceptance of a prepayment in violation of paragraph (a) of this section, or attempt to obtain voluntary termination of a mortgage insurance contract in violation of paragraph (b) of this section, is grounds for administrative action under parts 24 and 25 of this title, in addition to any other remedies available by law, including rescission of the prepayment or reinstatement of the insurance contract.

§ 248.105 Notice of intent.

(a) **Eligibility for filing.** An owner of eligible low income housing intending to prepay the mortgage or voluntarily terminate the mortgage insurance contract pursuant to § 248.141, extend the low income affordability restrictions of the housing in accordance with § 248.153, or transfer the housing to a qualified purchaser under § 248.157, may file a notice of intent unless the mortgage covering the project—

(1) Continued in default or fell into default on or after the November 28, 1990, and the mortgage has been assigned to the Commissioner as a result of such default;

(2) Continued in default or fell into default on or after November 28, 1990, while the mortgage was held by the Commissioner;

(3) Fell into default prior to November 28, 1990, if the owner entered into a workout agreement prior to that date, and on or after that date, the owner has defaulted under the workout agreement (and, if the agreement was with an insured mortgagee, the mortgage has been assigned to the Commissioner as a result of the default under the workout agreement); or

(4) Fell into default prior to November 28, 1990, but has been current since that date and the owner has not agreed to recompense the appropriate insurance fund for losses sustained by the fund as a result of any work-out or other arrangement agreed to by the Commissioner and the owner with respect to the defaulted mortgage.

(b) **Filing with the Commissioner.** The notice of intent shall be filed with the

HUD Field Office in whose jurisdiction the project is located. The notice of intent shall identify the project by name, project number and location. It shall contain a statement indicating whether the owner intends to extend the affordability restrictions on the project by retaining ownership of the project or transferring it to a qualified purchaser, or whether the owner intends to terminate the affordability restrictions on the project through prepayment of the mortgage or termination of the mortgage insurance contract. The notice of intent shall also request the tenants to notify the owner, the Commissioner, and the State or local officer identified in the notice of intent of any individual or organization that has been designated or retained by the tenants to represent the tenants with respect to the actions to be taken under subpart B of this part.

(c) *Filing with the State or local government and tenants.* The owner simultaneously shall file the notice of intent with the chief executive officer of the appropriate State or local government in which the project is located, or any officer designated by executive order or State or local law to receive such information, and with the mortgagee. In addition, the owner shall deliver a copy of the notice of intent to each occupied unit in the project and to any tenant representative, if any, known to the owner, and shall post a copy of the notice of intent in readily accessible locations within each affected building of the project. The copies of the notice of intent delivered to the tenants and the tenant representative shall include a summary of possible outcomes of the filing which shall be furnished by the Commissioner. Upon the request of any non-English speaking tenants residing in the affected project, the owner shall tabulate the number and type of translations needed by the tenants and request the local HUD field office to provide the appropriate translations. The owner shall deliver a copy of the translated notice of intent to all of the tenants who requested such translation. The failure of an owner to comply with any non-federal notice requirements shall not invalidate the notice of intent.

§ 248.111 Appraisal and preservation value of eligible low income housing.

(a) *Appraisal.* Upon receiving a notice of intent indicating an intent to extend the low income affordability restrictions under § 248.153 or transfer the project under § 248.157, the Commissioner shall provide for determination of the preservation values of the project pursuant to this section.

(b) *Notice.* Within 30 days after the filing of a notice of intent to extend the

income restrictions or to transfer the project, the Commissioner shall provide the owner with written notice of—

(1) The need for, and the rules and guidelines governing, an appraisal of the project;

(2) The filing deadline for submission of the appraisal;

(3) The need for an appraiser retained by the Commissioner to inspect the project and the project's financial records; and

(4) Any delegation to an appropriate State agency, if any, by the Commissioner of responsibilities regarding the performance of an appraisal pursuant to this section.

(c) *Appraisers.* The Commissioner and the owner shall each select and compensate an appraiser who shall:

(1) Neither be an employee of the Federal Government nor an employee or officer of any entity that is affiliated with the owner or the mortgagee of record;

(2) Be certified by the appropriate State agency under the standards established by the Federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 1451-1459); and

(3) Have six years of experience in the appraisal profession and at least three years experience in the practice of appraising multifamily residential properties;

(4) Is not the subject of a charge issued following a reasonable cause determination under the Fair Housing Act (42 U.S.C. 3601-3619).

(d) *Guidelines.* The Commissioner shall provide to the owner and the appraiser retained by the Commissioner guidelines for the conduct of the appraisal. The guidelines established by the Commissioner shall be consistent with customary appraisal standards. The guidelines shall assume repayment of the existing federally-assisted mortgage(s), termination of the existing Federal low income affordability restrictions, and costs of compliance with any State or local laws of general applicability. The guidelines may permit reliance upon assessments of rehabilitation needs and other conversion costs determined by an appropriate State agency, as determined by the Commissioner.

(e) *Operating expenses.* For the purpose of determining preservation values, the guidelines shall instruct the appraiser to use the greater of actual project operating expenses at the time of the appraisal, based on the average of the actual project operating expenses during the preceding three years, or projected operating expenses after

conversion, as determined by the Commissioner. However, if the current year operating expenses are higher than those of the preceding three years and the Commissioner has made a determination that these costs are unlikely to decrease in the future, the appraiser shall use current year operating expenses rather than operating expenses for the preceding three years for purposes of comparison with projected operating expenses after conversion. Likewise, if the current year operating expenses are lower than those of the preceding years and the Commissioner has made a determination that these costs are unlikely to increase in the future, the appraiser shall use current year operating expenses rather than operating expenses for the preceding three years for purposes of comparison with projected expenses after conversion. Where the highest and best use of a project is not as rental housing, the appraiser shall use projected operating expenses assuming conversion of the project to its highest and best use.

(f) *Preservation values.* The preservation values will be determined on the basis of the appraisals conducted by the owner's and the Commissioner's independent appraisers. Each appraiser will determine both the extension preservation value and the transfer preservation value, regardless of the owner's intentions as indicated in the notice of intent.

(g) *Highest and best use as residential property.* In determining the extension preservation value of the project, the appraiser shall assume conversion of the project to market-rate rental housing. The appraiser shall, in accordance with the guidelines established by the Commissioner, determine the amount of rehabilitation expenditures, if any, that would be necessary to bring the project up to quality standards required to attract and sustain a market-rate tenancy upon conversion and assess other costs that the owner could reasonably be expected to incur if the owner converted the property to market-rate multifamily rental housing.

(h) *Highest and best use.* In determining the transfer preservation value for the project, the appraiser shall assume conversion of the project to highest and best use for the property, and shall, in accordance with the guidelines established by the Commissioner, determine the amount of any rehabilitation expenditures, including demolition, that would be necessary to convert the project to such use and assess other costs that the

owner could reasonably be expected to incur if the owner converted the property to its highest and best use.

(i) *Submission of appraisal.* Within four months after the filing of the notice of intent:

(1) The owner shall submit to the HUD Field Office in whose jurisdiction the project is located, the appraisal made by the owner's selected appraiser; and

(2) The Commissioner's selected appraiser shall conduct and submit an appraisal to the Commissioner.

(j) *Joint determination of preservation values.* No later than one month after the owner and the Commissioner exchange appraisals, the owner and the Commissioner shall, on the basis of the appraisals delivered to them, agree on the preservation values of the project. If no agreement as to preservation values can be reached, the owner and the Commissioner shall jointly select a third appraiser meeting the qualifications set forth in paragraph (c) of this section by the end of six months from the date that the notice of intent was filed. The cost of this third appraisal shall be borne equally by both parties. The third appraiser must comply with the guidelines set forth in paragraph (d) of this section and must conduct the appraisal and submit an appraisal within two months after accepting the assignment. The determination by the third appraiser of the project's preservation values shall be binding on both the owner and the Commissioner.

(k) *Timeliness of appraisals.* The Commissioner may approve a plan of action to receive incentives under §§ 248.153, 248.157 or 248.161 only based upon an appraisal conducted in accordance with this section that is not more than 30 months old, unless the failure of the Commissioner to approve the plan of action within the 30-month period was due to circumstances beyond the control of the owner.

§ 248.121 Annual authorized return and aggregate preservation rents.

(a) *Annual authorized return.* For each eligible low income housing project appraised under § 248.111, the Commissioner shall set an annual authorized return on the project equal to 8 percent of the extension preservation equity.

(b) *Aggregate preservation rents.* For each eligible low income housing project appraised under § 248.111, the Commissioner shall also determine the aggregate preservation rents. The aggregate preservation rents shall be used solely for the purposes of comparison with the Federal cost limit under § 248.123. Actual rents received by the owner (or a qualified purchaser)

shall be determined pursuant to §§ 248.153, 248.157, and 248.161.

(c) *Extension preservation rent.* The extension preservation rent shall be the gross potential income for the project, as determined by the Commissioner, that would be required to support—

(1) The annual authorized return determined under paragraph (a) of this section;

(2) Debt service on any rehabilitation loan for the project, assuming a market rate of interest and customary terms;

(3) Debt service on the federally-assisted mortgage(s) for the project;

(4) Project operating expenses as determined by the Commissioner; and

(5) Adequate reserves.

(d) *Transfer preservation rent.* The transfer preservation rent shall be the gross potential income for the project, as determined by the Commissioner, that would be required to support—

(1) Debt service on the loan for acquisition of the project;

(2) Debt service on any rehabilitation loan for the project, assuming a market rate of interest and customary terms;

(3) Debt service on the federally-assisted mortgage(s) for the project;

(4) Project operating expenses as determined by the Commissioner; and

(5) Adequate reserves.

(e) *Adequate reserves and operating expenses.* For purposes of this section—

(1) Adequate reserves are the amount of funds which, when added to existing reserves, are sufficient to maintain the project, including needed deferred maintenance, at a level that meets the standards set forth in § 248.147; and

(2) Project operating expenses shall be based on operating expenses for the preceding 3 years, adjusted for reasonable reductions in operating costs due to rehabilitation and energy improvements. For purposes of comparison to the gross rents used in determining the Federal cost limit, project operating expenses shall include the cost of utilities paid by the residents.

(f) *Debt service.* For purposes of this section, the amount of debt service for an acquisition loan will be estimated based on the maximum loan to which the purchaser is entitled under § 241.1067 of this chapter. The debt service on any rehabilitation loan will be estimated using costs derived from the appraisals conducted under § 248.111, taking into account any funds provided for rehabilitation by State or local governments and assuming market rate interest rates.

§ 248.123 Determination of Federal cost limit.

(a) *Initial determination.* For each eligible low income housing project

appraised under § 248.111, the Commissioner shall determine whether the aggregate preservation rents for the project exceed the amount determined by multiplying the number of dwelling units in the project, according to appropriate unit sizes, by 120 percent of the section 8 existing fair market rent for the appropriate unit sizes.

(b) *Relevant local markets.* If either the extension or transfer preservation rent for a project exceeds the amount determined under paragraph (a) of this section, the Commissioner shall determine whether such extension or transfer preservation rent exceeds the amount determined by multiplying the number of units in the project, according to the appropriate unit sizes, by 120 percent of the prevailing rents in the local market area. The relevant local market, and the prevailing rents in such relevant local market, shall be determined on the basis of the appraisal conducted by the appraiser selected by the Commissioner pursuant to § 248.111 and any other information that the Commissioner determines is appropriate. If there are no comparables in the relevant local market and it is not otherwise possible to determine prevailing rents in that area, the section 8 existing fair market rent shall be the sole measure for determining the Federal cost limit.

(c) *Effect.* The extension or transfer preservation rent for an eligible low income housing project appraised under § 248.111 shall be considered to exceed the Federal cost limit only if the extension or transfer preservation rent exceeds the amount determined under paragraphs (a) and (b) of this section.

§ 248.127 Limitations on action pursuant to Federal cost limit.

(a) *Retention of the project.* With respect to owners who seek to retain the project, the owner may file a plan of action to receive incentives under § 248.153, except that if the extension preservation rent exceeds the Federal cost limit, the amount of the incentives may not exceed an amount that can be supported by a projected income stream equal to the Federal cost limit.

(b) *Transfer of the project.* With respect to owners who seek to transfer the project—

(1) If the transfer preservation rent does not exceed the Federal cost limit, or if the transfer preservation rent exceeds the Federal cost limit and the owner is willing to transfer the project at a price which will result in project rents that, on an aggregate level, do not exceed the Federal cost limit, the owner may file a second notice of intent

indicating an intention to transfer the project under § 248.157; or

(2) If the transfer preservation rent exceeds the Federal cost limit, the owner may file a second notice of intent to transfer the project under § 248.161 or, if no bona fide offers are received, to prepay the mortgage or terminate the mortgage insurance.

§ 248.131 Information from the Commissioner.

(a) *Information to owners terminating affordability restrictions.* Within six months after receipt of a notice of intent to terminate the low income affordability restrictions under § 248.141, the Commissioner shall provide the owner with a description of the criteria for such termination and with information that the owner needs to prepare a plan of action. This shall include information concerning the standards under § 248.141 regarding the approval of a plan of action and a list of the Federal incentives authorized under § 248.153 and available to those projects for which a plan of action involving termination of low income affordability restrictions, through prepayment of the mortgage or termination of the mortgage insurance contract, would not be approvable. The Commissioner shall also provide the owner with any other relevant information which the Commissioner may possess.

(b) *Information to owners extending affordability restrictions.* Within nine months of receipt of a notice of intent to extend the low income affordability restrictions under § 248.153 or to transfer the project under § 248.157, the Commissioner shall provide the owner who submitted the notice with—

(1) A statement of the preservation values of the project as determined under § 248.111;

(2) A statement of the aggregate preservation rents for the project as calculated under § 248.121;

(3) A statement of the applicable Federal cost limit for the market area (or relevant local market, if applicable) in which the project is located, and an explanation of the limitations under § 248.127 on the amount of assistance the Commissioner may provide based on such cost limits;

(4) A statement of whether either of the aggregate preservation rents exceeds the Federal cost limit; and

(5) A direction to file a plan of action and the information necessary to file a plan of action; or

(6) A direction to submit a second notice of intent under § 248.133.

(c) *Information to tenants and State or local governments.* The Commissioner shall provide any information provided

to the owner under paragraphs (a) and (b) of this section to the tenant representative, if any, known to the Commissioner, and shall post a notice in each affected building informing tenants of the name(s), address(es), and telephone number(s) of the tenant representative(s) and appropriate personnel in the local HUD field office, from whom they may obtain this information. The Commissioner shall also provide this information to that officer of State or local government to whom the owner submitted a notice of intent pursuant to § 248.105(c). The Commissioner shall include in the information packet made available to the tenants any other information relating to their rights and opportunities, including—

(1) The potential opportunity of the tenants to become priority purchasers under §§ 248.157 and 248.161; and

(2) The potential opportunity of resident homeownership under §§ 248.173 or 248.175.

§ 248.133 Second notice of intent.

(a) *Filing.* A second notice of intent must be filed by all owners who, after receiving the information provided by the Commissioner in § 248.131, elect to transfer the project under §§ 248.157 or 248.161.

(b) *Timeliness.* A second notice of intent must be submitted not later than 30 days after receipt of the information provided by the Commissioner under § 248.131. If an owner who is required to submit a second notice of intent fails to do so within this time period, the original notice of intent submitted under § 248.105 shall be void and ineffective for purposes of subpart B of this part.

(c) *Filing with the State or local government and tenants.* The owner simultaneously shall file the second notice of intent with that officer of State and local government to whom the owner submitted a notice of intent under § 248.105(c) and with the mortgagee. In addition, the owner shall deliver a copy of the second notice of intent to each tenant representative known to the owner, and if none is known, then to each occupied unit in the project.

§ 248.135 Plans of action.

(a) *Submission.* An owner seeking to terminate the low income affordability restrictions through prepayment of the mortgage or voluntary termination under § 248.141, or to extend the low income affordability restrictions on the project under § 248.153, shall submit a plan of action to the Commissioner in the form and manner prescribed in paragraph (d) or (e) of this section respectively, within

6 months after receipt of the information from the Commissioner under § 248.131.

(b) *Joint Submission.* An owner and purchaser seeking a transfer of the project under §§ 248.157 or 248.161 shall jointly submit a plan of action to the Commissioner in the form and manner prescribed in paragraph (e) of this section within six months after the owner's acceptance of a bona fide offer under § 248.157 or the purchaser's making of a bona fide offer under § 248.161.

(c) *Filing with the State or local government and tenants.* The owner shall notify the tenants of the plan of action by posting in each occupied building a summary of the plan of action and by delivery of a copy of the plan of action to the tenant representative, if any. In addition, the summary must indicate that a copy of the plan of action shall be available from the tenant representatives, whose names, addresses and telephone numbers are indicated on the summary, the local HUD field office, and the on-site office for the project, or if one is not available, in the location where rents are collected, for inspection and copying, at a reasonable cost, during normal business hours. Simultaneously with the submission to the Commissioner, the owner shall submit the plan of action to that officer of State or local government to whom the owner submitted a notice of intent under § 248.105(c). The Commissioner shall submit a copy of the plan of action to the appropriate agency of such State or local government which shall review the plan of action and advise the tenants of the project of any programs that are available to assist the tenants in carrying out the purposes of subpart B of this part.

(d) *Termination of affordability restrictions.* If the plan of action proposes to terminate the low income affordability restrictions through prepayment or voluntary termination in accordance with § 248.141, it shall include:

(1) A description of any proposed changes in the status or terms of the mortgage or regulatory agreement;

(2) A description of any proposed changes in the low income affordability restrictions;

(3) A description of any change in ownership that is related to prepayment or voluntary termination;

(4) An assessment of the effect of the proposed changes on existing tenants;

(5) An analysis of the effect of the proposed changes on the supply of housing affordable to low and very low income families or persons in the community within which the project is

located and in the area that the housing could reasonably be expected to serve;

(6) A list of any waivers requested by the owner pursuant to § 248.7; and

(7) Any other information that the Commissioner determines is necessary to achieve the purposes of subpart B of this part.

(e) *Extension of affordability restrictions.* If the plan of action proposes to extend the low income affordability restrictions of the project in accordance with § 248.153 or transfer the project to a qualified purchaser in accordance with §§ 248.157 or 248.161, the plan of action shall include:

(1) A description of any proposed changes in the status or terms of the mortgage or regulatory agreement;

(2) A description of the Federal incentives requested, including cash flow projections and analyses of how the owner will address any physical or financial deficiencies and maintain the low income affordability restrictions of the project;

(3) A description of any assistance from State or local government agencies, including low income housing tax credits that have been offered to the owner or purchaser or for which the owner or purchaser has applied or intends to apply;

(4) A description of any transfer of the property, including the identity of the transferee and a copy of any documents of sale;

(5) An income profile of the tenants as of the date of submission of the plan of action and as of January 1, 1987 (based on the area median income limits established by the Commissioner in February 1987), or if the January 1, 1987 profile is unavailable, a certification from the owner stating its unavailability and a profile as of January 1, 1988, or, if that is also unavailable, a profile as of January 1, 1989;

(6) A transfer of physical assets package, if a transfer is proposed;

(7) A list of any waivers requested by the owner pursuant to § 248.7; and

(8) Any other information that the Commissioner determines is necessary to achieve the purposes of subpart B of this part.

(f) *Revisions.* The owner or owner and purchaser may from time to time revise and amend the plan of action as may be necessary to obtain approval under subpart B of this part and must amend the plan of action no later than 30 days after a change in any of the information required in paragraphs (d) or (e) of this section. The owner or owner and purchaser shall submit any revision to the Commissioner, and provide a copy of the revision to the parties and in the

manner specified in paragraph (c) of this section.

(g) *Failure to Submit.* If the owner fails to submit a plan of action to the Commissioner, when prepayment or termination is sought, within the 6 month period set forth in paragraph (a) of this section or, when a transfer is sought, if the owner and purchaser fail to submit a plan of action within the 6 month time period set forth in paragraph (b) of this section, the notice of intent filed by the owner under § 248.105 shall be ineffective for the purposes of subpart B of this part and the owner shall be barred from submitting another notice of intent under § 248.105 until 6 months after expiration of such period.

(h) *Comment Period for tenants and State or local governments.* Upon submission of the plan of action by the owner, the tenants of the affected project and the State or local government shall have 60 days in which to provide comments on the plan of action to the Commissioner or to the owner, who will then submit the comments to the Commissioner. The Commissioner shall not approve a plan of action under subpart B of this part before the end of this 60-day period and all comments received during this period will be considered by the Commissioner in making its determination to approve or disapprove a plan of action.

(i) *Notification to tenants and the State or local government of plan of action approval.* Upon the Commissioner's approval of the plan of action, the owner shall notify tenants of the terms thereof by posting in each occupied building a summary of the plan of action and by delivery of a copy of the plan of action to the tenant representative, if any. In addition, the summary must indicate that a copy of the plan of action shall be available for inspection and copying during reasonable hours in a location convenient to the tenants.

§ 248.141 Criteria for approval of a plan of action involving prepayment and voluntary termination.

(a) *Approval.* The Commissioner may approve a plan of action that provides for the termination of the low income affordability restrictions through prepayment of the mortgage or voluntary termination of the mortgage insurance contract only upon a written finding that—

(1) Implementation of the plan of action will not—

(i) Materially increase economic hardship for current tenants, and will not in any event result in a monthly rental payment by any current tenant that exceeds 30 percent of the monthly

adjusted income of the tenant or an increase in the monthly rental payment in any year that exceeds 10 percent (whichever is lower); or in the case of a current tenant who already pays more than such percentage, an increase in the monthly rental payment in any year that exceeds the increase in the Consumer Price Index or 10 percent (whichever is lower); or

(ii) Involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available, determined without regard to the availability of Federal housing assistance that would address any such hardship or involuntary displacement; and

(2) The supply of vacant, comparable housing is sufficient to ensure that such prepayment will not materially affect—

(i) The availability of decent, safe, and sanitary housing affordable to low income and very low income families or persons in the area that the housing could reasonably be expected to serve;

(ii) The ability of low income and very low income families or persons to find affordable, decent, safe, and sanitary housing near employment opportunities; or

(iii) The housing opportunities of minorities in the community within which the housing is located.

(3) There are no open audit findings, open findings of noncompliance with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); the Fair Housing Act (42 U.S.C. 3601-3619); Executive Order 11063 (3 CFR 1959-1963 comp., p. 652); the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and all regulations promulgated under such statutes and authorities (including, but not limited to 24 CFR part 100), or outstanding violations of the regulatory agreement.

(b) *Disapproval.* If the Commissioner determines a plan of action to prepay a mortgage or terminate an insurance contract fails to meet the requirements of paragraph (a) of this section, the Commissioner shall disapprove the plan and within a reasonable time, shall inform the owner of the reasons for disapproval and suggest alternatives. In the case of disapproval of the plan of action, except for the failure to meet the requirement of paragraph (a)(3) of this section, the notice of intent filed under § 248.105 shall be rendered ineffective for the purposes of this subtitle, and the owner, in order to receive incentives, must file a new notice of intent under such section. If the plan of action is disapproved because of an outstanding civil rights or audit finding, the finding

must be closed before the Commissioner will approve a plan of action under this section.

§ 248.145 Criteria for approval of a plan of action involving incentives.

(a) *Approval.* The Commissioner may approve a plan of action for extension of the low income affordability restrictions on an eligible low income housing project or for transfer of the housing to a qualified purchaser, other than a resident council, only upon a finding that—

(1) Due diligence has been given to ensuring that the package of incentives set forth in the plan of action is, for the Federal Government, the least costly alternative that is consistent with the full achievement of the purposes of subpart B of this part. The Commissioner will conduct a "windfall profits" test to determine whether the project is located in a rental market where there is an adequate supply of decent, affordable housing. If the project is located in such a rental market, and if the provision of incentives would not serve other public policy objectives under subpart B of this part, then no incentives will be provided to the owner;

(2) The project will be retained as housing affordable for very low, low and moderate income families and persons, as determined under paragraph (a)(8) of this section, for the remaining useful life of the project;

(3) Throughout the remaining useful life of the project, adequate expenditures will be made for maintenance and operation of the project and the project meets the housing standards established in § 248.147 as determined by inspections conducted by the Commissioner;

(4) Current tenants will not be involuntarily displaced, except for good cause;

(5) Any increase in rent contributions for current tenants will be to a level that does not exceed 30 percent of the adjusted income of the tenant or the fair market rent, whichever is lower. However, the rent contributions of any tenants occupying the project at the time of any increase may not be reduced by reason of this paragraph, except with respect to tenants receiving section 8 assistance in accordance with paragraph (a)(7) of this section;

(6) Any resulting increase in rents for current tenants (except for increases made necessary by increased operating costs) shall be phased in as follows:

(i) If such increase is 30 percent or more, the increase shall be phased in equally over a period of not less than three years, with the first increase

occurring upon the effective date of the plan of action, and the subsequent two increases occurring annually thereafter;

(ii) If such increase is more than 10 percent but less than 30 percent, it shall be limited to not more than 10 percent per year;

(7) Section 8 assistance shall be provided, to the extent appropriations are available, if necessary to mitigate any adverse effect on current very low and low income tenants;

(8) Rents for units becoming available to new tenants shall be at levels approved by the Commissioner, taking into account any incentives provided under subpart B of this part, that will ensure, to the extent practicable, that the units will be available and affordable to the same proportions of very low, low and moderate income families and persons, including families and persons whose incomes are 95 percent or more of area median income, as based on the area median income limits established by the Commissioner in February 1987, as resided in the project as of the date of the tenant income profile submitted under § 248.135(e)(5), or the date the plan of action is approved, whichever date results in the highest proportion of very low income families. This limitation shall not prohibit a higher proportion of very low income families and persons from occupying the project;

(9) Future rent adjustments shall be—
(i) Made by applying an annual factor, to be determined by the Commissioner, to the portion of rent attributable to operating expenses for the project; and

(ii) Subject to a procedure, established by the Commissioner, for owners to apply for rent increases not adequately compensated by annual adjustment under paragraph (a)(9)(i) of this section, under which the Commissioner may increase rents in excess of the amount determined under paragraph (a)(9)(i) of this section only if the Commissioner determines such increases are necessary to reflect extraordinary necessary expenses of owning and maintaining the project;

(10) Any savings from reductions in operating expenses due to management efficiencies shall be deposited in project reserves for replacement and the owner shall have periodic access to such reserves, to the extent the Commissioner determines that the level of the reserves is adequate and that the project is maintained in accordance with the standards established in § 248.147;

(11) The mortgage on the project is current; and

(12) There are no open audit findings, open findings of noncompliance with title VI of the Civil Rights Act of 1964 (42

U.S.C. 2000d); the Fair Housing Act (42 U.S.C. 3601-3619); Executive Order 11063 (3 CFR 1959-1963 comp., p. 652); the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and all regulations promulgated under such statutes and authorities (including, but not limited to, 24 CFR part 100), or outstanding violations of the regulatory agreement.

(b) *Compliance with housing standards.* No incentives under § 248.153 may be provided, other than to qualified purchasers under §§ 248.157 and 245.161, and no distributions may be taken by the owner or purchaser, until the Commissioner determines that the project meets the housing standards set forth in § 248.147, except that incentives designed to correct deficiencies in the project may be provided.

(c) *Implementation.* Any agreement to maintain the low income affordability restrictions for the remaining useful life of the project may be made through execution of a new regulatory agreement, modifications to the existing regulatory agreement or mortgage, or in the case of prepayment of a mortgage or voluntary termination of mortgage insurance, a recorded instrument.

(d) *Determination of remaining useful life.* The Commissioner shall make determinations, on the record and after opportunity for a hearing, as to when the useful life of an eligible low income housing project has expired. Under procedures and standards to be established by the Commissioner, owners of eligible low income housing may petition the Commissioner for a determination that the useful life of such project has expired. Such petition may not be filed before the expiration of the 50-year period beginning upon the approval of a plan of action under subpart B of this part with respect to such project. In making a determination pursuant to a petition under paragraph (d) of this section, the Commissioner shall presume that the useful life of the project has not expired, and the owner shall have the burden of proof in establishing such expiration. The Commissioner may not determine that the useful life of any project has expired if such determination results primarily from failure to make regular and reasonable repairs and replacement, as became necessary. In making a determination regarding the useful life of any project pursuant to a petition submitted under paragraph (d) of this section, the Commissioner shall provide for comment by tenants of the project and interested persons and organizations with respect to the

petition. The Commissioner shall also provide the tenants and interested persons and organizations with an opportunity to appeal a determination under paragraph (d) of this section.

(e) In the case of any plans of action involving incentives the owner must agree to comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); the Fair Housing Act (42 U.S.C. 3601-3619); Executive Order 11063 (3 CFR 1959-1963 comp., p. 652); the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (including the Department's Accessibility Guidelines (24 CFR chapter I, subchapter A, appendix II) and all regulations issued pursuant to these authorities.

§ 248.147 Housing standards.

(a) *Standards.* As a condition to receiving incentives under subpart B of this part, the owner shall agree to maintain the project in accordance with local housing codes and the housing quality standards set forth in § 886.307 of this title. Where a housing quality standard conflicts with local housing codes, the owner shall maintain the project in compliance with the standard that is stricter.

(b) *Annual inspections.* The Commissioner shall inspect each project at least annually in order to determine compliance with the housing quality standards. At least 30 days prior to the inspection, the Commissioner shall notify any tenant representatives, or if none exist, the Commissioner shall provide the owner with a notice to be posted in each affected building, stating the time and date of the inspection and advising any interested tenants that they may accompany HUD personnel on the inspection and/or submit any comments they may have on the physical condition of the project. The Commissioner shall notify the owner of any deficiencies within 30 days following the inspection. The owner shall have 90 days from the date of such notification to correct any deficiencies cited by the Commissioner and shall promptly notify the Commissioner when such deficiencies have been corrected. The Commissioner shall reinspect the project upon such notification or, if the owner does not notify the Commissioner, upon the expiration of the 90-day period.

(c) *Sanctions for noncompliance.* If the Commissioner determines, upon reinspection of the project, that the project is still not in compliance with the standards set forth in paragraph (a) of this section, the Commissioner shall take any action appropriate to bring the project into compliance, including—

(1) Directing the mortgagee, with respect to an equity take-out loan provided under part 241 of this chapter, to withhold the disbursement to the owner of any escrowed loan proceeds and requiring that such proceeds be used for repair of the project; and

(2) Reduce the amount of the allowable distributions to 4 percent of extension preservation equity or (in the case of a purchaser 4 percent of cash invested, as appropriate, for the period ending upon a determination by the Commissioner that the project is in compliance with the standards and requiring that such amounts be used for repair.

(d) *Continued compliance.* To ensure continued compliance with the standards set forth in paragraph (a) of this section for a project subject to any action under paragraph (c) of this section, the Commissioner may limit access of and use by the owner of such amounts set forth in paragraph (c) of this section, for not more than the 2-year period beginning upon the determination that the project is in compliance with the housing standards.

(e) *Sanctions for continuous noncompliance.* If, upon inspection, the Commissioner determines that any eligible low income housing project has failed to comply with the standards established under this section for two consecutive years, the Commissioner may, upon notification to the owner of the noncompliance, take one or more of the following actions:

(1) Subject to the availability of appropriations, provide assistance, other than project-based assistance attached to the project, under parts 882 and 887 of this title for any tenant eligible for such assistance who desires to terminate occupancy in the project. For each unit in the project vacated pursuant to the provision of assistance under this paragraph, the Commissioner may, notwithstanding any other law or contract for assistance, cancel the provision of project-based assistance attached to the project for one dwelling unit, if the project is receiving such assistance, or convert the project-based assistance allocation for that unit to assistance under part 882 or 887 of this title;

(2) In the case of projects for which an equity take-out loan has been made under part 241 of this chapter, direct the mortgagee to declare such a loan to be in default and accelerate the maturity date of the loan;

(3) Declare, or direct the insured mortgagee to declare, any rehabilitation loan insured or provided by the Commissioner with respect to the project, including loans provided under

part 219 of this chapter, to be in default and accelerate the maturity date of the loan; and

(4) Suspend payments under or terminate any contract for project-based rental assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

(f) *Sanctions not exclusive.* The Commissioner may take any other action authorized by law or the project regulatory agreement to ensure that the project will be brought into compliance with the standards established under this section or with other requirements pertaining to the condition of the project.

§ 248.149 Timetable for approval of a plan of action.

(a) *Notification of deficiencies.* Not later than 60 days after receipt of a plan of action, the Commissioner shall notify the owner in writing of any deficiencies that prevent the plan of action from being approved. Such notice shall describe alternative ways in which the plan may be revised to meet the criteria for approval set forth in § 248.145.

(b) *Notification of approval.* Not later than 180 days after receipt of a plan of action, or such longer period as the owner requests, but not more than 365 days, the Commissioner shall notify the owner in writing whether the plan of action, including any revisions, is approved. If approval is withheld, the notice shall describe—

(1) The reasons for withholding approval; and

(2) Suggestions to the owner for meeting the criteria for approval.

(c) *Opportunity to revise.* The Commissioner shall give the owner a reasonable opportunity of not more than 60 days to revise the plan of action when approval is denied. If the owner fails to comply with this time period, it shall not be eligible for relief under paragraph (d) of this section.

(d) *Delayed approval.* If the Commissioner fails to approve a plan of action within the time set forth in paragraph (b) of this section, the Commissioner shall provide incentives and assistance under subpart B of this part, to an owner who is entitled to receive such incentives and assistance, in the amount that the owner would have received if the Commissioner had complied with such time limitations. Paragraph (d) of this section does not apply to plans of action that are not approved because of deficiencies.

§ 248.153 Incentives to extend low income use.

(a) *Agreements by the Commissioner.* After approving a plan of action filed pursuant to § 248.145, from an owner of eligible low income housing that includes the owner's plan to extend the low income affordability restrictions of the project, the Commissioner shall, subject to the availability of appropriations for such purpose, enter into such agreements as are necessary to enable the owner to—

(1) Receive the annual authorized return for the project as determined under § 248.121;

(2) Pay debt service on the federally-assisted mortgage(s) covering the project;

(3) Pay debt service on any loan for rehabilitation of the project;

(4) Meet project operating expenses; and

(5) Establish adequate reserves.

(b) *Permissible incentives.* Such agreements may include one or more of the following incentives, as determined necessary by the Commissioner:

(1) Increased access to residual receipts accounts as necessary to enable the owner to realize the annual authorized return;

(2) An increase in the rents permitted under an existing project-based section 8 contract;

(3) Additional project-based section 8 assistance or an extension of any project-based assistance attached to the housing;

(4) An increase in the rents on non-section 8 units occupied by current tenants up to the maximum allowable rents;

(5) Financing of capital improvements under part 219 of this chapter;

(6) Financing of rehabilitation through provision of insurance for a second mortgage under part 241 of this chapter;

(7) Redirection of the Interest Reduction Payment subsidies to a second mortgage for projects which are insured, assisted, or held by the Commissioner or a State or State agency under part 236 of this chapter;

(8) Access by the owner to a portion of the preservation equity in the project through provision of insurance for an acquisition or equity loan insured under part 241, subpart E of this chapter or through a non-insured mortgage loan approved by the Commissioner and the mortgagee;

(9) An increase in the amount of allowable distributions up to the annual authorized return; and

(10) Other incentives authorized in law.

(c) *Limitation on the provision of permissible incentives.* (1) The total

amount of incentives provided to a project under paragraphs (b)(2), (3), and (4) of this section shall not result in a projected rental income stream which exceeds the Federal cost limit.

(2) The debt service on the loan obtained by the owner under paragraph (b)(8) of this section, when added to the allowable distributions under paragraph (b)(9) of this section, shall not exceed the annual authorized return.

(d) *Interest reduction subsidies.* Where Interest Reduction Payment subsidies are sought to be redirected, pursuant to paragraph (b)(7) of this section, the lender may not unreasonably withhold its consent to such redirection.

(e) *Recalculation of section 236 basic rent and market rent.* With respect to any project with a mortgage insured or otherwise assisted pursuant to part 236 of this chapter, the basic rent and market rent, as defined in § 236.2 of this chapter, for each unit in such project may be increased to take into account the allowable distributions permitted under this section and the debt service on any equity loan, rehabilitation loan or acquisition loan approved under a plan of action under subpart B of this part.

§ 248.157 Voluntary sale of housing not in excess of Federal cost limit.

(a) *Offer to sell.* Where an owner has submitted a second notice of intent under § 248.133 for the purpose of transferring the project to a qualified purchaser, and the transfer preservation rent does not exceed the Federal cost limit, the owner shall offer the housing for transfer as provided in this section. The owner shall not be obligated to accept any offer made under this section, but may instead elect to retain the project and receive incentives under § 248.145.

(b) *Notification of qualified purchasers.* Upon receipt of a second notice of intent to transfer the project to a qualified purchaser, the Commissioner shall notify potential qualified purchasers of the availability of the project for sale, and of the names and addresses of the owner, or of a person representing the owner in the sale of the project, by—

(1) Mailing notices to non-profit organizations;

(2) Placing notices in the major local newspaper(s) in the jurisdiction in which the project is located;

(3) Mailing notices to clearinghouse networks; and

(4) Using any other means of notification which the Commissioner determines would be effective to notify

potential qualified purchasers of the sale of the project.

(c) *Right of first offer to priority purchasers.* (1) For the 6-month period beginning on the date of receipt by the Commissioner of a second notice of intent under § 248.133, the owner may accept a bona fide offer only from:

(i) A resident council intending to purchase the project under §§ 248.173 or 248.175, which has met the requirements for tenant support, pursuant to those sections;

(ii) A resident council intending to purchase the project and retain it as rental housing, which has the support of a majority of the tenants; or

(iii) A community-based nonprofit organization which has the support of a majority of the tenants.

(2) If no bona fide offer to purchase the project is made and accepted during or at the end of the 6-month period specified in paragraph (c)(1) of this section, the owner may offer to sell the project during the next 6 months to any priority purchasers.

(3) If no bona fide offer to purchase the project is made and accepted during or at the end of the 6-month period specified in paragraph (c)(2) of this section, the owner may offer to sell the project during the 3 months immediately following that period only to qualified purchasers.

(d) *Purchase price.* The sale price, including assumption of the debt on the federally-assisted mortgage(s), or the amount of the debt on the federally-assisted mortgage(s) that the project is taken subject to, may not exceed the transfer preservation value of the project.

(e) *Expression of interest.* Any priority purchaser seeking to make an offer during the 6-month periods specified in paragraph (c) of this section shall, and other qualified purchasers may, submit written notice thereof to the Commissioner. Such notice, if made by a priority purchaser seeking to make an offer during either 6-month priority purchaser marketing period, shall contain the following:

(1) A statement identifying the priority purchaser as a State or local government agency, a nonprofit organization, or a resident council;

(2) A copy of its articles of incorporation, charter and list of officers and directors, if the purchaser is a nonprofit organization or a resident council and in the case of a nonprofit organization, proof that the organization is, or has applied to be, a tax exempt organization in accordance with 26 U.S.C. 501(c); and

(3) A statement as to whether the purchaser is affiliated with any other entity for purposes of purchasing the project and whether any Low Income Housing Tax Credits may be awarded in connection with the purchase of the project.

(f) *Information from the Commissioner.* Within 30 days of receipt of an expression of interest by a priority purchaser, the Commissioner shall determine the status of the priority purchaser with respect to the categories listed in paragraph (h) of this section, and provide such purchaser with:

(1) A list of all possible assistance available from the Federal Government to facilitate a transfer of the project;

(2) The appraisal reports for the project as submitted under § 248.111;

(3) The Commissioner's determination as to the priority status of the purchaser and as to whether the purchaser qualifies as a resident council, community-based nonprofit organization or State or local government entity;

(4) A worksheet indicating the level of the earnest money deposit required upon the submission of a bona fide offer;

(5) An acknowledgment of the purchaser's right to inspect the project; and

(6) Any other relevant financial information that the Commissioner possesses concerning the project, including the information determined under § 248.121.

Within the same 30-day period, the Commissioner shall also notify the owner of the purchaser's expression of interest and instruct the owner to provide to the purchaser any information concerning the project that the Commissioner deems relevant to the transfer of the project.

(g) *Bona fide offer.* A bona fide offer is an offer to purchase eligible low-income housing at a sales price which does not exceed the transfer preservation value of the project.

(1) A bona fide offer must include the following:

(i) A contract of sale signed by the purchaser, which states that acceptance of the contract is contingent upon approval by the Commissioner;

(ii) An earnest money deposit from every qualified purchaser equal to the lesser of one percent of the transfer preservation value, \$50,000 or \$500 per unit, unless the purchaser is a resident council purchasing the project under a resident homeownership plan under § 248.173 or § 248.175, in which case the earnest money deposit shall be equal to \$200 per unit from 75% of the occupied units; and

(iii) If the purchaser is a resident council intending to purchase the project

pursuant to a resident homeownership plan, the information required under § 248.173(b); or

(iv) If the purchaser is a resident council intending to retain the project as rental housing, or a community-based nonprofit and the offer is submitted within the marketing period established in paragraph (c)(1) of this section, a resolution of the resident council, or a petition signed by tenants representing a majority of the units indicating their support of the offer.

(2) An owner may waive the requirement of an earnest money deposit or agree to accept a smaller deposit for all qualified purchasers, except resident councils who intend to purchase the project pursuant to a resident homeownership plan under § 248.173 or § 248.175. In order to be effective:

(i) The waiver must be indicated in the second notice of intent submitted under § 248.133 and the waiver must apply equally to all qualified purchasers, except resident councils who intend to purchase the project pursuant to a resident homeownership plan under § 248.173 or § 248.175; or

(ii) If the second notice of intent has already been submitted, the owner must submit to the Commissioner, in writing, its decision to waive the earnest money deposit. The Commissioner shall notify all qualified purchasers who have submitted an expression of interest under paragraph (e) of this section that the owner has waived the earnest money deposit requirement.

(h) *Retention and acceptance of offers.* The owner shall accept or reject any bona fide offer within 30 days of receipt of such offer. For an offer to be bona fide, it must meet the requirements of paragraph (g) of this section, as well as be submitted to the owner within the appropriate marketing period under paragraph (c) of this section. If an owner rejects any offer, it must return the earnest money deposit to the offeror at the time of rejection. A bona fide offer which is rejected by the owner will still be considered a bona fide offer for purposes of this section, even after the earnest money deposit has been returned. If an owner decides to accept the offer at a later date, the purchaser may renew the offer by resubmitting the earnest money deposit, if a deposit had originally been required, within 30 days of notification of the owner's acceptance of the offer.

(i) *Submission of offer to HUD.* The purchaser shall submit the offer to the Commissioner. The Commissioner shall review the offer which is preliminarily accepted by the owner to determine whether it meets the requirements of a

bona fide offer. The Commissioner shall notify the owner and purchaser, within 30 days after acceptance, whether the offer meets such requirements. The owner's preliminary acceptance of any offer pursuant to this section shall be conditional upon the Commissioner's certification that the offer is bona fide. If the Commissioner determines that the offer is not a bona fide offer, the offer will be considered invalid for the purposes of subpart B of this part.

(j) *Submission of plan of action.* Upon a determination by the Commissioner that the offer is bona fide and final acceptance of such an offer, the owner and purchaser shall jointly submit a plan of action to the Commissioner pursuant to § 248.135. The plan of action shall include any request for assistance from the Commissioner for purposes of transferring the project.

(k) *Requirements for plan of action approval.* If the qualified purchaser of the project is a resident council seeking to purchase the project under a resident homeownership program, the Commissioner may approve a plan of action only if the resident council's proposed resident homeownership program meets the requirements under § 248.173 or § 248.175. For all other qualified purchasers, the Commissioner may approve a plan of action submitted pursuant to this section only if the plan of action meets the criteria listed in § 248.145.

(l) *Failure to consummate sales transaction.* (1) If the owner accepts an offer from a priority purchaser during either of the two 6-month periods specified in paragraph (c) of this section, and before the expiration of the period specified in paragraph (c) of this section, the sales transaction either falls through or does not close within 90 days after the Commissioner's approval of the plan of action, the owner shall:

(i) Immediately notify the Commissioner that the sale has fallen through;

(ii) Notify any other purchaser that had submitted an offer to purchase the project; and

(iii) Resume holding the project open for sale for the remainder of the time periods specified in paragraph (c) of this section.

(2) If the owner accepts an offer from a purchaser, and during the 3-month period specified in paragraph (c) of this section, or thereafter, the sales transaction either falls through or does not close within 90 days after the Commissioner's approval of the plan of action, the owner shall take the following steps:

(i) Immediately notify the Commissioner that the sale has fallen through;

(ii) Contact any other purchaser that had submitted an offer to purchase the project and give such purchaser and any other qualified purchaser 60 days from the date of notification to the Commissioner in which to resubmit an offer to purchase the project.

(3) At any time during the 60-day period the owner may accept an offer submitted under paragraph (1)(2) of this section.

(4) If an offer submitted during the 60-day period specified in paragraph (1)(2) of this section is made and accepted, but the sale is not consummated within 90 days of the Commissioner's approval of the plan of action for reasons not attributable in whole or in part to the owner, the owner may terminate the low-income affordability restrictions through prepayment or voluntary termination, subject to compliance with the provisions of § 248.165.

(m) *Assistance.* Subject to the availability of amounts approved in appropriation acts, the Commissioner shall, for approvable plans of action, provide assistance sufficient to enable qualified purchasers to:

(1) Acquire the eligible low income housing project from the current owner for a purchase price not greater than the transfer preservation value of the project;

(2) Pay the debt service on the federally-assisted mortgage(s) covering the project;

(3) Pay the debt service on any loan for the rehabilitation of the project;

(4) Meet project operating expenses and establish adequate reserves for the housing;

(5) Receive a return on investment in an amount equal to 8 percent on any actual cash investment made to acquire the project;

(6) In the case of a priority purchaser, receive an adequate reimbursement for transaction expenses relating to acquisition of the project, not in excess of 5% of the project's transfer preservation equity, subject to approval by the Commissioner in accordance with standards applicable to insured loan transactions under this chapter; and

(7) In the case of an approved resident homeownership program, cover the costs of training for the resident council, homeownership counseling and training, the fees for the nonprofit entity or public agency working with the resident council, if such entity or agency is approved by the Commissioner, and costs related to relocation of tenants who elect to move. Assistance for such

costs, exclusive of relocation expenses, shall not exceed \$500 per unit or \$200,000 for the project, whichever is less.

(n) *Incentives; residual receipts.* The Commissioner may provide assistance for all qualified purchasers under subpart B of this part in the form of one or more of the incentives authorized under § 248.153, except that any residual receipts for the project transferred to the owner shall be deducted from the sale price of the project. The incentives provided by the Commissioner to any qualified purchaser may include an acquisition loan provided under subpart E of part 241 of this chapter.

(o) *Grants to priority purchasers.* The Commissioner may provide assistance for priority purchasers under subpart B of this part in the form of a grant for each unit in the project in an amount, as determined by the Commissioner, that does not exceed the present value of the total of the projected fair market rent for the next ten years, or such longer period if additional assistance is necessary to cover the costs set forth in paragraph (m) of this section.

(p) *Reimbursement of assistance.* The Commissioner reserves the right to seek reimbursement from a priority purchaser who, within ten years of approval of a plan of action, becomes affiliated with or transfers the project to any non-priority purchaser. The Commissioner shall be entitled to receive reimbursement for the difference between the assistance provided to the priority purchaser and the assistance that would have been provided in the same circumstances to a non-priority purchaser.

(q) *Seller financing.* In order to finance the acquisition or rehabilitation of a project under this section, a qualified purchaser may receive take-back financing from the owner of the project. If the purpose of the seller financing is to aid acquisition of the project, the principal amount of such financing, together with an acquisition loan provided under part 241 of this chapter, may not exceed the transfer preservation equity of the project, plus, in the case of priority purchasers, any expenses associated with the acquisition, loan closing, and implementation of the plan of action. If the purpose of the seller financing is to fund rehabilitation of the project, the principal amount of such financing may not exceed the equity requirements for a rehabilitation loan under § 241.70 or § 219.305 of this chapter. The seller may not charge interest on any seller financing at a rate in excess of that of the Federal acquisition or rehabilitation loan.

§ 248.161 Mandatory sale of housing in excess of the Federal cost limit.

(a) *In general.* With respect to any eligible low income housing for which the transfer preservation rent determined under § 248.121 exceeds the Federal cost limit, the owner shall offer the housing for transfer to qualified purchasers as provided in this section.

(b) *Applicability of voluntary sale provisions.* The provisions of § 248.157, other than paragraphs (a) and (p) of this section thereof, shall be applicable to any sale conducted under this section. If the owner receives an offer to purchase the project for a sale price equal to the transfer preservation value of the project, as determined under § 248.111, the owner shall be obligated to accept the offer upon its receipt and sell the project to the purchaser. If the owner receives an offer to purchase the project for a sale price less than the transfer preservation value of the project, the owner may accept the offer, but is not obligated to do so. Any offer to purchase a project under this section for less than the transfer preservation value must comply with the requirements of a bona fide offer in § 248.101, except for the requirement that the sale price equal the transfer preservation value. At the time of submission of the offer, the potential purchaser must also submit the documentation required in § 248.157(g).

(c) *Section 8 assistance.* Subject to the availability of amounts approved in appropriation acts, the Commissioner shall, for approvable plans of action, provide assistance to qualified purchasers under part 886, subpart A of this title sufficient to produce a gross potential income equal to the amount determined by multiplying 120 percent of the prevailing rents in the relevant local market in which the project is located by the number of units in the project, according to appropriate unit size, and any other incentives authorized under § 248.153 that would have been provided to a qualified purchaser under § 248.157.

(d) *Grants to qualified purchasers.* From amounts made available by Congress, the Commissioner may make grants to assist in the completion of transfers under this section to any qualified purchasers. Any grant made pursuant to paragraph (d) of this section shall be in an amount not exceeding the difference between the amount of assistance provided under paragraph (c) of this section and the amount of assistance specified in § 248.157(m).

(e) *Securing State and local funding.* The Commissioner shall assist any qualified purchaser of a project pursuant to this section in securing funding and

other assistance, including tax and assessment reductions from State and local governments to facilitate a transfer under this section.

§ 248.165 Assistance for displaced tenants.

(a) *Section 8 assistance.* Each low income family that is displaced as a result of the prepayment of the mortgage or voluntary termination of an insurance contract on eligible low income housing shall, subject to the availability of funds, receive assistance under parts 882 or 887 of this title in the form of section 8 certificates or vouchers. At its discretion, the Commissioner may set the section 8 existing fair market rent levels at the exception rent in order to allow tenants to use the certificates or vouchers to remain at the project.

(b) *Notification of Commissioner.* The owner of any eligible low income housing project who prepays the mortgage or voluntarily terminates the mortgage insurance contract pursuant to subpart B of this part, shall notify the Commissioner of:

(1) The names and addresses of all of the tenants in the project who will be displaced;

(2) The size of the unit in which each of the displaced tenants is currently dwelling; and

(3) The names of all of the displaced tenants who are special needs tenants, as that term is defined in § 248.101, as well as a statement as to the nature of their special need.

The owner shall provide the Commissioner with this information within 30 days of identifying such tenants for displacement, but in no event less than 30 days prior to the date when the tenants must vacate the premises.

(c) *Relocation of displaced tenants.* The Commissioner shall coordinate with public housing agencies to ensure that any very low or low income family displaced from eligible low income housing as the result of prepayment of the mortgage or termination of the mortgage insurance contract on such project is able to acquire a suitable, affordable dwelling unit in the area where the project from which the displaced family is located. The Commissioner, upon receiving information from the owner under paragraph (b) of this section stating that certain tenants will be displaced, shall request from the public housing agencies located in the same area as the affected project, notices of vacancies in other affordable projects which would be suitable for the displaced tenants. The Commissioner shall convey the notices of vacancies to the tenants who will be

displaced along with the addresses of the local public housing agencies.

(d) *Relocation expenses.* The Commissioner shall require the owner of eligible low income housing who prepays or terminates the insurance contract resulting in the displacement of tenants to pay 50 percent of the relocation expenses of each family which is relocated, except that the Commissioner shall increase such percentage to the extent that State or local law of general applicability requires a higher payment by the owner.

(e) *Continued occupancy.* Each owner who prepays the mortgage or terminates the mortgage insurance contract on eligible low income housing shall, as provided in paragraph (g) of this section, allow the tenants occupying units in such project on the date of submission of a notice of intent under § 248.105 to remain in the project for a period of three years, commencing on the date of prepayment or contract termination, at rent levels existing at the time of prepayment or termination, except for rent increases made necessary due to increased operating costs.

(f) *Replacement unit.* In any case in which the Commissioner requires an owner to allow tenants to occupy units under paragraph (e) of this section, an owner may fulfill the requirements of such paragraph by providing such assistance necessary for the tenant to rent a decent, safe, and sanitary unit in another project for the same 3-year period and at a rental cost to the tenant not in excess of the rental amount the tenant would have been required to pay to the owner in the owner's project, except that the tenant must freely agree to waive the right to occupy the unit in the owner's project. The provisions of paragraph (d) of this section requiring an owner who prepays or terminates an insurance contract to pay a portion of the relocation expenses incurred by displaced tenants shall also be applicable to tenants who relocate pursuant to this paragraph.

(g) *Applicability.* The provisions of paragraphs (e) and (f) of this section shall apply only to:

(1) All tenants in eligible low income housing projects located in a low-vacancy area; and

(2) Special needs tenants.

(h) *Low Vacancy Areas.* The Commissioner shall notify the owner, within 30 days of the owner's request to prepay under § 248.169, whether the project is located in a low vacancy area for purposes of paragraph (g) of this section.

(i) *Required acceptance of section 8 assistance.* Any owner who prepays the mortgage or terminates the mortgage

insurance contract on eligible low income housing and maintains the project for residential rental occupancy may not refuse to rent, refuse to negotiate for the rental of, or otherwise make unavailable or deny the rental of a dwelling unit in such project to any person, or discriminate against any person in the terms, conditions, or privileges or rental of a unit, or in the provision of services or facilities in connection therewith, because the person receives assistance under parts 882 or 887 of this title.

(j) *Regional pools.* In providing assistance under this section, the Commissioner shall allocate the assistance on a regional basis through the regional offices of the Department of Housing and Urban Development. The Commissioner shall allocate assistance under this section in a manner so that the total number of assisted units in each such region available for occupancy by, and affordable to, low income families and persons does not decrease because of the prepayment of a mortgage on eligible low income housing or the termination of an insurance contract on such project.

(k) This section shall only apply to prepayments and terminations occurring pursuant to §§ 248.157(l) and 248.169.

§ 248.169 Permissible prepayment or voluntary termination and modification of commitments.

(a) *In general.* Notwithstanding any limitations on prepayment or voluntary termination under subpart B of this part, an owner may terminate the low income affordability restrictions through prepayment or voluntary termination, subject to compliance with the provisions of § 248.165, under one of the following circumstances:

(1) The Commissioner approves a plan of action under § 248.153(a), but does not provide the assistance approved in such plan and contained in an executed use agreement between the Commissioner and the owner, including section 8 assistance or a loan provided under part 219 of this chapter, but not including insurance of a rehabilitation or equity take-out loan under part 241 of this chapter, during the 15-month period beginning on the date of final approval of the plan of action;

(2) After the date that the project would have been eligible for prepayment pursuant to the terms of the mortgage, notwithstanding this part, the Commissioner approves a plan of action under § 248.157 or § 248.161, but does not provide the assistance approved in such plan, including section 8 assistance, a loan provided under part

219 of this chapter, a grant provided under § 248.157(o), or a grant under § 248.161(d), before the earlier of:

(i) The expiration of the 2-month period beginning on the commencement of the first fiscal year beginning after such final approval; or

(ii) The expiration of the 6-month period beginning on the date of final approval.

(3) The Commissioner approves a plan of action under §§ 248.157 or 248.161 for any eligible low income housing not covered by paragraph (a)(2) of this section, but does not provide the assistance approved in such plan before the earlier of:

(i) The expiration of the 2-month period beginning on the commencement of the first fiscal year beginning after such final approval; or

(ii) The expiration of the 9-month period beginning on the date of final approval.

(4) An owner who intended to transfer the project to a qualified purchaser under § 248.157 or § 248.161, and fully complied with the provisions of such section,

(i) Did not receive any bona fide offers from any qualified purchasers within the applicable time periods; or

(ii) Received and accepted a bona fide offer from a qualified purchaser, but the sales transaction fell through for reasons not attributable in whole or in part to the owner, and the owner then complied with the requirements of § 248.157(l) and did not receive another bona fide offer from any qualified purchasers.

(b) *Section 8 assistance.* When providing section 8 assistance, the Commissioner may enter into a contract with an owner, contingent upon the future availability of appropriations, for the purpose of renewing expiring contracts for rental assistance as provided in appropriations acts, to extend the term of such rental assistance for such additional period or periods necessary to carry out an approved plan of action. The contract and approved plan of action shall provide that, if the Commissioner is unable to extend the term of such rental assistance or is unable to develop a revised package of incentives providing benefits to the owner comparable to those received under the original approved plan of action, the Commissioner, upon the request of the owner, shall take the following actions, subject to the limitations under the following paragraphs:

(1) Modify the binding commitments made pursuant to § 248.145(a)(2)-(10) that are dependent upon such rental assistance; or

(2) If the Commissioner determines that such modification is infeasible, permit the owner to prepay the mortgage and terminate the plan of action and any implementing use agreements or restrictions, but only if the owner agrees in writing to comply with the provisions of § 248.165.

(c) *Failure to provide section 8 assistance.* With regard to paragraph (b) of this section, the Commissioner shall notify the owner of an inability to either extend the term of section 8 rental assistance or to develop a revised package of incentives providing benefits comparable to those received under the original plan of action as soon as practicable upon discovering that fact. The owner shall inform the Commissioner in writing, within 30 days of receipt of the notice that, since the Commissioner is unable to fulfill the terms of the original plan of action, the owner intends to request that the Commissioner take action under paragraphs (b)(1) or (2) of this section. The Commissioner shall, no later than 90 days from receiving the owner's notice, take action to extend the rental assistance contract and to continue the binding commitments under § 248.145(a)(2)-(10).

§ 248.173 Resident homeownership program.

(a) *Formation of resident council.* Tenants seeking to purchase eligible low income housing in accordance with §§ 248.157 and 248.161 shall organize a resident council for the purpose of developing a resident homeownership program in accordance with standards established by the Commissioner. In order to fulfill the purposes of this section, the resident council shall work with a public or private nonprofit organization or a public body, including an agency or instrumentality thereof. Such organization shall have sufficient experience to enable it to help the tenants to consider their options and to develop the capacity necessary to own and manage the project, where appropriate, and shall be approved by the Commissioner.

(b) *Submission of expression of interest.* A resident council shall identify itself as such in an expression of interest submitted pursuant to § 248.157 or § 248.161 and shall state that, it is interested in purchasing the project pursuant to a homeownership program.

(c) *Bona fide offer.* When submitting an offer to purchase the project pursuant to this section, the resident council must simultaneously submit a certified list of project tenants representing at least 75 percent of the occupied units in the project, and representing at least 50

percent of all of the units in the project, who have expressed an interest in participating in the homeownership program developed by the resident council. An offer made without this certified list will not be considered a bona fide offer for the purposes of subpart B of this part.

(d) *Submission of a homeownership program.* (1) The resident council shall prepare a homeownership program acceptable to the Commissioner for giving all residents of the project an opportunity to become homeowners. The plan shall describe the major elements of, and schedules for, the homeownership program and demonstrate how the program complies with all applicable requirements of this section. The plan shall also describe the resident council's current abilities and proposed capacity-building activities to successfully carry out the homeownership program in compliance with this section. The homeownership program shall include, at a minimum, the following information:

(i) The amount of grant funds requested from the Commissioner, and the expected amounts and sources of other funding;

(ii) The proposed use of the grant funds to be received from HUD and of all other funds, including proceeds from the sale of units to initial purchasers, consistent with paragraph (h) of this section;

(iii) A summary of major rehabilitation activities to be carried out, including repairs, replacements and improvements;

(iv) The price at which the resident council intends to transfer ownership interests in, or shares representing, units in the project, broken down by unit size and/or type; the factors that will influence the establishment of such price, including, but not limited to, the resident council's acquisition cost, estimated rehabilitation costs, capitalization of reserves and organizational costs; how the price arrived at by the resident council compares to the estimated appraised value of the ownership interests or shares; and the underwriting standard that the resident council plans to use, or reasonably expects a public or private lender to use, for potential tenant purchasers, consistent with paragraph (g)(2) of this section;

(v) The expected number of very low, low and moderate income tenants that will be initial owners under the program, consistent with paragraph (g)(1) of this section;

(vi) A pro forma analysis which demonstrates the financial feasibility

and viability of the homeownership program, based on the required conditions specified in paragraph (g) of this section:

(vii) The financing arrangements that the tenants are expected to pursue or to be provided, including financing available through the resident council or a State or local governmental entity, and criteria for acceptability of conventional financing;

(viii) A description of the estimated costs expected to be paid by the homeowner at closing;

(ix) The type of homeownership contemplated, consistent with paragraph (f) of this section;

(x) How the marketing of currently vacant units and units occupied by nonpurchasing tenants that become vacant will affect the sales price and occupancy charges to purchasers;

(xi) A workable schedule of sale, subject to the limitations of paragraph (o) of this section, based on estimated tenant incomes;

(xii) Any restrictions on resale by homeowners over and above those specified in paragraph (i) of this section, and any restrictions on homeowners' equity, over and above those specified in paragraph (k) of this section;

(xiii) The qualifications of the resident council or the proposed management entity to manage the project, in compliance with paragraph (n) of this section;

(xiv) The expected number of non-purchasing tenants and their eligibility for section 8 rental assistance under paragraph (m)(2) of this section;

(xv) Expected scope and expenses of relocation activities, both for any temporary relocation due to rehabilitation as well as relocation assistance for nonpurchasing tenants, consistent with paragraph (m)(4) of this section;

(xvi) Expected scope and costs of technical assistance, training and counseling for the resident council, purchasers and non-purchasing tenants; and

(xvii) A certification that the resident council shall comply with the provisions of the Fair Housing Act (42 U.S.C. 3601-3619); title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); Executive Order 11063 (3 CFR 1959-1963 comp., p. 652); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107); and all regulations issued pursuant to these statutes and authorities.

(2) The Commissioner shall give the resident council a reasonable opportunity to revise the

homeownership program if approval is denied.

(e) *Approval of a homeownership program; assistance provided.* (1) When the Commissioner determines that the homeownership program submitted by the resident council meets the requirements of this section, is financially feasible, and is the least costly alternative that is consistent with establishing a viable homeownership program, the Commissioner shall approve the program.

(2) In connection with an approved homeownership program the Commissioner shall provide assistance sufficient to pay the following costs:

(i) The purchase price, which shall not exceed the transfer preservation value;

(ii) Transaction costs, as provided in § 248.157(m)(6);

(iii) Other costs, as provided in § 248.157(m)(7);

(iv) The costs of rehabilitation;

(v) The establishment of an adequate reserve for replacements; and

(vi) If necessary, the establishment of operating reserve escrows including contingencies against unexpected increases in expenses or shortfalls in homeowners' payments.

(3) Upon approval of the homeownership program, the Commissioner and the resident council shall enter into an agreement, which shall include, among other matters, procedures governing the drawdown of funds and remedies for noncompliance with the requirements of this section.

(f) *Method of conversion.* The Commissioner shall approve the method for converting the project to homeownership, which may involve acquisition of ownership interests in, or shares representing, the units in a project under any arrangement determined by the Commissioner to be appropriate, such as cooperative ownership, and fee simple ownership, including condominium ownership.

(g) *Required conditions.* The Commissioner shall require that the form of homeownership impose appropriate conditions, including conditions to assure that:

(1) To the extent practicable, the number of initial owners that are very low, low, and moderate income persons at initial occupancy are of the same proportion of very low, low, and moderate income tenants (including families and persons whose incomes are 95 percent or more of area median income) as resided in the project on January 1, 1987 (or if the January 1, 1987 profile is unavailable, a certification from the owner stating its unavailability and a profile as of January 1, 1988, or, if that is also unavailable, a profile as of

January 1, 1989) or as of the date of approval of the plan of action, whichever date results in the higher proportion of very low income families, except that the resident council may, at its option, increase the proportions of very low income and low income initial owners, however, no current tenant may be denied homeownership as a result of this paragraph;

(2) Projected debt service payments, occupancy charges and utilities payable by the owners shall not exceed 35 percent of the monthly adjusted gross income of the owners;

(3) The aggregate incomes of initial owners and other sources of funds for the project are sufficient to permit occupancy charges to cover the full operating costs of the project and any debt service; and

(4) Each initial owner occupies the unit it acquires for at least the initial 15 years of ownership, unless the resident council determines that the initial owner is required to move outside the market area due to a change in employment or an emergency situation.

(h) *Use of proceeds from sales to eligible families.* The entity that transfers ownership interests in, or shares representing, units to eligible families, or another entity specified in the approved application, may use 50 percent of the proceeds, if any, from the initial sale for costs of the homeownership program, including improvements to the project, operating and replacement reserves for the project, additional homeownership opportunities in the project, and other project-related activities approved by the Commissioner. The remaining 50 percent of such proceeds shall be returned to the Commissioner for use under §§ 248.157 and 248.161, subject to the availability of appropriations. Such entity shall keep, and make available to the Commissioner, all records necessary to calculate accurately payments due the Commissioner under paragraph (h) of this section.

(i) *Restrictions on resale by homeowners.* Resale of a homeowner's interest in a project with an approved homeownership program may occur subject to any reasonable restrictions placed on such a transfer by the resident council and approved by the Commissioner.

(1) *Transfer permitted.* A homeowner may transfer the homeowner's ownership interest in the unit, subject to the right to purchase under paragraph (i)(2) of this section, the requirement for the purchaser to execute a promissory note, if required under paragraph (i)(3) of this section and the restrictions on

retention of sales proceeds in paragraph (k) of this section. An applicant may propose in its application, and HUD may approve, reasonable restrictions on the resale of units under the program.

(2) *Right to purchase.* Where a resident management corporation, resident council, or cooperative has jurisdiction over the unit, it shall have the right to purchase the ownership interest in the unit from the initial homeowner for the amount specified in a firm contract between the homeowner and a prospective buyer. Where a resident management corporation, resident council, or a cooperative exercises a right to purchase, it shall resell the unit to an eligible family within a reasonable period of time.

(3) *Promissory note required.* At closing, the initial homeowner shall execute a nonrecourse promissory note for a term of twenty years, in a form acceptable to HUD, equal to the difference between the fair market value of the unit and the purchase price, payable to the Commissioner, together with a mortgage securing the obligation of the note.

(i) With respect to a sale by an initial homeowner, the note shall require payment upon sale by the initial homeowner, to the extent proceeds of the sale remain after paying off other outstanding debt incurred in connection with the purchase of the property, paying any other amounts due in connection with the sale, including closing costs and transfer taxes, and paying the family the amount of its equity in the property, computed in accordance with paragraph (k) of this section.

(ii) With respect to a sale by an initial homeowner during the first six years after acquisition, the family may retain only the amount computed under paragraph (k) of this section. Any excess is distributed as provided in paragraph (1) of this section.

(iii) With respect to a sale by an initial homeowner six to twenty years after acquisition, the amount payable under the note shall be reduced by 1/168th of the original principal amount of the note for each full month of ownership by the family after the end of the sixth year. The homeowner may retain all other proceeds of the sale.

(j) *Execution of promissory note by subsequent purchaser.* Where a subsequent purchaser during the 20-year period, measured by the term of the initial promissory note, purchases the property for less than the then current fair market value, the purchaser shall also execute at closing such a promissory note and mortgage, for the amount of the discount. The term of the

promissory note shall be the period remaining of the original 20-year period. The note shall require payment upon sale by the subsequent homeowner, to the extent proceeds of the sale remain after paying off other outstanding debt incurred in connection with the purchase of the property, and paying any other amounts due in connection with the sale (such as closing costs and transfer taxes). The amount payable on the note shall be reduced by a percentage of the original principal amount of the note for each full month of ownership by the subsequent homeowner. The percentage shall be computed by determining the percentage of the term of the promissory note that the homeowner has owned the property. The remainder may be retained by the subsequent homeowner selling the property.

(k) *Homeowners' equity.* The amount of equity an initial homeowner has in the property is determined by computing the sum of the following:

(1) The contribution to equity paid by the family, if any, including any down payment and any amount paid towards principal on a mortgage loan during the period of ownership;

(2) The value of any improvements installed at the expense of the family during the family's tenure as owner, as determined by the resident council based on evidence of amounts spent on the improvements, including the cost of material and labor; and

(3) The appreciated value, determined by applying the Consumer Price Index (urban consumers) against the contribution to equity under paragraphs (k) (1) and (2) of this section, excluding the value of any sweat equity or volunteer labor used to make improvements to the unit. The resident council may, at the time of initial sale, enter into an agreement with the family to set a maximum amount which this appreciation may not exceed.

(l) *Use of recaptured funds.* Any net sales proceeds that may not be retained by the homeowner under the homeownership program approved under this section shall be paid to the HOME Investment Trust Fund for the unit of general local government in which the project is located. If the project is located in a unit of general local government that is not a participating jurisdiction, as such term is defined in § 248.101, any such net sales proceeds shall be paid to the HOME Investment Trust Fund for the State in which the project is located. With respect to any proceeds transferred to a HOME Investment Trust Fund under paragraph (1) of this section, the Commissioner shall take such actions as

are necessary to ensure that the proceeds shall be immediately available for eligible activities to expand the supply of affordable housing under section 212 of the Cranston-Gonzalez National Affordable Housing Act of 1990 (42 U.S.C. 12742). The Commissioner shall monitor the HOME Investment Trust Fund for each State and unit of local government and shall require maintenance of any records necessary to calculate accurately payments due under this paragraph (1) of this section.

(m) *Protection of nonpurchasing families.* Nonpurchasing families who continue to reside in a project subject to a homeownership program approved under this section shall be protected as follows:

(1) *Eviction.* No tenant residing in an eligible property on the date the Commissioner approves a plan of action may be evicted by reason of a homeownership program approved under this section. This does not preclude evictions for material violation of the terms of occupancy of the unit.

(2) *Section 8 assistance.* If a tenant decides not to purchase a unit, or is not qualified to do so, the Commissioner shall ensure that assistance under parts 882 or 887 of this title is available for use in that or another property by each tenant that meets the eligibility requirements thereunder.

(3) *Rent increases for ineligible tenants.* Rents for tenants who do not purchase a unit but are ineligible for assistance under paragraph (m)(2) of this section may be increased to a level that does not exceed 30 percent of the tenant's adjusted income or the section 8 existing fair market rent, whichever is lower. Rent increases shall be phased in in accordance with § 248.145(a)(6).

(4) *Relocation assistance.* The resident council shall also inform each tenant that if the tenant chooses to move, the resident council, as owner of the project, will pay relocation expenses in accordance with the approved homeownership program. The provisions of § 248.165 shall not apply to resident councils who are project owners pursuant to an approved homeownership program under this section.

(n) *Qualified management.* As a condition of approval of a homeownership program under subpart B of this section, the resident council shall have demonstrated its abilities to manage eligible properties by having done so effectively and efficiently for a period of not less than three years or by entering into a contract with a qualified management entity that meets such standards as the Commissioner may

prescribe to ensure that the project will be maintained in a decent, safe and sanitary condition.

(o) *Timely homeownership.* The resident council shall acquire ownership of the project no later than 90 days after final approval of a plan of action pursuant to this section. The resident council shall transfer ownership of units in the project (other than units occupied by nonpurchasing tenants) to the tenants within a reasonable time thereafter, but in no event more than 4 years from the date of transfer of the project to the resident council. The Commissioner may seek contractual remedies against any resident council which fails to transfer ownership of all units within the 4-year period. During the interim period when the project continues to be operated and managed as rental housing, the resident council shall utilize written tenant selection policies and criteria that are approved by the Commissioner as consistent with the purpose of providing housing for very low income families. The resident council shall promptly notify in writing any rejected applicant of the grounds for any rejection.

(p) *Housing standards; inspections.* (1) Until the resident council has transferred all units in the project (other than those occupied by nonpurchasing tenants) to the initial purchasers, the project shall be maintained in accordance with the housing standards set forth in § 248.147.

(2) The Commissioner shall inspect the project at least annually in order to determine compliance with paragraph (p)(1) of this section.

(q) *Audits.* Each resident council shall be subject to the audit requirements in part 45 of this title and shall submit an annual audit to the Commissioner in such form as the Commissioner may prescribe. The resident council shall keep such records as may be reasonably necessary to fully disclose the amount and the disposition by such resident council of the proceeds of assistance received under subpart B of this part, including any proceeds from sales under paragraphs (h) and (i) of this section, the total cost of the homeownership program in connection with which such assistance is given or used, and the amount and nature of that portion of the program supplied by other sources, and such other sources as will facilitate an effective audit.

The Commissioner or his or her duly authorized representative shall have access for the purpose of audit and examination to any books, documents, papers, and records of the resident council that are pertinent to assistance received under subpart B of this part.

The Comptroller General of the United States, or any of the duly authorized representatives of the Comptroller General, shall also have access, for the purpose of audit and examination, to any books, documents, papers, and records of the resident council that are pertinent to assistance received under subpart B of this part.

(r) *Reports.* The resident council shall submit reports, as required by the Commissioner, in order to demonstrate continued compliance with the requirements of this section.

(s) *Assumption of the Federally-assisted mortgage.* The resident council may not assume a mortgage insured, held or assisted by the Commissioner under part 236 of this chapter or under part 221 of this chapter and bearing a below market interest rate as provided under § 221.518(b) of this chapter.

§ 248.175 Resident homeownership program—limited equity cooperative.

(a) Tenants may carry out a resident homeownership program through the purchase of eligible low income housing by a limited equity cooperative and the operation of the project as a limited equity cooperative.

(b) The purchase of a project by a limited equity cooperative and the operation of the project by the limited equity cooperative shall be carried out in accordance with the provisions of § 248.173 (a), (b), (c), (d), (except that paragraph (d)(i) of paragraph (d) shall include a statement of the amount of grant funds and the amount and type of incentives requested, rather than only the amount of grant funds requested), (e), (g)(3), (h), (i) (except paragraphs (i) (1) and (3)), (m), (n) and (o).

(c) The purchase and operation of eligible low income housing by a limited equity cooperative under this section shall be carried out in accordance with all provisions of subpart B of this part otherwise, applicable to the transfer and operation of a project with continued low income affordability restrictions, except as provided in this section.

§ 248.177 Delegated responsibility to State agencies.

(a) *In general.* The Commissioner shall delegate some or all responsibility for implementing subpart B of this part to a State housing agency if such agency submits a preservation plan acceptable to the Commissioner.

(b) *Approval.* State preservation plans shall be submitted in such a form and in accordance with such procedures as the Commissioner shall establish. The Commissioner may approve plans that contain:

(1) An inventory of low income housing located within the State that is or will be eligible low income housing under subpart B of this part within five years;

(2) A description of the agency's experience in the area of multifamily financing and restructuring;

(3) A description of the administrative resources that the agency will commit to the processing of plans of action in accordance with subpart B of this part;

(4) A description of the administrative resources that the agency will commit to the monitoring of approved plans of action in accordance with subpart B of this part;

(5) An independent analysis of the performance of the multifamily housing inventory financed or otherwise monitored by the agency;

(6) A certification by the public official responsible for submitting the comprehensive housing affordability strategy under section 105 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12705) that the proposed activities are consistent with the approved housing strategy of the State within which the eligible low income housing is located; and

(7) Such other certifications or information that the Commissioner determines to be necessary to implement an approved State preservation plan, which may include incentives that are authorized under other provisions of subpart B of this part.

(c) *Implementation agreements.* The Commissioner may enter into any agreements necessary to implement an approved State preservation plan, which may include incentives that are authorized under other provisions of subpart B of this part.

(d) *Fees.* Any State agency with responsibility so delegated under subpart B of this part may not charge any owner of eligible low income housing any fee for accepting notices of intent, processing plans of action or any other process pursuant to approval of a plan of action under subpart B of this part. This prohibition shall not preclude:

(1) An owner paying for its appraisal or share of a joint appraisal under the provisions of § 248.111; or

(2) A State agency from collecting fees normally associated with providing and processing financing insured under part 241 of this chapter.

§ 248.179 Consultation with other interested parties.

The Commissioner shall confer with any appropriate State or local government agency to confirm any State

or local assistance that is available to achieve the purposes of subpart B of this part and shall give consideration to the views of any such agency when making determinations under subpart B of this part. The Commissioner shall also confer with appropriate interested parties that the Commissioner believes could assist in the development of a plan of action that best achieves the purposes of subpart B of this part.

§ 248.181 Notice to tenants.

Except as provided in §§ 248.105 and 248.133, with respect to the first and second notices of intent, with regard to all provisions of subpart B of this part which mandate that information or material be given to the tenants, by the Commissioner, the owner, or a qualified purchaser, or other party, this requirement shall be satisfied where the notifying entity:

(a) Posts a copy of the information or material in readily accessible locations within each affected building, or posts notices in each location describing the information or material and specifying a location, as convenient to the tenants as is reasonably practical, where a copy may be examined and copied during reasonable hours; and

(b) Supplies a copy of the information or material to a tenant representative, if any.

§ 248.183 Preemption of State and local laws.

(a) *In general.* No State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that:

(1) Restricts or inhibits the prepayment of any mortgage described in § 248.101 or the voluntary termination of any insurance contract pursuant to § 207.253 of this chapter on eligible low income housing projects;

(2) Restricts or inhibits an owner of such projects from receiving the authorized annual return provided under § 248.121;

(3) Is inconsistent with any provision of subpart B of this part, including any law, regulation, or other restriction that limits or impairs the ability of any owner of eligible low income housing to receive incentives authorized under subpart B of this part, including authorization to increase rental rates, transfer the project, obtain secondary financing, or use the proceeds of any such incentives; or

(4) In its applicability to low income housing is limited only to eligible low income housing for which the owner has prepaid the mortgage or terminated the insurance contract.

(b) *Effect.* Any law, regulation or restriction described in paragraph (a) of this section shall be ineffective and any eligible low income housing exempt from the law, regulation, or restriction, only to the extent that it violates the provisions of this section.

(c) *Law of general applicability; contractual restrictions.* This section shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of subpart B of this part and relating to building standards, zoning limitations, health, safety, or habitability standards for housing, rent control, or conversion of rental housing to condominium or cooperative ownership, to the extent such law or regulation is of general applicability to both projects receiving Federal assistance and nonassisted projects. This section shall not preempt, annul, or alter any contractual restrictions or obligations existing before November 28, 1990 or voluntarily entered into by an owner of eligible low income housing on or after that date, and that limit or prevent that owner from prepaying the mortgage on the project or terminating the mortgage insurance contract.

15a. The subpart heading for newly designated subpart C is revised to read as follows:

Subpart C—Prepayment and Plans of Action Under the Emergency Low Income Preservation Act of 1987

16. In § 248.213, paragraph (b)(9) is redesignated as paragraph (b)(10) and a new paragraph (b)(9) is added to read as follows:

§ 248.213 Plan of action.

(b) ***
(9) A list of any waivers requested by the owner pursuant to § 248.7 of this part; and

17. Section 248.221 is amended by adding new paragraphs (c) and (d) to read as follows:

§ 248.221 Approval of a plan of action that involves termination of low income affordability restrictions.

(c) There are no open audit findings, open findings of noncompliance with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); the Fair Housing Act (42 U.S.C. 3601–3619); Executive Order 11063 (3 CFR 1959–1963 comp., p. 652); the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107); section 504 of the Rehabilitation Act of 1973 (29 U.S.C.

794); and all regulations promulgated under such statutes and authorities (including, but not limited to, 24 CFR part 100), or outstanding violations of the regulatory agreement.

(d) Any plan of action approved under this section shall specify actions that the Commissioner and the owner shall take to ensure that tenants displaced as a result of the termination of low income affordability restrictions are relocated to affordable housing.

18. Section 248.233 is amended by adding a new paragraph (f) to read as follows:

§ 248.233 Approval of a plan of action that includes incentives.

(f) The Commissioner shall not approve a plan of action under this section if there are open findings of noncompliance with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); the Fair Housing Act (42 U.S.C. 3601–3619); Executive Order 11063 (3 CFR 1959–1963 comp., p. 652); the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and all regulations promulgated under such statutes and authorities, or if there are open audit findings with respect to violations of the regulatory agreement.

19. In § 248.234, paragraph (c) is redesignated as paragraph (d), and a new paragraph (c) is added to read as follows:

§ 248.234 Section 8 rental assistance.

(c) The approved plan of action shall specify actions that the Commissioner and the owner shall take to ensure that any tenants displaced as a result of actions taken under paragraph (b) of this section are relocated to affordable housing.

§ 248.235 [Removed]

20. Section 248.235 is removed.

20a. A new subpart D (consisting of §§ 248.300 through 248.319) is added to read as follows:

Subpart D—State Preservation Project Assistance

- 248.300 General.
- 248.301 Initial application.
- 248.303 Approval of a State agency's initial application.
- 248.305 Applicability of subpart B of this part.
- 248.307 Authority to process and approve notices of intent and plans of action.
- 248.311 Notice of intent.
- 248.315 Preservation agreements.
- 248.319 Application for assistance.

Subpart D—State Preservation Project Assistance**§ 248.300 General.**

Upon application by a State agency or a local public housing agency, the Commissioner may make available assistance for use in preventing the loss of housing affordable for low and moderate income families that is assisted under a State program under the terms of which the owner may prepay a State assisted or subsidized mortgage on such housing.

§ 248.301 Initial application.

A State agency shall make an initial application to the Commissioner which:

(a) Describes the manner by which the State housing program provides mortgage assistance or subsidy to private mortgagors to provide housing opportunities for low and moderate income families;

(b) Includes copies of the authorizing legislation, any implementing regulations and any administrative guidance provided to owners;

(c) Includes a comprehensive description of the terms and conditions under which a private owner may prepay the assisted or subsidized mortgage without the prior consent of the State agency;

(d) Includes a complete set of pro forma mortgage and/or regulatory documents which evidence an owner's ability to prepay the assisted or subsidized mortgage without the consent of the State agency;

(e) Includes a list of all properties assisted under the State or local housing program whose owners are eligible to prepay the assisted or subsidized mortgages without the consent of the State agency.

§ 248.303 Approval of a State agency's initial application.

(a) The Commissioner will evaluate the State agency's application and will notify the State agency within 90 days of receipt that the program and properties qualify under subpart D of this part or that the program and properties do not qualify under subpart D of this part.

(b) If the Commissioner determines that the program and projects do not qualify under subpart D of this part, it will state the reasons why the program and properties do not qualify and will give the State agency an opportunity to provide additional information, as the Commissioner determines, which would assist the Commissioner in qualifying the program and properties.

§ 248.305 Applicability of subpart B of this part.

The provisions of subpart B of this part shall be applicable to any application of a State agency or local housing authority for assistance under subpart D of this part, except the following provisions:

Sec.

- 248.103 General prepayment limitation.
- 248.105 Notice of intent.
- 248.131 Information from the Commissioner: Only paragraph (a).
- 248.141 Criteria for approval of a plan of action involving prepayment and voluntary termination.
- 248.153 Incentives to extend low income use: Only paragraphs (a)(7), (d) and (e).
- 248.165 Assistance for displaced tenants.
- 248.169 Permissible prepayment or voluntary termination and modification of commitments.
- 248.173 Resident homeownership program: Only paragraph (s).
- 248.177 Delegated responsibility to State agencies.

§ 248.307 Authority to process and approve notices of intent and plans of action.

(a) *Delegation of authority.* State agencies which regulate or otherwise supervise owners of projects with State assisted or subsidized mortgages shall have the authority, reserved to the Commissioner under subpart B of this part, to process and approve all notices of intent and plans of action submitted to the State agency or local housing authority under subpart D of this part. State agencies may redelegate such authority to local housing authorities at their discretion.

(b) *Designation of processing agency.* The Executive Director of the State agency whose State assisted or subsidized mortgage program has been approved under § 248.303 shall inform all owners of projects with State assisted or subsidized mortgages that the State agency or a designated local housing authority shall accept and process notices of intent and plans of action.

§ 248.311 Notice of intent.

(a) *Eligibility for filing.* An owner of a project with a State assisted or subsidized mortgage intending to extend the low income affordability restrictions of the housing in accordance with § 248.153 or transfer the housing to a qualified purchaser under § 248.157 may file a notice of intent.

(b) *Filing with the State agency.* The notice of intent shall be filed with the agency specified in § 248.307(b) or the agency which regulates or otherwise supervises the State assisted or subsidized mortgage. The notice of intent shall also request the tenants to

notify the owner and the State agency of any individual or organization that has been designated or retained by the tenants to represent the tenants with respect to the actions to be taken under subpart B and subpart D of this part.

(c) *Filing with HUD, mortgagee and tenants.* The owner simultaneously shall file the notice of intent with the local HUD field office having jurisdiction over the area in which the project is located and with the mortgagee, if any. In addition, the owner shall deliver a copy of the notice of intent to each tenant in the project and to any tenant representative, if any, known to the owner, and shall post a copy of the notice of intent in readily accessible locations within each affected building of the project. The copies of the notice of intent delivered to the tenants and the tenant representative shall include a summary of possible outcomes of the filing which shall be furnished by the State agency. Upon the request of any non-English speaking tenants residing in the affected project, the owner shall tabulate the number and type of translations needed by the tenants and request the State agency to provide the appropriate translations. The owner shall deliver a copy of the translated notice of intent to all of the tenants who requested such a translation. The failure of an owner to comply with any non-federal notice requirements shall not invalidate the notice of intent.

§ 248.315 Preservation agreements.

(a) *Agreements required.* Owners of projects with State assisted or subsidized mortgages whose plans of action have been approved under § 248.307 shall enter into agreements, contracts and/or mortgage modifications with the State agency or local housing authority to maintain the housing as affordable to tenants in accordance with § 248.145. Such agreements may provide for the renewal of any assistance made available under § 248.319(c).

(b) *Term of agreement.* Preservation agreements shall be coterminous with the expiration of any assistance provided under § 248.153 and made available in accordance with § 248.319(c).

§ 248.319 Application for assistance.

(a) *Application for assistance.* State agencies or local housing authorities shall submit an application for assistance in a form prescribed by the Commissioner with the local HUD field office having jurisdiction over the project. The application shall include:

(1) A copy of the approved plan of action, including all applicable notices of intent;

(2) A copy of any worksheet or other document which demonstrates the extension and transfer preservation values of the project, the Federal cost limits (including the determination of relevant local market rents if applicable), and the preservation rents;

(3) A request for each incentive required as part of the approved plan of action and the amount thereof;

(4) A demonstration and certification by the Executive Director of the State agency or local housing authority that the assistance and incentives requested as part of the approved plan of action do not exceed the level of incentives required for a similarly situated project which is eligible low income housing as defined in subpart B of this part;

(5) Copies of proposed agreements, contracts and mortgage modifications proposed pursuant to § 248.315.

(b) *Notification of approval.* Not later than 90 days after receipt of the application for assistance, the local HUD field office shall notify the Executive Director of the State agency or local housing authority of the approval or disapproval of the application. If the application is disapproved, the notification shall state the reasons therefor and afford the State agency or local housing authority the opportunity to revise the application to make it approvable.

(c) *Funding.* After approving the State agency's or local housing authority's application for assistance, the HUD field office shall make the assistance in the approved application available to the State agency or local housing authority

within the time frames specified in § 248.169.

(d) *Agreements.* The State agency or local housing authority shall provide the local HUD field office with a copy of all agreements entered into with the owner pursuant to § 248.315.

(e) *Section 8 contract administration.* Any contract for Section 8 assistance made pursuant to the approved plan of action, the State agency's or local housing authority's application for assistance and the regulations at 24 CFR 886, subpart A shall be administered by the State agency or local housing authority pursuant to § 886.120 of this title.

Dated: March 6, 1992.

Jack Kemp,
Secretary.

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