



# Council for Affordable and Rural Housing

*Serving the Affordable Housing Needs of Rural America*

January 23, 2020

VIA E-MAIL: [www.regulations.gov](http://www.regulations.gov)

Office of General Counsel  
Regulations Division, Room 10276  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> St SW, Room 4100  
Washington, DC 20410-0500

Re: White House Council on Eliminating Regulatory Barriers to Affordable Housing  
Request for Information  
Docket No. FR-6187-N-01

To Whom It May Concern:

The Council for Affordable and Rural Housing (“CARH”) provides these comments as requested in FR-6187-N-01, regarding the elimination of Federal, State, local and Tribal laws, regulations and administrative practices that artificially raise the costs of affordable housing development and contribute to shortages in housing supply, consistent with Executive Order 13878, “Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing.”

CARH represents for-profit and non-profit companies providing affordable rural rental housing throughout America. For 40 years, CARH has served as the nation’s premier association for participants in the affordable rural housing profession, including builders, owners, developers, managers, non-profits, housing authorities, syndicators, accountants, architects, attorneys, bankers, and companies that supply goods and services to the industry. CARH is the only association that solely represents the needs of the entire rural rental affordable housing industry.

A number of federal programs have a significant impact on the rural housing market. We applaud HUD for prioritizing the reduction of unnecessary barriers to affordable housing and for seeking public comment to influence its policymaking. Rural America has fewer credit options than urban America, making construction and rehabilitation in rural areas particularly challenging. Our comments focus on the following issues which could have a significant impact on decreasing the costs and burdens of affordable housing production in rural areas:

- Ginnie Mae’s backing of the US Department of Agriculture, Rural Development (“USDA/RD”) Section 538 Guaranteed Loan Program
- Section 8 – Project Based Rental Assistance (“PBRA”), Housing Choice Vouchers (“HCV”) and Project Based Vouchers (“PBV”)
- HOME

- Harmonizing USDA/RD and HUD programs
- Encourage predictable USDA/RD Processing, and flexible rent setting, and a new revolving loan program
- State and local taxing of Housing Credits

### **1. Ginnie Mae Support of the USDA/RD 538 Guaranteed Loan Program**

Currently, there is an operational crisis that has occurred between Ginnie Mae and USDA/RD about the Section 538 Guaranteed Loan program. USDA/RD has very specific cash management and subordination requirements. Recently, as the result of an internal USDA/RD review, RD concluded that it must change its practice of subordinating existing Section 515 multifamily debt and Section 514 farm labor debt to third party debt. RD will only permit subordination of its Section 515/514 lien position as to land and building. USDA/RD is requiring parties use RD Subordination form 460-2. We understand that the 460-2 form has not been approved by Ginnie Mae.

This has become a major issue, jeopardizing the Section 538 program and the more than 12,000 units in process of being preserved for low and moderate income families in rural areas across the country. Total amount of the transactions at issue exceeds \$300 million.

2. The Section 538 program has been performing well for many years. It is a small program that has an oversized impact on rural multifamily housing financing. Section 538 leverages other resources, is more cost effective than HUD programs and is geared to smaller properties and smaller loan sizes. The last two administrations had sought to expand the program, which has struggled to attract support in the secondary mortgage market. However, Ginnie Mae's participation has helped make the Section 538 program much more efficient and a key to current success. We urge HUD to work with RD to align program requirements, adjusting RD and Ginnie processes as may be most efficient, to ensure that the Section 538 program continues as a functioning loan program.

### **3. Maximize the Efficiency and Effectiveness of Section 8 Project-Based Assistance**

Project-based rental assistance is a vital resource in ensuring housing opportunities in rural areas and economically depressed areas. Many new construction and substantial rehabilitation projects depend on the addition of rental assistance, most often provided through a Section 8 program, in order to ensure access to financing credit. Indeed, a substantial portion of the USDA/RD Section 515 direct loan apartment complexes were developed with and remain dependant on Section 8 project based rental assistance. Unfortunately, administrative difficulties in securing or transferring Section 8 assistance often cause project delays and unnecessary additional costs. Maximizing the efficiency of Section 8 assistance and reducing the programs' administrative and regulatory burdens in the following ways can help avoid unnecessary costs and delays:

- Streamline processes and improve initial funding procedures. For Project-Based Voucher (PBVs), Project-Based Rental Assistance (PBRA) and other forms of

project-based Section 8 rental assistance, funding procedures – especially at initial lease-up – can be slow and administratively challenging. Not only do these issues cause direct delays in the flow of funds, they also dis-incentivize project owners from utilizing these resources. Streamlining the processing steps required to start payments, simplifying reporting and asset management procedures, and taking other steps to ensure transparent, simple and reliable funding mechanisms can instill confidence in the Section 8 programs and maximize their effectiveness.

- Simplify PBRA assignments and compliance. While in the long term we would advocate for and urge HUD to support new appropriations for PBRA assistance, current projects must rely on assignments and transfers of PBRA assistance. Streamlining procedures for assigning or transferring PBRA assistance could reduce unnecessary costs, delays and other administrative burdens. Assignments of HAP Contracts are increasingly becoming bogged down with requirements more appropriately related to a Transfer of Physical Assets (TPA), in which HUD bears more potential risk and in which there is a greater need to underwrite transactions. In addition, requirements for such requests often vary from field office to field office. HUD should create a standardized list of requirements, focused on items that reflect legitimate and necessary HUD interests that potential project owners can rely on.
- Encourage and facilitate 8bb PBRA transfers. Thanks to Section 8bb of the U.S. Housing Act of 1937 (“8bb”), it is possible to transfer PBRA assistance from a site where the current owner no longer wishes to participate in PBRA to a new project and location. Unfortunately, the 8bb process is incredibly complex and administratively burdensome. Since the PBRA resource would be lost without this transfer, HUD should minimize the steps and information required for its transfer. In addition, HUD should update its Section 8 database with relevant information on expiring contracts, including project owner information. We note that USDA/RD maintains a database to provide such information. Alternatively, to discourage unintentional windfalls, HUD could take possession of expiring budget authority, require parties interested in receiving assistance to apply to HUD directly, and allocate budget authority according to the Department’s priorities.
- Provide greater flexibility for PBV contracts. In the absence of explicit regulatory restrictions to limit PBV contract flexibility, PBV contracts should be governed by standard and universal principles of contract law. Such principles include the ability to terminate or amend a contract upon mutual agreement of the parties, assign the contract or transfer the contract. Recent HUD guidance has purported limitations on these rights. The PBV program, allowing local housing authorities (PHAs) to contract with local project owners, was never designed to have the same federal oversight requirements as PBRA which is administered by HUD through Performance-Based Contract Administrators (PBCAs). Rather than build a wholly new asset management bureaucracy, HUD should recognize the asset management responsibilities of the local PHAs and allow them to exercise the flexibility PBV was designed for.

Changes such as these will ease the administrative burdens on Section 8 programs, and increase their ability to facilitate affordable housing production.

#### **4. Support the HOME Program and Increase Flexibilities**

HUD's HOME Program is an important resource for investment and development in rural areas. The program's funding and flexibility allow states and localities to address their particular needs and priorities and provide resources to fill needs unmet by other financing sources. Longer term, we urge HUD to champion greater funding and increased support for the HOME program. In the more immediate term, we encourage HUD to work together with Participating Jurisdictions ("PJs") in the HOME program to prioritize and facilitate the use of HOME funds in rural areas. To the extent administrative guidance and/or regulations can be made more flexible to allow for increased creativity, reduced administrative burden or otherwise greater ease in utilizing HOME funds in rural areas, we urge HUD to seek such goals and take such steps wherever possible.

#### **5. Harmonize USDA/RD and HUD programs**

USDA/RD's housing programs, such as the Section 538 loan guaranty program, the Section 515 direct loan program and the Section 521 Rental Assistance (RA) program have proven to be a powerful and efficient tools in affordable housing production in rural areas and should be expanded. We encourage HUD, as the leader of the White House Council on Eliminating Regulatory Barriers in Affordable Housing, to support an increase of the Section 538 program authority and expansion of the Section 515 and Section 521 RA programs. In addition, HUD can help USDA/RD streamline and align its programs with FHA requirements and processing. Section 538 program requirements should more closely align with FHA program requirements. This would not only greatly reduce the administrative burdens and unnecessary costs, include extensive time delays, associated with the Section 538 program, but also make the program more attractive to lenders and borrowers already familiar with FHA-insured financing. For Section 515 and Section 521 RA programs, HUD and USDA/RD should work together to eliminate unnecessary requirements that prevent these programs from being used in conjunction with FHA-insured financing. Given the limited credit available to rural areas, these long-talked about changes are urgently necessary to protect America's rural areas and reduce barriers to affordable housing production.

#### **6. Encourage Predictable USDA/RD Processing, Flexible Rent Setting, and a New Revolving Loan Program**

Preservation of the USDA/RD multifamily portfolio is vital to rural America. One of the major impediments to preserving existing housing stock—and to creating new housing stock—is lack of sufficient financial resources. The housing industry has been able to expand and leverage available resources, but there are a few basic issues where RD's practices are simply different, not better, than state of the art housing financing. This difference drives away conventional and even other government resources. A key example is the Ginnie Mae differences with USDA/RD over the Section 538 program, noted above.

Another, is that each USDA/RD preservation transaction has to be created from the ground up, as a one-off transaction. USDA/RD has made significant process improvements with use of the Preliminary Assessment Tool, an important underwriting spreadsheet available to the public. But actually using that Tool still is closer to starting from scratch each transaction rather than using an existing process. Two other examples of this is that Section 515 transactions are either non-profit or limited dividend. Traditionally, RD has set that limited dividend at 8% of equity. Because that can yield large numbers in certain transactions, RD has sought different paths to capping but in many cases has sought to keep limited dividends, or Returns To Owners, at a few thousand dollars a year, not enough to cover partnership level costs let alone realize any dividend. And there has been no set methodology. There should be a reasonable dividend, providing an actual sum and should have a predictable formula that the public knows about in advance of processing.

Rents in USDA/RD rural multifamily properties should also be set optimally so that the project can sustain the property, while also accommodating the housing needs of low-income communities. However, many developers and owners, especially those in high-needs rural areas, frequently report that the RD rents are still unaffordable to extremely low income residents without rental subsidy. These unsubsidized units can go un-rented for long periods because they are not deeply subsidized enough for the rural poor. Of course, vacant units do not produce revenue, and instead they just cost money. The result is that, in effect, the subsidized units have to pay for the vacant unsubsidized units. USDA/RD should permit rents at different levels, below the maximum approved rent, to allow the owners to adjust to local market conditions, and have a further, important tool to achieve maximum occupancy. There is no legal basis or requirement for USDA/RD's long-time position, other than it is simpler to have one rent for each unit type. Simpler in this case is not better.

Further, Congress allowed income averaging on new Housing Credit properties from 2018 forward. However, in effect, such income averaging cannot be implemented in RD programs without rent flexibility. Housing Credit income averaging requires having low income residents and widely varying income levels and widely varying rent levels. For example, an unsubsidized tenant at 20% of area median income ("AMI") cannot pay the same rent amount as an unsubsidized tenant at 80% of AMI. RD is precluding this new tool in Housing Credits.

We also need to increase the available financing tools for housing preservation. Specifically, we believe that existing escrows required by RD can serve a dual purpose of capitalizing a new revolving loan fund; using deposits in the Rural Housing Insurance Fund, not needed in the current fiscal year, to loan to eligible properties at the applicable federal rate of interest; and, to pay for asset management costs and offset loan risk. The proposed loans also would be backed by a voluntary guaranty or pledge of Section 515 reserve funds from owners of participating properties.

Another long neglected tool is Section 515(t), which USDA has not implemented, but should because it could guarantee equity loans to provide a fair return and further recapitalization

resources for properties that are 20 years old or older, attracting new owners and new private capital

## **7. Discourage States from Taxing the Value of Housing Credits**

Housing Credits are a vital tool in the development of affordable housing, providing equity investment necessary to close financing gaps for projects that would be infeasible with them. A handful of states, such as Alabama, have moved to include the value of Housing Credits in their calculation of property taxes. This tax improperly strains federal resources to address state needs. Such taxes also place additional burdens on affordable properties and creates unnecessary barriers to development. We urge HUD, in its role as the leader of the White House Council on Eliminating Regulatory Barriers in Affordable Housing to examine the steps the federal government could take to dis-incentivize states from taxing the value of Housing Credits.

We appreciate the opportunity to submit these comments, and we hope the above-noted comments will be considered along with other comments from the public. Should you require any additional information, please contact me, Colleen Fisher, at (703) 837-9001 or (703) 837-9001.

Sincerely,

A handwritten signature in blue ink that reads "Colleen M. Fisher". The signature is written in a cursive style.

Colleen M. Fisher  
Executive Director