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Improving The Implementation Of The Weatherization Assistance Program

Weatherization Background:

The American Recovery and Reinvestment Act (ARRA) provided a massive extra $5 billion for the Weatherization Assistance Program (WAP) run by the U.S. Department of Energy (DOE). In addition, a new agreement between DOE and the U.S. Department of Housing and Urban Development (HUD) has laid the groundwork for greater access to WAP funds for affordable multifamily rental projects.[1] A final rule issued by the Department of Energy in January 2010 formalized how WAP applications would be evaluated from buildings that are part of the HUD-assisted and public housing programs, the Federal LIHTC program, and the USDA Rural Development program. Key items addressed in this rule include income certification, protecting tenants from rent increases, ensuring benefits from the WAP program accrue to residents, and owner financial participation.[2]

Under the Weatherization Assistance Program, federal appropriations are allocated annually by formula to states ("grantees") for distribution through local agencies and government entities ("subgrantees") to fund energy-efficiency improvements for low-income households. States craft annual plans to direct how the monies are to be spent, including eligibility standards for recipients and priorities in the use of funds. Historically, the local weatherizing agency subgrantees – over 900 nationwide – verify the eligibility of applicant residents, and fund and facilitate installation of the energy improvements.

Eligible weatherization measures can include improved insulation, air-sealing energy-efficient windows, and heating/cooling system upgrades. ARRA raised the general income limit to 200 percent of the poverty level, and the maximum average expenditure to $6,500 per unit.

Multifamily Weatherization: The Need Is Great

There is great need and demand to weatherize the multifamily affordable housing portfolio (Public Housing, HUD Assisted, USDA-Rural Development Assisted and Low-Income Housing Tax Credit). According to the American Housing Survey, more than half of the nation's WAP

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[1] Memorandum of Understanding Between Department of Energy And Department of Housing and Urban Development, Issued May 6, 2009
http://portal.hud.gov/portal/page/portal/HUD/press/documents/doemoucombined.pdf

[2] Final Rule published in the Federal Register, Vol. 75, No. 15, Monday, January 25, 2010, pg. 3847. The final rule is effective February 24, 2010. See Appendix 8 for additional details.

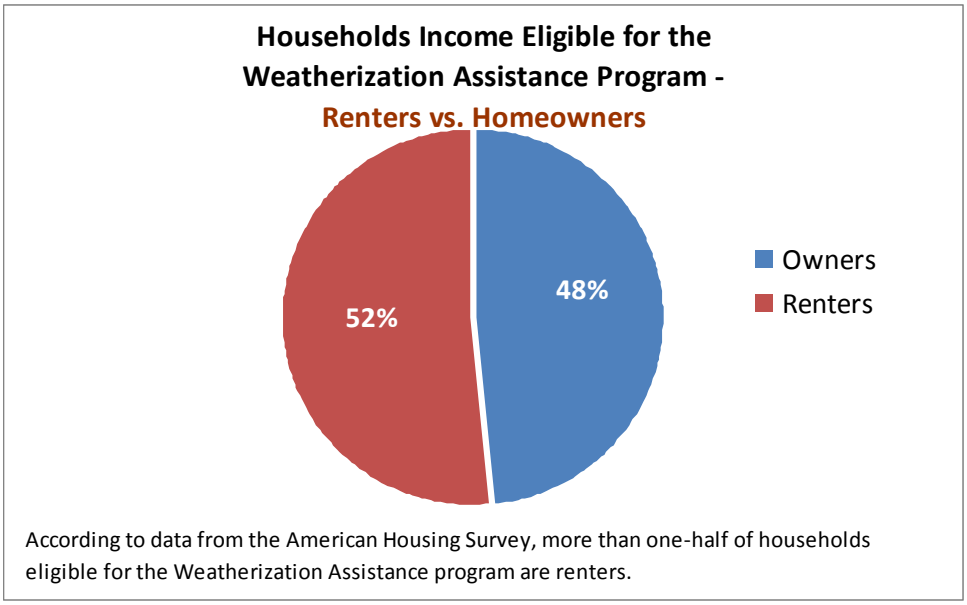
income eligible households are renters.[3] The funds allocated in ARRA could have an immediate impact in reducing the energy expenditures of underserved low-income individuals living in multifamily communities and contribute to preserving the affordability of these properties. This would result in a number of tenant and public benefits including reduced utility burdens for renter households as well as for federal rental assistance outlays, long-term preservation of affordable properties, carbon emissions reductions and immediate job creation. It would also meet several of the stated purposes of the ARRA including:

- Preserving and creating jobs and promoting economic recovery[4]
- Assisting those most impacted by the recession
- Invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits

It has proven a major challenge for the existing WAP infrastructure to quickly and effectively allocate the eleven fold increase in WAP funds provided by ARRA to their traditional client base (single family homes) in the short amount of time allotted. A recent DOE Inspector General's report cites that as of February 16, 2010 "Only $368.2 million (less than 8 percent) of the total award of $4.73 billion had been drawn by grantees for weatherization work. Corresponding to the low spending rates, grant recipients fell significantly short of goals to weatherize homes…only 2 of the 10 highest funded recipients completed more than 2 percent of planned units." [5]

Although the pace has increased since that date, we calculate that even if the current performance rate is maintained, many states are at risk of not using all their funds by the March 2012 deadline

[3] 52 percent of households with incomes of less than 200% of poverty are renters. U.S. Census Bureau, 2007 American Housing Survey, Table 2-12: Income Characteristics and Occupied Units, December 2008. http://www.census.gov/hhes/www/housing/ahs/ahs07/ahs07.html . Graph provided by the National Housing Trust.



[4] In addition to creating much needed construction jobs, weatherization projects create jobs in peripheral businesses including energy auditing, engineering, financial services, manufacturing of building materials etc…

[5] US Department of Energy Office of Inspector General Office of Audit Services, Special Report: Progress in Implementing the Department of Energy's Weatherization Assistance Program Under the American Recovery and Reinvestment Act, OAS-RA-10-04, February 19, 2010 http://www.ig.energy.gov/documents/OAS-RA-10-04.pdf

imposed by ARRA when unused funds will be returned to Treasury. To their credit, HUD and the DOE concluded that multifamily affordable housing brings an important degree of scalability to the Weatherization Assistance Program's ultimate goal of reducing the utility burden on low-income individuals. A significant number of states have responded positively to the DOE/HUD memorandum of understanding by adopting policies to prioritize WAP funds for multifamily weatherization. These states include: Alaska, Colorado, Delaware, Florida, Kansas, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont and Wisconsin.[6]

Unfortunately, even in the minority of states which have made multifamily housing a priority, time constraints, lack of a fully developed program, subgrantee capacity and regulatory barriers are preventing WAP funds from being effectively deployed in multifamily housing. The following memo outlines and identifies these barriers and proposes immediately implementable solutions.

Issue Area 1: Grants Vs. Loans

Grants Vs. Loan

While it may seem unusual for people not familiar with multifamily finance, many owners of multifamily affordable housing are unable to effectively use government subsidies that come in the form of a grant. Because of accounting requirements for regulated multifamily housing owners, performance of weatherization work on these properties results in increasing the accounting basis of the underlying asset. As a result, the value increase due to the improvements needs to be reflected by a corresponding grant income or loan entry. Grants can have unintended and significantly adverse tax implications for ownership entities and may also reduce their ability to leverage other forms of financing. As a result, most multifamily owners prefer government subsidies to come in the form of a loan.

Unfortunately, DOE has informed parties that have asked for approval to loan WAP funds into multifamily projects that the regulations and legislation do not permit this use. It should be noted that NH&RA does not see the legal basis for this conclusion. There is no express prohibition in the enabling legislation or regulations against allowing WAP funds to be used as loans. There is also sufficient precedent in other DOE and HUD programs that are also designed to decrease the housing cost burden on low-income individuals to permit for a loan mechanism.[7]

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[6] *Fact Sheet: Multifamily Weatherization State Best Practices*, National Housing Trust & Enterprise Community Partners, March 2010. See Appendix 4 for additional details.

[7] We have observed that both Congress and DOE's own regulations emphasize the need for this type of flexibility. The WAP regulations note that "to the maximum extent practicable, the use of weatherization assistance shall be coordinated with other Federal State, local, or privately funded programs in order to improve energy efficiency and to conserve energy…" 10 CFR 440.16(e) Structuring WAP funds as loans are essential for owners that want leverage other sources financing in conjunction with WAP funds, most notably the Low-Income Housing Tax Credit (LIHTC).
Additionally, DOE's own Financial Assistance Rules actually already contemplate the use of loans. DOE has implemented regulations that govern the disbursements of "repayments to and interest earned on a revolving fund", which would only be germane to the program if WAP funds were to be loaned, as opposed to granted, to eligible projects. These same rules further state: "Grantees are encouraged to earn income to defray program costs. Program income includes incomes from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interests on loans made with grant funds…" 10 CFR 600.225(a) A letter and legal memorandum issued by the New York State Division of Housing and Community Renewal to the Department of Energy's Office of Energy Efficiency &

DOE's apparent legal interpretation, which has not been released, is very problematic for affordable housing providers because grants must be treated as taxable income to the ownership that is providing the income-restricted housing. Since all of the funds are used for energy efficiency improvements, there are no funds available to pay the associated tax liability. This is a major economic disincentive to the ownership and will prevent a large number of owners from participating in the program. Several of our members have had to turn back substantial WAP funds because of the taxable income issue. As noted above, the inability to loan WAP money into projects also hampers its ability to be used with LIHTCs, which is the primary tool available to rehabilitate existing affordable housing. Without this flexibility we lose the ability to leverage WAP funds with other funding sources, dramatically reducing their effectiveness.

It should also be noted that expending funds as grants is also less advantageous to program administrators as such funds cannot be recovered and used in the future to benefit other low income households and to achieve greater energy reductions. It is our belief that permitting WAP subgrantees to convert WAP grants into loans would help ensure the long-term sustainability of the Weatherization Assistance Program. Many other energy retrofit programs use a portion of the energy savings to repay loans for energy improvements. As a result, loan repayments do not adversely impact affordability of units and could be recycled for future weatherization projects.

Solution

We urge DOE to reconsider its legal position, and make any internal analysis public to enable a problem-solving discussion of this issue. We also suggest that, since this position is unpublished policy, DOE can immediately change it or, if necessary, implement a normal or emergency rule making or notice process. A more time consuming and we believe unnecessary route would be to ask Congress to resolve this issue by amending the WAP statute to expressly permit WAP funds to be loaned into eligible multifamily projects. Unfortunately, time constraints make this resolution unlikely. In either event, this is revenue neutral and as mentioned above, there is previous precedent in other housing related programs.

The Department of Energy already has grant programs (the ARRA Energy Efficiency Community Block Grants and State Energy Program) in place that authorize grants to be converted into loans, either directly or through non-profit intermediaries. NH&RA recommends that DOE adopt the general procedures governing loans set forth in SEP Program Notice 10-08 (Guidance For State Energy Program Recipients on Financing Programs)[8] for the Weatherization Assistance Program. This notice outlines procedures whereby SEP funds can be used for revolving loan funds. Please see Appendix 1 for suggested language.

It should also be noted that HUD's HOME Funds and CDBG Funds are often granted to non-profits, which then loan the project funds into affordable housing projects owned by private entities in a similar process.

Renewable Energy dated September 10, 2009 and March 10, 2010 respectively illustrates these points in great detail. See Appendix 3 for the complete text.

[8] Department of Energy, SEP Program Notice 10-08, Guidance For State Energy Program Recipients on Financing Programs, Issued March 8, 2010.
http://www1.eere.energy.gov/wip/pdfs/sep_financing_program_guidance_10-08_revised_04202010.pdf

Issue Area 2: Subgrantee Capacity

Divergent Subgrantee Capacity:

Throughout the country, there is a wide range of organizations that serve as WAP subgrantees. Many subgrantees focus almost exclusively on 1-4 family buildings and lack sufficient technical capacity to perform multifamily audits, negotiations and retrofits. The more limited range of subgrantees that have the capacity to perform multifamily retrofits are constrained in their ability to do so by State-based jurisdictional limitations and a conventional focus on small buildings through WAP. Because subgrantees are usually geographically restricted in the areas they will provide services, owners of more than one multifamily property often find themselves having to deal with multiple subgrantees, each of whom has a different approach and process. The effect is to obstruct or slow down the WAP process.

Additionally, many traditional subgrantees are completely unfamiliar with the nature of privately held multifamily housing entities, such as Limited Partnerships. These complex legal structures often require specific consents from the partners or the mortgage holder in order to agree to certain contracts.

Solution 1: Override Subgrantee Jurisdiction Restrictions

Subgrantees that have the technical capacity to perform multifamily audits and retrofits could be allowed to deploy their services outside of conventional service territories. This specialized approach would support multifamily audits and streamline the project design and predevelopment. As long as multifamily subgrantees perform retrofits for buildings that are otherwise not being targeted by other local single-family oriented subgrantees, this strategy should be effective in increasing the number of multifamily weatherization retrofits.

Solution 2: Promote Joint-Venture Partnerships Between Subgrantees

In concert with overriding jurisdictional restrictions, DOE should explicitly encourage retrofit-partnerships between subgrantees with multifamily capacity, and the subgrantees that are currently unable to handle multifamily buildings in their service territories. Our experience has shown it to be feasible for subgrantees to each contribute WAP-funds to multifamily projects and divide the workload based on capacity. For example, a more sophisticated subgrantee could perform comprehensive energy audits and work-scope development, while the subgrantee that would conventionally provide retrofits for that territory could perform income documentation, field measurements, and construction oversight for the multifamily buildings being retrofitted. With appropriate administration, this strategy could even be performed across state lines.

Solution 3: Designate One State Multifamily Subgrantee

The most effective way to deal with this issue is to nominate one entity to be the multifamily grantee on a state wide basis. The state housing finance agency is often the most logical candidate as they already have much of the expertise needed but there are also a number of non-profits, energy service companies, CAP agencies and other government entities that would be qualified to take on this role. One multifamily subgrantee with sufficient capacity can most efficiently process multifamily properties throughout the state.

Solution 4: Subgrantee Technical Assistance

DOE may also consider providing funding earmarked for multifamily retrofit technical consultation to supplement the technical capacity of subgrantees without multifamily experience.

Subgrantees would be able to use this funding to contract with engineering firms and subgrantees with more multifamily experience to provide audits and consultation regarding all aspects of multifamily retrofits under WAP. Perhaps more expediently, DOE could contract directly with a network of technical assistance providers on a regional basis. It should be noted that we do not see technical assistance alone as a sufficient solution. Given the time constraints of the ARRA funds, the process for awarding technical assistance may ultimately be too time-consuming for the short-term.

Issue Area 3: Implementation Challenges

Contractor Hiring and Monitoring

Because of the program's historical single-family orientation, a WAP subgrantee's existing contractor network may not have the necessary skill set or experience to tackle a major multifamily retrofit especially when it is being done in the context of a larger rehabilitation scope.

It would be more efficient from a construction and cost standpoint if the work funded by WAP funds is incorporated in one scope of work with control vested in one contractor retained by the owner, especially if the contractor is already experienced with a particular building. When undertaking a retrofit or rehabilitation owners use a general contractor that oversees the work of any and all subcontractors. The performance of the general contractor is critical to the owner as if the work is not done properly or on a timely basis it can have dramatic negative impact on the property and the residents. The general contractor is ultimately responsible for quality of all work completed including issues arising out of work under warranty and related to lien waivers. Contractors will not take on these responsibilities if they are forced to use subcontractors they do not know or may not believe are qualified. In most cases owners have existing relationships with contractors or have qualified contractors on staff. These contractors know the building well and are better able to determine what does and does not work in installation.

Solution:

Almost 20 years of best practices for contracting for repairs to single and multifamily housing stipulate that the best construction outcomes are achieved if owners hire their own contractors to perform work. This practice is already incorporated in HUD technical assistance documents and training. In these cases, Federal and state program administrators stipulate contractor qualifications and experience in their program requirements. Administrators are also responsible for reviewing scopes of work, determining if costs provided by contractors are reasonable and overseeing construction. With these appropriate safeguards in place, sub grantees do not have to put themselves in the middle of what is a traditional, market-based transaction.

HUD's Green Retrofit Program (GRP), also an ARRA program, may provide a good example for DOE to emulate. GRP relies on owners to select and oversee contractors and it also takes into account the specific bidding and other requirements set forth for ARRA programs.[9] For the sake of expediency, NH&RA suggests that DOE to adopt the process already in place with the GRP as drafted in Appendix. HUD's HOME and CDBG programs are similarly structured.

[9] Department of Housing & Urban Development, Notice 09-02, Green Retrofit Program for Multifamily Housing (GRP), Issued May 13, 2009.

Low-Income Eligibility.

As currently defined, DOE certifies eligibility for WAP funds on a building-by-building basis. Many multifamily affordable projects are comprised of multiple buildings, often times with some form of income mixing. Depending on how the units are mixed, some qualified low-income units are disqualified from utilizing WAP funds. This issue has been addressed in other federal housing programs and in all cases, eligibility is based on a project, not on individual buildings making up a project.

Solution

Amend Code of Federal Regulations – Title 10 Part § 440.22(b)(2) as follows:
"Not less than 66 percent (50 percent for duplexes and four-unit buildings, and certain eligible types of large multi-family buildings) of the dwelling units in the [STRIKE ~~building~~ AND INSERT "project"]:"[10]

Time Constraints:

Due to the limited time frame in which stimulus funds can be spent, there is a need to pursue multifamily-targeted retrofits that can be completed before March 2012. Because multifamily projects take substantially more time to complete all WAP-related documentation and energy analysis (we generally assumes 6 to 12 months between building identification and retrofit implementation), DOE's strategy for targeting multifamily retrofits must be implemented as soon as possible. It should also be noted that many States have already awarded contracts for the majority of WAP-targeted stimulus funds available. This complicates DOE's position by necessitating multifamily retrofits to be targeted through existing contracts.

Solution:

We recommend DOE act quickly as possible to implement these recommended changes, using emergency rulemaking, executive order or other methods as necessary.

About NH&RA:

NH&RA is a national trade association comprised of professionals involved in the development and management of affordable housing. Our members have developed, own and/or manage the majority of HUD-Assisted and low-income housing tax credit units around the country.

Our Council for Energy Friendly Affordable Housing (CEFAH) is a working group that is focused on improving the energy and utility performance of the nation's multifamily affordable housing portfolio. If you have any questions about NH&RA or CEFAH please feel free to contact Thom Amdur at 202-939-1753 or tamdur@housingonline.com or visit our website www.housingonline.com.

NH&RA would like to acknowledge the contribution of the National Housing Trust, the Community Environmental Center (CEC), Local Initiatives Support Corporation (LISC), New York State Division of Housing & Community Renewal, WinnDevelopment and the Stewards for Affordable Housing for the Future in the development of these recommendations.

[10] 10 CFR 440.22(b)(2)
http://www.oahp.net/GRPCA/GREEN%20RETROFIT%20PROGRAM%20FOR%20MULTIFAMILY%20HOUSING%20-%20FINAL%20NOTICE%205-13-09.pdf

Appendix 1

The following suggested language is derived from Department of Energy SEP Program Notice 10-08, originally issued: March 8, 2010.

SUBJECT: GUIDANCE FOR WEATHERIZATION ASSISTANCE PROGRAM RECIPIENTS ON FINANCING PROGRAMS.

PURPOSE

To provide guidance to Department of Energy's (DOE's) Weatherization Assistance Program (WAP) Grantees on using WAP to fund retrofit loans

SCOPE

The provisions of this guidance apply to recipients of WAP funds, pursuant to Formula Grant or American Recovery and Reinvestment Act of 2009 (Recovery Act).

LEGAL AUTHORITY

WAP is authorized under 42 USC 6863 et seq. All grant awards made under this program shall comply with applicable law, including the Recovery Act, and other procedures applicable to this program.

GUIDANCE

Eligibility of Loans

A loan fund is an eligible use of funds under the WAP Program to the extent that the activities supported by the loans are eligible activities under the program.

Obligation & Drawing Down of Funds

Loan Capital: Program monies being used for a loan fund are considered obligated by the recipient once they have been used to capitalize a loan fund. A loan fund may be capitalized in any of the following circumstances:

1. Receipt of a loan application from potential borrowers
2. State or local requirements (regulatory, statutory, or constitutional) dictate
3. The distribution account is operated by a third party

Funds may be drawn down at the time the fund is capitalized. Funds are considered expended when the revolving loan fund has loaned to specific borrowers for an amount equal to or greater than the program monies that initially capitalized the fund.

Loan Defaults

Grantees are not required by DOE to replenish or replace any amounts which were lost to loan default. Loans involve risk by their very nature, so loss due to default of a borrower is an anticipated and allowable cost under a WAP grant.

Federal Character of Revolving Loan Funds

Generally, federal funds used to capitalize a revolving loan fund maintain their federal character in perpetuity. As a result, federal requirements that apply to the funds such as NEPA and the National Historic Preservation Act would be applicable at each revolution of the loan fund. Federal requirements that apply to Recovery Act funds, such as the Davis-Bacon Act

requirements, Buy-American requirements, and Recovery Act reporting requirements would be applicable at each revolution of a loan fund that was funded through the Recovery Act.
The applicability of these federal requirements need not cause difficulty in administering a revolving loan fund program. DOE has previously provided guidance on streamlining compliance with NEPA and the National Historic Preservation Act. The templates that DOE has provided to States to obtain categorical exclusions under NEPA for sub-grant programs could also be applied to revolving loan funds program. DOE has worked with the Advisory Council on Historic Preservation to provide States with programmatic agreements in order to streamline compliance with the National Historic Preservation Act requirements. Individual homeowners receiving loans under a revolving loan fund program would not be required to comply with the Davis-Bacon Act. Similarly, the Buy American requirements apply to “public buildings” and “public works” and thus would not be applicable to projects performed on individual homes.
The continuing federal character of the funds means that if the grantee decides to end a revolving loan fund program or loan loss reserve program, any remaining funds would need to be used by the grantee for an eligible purpose or otherwise returned to DOE.

Program Income

All program income (including interest earned) paid to grantees is subject to the terms and conditions of the original grant.

Appendix 2

The following language was adopted from HUD Notice H 09-02: SUBJECT: Green Retrofit Program for Multifamily Housing (GRP)

The Recovery Act requires transparent reporting of the use of all funds. The approved Green Retrofits will be available through a public website. The Owner must provide bids/cost estimates for proposed Green Retrofits, within a time period reasonably prescribed by the PAE[11] (generally within fifteen (15) days), from sources that are not the Owner, an Affiliate of the Owner, the management agent, or an Affiliate of the management agent. It is the Owner's responsibility to ensure that contractors are properly licensed and have the capacity to complete the work properly and timely. The PAE may recommend that an Owner, management agent, or one or more of their respective Affiliates may complete the Green Retrofits, but the bids/ cost estimates must be supported by arms-length bids/cost estimates. Owner must obtain bids/cost estimates whenever the Green Retrofit costs are of a certain size, are uncertain, or are subject to change. Specifically, at least one bid/cost estimate is required for any item costing from $10,000 to $50,000; and multiple bids/cost estimates are required for any item costing $50,000 or more. In addition, bids may also be required for any of the following reasons:

i. For any item that is subject to significant price fluctuations, and/or
ii. For any item that is unique or not immediately available from established vendors, and/or
iii. For any item that is only available from a limited number of suppliers, and/or
iv. For any item that should be supported by a bid, at the discretion of the Owner, and/or
v. For any significant item that should be supported by a bid, at the discretion of the PAE.

[11] Participating Administrative Entities—in the case of the WAP this would likely be the subgrantee

Appendix 3

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David A. Paterson
Governor

Deborah VanAmerongen
Commissioner

New York State Division of Housing and Community Renewal
25 Beaver Street
New York, NY 10004

September 10, 2009

Mr. Gilbert P. Sperling
Program Manager
Weatherization & Intergovernmental Program
Office of Energy Efficiency & Renewable Energy
U.S. Department of Energy, EE-2K
1000 Independence Avenue, SW
Washington, D.C. 20585-0121

Dear Mr. Sperling:

New York State has a large number of multifamily units across the State that have significant need for weatherization upgrades and retrofit of major systems. Over the last three years, New York State has embarked upon a concerted effort to preserve its existing portfolio of housing for persons of low and moderate income.

Much of the portfolio of affordable housing in New York State was constructed prior to 1980 and is in need of significant resources to decrease energy consumption and replace major systems while keeping rents affordable for persons of low income.

New York State has directed a significant amount of State and federal resources to this preservation effort. The federal Low Income Housing Credit ("LIHC" see, Internal Revenue Code Section 42) is the most effective program for this effort. The LIHC leverages significant amounts of private equity and investment in return for tax credits over a 10 year period.

Many other federal programs are used successfully with the LIHC program including Section 8, Community Development Block Grant, HOME and FHA insured loans, to name just a few.

New York State, in partnership with its subgrantee network and affordable housing development community, has developed a model for the use of Weatherization funds with LIHC. This approach will magnify the effectiveness of the Weatherization program by leveraging significant additional private investment to maximize the amount of funds available for increasing the energy efficiency of this important resource.

We submit this description with a demonstration of the funds leveraged in a sample development budget and a review of the relevant issues for your consideration. Please contact us directly if you need any additional information. We will keep you apprised of our progress in implementing this initiative.

Sincerely,

Deborah VanAmerongen
Commissioner

Enclosure

Maximizing the use of Weatherization Assistance Program (WAP) in Multi-Family, Mixed Finance Housing Projects

The American Recovery and Reinvestment Act (ARRA) appropriated significant funding for the Weatherization Assistance Program (WAP). In New York, ARRA funding will provide approximately $394 million for the Program, making the New York State the largest recipient of Weatherization Assistance Program (WAP) funding in the U.S. New York has developed and the Department of Energy (DOE) has approved an innovative WAP Plan for the efficient use of ARRA in a timely manner that fully maximizes the federal resource.

With the additional ARRA funding, more than 45,000 low-income households will receive weatherization assistance. Approximately 65 percent of the dwelling units weatherized will be renter-occupied. More than two-thirds of New York's income-eligible households live in rental units. It is projected that of these rental units, approximately 20 percent will be in single-family (one- to four-unit) buildings and 80 percent will be in multi-family buildings.

Unlike many states, New York has experience using WAP funding to weatherize multi-family buildings. During the past several years the State has made an effort to increase the proportion of rental units assisted through the Program. An additional strategy employed by the State has been to actively encourage the leveraging of non-DOE sources of funding in the weatherization projects. With more than 1.5 million New York households eligible under WAP guidelines, leveraging has been and will continue to be of paramount importance in the effort to stretch scarce and valuable federal WAP funds.

Through New York's experience in weatherizing multi-family buildings, an impediment has sometimes prevented the most efficient use of WAP funds in larger, mixed finance affordable housing projects. The issue is discussed below, and DHCR's approach is offered to address it.

The proposed modification will increase the amount of private investment leveraged with of WAP funds in New York, and could be implemented in any State that chooses to weatherize multi-family buildings as a part of their overall WAP strategy. By overcoming the primary barrier for the use of WAP in mixed finance affordable housing projects, the amount of private sources of funding to implement energy efficiency measures will be greatly increased.

Issue:

When Weatherization Assistance Program (WAP) grants are included in low income housing tax credit projects, it results in the reduction of the amount private equity that can be raised to pay the costs of rehabilitating the building. Structuring WAP award as a loan rather than a grant, would greatly increase the private equity leveraged under the low income tax credit program and increase funds available for energy efficiency improvements.

Background:

One of the current primary vehicles available in the creation/preservation of affordable housing in the U.S. is the Low Income Housing Tax Credit ("LIHTC") program. Since the Program's inception in 1986 through 2006, more than 1.7 million affordable rental units have been created

or retained[1]. LIHTC, which is based on Section 42 of the Internal Revenue Code, provides an incentive to the private market to invest in affordable rental housing. Federal housing tax credits are awarded to developers of qualified projects. Developers then sell these credits to investors to raise capital (or equity) for their projects, which reduces the debt that the developer would otherwise have to borrow. Because the debt is lower, a tax credit property can in turn offer lower, more affordable rents; thus providing affordable housing for renters.[2]

Provided the property maintains compliance with the program requirements, investors receive a dollar-for-dollar credit against their Federal tax liability each year over a period of 10 years. The amount of the annual credit is based on the amount invested in the affordable housing.

The tax credit amount is based on certain costs associated with a building and the portion of the building that low-income households occupy. The cost of acquiring and rehabilitating, or constructing a building constitutes the building's *eligible* basis. Therefore, LIHTC awards are based upon a statutory applicable percentage multiplied by the eligible basis of a project.

Eligible basis is generally equal to depreciable basis. When calculating the eligible basis for tax credit purposes, the eligible basis (but not the depreciable basis) is reduced by federal grants. Moreover, if a grant is received by the project and the project has control over the funds, it is taxable income, whether or not it came from a federal source. State and local grants which are included in the recipient's income can be included in eligible basis, but not if the funds originate from the federal government.

As a result, WAP grants cannot be counted toward eligible basis. However, if the funds are advanced to the project in the form of a mortgage secured "soft" loan with a fixed maturity date, the WAP funds will no longer be considered federal grants for tax purposes; the loan will not be included in the project owner's income and will be included in eligible (and depreciable) basis. The WAP funds will then qualify the project for additional LIHTCs, reducing the debt supported by the rents; reducing operating costs; and therefore providing reduced rents for the tenants. Attached please find an example of a project in New York that could leverage significant additional funds for energy efficiency measures through the approach described below. As you will see in the project example, the amount of leveraged funds that could be raised is dramatic.

DHCR Approach:

DHCR proposes that weatherization funds be loaned from the state agency or subgrantee to the tax credit owner. This will allow DOE funds to leverage additional private equity from the low income tax credits and result in additional investment in energy efficiency measures. In the proposed scenario, WAP funds would not be supplanting any existing funds but instead will provide additional resources for energy efficiency measures to preserve the affordability of these housing units. It is important to note that a similar structure is used in mixed finance structures that include federal funds from the U.S. Department of Housing and Urban Development (HUD). Affordable housing developers regularly structure federal subsidies from

[1] LIHTC Database, U.S. Department of Housing and Urban Development
[2] *Tax Credits for Low Income Housing*, Guggenheim, 13th edition

HUD's Community Development Block Grant Program and the HOME Investment Partnership Program as loans.

Conclusion:

DHCR has reviewed all relevant statutory and regulatory provisions which may apply to this initiative and no impediments have been identified. In fact, this initiative furthers the national and program goals of encouraging energy efficiency measures and facilitating the leveraging and investment of private funds. DHCR is appreciative of the U.S. Department of Energy's ongoing support and assistance to New York's successful Program. We look forward to the Agency's comments on our initiative. This initiative will help ensure, not only New York's success in leveraging other resources in multi-family buildings but also Programs throughout country. Upon DOE's approval, DHCR is able to move quickly to implement the new processes.

New York State
Division of Housing and Community Renewal

M E M O R A N D U M

To: Daniel Buyer, Assistant Commissioner, WAP ARRA Initiatives

From: Brian P. McCartney, Supervising Attorney

Date: March 10, 2010

Subject: Weatherization Assistance

ISSUE:

Whether it is permissible for a grantee or subgrantee to disburse weatherization assistance in the form of a loan to finance allowable expenditures (as that term is defined at 10 CFR 440.18)?

LEGISLATIVE BACKGROUND:

The federal enabling legislation for the Weatherization Assistance Program (WAP) is found at 42 U.S.C. 6861 et seq. Applicable regulations include 10 CFR Part 440, "Weatherization Assistance Program for Low-Income Persons", and 10 CFR Part 600, "Financial Assistance Rules".

Initially, it should be noted that, in enacting the Energy Conservation in Existing Buildings Act of 1976, Congress found that:

> "…the primary responsibility for the implementation of such major programs should be lodged with the governments of the States; the diversity of conditions among the various States and regions of the Nation is sufficiently great that a wholly federally administered program would not be as effective as one which is tailored to meet local requirements and to respond to local opportunities; the State should be allowed flexibility within which to fashion such programs, subject to general Federal guidelines and monitoring sufficient to protect the financial investments of consumers and the financial interest of the United States and to insure that the measures undertaken in fact result in significant energy and cost savings which would probably not otherwise occur;…[1]

[1] 42 U.S.C. 6851(a)(4) (emphasis added)

Congress further held that "…[s]tates…should be encouraged, with Federal financial and technical assistance, to develop and support coordinated weatherization programs designed to alleviate the adverse affects of energy costs on such low-income persons, to supplement other Federal programs serving such low-income persons, and to increase energy efficiency."[2] Echoing this sentiment, the Department of Energy's (DOE) WAP implementing regulations direct that "[t]o the maximum extent practicable, the use of weatherization assistance shall be coordinated with other Federal, State, local, or privately funded programs in order to improve energy efficiency and to conserve energy…"[3]

FINDINGS:

DOE's Financial Assistance Rules address, and clearly contemplate, the use of weatherization assistance as loans. More specifically, they provide that: "Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity."[4] Obviously, the issue of repayments and interest is only germane if such financial assistance may be loaned, as opposed to granted, to eligible projects. The Rules further state: "Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds…"[5]

CONCLUSION:

I have reviewed applicable statutory and regulatory provisions and find that the disbursement of weatherization assistance by grantees and subgrantees in the form of loans to finance allowable expenditures is permissible. Moreover, DHCR's initiative to coordinate the use of weatherization assistance with the Low-Income Housing Credit program would directly further Congress' goal of increasing energy efficiency while facilitating the leveraging of other funding sources.

[2] 42 U.S.C. 6861(a)(4)
[3] 10 CFR 440.16(e)
[4] 10 CFR 600.221(f)(1)
[5] 10 CFR 600.225(a) (emphasis added)

Appendix 4

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Dept. of Energy Announces New Regulations to Facilitate Weatherization of Subsidized Affordable Housing

DOE issues final rule minimizing duplicative verification requirements among Federal agencies.

Shortly after the American Recovery and Reinvestment Act (ARRA) was signed into law, HUD and the Department of Energy (DOE) announced an interagency effort to improve the energy efficiency and livability of HUD assisted and LIHTC homes by minimizing barriers to participation of these homes in the Weatherization Assistance Program (WAP). At the time, HUD Secretary Donovan remarked that "this partnership will ensure that HUD and DOE together can play a significant role in the Administration's goal to weatherize one million homes, while at the same time serving a population in need."

DOE has now announced that hundreds of thousands of HUD, LIHTC and USDA multifamily apartments meet certain WAP eligibility requirements without the need for further evaluation or verification by the State WAP administering agency or local subgrantee.[1] In doing so, DOE has significantly reduced the burden of evaluating WAP applications for these multifamily properties.

The following page includes a summary of DOE's guidance for evaluating WAP applications from buildings that are part of HUD assisted and public housing programs, the Federal LIHTC program, and the USDA Rural Development program. Key issues addressed in the final rule are:

Demonstrating Income Eligibility. For a property to be eligible for WAP, the owner must demonstrate that no less than 66% of the building's households have incomes at 200% of poverty or less. DOE has concluded that existing income verification procedures for HUD assisted, public housing, and LIHTC properties are sufficient for determining eligibility for WAP. As a result, HUD will identify properties that are income eligible and no further income verification process by the owner will be required.

Protecting Tenants from Rent Increases and Preventing Undue or Excessive Enhancement to the Value of the Dwelling Unit. Under WAP, a grantee must establish procedures that ensure a tenant is not subject to rent increases for a reasonable period of time after weatherization work has been completed. In addition, a grantee is required to ensure that WAP expenditures are focused solely on property enhancements that provide weatherization benefits and do not result in undue or excessive enhancement to the value of the property.

Ensuring the Benefits of Weatherization Accrue to Tenants. Under WAP, property owners must demonstrate that weatherization benefits will accrue primarily to multifamily tenants. This can easily be demonstrated through utility cost savings in cases where tenants pay utilities directly. DOE has now clarified that property owners can also meet this requirement through other means. As a model, DOE cited the State of Washington's policy recognizing that preserved low-income housing, added comfort, and environmental health benefits as a result of weatherization upgrades can be considered direct benefits to tenants.

Owner Financial Participation. DOE has not amended the regulatory provision regarding financial participation from multifamily building owners. DOE reiterated that "a State *may require financial participation where feasible* from multifamily owners" (DOE's emphasis). In fact, many States, including Kansas, Virginia and New York, are reducing or waiving this requirement, or reserving the option to negotiate the contribution requirement with each owner.

[1] Final Rule published in the Federal Register, Vol. 75, No. 15, Monday, January 25, 2010, pg. 3847. The final rule is effective February 24, 2010.

Housing Program	Demonstrating Income Eligibility	Protecting Tenants from Rent Increases and Preventing Undue or Excessive Enhancement to the Value of the Home	Ensuring the Benefits of Weatherization Accrue to Tenants
HUD Qualified Assisted Housing (includes public housing projects, properties with project-based Sec. 8 assistance, and Sec. 202/811 properties. In addition, the rule applies to Sec. 236 and 221(d)(3) properties if at least 66% of households receive project-based Sec. 8 assistance.)[2]	**If no less than 66% of the building's** households have incomes at or below 200% of poverty as determined by HUD data, the building is automatically income eligible for the Weatherization program. HUD will identify these properties and provide a list to DOE. No additional income verification procedures will be required for these properties. **If less than 66% of the building's** households have incomes at or below 200% of poverty as determined by HUD data, the building is not automatically income eligible.	**If the property is covered by a project-based Sec. 8 contract expiring in 3 years or beyond,** the property satisfies the rent protection requirements under WAP without the need for further evaluation or verification. **If the property is covered by a project-based Sec. 8 contract expiring in less than 3 years**, it is up to the State to determine if the property satisfies the rent protection requirement under WAP. **However, DOE is clear that a State may determine that these properties still satisfy the rent protection requirement** depending on what the State views as an acceptable timeframe of rent protections. HUD will identify the terms of the property's Sec. 8 contract so States will know the amount of time remaining on the contract. **All HUD Qualified Assisted Housing satisfies the requirement to protect against undue or excessive enhancement** of the weatherized building, without the need for further evaluation or verification.	**Administering State agencies can take into consideration benefits other than reduced utility costs when ensuring that benefits of WAP services accrue primarily to tenants.** Benefits can include a combination of long-term preservation of the property, continued monitoring of protections against rent increases, and a healthier living environment. States may also consider ways in which energy savings and owner contributions can be structured to provide benefits to tenants, including through property upgrades such as apartment modernization and improved security systems, or improved resident services such as broadband access and job training. HUD Qualified Assisted Housing programs in and of themselves do not ensure that benefits of WAP services accrue primarily to tenants, and the State agencies must establish procedures to satisfy this requirement.

[2] DOE is clear that other HUD assisted properties, including Sec. 236 and 221(d)(3) properties with no Sec. 8 assistance, may still be eligible for the Weatherization Assistance Program assuming owners can demonstrate that the properties meet the requirements of the program.

Housing Program	Demonstrating Income Eligibility	Protecting Tenants from Rent Increases and Preventing Undue or Excessive Enhancement to the Value of the Home	Ensuring the Benefits of Weatherization Accrue to Tenants
Low Income Housing Tax Credit	Same as HUD Qualified Assisted Housing.	LIHTC properties need to separately meet the rent protection AND excessive enhancement requirements. It is up to the State or local WAP grantee to establish the necessary conditions to meet these requirements.	Same as HUD Qualified Assisted Housing.
USDA Sec. 515	**If 100% of a project's units are occupied by** households with incomes at or below 200% of poverty as determined by USDA data, the project is deemed automatically eligible. USDA will identify these properties and provide a list to DOE. No additional income verification procedures will be required. **If less than 100% of the project's** households have incomes at or below 200% of poverty as determined by USDA data, the building is not automatically income eligible. The project may still qualify for WAP services, but the owner must demonstrate that at least 66% of households residing in a Sec. 515 building have incomes at 200% of poverty or less.	The final rule makes no reference to whether the Sec. 515 program has sufficient controls to provide tenants protection from rent increases or to protect against excessive enhancement of the building. Absent this determination, presumably it is up to the State or local WAP grantee to establish the necessary conditions to meet these requirements.	Same as HUD Qualified Assisted Housing.

Appendix 5

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Multifamily Weatherization State Best Practices

FACT SHEET March 2010

Multifamily Affordable Housing Weatherization: The Need

Rising energy costs can pose a significant threat to maintaining affordable rental housing. Energy efficiency upgrades in rental housing is a cost effective approach to lowering operating expenses, maintaining affordability for low income households, reducing carbon emissions, and creating healthier, more comfortable living environments for low income families.

Increased funding for the Weatherization Assistance Program (WAP) through the American Recovery and Reinvestment Act (ARRA) provides an unprecedented opportunity to expand the benefits of residential energy efficiency improvements to a much wider range of deserving and eligible families who have not traditionally been served by the program. Nationwide, there are 34 million families who are income eligible for WAP services, including 17 million renter households. Many states have adopted policies to ensure that low-income renters residing in multifamily homes have an opportunity to benefit from weatherization services.

Several state WAP agencies have set aside funds to target multifamily housing, including subsidized properties at risk of being lost from the affordable housing stock.

Kansas: Kansas Housing Resources Corp. has set aside 25% of its allocation to weatherize Low Income Housing Tax Credit (LIHTC), Section 8 and Section 515 rural properties.

Florida: The FL Dept. of Community Affairs plans to significantly increase multifamily weatherization and has tentatively set aside 25% of recovery weatherization funds for multifamily housing.

Massachusetts: The MA Dept. of Housing and Community Development has reserved $6 million specifically for privately-owned, subsidized multifamily properties in need of preservation. The state will also use $7 million in federal weatherization funds to replace inefficient heating systems in public housing units.

New York: The New York Division of Housing and Community Renewal has set aside $60 million for multifamily housing, focusing on LIHTC, Section 515 rural housing, and HUD assisted housing. More than 9,400 multifamily affordable homes throughout New York State will be made more energy efficient and safer.

Oregon: Oregon Housing and Community Services has made multifamily housing a priority and has set a target of using 25% of its funds for multifamily housing, including 10% for rental housing properties at-risk of losing federal housing subsidies.

Wisconsin: The Wisconsin Energy Assistance Bureau has launched the Multifamily Weatherization Recovery Project with the goal of weatherizing 3,000 units in large multifamily buildings where there is considerable potential for energy savings and it will create weatherization jobs in the local community.

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In several states, the Housing Finance Agency has partnered with the state WAP agency to receive an allocation of recovery weatherization funds to supplement existing multifamily retrofit efforts.

New Jersey: The New Jersey Housing and Mortgage Finance Agency is receiving $30 million from the NJ Dept. of Community Affairs to weatherize state financed multifamily housing. Participating owners must commit to additional affordability requirements.

Pennsylvania: The Pennsylvania Housing Finance Agency is receiving more than $20 million from the PA Department of Community and Economic Development to supplement its Preservation through Smart Rehab program.

Rhode Island: The Rhode Island Office of Energy Resources has reserved 33% of the state's ARRA WAP funds for large multifamily housing and has contracted with Rhode Island Housing to administer the funds.

Vermont: The Vermont Housing Finance Agency is working with the VT Dept. for Children and Families to secure $12-15 million in weatherization funds to supplement a multifamily energy efficiency loan fund.

Many state WAP agencies are taking steps to support multifamily weatherization by adopting more flexible policies, improving coordination among local weatherization providers, and identifying new local providers with experience weatherizing multifamily housing.

Colorado: The Colorado Governor's Energy Office selected a new provider with multifamily experience to run a statewide program focused on weatherizing large multifamily buildings.

Kansas: Kansas Housing Resources Corp. has eliminated the requirement that multifamily owners make a financial contribution toward the weatherization costs. Other states are waiving the financial contribution requirement on a case-by-case basis if the owner can demonstrate hardship in paying the costs.

New York: Since not all local weatherization agencies have experience making improvements in multifamily housing, the NY Division of Housing and Community Renewal formed partnerships with new subgrantees to weatherize portfolios of multifamily properties. For example, the Local Initiatives Support Corporation and Enterprise have partnered to deliver weatherization services to more than 2,100 HUD and LIHTC units in NYC. Similar partnerships have been formed to provide services to multifamily residents in upstate NY and Long Island.

Ohio: The Ohio Department of Development is encouraging all local providers to weatherize multifamily housing including properties with Section 8 subsidies, Section 515 and LIHTC properties. To streamline the process, the agency has designated a staff person to receive and coordinate all multifamily projects.

Washington: The Department of Community, Trade and Economic Development (CTED) has revised its weatherization policies to be more inclusive of non-profit owned and HUD-funded multifamily housing. In addition to reduced utility payments, CTED defines benefits to the tenant to include "preserved low-income housing, added comfort, and improved indoor air quality."

For more information about multifamily weatherization state practices, contact Todd Nedwick at the National Housing Trust at tnedwick@nhtinc.org or Lydia Tom at Enterprise at ltom@enterprisecommunity.org.

Appendix 6

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U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Special Attention of

All Eligible Owners
All Multifamily Housing Staff
All Office of Affordable Housing Preservation Staff
All Participating Administrative Entities

Notice H 09-02

Issued: May 13, 2009

Expires: September 30, 2012

Cross References

SUBJECT: Green Retrofit Program for Multifamily Housing (GRP)

The purpose of this Notice is to provide guidance on the Green Retrofit Program for Multifamily Housing that is described below.

Background

Title XII of Division A of the American Recovery and Reinvestment Act of 2009, P. L. 111-5 (the "Recovery Act"), in the section titled "Assisted Housing Stability and Energy and Green Retrofit Investments" under "Housing Programs", includes authority for HUD to make loans, make grants, and take a variety of other actions to facilitate utility-saving retrofits and other retrofits that produce environmental benefits, in certain existing HUD-assisted multifamily housing, subject to agreement between HUD and the Owner. These activities are undertaken to further the objectives of the Recovery Act, namely, to provide a necessary boost to our economy in these difficult times and to create jobs, restore economic growth, and strengthen America's middle class. The Recovery Act is designed to stimulate the economy through measures that, among other things, modernize the Nation's infrastructure, jump start American energy independence, and protect those in greatest need.

Green Building is an approach to sustainable development that is designed to result in a property that reduces energy demand, costs less to operate, improves the residents' quality of life, and reduces its impact on the environment. This Notice uses the terms "Green Retrofit Program" and "GRP" to refer to the various authorities discussed above. Issuance of this Notice implements the Green Retrofit Program.

Table of Contents

Program Implementation

HUD will implement the GRP through the Office of Affordable Housing Preservation (OAHP), using, where appropriate, policy and program approaches developed for OAHP's Mark-to-Market Green Initiative.

The GRP will also use OAHP's existing infrastructure for program management, due diligence, underwriting, closing, and rehabilitation escrow administration. Certain Mark-to-Market participating administrative entities (PAEs) will carry out due diligence, underwriting and negotiation activities, and closing for the GRP pursuant to each PAE's existing portfolio restructuring agreement, as amended.

All materials noted as being available from the GRP web site may be found at http://portal.hud.gov/pls/portal/url/page/recovery/programs/green or www.hud.gov/recovery . References to days in this Notice mean calendar days.

Program Summary

This Program Summary section is a summary of certain key provisions of this Notice. In the event of conflict between any terms or conditions contained in this Program Summary section and those contained in the numbered provisions of the Notice, the terms and conditions in the numbered provisions will control.

In the GRP, HUD will accept applications for a Green Retrofit Grant or Green Retrofit Loan on a first come, first served basis, beginning on June 15, 2009, and subject to allocations for project categories, geographic location and Owner/Affiliate concentration. HUD may offer either a Green Retrofit Grant, or a Green Retrofit Loan repayable from a share of Surplus Cash and from sale and refinancing proceeds, of up to $15,000 per unit for an individual Eligible Project, and expected to average not more than $10,000 per unit across all Eligible Projects that are funded, to be used to finance Green Retrofits that will reduce ongoing utility consumption, benefit resident health, and/or

benefit the environment. The Owner's period of performance for completing all Green Retrofits will generally be twelve (12) months, but in no event shall it exceed twenty-four (24) months. The program requirements differ depending on the type of project-based assistance contract and depending on the owner entity (nonprofit or for profit). *See Definitions for Eligible Projects. See Paragraph IV.A for Applicant Pool. See Paragraph V for Green Retrofit Grants. See Paragraph VI for Green Retrofit Loans. See Definitions for Green Retrofits.*

At the closing of the Green Retrofit Grant or Green Retrofit Loan, the retrofit funds will be deposited into a rehabilitation escrow and the Owner will receive a GRP Pre-Development Incentive equal to the lesser of 1% of the estimated cost of the Green Retrofits or $10,000. All Owners of Eligible Projects are eligible to receive this incentive, including nonprofit Owners. Limited dividend Owners may receive this incentive in addition to any limited dividend. *See Paragraph VII.B for the GRP Pre-Development Incentive.*

Upon satisfactory completion of the Green Retrofits, the Owner will receive the GRP Efficiency Incentive (up to the lesser of 3% of the estimated cost of the Green Retrofits or $30,000). All Owners are eligible to receive this incentive, including nonprofit Owners. Limited dividend Owners may receive this incentive in addition to any limited dividend. *See Paragraph VII.C for the GRP Efficiency Incentive.*

The GRP involves two assessments of financial feasibility. The owner submits a GRP Application that includes an Initial Feasibility Assessment, annual and year-to-date financial statements, evidence of authority to accept a Green Retrofit Grant or Green Retrofit Loan, due diligence information, owner commitments and required certifications, as detailed below. Passing this Initial Feasibility Assessment is a precondition for commencement of due diligence and underwriting but does not assure that the project will pass the Final Feasibility Assessment and receive an offer for a Green Retrofit Grant or Green Retrofit Loan. After the PAE completes full due diligence and underwriting, the Eligible Project must pass a Final Feasibility Assessment, based on underwritten cash flow. Passing the Final Feasibility Assessment is a precondition for receiving an offer of a Green Retrofit Grant or Green Retrofit Loan. Both Feasibility Assessments are discussed in more detail below. *See Paragraph II for requirements for a complete GRP Application.*

The Initial Feasibility Assessment that the owner provides as part of its GRP Application must be prepared using a template provided by HUD, a copy of which is available from the GRP web site (http://portal.hud.gov/pls/portal/url/page/recovery/programs/green or www.hud.gov/recovery). It requires the Owner to enter information from the project's annual financial statements to derive key financial ratios which vary by program type. The project passes the Initial Feasibility Assessment in one of two ways:

- If HUD's minimum thresholds for the key financial ratios are met or exceeded. The HUD-prescribed template includes the minimum thresholds, which are calculated from the project's financial statements and are established for each program type; or
- HUD determines that consideration of additional project-specific information provided in the GRP Application would result in the project passing the Initial Feasibility Assessment.

HUD will accept for processing, and authorize the PAE to conduct due diligence and

underwriting, for only those projects that pass the Initial Feasibility Assessment. *See Paragraph II.A for information required in the GRP Application. See Paragraphs IV.E regarding the Initial Feasibility Assessment.*

The Initial Feasibility Assessment is based on historical cash flow plus standard economic assumptions applied to the individual program type under which the project was developed. The Final Feasibility Assessment uses the same minimum thresholds for key financial ratios as the Initial Feasibility Assessment but is based on the PAE's underwriting. If an Eligible Project does not pass the Final Feasibility Assessment, HUD will either decline to offer a Green Retrofit Grant or Green Retrofit Loan; or (for properties eligible for the Mark-to-Market program) will make eligibility for a Green Retrofit Grant or Green Retrofit Loan contingent on the Owner's agreement to a Mark-to-Market debt restructure transaction. *See Paragraph IV.F.4 regarding the Final Feasibility Assessment.*

The GRP will be administered by OAHP, which also administers the Mark-to-Market program. GRP is a distinct new program differentiated from the Mark-to-Market program in several notable ways; the Green Retrofit Program:

- will not involve evaluation of comparable market rents (except that normal contract renewal timing will be accelerated for certain projects; see *Paragraph II.A.15.f*),
- will not involve changes to contract rents,
- will not require the Owner to contribute toward the cost of Green Retrofits (subject to exceptions for partially assisted projects and projects with large project account balances; see *Paragraph IV.F.3*),
- will not involve restructuring of existing project debt,
- will not include a Mark-to-Market program Use Agreement (but will require its own Green Retrofit Program Use Agreement),
- will include the Owner's commitment to elect to renew Expiring Contracts, using any available option (other than opting out), for a period of at least 15 years beyond the existing expiration of affordability requirements on the project,
- will use the Mark-to-Market program underwriting for a project that is currently undergoing debt restructuring and is also accepted for GRP processing; and
- will provide opportunities for the Owner to earn a GRP Pre-Development Incentive at the closing; a GRP Efficiency Incentive upon satisfactory completion of all Green Retrofits; a Targeted Low-Income Jobs Creation Incentive after completion of all Green Retrofits; and a GRP Incentive Performance Fee annually during the term of the Green Retrofit Program Use Agreement.

The Recovery Act requires the payment of not less than prevailing wage rates (Davis-Bacon wage rates) to all laborers and mechanics employed on Green Retrofit construction work. All construction employers will be required to prepare, certify and submit weekly payroll reports for each week work is performed on the project. *See Paragraph IV.I.4 for Davis-Bacon requirements.*

All Owners must make Green Retrofit Owner Commitments and must prepare a GRP Operations & Maintenance (O&M) Plan (for the ongoing Green Operation of the project) as a condition of receiving a Green Retrofit Grant or Green Retrofit Loan. *The template forms of Green*

Retrofit Owner Commitments and GRP O&M Plan are available from the GRP web site.

Upon achievement of annual performance benchmarks, and subject to compliance with the Green Retrofit Owner Commitments, Owners become eligible to earn the GRP Incentive Performance Fee (3.0% of collected revenue annually, payable solely from Surplus Cash). If there is insufficient Surplus Cash to pay the entire earned Incentive, the Incentive is partially paid from the Surplus Cash available, up to the full Incentive amount earned. Any Incentive earned but unpaid in a fiscal year cannot be carried forward, accrued, or paid from a future project fiscal year. All Owners are eligible to receive this incentive, including nonprofit Owners. Limited dividend Owners may receive this incentive in addition to any limited dividend. *See Paragraph VII.D for the GRP Incentive Performance Fee.*

HUD anticipates that the GRP will result in future savings, including the reduction of utility allowances for tenant-paid utilities, through a reduced need for future budget-based rent adjustments attributable to a portion of a project's utility costs, and (for projects subject to Green Retrofit Loans) through receiving a share of annual Surplus Cash as an annual payment on the Green Retrofit Loan. There are three categories of Owners of Eligible Projects that HUD, in its discretion, may offer a Green Retrofit Grant or Green Retrofit Loan: (1) Owners of Section 202 projects, (2) Owners of Section 811 projects, and (3) nonprofit Owners of other projects with tenant paid utilities for at least heat and lights. All other Owners of Eligible Projects may only be eligible for Green Retrofit Loans. *See Paragraph VI.G for Green Retrofit Loan payment requirements.*

HUD will limit the number of Eligible Projects that are accepted by HUD for processing, so as not to exceed the funding appropriated in the Recovery Act. Additional applicants will be placed on a waiting list. In the event that HUD decides to discontinue processing of an Eligible Project, HUD will consider assigning an Eligible Project from the waiting list to a PAE. HUD will provide information on application status and the waiting list on the GRP web site at least weekly. *See Paragraph IV.A for discussion of the Waiting List.*

Upon assignment of an Eligible Project to a PAE, the PAE will first verify the Initial Feasibility Assessment provided by the Owner and confirm that HUD's minimum thresholds for GRP participation are met or exceeded (that the property passes the Initial Feasibility Assessment). The PAE will then commission, among other appropriate due diligence, a GRP Physical Condition Assessment (GRPCA) that will evaluate the opportunities for Green Retrofits and Green Operation. The PAE will also conduct a tenant meeting at the project to gain input from the tenants on energy and water conservation measures, indoor air quality, and other items that benefit the environment generally (all items that may be eligible for funding as Green Retrofits). *See Paragraph III for the GRPCA. See Definitions for Green Operation.*

Upon completion of due diligence and underwriting, the PAE will discuss its recommended Green Retrofit Plan with the Owner. HUD expects Owners to find acceptable the recommended Green Retrofits and requires that Owners accept a minimum of 75% of them (by cost). If the Owner fails to do so, HUD may discontinue processing and reject the Owner's GRP Application. If the Owner accepts the minimum or more, the PAE will present the Green Retrofit Plan to HUD for approval. If the Plan is approved, the PAE will prepare a Green Retrofit Plan Commitment that it

offers to the Owner. HUD expects to offer a Green Retrofit Plan Commitment and close the Green Retrofit Grant or Green Retrofit Loan within 120 days after the Eligible Project is assigned to a PAE. The Owner must cooperate timely in providing access to the Eligible Project and in providing all information requested by the PAE or HUD or risk removal from processing without any further opportunity to participate in the GRP.

Green Retrofit Plan Commitments will be executed by HUD subject to availability of funding. Funding will be obligated at the closing. Closing must occur within thirty (30) days after HUD executes the Green Retrofit Plan Commitment. *See Definitions for Green Retrofit Plan and IV.F. See the GRP web site and Paragraph IV.I for the Green Retrofit Plan Commitment. See Paragraph IV for additional discussion of due diligence, underwriting, approval, funding and closing.*

HUD's decisions regarding Initial Feasibility, Final Feasibility, and the Green Retrofit Plan Commitments are final.

Legal Documents

The term "Legal Documents" references all documents determined necessary by HUD or the PAE to effectuate the closing. (On the release date of this Notice, the Legal Documents are pending final Paperwork Reduction Act approval. The GRP web site will be updated with the final documents.)

Legal Documents include, without limitation, the following template legal documents available from the GRP web site, each of which will be used without modification unless the PAE determines, and HUD concurs, that modifications are required in order to comply with applicable State or local law:

- For all projects:
  - Green Retrofit Plan Commitment
  - Green Retrofit Program Rehabilitation Escrow Deposit Agreement
  - Green Retrofit Owner Commitments
  - Green Retrofit Program Use Agreement
- For projects that receive Green Retrofit Loans:
  - Green Retrofit Note
  - Green Retrofit Mortgage
- For projects that receive Green Retrofit Grants:
  - Green Retrofit Grant Agreement

Additional legal documents will be required in order to close a Green Retrofit Loan or Green Retrofit Grant, as required by HUD or applicable state or local law. These additional legal documents include, without limitation:

- Owner's certification and attorney opinion as to authority to accept and close a Green Retrofit Grant or Green Retrofit Loan
- Consent from existing lienholders, where required, and other parties whose consent is required

- Security Agreement with respect to personal property
- Modification to Section 8 contract(s), if necessary to conform to HUD's financial reporting and physical inspection requirements

I. Definitions

A. **Mark-to-Market Terms.** The following terms have the meaning given to them pursuant to the Multifamily Assisted Housing Reform and Accountability Act of 1997 as amended (MAHRA) or pursuant to 24 CFR Part 401 as applicable:

1. Applicable Federal rate.
2. Expiring Contract.
3. MAHRA.
4. Participating Administrative Entity (PAE).
5. Restructuring Plan.

B. **Other Terms.** As used in this Notice, the term—

1. **Affiliate.** Affiliate means any person or business concern that directly or indirectly controls policy of a principal or has the power to do so. Persons and business concerns controlled by the same party are also affiliates.
2. **AFS.** AFS means the annual financial statements of a project that HUD requires the owners of certain projects to submit annually.
3. **Control.** Control means the direct or indirect power (under contract, equity ownership, the right to vote or determine a vote, or otherwise) to direct the financial, legal, beneficial or other interests of the owner of a project.
4. **Eligible Project.** Eligible Project means a project that:
   a. does not have an Ineligible Owner; and
   b. is not an Ineligible Project; and
   c. falls into one of the following categories (note that the references below to "Project-based Assistance" does not include project-based vouchers):
      i. Projects receiving Project-based Assistance pursuant to Section 202 of the Housing Act of 1959 (12 U.S.C. 17012).
      ii. Projects receiving Project-based Assistance pursuant to Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013).
      iii. Projects receiving Project-based Assistance under Section 8 of the United States Housing Act of 1937 as amended (42 U.S.C. 1437f);
   d. has at least the following number of multifamily units:
      i. 32 units for Section 202 projects.
      ii. 8 units for Section 811 projects.
      iii. 20 units for Section 8 projects with USDA Section 515 loans.
      iv. 72 units for all other project-based Section 8 projects.
5. **Green Operation.** Green Operation is operation of an Eligible Project that complies with the Green Retrofit Owner Commitments. Green Operation includes, without limitation:
   a. The use of Green Components (as defined in the Green Retrofit Owner Commitments) where prudent and appropriate for operations and replacements;

b. Materially lower use of chemicals thought to be harmful to humans for cleaning and maintenance;
c. Adherence to Integrated Pest Management (IPM) principles;
d. Maintenance of a Green property management qualification as required by HUD;
e. Providing access to the project and its records for the preparation of any post-closing analyses required by HUD;

6. **Green Retrofit.** Green Retrofit means a retrofit, acceptable to HUD, that has one or more of the following attributes, when compared with the comparable component that would normally be used by owners of similar properties in the same market area:
   a. Materially lower electric / heating fuel / water consumption.
   b. Materially lower emissions of chemicals thought to be harmful to humans.
   c. Materially longer useful life.
   d. Materially more biodegradable.
   e. Materially more easily recycled.
   f. Materially lower use of raw materials/materially more recycled content.
   g. Materially lower transportation costs of products delivered to the project.
   h. The determination of materiality shall be made in HUD's sole discretion.
7. **Green Retrofit Grant.** Green Retrofit Grant means a grant pursuant to Paragraph V.
8. **Green Retrofit Loan.** Green Retrofit Loan means a loan pursuant to Paragraph VI.
9. **Green Retrofit Owner Commitments.** Green Retrofit Owner Commitments means required commitments by the Owner, acceptable to HUD. HUD will use the template forms of Green Retrofit Owner Commitments and GRP O&M Plan that are available from the GRP web site and may choose to modify those forms as experience is gained in the GRP.
   a. Green Retrofit Owner Commitments are required in order to receive a Green Retrofit Grant or Green Retrofit Loan.
   b. The Owner must be in compliance with its Green Retrofit Owner Commitments to be eligible to earn the annual GRP Incentive Performance Fee.
   c. Each participating Owner must develop, for HUD approval, a GRP O&M Plan.
10. **Green Retrofit Plan.** Green Retrofit Plan means a plan pursuant to Paragraph IV.F, acceptable to HUD, based on which HUD will consider making an offer of a Green Retrofit Plan Commitment.
11. **Green Retrofit Plan Commitment.** Green Retrofit Plan Commitment means a written offer pursuant to Paragraph IV.I to the Owner for a Green Retrofit Plan, executed first by the Owner and then by HUD. This is not a valid commitment unless executed by both parties.
12. **GRP Efficiency Incentive.** GRP Efficiency Incentive means the incentive described in Paragraph VII.C.
13. **GRP Incentive Performance Fee.** GRP Incentive Performance Fee means the incentive described in Paragraph VII.D.
14. **GRP Physical Condition Assessment (GRPCA).** GRP Physical Condition Assessment means a project-specific, on-the-ground evaluation by a qualified independent third party(ies) procured by the PAE, pursuant to HUD's requirements, in accordance with Paragraph III.
15. **GRP Pre-Development Incentive.** GRP Pre-Development Incentive means the

incentive described in Paragraph VII.B.

16. **Ineligible Owner.** Ineligible Owner means any of the following:
    a. An Owner described in Section 516(a) of MAHRA (with the exception of Section 516(a)(4)).
    b. An Owner whose project's most recent management review rating is less than satisfactory.
    c. An Owner whose project's most recent HUD Real Estate Assessment Center (REAC) physical inspection score is below 60.
    d. An Owner who is not in substantial compliance with applicable performance standards and legal requirements, including, without limitation,
        i. HUD's determination that the Owner is ineligible, based on information submitted by the owner pursuant to Paragraph II.A.12, the multifamily field office with jurisdiction finds previous participation issues; or
        ii. Owner is not in compliance with HUD's AFS reporting requirements.
17. **Ineligible Project.** Ineligible Project means any of the following:
    a. A project described in Section 516(a)(4) of MAHRA.
    b. A project whose debt has been restructured pursuant to the Mark-to-Market Green Initiative.
18. **Initial Feasibility Assessment.** A standard template prescribed by HUD in accordance with Paragraph IV.E, to assess whether the Eligible Project is physically and financially viable and is likely to be maintained and preserved long-term.
19. **Integrated Pest Management (IPM).** IPM is defined in detail in the Green Retrofit Owner Commitments. It is an approach to pest management focused on preventing the entry of pests and the early detection of infestations, in order to minimize the use of pesticides. IPM also involves selecting the least toxic pesticide that is likely to be effective in combating the identified infestation. IPM does not permit the use of pesticides (including low-toxicity pesticides) unless there is an identified infestation. IPM minimizes the use of fogging and spraying application techniques in favor of baiting techniques. Additional information on IPM is available from the GRP web site.
20. **Owner.** Owner means the holder of legal title to the project.
21. **Project-based Assistance.** Project-based assistance pursuant to:
    a. Section 202 of the Housing Act of 1959 (12 U.S.C. 17012); or
    b. Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013); or
    c. Section 8 of the United States Housing Act of 1937 as amended (42 U.S.C. 1437f).
    d. Note that the term "Project-based Assistance" does not include project-based vouchers.
22. **Surplus Cash**. Surplus Cash (profit-motivated Owner) or Residual Receipts (nonprofit Owner) or Excess Cash (USDA Section 515 Owner) means any cash remaining at the end of an annual fiscal period after
    a. the payment of:
        i. All sums due or currently required to be paid under the terms of any mortgage or note whose lien position is senior to that of the Green Retrofit Loan ("Primary Indebtedness");

ii. All amounts required to be deposited in the reserve fund for replacements;
iii. All obligations of the project other than the Primary Indebtedness unless funds for payment are set aside or deferment of payments has been approved by the Secretary of the federal agency or the state housing finance agency; and

b. the segregation of:
i. an amount equal to the aggregate of all special funds required to be maintained by the project; and
ii. all tenant security deposits held.

II. GRP Application.

A. **Required Information.** An Owner's GRP Application must contain each of the following:

1. **Initial Feasibility Assessment Template.** The Initial Feasibility Assessment template (available from the GRP web site), completed with applicable information regarding the project.
2. **For Projects That Do Not Pass Initial Feasibility.** If the template indicates that the project does not pass the Initial Feasibility Assessment, the Owner must also include project-specific reasons that if considered, would result in the project meeting or exceeding HUD's minimum thresholds. See Paragraph IV.E.5.
3. **Evidence of Authority.** Closing a Green Retrofit Grant or Green Retrofit Loan will create a new encumbrance, will require a Use Agreement extending affordability at least 15 years, will create new incentives, and will modify the Eligible Property's cash distribution provisions. Accordingly, HUD expects that many Owners will need to obtain the consent of parties holding ownership interests, and that many Owners will need to obtain the consent of other parties such as lenders and lienholders, in order to enter into a Green Retrofit Plan Commitment and close the transaction. HUD requires this consent prior to the time of application. Each of the following are required to be provided in the GRP Application (HUD's requirements for each of the following are attached to this Notice):
   a. A certification, acceptable to HUD, from an authorized representative of the Owner, that either:
      i. No consent is required from any party having an ownership interest or from any lender or other party; or
      ii. Each party whose consent would be required has executed a consent or certification acceptable to HUD. The executed documents must be included in the GRP Application; and
   b. An opinion of counsel acceptable to HUD regarding the consents necessary to consummate the GRP transaction and regarding the authority of the Owner's designated representative.
4. **Owner Preferences.** The Owner must indicate:
   a. Whether the Owner prefers a Green Retrofit Grant or a Green Retrofit Loan, and the reasons for such preference, but the determination of which to offer is at HUD's discretion. This requirement does not apply to Owners who are only eligible for a Green Retrofit Loan pursuant to Paragraph V.B. HUD's

determination on offering Green Retrofit Grants or Green Retrofit Loans is made in order to ensure that both HUD and the Owner benefit from utility savings. The Owners with a choice of the Green Retrofit Grant or Green Retrofit Loan will be able to change their preference after acceptance of their application.

b. Whether the Owner will consider each of the optional Green alternatives described in Paragraph III.C.2.

c. Any potential Green Retrofits in which the Owner is particularly interested.

5. **Three Years' Annual Financial Statements.** The annual financial statements for the most recent three project fiscal years (audited if required by the existing business and legal agreements). This requirement is not applicable if the project has filed its AFS electronically with HUD for the past three years.

6. **Current Year Unaudited Financial Statements.** Unaudited financial statements for the project, for the current project fiscal year, as of a date not more than 90 days prior to the date of the GRP Application. The Owner will provide updated financial statements if the PAE so requests.

7. **Accounts Payable.** If the project has negative Surplus Cash as of the date of the most recent financial statement, the Owner must identify in the GRP Application any payables owed to the Owner, its Affiliates, the managing agent, or its Affiliates, that are older than (60) days and agree to place those in a residual receipts note acceptable to HUD. If proforma negative Surplus Cash remains, the Owner must provide a complete list of all accounts payable for HUD's review and approval.

8. **Flood Insurance.** HUD requires that flood insurance be maintained, where applicable, in accordance with Section 102(b)(2) of the Flood Disaster Protection Act. See Paragraph IV.I.5 for more information. The Owner must state in its GRP Application that it has flood insurance, it will obtain flood insurance acceptable to HUD prior to closing, the property is not in a Special Flood Hazard Area (SFHA) designated by the Federal Emergency Management Agency (FEMA), or the property is in an SFHA community that does not participate in the National Flood Insurance Program but less than one year has passed since the FEMA notification regarding such hazards.

9. **Description of Existing Components.** A standard template form, available from the GRP web site, containing information on each major building system (e.g., roofs, refrigerators, windows, and exterior walls) indicating when existing components were installed and a description of existing components including energy efficiency (e.g., annual electric consumption for refrigerators, SEER rating for air conditioners).

10. **Utility Releases (Owner Paid Utilities).** With respect to each utility paid by the Owner, a release form signed by the Owner, in a form acceptable to the applicable utility providers, authorizing the PAE or its designee to obtain utility consumption data with respect to all utility accounts in the name of the Owner.

11. **Information with Respect to Tenant Paid Utilities.** If any utilities are paid by tenants:

    a. A list of tenants who have lived in the property for at least twelve months, showing name, move-in date and unit type.

    b. Release forms signed by tenants as discussed in subparagraph 15.g, in order to allow the PAE to obtain utility consumption data for tenant-paid utilities.

    c. Any explanation required under subparagraph 15.g.(vi), if the Owner provides less than 50 percent of the number of possible tenant releases.

12. **Previous Participation Information.**
    a. The Owner must provide evidence there are no flags raised in the Active Partner Performance System (APPS), also known as "2530 Clearance". This evidence must be in writing from the HUD field office or appropriate USDA Rural Development office (for a USDA Section 515 project).
    b. The Owner must provide a certification of ownership entity. This certification requires the following attachments:
        i. The partnership agreement (or other governing documents) including all amendments.
        ii. A description of the formal consent process, if any that is required under the ownership entity's governing documents to extend the term of the ownership entity.
        iii. A description of the formal consent process, if any, that is required in order for the ownership entity to close a Green Retrofit Loan or Green Retrofit Grant (e.g., if a vote of partners is required, what percentage of the ownership interests must vote in favor).
        iv. Identification of the persons who are authorized to sign a Green Retrofit Plan Commitment on behalf of the Owner and the persons who are authorized to sign the Legal Documents.
13. **Data Universal Numbering System (DUNS) Number.** The Owner must provide a current Data Universal Numbering System (DUNS) number in the GRP Application. The Owner who does not have a DUNS number must obtain it before submitting the GRP Application. HUD will reject GRP Applications that do not have a DUNS number. There is no charge for obtaining a DUNS number and it can be obtained online or by telephone:
    a. The Owner can visit this website and provide the necessary information – http://fedgov.dnb.com/webform.
    b. The Owner can **c**all 866-705-5711 toll free.
    c. The information required for the DUNS number includes: legal name, trade style/ doing business as/ or other name the organization uses, physical address, mailing address, telephone number, contact name, Standard Industrial Classification (SIC) code (line of business), number of employees, and headquarters name and address (if applicable).
    d. The Owner can seek online assistance at the following web site: http://www.dnb.com/US/duns_update/ or phone assistance at the following number: 888-814-1435 (Monday through Friday, 8am-6pm EST).
14. **Central Contractor Registration (CCR).** The Owner must provide a CCR (CAGE) number in the GRP Application. If the Owner does not have a current CCR (CAGE) number, the Owner must register in the CCR system available at the following web site - http://www.ccr.gov/StartRegistration.aspx (note that both the DUNS number application and CCR can be completed through this web site).
    a. If the Owner is obtaining a DUNS number and a CCR number, the DUNS number must be obtained at least 24 hours before the CCR registration can be initiated.

b. The information required for the CCR registration includes: DUNS number, tax identification number (TIN) and taxpayer name, average number of employees, and average annual receipts.
c. The Owner can contact the CCR Assistance Center, 24 hours a day, 7 days a week, at 888-277-2423 or 269-961-5757, or visit the web site at www.ccr.gov.

15. **Required Certifications.** The Owner must certify to HUD that to the best of the Owner's knowledge and belief:
a. All materials submitted with the GRP Application are accurate, complete, and not misleading.
b. If the Owner is subject to a requirement to file AFS with HUD, the Owner must be current with filing of AFS, and all findings, if any, must be resolved as of the date of the GRP Application.
c. The project meets the requirements of at least one of the categories listed in the Definitions for Eligible Project.
d. Neither the Owner, the management agent, or any Affiliate of the Owner or management agent, is debarred or suspended. For further information see 2 CFR Parts 180 and 2424 as well as 48 CFR Parts 9 and 2409.
e. Neither the Owner, the management agent, or any Affiliate of the Owner or management agent, is subject to a Limited Denial of Participation. For further information see 2 CFR Part 2424, Subpart J.
f. The Owner is not an Ineligible Owner.
g. The project is not an Ineligible Project.
h. There is no litigation or other claim pending or threatened against the Owner or the Project other than as disclosed in the GRP Application.
i. The Owner has not received, applied for, and is not pursuing, any other funding pursuant to the Recovery Act with respect to the Eligible Project; except as fully disclosed in the GRP Application.
j. The Owner has not received, applied for, and is not pursuing, any other funding with respect to the Eligible Project (including, without limitation Low Income Housing Tax Credit funding); except as fully disclosed in the GRP Application.
k. There is no judgment lien against the Eligible Project for a debt to the United States. See 28 U.S.C. Section 3201(e).
l. Neither the Owner nor any Affiliate of the Owner has a delinquent federal debt.
m. Regarding debts to Owner, Affiliates of the Owner, management agent, or Affiliates of the management agent, either:
    i. No secured creditor of the Owner is an Affiliate of the Owner or management agent or is under Control of the Owner or management agent; or
    ii. Each such secured creditor has given its consent to be subordinate in lien priority and/or payment priority as applicable, to a Green Retrofit Loan or Green Retrofit Grant and associated documents as required by this Notice.
n. The Owner is in compliance with Fair Housing and Civil Rights Laws and that each of the following is true. The Owner
    i. has not been charged with an ongoing systemic violation of the Fair Housing Act.

ii. is not a defendant in a Fair Housing Act lawsuit filed by the Department of Justice alleging an ongoing pattern or practice of discrimination.

iii. has not received a letter of findings, identifying ongoing systemic noncompliance under Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, or section 109 of the Housing and Community Development Act of 1974.

iv. if applicable, has resolved, to HUD's satisfaction, the charge, lawsuit, or letter of findings referenced in subparagraphs (i), (ii), or (iii) before submitting the GRP Application.

o. The Owner must include the completed and executed Byrd Amendment Certification and the Form SF-LLL Lobbying Disclosure with the GRP Application. These forms are available on the GRP web site.

16. **Required Commitments.** The Owner must make commitments to HUD that:

a. The Owner and management agent will cooperate with HUD pursuant to Paragraph IV.G regarding Green Retrofit Plan Development.

b. The Owner acknowledges that the Recovery Act requires that each recipient of a Green Retrofit Loan or Green Retrofit Grant provide at least an additional 15 years of affordability running from the end date of the current affordability restricted period, understands that any offer of a Green Retrofit Plan Commitment will include such a requirement, is prepared to accept such a requirement, and is prepared to execute binding Legal Documents to effectuate such a requirement.

c. The Owner will provide the expiration date of all affordability requirements on the Eligible Project. The discussion below encompasses affordability requirements of every sort, including without limitation: affordability requirements under a project based rental assistance contract (e.g., project based Section 8, Rent Supplement, Rental Assistance Program, USDA Rental Assistance, …), affordability requirements pursuant to a mortgage loan (e.g., a Section 236 loan or a USDA Section 515 loan), affordability requirements pursuant to a grant (e.g., a Section 202 capital grant), affordability requirements pursuant to a use or affordability agreement (e.g., a HOME program affordability agreement or a Mark-to-Market Use Agreement), and affordability requirements pursuant to a deed restriction or covenant (e.g., the land is leased or was purchased from a redevelopment authority and carries affordability restrictions). The Owner agrees to specify all such applicable affordability/use agreements, and to provide true and complete copies of applicable documents timely if the PAE or HUD so requests.

d. If the Eligible Project is on leased land, the Owner will provide the expiration date of the lease in the GRP Application. Further the Owner will provide a true and correct copy of the lease(s), including all amendments in the paper application.

e. The Owner has reviewed, understands, and is prepared to execute at closing without changes, the draft forms of the GRP Legal Documents. Final Paperwork Reduction Act approval is pending and the final documents will be posted on the GRP web site when available.

f. The Owner has reviewed, understands, and agrees to carry out the responsibilities described below with respect to certain projects with project-based Section 8 contracts expiring within eighteen (18) months. This provision does not apply to the following categories of Eligible Projects: Section 202, Section 811, USDA Section 515, projects with first mortgage financing provided by a State housing finance agency, and projects whose debt has been restructured pursuant to the Mark-to-Market program or the Portfolio Reengineering Demonstration program (section 210 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1996, 110 Stat. 1321). It does apply to all other Eligible Projects having a mortgage loan that is insured or held by the Secretary and having an Expiring Contract whose expiration date falls eighteen (18) months or less after the date of the GRP Application. For such projects, Owners, HUD and contract administrators will avoid potentially duplicative due diligence, underwriting and processing costs by accelerating the contract renewal process. Upon acceptance of the Eligible Project for processing by HUD, and upon notification of such acceptance from PAE to the Owner:

   i. The Owner must agree to make a contract renewal request (including, if required, a rent comparability study), within 60 days after the PAE so requests, and to provide copies thereof to OAHP and the PAE.

   ii. The contract renewal process for such Expiring Contract will be accelerated; with renewal being approved by the party designated to do so under the Section 8 Renewal Policy Guide (e.g., contract administrator), and with any resulting renewal contract having an effective date not later than the closing date. The PAE and OAHP will review any rent comparability study only if the Eligible Project is eligible for the Mark-to-Market program. The Owner is required to complete the early contract renewal process regardless of whether a Green Retrofit Grant or Green Retrofit Loan is offered by HUD. The Expiring Contract will be terminated when the early renewal contract term begins.

   iii. The Owner must indicate whether the Eligible Project is an "eligible multifamily housing project" under MAHRA (note that projects whose debt has been restructured pursuant to the Mark-to-Market program or the Portfolio Reengineering Demonstration program are not M2M eligible), and if not, the reason(s).

   iv. Failure to provide the early renewal request, including any required rent comparability study, timely constitutes grounds for rejection under Paragraph IV.H.

g. If utilities are tenant-paid, the Owner shall use best efforts to obtain tenant releases so that the PAE can obtain information about actual tenant utility consumption directly from each utility company.

   i. For tenants in occupancy twelve months or more, releases shall be sought from all tenants whose names appear in the list discussed in Paragraph II.A.15.

ii. Releases shall authorize the utility company to release the needed information to the Owner, HUD and any designee of HUD.
iii. The needed information is the actual utility consumption and expense for the tenant for the most recent twelve months.
iv. The Owner shall use a form of permission / release that is acceptable to the utility company.
v. The signed permission / release forms must be attached to and submitted with the GRP Application.
vi. If the Owner is unable to obtain at least 50 percent of the possible tenant release forms, the Owner must provide a discussion of the efforts undertaken to obtain releases, and such efforts must include written communication to each tenant on at least two different occasions, an on-site tenant meeting following the first written communication, and at least two in-person attempts to contact each tenant that did not provide a release form after being requested to do so.

h. The Recovery Act requires transparent reporting of the use of all funds. The approved Green Retrofits will be available through a public website. The Owner must provide bids/cost estimates for proposed Green Retrofits, within a time period reasonably prescribed by the PAE (generally within fifteen (15) days), from sources that are not the Owner, an Affiliate of the Owner, the management agent, or an Affiliate of the management agent. It is the Owner's responsibility to ensure that contractors are properly licensed and have the capacity to complete the work properly and timely. The PAE may recommend to HUD that an Owner, management agent, or one or more of their respective Affiliates may complete the Green Retrofits, but the bids/ cost estimates must be supported by arms-length bids/cost estimates. HUD requires the Owner obtain bids/cost estimates whenever the Green Retrofit costs are of a certain size, are uncertain, or are subject to change. Specifically, at least one bid/cost estimate is required for any item costing from $10,000 to $50,000; and multiple bids/cost estimates are required for any item costing $50,000 or more. In addition, bids may also be required for any of the following reasons:
i. For any item that is subject to significant price fluctuations, and/or
ii. For any item that is unique or not immediately available from established vendors, and/or
iii. For any item that is only available from a limited number of suppliers, and/or
iv. For any item that should be supported by a bid, at the discretion of the Owner, and/or
v. For any significant item that should be supported by a bid, at the discretion of the PAE.

i. The Owner understands that Eligible Projects that are partially assisted, as that term is defined in this Notice (see Paragraph IV.F.3.a), Eligible Projects with large project account balance (see Paragraph IV.F.3.b), and Eligible Projects requiring improvements that cannot be funded by the GRP (see Paragraph IV.F.3.c), will require an owner contribution. The Owner agrees to provide the

source of the contribution, approved by all other parties who must consent, upon request by the PAE.

B. **GRP Application Submission Instructions**. Applicants must follow these instructions for submitting their GRP Application to HUD. There are two sets of instructions, one for emailing the EXCEL spreadsheet component of the GRP Application and one for mailing the paper components of the GRP Application. Both sets of instructions must be satisfied in order to submit a GRP Application.

1. **Emailing the EXCEL Spreadsheet.** The GRP Application includes an EXCEL spreadsheet with two worksheets, one being the Application Form and the other being the Initial Feasibility Assessment. The Owner must email the completed EXCEL file, named "[project]_[last four numbers of REMS number].xls" or in the event the project does not have a REMS number, "[project]_[citystate].xls" to GRPAPPLICATION@HUD.GOV. This portion of the GRP Application will be accepted for processing if received on or after June 15, 2009. Earlier submissions will be rejected.

   Mailing the Required Documentation. The Owner must print the completed Application Form from the EXCEL spreadsheet component of the GRP Application, sign it, and include it as the cover page for the required documentation that is mailed to HUD. All other documents required to be submitted should be included in the order they are referenced in this Notice. The mailing should be sent to HUD using any service to ensure it is received within seven (7) days after the date of emailing the EXCEL spreadsheet as instructed in subparagraph 1. However, HUD advises that Owners who plan to use regular mail delivery through the U.S. Post Office should allow an additional five days for that delivery to arrive at HUD (effectively providing the Owner no more than two (2) days after emailing the EXCEL spreadsheet to mail the paper submission). If for any reason whether or not in the Owner's control HUD has not received the mailing within seven (7) days after the date of receiving accompanying email spreadsheet, the GRP Application will be rejected. Owners are encouraged to use a service that can track receipt of the mailing at HUD. The mailing must be addressed to:

   U.S. Department of Housing and Urban Development
   Office of Affordable Housing Preservation
   Green Retrofit Program for Multifamily Housing
   ATTN: GRP Application Delivery
   451 7th Street, SW, Room 6222
   Washington, DC 20410

2. **Rejected GRP Applications.** HUD will notify applicants when the GRP Application has been rejected and the reasons for rejection but will not return any files or documentation submitted to HUD. Applicants whose GRP Application was rejected for failure to follow the submission instructions may resubmit the entire application. The requirements for emailing and mailing the resubmitted GRP Application are identical to those for the original delivery, as described in subparagraph 1 and 2 above. Resubmissions shall be processed based on the validated date and time of receipt of the resubmission.

C. **Threshold Requirements.**

1. **Complete Application.** Incomplete applications will be rejected and HUD will notify the applicant of the rejection but will not return any files or documentation submitted to HUD. Applicants notified of incomplete or non-responsive applications may resubmit revised applications. Resubmissions shall be processed based on the validated date and time of receipt of the resubmission.
2. **Authorized Representative.** The required certifications discussed in subparagraph A must be made by an authorized representative of the Owner. These certifications may not be made by the management agent or by a consultant or contractor.
3. **Compliance with Fair Housing and Civil Rights Laws.** If any of the conditions listed below are applicable, the application will be rejected. If the owner:
   a. Has been charged with an ongoing systemic violation of the Fair Housing Act; or
   b. Is a defendant in a Fair Housing Act lawsuit filed by the Department of Justice alleging an ongoing pattern or practice of discrimination; or
   c. Has received a letter of findings, identifying ongoing systemic noncompliance under Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, or section 109 of the Housing and Community Development Act of 1974, and the charge, lawsuit, or letter of findings referenced in subparagraphs (a), (b), or (c) above has not been resolved to HUD's satisfaction before submitting the GRP Application, the application will be rejected.

III. GRP Physical Condition Assessment (GRPCA)

A. **In General.** Each GRPCA shall include an assessment of traditional replacements, an assessment of potential Green Retrofits, an energy audit, an IPM inspection, a 20 year projection of capital needs, and such other components as HUD may require.

B. **GRPCA Requirements.** The requirements for the GRPCA and the requirements for the qualifications of the GRPCA providers are available from the GRP web site.

C. **Assessment of Traditional and Green Alternatives.** The GRPCA shall include the provider's assessment of, and recommendations concerning, Green alternatives (incorporating Green Retrofits) to traditional replacement strategies. The GRPCA shall take the following into account in developing its analysis of traditional and Green alternatives.

1. **Required Green Alternatives.** The GRPCA provider shall recommend the following (the Secretary may waive any of the following requirements upon a showing by the PAE that the requirement is unnecessary or impractical):
   a. Products and Appliances.
      i. If not currently installed: low-flow faucet aerators, low-flow shower heads, and low-flush toilets. The GRPCA shall recommend low-flow faucets if faucets need to be replaced.
      ii. ENERGY STAR rated refrigerators, for existing refrigerators having 15 percent or less remaining useful life.

iii. ENERGY STAR rated dishwashers, for existing dishwashers having 15 percent or less remaining useful life.

b. Heating and Cooling.
   i. Recommended HVAC unit sizes and efficiency ratings determined by the GRPCA provider using methodology acceptable to HUD.
   ii. ENERGY STAR rated HVAC systems, for existing systems having 15 percent or less remaining useful life. However:
      A. The GRPCA provider may recommend evaporative cooling in lieu of air conditioning for Eligible Projects in appropriate climate zones.
      B. If the Eligible Project has Packaged Terminal Air Conditioner (PTAC) units, the GRPCA provider may recommend Packaged Terminal Heat Pumps, PTAC units, or conversion to central air conditioning.

c. Water Heaters. High efficiency domestic hot water heaters, for existing hot water heaters having 15 percent or less remaining useful life. If natural gas is used for domestic hot water heating, the GRPCA provider shall recommend ENERGY STAR rated natural gas fired hot water heaters. Otherwise, the GRPCA provider shall recommend the highest efficiency units that are cost-justified for the Eligible Project, using analytical methods approved by HUD.

d. Building Envelope.
   i. ENERGY STAR rated windows, for all existing single-pane windows and for any other existing windows having 15 percent or less remaining useful life.
   ii. ENERGY STAR rated sliding glass doors, for all existing sliding glass doors having 15 percent or less remaining useful life.
   iii. ENERGY STAR rated storm doors, for all existing storm doors having 15 percent or less remaining useful life, but not when used with ENERGY STAR rated exterior doors.
   iv. ENERGY STAR rated exterior doors, for all existing doors opening to unheated/uncooled areas having 15 percent or less remaining useful life, but not when used with ENERGY STAR rated storm doors.
   v. Additional insulation in accessible areas, to the current new construction code requirement. If additional insulation beyond the new construction codes requirement can be cost-justified, using analytical methods approved by HUD, the GRPCA provider shall recommend such addition insulation.

e. Lighting.
   i. ENERGY STAR rated interior compact fluorescent light bulbs.
   ii. Replacement of lighted exit signs with LED fixtures.

f. Ventilation and Indoor Air Quality.
   i. ENERGY STAR rated ceiling fans, for all existing ceiling fans having 15 percent or less remaining useful life.
   ii. Bath and kitchen exhaust ducted to the outside, if practicable.
   iii. ENERGY STAR rated bath and kitchen exhaust fans to replace existing ducted fans having 15 percent or less remaining useful life.

iv. No or Low-volatile organic compound (no/low-VOC) cabinets, or sealing open surfaces and cut edges, when replacing kitchen cabinets and bath vanities.
v. Use of no/low-VOC paint and sealants for interior applications.
vi. Carbon monoxide alarm on each occupied floor of the unit, near the bedroom, if there is a nearby combustion source.

g. Other Green Features.
i. Any recommended landscaping improvements are required to evaluate practical water conservation measures including xeriscaping.
ii. Any physical changes needed to facilitate integrated pest management approaches.
iii. Up-front changes to facilitate recycling of household wastes, if practicable considering the property configuration and the local recycling options.
iv. Maintenance of a collection point within the Eligible Project for hazardous wastes (e.g., electronic equipment, computer printer ink, compact fluorescent bulbs, lithium batteries) of tenants and of the Eligible Project, and environmentally sound disposal of such wastes, if the Owner determines that to do so is operationally practicable and financially reasonable.
v. Green management of rehabilitation/construction debris.

2. **Optional Green Alternatives.** In the interest of simplifying implementation of the GRP, HUD provides participating Owners with the option for the GRPCA not to evaluate certain advanced and/or high-cost Green alternatives that the Owner is not seriously interested in pursuing. When the Owner applies to participate in the GRP, the Owner may indicate its willingness to consider each of the optional Green alternatives listed below. More information on each of these optional Green alternatives is available from the GRP web site, and HUD encourages Owners to carry out their own due diligence as well. The GRPCA will evaluate each optional Green alternative only if the Owner states a serious willingness to consider it:

a. Combined heat and power ("CHP", sometimes also referred to as co-generation). CHP utilizes a generator to produce electric power for use in the building, and captures the resulting heat for use to heat the building. Ideal candidates for CHP are large buildings, with central hot water generation, that can or could utilize centrally generated hot water for heating, in areas with electricity costs above 10 cents per kilowatt hour.
b. Green energy. Solar, wind or geothermal system installations that would provide an alternate energy source for the Eligible Project. Solar installations are photovoltaic panels that convert sunlight into electricity. Wind installations are windmills or wind turbines which, in areas with frequent wind activity, convert wind into electricity. Geothermal installations take advantage of the near constant temperature below ground and use that as a source of heat in the winter and cooling in the summer.
c. Fuel Cells. Fuel cells owned by a property to produce electricity from natural gas or hydrogen are becoming less expensive and can be an efficient source of electric power.

d. Vegetative roof (sometimes referred to as a green garden roof). Vegetative roofs are flat roofs that utilize a cover of grass or other vegetation, providing additional insulation, reducing the "heat island" effect of traditional roofs, and improved storm water management.

e. Reflective metal roof. Reflective metal roofs are pitched roofs in lighter colors that reduce the "heat island" effect of traditional roofs. Reflective metal roofs have a significantly higher initial cost but also have a significantly longer useful life, by comparison to standard roof systems. Reflective metal roofs may be ENERGY STAR rated.

f. Roofing shingles. ENERGY STAR qualified roof products reflect more of the sun's rays. This can significantly lower roof surface temperature, decreasing the amount of heat transferred into a building. These products can also help reduce the amount of air conditioning needed in buildings.

g. Floors. Conversion of carpeted surfaces to smooth-and-cleanable surfaces such as linoleum to reduce allergens or to make thorough cleaning easier.

h. Siding. Replacement of existing siding with cementitious (cement fiber) siding.

i. Compact fluorescent lighting (CFL) or light emitting diode (LED) fixtures. ENERGY STAR rated interior CFL or LED fixtures.

j. Porous Pavers. Porous pavers can be used to reduce water run-off or preserve grassy areas in rarely used access routes.

k. Retention Ponds. Retention ponds reduce and manage water run-off and can be used as an irrigation source. They are generally more effective than detention ponds.

l. Greywater Recycling. Greywater recycling refers to re-use of minimally contaminated water from sinks and washing machines for irrigation water.

3. **Cost-Effectiveness.** In the interest of cost-effectiveness, HUD places the following limits on additional cost for Green alternatives:

   a. The GRPCA shall analyze the optional Green alternatives discussed in subparagraph 2 above only if the Owner indicates willingness to consider such Retrofits and HUD concurs.

   b. However, the PAE may contract with the GRPCA provider to provide analysis of the optional Green alternatives discussed in subparagraph 2 on a case by case basis.

   c. Other than as discussed above regarding combined heat and power, solar, and wind systems, the GRPCA shall not consider the addition of electric power generation systems.

   d. With regard to other Green Retrofits that are intended to reduce utility consumption, if the potential Green Retrofit exceeds the cost of the traditional alternative by more than the greater of (1) $1,000 per unit or (2) 30%, the GRPCA will not consider or recommend it.

4. **Recovery Act Section 1604 Restrictions.** The GRP proceeds (whether Green Retrofit Grant or Green Retrofit Loan) cannot be used for, and the GRPCA shall not include any proposed Green Retrofit which will directly benefit, any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.

D. **Energy Audit.** The purpose of the energy audit is to have a qualified energy specialist identify the most promising opportunities for reducing utility costs, and to make estimates of potential utility consumption savings and utility cost savings if each of those candidates is implemented. The scope of the energy audit is described in the GRPCA scope of work.

E. **Integrated Pest Management (IPM) Inspection.**

1. **IPM Inspection Generally.** The IPM inspection includes placing and retrieving glue traps to determine whether any infestation currently exists, inspecting for evidence of infestations, identifying opportunities to seal pest entry points, and identifying opportunities to make landscaping changes to discourage pests from entering the buildings.
2. **Includes Evaluation of Pest Management Practices.** The IPM inspection also includes evaluation of current pest management practices and identifying opportunities to incorporate IPM principles into the property's pest management approach.
3. **Owner's IPM Commitment.** Each Owner who receives a Green Retrofit Grant or Green Retrofit Loan agrees to adhere to IPM practices in the ongoing operation of the Eligible Project for the life of the Green Retrofit Program Use Agreement.

F. **Environmental Screen.** The GRPCA will include completion of a standard template form available from the GRP web site that will assist HUD in completing its environmental review. See Paragraph IV.K.

IV. Commitments and Funding

A. **Applicant Pool.** HUD will limit initial acceptance for processing to Eligible Projects having a total number of units not exceeding the estimated funding capacity of the GRP.

1. **Application Period.** No GRP Applications will be accepted until June 15, 2009. Applications received after on and after that date will be evaluated on a first come, first served basis for potential assignment to the applicant pool.
2. **Size of Pool.** Initially, HUD will accept for processing Eligible Projects having not more than 20,000 units in total.
3. **Caps by Project Category.** Subject to the actual mix of applications, HUD has calculated the initial applicant sub-pools in proportion to the number of units in that program type likely to be eligible for the Green Retrofit Program to further its goal of encouraging diversity in applicants:
    a. Section 202 Projects - 18.4% of units initially accepted for processing which is approximately 3,700 units.
    b. Section 811 Projects - 1.7% of units initially accepted for processing which is approximately 350 units.
    c. USDA Section 515 Projects with Project Based Section 8 - 5.1% of units initially accepted for processing which is approximately 1,000 units.
    d. Other Project-Based Section 8 Projects - 74.8% of units initially accepted for processing which is approximately 15,000 units.
4. **Other Caps.**
    a. Projects Under Control of Owner or Affiliates - No more than 3.0% of units

initially accepted for processing in projects under control of Owner or Affiliates.

b. By HUD Region - HUD will seek geographic diversity in the Applications. Initially, no more than 20% of units accepted for processing will be located in any one HUD Region.

5. **Projects in Multiple Categories.** Each project will be counted in each applicable category. For example, in order for a Section 202 project in Region 7 to be placed in the initial applicant pool, there must be room to accommodate the project within the limit on Section 202 Projects and within the limit on projects in Region 7.

6. **Waiting List.** HUD will establish a waiting list from which to select further projects in the event that funding is available after the initial applicant pool has been processed.
   a. Applications that are not complete will be rejected without further review.
   b. Each additional Eligible Project that is not initially selected for the applicant pool will be placed on the waiting list in the order the Owner's complete GRP Application was received by HUD.
   c. Eligible Projects will be selected from the waiting list in waiting list sequence without regard to the limitations discussed in subparagraphs 3 and 4 above. Those limitations apply only with respect to initial assignments to PAEs.

7. **Application List on GRP web site.** At least weekly, HUD will post a summary of applications on the GRP web site, showing total units by project category for Eligible Projects selected for the applicant pool, and showing waiting list status for all other Eligible Projects.

B. **No Re-Application.** If a property is accepted for processing in the GRP and its participation does not result in a Green Retrofit Plan Commitment that is executed by both the Owner and HUD, the Owner may not re-apply to participate in the GRP.

C. **HUD's Offer for Funding.** Making application for a Green Retrofit Grant or Green Retrofit Loan does not impose an obligation on HUD to process, assign to a PAE, approve or fund the requested transaction. HUD shall make any offer for a Green Retrofit Grant or a Green Retrofit Loan in writing, and such offer will include all conditions to such offer. HUD does not reserve funding until such time as both the Owner and HUD have executed the Green Retrofit Plan Commitment.

D. **Green Retrofit Plan Commitments, Execution, and Funding.**

1. **Offer of Green Retrofit Plan Commitment.** HUD shall offer a Green Retrofit Plan Commitment, for execution by the Owner, subject to the availability of funding.
2. **Owner Execution of Green Retrofit Plan Commitment.** The PAE must receive the executed Green Retrofit Plan Commitment no more than ten days after the date of the commitment. The Owner must execute and return the commitment to the PAE by fax and by overnight delivery service.
3. **Funding Reservation.** HUD shall reserve funding for a transaction when HUD executes the Green Retrofit Plan Commitment.
4. **Funding Obligation.** HUD shall obligate funding for a transaction at the closing.
5. **Expiration of Commitment.** A Green Retrofit Plan Commitment shall expire, and any funds reservation shall be canceled, if the proposed transaction has not closed 30 days

following HUD's execution of the Green Retrofit Plan Commitment.

6. **When Available Funding is Reserved or Obligated.** Once all appropriated funds have been reserved:
    a. HUD shall maintain a waiting list of transactions with approved Green Retrofit Plan Commitments executed by the Owner, not executed by HUD, and for which no funding is available. This is distinct from the waiting list (to be assigned to a PAE) discussed in Paragraph IV.A; this is a separate waiting list of approved projects that are waiting for potential funding.
    b. As previously reserved funding is recaptured, HUD shall execute the Green Retrofit Plan Commitment and reserve funding in the order in which the Owner executed the commitment.

E. **Initial Feasibility Assessment.** The Recovery Act requires that HUD determine that each property proposed for funding is physically and financially viable and is likely to be maintained and preserved long-term. To meet this requirement, HUD and the PAE will make an Initial Feasibility Assessment, to determine whether the project, after the proposed Green Retrofits have been completed, is likely to be maintained and preserved long-term.

1. **HUD Template.** The Initial Feasibility Assessment will be made using a template prescribed by HUD. The template will use amounts reported in the AFS (without adjustment), will use formulas and standards prescribed by HUD, and will not require or allow judgment or adjustment by the Owner, HUD or PAE. The initial feasibility assessment template is available from the GRP web site. An Eligible Project will be rejected unless it passes the Initial Feasibility Assessment.
2. **Requirements to Pass Initial Feasibility Assessment.** An Eligible Project can pass the Initial Feasibility Assessment in either of the following two ways:
    a. HUD's minimum thresholds for debt service coverage ratio and operating cushion are met or exceeded. The minimum thresholds vary by program type. The minimum thresholds are calculated, and program type is determined, in the HUD-prescribed template.
    b. HUD determines that project-specific information provided in GRP Application supports a presumption that, if a PAE completed a due diligence and underwriting assessment, the project would pass the Final Feasibility Assessment, and on that basis the project should be deemed to have passed the Initial Feasibility Assessment.
3. **Owner Completes the Template Initially.** The Owner will provide a copy of the HUD template, completed with information on the project, at the time of the GRP Application.
    a. If, based on the owner's information, the Eligible Project passes the Initial Feasibility Assessment; HUD will assign the project to a PAE to validate the Initial Feasibility Assessment.
    b. If, based on the owner's information, the project does not pass the Initial Feasibility Assessment, the Owner must include with its GRP Application, a discussion of project-specific reasons that if accepted would result in the project meeting or exceeding HUD's minimum requirements. See subparagraph 5 for additional information on such potential project-specific reasons.

4. **PAE's Validation of Initial Feasibility Assessment.** Upon assignment of a project to a PAE for processing, and prior to ordering any due diligence materials, the PAE will verify the Owner's information contained in the Initial Feasibility Assessment.
    a. If, based on the PAE's verification, the project passes the Initial Feasibility Assessment; the PAE will proceed with processing, will order the GRPCA and other appropriate due diligence materials, and will proceed with development of a proposed Green Retrofit Plan.
    b. If, based on the PAE's verification, the Eligible Project does not pass the Initial Feasibility Assessment, the PAE will discontinue processing and HUD will reject the GRP Application. The Owner will be notified but no files or materials submitted by the Owner will be returned by HUD.
5. **Potential Project-Specific Reasons That May Support Being Deemed to Have Passed the Initial Feasibility Assessment After Failing It.** For example, the Owner might be able to show that:
    a. The existing first mortgage debt has been refinanced to reduce monthly payments; or
    b. The existing first mortgage debt will mature and be extinguished soon enough to allow the project to be feasible; or
    c. The project is currently undergoing a Mark to Market restructuring, or simultaneous with the GRP Application has made the election to enter the Mark to Market program, and the expected restructuring will reduce monthly payments and operating expenses;
    d. A grant or soft loan has been obtained, that will be used to reduce the needed Reserve for Replacements deposit; or
    e. An analysis of capital replacement costs included in the historical operations and maintenance expenses shows that a greater reduction in these expenses is likely than is assumed in the HUD feasibility template; or
    f. The Owner may be able to show that some expenses incurred historically will not be needed in the future (for example, that a one-time expense due to a water leak should be removed from the historical expenses for purposes of feasibility analysis).
    g. The most recent actual real estate tax payment and/or insurance premium is lower than the level shown in the Initial Feasibility Assessment.

    In general, information about actions that the Owner plans to take (but has not actually taken) will not be considered persuasive. In general, suggestions that historical costs can be reduced will not be considered persuasive unless the Owner has actually entered into a new contract(s) providing for such lower costs.

F. **PAE's Development of Proposed Green Retrofit Plan.** The PAE will make at least the following determinations, in the process of preparing a proposed Green Retrofit Plan:
1. **Financial and Underwriting Analysis.** The PAE will use an electronic underwriting model prescribed by HUD (a copy of the underwriting model is available from the GRP web site) to carry out financial and underwriting analysis as required by HUD including without limitation:
    a. Financial evaluations of potential Green Retrofits.

b. An adequate ongoing monthly deposit to the Reserve for Replacements, assuming that Green Retrofits are made, in accordance with subparagraph N.
c. Estimated pro forma cash flow, if Green Retrofits were made.
d. A Final Feasibility Assessment, based on the preceding, in accordance with subparagraph 4 below.
e. Note that the PAE may use the Mark-to-Market program underwriting for a project that is undergoing debt restructuring and is accepted for GRP processing. In the event of any conflict between this Notice and the Mark-to-Market Operating Procedures Guide, the Secretary will determine the governing requirements.

2. **Recommended Green Retrofits.**
   a. The Green Retrofits that the PAE determines are most appropriate for the project, taking into account the long-term physical and financial viability of the project, potential reductions in energy and water usage, potential benefits to resident health, and potential benefits to the environment. In making this determination, the PAE shall give the Owner an opportunity to comment on the GRPCA, for example to point out issues that may affect the practicability or cost of particular alternatives, and shall consider the tenant comments provided at the tenant meeting.
   b. Recommended Green Retrofits shall be prioritized, and the reasons for the priority sequence shall be discussed.

3. **Required Owner Contribution.** The Owner will not be required to make a contribution toward Green Retrofits except for partially assisted projects and large project account balance projects as described below. In the event a project is both partially assisted and has a large project account balance, HUD will require the larger of the two possible owner contributions:
   a. Partially Assisted Projects - Green Retrofits must be made in all units of an Eligible Project, however, the Green Retrofit Loan or Green Retrofit Gran cannot be used to fund Green Retrofits for non-assisted units except as follows: The requirement for owner contribution is limited to Eligible Projects having fewer than 100% of the units subject to a contract for Project-Based Assistance, net of non-assisted units that are utilized for Project benefit such as community room, property manager housing, rental office, etc., not to exceed the lesser of 10% of the total number of Eligible Project units, or 5 units. For such projects, at the time the Owner requests to participate, the Owner must agree in advance that at the closing the Owner will deposit with the rehabilitation escrow administrator an amount based on the following formula:
      i. Determine the number of units that cannot be funded by the Green Retrofit Grant or Loan by subtracting from the total Eligible Project units, all units subject to a contract for Project-Based Assistance and all non-assisted units that are utilized for Project benefit (using the lesser of 10% of the total number of Eligible Project units, or 5 units). This difference is the number of units that cannot be funded in the GRP. Multiply the number of units that cannot be funded in the GRP by the total estimated amount of the Green Retrofit Grant or Loan (Owner is to assume $10,000 per unit in its

GRP Application but the Owner will be responsible for the actual costs up to $15,000 per unit);

ii. For Eligible Projects with mortgage loans from, or insured by, the Secretary, the required deposit may be made in whole or in part from project funds only if the multifamily field office with jurisdiction gives its advance approval in writing and if HUD determines that remaining project funds are adequate for purposes of the Final Feasibility Assessment. Any such approval must be provided together with the GRP Application.

iii. Example: the project has 120 units, of which 84 (70%) are subject to a contract for Project-Based Assistance. The 36 non-assisted units include 6 non-assisted units for various Project benefit purposes. For a Project with a total scope of retrofits equal to $10,000 per unit, the Owner would be required to deposit $310,000 at the closing (120 units less 84 assisted units, less 5 non-assisted units (using the lesser of 10% of total units or 5 units) = 31 units that cannot be funded in the GRP) x $10,000 per unit = $310,000.

iv. At the time the Owner submits the GRP Application, the Owner must demonstrate to HUD's satisfaction that the Owner has a source of funds for the required contribution, estimated at $10,000 per unit, and that the funds are committed.

b. Projects with Large Project Account Balances - This requirement is limited to Eligible Projects having combined Reserve for Replacements and Residual Receipts balances in excess of $5,000 per unit. The balances shall be measured as of the date of most recent audited financial statements of the Eligible Project as of the date of the GRP Application. For such projects, at the time of the GRP Application, the Owner must agree to deposit with the rehabilitation escrow administrator, at the closing, an amount equal to the lesser of the amount by which such balances exceed $5,000 per unit; and the following:

i. The total estimated in accordance with Paragraph V.E.1 through 7, or VI.E.1 through 7 as applicable;

ii. Times 50%.

The required deposit shall be made in whole from such project account balances, subject to the written approval of the multifamily field office with jurisdiction.

c. The Green Retrofit Grant or Green Retrofit Loan is only available for energy or green retrofits. In the unlikely event that installation of the Green Retrofits requires tenant relocation, those relocation expenses cannot be funded by the Green Retrofit Grant or Green Retrofit Loan. For items identified in the GRPCA as non-functioning and requiring repair and that are not Green Retrofits:

i. Exigent health and safety items must be mitigated immediately by the Owner. Within 72 hours from the date of the inspection, the Owner must submit a certification to the field office that these items have been mitigated successfully. Failure to mitigate and provide the certification within the time period will constitute grounds for a determination that the project is an Ineligible Project pursuant to Paragraph IV.H.

ii. Other items must be repaired by the Owner within sixty days after notice from the PAE or HUD. Failure to complete these repairs within that time

period will constitute grounds for a determination that the project is an Ineligible Project pursuant to Paragraph IV.H. No offer for a Green Retrofit Loan or Green Retrofit Grant will be issued until such items have been repaired.

4. **Final Feasibility Assessment.** The PAE determines whether the Eligible Project will be physically and financially viable and is likely to be maintained and preserved long-term, after implementation of a Green Retrofit Plan, based on full due diligence and underwriting.
    a. The Final Feasibility Assessment will be made using the electronic underwriting model prescribed by HUD.
    b. The Final Feasibility Assessment will use the same threshold requirements for debt service coverage ratio and operating cushion as the Initial Feasibility Assessment.
    c. If the PAE determines that the Eligible Project passes the Final Feasibility Assessment, the PAE will develop a proposed Green Retrofit Plan.
    d. If the PAE determines that the Eligible Project does not pass the Final Feasibility Assessment, the PAE will recommend to HUD that no Green Retrofit Plan Commitment be issued to the Owner. If HUD determines that no Green Retrofit Plan Commitment should be issued:
        i. If the property is eligible for a Restructuring Plan, HUD shall not offer a Green Retrofit Grant or Green Retrofit Loan except in conjunction with a Restructuring Plan.
        ii. Otherwise, HUD shall elect in its sole discretion either to not offer a Green Retrofit Grant or Green Retrofit Loan; or to offer a Green Retrofit Grant or Green Retrofit Loan contingent upon the Owner curing, at the Owner's expense from non-project funds, the factors causing the Eligible Project not to be viable long-term.
5. **Owner's Proposed GRP O&M Plan.** The acceptability of the Owner's proposed GRP O&M Plan;
6. **Recommended Terms of Green Retrofit Grant or Loan.** The amount and other terms of the proposed Green Retrofit Grant or Green Retrofit Loan as applicable; and
7. **Recommended REDA.** A proposed Green Retrofit Program Rehabilitation Escrow Deposit Agreement setting forth each Green Retrofit together with appropriate specifications and other performance criteria.

G. **Cooperation with Owner and Management Agent and Comments from Residents in Green Retrofit Plan Development.** A PAE must use its best efforts to seek the cooperation of the Owner and management agent in the development of the Green Retrofit plan, and to obtain comments from the Owner and management agent, and to consider comments provided by residents in the required tenant meeting, when developing the PAE's recommendations.

H. **Rejection of a Request for a Green Retrofit Plan Because of Actions or Omissions of Owner or Affiliate or Project Condition.** Notwithstanding an initial determination to accept the Owner's request for a Green Retrofit Plan, the PAE is responsible for a further, more

complete and ongoing assessment of the eligibility of the Owner and project while the Green Retrofit Plan is being developed. If any of the grounds for rejection below exist, HUD may elect not to permit continued processing toward (or consideration of) a Green Retrofit Plan. HUD will advise the PAE if at any time HUD becomes aware that any of the grounds for rejection listed below exist. The PAE must advise HUD if at any time the PAE becomes aware that any of the grounds for rejection listed below exist.

1. **Suspension or Debarment.** At any time before a closing, the Owner is debarred or suspended under 2 CFR Parts 180 and 2424 as well as 48 CFR Parts 9 and 2409.
2. **Other grounds.** If:
    a. An Affiliate is debarred or suspended under 2 CFR Parts 180 and 2424 as well as 48 CFR Parts 9 and 2409; or
    b. The Owner, the management agent, or any Affiliate of the Owner or management agent is subject to a Limited Denial of Participation under 2 CFR Part 2424, Subpart J; or
    c. HUD or the PAE determines that the Owner is an Ineligible Owner; or
    d. HUD or the PAE determines that the project does not meet the physical condition standards in 24 CFR Part 401.558 and that the poor condition of the project is not likely to be remedied in a cost-effective manner through the Green Retrofit Plan; or
    e. The PAE has determined that the Owner and/or management agent has failed to cooperate with the PAE's requests for information pursuant to Paragraph IV.G.

I. **Proposed Green Retrofit Plan Commitment.** After the PAE obtains HUD's approval of the Green Retrofit Plan, the PAE submits a proposed Green Retrofit Plan Commitment to HUD for approval, prior to submitting the commitment to the Owner for execution. The template form of Green Retrofit Plan Commitment is available from the GRP web site. The proposed Green Retrofit Plan Commitment must be in a form approved by HUD, incorporate the Green Retrofit Plan, and include the following:

1. **Green Retrofit Grant or Green Retrofit Loan.** HUD will determine what form of GRP funding to offer the Owner, taking into consideration the Owner's preference and HUD's requirements at Paragraph V.B. If HUD offers a Green Retrofit Grant, the commitment will include the amount of the grant. If HUD offers a Green Retrofit Loan, the commitment will include the amount of the loan and the interest rate, term and payment provisions of the loan.
2. **Recommended Green Retrofits.** The Green Retrofits recommended by the PAE, in sufficient detail to allow the Owner to obtain bids.
3. **Fair Housing and Civil Rights Compliance**. The Owner must comply with all applicable fair housing and civil rights requirements in 24 CFR 5.105(a).
4. **Prevailing Wage Requirements.** The Recovery Act requires the payment of not less than prevailing wage rates (Davis-Bacon wage rates) to all laborers and mechanics employed on Green Retrofit construction work. Additional information about Davis-Bacon wage and reporting requirements can be found at HUD Office of Labor Relations web site, www.hud.gov/offices/olr and at the Department of Labor (DOL) web site, www.dol.gov/esa/whd/contracts/dbra.htm. HUD Labor Relations staff are available to provide technical assistance. A list of the staff, their contact information,

and the jurisdictions they serve are on the Labor Relations web site (see above). See also HUD Handbook 1344.1, Federal Labor Standards Compliance in Housing and Community Development Programs.

a. The DOL determines locally prevailing wage rates which are published in Davis-Bacon wage decisions. Wage decisions may be accessed at www.wdol.gov.
b. Owners will be required to incorporate form HUD 2554, Supplementary Conditions of the Contract for Construction, and the applicable Davis-Bacon wage decision in all Green Retrofit construction contracts.
c. All construction employers, including the owner where the owner's own employees perform covered construction work, will be required to prepare, certify and submit to the owner weekly payroll reports for each week work is performed on the project. Owners must collect and submit these payroll reports to HUD or its designee. Construction employers are encouraged to use optional Payroll form WH-347. This form and instructions are available online at www.dol.gov/esa/whd/forms/wh347instr.htm.
d. Inspectors at the property on behalf of HUD will conduct interviews with laborers and mechanics employed in the construction work. The interviews will be taken in confidence and documented on form HUD-11, Record of Employee Interview. Information collected during these interviews will be compared to the corresponding payroll reports to evaluate compliance.

5. **Flood Insurance.** If an Eligible Project is located in a Special Flood Hazard Area (SFHA) designated by the Federal Emergency Management Agency (FEMA), a Green Retrofit Grant or Green Retrofit Loan may be provided only if
   a. The Owner has the necessary flood insurance and provides evidence of it at closing;
   b. The Owner does not have the necessary flood insurance and will obtain it and provide evidence of it prior to closing; or
   c. The property is in an SFHA in a community that does not participate in the National Flood Insurance Program but less than one year has passed since the FEMA notification regarding such hazards.
6. **Rehabilitation Escrow Management.** The template form of Green Retrofit Program Rehabilitation Escrow Deposit Agreement is available from the GRP web site.
   a. Rehabilitation escrow arrangements, which shall include placing all Green Retrofit Grant and Green Retrofit Loan funds in escrow to be administered by a rehabilitation escrow administrator selected by HUD, upon such terms and conditions as HUD may require.
   b. A requirement to commence rehabilitation within 60 days following the closing.
   c. A condition that the Owner ensure its contractors and subcontractors are in compliance with the Davis-Bacon requirements in Paragraph IV.I.4 prior to the rehabilitation escrow administrator approving the Owner's request for reimbursement/payment.
   d. A requirement to complete rehabilitation within 12 months following the closing.
   e. A prohibition on disbursements from the escrow, except to disburse the remaining balance to HUD, beginning twenty-four (24) months following the closing.

f. A provision that HUD, in its sole discretion, may extend the deadline for completion of rehabilitation, but not beyond twenty one (21) months following the closing, so as to allow at least 3 months for final inspections and reimbursements.

g. A requirement that any funds remaining in the rehabilitation escrow after payment of all eligible costs be returned to HUD and that the original amount of the Green Retrofit Grant or Green Retrofit Loan as applicable be reduced through a modification to the Legal Documents.

7. **Estimated Sources and Uses.** A schedule setting forth all sources and uses of funds to implement the Green Retrofit Plan.

8. **Required Owner Commitments.** Green Retrofit Owner Commitments in accordance with current guidance from HUD. The most current version of the Green Retrofit Owner Commitments is available from the GRP web site.

9. **Recommended O&M Plan.** A GRP Operations and Maintenance Plan that has been proposed by the Owner and is acceptable to the PAE (the most current version of the GRP O&M Plan is available from the GRP web site).

10. **OMB Reporting Requirements.** The Owner's agreement to comply with any requests from HUD, the PAE or the rehabilitation escrow administrator regarding applicable reporting requirements imposed by the Office of Management and Budget, with respect to the Green Retrofit Loan or Green Retrofit Grant. Specifically:

    a. Recipients of Federal funding under the Recovery Act are required to comply with extensive reporting requirements. The reporting requirements outlined in this Notice may be further amended by the Office of Management and Budget (OMB) or other government authorities.

    b. These reporting requirements apply to the Owner, who will have responsibility for compiling and submitting the required reports down to the first tier sub-recipient (i.e., contractors, but not subcontractors).

    c. If Recovery Act funds are combined with other funds to fund or complete projects and activities, Recovery Act funds must be accounted for separately from other funds and reported to HUD or any federal web site established for Recovery Act reporting purposes.

    d. Required Data Elements. The Owner and each contractor engaged by the Owner are required to submit the following information to HUD:

        i. The total amount of funds received from HUD. This is the amount of funding actually received from the rehabilitation escrow administrator.

        ii. The amount of recovery funds received that were obligated and expended for projects or activities. This is the total amount of funding provided, including the amount of funds for the Green Retrofits and incentives.

        iii. A detailed list of all projects or activities for which recovery funds were obligated and expended, including the name of the project or activity; a description of the project or activity; an evaluation of the completion status of the project or activity; and an estimate of the number of jobs created and the number of jobs retained by the project or activity.

    e. Reporting Deadlines. Reports are due to HUD ten days after the end of each calendar quarter beginning July 10, 2009.

11. **Post-Rehab Utility Baseline Analyses.** The Owner's agreement to provide updated utility releases (for the Owner and for tenants) in connection with any post-rehab utility baseline analyses commissioned by HUD.
12. **Other.** Other terms and conditions prescribed by HUD.

J. **Review of the Proposed Green Retrofit Plan.** Prior to presenting the recommended Green Retrofit Plan to HUD for its review and approval, the PAE will present the recommended Green Retrofit Plan to the Owner for its acceptance. This recommendation will include consideration of all Optional Green Alternatives selected by the Owner in the GRP Application.

1. **Owner Must Accept 75% of Recommended Green Retrofits By Cost.** HUD expects that the PAE's recommended Green Retrofits will be found acceptable by the Owner. The Owner may, however, decline up to 25 percent, by cost, of the originally recommended Green Retrofits.
2. **If Owner Declines.** If the Owner chooses not to accept at least 75 percent of the recommended Green Retrofits, by cost, the PAE will recommend that HUD remove the project from the GRP.
3. **Review and Approval by HUD.** After obtaining the Owner's acceptance, the PAE will submit the proposed Green Retrofit Plan (indicating for each recommended Green Retrofit whether the Owner accepted), to HUD for its review and approval. HUD will complete the Environmental Review described in subparagraph K prior to its approval of the Green Retrofit Plan and/or the Green Retrofit Plan Commitment.
4. **Green Retrofit Plan Commitment.** Based on HUD's decision regarding the proposed Green Retrofit Plan, the PAE will prepare a Green Retrofit Plan Commitment for HUD's review and approval.

K. **Environmental Review.** Before approving a Green Retrofit Grant or Green Retrofit Loan, and before approving a Green Retrofit Plan Commitment, HUD will perform an environmental review on the proposed Project, in accordance with 24 CFR Part 50, as evidenced by HUD's execution of a completed Form HUD-4128. Owners may not undertake work, or commit funds for work, that is proposed to be funded with a Green Retrofit Grant or Green Retrofit Loan, from the time HUD receives the Owner's GRP Application until HUD notifies the Owner that the Green Retrofit Grant or Green Retrofit Loan has been approved following the HUD environmental review. The proceeds of a Green Retrofit Grant or Green Retrofit Loan cannot be used to remediate environmental issues except if the costs are incidental to the approved Green Retrofit (such as removing lead-based paint on window frames when windows are being replaced as a Green Retrofit).

L. **Execution of Green Retrofit Plan Commitment.** After HUD approves the Green Retrofit Plan, the PAE prepares the Green Retrofit Commitment and delivers it to the Owner for execution. After the Owner executes it, the commitment is returned to the PAE, who in turn provides it to HUD for execution.

M. **Closing Conducted by a PAE.** After HUD has executed the Green Retrofit Plan Commitment, a PAE shall arrange for a closing in no more than thirty days, to execute all

documents necessary for implementation of the Green Retrofit Plan. The PAE must use standard documents approved by HUD, each of which will be used without modification unless the PAE determines, and HUD concurs, that modifications are required in order to comply with applicable State or local law.

N. **Reserve for Replacements.** A Reserve for Replacements sufficient to ensure the property's long-term physical and financial integrity is integral to maintaining the property as affordable housing in decent, safe, and sanitary condition meeting the standards of the Uniform Physical Condition Standards in 24 CFR Part 5 subpart G.

1. **If No Reserve for Replacements.** If the Eligible Project does not have a Reserve for Replacements requirement, the Green Retrofit Plan approved by HUD shall recommend such reserve be established.
2. **Annual Inflation Adjustment.** Unless already required in existing agreements, the Green Retrofit Plan Commitment shall require the Owner to initiate adjustment of the deposit to the Reserve for Replacements annually for inflation following the closing of the GRP transaction.
3. **Best Efforts to Make Project Feasible At Current Monthly Reserve Deposit Level.** To the extent practicable, the PAE shall recommend Green Retrofits so that, after implementation, the 20-year capital needs of the project would be able to be met through the existing Reserve for Replacements balance, existing deposit to the Reserve for Replacements (with future inflation adjustments), and a reasonable allowance for interest income.
4. **Required Increase to Monthly Reserve Deposit Level, If Needed.** If the PAE determines that 100% of 20-year capital needs cannot be met through the Replacement Reserve unless the existing deposit is increased, OAHP may, in consultation with the HUD multifamily field office, USDA Rural Development office, or State housing finance agency, as appropriate, recommend an increased deposit to the Reserve for Replacements.
5. **Green Retrofit Grant or Loan Funds May Not Be Deposited to the Reserve for Replacements.** A deposit to the Reserve for Replacements is not an eligible use of GRP funding.
6. **Existing Monthly Deposit is More Than Adequate.** If the existing monthly deposit to the Reserve for Replacements is greater than needed, OAHP may, in consultation with the HUD multifamily field office, USDA Rural Development office, or State housing finance agency, as appropriate, recommend a reduction in the existing deposit to the Reserve for Replacements.

V. Green Retrofit Grant

A. **Statutory Authority.** HUD's offer of a Green Retrofit Grant shall be made under the authority granted to the Secretary under the GRP to specify alternative requirements and will not use any existing HUD grant program.

B. **Eligibility.** There are three categories of Owners of Eligible Projects that HUD, in its discretion, may offer a Green Retrofit Grant or Green Retrofit Loan: (1) Owners of Section

202 projects, (2) Owners of Section 811 projects, and (3) nonprofit Owners of other projects with tenant paid utilities for at least heat and lights. All other Owners of Eligible Projects may only be offered a Green Retrofit Loan, except the incentives funded as part of the transaction will be evidenced by a grant pursuant to Paragraph VI.E.5.

C. **AFS Required.** This requirement is applicable to Eligible Projects that are not currently subject to a requirement to file AFS to HUD, that are not USDA Section 515 projects, and that are not State housing finance agency financed projects. For such projects, each project-based Section 8 contract shall be modified to provide that

1. **Requirement.** The Owner shall comply with the Uniform Financial Reporting Standards of 24 CFR Part 5, Subpart H, including any changes in the regulation and related directives.
2. **Current and Successive Contracts.** This obligation shall apply during the current term of such contract and for each successive renewal term.
3. **Term.** This obligation shall apply during the term of the Green Retrofit Program Use Agreement.

D. **Physical Inspection Required.** If the Eligible Project is not currently subject to such a requirement, each project-based Section 8 contract shall be modified to provide that

1. **Inspection Requirements.** The Owner shall comply with the Physical Condition Standards and Inspection Requirements of 24 CFR Part 5, Subpart G, including any changes in the regulation and related directives.
2. **Other Requirements.** The Owner shall comply with HUD's Physical Condition Standards of Multifamily Properties of 24 CFR Part 200, Subpart P, including any changes in the regulation and related directives.
3. **Current and Successive Contracts.** This obligation shall apply both during the current term of such contract and during each successive renewal term.
4. **Term.** This obligation shall apply during the term of the Green Retrofit Program Use Agreement.

E. **Amount of Green Retrofit Grant.** The amount of the Green Retrofit Grant shall be the sum of:

1. **Green Retrofits.** The estimated cost of the Green Retrofits, as approved by HUD, and less any owner contribution required pursuant to Paragraph IV.F.3;
2. **Contingency.** A 10 percent contingency;
3. **GRP Pre-Development Incentive.** The GRP Pre-Development Incentive of the lesser of 1 percent of the estimated cost of the Green Retrofits or $10,000;
4. **GRP Efficiency Incentive.** The GRP Efficiency Incentive of the lesser of 3 percent of the estimated cost of the Green Retrofits or $30,000;
5. **Targeted Low-Income Job Creation Incentive (If Applicable).** The estimated amount of any Targeted Low-Income Job creation incentive pursuant to Paragraph VII.E:
6. **Rehabilitation Administration Fee.** Any fee for administration of the rehabilitation escrow deposit agreement; and
7. **Utility Baseline Fees.** Any fees for completing:

a. A baseline analysis of the Eligible Project's utility consumption (including utilities paid by tenants) prior to making Green Retrofits.
b. One or more post-closing baseline analyses, after making Green Retrofits.

VI. Green Retrofit Loan

A. **Statutory Authority.** HUD's offer of a Green Retrofit Loan shall be made under the authority granted to the Secretary under the GRP to specify alternative requirements, and will not use any existing HUD loan program.

B. **Eligibility.** Any Eligible Project may be offered a Green Retrofit Loan, at HUD's discretion.

C. **AFS Required.** This requirement is applicable to Eligible Projects that are not currently subject to a requirement to submit AFS to HUD. For such projects, each project-based Section 8 contract shall be modified to provide that
1. **Requirement.** The Owner shall comply with the Uniform Financial Reporting Standards of 24 CFR Part 5, Subpart H, including any changes in the regulation and related directives.
2. **Current and Successive Contracts.** This obligation shall apply during the current term of such contract and for each successive renewal term.
3. **Term.** This obligation shall apply during the term of the Green Retrofit Program Use Agreement.

D. **Physical Inspection Required.** If the Eligible Project is not currently subject to such a requirement, each project-based Section 8 contract shall be modified to provide that
1. **Inspection Requirements.** The Owner shall comply with the Physical Condition Standards and Inspection Requirements of 24 CFR Part 5, Subpart G, including any changes in the regulation and related directives.
2. **Other Requirements.** The Owner shall comply with HUD's Physical Condition Standards of Multifamily Properties of 24 CFR Part 200, Subpart P, including any changes in the regulation and related directives.
3. **Current and Successive Contracts.** This obligation shall apply both during the current term of such contract and during each successive renewal term.
4. **Term.** This obligation shall apply during the term of the Green Retrofit Program Use Agreement.

E. **Amount of Funding.** The amount of the funding shall be the sum of:
1. **Amount of Green Retrofit Loan.**
   a. The estimated cost of the Green Retrofits, as approved by HUD, and less any required owner contribution pursuant to Paragraph IV.F.3;
   b. A 10 percent contingency;
   c. Any fee for administration of the rehabilitation escrow deposit agreement; and
   d. Any fees for completing:
      i. A baseline analysis of the Eligible Project's utility consumption (including utilities paid by tenants) prior to making Green Retrofits.

ii. One or more post-closing baseline analyses, after making Green Retrofits.

2. **Amount of Green Retrofit Grant for Incentives.** Simultaneous with the closing of the Green Retrofit Loan, the Owner will be offered a grant for the GRP incentives which at closing would be deposited to the rehabilitation escrow and earned and distributed as described as noted below:
   a. The GRP Pre-Development Incentive of the lesser of 1 percent of the cost of the Green Retrofits or $10,000 (see Paragraph VII.B);
   b. The GRP Efficiency Incentive of the lesser of 3 percent of the cost of the Green Retrofits or $30,000 (see Paragraph VII.C); and
   c. The estimated amount of any Targeted Low-Income Job creation incentive (see Paragraph VII.E).

F. **Security.**
   1. **Real Property.** The repayment of the Green Retrofit Loan shall be secured by a recorded mortgage or deed of trust.
   2. **Subordination Requirements for Affiliate Indebtedness.** If any existing indebtedness is secured by the Eligible Project and is held by a party that is an Affiliate of the Owner or management agent, any Green Retrofit Plan Commitment shall include a provision requiring that:
      a. The lien of such existing indebtedness be subordinated to the lien of the Green Retrofit Loan; and
      b. Payments toward any such existing indebtedness shall be limited to the share of Surplus Cash, if any, that is distributed to the Owner.
   3. **Personal Property.** The repayment of the Green Retrofit Loan shall also be secured by a security agreement and appropriate Uniform Commercial Code filings with respect to property other than real property.

G. **Payments from Surplus Cash.**
   1. **Legal Documents Control.** The following is a summary of relevant provisions of the Legal Documents. In the event of conflict between this Notice and the Legal Documents, the Legal Documents shall control.
   2. **Surplus Cash Distribution Sequence.** During the term of a Green Retrofit Loan any Surplus Cash shall be distributed annually as described below. NOTE: The definition of Surplus Cash considers accounts payable. HUD recognizes that accounts payable that were not paid or subordinated to the Green Retrofit Loan must be paid or otherwise, funds must be set aside, prior to this distribution sequence.
      a. First, to HUD, in the amount of 50% of the Surplus Cash, as a payment toward the Owner's obligation under the Green Retrofit Loan;
      b. Second, to the Owner, to pay any GRP Incentive Performance Fee earned with respect to such fiscal year;
      c. Third, any remaining Surplus Cash shall be distributed (or deposited into the residual receipts account, as applicable) in accordance with the otherwise applicable provisions of the governing documents of the project.

H. **Acceleration.** HUD may declare the remaining balance of the Green Retrofit Loan

immediately due and payable and exercise any and all remedies provided in the Legal Documents if any of the following occurs:

1. **Rejection of HUD's Renewal Offer.** The Owner fails to request to renew an Expiring Contract, for a period of time that was established in the Legal Documents.; or
2. **Refinancing.** Any debt secured by the project, with a lien position senior to that of the Green Retrofit Loan, is refinanced, terminated, accelerated, or paid in full, except as approved by the holder of the Green Retrofit Loan; or
3. **Sale.** Ownership of the project is transferred and the Green Retrofit Loan is assumed by any subsequent purchaser, unless HUD agrees to such assumption pursuant to Paragraphs VI.K and VI.L.
4. **Default of Business and Legal Documents.** The owner is in default under any document that evidences or secures the Green Retrofit Loan, or any other document executed by Owner in connection with the Green Retrofit Loan including, without limitation, the Green Retrofit Program Use Agreement.

I. **Interest Rate.** The Green Retrofit Loan will accrue interest at a simple rate of interest (not compounded) unless the Owner requests otherwise and HUD agrees. HUD, in consultation with the Owner, may set the interest rate for the Green Retrofit Loan at either:

1. **One Percent.** 1 percent per year; or
2. **AFR.** The Applicable Federal Rate.

J. **Loan Term.**

1. **Minimum and Maximum Term.** HUD, in consultation with the Owner, may set the loan term for the Green Retrofit Loan at no less than 15 years and no more than 35 years.
2. **Required Affordability Period.** In accordance with the Recovery Act requirement for an affordability period of at least fifteen years beyond any pre-existing affordability period, prepayment of a Green Retrofit Loan does not terminate the Green Retrofit Program Use Agreement or the affordability restrictions therein.
3. **Due at Maturity.** The full unpaid balance, including any accrued but unpaid interest, is due and payable at maturity.

K. **Subsequent Modification.** At the request of a project Owner, HUD may take any or all of the following actions with respect to a Green Retrofit Loan, any time more than two years after its origination, if HUD determines in accordance with subparagraph L that such modifications are in the interest of HUD:

1. **Modify Rate.** Modify the interest rate.
2. **Extend Maturity.** Extend the maturity to a date that is no more than 35 years from the date of extension.
3. **Modify Payment Provisions.** Modify the payment priority, payment amount, and/or other payment requirements.
4. **Subordinate.** Subordinate the lien priority and/or payment priority of the Green Retrofit loan to new indebtedness, or otherwise modify the lien or payment priority of the Green Retrofit loan.
5. **Allow Assumption.** Agree to allow assumption of the Green Retrofit loan by a

purchaser.

L. **HUD's determination that modifications are in the interest of HUD.** The Secretary shall determine that the proposed actions are in the interest of the Secretary only if each of the following requirements is satisfied:

1. **Recapture of Excess Reserves.** Any Reserve for Replacements balance in excess of project needs, as determined by HUD, is repaid to HUD as a partial prepayment, up to the full unpaid balance, including any accrued but unpaid interest, of the Green Retrofit Loan; and
2. **Other Applicable HUD Requirements.** The proposed refinancing or sale meets all applicable requirements of HUD other than requirements pursuant to this Notice; and
3. **HUD Share of Proceeds (Sale).** If a proposed sale transaction involves a proposed equity payment to the seller and/or proposed compensation to the purchaser, HUD will require a lump sum partial prepayment of the Green Retrofit Loan equal to 50 percent of such seller and purchaser proceeds, as determined by HUD, up to the full unpaid balance, including any accrued but unpaid interest, of the Green Retrofit Loan, in addition to any prepayment necessary to meet the requirements of subparagraphs 1 or 5; and
4. **HUD Share of Proceeds (Refinancing).** If a proposed refinancing transaction involves a proposed equity pay-out, HUD will require a lump sum partial prepayment of the Green Retrofit Loan equal to 50 percent of the proposed equity pay-out, as determined by HUD, in addition to any prepayment necessary to meet the requirements of subparagraphs 1 or 5, up to the full unpaid balance, including any accrued but unpaid interest of the Green Retrofit Loan; and
5. **Note Value Test.** The proposed actions are in connection with a proposed refinancing of the first mortgage debt, and/or with a proposed sale of the project; and either:
    a. the expected value to HUD of the future stream of repayments, on a net present value basis, would not be decreased as a result of the proposed actions, taking into account any proposed payment to be made at the closing of the proposed refinancing or sale (other than a prepayment pursuant to subparagraphs 1, 3 or 4); or
    b. the expected value to HUD of the future stream of repayments, on a net present value basis, would not be decreased by more than 25 percent as a result of the proposed actions, taking into account any proposed payment to be made at the closing of the proposed refinancing or sale (other than a prepayment pursuant to subparagraphs 1, 3 or 4), and the proposed actions include a Use Agreement pursuant to MAHRA (or affordability and use restrictions that are determined by HUD to be equivalent as to level of affordability and level of enforceability), with a term extending at least 30 years from the closing of the proposed refinancing or sale and at least 10 years beyond the term of any existing MAHRA Use Agreement.

VII. Other GRP Features

A. **Re-determination of allowances for tenant-paid utilities.** If any utilities are paid by tenants, the Owner will agree, by executing the Green Retrofit Plan Commitment, to re-determine tenant utility allowances at least twelve (12) months and not more than eighteen (18) months following completion of the Green Retrofits, and periodically thereafter, in accordance with applicable requirements of HUD.

B. **GRP Pre-Development Incentive.** The GRP Pre-Development Incentive will be payable to the Owner at the closing of the Green Retrofit Grant or Green Retrofit Loan. By offsetting owner's due diligence and out-of-pocket closing costs, HUD ensures Owners can timely consummate the GRP transaction and that will minimize the number of projects that are unable to close due to associated costs. For transactions subject to Green Retrofit Plan Commitments executed by HUD on or before the expiration date of this Notice, the amount of the GRP Pre-Development Incentive amount shall be the lesser of:
   1. $10,000; or
   2. 1 percent of the estimated cost of the Green Retrofits.

C. **GRP Efficiency Incentive.** The GRP Efficiency Incentive is time-based, incentivizing timely completion of retrofits. Timely completion creates jobs, purchases materials, improves the properties and communities, and accesses future efficiency savings, more quickly.
   1. **Maximum Amount.** For transactions subject to Green Retrofit Plan Commitments executed by HUD on or before the expiration date of this Notice, the maximum GRP Efficiency Incentive amount shall be the lesser of:
      a. $30,000; or
      b. 3 percent of the estimated cost of the Green Retrofits; or
      c. funds remaining in the rehabilitation escrow after paying the actual cost of all items except for the GRP Efficiency Incentive.
   2. **Based on Estimated Cost.** The GRP Efficiency Incentive amount will not be adjusted based on the actual cost of the Green Retrofits.
   3. **Potential Reduction Based on Delayed Completion of Rehab.** The actual GRP Efficiency Incentive will be a percentage of the maximum incentive as follows:
      a. 100% if all repairs are completed within twelve (12) months after the closing, as verified by the Rehabilitation Escrow Administrator.
         i. The PAE's recommended Green Retrofit Plan may provide a period longer than twelve (12) months based on exceptional factors such as an extremely short building season.
         ii. After closing, this twelve (12) month limitation may be extended at HUD's sole discretion based upon a showing that the Owner commenced rehabilitation timely and that delays occurred that were beyond the Owner's reasonable control.
      b. Less 10% for each month or partial month by which the completion of repairs exceeds twelve (12) months.
      c. No GRP Efficiency Incentive will be earned or paid if less than all Green Retrofits are completed, or if any Green Retrofits are completed more than 21 months after the closing, as verified by the Rehabilitation Escrow Administrator.

D. **GRP Incentive Performance Fee.** The GRP Incentive Performance Fee recognizes the demands on the Owner to continually realize efficiencies and savings, maintain a healthy environment for residents, and continually provide opportunities for staff, contractors and residents to practice green building principles. Successful completion of those activities contributes to HUD's ability to maximize the return on the Green Retrofit Loans.

1. **Projects Not Already Eligible for a Mark-to-Market Incentive Performance Fee.** For transactions subject to Green Retrofit Plan Commitments executed by HUD on or before the expiration date of this Notice, the GRP Incentive Performance Fee amount shall be 3.0% of the Effective Gross Income derived from the property.
2. **GRP Projects Referred to Mark-to-Market Because of Infeasibility.** For transactions determined infeasible and referred to Mark-to-Market, any Incentive Performance Fee will be in accordance with applicable provisions of the Mark-to-Market program.
3. **Eligible Projects Already Eligible for a Mark-to-Market Incentive Performance Fee.**
    a. Green Initiative projects are not eligible. See the definition of Ineligible Project.
    b. For other M2M debt restructure projects, the Green Retrofit Plan Commitment will provide that the existing M2M IPF percentage will be increased by 50% (e.g., a 3.0% IPF will be increased to 4.5%).
4. **Pre-Conditions.** The Owner must satisfy pre-conditions, including physical, managerial and financial soundness, as further described in the Legal Documents, in a manner acceptable to HUD, to earn the GRP Incentive Performance Fee.
5. **Duration.** The Owner shall be eligible to receive the GRP Incentive Performance Fee with respect to each project fiscal year ending during the term of the Green Retrofit Program Use Agreement.

E. **Targeted Incentive for Job Creation (optional).** The Recovery Act provides that HUD could offer a targeted incentive to Owners to encourage job creation for low-income and very low-income (as those terms are defined in the applicable Eligible Program) individuals. This incentivizes owners to contract with Eligible Residents and Eligible Business Concerns for completion of Green Retrofits. It creates jobs, training, and builds future job opportunities in the emerging green sector.

1. **Incentive Based on Actual Rehab Payments.** The incentive described in this paragraph is for making actual payments from Green Retrofit Grant and Green Retrofit Loan funds to "Eligible Residents" and "Eligible Business Concerns" that equal or exceed the levels discussed in this paragraph. Payments may be for labor, materials, or both.
    a. An "Eligible Resident" is: a low- or very low-income person residing in the metropolitan area or Non-metropolitan County in which the Eligible Project is located.
    b. An "Eligible Business Concern" is a business that can provide evidence that it meets one of the following:
        i. 51 percent or more owned by Eligible Residents; or

ii. At least 30 percent of its full time employees include persons who are currently Eligible Residents, or within three years of the date of first employment with the business concern were Eligible Residents.

2. **Amount of Incentive.** If the incentive is earned, the incentive amount will be the lesser of:
   a. 10 percent of amounts actually paid to Eligible Residents and Eligible Business Concerns; or
   b. $25,000.
3. **Requirements to Qualify for the Incentive.** In order to qualify for this incentive, the Owner who elects to pursue it must comply with the requirements of Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the regulations found at 24 CFR Part 135. Additional information on these requirements can be found at www.hud.gov/section3.
   a. Requirements. Owners must comply with the "Recipient Responsibilities" found in Subpart B of 24 CFR Part 135, and to ensure the compliance of any contractors, developers, or sub-recipients of covered funding.
   b. Reporting Requirements. Owners are required to comply with the Section 3 annual reporting requirements found at Subpart E of 24 CFR Part 135.
   c. Final Reporting. Owners shall submit a final Section 3 summary report to HUD after completing the Green Retrofits indicating the amount of employment, contracting, and other economic opportunities were generated by the expenditure of these funds.
4. **Minimum Amount Paid to Eligible Recipients.** An Owner will earn the incentive if all Green Retrofits are completed, the Owner is otherwise in compliance with the requirements hereof, and the actual amount paid to Eligible Residents and Eligible Business Concerns equals or exceeds the level indicated below.

Amount of Green Retrofit Grant or Loan	**% of Total Paid to Eligible Residents and/or Eligible Business Concerns**
Up to $600,000	4.0% of total
$600,001-$800,000	3.5% of total
$800,001-$1 million	3.0% of total
Above $1 million	2.5% of total

VIII. Implementation of the Green Retrofit Plan After Closing

A. **Monitoring and Compliance Agreements.** During the term of a Green Retrofit Grant Use Agreement or Green Retrofit Loan, HUD will regulate the operations of the mortgagor through the terms and conditions of recorded documents and other agreements entered into in conjunction with the GRP but which are not recorded.

B. **Servicing of Green Retrofit Grants and Green Retrofit Loans.** HUD or its designee will be responsible for servicing the Green Retrofit Grant or Green Retrofit Loan, as applicable, including determining the amounts receivable by the Owner for the GRP Efficiency Incentive

and GRP Incentive Performance Fees, and including determining the amounts receivable by HUD pursuant to Paragraph VI.G.2.b.

C. **Post-Closing Utility Baseline Analysis.** The Green Retrofit Plan Commitment will include the Owner's agreement to provide an updated utility baseline analysis, acceptable to HUD, for a twelve month period beginning as soon as practicable following completion of the Green Retrofits to the satisfaction of the Rehabilitation Escrow Administrator (i.e., beginning approximately thirteen months following the closing).

If you have any questions concerning this Notice, please visit the GRP web site or OAHP's Resource Desk, at www.oahp.net, where there is a Question & Answer feature.

Sincerely,

Brian D. Montgomery
Assistant Secretary for Housing -
Federal Housing Commissioner

Attachments:

Requirements for Owner's Evidence of Authority

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Green Retrofit Program for Multifamily Housing ("GRP") Requirements for Owner's Evidence of Authority

OVERVIEW

Each Owner must include in its GRP Application evidence of authority to accept a Green Retrofit Plan Commitment and to close a Green Retrofit Loan or Green Retrofit Grant. This document provides further guidance on obtaining the necessary consents and certifications to comply with the requirements.

REQUIREMENTS FOR GRP APPLICATION

The requirements are detailed in Paragraph II.A of the Notice. Failure to meet these requirements will result in HUD rejecting the application.

DOCUMENTATION REGARDING OWNERSHIP CONSENTS (II.A.3.A)

Option (i): No Consent Required. If the Owner's representative needs no further consent to enter into and consummate a GRP transaction:

> I certify that, under the [describe organizational documents] of [name of ownership entity], I have the authority without the need to obtain the consent of any other party to execute a Green Retrofit Plan Commitment on behalf of the Owner and to execute the Legal Documents at the closing on behalf of the Owner.

Option (ii): Consents Required. If the Owner's representative needs consent to enter into and consummate a GRP transaction:

> I certify that, under the [describe organizational documents] of [name of ownership entity], consent of the following parties having ownership interests will be required before I will have the authority to execute a Green Retrofit Plan Commitment on behalf of the Owner and to execute the Legal Documents at the closing on behalf of the Owner: [describe parties whose consent is required, e.g. limited partners holding at least 60% ownership interest, or at least x of y members of the Board of Directors]. I certify that I have requested the consent of each such party and that I have provided to each such party information about the potential Green Retrofit transaction sufficient to allow such party to understand the nature of the transaction and specifically discussing at least the following: new encumbrance, new use agreement, repayment requirements, new incentives, future commitments and responsibilities, and changes to cash distribution provisions. I further

certify that I have received certifications in a form acceptable to HUD from [list]. A copy of each such certification is attached hereto. I certify that, if such certifications were converted to binding consents, that would be sufficient to authorize me pursuant to the organizational documents referenced above to consummate the Green Retrofit transaction on behalf of the Owner.

Acceptable Certification Language (Ownership). If consent is required, the party holding an ownership interest must offer the following certification:

> I certify that I have received information about the potential Green Retrofit transaction for [identify the Eligible Project] sufficient to allow me to understand the nature of the transaction and specifically discussing the following: new encumbrance, new use agreement, new incentives, future commitments and responsibilities, and changes to cash distribution provisions. I further certify that I have no objection to the potential Green Retrofit transaction, and that I am prepared to give my binding consent to such transaction within ten (10) days of a request to do so.

DOCUMENTATION REGARDING LENDER OR OTHER PARTIES CONSENTS (II.A.3.A)

Option (i): No Consent Required. If the Owner's representative needs no further consent to enter into and consummate a GRP transaction:

> I certify that [either] [there are no lender or lienholder or other parties that do not hold an ownership interest who must consent] [or] the following is a list of all lienholders with respect to [identify the Eligible Project]: [list of lienholders]. I certify that no consent is needed from any party listed herein or any other party other than a party holding an ownership interest in order for [name of ownership entity] to execute a Green Retrofit Plan Commitment and execute the Legal Documents at the closing.

Option (ii): Consents Required. If the Owner's representative needs consent to enter into and consummate a GRP transaction:

> I certify that the following is a list of all lenders or lienholders and all other parties (other than parties holding an ownership interest) with respect to [identify the Eligible Project whose consent is required before [name of ownership entity] can execute a Green Retrofit Plan Commitment and/or execute the Legal Documents at the closing: [list parties whose consent would be required]. I certify that I have requested the consent of each such party and that I have provided to each such party information about the potential Green Retrofit transaction sufficient to allow such party to understand the nature of the transaction and specifically discussing at least the following: new encumbrance, new use agreement, repayment requirements, new incentives, and changes to cash distribution provisions. I further certify that I have received certifications in a form acceptable to HUD

> from each of them. A copy of each such document is attached here to as [attachment x]. I certify that, if such certifications were converted to binding consents, there would be sufficient binding consents under the terms of the organizational documents to authorize me to consummate the Green Retrofit transaction on behalf of the Owner.

Acceptable Certification Language (Other Than Ownership). If consent is required, the party holding an ownership interest must offer the following certification:

> I certify that I have received information about the potential Green Retrofit transaction for [identify the Eligible Project] sufficient to allow me to understand the nature of the transaction and specifically discussing the following: new encumbrance, new use agreement, repayment requirements, new incentives, and changes to cash distribution provisions. I further certify that I have no objection to the potential Green Retrofit transaction, and that I am prepared to give my binding consent to such transaction timely within ten (10) days of being requested to do so.

LIENHOLDER CERTIFICATIONS INVOLVING HUD

If the loan documents require the consent of the lender, evidence of the lender's consent is required to be submitted with the GRP Application. Where an FHA-insured lender is a lienholder, the lender may assume that FHA will consent upon request

Where HUD or FHA itself is a lienholder (e.g., a Section 202 direct loan, or a HUD-Held loan), the Owner may assume that HUD will consent upon request, and no evidence of HUD's consent is required to be submitted with the GRP Application.

OPINION OF COUNSEL (II.A.3.B)

Counsel giving the following opinion must be licensed in the jurisdiction in which the ownership entity is organized. The opinion must state that, on the assumption that any certifications (in a form acceptable to HUD) that the Owner has received were converted into binding consents prior to closing:

1. all consents that would be required in order to consummate the Green Retrofit transaction have been received; and
2. the party signing the GRP Application on behalf of the Owner has been legally authorized to do so and to bind the Owner in accordance with its terms without any further approvals or consents being obtained.

Appendix 7

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Department of Energy
Washington, DC 20585

SEP PROGRAM NOTICE 10-08
EFFECTIVE DATE (Revised): April 20, 2010
ORIGINALLY ISSUED: March 8, 2010

SUBJECT: GUIDANCE FOR STATE ENERGY PROGRAM RECIPIENTS ON FINANCING PROGRAMS.

PURPOSE

To provide guidance to Department of Energy's (DOE's) State Energy Program (SEP) Grantees on revolving loan funds and loan loss reserves.

SCOPE

The provisions of this guidance apply to recipients of SEP funds, pursuant to Formula Grant or American Recovery and Reinvestment Act of 2009 (Recovery Act).

LEGAL AUTHORITY

SEP is authorized under Energy Policy and Conservation Act, as amended (42 USC 6321 et seq.). All grant awards made under this program shall comply with applicable law, including the Recovery Act, and other procedures applicable to this program.

GUIDANCE

Eligibility of revolving loan funds

A revolving loan fund is an eligible use of funds under the SEP Program to the extent that the activities supported by the loans are eligible activities under the program. The implementing regulations for SEP expressly identify revolving loan funds as an eligible use of SEP funds under 10 CFR 420.18(d).

Leveraging Funds under the SEP: Purpose and Type of Leveraging under the SEP

State arrangements for leveraging additional public and private sector funds, including rebates, grants, and other incentives, must be arranged to ensure that federal funds go to the "purchase and installation of energy efficiency and renewable energy measures." 42 USC 6322(d)(5)(A). The leveraging of funds may be accomplished through mechanisms such as partnerships with third party lenders, co-lending, third-party administration of loans, and loan loss reserves.

Loan Loss Reserves under the SEP

SEP funds can be used for a loan loss reserve to support loans made with private and public funds and to support a sale of loans made by a grantee or third-party lenders into a secondary market, subject to the following conditions. In order to ensure that a use of SEP funds to leverage additional public and private sector funds furthers the stated purposes of SEP, the activities supported by the leveraged funds are limited to those activities for the purchase and installation of energy efficiency and renewable energy measures consistent with the SEP regulations. Additionally, a grantee must ensure that the following conditions are met:

a) Grantee shall have the right to review and monitor the loans provided by third party lenders to ensure that loans are being made for the "purchase and installation of energy efficiency and renewable energy measures" and comply with all conditions of ARRA funds (e.g., Davis Bacon, and Buy American) where applicable.
b) A grantee establishing a loan loss reserve has no legal or financial obligation beyond the funds committed to the reserve and is not subject to further recourse in the event losses exceed the amount of the reserve;
c) Any SEP funds not used in connection with loan losses paid to third party lenders or secondary market investors must be used by, or at the direction of, the grantee according to the original restrictions of SEP.
d) Under no circumstances shall SEP funds be released to a third party lender or secondary market investor for any purpose not pertaining to loan losses.

A grantee cannot use more than 50% of their ARRA SEP funds for a loan loss reserve.

Interest Rate Buy-Downs

SEP funds can be used for interest rate buy-downs subject to the conditions identified in this section. An interest rate buy-down is when one party (e.g., grantee) provides a lump-sum payment based on the net present value of the difference between a target return to the lender or loan investor and the borrower's interest rate. This has two primary purposes: (1) increase project affordability and demand by reducing monthly payments and (2) maintaining or increasing lender / investor interest in making loans by yielding higher returns.

In order to ensure that a use of SEP funds for interest rate buy-downs furthers the stated purposes of SEP, the loans supported by the interest rate buy-downs must be for the purchase and installation of energy efficiency and renewable energy measures consistent with the SEP regulations.

Third Party Loan Insurance

SEP funds can be used for the purchase of third party loan insurance subject to the conditions identified in this section. Third party loan Insurance is a financial arrangement whereby a third party bears some portion (or all) of a loss on a specific

portfolio. This typically takes the form of a lender or investor purchasing an insurance policy from a third party against losses on a portfolio of loans up to a fixed percentage (the stop loss) of the sum of all the original loan amounts. The maximum insurance payout is determined by the value of the portfolio and not the value of individual loans.

In order to ensure that a use of SEP funds for third party loan insurance furthers the stated purposes of SEP, the loans supported by the third party loan insurance must be for the purchase and installation of energy efficiency and renewable energy measures consistent with the SEP regulations.

Loan Guarantees
As stated in 10 CFR §420.18, SEP loan documents may not include principles of loan forgiveness [§420.18(e)(2)], and may not be used for loan guarantees [§420.18(f)(2)].

Obligation & Drawing Down of Funds
Loan Capital: Program monies being used for a loan fund are considered obligated by the recipient once they have been used to capitalize a loan fund. A loan fund may be capitalized in any of the following circumstances:

a) Receipt of a loan application from potential borrowers
b) State or local requirements (regulatory, statutory, or constitutional) dictate
c) The distribution account is operated by a third party

Funds may be drawn down at the time the fund is capitalized. If a recipient requires an earlier draw down under requirements “b” and “c” listed above, they should document the relevant requirement and provide that documentation to their Project Officer.

Funds are considered expended when the revolving loan fund has loaned to specific borrowers for an amount equal to or greater than the program monies that initially capitalized the fund.

Loan loss reserve funds are considered expended when they are committed as a credit enhancement to support a loan or portfolio of qualifying loans under the SEP guidelines. For loan loss reserves supporting a revolving loan fund operated under the grantee, loan loss reserve funds are considered committed by sending a letter to the project officer indicating the establishment of the loan loss reserve. For loan loss reserves supporting third party loans, loan loss reserve funds are considered committed when the grantee enters into a signed agreement with the third party.

Loan Defaults
Grantees are <u>not</u> required by DOE to replenish or replace any amounts which were lost to loan default. Loans involve risk by their very nature, so loss due to default of a borrower is an anticipated and allowable cost under an SEP grant.

Federal Character of Revolving Loan Funds

Generally, federal funds used to capitalize a revolving loan fund maintain their federal character in perpetuity. As a result, federal requirements that apply to the funds such as NEPA and the National Historic Preservation Act would be applicable at each revolution of the loan fund. Federal requirements that apply to Recovery Act funds, such as the Davis-Bacon Act requirements, Buy-American requirements, and Recovery Act reporting requirements would be applicable at each revolution of a loan fund that was funded through the Recovery Act.

The applicability of these federal requirements need not cause difficulty in administering a revolving loan fund program. DOE has previously provided guidance on streamlining compliance with NEPA and the National Historic Preservation Act. The templates that DOE has provided to States to obtain categorical exclusions under NEPA for sub-grant programs could also be applied to revolving loan funds program. DOE has worked with the Advisory Council on Historic Preservation to provide States with programmatic agreements in order to streamline compliance with the National Historic Preservation Act requirements. Individual homeowners receiving loans under a revolving loan fund program would not be required to comply with the Davis-Bacon Act. Similarly, the Buy American requirements apply to "public buildings" and "public works" and thus would not be applicable to projects performed on individual homes.

The continuing federal character of the funds means that if the grantee decides to end a revolving loan fund program or loan loss reserve program, any remaining funds would need to be used by the grantee for an eligible purpose or otherwise returned to DOE.

Program Income

All program income (including interest earned) paid to grantees is subject to the terms and conditions of the original grant.

Claire Broido Johnson

Claire Broido Johnson
Acting Program Manager
Weatherization and Intergovernmental Program
Energy Efficiency and Renewable Energy

Appendix 8

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Rules and Regulations

Federal Register
Vol. 75, No. 15
Monday, January 25, 2010

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 392

[Docket No. FSIS–2009–0029]

Petitions for Rulemaking; Approval of Information Collection

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule; information collection approval.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing that the Office of Management and Budget (OMB) has approved the information collection associated with its final rule "Petitions for Rulemaking," published April 9, 2009.

DATES: On July 16, 2009, the Office of Management and Budget approved the information collection requirements for the rule published April 9, 2009, at 74 FR 16104 and effective June 8, 2009.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Director, Policy Issuances Division, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, Washington, DC 20250, (202) 720–5627.

SUPPLEMENTARY INFORMATION: FSIS has been delegated the authority to exercise the functions of the Secretary as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). FSIS protects the public by verifying that meat, poultry, and egg products are safe, wholesome, unadulterated, and correctly labeled and packaged.

FSIS is notifying the public that OMB has approved the information collection associated with the final rule "Petitions for Rulemaking," which published on April 9, 2009 (74 FR 16104). The final rule amended the FSIS administrative regulations by adding a new part 392 that established regulations governing the submission of petitions for rulemaking to FSIS.

OMB had not approved the information collection requirements associated with the Petitions for Rulemaking final rule when the final rule published. Therefore, in the preamble to the rule, FSIS explained that it would collect no information associated with rule until the information collection request received OMB approval (74 FR 16104, 16106–16107). OMB approved the information collection on July 16, 2009; the OMB number is 0583–0136.

Therefore, FSIS will now begin to collect information associated with the final rule. In addition, now that FSIS is authorized to collect such information, effective January 25, 2010 the Agency will begin to post all petitions for rulemaking that it receives, along with any supporting documentation, on the FSIS Web site at *http://www.fsis.usda.gov/regulations_&_policies/Petitions/index.asp* (*see* 9 CFR 392.6(a)).

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this document, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2009_Notices_Index/index.asp.*

FSIS also will make copies of this **Federal Register** publication available through the *FSIS Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Update* is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The *Update* also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on January 19, 2010.

Alfred V. Almanza,

Administrator.

[FR Doc. 2010–1263 Filed 1–22–10; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF ENERGY

10 CFR Part 440

[Docket No. EEWAP0515]

RIN 1904–AB97

Weatherization Assistance Program for Low-Income Persons

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) is amending the eligibility provisions applicable to multi-unit buildings under the Weatherization Assistance Program for Low-Income Persons. As a result of today's final rule, if a multi-unit building is under an assisted or public housing program and is identified by the U.S. Department of Housing and Urban Development (HUD), and included on a list published by DOE, that building will meet certain income eligibility requirements, and will also satisfy one or both of the procedural requirements to protect against rent increases and undue or excessive enhancement of the weatherized building, as indicated by the list, under the Weatherization Assistance Program without the need for further evaluation or verification. The preamble of today's final rule also provides guidance to States with respect to addressing the requirement that the benefits of weatherization assistance in connection with such rental units,

including units where the tenants pay for their energy through their rent, will accrue primarily to the low-income tenants residing in such units. If a multi-unit building includes units that participate in the Low Income Housing Tax Credit (LIHTC) Program, identified by HUD, or includes units that participate in the U.S. Department of Agriculture (USDA) Rural Housing Service's Multifamily Housing Programs, and is included on a list published by DOE, that building will meet the income eligibility requirements of the Weatherization Assistance Program without the need for further evaluation or verification. Today's final rule will reduce the procedural burdens on evaluating applications from buildings that are part of HUD assisted and public housing programs, the Federal LIHTC programs, and the USDA Rural Development program.

DATES: This final rule is effective February 24, 2010.

FOR FURTHER INFORMATION CONTACT: Claire Broido Johnson, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Weatherization and Intergovernmental Program, EE–2K, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–1510, e-mail: *Claire.Johnson@ee.doe.gov,* or Chris Calamita, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9507, e-mail: *Christopher.Calamita@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Sections 411–418 of the Energy Conservation and Production Act (Act) established the Weatherization Assistance Program for Low-Income Persons (Weatherization Assistance Program). (42 U.S.C. 6861 *et seq.*) The Weatherization Assistance Program reduces energy costs for low-income persons, families, and households by increasing the energy efficiency of their homes, while promoting their health and safety. DOE works in partnership with State- and local-level agencies to implement the Weatherization Assistance Program. DOE's Project Management Center awards grants to State-level agencies, which then contract with subgrantees (*e.g.,* local agencies). The subgrantees then provide weatherization services to eligible low-income families.

In establishing the Weatherization Assistance Program, Congress found that "a fast, cost-effective, and environmentally sound way to prevent future energy shortages in the United States while reducing the Nation's dependence on imported energy supplies is to encourage and facilitate, through major programs, the implementation of energy conservation and renewable-resource energy measures with respect to dwelling units." (42 U.S.C. 6861(a)(1)) Congress also recognized that many dwellings owned or occupied by low-income persons are energy inefficient and that low-income persons can least afford to make the modifications necessary to improve the energy efficiency of such dwellings. (42 U.S.C. 6861(a)(2)) Additionally, Congress directed that States, through Community Action Agencies and units of general purpose local government, should be encouraged, with Federal financial and technical assistance, to develop and support coordinated weatherization programs designed to alleviate the adverse effects of energy costs on low-income persons, to supplement other Federal programs serving such low-income persons, and to increase energy efficiency. (42 U.S.C. 6861(a)(4))

Congress, therefore, stated that the purpose of the Weatherization Assistance Program is to develop and implement an assistance program to increase the energy efficiency of dwellings owned or occupied by low-income persons, reduce their total residential energy expenditures, and improve their health and safety,[1] especially low-income persons who are particularly vulnerable such as the elderly, the handicapped, and children. (42 U.S.C. 6861(b))

The Weatherization Assistance Program statute recognizes that single-family dwelling units are potentially high-energy-consuming dwelling units, and grantees should consider appropriate prioritization for such units or other high-energy-consuming dwelling units. (42 U.S.C. 6864(b)(2)) The statute also recognizes that in some instances, weatherization efforts under the program may be appropriate for buildings in which there are multiple rental units. (42 U.S.C. 6863(b)(5))

Congress recognized that additional considerations are necessary when evaluating the eligibility of multi-unit buildings, as opposed to single-family dwellings. In any case in which a person requesting weatherization assistance from a subgrantee for a dwelling that consists of a rental unit or rental units, the State, in implementing its weatherization program, must ensure that—

- The benefits of weatherization assistance in connection with such rental units, including units where the tenants pay for their energy through their rent, will accrue primarily to the low-income tenants residing in such units;
- For a reasonable period of time after weatherization work has been completed on a dwelling containing a unit occupied by an eligible household, the tenants in that unit (including households paying for their energy through their rent) will not be subjected to rent increases unless those increases are demonstrably related to matters other than the weatherization work performed;
- The enforcement of the rent increase provision is provided through procedures established by the State by which tenants may file complaints and owners, in response to such complaints, shall demonstrate that the rent increase concerned is related to matters other than the weatherization work performed; and
- No undue or excessive enhancement will occur to the value of such dwelling units.(42 U.S.C. 6863(b)(5))

DOE provided additional direction regarding the eligibility of multi-unit buildings in the Weatherization Assistance Program regulations. Under the DOE regulations a subgrantee may weatherize a building containing rental dwelling units using financial assistance for dwelling units eligible for weatherization assistance, where:

- The subgrantee has obtained the written permission of the owner or his agent;
- Not less than 66 percent (50 percent for duplexes and four-unit buildings, and certain eligible types of large multi-

[1] Weatherization work may include the abatement of hazards such as lead, which may be required prior to the installation of weatherization materials. See, 10 CFR 440.16(h).

family buildings) of the dwelling units in the building:

○ Are eligible dwelling units, or

○ Will become eligible dwelling units within 180 days under a Federal, State, or local government program for rehabilitating the building or making similar improvements to the building; and

• The grantee has established procedures for dwellings which consist of a rental unit or rental units to ensure that:

○ The benefits of weatherization assistance in connection with such rental units, including units where the tenants pay for their energy through their rent, will accrue primarily to the low-income tenants residing in such units;

○ For a reasonable period of time after weatherization work has been completed on a dwelling containing a unit occupied by an eligible household, the tenants in that unit (including households paying for their energy through their rent) will not be subjected to rent increases unless those increases are demonstrably related to matters other than the weatherization work performed;

○ The enforcement of the rent increase provision is provided through procedures established by the State by which tenants may file complaints, and owners, in response to such complaints, shall demonstrate that the rent increase concerned is related to matters other than the weatherization work performed; and

○ No undue or excessive enhancement shall occur to the value of the dwelling units.

10 CFR 440.22(b). An eligible dwelling unit is one that is occupied by a family unit (1) whose income is at or below 200 percent of the poverty level, (2) which contains a member who has received cash assistance payments under certain Social Security programs, or applicable State or local laws at any time during the 12-month period preceding the determination of eligibility under the Weatherization Assistance Program, or (3) if the State elects, is eligible for assistance under the Low-Income Home Energy Assistance Act, provided that such basis is at least 200 percent of the poverty level. 10 CFR 440.22(a); See also, 42 U.S.C. 6862(7).

The American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) significantly increased the focus of weatherization activities by providing $5 billion in funding for the WAP program. This unprecedented level of funding supports the Administration's stated goal of weatherizing 30,000 homes a month. The increased weatherization effort will reduce the total residential energy expenditures, and improve their health and safety, of low-income persons on a much broader scale than previously seen, as well as additional benefits such as contributing to a reduction in greenhouse gas emissions due to the increased efficiency of the nation's building stock.

II. Proposed Regulation

DOE recognizes that determining the eligibility of multi-unit buildings may present difficulties to subgrantees in evaluating the income eligibility of tenants meeting the 200 percent of poverty requirement, and that this difficulty can be overcome where other Federal agencies already have procedures in place for determining such income eligibility. On May 21, 2009, DOE published a notice of proposed rulemaking (NOPR) to address verification of the eligibility requirements under the weatherization program for multi-family buildings participating in other Federal programs.[2] 74 FR 23804. Following the publication of the NOPR, DOE issued a notice announcing a public meeting that was held on June 18, 2009, and that extended the comment period to July 6, 2009. 74 FR 27945.

In the NOPR, DOE proposed that if a multi-unit building is under an assisted or public housing program and is identified by HUD, and included on a list published by DOE, that building would meet certain income eligibility requirements, and the procedural requirements to protect against rent increases and undue enhancement of the weatherized building would be satisfied, under the Weatherization Assistance Program without the need for further evaluation or verification. Additionally, DOE proposed that if a multi-unit building includes units that participate in the LIHTC Program, identified by HUD, and included on a list published by DOE, that building would meet the income eligibility requirements of the Weatherization Assistance Program without the need for further evaluation or verification. DOE requested comment on how States and subgrantees may ensure compliance with the requirement that benefits of weatherization accrue primarily to low-income tenants that reside in such buildings. 74 FR at 23807.

DOE stated that it believed that the proposed rule would reduce the procedural burdens on evaluating applications from buildings that are part of HUD-assisted and public housing programs, and the Federal LIHTC programs. 74 FR at 23807. The Act requires that DOE promulgate regulations that, in part, provide guidance to assist the States in their efforts to ensure that appropriate procedures are established to satisfy the procedural burdens. (42 U.S.C. 6863(b)(2))

III. Final Rule

In today's final rule, DOE is adopting the revisions to the Weatherization Assistance Program as proposed, with two differences. First, DOE is including buildings that participate in the USDA Rural Development program and are identified by USDA, on the list of buildings that meet the income requirements of the Weatherization Assistance Program without the need for additional verification.

Second, an additional list will be provided in order to address the current State practice for complying with the requirement to protect against rent increases. Buildings that have three or more years remaining under the applicable arrangement with HUD will be included, as appropriate, on a list that demonstrates compliance with the income requirements and compliance with the procedural requirements under the Weatherization Assistance Program to protect against rent increases and undue enhancement of the weatherized building. Buildings that have less than three years remaining under the applicable arrangement with HUD will be included on a separate list, as appropriate, to demonstrate compliance with the income requirements and compliance with the procedural requirement to protect against undue enhancement.

Today's final rule will reduce the review and verification that a subgrantee must undertake when evaluating the eligibility of the identified buildings. The purpose of today's final rule is to reduce the burden on States and subgrantees when evaluating applicability requirements for which HUD or USDA has already collected and verified the necessary data.

[2] The proposal did not address the requirements applicable to permissible expenditures under WAP or the required weatherization materials. Those requirements, along with the requirements in 10 CFR Part 440 not addressed in today's final rule remain are not amended.

A. Eligibility Requirements Met by Identified Housing

1. Income Requirement

a. Qualified Assisted Housing and LIHTC Programs

As stated previously under the DOE regulations, a subgrantee can only weatherize a building containing rental dwelling units using financial assistance for dwelling units eligible for weatherization assistance, where not less than 66 percent (50 percent for duplexes and four-unit buildings, and certain eligible types of large multi-family buildings) of the dwelling units in the building meet the income eligibility levels. 10 CFR 440.22(b)(2).

HUD's Qualified Assisted Housing [3] programs generally serve the population for which the Weatherization Assistance Program was established to serve. This assisted and public housing portfolio includes properties that are privately owned, but receive some form of HUD assistance subject to affordability and income requirements. Income targets for HUD programs are set in relationship to a percentage of area median income—generally, 30 to 80 percent of area median income. A review of data from HUD programs indicates that a large majority of residents in HUD assisted and public housing would meet the income eligibility requirements of the Weatherization Assistance Program. HUD data show that nationally close to 100 percent of residents in these properties meet the 200 percent income requirement, far exceeding the 66 percent threshold required under DOE's regulation. 10 CFR 440.22(b)(2).

Moreover, the income verification process applicable to the HUD programs is rigorous. Under these HUD programs, HUD assisted housing owners or public housing authorities must determine each participating family's income before the family is permitted to move into the assisted housing, and at least annually thereafter. To ease the existing burden of manual verification and reduce the potential for human error, HUD has developed a sophisticated system of third-party income verifications, originally designated as the Upfront Income Verification (UIV) system, now known as the Enterprise Income Verification (EIV) system. The EIV system is now used voluntarily by HUD housing providers, but will convert to a mandatory system in January 2010. The EIV system, a central repository and source for income and benefit data, is accessible in a secure manner over the internet, for use by public housing authorities and owners or their agents to improve the accuracy of rent and income determinations. HUD monitors compliance with tenant eligibility requirements on an annual basis through management and occupancy reviews in addition to the submission of tenant data to HUD payment systems. Tenant eligibility certifications are required in order for subsidy payments to be authorized. A building owner must verify each family's income, assets, expenses, and deductions three times: (1) Prior to move-in, (2) as part of the annual recertification process, and (3) as a result of changes in income allowances, or family characteristics reported between annual re-certifications.

Property owners participating in the LIHTC Program are directed to utilize the income verification process set forth Internal Revenue Code Section 42, and Internal Revenue Service (IRS) Handbook 8823 (Chapter 5), and incorrect eligibility determinations may adversely affect the utilization of the tax credits.

After the initial determination of eligibility, owners, or their agents, are required to recertify each low-income household at least annually, within 120 days of the anniversary date of the occupancy. The allocating agency, typically a state housing finance agency, is responsible for monitoring compliance with the provisions during the affordability period and must report the results of monitoring to the IRS. The allocating agency is required to perform an on-site inspection and a review of 20 percent of tenant files at least every three years.

The income of the families occupying units in buildings under the Qualified Assisted Housing and LITHC Programs is subject to HUD's rigorous verification processes. Given the nature of the data collected by HUD and the income verification procedures employed under these housing programs, DOE has determined that buildings identified by HUD as having not less than 66 percent (50 percent for duplexes and four-unit buildings) of dwelling units occupied by family units whose income is at or below 200 percent of the poverty level would meet the minimum income eligibility requirements for multi-unit buildings under the Weatherization Assistance Program.

In the NOPR, DOE requested comments on its proposal that income data collected by HUD under the Qualified Assisted Housing and LIHTC programs would be sufficient for the purpose of demonstrating the income requirements of multi-unit buildings under the Weatherization Assistance Program. The responses DOE received supported the proposal and indicated that it would reduce burdens on property owners, tenants, grantees, and subgrantees thereby allowing more of the weatherization funds to be used for energy improvements. *(See LISC, p. 2)*

Some of the commenters indicated that a simpler and more effective approach would be to raise the income eligibility ceiling for the program, specifically by making eligible for the Weatherization Assistance Program any household that meets the National Housing Act definition of "low-income." DOE did not propose to amend the definition of "low-income" in the NOPR and such an amendment as suggested by commenters would be outside the scope of notice for this rulemaking.

DOE also received comments regarding the exclusion of Section 221(d)(3) and (d)(5) Below Market Interest Rate (BMIR), and Section 236 programs from eligibility. The comments expressed that these programs carry income restrictions and also typically use project-based Section 8 subsidies. The comments additionally indicated that residents using the Section 8 subsidies have the same income reporting requirements as other Section 8 subsidy holders. Commenters remarked that while not all Section 221(d)(3) BMIR and Section 236 properties have Section 8 housing, to the extent that they do, these properties should meet the definition of "qualified assisted housing." Some of the commenters suggested that the definition of "qualified assisted housing" be revised to clarify that Section 221(d)(3) BMIR and Section 236 buildings are only excluded from consideration as qualified assisted housing if fewer than 66 percent of the units have project-based Section 8 assistance. This issue was also raised at the public meeting held on June 18,

[3] For the purposes of this rule, "Qualified Assisted Housing" includes public housing projects, and assisted housing projects that receive project-based Section 8 assistance, under the U.S. Housing Act of 1937, as amended (42 U.S.C. 1437 *et seq.*), Supportive Housing for the Elderly projects receiving HUD assistance under section 202 of the Housing Act of 1959 (12 U.S.C. 17012), or Supportive Housing for Persons with Disabilities under section 811 of the Cranston-Gonzales National Affordable Housing Act, as amended (42 U.S.C. 8013). For the purpose of this rulemaking "Qualified Assisted Housing" does not include projects also benefiting from assistance under Section 221(d)(3) and (d)(5), and 236 of the National Housing Act (12 U.S.C. 1715l(d)(3) and (d)(5), and 12 U.S.C. 1715z–1, respectively), except such Sections 221(d)(3) and 236 projects with Section 8 assistance on not less than 66 percent of the multi-family units are included. DOE notes that while these excluded projects will not be included in the published list of properties under today's final rule, these projects may qualify under the Weatherization Assistance Program so long as the projects meet all of the necessary requirements, including the verified tenant income levels.

2009. At that meeting, HUD stated that every family that receives housing assistance must certify their income before they move in and must recertify every year thereafter. Further, owners are required to monitor, certify, and maintain records of compliance with tenant eligibility. HUD also stated that nearly all of the residents within its programs being considered eligible meet the 200 percent above poverty line requirement stated in the public law, including the Section 221(d)(3) and Section 236 properties having Section 8 housing assistance under discussion.

DOE notes that Section 221(d)(3) and Section 236 may qualify under the Weatherization Assistance Program so long as the projects meet all of the necessary requirements, including the verified tenant income levels. To the extent that these properties have project-based assistance under the Section 8 program on not less than 66 percent of the multi-family units (50 percent for duplexes and four-unit buildings), and HUD includes such buildings in the list of properties meeting the income requirements of the Weatherization Assistance Program, Section 8 properties will be included in today's final rule.

After consideration of the comments, DOE concludes in today's final rule that the income data collected by HUD would be sufficient for the purpose of demonstrating the income requirements of multi-unit buildings under the Weatherization Assistance Program.

b. USDA Rural Development Program

DOE also received a number of comments indicating that buildings that participate in the USDA Rural Housing Service's Multifamily Housing Programs undergo equally rigorous income verifications. The income verification process for the Rural Housing Service's Multifamily Housing Programs is very similar to that of HUD. The USDA Rural Housing Service's Multifamily Housing Programs utilize HUD's income, asset and deduction requirements for eligibility to reside in Rural Housing Service multifamily properties and to receive the benefits of Rural Development's Rental Assistance subsidy programs. Property owners and their management agents are responsible for determining a family's income when they apply for housing. USDA performs an annual audit of a statistical sample of tenant files to ensure that the rent and subsidy are calculated properly, with adequate supporting documentation. In addition, USDA field staff performs periodic supervisory visit inspections where tenant files are selected at random and audited for confirmation of documentation. In the 26 states that permit wage matching, USDA has initiated memoranda of understanding with these individual departments of labor to receive confirmation information on wages reported. USDA field staff provides such confirmation to property managers, who check the data against that reported by tenants. USDA multifamily regulations require that tenants recertify their income annually, and whenever they have a monthly income change of $100 or more.

Unlike HUD, USDA maintains data on participation in the Rural Housing Service's Multifamily Housing Programs at a project level, as opposed to a building level. A single project may be comprised of more than one building. As a result of maintaining income data on a project level without knowing the breakdown of the income of tenants on a per building basis, a project identified by USDA as having 66 percent of the dwelling units occupied by low-income tenants does not ensure that each building in that project meets the 66 percent threshold. For example, if a project consisted of three buildings with ten units each, and two of the three buildings were occupied solely by low-income tenants, the project would have 66 percent of the dwelling units occupied by low-income tenants. However, the third building could have no low-income tenants.

The purpose of the proposed rule was to minimize duplicative verification requirements among Federal agencies. While the proposed rule considered coordinating WAP requirements with only HUD data, income data collected and verified by USDA provide a similar opportunity to minimize duplicative income verification requirements. DOE has determined that buildings identified by USDA as having 100 percent of dwelling units occupied by family units whose income is at or below 200 percent of the poverty level would meet the minimum income eligibility requirements for multi-unit buildings under the Weatherization Assistance Program. In order to ensure that the buildings identified by USDA meet the 66 percent requirement at the building level, the list of buildings identified by USDA will include only those projects for which 100 percent of the units are occupied by families that meet the Weatherization Assistance Program income requirement.

2. Protection From Rent Increases

Under the Weatherization Assistance Program, a grantee must establish procedures that ensure that for a reasonable period of time after weatherization work has been completed on a dwelling containing a unit occupied by a low-income tenant, the tenant in that unit will not be subjected to rent increases unless those increases are demonstrated to be related to matters other than the weatherization work performed. 10 CFR 440.22(b)(3)(ii). The enforcement of this provision is provided through procedures established by the State by which tenants may file complaints, and owners in response to such complaints must demonstrate that the rent increase concerned is related to matters other than weatherization. 10 CFR 440.22(b)(3)(iii). Under the Qualified Assisted Housing programs, tenant rents are capped at 30 percent of their income, so tenants would not be subject to rent increases as a result of the weatherization.

DOE has proposed that the restrictions on rent for units in buildings participating in the Qualified Assisted Housing Programs would provide the assurance required under the Weatherization Assistance Program that for a reasonable period of time after weatherization work is completed on a dwelling occupied by a low-income family unit, rent will not increase. In the proposed rule, DOE requested comments on this issue. DOE also requested comments on its understanding that the LIHTC Program does not offer sufficiently uniform protections regarding rent increases so as to permit DOE to determine that buildings under the LIHTC Program would meet the rent control requirement of the Weatherization Assistance Program.

In response, DOE received comments supportive of a DOE determination that the Qualified Assisted Housing Program and LIHTC Program sufficiently protect low-income tenants from rent increases to satisfy the rent control requirement. One of the comments noted that currently some States require rent control provisions to remain in place for three years as a condition of weatherizing multi-family housing. If a HUD building were to have its rent structure expire within three years, the proposed categorical assurance would result in a less rigorous rent restriction on the HUD building than States apply to other multi-family buildings.

In today's final rule, DOE has determined, based on the nature of the conditions for property owners under the Qualified Assisted Housing Programs, that generally, the Qualified Assisted Housing Program sufficiently protects low-income tenants from rent increases so as to satisfy the requirement that grantees under the Weatherization Assistance Program

establish procedures to protect low-income tenants against rent increases resulting from weatherization. However, DOE recognizes that some States may currently require a three-year commitment from property owners to protect against rent increases resulting from the weatherization work.

To address the issue of current practice in some States, DOE will publish segregated information on the list of eligible multi-unit buildings identified by HUD in order to indicate which buildings have a minimum of three years remaining on their commitment with HUD. The properties included on the list of buildings that have less than three years remaining on their commitment with HUD will satisfy the income requirements and the requirement that limits undue enhancement. The properties included on the list that includes buildings with three or more years remaining on their commitment with HUD will satisfy the income eligibility requirements. They will also satisfy both of the procedural requirements to protect against rent increases and undue or excessive enhancement of the weatherized building, without the need for further evaluation or verification.

It is important to note that today's rule does not require a minimum of three years remaining on a building's commitment with HUD in order to comply with the rent control requirement under the Weatherization Assistance Program. A State may determine that a different timeframe is acceptable. However, in recognizing that some States currently require a three-year commitment from property owners to demonstrate compliance with the rent control provisions, the list of properties to be published by DOE will distinguish those for which there is at least three years remaining on the commitment to the Qualified Assisted Housing programs. For those properties that have less than three years remaining, the list will indicate the amount of time remaining under the commitment with HUD to allow States to determine whether that period is sufficient to satisfy the rent control requirement established by the State.

With regard to the LIHTC program, a comment indicated that although the LIHTC program provides for rent control, it does not have the same uniform restrictions as those associated with the Qualified Assisted Housing programs. The commenter stated that the fact that the LIHTC program does not have the same restrictions on rent control could be resolved with an agreement between the owner and the weatherization subgrantee that limits rent increases according to a standard acceptable to DOE or the subgrantee. With respect to the issue of rent control in the LIHTC Program, DOE received comments indicating that for LIHTC properties, there is no direct cost-based rent setting under the LIHTC program and that the total tenant housing cost is capped by a formula based on the area median income. Commenters noted that while in practice LIHTC property rents are limited by the lower of the cap or market rents and therefore unlikely to increase as a result of weatherization costs, a rent controlling covenant running with the unit receiving weatherization funds could be an option. Another comment on the issue of rent control in the LIHTC program urged DOE to allow state agencies administering the Weatherization Assistance Program the flexibility to determine the appropriate rent control procedures.

DOE recognizes that properties under the LIHTC program may have various rent control conditions, however, the extent and nature of those conditions may not be uniform throughout the program. Under today's final rule, properties participating in the LIHTC program will not be included in the list of properties that meet the rent control provisions of the Weatherization Assistance Program without a need for additional conditions on the property owner. For the properties under the LIHTC program, the State, or weatherization grantee, maintains flexibility in establishing the necessary rent control conditions. After considering the comments, DOE maintains its preliminary understanding that the LIHTC Program does not provide sufficiently uniform protections against rent increases so that DOE could determine that buildings under the LIHTC Program would meet the rent control requirement of the Weatherization Assistance Program.

3. No Undue or Excessive Enhancement to the Value of the Dwelling Units

Weatherization of a building containing rental units requires that the applicable grantee ensure that no undue or excessive enhancement occur to the value of the dwelling units. 10 CFR 440.22(b)(3)(iv). The expenditures allowed under the Weatherization Assistance Program help focus enhancements on those that provide weatherization benefits. For example, repairs to a dwelling unit must be necessary to make the installation of weatherization materials effective. 10 CFR 440.18(d)(9). Moreover, for buildings that are in the Qualified Assisted Housing Programs, HUD controls the capital improvements that may be made. In the NOPR, DOE requested comments on whether HUD control of improvements to buildings under the Qualified Assisted Housing programs would ensure that no undue or excessive enhancement would occur as a result of weatherization. DOE also requested comment on whether similar and sufficient controls were present under the LIHTC Program to allow DOE to make a similar finding for the LIHTC Program.

Commenters expressed their support for a DOE determination that controls over buildings in the Qualified Assisted Housing and LIHTC would ensure that no undue or excessive enhancement would occur as a result of weatherization. One commenter noted that with regard to the excessive enhancement issue, LIHTC properties should be treated in the same manner as Qualified Assisted Housing properties. The commenter added that the existence of maximum rental rates and long-term use restrictions in the LIHTC program acted as strong disincentives to the undertaking of excessive enhancements and for those reasons, the commenter urged DOE to conclude that LIHTC properties have controls in place to ensure no undue or excessive enhancement. This commenter indicated that DOE could alternatively consider defining "excessive enhancement" by reference to a savings to investment ratio over the lifecycle of the improvement.

DOE recognizes that some of the conditions placed on property owners under the LIHTC program may make it unlikely for weatherization work to result in undue or excessive enhancements to the property. However, in some cases, additional conditions may be required in order to assure compliance with this requirement. Because of the variability of arrangements under the LIHTC program, DOE is not including properties under the LIHTC program on the published list of properties that comply with the "no undue or excessive enhancement requirement" without need for further conditions or verification.

Based on review of the public comments, DOE has determined in today's final rule that the existing limits on permissible work under the Weatherization Assistance Program and the HUD control of improvements under the Qualified Assisted Housing programs provide the necessary assurances that no undue or excessive enhancement will occur as a result of the weatherization of the buildings identified by HUD.

B. Other Eligibility Requirements

1. Accrual of Benefits

Under the Weatherization Assistance Program regulations, a grantee must ensure that for multi-unit buildings the benefits of weatherizing a building that consists of rental units, including rental units where the tenant pays for energy through rent, accrue primarily to the low-income tenants. (42 U.S.C. 6863(b)(5)(A); 10 CFR 440.22(b)(3)(i)). The payment of utilities in Qualified Assisted Housing Programs and LIHTC can be structured in a number of ways. For centrally-metered utilities, utility expenditures are included in monthly rent payments. For individually- or sub-metered utilities, tenants may receive a utility allowance, or the utility allowance can be provided directly to the utility company. Given the variability with how the benefits of weatherization, particularly utility savings, could be realized by tenants in the Qualified Assisted Housing and LIHTC Programs, a request for weatherization of a multi-unit building on the list provided by HUD would need to demonstrate that the benefits of the weatherization work accrue primarily to the low-income tenants.

Compliance with the requirement for the benefits of weatherization to accrue to the low-income tenants can be demonstrated more readily when the weatherization results in reduced utility costs for the tenant. Under the Qualified Assisted Housing programs and the LIHTC Program, tenants may not directly pay for all or part of their utility bills. In instances in which tenants of a building do not directly pay utility costs and have capped rents, the property owner needs to demonstrate that benefits accrue primarily to the tenant of the weatherized units other than by the benefit of reduced utility bills. In the NOPR DOE requested comments on how to ensure compliance with the requirement that benefits of weatherization accrue primarily to the low-income tenants, including information on procedures that may be used by States and subgrantees to determine that the accrual provision is satisfied in the context of buildings in the Qualified Assisted Housing programs and LIHTC Program.

DOE finds that public comments provided helpful guidance on how States could potentially meet the requirement of ensuring that the benefits accrue primarily to low-income tenants. Some commenters submitted that reduced utility bills were not the only indication of a benefit accruing primarily to the low-income tenant and treating them as such would run contrary to the realities of assisted rental housing and undermine the work many States have done to address housing and resident needs. The commenters urged DOE to determine that this accrual requirement could be met by the safer, healthier living environment low-income tenants experience as a result of weatherization. *(Nat'l Housing Law Project, SAHF, OH Partners for Affordable Energy)* Commenters also asserted that this requirement could be met by the preservation of the property as affordable rental housing. They indicated that weatherization funds help these properties manage rising energy costs and therefore, protect the long term viability and availability of affordable housing, thereby primarily benefiting current and future low-income tenants. *(See SAHF, p. 3–4; OH Partners for Affordable Energy, p. 4)* One commenter stated that in strong markets, properties are affordable only because of control or long-term use restrictions. Some comments urged DOE to determine that the accrual requirement could be met if a non-profit owns or controls the property or the property is subject to a low-income use restriction for a certain period of time. *(See SAHF, p. 3; NCLC, p.14)* DOE agrees that procedures under which weatherization work incorporates use agreements that extend the affordable character of the project for the low-income tenants can be relied on by States, in part, to ensure the accrual of benefits of the weatherization to low-income tenants.

Other commenters expressed that while the reduction of energy costs was not the only benefit low-income tenants could derive from weatherization, it was the most important. *(See NCLC/TLSC, p. 4–5)* They added that in instances where low-income tenants pay for utilities as part of their capped rent, the financial benefits resulting from weatherization accrue primarily to owners rather than low-income tenants. *(See NCLC/TLSC, p. 4–5)* In instances where low-income tenants pay for their own utilities, the commenters asserted that the benefits would accrue primarily to the tenants.

DOE has determined that the Qualified Assisted Housing programs, in and of themselves, may not provide the conditions necessary to ensure that the benefits of weatherization accrue primarily to the low-income tenants. This was recognized by many of the commenters who provided examples of instances in which the benefits could be demonstrated as accruing primarily to the low-income tenants through the imposition of conditions in addition to those present under the Qualified Assisted Housing Programs. Administering State agencies have the responsibility to ensure that the benefits of weatherization activities at Qualified Assisted Housing properties accrue primarily to the low-income tenants. Thus, States may establish requirements and procedures for subgrantees to demonstrate that this standard is met.

Given the variability with how utility savings could be realized by tenants in the Qualified Assisted Housing and LIHTC programs, a request for weatherization of a multi-unit building that is on the list provided by HUD would still need to demonstrate to the State (or subgrantee administering the program) that the benefits of the weatherization work accrue primarily to the low-income tenants. Demonstration of the benefits of weatherization accruing primarily to the low-income tenants can include reduced utility costs, and also a combination of longer-term preservation of the property as affordable housing, continued monitoring by or on behalf of DOE of the Weatherization Assistance Program's statutorily required protection from rent increases to low income tenants, and the benefits of a healthier living environment (*e.g.,* improved livability from thermal insulation, reductions in drafts, and fewer problems with allergens in living units).

Commenters cited procedures currently employed by States to ensure that the benefits of weatherization accrue primarily to low-income tenants. For example, the State of Washington recognizes "preserved low-income-housing, added comfort, and improved indoor air quality" as direct benefits to tenants, and requires documentation of the direct benefits that satisfy the accrual of benefits requirement. The approach taken by the State of Washington provides one model example of how States can ensure that the benefits of weatherization accrue primarily to low-income tenants. DOE is considering describing this and possibly other existing procedures in guidance as a non-inclusive list of examples of weatherization benefit accrual to low-income tenants. States may also consider other ways in which owner contributions or energy savings could be structured such that the benefits of weatherization can be shown to accrue primarily to the low-income tenants. These may include investments in capital expenditures such as energy efficient appliances, modernization of apartments, health and safety improvements, improved security systems, and other upgrades to the physical plant, as well as services such as such as broadband access, job

training through local community centers, and, access to local community facilities or after-school programs. States may consider these examples, a combination of these examples, or other conditions when considering how to ensure that the benefits of the weatherization accrue primarily to the low-income tenants.

2. Permission of Owner or Owner's Agent

Today's final rule will not alleviate the need for a subgrantee to obtain the written permission of the owner or the owner's agent or to confirm that a dwelling unit is not designated for acquisition or clearance by Federal, State, or local program within 12 months from the date of the weatherization.

3. Owner Financial Participation

DOE received a comment asserting that requiring additional owner contributions to participate in the weatherization program will create an additional and undue burden on the owner. *(OH Dept. of Development)* This commenter added that the owner contribution should be waived and required at the discretion of the State Home Weatherization Assistance Program recipient, and that it also be based on a financial analysis of the housing finance agency. *(OH Dept. of Development)* Today's final rule does not amend the regulatory provision regarding financial participation from building owners. As stated in the regulation, a State *may require financial participation where feasible* from owners of multi-family buildings. See, 10 CFR 440.22(d), emphasis added.

C. Other Comments Received

1. Allowable Expenditures

Some comments expressed interest in DOE addressing the restriction that prohibits weatherization funds from being used in buildings that have received funding since September 30, 1993. 10 CFR 440.18(f)(2)(iii). The commenters remarked that technological improvements and escalating energy prices since 1993 justify allowing weatherization programs to revisit properties that already received assistance.

DOE notes that the prohibition on the use of weatherization funds from being used in certain buildings that have received funds in previous years is established by statute and not subject to amendment by DOE. (See, 42 U.S.C. 6865(c)(2)).

2. Prioritization/Promotion of Multi-Family Projects

Some commenters presented the view that the rule could result in agencies providing services favoring multifamily properties than other types of properties. They urged that the decision on what types of dwellings to weatherize remain a local one because local agencies are most familiar with the needs of their communities. (*See OH Partners for Affordable Energy, others*)

Today's final rule does not require States to establish a particular prioritization with regard to the weatherization of multi-family buildings. Today's final rule minimizes procedural burdens on those States and subgrantees that choose to weatherize multi-family buildings for which the Federal government has data to support the eligibility of those buildings under DOE's Weatherization Assistance Program.

IV. Regulatory Analysis

A. Review Under Executive Order 12866

Today's final rule has been determined to be an economically significant regulatory action under section 3(f)(1) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

The American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5; Recovery Act) provided $5 billion for the Weatherization Assistance Program. Funding for grants under the Weatherization Assistance Program at a level greater than $100 million makes this rulemaking economically significant under the Executive Order.

The weatherization grants provided under this program constitute transfer payments. In this case, the payments are from the Government to grantees (*e.g.,* States, units of general purpose of local government, and community action agencies), and the payments do not represent a change in the total resources available to society. The grants do generate impacts such as weatherization benefits, however, which are discussed qualitatively in this final rule.[4] *See* OMB Circular A–4, at 14, 38 and 46. Given that today's rule is finalized prior to complete expenditure of the Recovery Act funds by grantees and subgrantees under the Weatherization Assistance Program, today's final rule could impact the process used by grantees and subgrantees to evaluate applications with respect to multi-unit buildings that are covered by this final rule for the purpose of distributing funds provided under the Recovery Act. Such changes in the process for application evaluation have the potential to cause a change in the distribution of Recovery Act funding, which may constitute a transfer between different non-Federal entities. Such impacts would also be a consideration when categorizing this rulemaking under Executive Order 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," (67 FR 53461; August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.* Today's action revises the eligibility requirements that apply to the administration of the Weatherization Assistance Program grants by grantees and subgrantees. Because the matter of today's action relates to grants, it is not subject to the notice and comment provisions of the Administrative Procedure Act. 5 U.S.C. 553(a)(2). Therefore, the analytical requirements of the Regulatory Flexibility Act do not apply. Although DOE requested comment, today's final rule on the eligibility of multi-unit buildings under the Weatherization Assistance Program is not subject to any legal requirement to publish a general notice of proposed rulemaking.

C. Review Under the National Environmental Policy Act of 1969

DOE has determined that today's action is covered under the Categorical Exclusion found in DOE's National

[4] It is important to note that rules that transfer Federal dollars often have opportunity costs or benefits in addition to the budgetary dollars spent because they can affect incentives, and thus lead to changes in the way people behave (e.g., in their investment decisions). For example, OMB Circular A–94 suggests that transfers that result from increased taxes may be associated with a marginal excess burden (deadweight loss) of 25 cents per dollar of Federal revenue collected (p. 12).

Environmental Policy Act regulations at paragraph A.6. of Appendix A to subpart D, 10 CFR part 1021. That Categorical Exclusion applies to rulemakings that are strictly procedural, such as rulemaking establishing the administration of grants. Today's action amends the eligibility provisions for multi-unit buildings under the Weatherization Assistance Program. The regulations will not have direct environmental impacts. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

D. Review Under Executive Order 13132, "*Federalism*"

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that pre-empt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's final rule and has determined it will not pre-empt State law and will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

E. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. The review required by sections 3(a) and 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the pre-emptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them.

DOE has completed the required review and determined that, to the extent permitted by law, today's action meets the relevant standards of Executive Order 12988.

F. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of Title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

Today's final rule will not impose a Federal mandate on State, local or tribal governments, and it will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

G. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Review Under the Treasury and General Government Appropriations Act of 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

I. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use, should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Review Under Executive Order 13175

Executive Order 13175, "Consultation and Coordination with Indian Tribal

Governments" (65 FR 67249; November 9, 2000), requires DOE to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" refers to regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." Today's regulatory action is not a policy that has "tribal implications" under Executive Order 13175. Today's regulatory action amends the eligibility provisions applicable to multi-unit buildings under the Weatherization Assistance Program. DOE has reviewed today's action under Executive Order 13175 and has determined that it is consistent with applicable policies of that Executive Order.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is a "major rule" as defined by 5 U.S.C. 804(2). DOE also will submit the supporting analyses to the Comptroller General in the U.S. Government Accountability Office (GAO) and make them available to each House of Congress.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects in 10 CFR Part 440

Administrative practice and procedure, Aged, Energy conservation, Grant programs—energy, Grant programs—housing and community development, Housing standards, Indians, Individuals with disabilities, Reporting and recordkeeping requirements, Weatherization.

Issued in Washington, DC, on January 14, 2010.

Catherine R. Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons set forth in the preamble, DOE is amending Part 440 of chapter II of title 10, Code of Federal Regulations to read as follows:

PART 440—WEATHERIZATION ASSISTANCE PROGRAM FOR LOW-INCOME PERSONS

■ 1. The authority citation for Part 440 continues to read as follows:

Authority: 42 U.S.C. 6861, *et seq.;* 42 U.S.C. 7101 *et seq.*

■ 2. Section 440.22 is amended by adding paragraph (b)(4) to read as follows:

§ 440.22 Eligible dwelling units.

* * * * *

(b) * * *

(4)(i) A building containing rental dwelling units meets the requirements of paragraph (b)(2), and paragraphs (b)(3)(ii) and (b)(3)(iv), of this section if it is included on the most recent list posted by DOE of Assisted Housing and Public Housing buildings identified by the U.S. Department of Housing and Urban Development as meeting those requirements.

(ii) A building containing rental dwelling units meets the requirements of paragraph (b)(2), and paragraph (b)(3)(iv), of this section if it is included on the most recent list posted by DOE of Assisted Housing and Public Housing buildings identified by the U.S. Department of Housing and Urban Development as meeting those requirements.

(iii) A building containing rental dwelling units meets the requirement of paragraph (b)(2) of this section if it is included on the most recent list posted by DOE of Low Income Housing Tax Credit buildings identified by the U.S. Department of Housing and Urban Development as meeting that requirement and of Rural Housing Service Multifamily Housing buildings identified by the U.S. Department of Agriculture as meeting that requirement.

(iv) For buildings identified under paragraphs (b)(4)(i), (ii) and (iii) of this section, States will continue to be responsible for ensuring compliance with the remaining requirements of this section, and States shall establish requirements and procedures to ensure such compliance in accordance with this section.

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[FR Doc. 2010–1300 Filed 1–22–10; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0453]

RIN 1625–AA09

Drawbridge Operation Regulations; Great Egg Harbor Bay, Between Beesleys Point and Somers Point, NJ

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the regulations that govern the operation of the US Route 9/Beesleys Point Bridge over Great Egg Harbor Bay, at mile 3.5, between Beesleys Point and Somers Point, NJ. This rule will allow the drawbridge to operate on an advance notice basis during specific dates and times of the year. The rule change will result in more efficient use of the bridge during dates and times of infrequent transit.

DATES: This rule is effective February 24, 2010.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0453 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0453 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Sandra S. Elliott, Bridge Administration Branch, Fifth Coast Guard District, telephone 757–398–6557, e-mail *Sandra.S.Elliott@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 24, 2009, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations; Great Egg Harbor Bay, between Beesleys Point and Somers Point, NJ, in the **Federal Register** (74 FR 30031). We received two comments on