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## LAW ALERT

### SAME HOME PROGRAM, NEW HOME RULES

The changes to the HOME Investment Partnerships Program ("HOME") regulations (24 C.F.R. 92), published in a federal register final rule on July 24, 2013 (the "Final Rule") [Final Rule \(Changes Only\)](#), represent what HUD has called the most significant change to the HOME program in 17 years. While the Final Rule largely adopts the proposed rule published by HUD on December 16, 2011, the Final Rule also incorporates HUD's response to public comments and some previously unpublished guidelines. The Final Rule requires each participating jurisdiction ("PJ") and housing developers to understand and implement some significant changes in relatively short order. The purpose of this Law Alert is to highlight key elements of the Final Rule and when they become effective.

#### **I. Effective Dates of the Final Rule**

Generally, the changes to the HOME regulations under the Final Rule are applicable to housing projects for which HOME funds are committed on or after August 23, 2013 (30 days following publication date of the Final Rule). As discussed below, there are six exceptions to the August 23, 2013 effective date, intended to allow participating jurisdiction time to implement new procedures to comply with the Final Rule. Despite the noted exceptions, the PJ may choose to begin to implement such requirements prior to the later effective date, so it is prudent to become familiar with all of the changes incorporated in the Final Rule. (Note that FY 2012 and FY 2013 HOME funded projects are also subject to the provisions of Public Law 112-55, *Consolidated and Further Continuing Appropriates Act, 2012.*)

#### **II. Key Elements of the Final Rule.**

- A. New Project Milestones and Deadlines. New, more stringent milestones and deadlines are imposed from "*commitment*", sale and lease-up, to "*project completion*", including the following:
- The definition of "*commitment*" is revised to prohibit a PJ from committing HOME funds to a project unless there is a reasonable expectation that construction will begin in 12 months, and not until all necessary financing has been secured, a budget and schedule established, and underwriting and subsidy layering are complete.\*
  - A HOME project not completed within 4 years of *commitment* must be terminated and the PJ will have to repay the HOME funds to its HOME account (subject to a 12 month extension on a showing of project progress).
  - HOME-assisted rental units must be occupied by income-eligible households within 18 months of *project completion*; if not, the PJ must repay HOME funds for the unrented units. Note, for units that remain unrented for 6 months following *project completion*, the PJ must identify and develop an enhanced marketing plan and report this information to HUD.

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\* *Regulation published in Final Rule differs from the proposed rule published by HUD December of 2011.*

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- A homebuyer unit must have a ratified sales contract within 9 months of completion of construction or rehabilitation (6 months for FY 2012 and FY 2013 HOME funded projects), or the PJ must either convert it to a HOME rental unit or repay the full HOME investment.\*
  - Community Housing Development Organizations (CHDO) set-aside funds must be committed to specific projects within 24 months of the PJ receiving its HOME allocation (*effective 10/22/13*). The PJ can no longer "reserve" CHDO funds for projects that will be identified at a later date. CHDO set-aside funds must be expended within 5 years of the date the PJ receives its formula allocation (*effective 1/1/15*).
- B. **Underwriting and Oversight**. The Final Rule significantly increases the underwriting and oversight responsibilities of each PJ, potentially increasing program administration costs. The following are examples of requirements under the new regulations:
- The PJ must undertake more formal risk assessments of projects and developers prior to the commitment of funds, implementing written policies for assessing long term viability, reasonableness of costs and amount of return to owner, market need, experience and financial capacity of the developer, and strength of other financial commitments.
  - The PJ must perform a subsidy layering underwriting analysis for all projects (not just those with other public funds).
  - Each PJ is required to develop written policies for homebuyer programs that include underwriting standards to determine the appropriate amount of assistance, anti-predatory lending strategies, and measures to ensure that the terms of refinancing of debt senior to the HOME assistance is reasonable (*effective 1/24/14*).
  - Each PJ must examine the financial condition of projects with more than 10 units annually to evaluate financial viability of the project (*effective 7/24/14*).
  - Each PJ must examine at least 2 months of source documentation for qualifying income determinations; provide a utility allowance for each project; and must expressly examine and set rents annually to ensure against "undue" increases in rent.
- C. **Use of HOME Funds; Fees Charged**. The Final Rule allows new uses of HOME Funds and for a PJ to charge certain fees, granting a modicum of increased flexibility.
- HOME funds may be used to pay for predevelopment architectural and related professional services incurred not more than 24 months prior to the date of the HOME commitment.
  - A PJ's costs of obtaining a CPA cost certification for a project audit may be an eligible cost.
  - The PJ may charge project owners a reasonable annual fee for compliance monitoring during the affordability period in connection with the increased monitoring requirements discussed below.
- D. **Property Standards and Inspections**. The Final Rule makes changes to the property standards and inspection requirements which will affect overall project costs. For instance:
- Each PJ must adopt written rehabilitation standards to provide the basis for determining the level of rehabilitation needed (but note the requirement for developing standards for methods and materials for new constructions projects in the proposed rule has been removed in the Final Rule; such projects must comply with applicable building codes) (*effective 1/24/15*).\*
  - Capital needs assessments are required for rehabilitation projects of 26 or more units (*effective 1/24/15*).
  - Upon completion of rehabilitation work, the PJ must ensure that all units pass an inspection that addresses "Uniform Physical Conditions Standards" ("UPCS") (uniform national standards established by HUD pursuant to 24 CFR 5.703 for inspectable items) for the following areas: site, building exterior, building systems, dwelling units, and common areas (*effective 1/24/15*).\*

- The PJ must perform inspections of projects prior to commitment of funds and commencement of work (rehabilitation projects), and during progress of the work and upon completion to evaluate compliance with the standards (rehabilitation projects) and with codes (new construction projects)(effective 7/24/14).
  - The PJ must establish ongoing property standards and inspection checklists for rental projects (effective 1/24/15) and perform ongoing monitoring and inspections of such projects within 12 months of completion and at least once every 3 years thereafter on a statistically valid sample of units (effective 7/24/14). Rental projects must use UPCS for ongoing inspections only in the absence of applicable state or local codes.\*
- E. CHDOs. The proposed rule makes several changes to the requirements for the staffing of CHDOs and the award of funds to CHDOs requiring greater accountability, and specificity of awards. The rule also clarifies previous HUD guidance on CHDO owned, developed, or sponsored housing, including for example:
- Each time the PJ commits HOME funds, it must re-certify a nonprofit's qualifications to be a CHDO and its capacity to own, sponsor, or develop housing.
  - To qualify as a CHDO for development or sponsor activities, a nonprofit entity must have paid staff (part time is sufficient) whose experience qualifies them to undertake CHDO set-aside activities. Capacity cannot be demonstrated by use of a consultant, except in the first year that a CHDO becomes certified.\*
  - Housing is considered "sponsored" by the CHDO if the property is owned or developed by a wholly owned subsidiary of the CHDO, a limited partnership in which the CHDO or its subsidiary is the sole general partner, or a limited liability company in which the CHDO or its subsidiary is the sole managing member.
  - A limited partnership agreement or LLC operating agreement must only permit the removal of the CHDO for cause and must require that the CHDO be replaced with another CHDO.
- F. Troubled Rental Projects. The Final Rule adds new regulations to help jurisdictions preserve HOME-assisted projects that are "troubled" (operating costs exceed revenues) and at a risk of foreclosure and would allow for these actions to be approved outside of the typical waiver process. Under this new section HUD may allow a jurisdiction to:
- Invest additional HOME funds so long as the new investment does not exceed the per-unit subsidy limit;
  - Use HOME funds to capitalize operating reserves; and
  - Reduce the number of HOME units if more than the required minimum were designated.

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