



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

September 12, 2014

MEMORANDUM FOR: William G. Rudy, Acting Director, Office of HIV/AIDS Housing,
Office of Community Planning and Development, DNH

FROM: 
Althea M. Forrester, Associate General Counsel for Assisted
Housing and Community Development, Office of General
Counsel, CAHB

SUBJECT: Permissibility of Formula Grantees under the Housing Opportunities
for Persons With AIDS Program to Provide Funding to Project
Sponsors in the Form of a Loan

This memorandum responds to your August 8, 2014, request for a legal opinion to address whether Housing Opportunities for Persons With AIDS (HOPWA) program formula grantees are permitted to award HOPWA grant funds to project sponsors in the form of a loan. Your request states that HOPWA formula grantees have routinely used their grant funds to provide loans to project sponsors – particularly in projects that are funded in part through the use of Low Income Housing Tax Credits. Based on my office's review of the relevant legal authorities, I conclude that HOPWA formula grantees are permitted to do so.

The HOPWA program is authorized under the AIDS Housing Opportunity Act (hereafter, "the Act"), Pub. L. No. 101-625, Title VIII, Subtitle D, *as amended*, codified at 42 U.S.C. §§ 12901 *et seq.* Under that authority and consistent with program regulations at 24 C.F.R. part 574, HUD makes grants to states, units of general local government, and nonprofit organizations with amounts appropriated by Congress to meet the housing needs of low-income persons with HIV/AIDS and their families. HOPWA grantees are required to carry out eligible activities through project sponsors. 42 U.S.C. § 12903(b). Project sponsor is defined as a "nonprofit organization or a housing agency of a State or unit of local government that contracts with a grantee to receive assistance under this chapter." 42 U.S.C. § 12902(14).

Section 855 of the Act, 42 U.S.C. § 12904, provides that HOPWA grants are only available "for approved activities to carry out strategies designed to prevent homelessness among eligible persons," which includes activities that:

- (1) enable public and nonprofit organizations or agencies to provide housing information to such persons and coordinate efforts to expand housing assistance resources for such persons under section 857;

- (2) facilitate the development and operation of shelter and services for such persons under section 858;
- (3) provide rental assistance to such persons under section 859;
- (4) facilitate (through project-based rental assistance or other means) the moderate rehabilitation of single room occupancy dwellings (SROs) that would be made available only to such persons under section 860;
- (5) facilitate the development of community residences for eligible persons under section 861;
- (6) carry out other activities that the Secretary develops in cooperation with eligible States and localities, except that activities developed under this paragraph may be assisted only with amounts provided under section 854(c)(3).

Section 855 concludes with the following sentences, “[t]he Secretary shall establish standards and guidelines for approved activities. The Secretary shall permit grantees to refine and adapt such standards and guidelines for individual projects, where such refinements and adaptations are made necessary by local circumstances.”

The statutory language in Section 855 governing eligible activities for the HOPWA program is broad. It does not specify the form in which grantees must provide HOPWA funds to project sponsors. Rather, it provides HOPWA grantees with flexibility to design and tailor their programs to meet the housing needs dictated by local circumstances. For instance, a HOPWA grantee that is acting under Section 855(2) may determine that providing a HOPWA-funded loan to a project sponsor to “facilitate the development” of a homeless shelter is the most effective form of financing the shelter project. The shelter would serve persons with HIV/AIDS, and provide them with appropriate supportive services. Under such a case, the project sponsor may be able to leverage additional funding sources and repay the grantee after a certain period of time. Alternatively, the HOPWA grantee may consider providing a forgivable loan to the project sponsor, in which case, the project sponsor could commit to operating the HOPWA-funded shelter for a certain minimum period of time in return for the loan being forgiven by the grantee. Nothing in Section 855 of the Act or the corresponding HOPWA regulations would prohibit these types of arrangements between a grantee and a project sponsor in furtherance of an eligible activity.

Similarly, Section 855(5) does not provide that development of community residences to provide permanent or transitional housing must be carried out by providing grants directly to project sponsors. To the contrary, Section 861 of the Act, to which Section 855(5) refers, anticipates that HOPWA funds will be used to finance the construction and operating costs of community residences, authorizes the use of Section 8 tenant-based rental assistance in such facilities, and mandates an affordable rent structure. See 42 U.S.C § 12910. Project sponsors may design these community residences to generate rent receipts and other income to finance operating costs of the project. Accordingly, a HOPWA grantee funding the project sponsor may

determine that providing HOPWA assistance in the form of a loan, rather than a grant, would be most appropriate and would maximize the availability of funds for HOPWA program beneficiaries. Nothing in Section 855 would prohibit a grantee from structuring HOPWA assistance to a project sponsor in this way.

The last sentence in section 855—"The Secretary shall permit grantees to refine and adapt such standards and guidelines for individual projects, where such refinements and adaptations are made necessary by local circumstances"—underlines the statute's flexibility with respect to the *form* in which the grantee implements the program activities. 42 U.S.C. § 12904. Nothing in the HOPWA regulations at 24 C.F.R. part 574, including subpart D ("Uses of Grant Funds"), restricts the flexibility provided in section 855 with respect to the form in which grant funds are provided to a project sponsor to carry out an eligible activity under the Act.

Beyond section 855, there is other support within the Act for the permissibility of grantees using HOPWA grant funds to make loans to project sponsors. In section 853 of the Act, 42 U.S.C. § 12902, "grantee" is defined as "a State or unit of general local government receiving grants from the Secretary under this chapter." By contrast, "project sponsor" is defined as a "nonprofit organization or a housing agency of a State or unit of general local government that contracts with a grantee to receive assistance under this chapter." The salient point of distinction between these definitions is that the definition of "grantee" specifically provides that assistance is received in the form of a grant, while the definition of project sponsor does not prescribe the form of assistance received.

Outside of the Act, the OMB circulars, as implemented through 24 C.F.R. parts 84 and 85, lend further support to the permissibility of a HOPWA grantee providing grant funds to project sponsors in the form of a loan. A grantee's acceptance and use of HOPWA grant funds are subject to the uniform administrative requirements on grants and cooperative agreements in OMB Circular Nos. A-102 (for states and local governments) and A-110 (for non-profit organizations). 24 C.F.R. § 574.605. These circulars encourage the generation and use of program income to defray program costs.¹ HUD's implementing regulations at 24 C.F.R. parts 84 and 85 reiterate this encouragement of program income and define program income to include interest on loans made with grant funds. 24 C.F.R. §§ 84.2 and 85.25. As you are aware, the Office of Management and Budget has issued a final rule that supersedes OMB Circular Nos. A-102 and A-110, among others. HUD will amend its regulations to implement the new rule for HUD programs, including HOPWA. The new rule encourages non-Federal entities to earn income to defray program costs and defines "program income" to include "principal and interest on loans made with Federal award funds." See 2 C.F.R. §§ 200.80 and 200.307.

In summary, the flexibility provided by the Act as to the *form* in which grantees provide HOPWA funds to project sponsors to carry out eligible activities as well as the encouragement for generation and use of program income in the OMB circulars, which includes interest earned on loans made from grant funds, justifies the conclusion that it is permissible for HOPWA formula grantees to provide their grant funds to project sponsors in the form of a loan.

¹ See OMB Circular Nos. A-102, at 2(e) ("agencies shall encourage grantees to generate program income to help defray program costs") and A-110 ("To the extent available, recipients shall disburse funds available from ... program income... before requesting additional cash payments").

If you have any further questions or concerns, please contact Brian Stecker or Jad Atallah, of my office at (202) 708-2027. Thank you.