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

OFFICE OF GENERAL COUNSEL

July 6, 2009

MEMORANDUM FOR: Helen R. Kanovsky, General Counsel, C

THROUGH: John W. Herold, Deputy General Counsel for Housing Programs, CP

FROM: John J. Daly, Associate General Counsel for Insured Housing, CI

Elton J. Lester, Associate General Counsel for Assisted Housing and Community Development, CD

SUBJECT: Mark-to-Market Section 8 Subsequent Renewal Authority

Various offices within the Office of General Counsel have been engaged in a vigorous debate about provisions of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (Title V of Pub. L. No. 105-65, October 27, 1997, 111 Stat. 1344, 1384, 42 U.S.C. 1437f note), as amended ("MAHRA"). Specifically, substantial efforts have been expended to determine the statutorily prescribed renewal authority for an expiring, or terminating, Section 8 housing assistance payment contract, initially renewed pursuant to Section 515(a) of MAHRA (the "Full Mark-To-Market Renewal Contract" or "Initial Renewal"), for a project that has received the benefits of a Mark-to-Market ("M2M") Program debt restructuring ("Debt Restructuring") under MAHRA. The issue is whether the Secretary is authorized under MAHRA to accept an owner's request for subsequent renewals of the Full Mark-To-Market Renewal Contract ("Subsequent Renewal(s)") under Section 524 of MAHRA,[1] or is the Secretary required to make Subsequent Renewal offers under Section 515(a). The position of our respective offices is that the Secretary's Subsequent Renewal authority under Section 515(a) for projects that underwent Debt Restructuring is mandatory, not discretionary, and that Section 524 renewals are available only for projects that are not, or will not be, the subject of a Debt Restructuring. Our position is based on specific authority in Section 515 as well as related M2M provisions in MAHRA, especially the prescriptive requirements in Section 514.

The procedures and requirements for a Debt Restructuring are prepared by the Secretary (or a PAE on behalf of the Secretary), pursuant to Section 514(a), and are expressed in a "Mortgage Restructuring and Rental Assistance Sufficiency Plan ("Restructuring Plan"), the terms and conditions of which are prescribed in Section 514.[2] Section 514(e) contains a prescriptive list of requirements that each Restructuring Plan must contain, including a requirement that the plan

[1] Except as may be otherwise indicated, all statutory references will be to sections of MAHRA.

[2] A Restructuring Plan contains details of a plan developed by HUD and a "Participating Administrative Entity," or "PAE," during the underwriting process for a Debt Restructuring.

"allow for rent adjustments by applying an operating cost adjustment factor established under guidelines established by the Secretary." Subsection 514(g), entitled "Rent Levels," states in paragraph (1) that, "[e]xcept as provided in paragraph (2)" each Restructuring Plan "shall establish . . . adjusted rent levels that are equivalent to rents derived from comparable properties . . ." While developing a Restructuring Plan, paragraph (2) authorizes use of rents in excess of comparable rents (*e.g.*, budget-based rents) under limited circumstances and in very limited amounts for "preservation-worthy" projects. A Restructuring Plan is incorporated into a Restructuring Commitment that is presented by HUD to a project owner. An owner's acceptance of terms and conditions of the Restructuring Plan in the Restructuring Commitment becomes the basis for closing the Debt Restructuring transaction. By its terms, the Restructuring Commitment (and its Restructuring Plan) remain in effect after closing of a Debt Restructuring transaction. There is no authority in MAHRA for modifying provisions in the Restructuring Plan after closing, and adherence to the Restructuring Plan is mandatory with compliance monitoring authorized under Section 519.

Section 515 states:

> SECTION 8 RENEWALS AND LONG-TERM AFFORDABILITY COMMITMENT BY OWNER OF PROJECT
>
> (a) SECTION 8 RENEWALS OF RESTRUCTURED PROJECTS.—
>
> (1) PROJECT-BASED ASSISTANCE.—Subject to the availability of amounts provided in advance in appropriations Acts . . . , with respect to an expiring section 8 contract on an eligible multifamily housing project to be renewed with project-based assistance . . ., the Secretary shall offer to renew such contract, and the owner of the project shall accept the offer, if the initial renewal is in accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan. (emphasis added).
>
> * * *
>
> (b) REQUIRED COMMITMENT.—After the initial renewal of a section 8 contract pursuant to this section, the owner shall accept each offer made pursuant to subsection (a) to renew the contract, for the term of the affordability and use restrictions required by section 514(e)(6), if the offer to renew is on terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan (emphasis added).

There appears to be no dispute that the renewal authority for an Initial Renewal is Section 515(a). A parsing of Sections 515(a) and 515(b) demonstrates that the sole authority for the Secretary to enter into a Subsequent Renewal also is Section 515(a).

The plain language of Section 515(a) clearly requires the Secretary to offer the Initial Renewal thereunder "if [meaning on condition that or in the event that[3]] the initial renewal is in

---

[3] See *Michael Donald Dodd, Petitioner, v. United States*, 545 U.S. 353, 357 (2005) for the use of the word "if," from Webster's Third New International Dictionary 1124 (1993), that is defined as "in the event that" or "on condition that."

accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan." The Secretary already is obligated under the Restructuring Commitment to offer an Initial Renewal and Subsequent Renewals in accordance with terms and conditions in the Restructuring Plan. If the owner elects not to accept an Initial Renewal offer, Secretary is not authorized under section 515 to renew the Expiring Contract, nor is the Secretary obligated to renew the Section 8 assistance under Section 524. For each Subsequent Renewal, the Secretary must make an offer pursuant to Subsection 515(a), and Subsection 515(b) obligates the owner for 30 years[4] to accept "each offer made pursuant to subsection (a) ... if the offer to renew is on terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan. To emphasize the continuing nature of the Secretary's obligation to make renewal offers for 30 years in accordance with the Restructuring Plan, the Subsequent Renewal authority in Section 515(b) specifically incorporates the mandatory renewal requirement in Section 515(a) by including the phrase "each offer made pursuant to subsection (a)." Consequently, neither the term "if" clause in Section 515(a) nor the "if" clause in Section 515(b) provide the Secretary with any discretion about whether to offer the Initial Renewal or any Subsequent Renewal, provided there are no circumstances beyond the Secretary's control (*e.g.*, lack of sufficient appropriations) that affect his ability to offer a Section 8 renewal contract on terms and conditions in the Restructuring Plan. *See* Michael *Donald Dodd, Petitioner, v. United States*, 545 U.S. 353, 357 (2005). Consequently, the statutory requirements in Section 515 further the Restructuring Plan and evidence a long-term (30 years) mutual commitment between the Secretary and a project owner that precludes consideration of an owner's request for Subsequent Renewal under Section 524.

It has been suggested that *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984) may provide guidance to resolve the pending issue due to a perceived ambiguity in Section 515. *Chevron* established the basic framework for statutory interpretation when an ambiguity exists or if the statute is silent on an issue. With respect to Sections 515(a) and (b), Congress has spoken directly on the precise question at issue (*i.e.*, what authority the Secretary has to make Subsequent Renewal offers under Section 515(a)). For the reasons noted above, our position is that Congress clearly has indicated that Subsequent Renewal offers by the Secretary for M2M Debt Restructured transactions must be made under Section 515(a) in accordance with terms and conditions in the Restructuring Plan. Since Congressional intent in Sections 515(a) and (b) is clear, there is no ambiguity and no basis for application of an alternative interpretation pursuant to *Chevron*.

An argument was proffered recently that MAHRA Section 524 (referred herein as "New

---

confirmed in *Merriam-Webster Online Dictionary*. Retrieved June 23, 2009, from http://www.merriam-webster.com/dictionary/if. In the *Dodd* case, the Supreme Court held that, "with respect to a [statutory] provision of a 1-year limitation period (for a federal prisoner's motion under [a statute] for relief from a sentence on the basis of a right newly recognized by the United States Supreme Court) that starts when the Supreme Court initially recognizes the right, a qualifying clause in the [statute] stating that the limitation period starts upon initial recognition *'if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review'* -- means that the starting date does not apply at all *if* the conditions in the qualifying clause have not been satisfied." *Id.*

[4] The cross-reference in Section 515(b) to Section 514(e)(6) incorporates the mandatory 30 year period related to M2M use agreements.

Section 524")[5] might be dispositive of the issue of determining the Secretary's authority for Subsequent Renewals. New Section 524 was enacted after Section 515; therefore, an assertion has been made that the "later enacted statute" doctrine of statutory interpretation would mean that New Section 524 would prevail over, and essentially repeal, Section 515(b). That interpretation is not correct. New Section 524(g) states:

> (g) Applicability. - Except to the extent otherwise specifically provided in this section, this section shall apply with respect to any multifamily housing project having a contract for project-based assistance under section 8 [42 U.S.C. 1437f] that terminates or expires during fiscal year 2000 or thereafter.

The introductory clause "[e]xcept to the extent otherwise specifically provided in this section . . ." limits the applicability of New Section 524(g) and removes the mandatory renewal obligation imposed on the Secretary under New Section 524(a)(1) to accept an Owner's renewal offer if: (i) the owner is deemed to be ineligible due to material adverse financial or managerial action or omissions pursuant to Section 516 of MAHRA (or the poor condition of the project cannot be remedied in a cost effective manner), (ii) the amount of section 8 appropriations is insufficient, or (iii) most importantly for this discussion, the Secretary determines that the property must receive a Debt Restructuring. If the Secretary determines that a property must receive a Debt Restructuring, the desired renewal authority clearly is Section 515(a) pursuant to a Restructuring Plan, and the Subsequent Renewal authority is Sections 515(a) and (b) (*i.e.*, section 515(a) for the Secretary's obligation to make a renewal offer consistent with the Restructuring Plan and Section 515(b) for the owner's obligation to accept the Secretary's Subsequent Renewal offer). Consequently, for cases in which the Secretary has determined that a Debt Restructuring is necessary, and a project owner already has received the benefits of that Debt Restructuring, the Subsequent Renewal authority must be Section 515. The later-enacted statute doctrine does not alter this analysis.[6] In addition, after the enactment of the New Section 524, Congress twice extended Subtitle A of MAHRA, which includes Sections 515, without repealing those Subsections 515 (a) or (b), so one cannot say now that the New Section 524, including Subsection 524(g), is the later-enacted statute and can serve as a basis for a project owner rejecting a Subsequent Renewal under Subsection 515.

In addition to discussions with respect to determining the statutory authority for Subsequent Renewals, our offices have engaged in an ongoing analysis that has considered the availability of making annual adjustments to Initial Renewals or Subsequent Renewals on a budget basis rather than utilizing an Operating Cost Adjustment Factor ("OCAF"). We believe that MAHRA Section

---

[5] The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 2000 (Pub. L. 106-74, approved October 20, 1999), amended section 524 of MAHRA and affected in a material manner the rule making process for the Final Rule (24 CFR Part 401).

[6] 2B Sutherland Statutory Construction §51:5 (7th ed., Singer ed.) ("where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication"). Subsections 515(a) and (b) were not repealed in general words or by necessary implication; in fact, they remain critical to continue carrying out the Debt Restructuring process. Taken to its extreme, the proposed interpretation of Section 524(g) would mean that HUD no longer would have authority to provide an Initial Renewal to close a M2M Debt Restructuring transaction after 2000.

514(e)(2) precludes a budget-based approach by providing that "[e]ach mortgage restructuring and rental assistance sufficiency plan shall . . . allow for rent adjustments by applying an operating cost adjustment factor established under guidelines established by the Secretary." Consequently, an OCAF is the only rent adjustment authorized under Section 514(e)(2). Sections 514(g)(2) and (3) permit a very limited budget-based approach, but such authority must be incorporated into a Restructuring Plan before the closing of a Debt Restructuring transaction.[7] Budget-based rents for Debt Restructuring projects are available on a limited basis for incorporation into a Restructuring Plan but only when the Office of Affordable Housing Preservation has determined that the above-market or "exception rents" are necessary for the operation of the property and that alternative housing is not available in the market-place. Allowing budget basing for annual adjustments after closing of a Debt Restructuring transaction, as contemplated by suggested interpretations of this statutory scheme, would not conform to the statutory limitations imposed by Congress for granting exception rents in a M2M Debt Restructuring.[8]

In summary, Congress indicated that the purposes in MAHRA section 511(b) would be satisfied and subsequently realized through the closing of a M2M Debt Restructuring. Despite the surface appeal of providing additional Section 8 funds to owners struggling with project expenses and/or with projects in need of substantial repairs, MAHRA does not provide the solution. To interpret otherwise would set a precedent for excessive and escalating section 8 subsidies, the very problem that Congress intended to correct through the M2M program.[9] The two New York properties that have provided the impetus to review the issues in this memorandum may be uniquely positioned to seek an interpretation of the statutory scheme to allow budget-based adjustments due to purported below market rents; however, the necessary statutory analysis cannot be made on a project-by-project basis. Will other projects in need of substantial repairs or struggling with operating expenses likewise have below market rents? How should the Secretary respond to their requests?[10] In addition, it appears that the two New York properties may seek a level of rehabilitation that exceeds the MAHRA imposed limitation of a "non-luxury standard adequate for the rental market intended at the original approval of the project–based assistance."[11] To accept the Owner's request for a budget-based rent increase under Section 524 would frustrate Congressional intent and would result in an expenditure of funds not authorized under Sections 515.

---

[7] For properties not subject to a Debt Restructuring, Section 524(c) does permit the use of budget based annual adjustments for basic renewals (*i.e.*, not Mark-Up-To-Market section 8 contracts) at the owner's request and at the discretion of the Secretary, rather than using an operating cost adjustment factor, but only for annual adjustments made after the initial renewal of a Section 8 housing assistance payment contract under Section 524.

[8] Despite the option for budget-based adjustments under 24 CFR 401.412(b), we believe that provision in the rule is not authorized by MAHRA and must be removed.

[9] Furthermore, the GAO and OMB relied upon a level of section 8 savings predicated on maintaining the M2M rent structure determined under consummated Debt Restructurings as partial consideration for the extensions of the sunset date for the M2M program.

[10] Projects seeking a refinancing of existing M2M debt are subject to Housing Notice: H 08-04, entitled "Guidelines for Assumption, Subordination, or Assignment of Mark-to-Market (M2M) Program Loans in Transfer of Physical Assets (TPA) and Refinance Transactions."

[11] See MAHRA Section 517(c).

For the reasons stated above, we maintain that the Secretary's Subsequent Renewal authority under Section 515(a) for projects that have undergone Debt Restructuring is mandatory, not discretionary, and Section 524 renewals are available only for projects that are not, or will not become, the subject of a Debt Restructuring. With respect to annual adjustments, however, we believe that OCAF could provide a means to address project operating expenses (but not upfront payment of rehabilitation expenditures) which an owner is having difficulty paying through project income. Since OCAF is determined by the Secretary, that process could be reviewed by the Department in the context of providing some relief for owners in good standing with HUD.[12]

[12] See, generally, General Accountability Office, Project -Based Rental Assistance: HUD Should Update Its Policies and Procedures to Keep Pace with the Changing Housing Market, GAO-07-290, April 11, 2007, available at http://www.gao.gov/new.items/d07290.pdf. For the reasons noted above, our position is that Congress clearly has indicated that Initial Renewal and Subsequent Renewal offers by the Secretary for M2M Debt Restructured transactions must be made under Section 515(a), but OCAF rent adjustments can be made under guidelines established by the Secretary