

Reinsurance and Subsidy Layering

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Subject: Reinsurance and Subsidy Layering

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MEMORANDUM FOR: Linda D. Cheatham, Director, Office of Insured  
Multifamily Housing Development, HMI

FROM: John J. Daly, Associate General Counsel, Office of Insured  
Housing and Finance, GH

SUBJECT: Clarification of Memorandum on Section 542(b) of the  
Housing and Community Development Act of 1992 -  
Risk-Sharing Demonstration Program

We are writing to you in connection with a memorandum, entitled "Section 542(b) of the Housing and Community Development Act of 1992 - Risk-Sharing Demonstration Program," which this office previously sent to you on November 30, 1993. (Attachment A.) As you may be aware, we recently reviewed the Office of Housing's new Subsidy Layering Guidelines ("SLGs") that were published in the Federal Register on February 25, 1994, as well as prepared a memorandum (for the General Counsel's signature) examining whether former President Bush's signing statement precluded full delegation of subsidy layering responsibilities to HCAs under section 911 of the Housing and Community Development Act of 1992 ("1992 Act"). As a result of our efforts in connection with these matters, we have concluded that it would be useful to clarify two portions of the November 30, 1993 memorandum. As set forth in more detail below, both clarifications pertain to that portion of the November 30, 1993 memorandum which examined whether the subsidy layering requirements of section 102(d) of the Department of Housing and Urban Development Reform Act ("Reform Act") could be delegated.

The first clarification relates to a sentence that appears on page 6 (in the first full paragraph) of the November 30, 1993 memorandum. There we stated that if, in accordance with section 911, the Office of Housing were to issue guidelines providing for a delegation of authority to HCAs to carry out the subsidy layering responsibilities of section 102(d) of the Reform Act, then 24 C.F.R. Section 12.52(a) 24 C.F.R. Section 12.52(a)(1) states: "[b]efore HUD makes any assistance subject to this subpart [D] available with respect to a housing project for which other government assistance is, or is expected to be, made available, HUD will determine, and execute a certification, that the amount of the assistance is not more than is necessary to make the assisted activity feasible after taking account of the other government assistance." would need to be

changed. We further stated that we deferred to Myra L. Ransick, Assistant General Counsel for Regulations, as to whether any such guidelines could be issued under the authority of section 911 before a change was made to that regulation.

We have since concluded that 24 C.F.R. Section 12.52(a) would not need to be amended before any issuance of guidelines under section 911. Indeed, as previously noted, the Office of Housing recently published the SLGs which, among other things, provide for a delegation of authority to HCAs for the subsidy layering function. This is because OGC's Implementation Guide for the 1992 Act did not state that a regulation change was needed. Further, the statute (in section 911(a)) expressly instructs the Secretary to establish guidelines (not regulations) for HCAs to carry out the section 102(d) function. Finally, section 911 authorizes a delegation of HUD's existing section 102(d) authority. Therefore, through the issuance of guidelines, HUD can delegate its responsibilities (as set forth in 24 C.F.R. Section 12.52(a)) to determine and execute a certification that there is no excess subsidy in a project. We do recommend (for sake of clarity), however, that when 24 C.F.R. Part 12 is next amended, the regulations at Subpart D also be amended to take the delegation into account. In our view, a technical amendment to Subpart D could make clear that, pursuant to section 911, and to the extent set forth in the SLGs and any related instructions, HCAs may perform the subsidy layering function for low-income housing tax credit ("LIHTC") projects that receive HUD assistance.

The second clarification relates to a sentence that appears on page 7 (in the first paragraph) of the November 30, 1993 memorandum. There we were considering the fact that (at the time the November 30, 1993 memorandum was written), the Office of Housing had not implemented section 102(d) for non-LIHTC forms of other government assistance. See Administrative Guidelines published at 56 Fed. Reg. 14436 (April 9, 1991). In connection with examining the effect that such partial implementation would have on a delegation to HCAs to perform the subsidy layering function, we stated:

Normally, the Office of Housing first would have to implement its authority under 24 C.F.R. Part 12, Subpart D, for such other forms of other government assistance [i.e., non-LIHTC assistance] before it could delegate such functions. There are, however, two caveats to this. First, in the case of projects with HUD assistance and LIHTCs, we again defer to Ms. Ransick as to whether Section 911 is self-implementing and would, therefore, allow HCAs to

perform the Section 102(d) subsidy layering functions for any additional other government assistance going to LIHTC projects. Second, in the case of projects with HUD assistance and other government assistance that is not a LIHTC ... Congress would have to pass a statute providing

the requisite authority to delegate the Section 102(d) functions [because Section 911 only speaks to a delegation for LIHTC projects]." (Emphasis added.)

We wish to clarify the sentence that is emphasized in the preceding quote. To begin, in view of the fact that section 911(a) provides that the Secretary must establish guidelines for HCAs to implement the requirements of section 102(d), it is clear that section 911 is not self-implementing. This is because, if section 911 were self-implementing, the Department would not need to take any action to make it operative. In addition, we did not intend to suggest that when HCAs were delegated authority to perform the subsidy layering function for LIHTC projects under section 911, they could not consider all sources going to a project. In this regard, we believe that in an LIHTC project all sources, including any other forms of other government assistance (such as a state or local grant) that are available as a source to a project, should be considered by an HCA when performing the subsidy layering review and certification functions under section 911. We note that the April 1991 guidelines (which the Office of Housing previously followed) were limited to LIHTC projects and, yet, contemplated that all sources to such projects would be considered as part of the subsidy layering analysis. In this regard, the April 1991 guidelines expressly stated that: "[i]n applying these guidelines, the Office of Housing will review all proposed sources and uses of funds. See 56 Fed. Reg. 14437 (April 9, 1991). The April 1991 guidelines further stated that "[t]he Department will consider all loans, grants or other funds provided by parties other than HUD ..." Id.

Attachment