Affordable Housing Management Association of Washington

November 23, 2020

Via E-Mail (www.regulations.gov)

Ms. Jennifer Larson
Multi-Family Housing Portfolio Management Division
Rural Housing Service
Stop 0782
1400 Independence Avenue SW
Washington, DC 20250-0782

RE: Rental Assistance and Asset Management for the Multi-Family Housing Direct Loan Programs
Docket No. RHS-20-MFH-0017

Dear Ms. Larson:

The Affordable Housing Management Association or Washington ("AHMA-WA") provides these comments to the Rural Housing Service, USDA, Docket No, RHS-20-MFH-0017 proposed rule to the Rental Assistance and Asset Management for the Multi-Family Housing Direct Loan Programs which is proposing to amend its regulation to implement changes related to the development of a sustainable plan for the Rental Assistance program.

The AHMA-WA, through its Affordable Rural Housing Committee (ARHC) promotes and supports safe, clean and affordable housing in rural communities. Our members develop, manage or own properties funded through USDA/Rural Development (RD), the Low-Income Housing Tax Credit (LIHTC), and other programs promoting affordable rural housing. AHMA-WA advances their common interests by promoting professionalism; providing a strong, united voice among policymakers; and offering education, resources and information. AHMA-WA is a statewide association consisting of members actively involved in the rural multifamily housing industry and works closely with the USDA's Rural Housing Service at both the national and statewide levels, conducts training programs, represents the industry before Congress, and working closely with USDA, holds an annual convention, and regularly updates our members on new developments.

AHMA-WA appreciates and supports the efforts of the Rural Housing Service to provide greater flexibility, economic utilization, and efficiency when administering Rental Assistance and the managing assets of RD's Direct MFH Loan portfolio. In an effort to provide RHS with direct and respectful feedback, we request the Agency's kind review and consideration of the following attached comments:

Sincerely,

DeAnn Hartman
Executive Director
AHMA of Washington

Comments on RD's 9/23/2020 Proposed Changes to 7 C FR 3560

Prepared for AHMA-WA by Larry Anderson, Get RD Done Right! - 11-23-20

Proposed changes are referenced by the "change number" as listed in the FR document. The "bolded" title below for each change number is an editorial description. Feedback is welcome.

Comments on Critical Proposed Changes:

25. **Limiting prepayment prevention incentive offers to only those projects RD chooses to preserve.** Amend 3560.656 by removing the word "will" and replacing it with "may" in paragraph (a)….

I recommend that RD withdraw this proposed revision and leave the regulation unchanged. The following are key issues:

The change violates statute:

Section 502 (c) (4) (A) of the Housing Act of 1949 requires that before the Secretary of Agriculture accepts an offer to prepay that the "***Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use…***" by using incentives as outlined in Section 502 (c) (4) (B). Changing "will" to "may" violates that requirement.

The change is bad policy as it accelerates the shrinking of RD's rental housing portfolio:

The statute clearly requires RD to offer an incentive to anybody requesting to prepay as a means to retain affordable rural rental housing. The statute was written to provide the government an effective tool to try to preserve affordable rental housing built with taxpayer support from leaving the program. The "shall" (or "will" in the regulation) says that the government will offer a financial incentive to owners to stay in the program so that it could be retained in the RD portfolio and continue to serve its tenants and community. A "may" eliminates RD's duty and responsibility to offer an incentive. Without an incentive to stay, many more owners will remove their housing from the affordable pool of rural rental housing.

The change magnifies the role of government subjectivity in choosing who gets an offer.

RD may understandably desire to be able to pick and choose who they offer an incentive to avert prepayment as their funding is limited. However, a "may" gives RD broad authority to decide if a project is in the wrong state, wrong county, in the hands of an owner it doesn't want, requires too many resources, or anything else on a long list of imaginable subjective characteristics. Since there is no explanation provided in their proposed rule as to "why" RD wants this change, the public has no idea of how they will use it or what criteria RD will use with their new authority. It is easy to see that with an undefined and unlimited new authority, RD's decisions will be suspect and subject to litigation if perceived to be arbitrary or capricious.

The change upends the statutory process for considering the impact on tenants and a community.

The statute requires the Agency to consider a prepayment's impact on tenants and the community only after a borrower rejects the Agency's incentive efforts to preserve the housing and is about to prepay. A "may" allows RD to ignore their structured and public process for determining impact on tenants and the community and make a similar, but hidden decision upfront with no declared criteria to assure due process, fairness, or review.

The change will discourage participation in the prepayment prevention process.

The change pulls the rug out of the prepayment prevention incentive program as nobody entering the process will know if they will be offered an incentive until RD decides if that project, owner, group of tenants or rural community are preservation worthy based on unknown criteria. Who would enter that process, which can be time consuming and expensive, without some kind of assurance they will be treated fairly by RD? This change would take away one of RD's most effective preservation tools at a time when it is needed the most.

The change is unnecessary.

Based on past experience, RD may only offer a couple of dozen incentive offers each year. The incentive process was designed with two steps so that only those owners who are actively considering staying in the program receive a specifically developed offer that meets their unique tenant and market needs. If the owner has no intention of considering a specific offer, they can reject the general incentive offer and move on. Further, RD bases incentive offers on an appraisal (often provided at an owner's expense) to assure that it is "reasonable" as required by statute and reflects a fair assessment of the project's market value in the community. As far as funding availability, RD has a waiting list function built into the process by the statute, regulation and handbooks to handle temporary funding shortages.

RD provides no indication of why this change is needed.

Interestingly, in the FR documentation RD offers no explanation of why they are doing this and fails to even mention this change in their preamble. Additionally, RD publishes no public information on the frequency of incentive offers or the use of incentives in its MFH program. However, public information does indicate that the portfolio continues to shrink at an accelerating rate.

Since this is not a good idea on so many levels, the public should be provided an explanation. Maybe RD has found a legal loophole to implement this change, but it sure would be helpful to understand why they have chosen to exploit that option if it does exist. It would be even better if RD reconsidered the harm and confusion this change will cause and withdraw it.

19. **Reduce the number of RA units in circulation and limit their use to renewal only.** RD proposes to amend Section 3560.259 by revising paragraphs (a) (3) and (4) and adding paragraph (d)…. The new paragraph (d) reads: Agency use of obligation balances. In lieu of transferring rental assistance units, the Agency may elect to utilize the remaining obligation balances of units identified in 3560.259 (a)(2) and (3) for renewal purposes.

I recommend that RD withdraw this proposed change.

The change reduces the number of RA "units" in circulation.

Rather than transferring the remaining RA obligation funds in an unused RA contract in their original "unit" format to another project as they do now, RD is seeking the authority to "combine" unused RA unit obligation balances to make full units (about $4,500 each). This will become a new method for RD to reduce the number of RA units available to tenants.

The change unnecessarily limits the use of newly "combined" RA units to renewal purposes only.

The paragraph goes further and also limits the use of these newly combined RA units so that they can only be used for renewal purposes. This would unfortunately end RD's recent practice of providing relief to thousands of tenants and hundreds of properties who have received transferred RA units reclaimed when no longer in use. These RA units have primarily assisted tenants with the greatest shelter cost "overburden," but they have also been used to help aging properties address long term preservation needs.

With this new limitation on use, the new combined RA units will go to renew contracts only. This assures that RD does not extend RA benefits regardless of need, to tenants and properties who do not receive it now. Tenants and properties will be harmed by this change.

The change is bad policy as it reduces the number of RA units available, restricts their use and discourages preservation efforts.

So, not only will RD reduce the number of RA units in circulation (by combining balances before a transfer of RA), they will also limit its use to only tenants receiving it now. This will be devastating to very low-income tenants now paying above 40% or 50% of their income for shelter costs, reduce the number of viable MFH properties, and eliminate the possibility of others to be preserved as they will be unable to bring in additional financial resources.

20. **Tighter control on Taxes & Insurance and Reserve accounts.** Amend Section 3560.302 by revising paragraphs (c)(3)(ii)(and (iii) paragraphs (c)(5)(i), (ii) and (iv)….

RD adds language to hold borrower T&I account funds (ii) and reserve account funds (iii) in escrow (Note: change #4, amending 3560.65, also addresses the new reserve account escrow authority).

I recommend that the change be withdrawn.

This is questionable policy as it increases micro-management rather than address real issues.

RD provides no explanation of why or how this will occur, but it will give RD the regulatory authority to hold project money in escrow. It should be noted that most instances of shortages for taxes, insurance, or reserve accounts are because RD MFH properties are located in low rent rural areas and RD does not provide sufficient RA or approve rents high enough to cover normal and typical operational and maintenance costs.

The change ignores existing authorities and the lack of available administrative infrastructure.

RD never did this in the past as most RD properties are managed by professional management agents who valiantly struggle to operate with low rents. RD has relied on other available servicing approaches that work. For example, RD can provide additional RA, approve rent increases and provide work out plans that address budgetary issues. If Management Agent or Borrower maleficence is the issue, RD can and should remove them. Additionally, RD has no automated system to accomplish or track escrowing and has provided no indication how it will create a new system in the future.

Tighter reserve account restrictions may limit or discourage preservation transactions.

RD goes on further to say in (iv) that reserve account funds will be held in trust for the loan obligation "through transfers or assumptions." Again, not sure of what this means as there is no explanation as to how this will affect the underwriting process or the ability of a seller to take excess cash funds out during a transfer as is now typically done. Arbitrarily limiting a potential sales price, may make infeasible many possible preservation transactions.

21. **Tighter Non-Profit Asset Management Fee rules**. Revise 3560.303.

In 3560.303 ((b) (1)(vii), RD clarifies in (A)(B)(C) and (D) that all asset management costs incurred by a NP must be prorated.

As an editorial comment, rather than repeating the same verbiage in each paragraph, I recommend that it simply be added once in the last sentence of the lead in paragraph (vii).

This change is acceptable provided that the total costs are not limited in an arbitrary way like RD has imposed in the past that punished NP's with multiple projects under one ownership structure. The repeated language does not appear to be necessary.

I would also recommend that a (E) be added to read "The salary of a full or part time asset manager position."

Since this proposed rule opened up this paragraph, it would be a great opportunity to clarify that an asset management fee cam be used to compensate a full or part-time employee who performs the duties of an asset manager. The regulation currently implies that this function is performed as the asset management decision of a Board of Director needs to be based on documentation and facts prepared in advance, but it would be good to make it explicit as it is a necessary ownership function regardless of the profit format of the ownership entity.

2. **Leadership Designee.** 3560.8 is amended to replace the "State Director" with "Leadership Designee."

I recommend that this proposed change be addressed by RD in more detail.

If reorganization is going to remove the State Director from the MFH program chain of command, several key supervisory responsibilities like appeals, reviews and servicing authorities will be moved to the "Leadership Designee" position. The FR document provides no clue of who this might be or how to find out who to contact if you want to appeal an RD MFH decision, seek a waiver, or request a signature for a servicing or loan making transaction. I imagine there will be a document eventually, but it's difficult to accept this change as being constructive with so much unknown regarding the State Director functions to be replaced by a Leadership Designee.

Other thoughts on the proposed rule with no comment developed at this time:

6. **Revising the split between management fee expenses and project operational expenses.** Amend 3560.102.

There is a lot of minor changes to the text that may have the potential to leave Management Agents under compensated if the bundle of services to be included increases without an increase to management fees. Various editorial changes to Management issues Amend Section 5660.102 (b), (g)(1)(iv) and (i) and (j). Not sure of the organization principle, but references to energy audits and working with other governmental agencies pulled out.

It would be helpful if more insight was provided by RD about this change.

3. **Revising the definition of a domestic farm laborer.** 3560.11 revised.

This now includes the phrase "or person legally admitted to the United States and authorized to work in agriculture." This allows H2A workers to occupy RD FLH per recent legislative changes. This small change could have a huge effect on the RD's FLH program when operational rules are changed in the handbook and funding documents.

It would be helpful if more insight was provided by RD about this change.

Other Changes:

1. **Basic Authority Statement**. 42 USC 1480.

3. **Remove acronym (typo?) MFHMFH**. Amend 3560.11. Replace with MFH – Appears editorial.

4. **Establish escrow for T&I and Reserve accounts**. (see comments for 20 above)

5. **MFH Leadership Designee.** (see comments for 2 above)

7. **Floor for AFHMP requirements moved from 4 to 5 units.** Amend 3560.104 (b) (1). How many projects are affected?

8. **Insurance deductible**. Amend 3560.105 (c)(4) and (f)(10). Appears to be editorial.

9. **Eliminates the listing of elderly units in mixed housing.** Amend 3560.152 (c)(1). Curious if "mixed housing" still exists in RD MFH program. Appears there is no change to (e)(2)(iv).

10. **Several editorial changes to Tenant Selection policies.** (a)(9) replace gender with sex. (j) replaces "may" with "will" so it reads "borrower will deny admission for criminal activity…". Appears to be editorial.

11. **Several Lease language change to implement Violence Against Women Act of 2013.** Amend 3560.156. Appears to make needed changes to the lease to implement the act.

12. **Changes in tenant eligibility as a result of a death**. 3560.158. I don't see a change, maybe editorial.

13. **Termination of Occupancy for natural disaster, only applicable during the period of a "disaster declaration."** Amend 3560.159. Not sure of the reason, but a tighter restriction on eligibility placed.

14. **Notice of rent change.** Section 3560.205. Appears editorial.

15. **Establishing rents for HUD project-based assistance.** 3560.207. Appears editorial.

16. **Separate listing of USDA Vouchers**. Amend 3560.252 (b)(2). Appears editorial.

17. **Disqualifying tenants with delinquent Federal debt form receiving USDA RA.** Add 3560.254 (c)(6). Not sure how this will be implemented.

18. **Rewording of term of RA Agreement.** 3560.258. Appears editorial. It remains 12 months or until RA obligation runs out.