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

OFFICE OF GENERAL COUNSEL

March 23, 2004

Index Number: 3.100 (Insurance Eligibility by Multifamily Programs) CIM-0131
Subject: OMHAR/MAHRA Sunset

MEMORANDUM FOR: Charles H. Williams, Director, Office of Multifamily Housing Assistance Restructuring, HY

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

SUBJECT: OMHAR/MAHRA Sunset

You have asked for legal advice about the termination of the Office of Multifamily Housing Assistance Restructuring (OMHAR), effective October 1, 2004, and the termination of restructuring authority under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA), effective October 1, 2006. MAHRA contains the basic statutory authority for administration of the Mark-to-Market program. Presented below are the three questions you asked and our reply to each of them.

Q. Must the Department of Housing and Urban Development use Participating Administrative Entities (PAEs) to perform restructurings after OMHAR's sunset on September 30, 2004?

A. Yes, the Department must use PAEs to perform restructurings after OMHAR's sunset on September 30, 2004, subject to certain statutory exceptions.

MAHRA Section 513(a)(1) states, in part: "[s]ubject to subsection (b)(3), the Secretary *shall* enter into portfolio restructuring agreements with participating administrative entities for the implementation of mortgage restructuring and rental assistance sufficiency plans . . . ." (emphasis added). Subsection (b)(3) encourages PAEs to develop partnerships with nonprofits if such partnerships enhance the PAE's ability to meet the objectives of MAHRA. Subsection (b)(4) provides that the Department or other qualified entity may perform the functions of a PAE with respect to individual multifamily housing projects if a PAE is unavailable or if a PAE cannot meet the selection criteria in (b)(1). In the absence of either of these exceptions, the Office of Housing does not have the option to undertake debt restructurings without the involvement of a PAE that otherwise satisfies the criteria in subsection (b)(1).

Q. What action constitutes a binding commitment under which the Department would be required to complete the Mark-to-Market (M2M) restructuring post-September 30, 2006?

A. MAHRA Section 579 states, in part:

> (a) REPEALS.—
> (1) Mark-to-Market Program. Subtitle A . . . is repealed effective October 1, 2006.
> (2) OMHAR. Subtitle D . . . is repealed effective October 1, 2004.
>
> (b) EXCEPTION.—Notwithstanding the repeal under subsection (a), the provisions of subtitle A (as in effect immediately before such repeal) shall apply with respect to projects and programs for which binding commitments have been entered into under this Act before October 1, 2006.

MAHRA has no definition for the term "binding commitments," but the Department has determined that the execution of a project-based Section 8 Housing Assistance Payment (HAP) renewal contract containing the following provision would constitute a binding commitment which, if executed before October 1, 2006, would obligate the Department to complete a M2M debt restructuring plan for an otherwise eligible project even if the completion date were to be after September 30, 2006. That provision states:

> The Renewal Contract constitutes a binding commitment for purposes of section 579(b) of MAHRA.

This provision had been drafted for use when the effective date for MAHRA repeal initially was to be October 1, 2001. Use of this provision in the HAP contract would confirm establishment of a "binding commitment" under Section 579(b) as early as possible in the M2M debt restructuring pipeline so that as many otherwise eligible projects as possible could be processed under the authority in MAHRA. This position would be consistent with the "Findings" and the "Purposes" set forth in MAHRA Section 511. HUD's interpretation of the term "binding commitments" also would be entitled to respect to the extent that its interpretation is persuasive. In Christensen v. Harris County, 529 U.S. 576 (2000), the U.S. Supreme Court held that the statutory interpretations of agencies found in opinion letters, policy statements, and other administrative guidelines, while not entitled to the same amount of deference as interpretations issued through notice and comment rulemaking, are entitled to respect. We think the reasoning behind the Department's interpretation of "binding commitments" would be sufficiently persuasive to withstand challenge.

Q. What is the appropriate process/contractual agreement to extend PAE's Portfolio Restructuring Agreements (PRA) beyond September 30, 2006, to allow them to complete the assets in their pipeline?

A. An appropriate manner to extend a PAE's PRA would be for both HUD and the PAE to execute an extension of the PRA for a term of one year.

The regulation at 24 C.F.R. 401.309(a) states, in part: "[t]he PRA will have a term of 1 year, to be renewed for successive terms of 1 year with the mutual agreement of both parties." A letter agreement signed by both parties would satisfy this rule. Note that, pursuant to MAHRA Section 579, the PRA could be renewed only for work on eligible multifamily housing projects for which a binding commitment under MAHRA had been entered into before October 1, 2006.

Please contact Millicent Potts at 708-4090, ext. 5255, if you have any questions or desire further assistance.