

August 25, 2022

The Honorable Marcia Fudge  
Secretary  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW  
Washington, DC 20410

Dear Secretary Fudge:

The undersigned organizations commend you and the entire Biden-Harris Administration for your commitment to addressing the nationwide shortfall of quality, affordable housing as laid out in the President's Housing Supply Action Plan. Our organizations are particularly pleased that you intend to tackle reforms to HOME Investment Partnerships (HOME) program guidance as part of this initiative. HOME is HUD's flagship program for the production and preservation of affordable rental and homeownership housing, and we are encouraged by the important work HUD has started to modernize HOME guidance to maximize the program's impact and assist low-income households suffering from rising housing costs.

As promised in our May 18 letter, the undersigned HOME program stakeholders have developed a consensus set of recommendations for your consideration as you begin to evaluate updates to the HOME program guidance to modernize and strengthen the program. Some of the undersigned organizations may send you individual recommendations in addition to those contained in this consensus letter.

Many of our organizations are members of the HOME Coalition—a collaboration of national and regional organizations representing all types of participants in the HOME program, including government officials, state and local participating jurisdictions (PJs), nonprofit and for-profit developers, Community Housing Development Organizations, owners of affordable housing, and advocates for renters, homeowners, and homebuyers.

The recommendations below draw on the variety of perspectives and decades of experience our organizations have working with the HOME program. They identify aspects of the program that we agree need modification to allow states and localities to do more with their existing HOME resources and maximize the program's effectiveness. They also consider how HOME requirements could be better aligned with those of other HUD programs and other affordable housing programs to ease administrative burden when multiple subsidies are used together. Individual organizations who have signed this consensus set of recommendations may offer additional proposals.

We commend you and your staff's commitment to advancing the HOME program as a key tool for the production and preservation of affordable rental and homeownership housing. We would welcome the opportunity to discuss these recommendations as HUD begins its work to successfully modernize HOME.

Sincerely,

Council of State Community Development Agencies  
CSH  
Enterprise Community Partners  
Fahe  
Habitat for Humanity International  
Homeownership Alliance  
Housing Partnership Network  
Grounded Solutions Network  
Local Initiatives Support Corporation  
National Alliance of Community Economic Development Associations  
National Association for County Community and Economic Development  
National Community Development Association  
National Council of State Housing Agencies  
National Housing Conference  
National Housing Trust  
National Leased Housing Association  
National NeighborWorks Association  
New England Housing Network  
Stewards of Affordable Housing for the Future  
Vermont Housing and Conservation Board

## Cross-Cutting Issues

### 1. Consolidated Plan and Related Planning Processes (24 CFR 91)

In 1995, HUD created the Consolidated Plan (ConPlan) to serve as a planning document for state or local grantee governments. The ConPlan process and document merge the planning and application requirements of four HUD block grant programs: HOME, the Community Development Block Grant (CDBG) program, the Emergency Solutions Grants (ESG) program, and the Housing Opportunities for Persons With AIDS (HOPWA) program. The Housing Trust Fund (HTF) interim rule, published in 2015, integrates that program into the ConPlan as well.

ConPlan requirements have mounted in recent years, which has increased the administrative burden for state and local governments administering these programs.

Recommendation: HUD should issue an Advance Notice of Proposed Rulemaking inviting comments on how the ConPlan could be improved and simplified. This effort also should consider improvements to the Annual Action Plan (AAP) and Consolidated Annual Performance and Evaluation Report (CAPER) with a special focus on reducing redundancies across planning documents. We also urge HUD headquarters to facilitate greater consistency among local HUD offices in how they interpret and implement ConPlan and related planning regulations and guidance.

### 2. Income Verification Requirements (24 CFR 92.203)

HOME requires a minimum of eight weeks of pay stubs (if an employee is paid weekly) or two months of source documentation to verify income. This requirement is unnecessarily burdensome and differs from the income verification requirements of other HUD and non-HUD affordable housing programs.

Recommendation: HUD should reduce this requirement to four to six consecutive pay stubs or third-party employment verification to align with Section 8 and Housing Credit policies.

### 3. Environmental Reviews and Choice Limiting Actions (NEPA: 40 CFR 1500-1508, Part 50 and Part 58)

When HOME funding is used in properties with other federal subsidies, there may be multiple responsible entities involved in the financing, and multiple subsidies with environmental review requirements. This often creates duplication of efforts in regards to the environmental review process and can lead to delays and unnecessary costs.

Recommendation: Allow PJs to use the approved environmental review developed by another responsible entity (e.g., Public Housing Authority) when providing HOME assistance to the same project.

### 4. Davis-Bacon (29 CFR 5)

Projects that receive HOME funding sometimes receive funding through other federal programs, which also require compliance with Davis-Bacon or similar labor standards. HUD programs vary considerably in whether, when, and to what extent compliance with Davis-Bacon is required. In addition, despite meeting

the same or near-same requirements to demonstrate prevailing wages, separate compliance and monitoring processes must be carried out for each funding entity.

**Recommendation:** HUD should streamline Davis-Bacon compliance for properties with multiple subsidies that require compliance with Davis-Bacon or similar labor standards, including by allowing the entity responsible for the most significant Davis-Bacon-required funding source (cognizant agency) to take the lead on Davis-Bacon compliance and only require Davis-Bacon reporting under the lead funding source to determine compliance.

## 5. Construction Timeline (24 CFR 92.2(2))

HOME regulations require construction to start within a year of executing a contract. However, given the recent volatility in materials pricing, many projects face significant delays before being able to close, as funders must often re-underwrite the projects and developers search for gap financing to address unexpected cost increases. Furthermore, even once a project has closed, the construction timeline can be further delayed by supply chain and labor disruptions. Together, these challenges make it difficult, and sometimes impossible for construction to start within a year of executing a contract as required by HOME regulations.

**Recommendation:** HUD should update this requirement to provide flexibility to adjust to economic constraints either by allowing more time or allowing documented progress toward construction like plan or permit approvals or the execution of a construction contract to satisfy the requirement. At a minimum, HUD should provide a temporary waiver of this requirement until the market becomes more predictable.

## 6. Minimum Property Standard Exemptions (24 CFR 200.926)

HUD requires PJs to ensure all properties receiving HOME funds for rehabilitation of any kind meet strict Minimum Property Standards (MPS). However, this standard makes it difficult to use HOME to assist in disaster recovery situations or for other emergency repairs. It is also duplicative when applied to homebuyer activities, as such housing typically undergoes inspection by licensed home inspectors. Therefore, it is redundant to require the PJ to also ensure the property meets MPS.

**Recommendation:** HUD should exempt emergency repair from MPS standards, allowing HOME to be a more efficient tool to use in disaster recovery and other emergency situations. Furthermore, we recommend exempting HOME homebuyer activities from the MPS requirement, so long as the owner attests that the property has undergone a home inspection.

## 7. Inappropriate Application of the Community Land Trust Definition (42 USC §12773)

Community Land Trusts are nonprofit entities meeting Internal Revenue Service requirements for nonprofit tax status, and should be treated as nonprofits for purposes of their involvement in the HOME program. However, HUD associates CLTs with CHDOs due to a statutory definition of CLTs, which Congress intended to be narrowly applied to eligibility to receive HUD technical assistance and capacity building under Part B—Community Housing Partnership. This confusion is stymying CLT involvement in HOME because HUD is applying the CLT definition specific to technical assistance to all aspects of the HOME program; thus, treating CLTs differently than it does other nonprofits. This disparate treatment is not what Congress intended when it created the CLT definition applicable to technical assistance.

Recently, the Office of Affordable Housing Programs (OAHP) provided a determination to a HUD TA provider that a CLT must meet not only the CLT definition for technical assistance, but also the CHDO definition, and that the CLT would *only* be able to use CHDO set-aside dollars and not general HOME dollars. This determination is extremely problematic, as it prevents CLTs from participating in the HOME program the way other nonprofits are able to participate.

Moreover, the 2013 HOME program final rule further complicates the problem because it made it more difficult for a CLT to qualify as a CHDO. The 2013 rule specifies at least one third of the board of a CHDO are low-income representatives (Part 92.2). However, the current statutory definition of CLT states that the board of directors, “is composed of equal numbers of (i) lessees pursuant to paragraph (3)(B), (ii) corporate members who are not lessees, and (iii) any other category of persons described in the bylaws of the organization.” While most lessee members likely qualify as low-income representatives, this will not always be true if they experience economic mobility.

In practice, many CLTs do not meet the definitional requirements of a CHDO, and thus should not be eligible for CHDO set-aside funds unless the CLT also meets CHDO requirements. However, CLTs—like other housing and community development nonprofits—should be eligible to receive other HOME resources outside of the CHDO set-aside.

**Recommendation:** HUD should treat CLTs like all other entities that have nonprofit tax status under IRS rules. All CLTs should be able to access general HOME funding the same way other nonprofit entities are able to do so. Should the CLT also meet CHDO requirements, it should be able to access CHDO set-aside funds. Should the CLT meet the definition of CLT under Part B—Community Housing Partnership, it should be able to access CHDO set-aside funds, technical assistance, and capacity building funds.

**Recommendation:** HUD should clarify that CLT board composition requirements meet the CHDO requirements for low-income representation even if individual members who were low-income when they joined the board experience economic mobility during their tenure on the board. In addition, HUD should clarify that demonstrated capacity and a history of serving the local community are not required for CLTs per the statute.

## Rental

### 8. Definition of “Features” Related to HOME Qualifications for Rental Housing (24 CFR 92.205(d); 24 CFR 92.252(j))

HUD requires PJs to compare size, features, and number of bedrooms of HOME-assisted units and non-assisted units in a multi-unit development to determine HOME eligible development costs. The term ‘features’ is not clearly defined in the regulations. This has led to confusion about which features must be included in this analysis in order for a PJ to be compliant.

**Recommendation:** HUD should either remove the ambiguous term ‘features’ from these sections or define specific features to be included in the comparison.

## 9. Repayment Requirements (24 CFR 92.252(e))

The HOME repayment regulations go beyond statutory requirements by directing PJs to repay all HOME funds if, at any point during the affordability period, a property in which those funds were invested falls out of compliance with program rules, regardless of how long the development was in compliance. PJs do their best to recapture HOME funds from noncompliant properties to repay HUD; however, sometimes it is impossible for those properties to repay the funding and PJs are left with the repayment responsibility.

Moreover, requiring the repayment of all invested HOME funds in a property if the property goes out of compliance at any point during the affordability period may be a disincentive for undertaking certain types of development, which may have more risk associated with them. For example, deeply targeted developments, such as permanent supportive housing, may be riskier than developments that charge rents at or just below the HOME program rent limits.

Recommendation: In conversations with stakeholders, HUD has raised concerns about modifying this policy in case owners decide to repurpose a HOME-financed property soon after the property is placed in service. Thus, full repayment is seen as a significant deterrent from such action. The undersigned organizations agree that this is an undesirable outcome, and as such recommend that HUD require full repayment of HOME funds for the first half of the affordability period. However, in the second half of the affordability period, HUD should allow prorated repayment to acknowledge the time in which the property served as affordable housing. This compromise approach reduces the risk of full repayment if a project is no longer able to comply with program rules as affordable housing for example in year 19 of a 20-year affordability period.

## 10. Property Inspections (24 CFR 92.251)

HUD requires HOME PJs to inspect properties for compliance with all state or local habitability codes, if they exist. Only if there are no state or local habitability codes may a PJ use the uniform, national standard, currently Uniform Physical Condition Standards (UPCS). For state PJs this is especially burdensome, as local codes vary significantly from location to location within a state and information about such codes is not always easily obtained. Further, local habitability codes may change over time, so states must check to determine if they have changed each time they inspect a property. Moreover, to truly inspect to any specific code, inspectors must be trained in that code's requirements. It is unreasonable to expect state inspectors to have training in every local code for every jurisdiction in the state.

Every other HUD program—including Public Housing, Section 8 Project-Based Rental Assistance, Housing Choice Vouchers, Section 811 Housing for Persons with Disabilities, Section 202 Housing for the Elderly, —as well as the Low-Income Housing Tax Credit (Housing Credit) and Rural Development programs require or allow applicable grantees/government entities to inspect properties based on a uniform, national standard. Grantees/ government entities utilizing the Housing Credit and HUD programs other than HOME currently inspect in accordance with HUD's UPCS, while Rural Development uses its own MHF Interior and Exterior Physical Standards for properties receiving U.S. Department of Agriculture funding. HOME is the only program where inspection to local codes is required. HOME is the only program where inspection to local code is required.

UPCS is a rigorous inspection protocol developed by HUD to evaluate if its residents live in decent, safe, and sanitary housing. We have every expectation that any successor to UPCS, such as NSPIRE, will be

similarly rigorous. There is no reason why this standard should be acceptable for all other HUD-subsidized and Housing Credit-financed properties, but not for properties receiving HOME funding. Moreover, aligning inspection standards simplifies multiple subsidy compliance and reduces transactional costs.

**Recommendation:** HUD should allow state PJs to inspect all their HOME properties in accordance with either local codes or a national standard as determined by HUD. If a state PJ chooses to use the national uniform standard, PJs can and should still require owners to certify that they meet local codes, but should not be required to inspect the property in accordance with the local code.

## 11. Establishment of Utility Allowances in HOME-Assisted Projects (24 CFR 92.252(d))

Under the HOME final rule, published in 2013, HOME-assisted projects are no longer permitted to use the utility allowances (UAs) established by local Public Housing Authorities (PHAs). Instead, HOME regulations require PJs to “otherwise determine the utility allowance for the project based on the type of utilities used at the project” by using either the HUD Utility Schedule Model (HUSM) or a project-specific methodology based on actual usage at the project.

This requirement has created processing difficulties and financial burdens for property owners and PJs, because the UA methodology requires property owners annually to collect usage data from utility providers specific to their properties in order to adjust the properties’ UA each year. After the owner has completed this analysis, it must be submitted to the PJ for review and approval. This HOME regulation also conflicts with regulations governing other HUD programs, as well as USDA rural housing programs. The benefits of the new UA determination requirement simply do not justify the burdens it imposes on property owners and PJs.

**Recommendation:** HUD should return to the previous practice of allowing HOME projects to rely on UAs established by local PHAs.

## Tenant-Based Rental Assistance (TBRA)

### 12. Rent Reasonableness (Section 92.209(f))

PJs are required to disapprove a lease for TBRA if the rent is not reasonable based on rents charged for comparable unassisted units. HOME guidance further requires that PJs determine comparability by obtaining rents from three comparable units. The rent reasonableness checklist and certification form require time-consuming research on comparable units including number of bedrooms, square footage, housing condition, building age, and condition, which can be burdensome for staff requirement.

**Recommendation:** Eliminate the comparability requirement and instead provide grantees with a “safe harbor” for satisfying the rent reasonableness requirement. For example, if the rent for a unit is within 10 percent of the Area fair-market rent (FMR) or Small Area FMR it should be presumed to meet the rent reasonableness standard.

### 13. Minimum Rent Contribution (Section 92.209(h)(2))

The HOME regulations regarding minimum rent contribution go beyond statutory requirements to require PJs to establish a minimum rent payment. This is unnecessary and contrary to the requirement that tenants pay 30 percent of their household income for rent, as the minimum rent contribution under this requirement could exceed 30 percent of the tenant's income depending on the amount.

Recommendation: HUD should delete the requirement at 24 CFR 92.209(h)(2) that PJs must establish a household's minimum rent contribution.

### 14. Rent Standards (Section 92.209(h)(3))

The HOME regulations allow PJs to establish a rent standard based on "local market conditions" or on the Section 8 Housing Choice Voucher Program. Most grantees establish their TBRA rent standard using the Section 8 program guidelines which limit rent standards to a range between 90 percent to 110 percent of the metro area Fair Market Rents (see 24 CFR Part 982.503(b)(1)(i)). In some cases, the Section 8 standard is significantly higher or lower than market rents, and a tenants may be better served if the PJ relied on local market conditions. However, many PJs are reticent to do so because of insufficient guidance on how to set up such a system in a manner acceptable to HUD.

Further, HUD guidance currently does not clearly allow the use of the more recent Small Area FMRs to determine TBRA rent standards. HUD instituted Small Area FRMRs to better conform with actual market.

Recommendation: HUD should provide more guidance to PJs wishing to develop a rent standard based on "local market conditions." This would provide additional flexibility for grantees in areas where market rents differ significantly from FMRs and allow TBRA-assisted tenants to access more eligible units. HUD should also clarify that HOME grantees may adopt a rent standard utilizing the zip code-based Small Area FMRs rather than the metro area-based Fair Market Rents

### 15. Tenant-Based Rental Assistance-A HOME Program Model

The Tenant Based Rental Assistance-A Home Program Model was published in 1997 to assist PJs in designing TBRA programs that meet HUD requirements. The program model has not been updated since 1997 and does not include changes made to TBRA in the 2013 HOME rule.

Recommendation: As more PJs use, or consider using, HOME funds for TBRA an update to the model program is needed to ensure TBRA programs are set up correctly. The updated model should be posted on HUD Exchange.

## Community Housing Development Organizations (CHDOs)

### 16. CHDO Staffing, Certification, and Organizational Requirements (24 CFR 92.300)

Some current HOME regulations related to the CHDO set-aside have had an adverse impact, especially on communities of color and rural communities. While the undersigned organizations have different

perspectives on how best to address the challenges related to ensuring that there are enough quality CHDOs able to undertake HOME projects, we do agree that there are ways that HUD could provide more flexibility to meet CHDO requirements and certify more entities as CHDOs. These are:

- how a nonprofit/CHDO demonstrates its capacity to undertake a HOME-funded project;
- how a nonprofit demonstrates accountability to the community it serves such that it is able to qualify as a CHDO; and
- how CHDO certification takes place and the duration of the certification.

**Recommendation:** HUD should consider ways to remove barriers to becoming a CHDO and include additional flexibilities and options to meet CHDO capacity, community accountability, and certification requirements while maintaining adequate standards to ensure CHDOs are responsible stewards of HOME funds.

**Recommendation:** Allow PJs the option to sub-contract all or part of the CHDO certification process to a statewide or regional capacity building community development organization or network with the history and experience of working directly with the local organizations and communities the set-aside program is intended to benefit. The sub-contract could allow for full authorization to make certifications. Alternatively, the sub-contract could simply allow the sub-contracted organization to implement a process by which they make a set of recommendations for certification to the PJ, with the PJ retaining final decision-making authority.

## 17. CHDO Sponsorship of Homeownership Activities (24 CFR 92.300)

Under the pre-2013 HOME rule, a CHDO was able to “sponsor” homebuyer housing. Under the current rule, there is no equivalent role for CHDOs in homebuyer housing. This has limited how CHDO set-aside dollars may be used. CHDOs have unique value to bring to homeownership activities, including the ability to engage low-income populations in siting, design, finance, and management decisions while leveraging the technical expertise of developers to execute the project.

**Recommendation:** HUD should reinstate a CHDO’s ability to sponsor homeownership projects, eliminated by the 2013 rule.

## 18. HUD List of Active CHDOs

Currently, it is challenging for researchers, intermediaries, capacity building organizations, and others to: research trends among CHDOs, target non-governmental capacity building resources to CHDOs, and evaluate the extent to which the CHDO Program is meeting its goals. It is our understanding that HUD may already have this information, but does not make it publicly available.

**Recommendation:** HUD should create, maintain, and make publicly available annually a list of the organizations certified as CHDOs with information already submitted by PJs. The list should be easily findable or downloadable from HUD’s website.

## Homeownership

### 19. Underwriting for Homebuyer Assistance (24 CFR 92.254(f))

PJs that offer homeownership assistance are required to establish underwriting standards “that evaluate housing debt and overall debt of the family, the appropriateness of the amount of assistance, monthly expenses of the family, assets available to acquire the housing, and financial resources to sustain homeownership.”

This language is vague and has caused confusion among both PJs and HUD field offices, causing some PJs to adopt particularly restrictive underwriting standards so as to avoid possible violations. For example, some PJs have interpreted the language as requiring them to establish hard caps on the ratios for debt-to-income and housing expenses, standards much of the mortgage lending industry has discontinued. Such hard ratios limit flexibility in underwriting and ignore other compensating factors, such as borrowers with strong credit scores and/or sufficient cash reserves. In such instances, borrowers may not be eligible to receive assistance through HOME despite being approved by a lender for a Qualified Mortgage (QM) as defined by the Consumer Financial Protection Bureau (CFPB).

**Recommendation:** HUD should provide an underwriting safe harbor that says that the HOME underwriting standards have been met if the first mortgage used to purchase a home meets CFPB’s Qualified Mortgage definition.

### 20. Appropriate Amount of Homeowner Assistance (24 CFR 92.254(f))

HUD requires that PJs establish a method for determining “the appropriateness of the amount of assistance” for each household receiving homeownership assistance. This has historically been interpreted to mean the PJ needs to determine an appropriate amount of subsidy for each individual buyer.

PJs have adopted a number of different standards for determining the appropriate homebuyer assistance level. The variation has led to confusion among lenders, and in some cases, made it difficult for PJs to market their homebuyer assistance programs both to lenders and prospective homebuyers because they do not know how much assistance they will be able to provide a homebuyer until the home is purchased and mortgage amount is set.

**Recommendation:** HUD should establish a maximum amount of assistance that can be provided to homebuyers through HOME. Any amount provided under that limit would be considered appropriate. One possible approach would be for HUD to cap the amount of assistance at a set percentage of the median home sales in the market in which the home is located.

### 21. Lender Fees (24 CFR 92.254(e)(2))

PJs providing home purchase assistance “must determine that the fees and other amounts charged to the family by the lender for the first mortgage financing are reasonable.” The regulations provide no clarification on what is meant as “reasonable,” leading to conflicting interpretations between PJs and HUD Field Offices.

Recommendation: HUD should establish a safe harbor that allows the reasonable fee standard to be met if the loan meets CFPB’s QM definition, a standard that caps lender fees at 3 percent of the mortgage amount for most loans.

## 22. Selling Homes to Eligible Buyers that Had Previously Been Leased (24 CFR 92.254(a)(3))

HUD requires HOME-funded houses to be sold within nine months of completion. If a home is not sold within this timeframe, it must be rented to a tenant eligible for HOME assistance. The regulations offer no guidance on how a home that has been leased under the provision can subsequently be sold, leading many PJs to believe that they cannot sell the home as originally intended once it has been rented out or that it can only be sold according to the Lease-Purchase provisions in Section 92.254(a)(7).

Recommendation: HUD should explicitly allow a home leased under its requirements to be sold to a HOME-eligible buyer after a tenant voluntarily moves out of the rented home or is legally evicted for cause.

## 23. Homes Developed under the Low Income Housing Tax Credit Program for Lease Purchase (24 CFR 92.254(a)(7) and 92.255)

The Low Income Housing Tax Credit (Housing Credit) program includes the flexibility for states to use credits to finance units that are intended for lease purchase, in which there is a 15 year rent period, followed by the opportunity for the tenant to purchase the unit. During the Housing Credit rental period, the HOME rules defer to the Housing Credit qualification standards for whether a renter is eligible to rent a HOME-assisted unit. The Housing Credit qualification standards require an initial qualification of the tenant at the time that they originally lease the unit, but if the tenant household increases its income over the Housing Credit and/or HOME maximum, the tenant is still qualified to live in the unit and is not displaced.

Since the adoption of the 2013 HOME rules, there is a general understanding that at the end of the Housing Credit fifteen-year rent period when a tenant becomes eligible to purchase their home, the PJ must income re-qualify the tenant under HOME rules at the time of the sales transaction. If the tenant’s income exceeds 80 percent of AMI at the time of re-qualification, they are disqualified from purchasing the HOME-assisted unit. This outcome is inequitable and contradictory to the purpose of a lease-purchase program for low-income residents.

Recommendation: HUD should allow HOME funds to assist buyers in purchasing a HOME-assisted unit in a Housing Credit property designed for lease-purchase provided the household was qualified to rent the unit at the time of move-in. This would maintain the intent of lease-purchase programs and support families in wealth-building.

## 24. Property Inspection Standards for Homeownership Homes (24 CFR 92.254(e)(2))

When HOME funds are used to help a homebuyer purchase an existing house, PJs are required to ensure that “At minimum, the standards must provide that the housing meets all applicable State and local housing quality standards and code requirements.” It is unclear what it meant by this requirement, and

many PJs have interpreted it as meaning that the existing homes must comply with the state and local building codes that are in-effect at the time of purchase.

Because state and local building codes are regularly updated, this means that many older homes may not meet the most recent requirements despite being safe and having met the standards at the time the home was built. This makes it very difficult, and near impossible for some PJs, to provide homebuyer assistance for existing homes.

Recommendation: Allow for the property inspection requirements for existing homes to be met if a state or local code enforcement agency has issued the home a certificate of occupancy or a certificate of completion; or the PJ has completed a home inspection that certifies that the home is compliant with a national standard as determined by HUD (e.g., UPCS), or aligns with FHA’s inspection and appraisal requirements for loan approval. The inspection should be completed no earlier than 90 days before HOME funds have been committed.

## 25. Leaving Property to Heirs (24 CFR 92.254(c)(1))

Currently, HUD does not permit someone to inherit a HOME homeownership unit unless the heir is income-eligible at 80 percent AMI. Even in instances where the heir is income-eligible, a HUD field office recently required that the home be listed on the market to provide any income-eligible buyer the opportunity to purchase the property. The current regulations run counter to HUD’s goals of residential stability and anti-displacement. Permitting heirs to inherit a home better enables intergenerational wealth-building, especially for people of color.

Recommendation: HUD should allow for heirs to inherit a HOME homeownership unit—regardless of their income.

## 26. Repair/Replacement Reserve Fees

Current HOME regulations do not permit repair or replacement fees for HOME-assisted homebuyers. Community Land Trusts (CLTs) and shared equity programs often charge homeowners in their program such fees, which they incorporate into their underwriting, to enable them to afford any necessary repairs that may arise unexpectedly. Many of the households served through the HOME program earn around 60 percent AMI, making it difficult to afford the costs of a major home repair unless they have adequately saved for it. A repair or replacement fee would help the homeowner properly maintain the home, afford critical repairs, and ensures that the next homeowner does not face costly deferred maintenance or the replacement of major systems upon move-in. Allowing for such fees to charge to HOME-assisted homebuyers is consistent with HOME’s mission of supporting sustainable homeownership for low-and-moderate-income families.

Recommendation: HUD should allow repair/replacement reserve fees as permissible.

## 27. Resale Fees/Ground Lease Reissuance Fees (24 CFR 92.206(d) and 92.214(b))

CLTs and other shared equity homeownership programs receive a “fee” upon resale of a home to cover their services and management of resales. This “fee” is not a fee in the traditional sense, but rather is incorporated into the nonprofit resale formula establishing the maximum resale price that a new

homebuyer would pay for the home (e.g. the maximum resale price is original purchase price + 25percent of appreciation + 3percent resale fee). However, some shared equity programs have the fee be paid by the seller. This is often because the program is performing the functions of a real estate agent including, finding an eligible buyer, educating them on the shared equity program, and executing legal documents. The HOME regulation does not directly address these types of resale fees, but these costs are reasonable and should be treated as customary transaction costs.

**Recommendation:** HUD should permit resale fees for community land trusts and other shared equity homeownership programs in cases where the organization provides services and manages the resale of a HOME-assisted property.

## 28. Buyer-Initiated Programs (24 CFR 92.254)

Some CLTs or other nonprofits administer buyer-initiated shared equity homeownership programs. Under these programs, the potential homebuyer identifies, on their own, a property that they would like to purchase. If the necessary property standards and requirements are met, the nonprofit provides a subsidy at closing to make the purchase price of the home affordable and to conduct any necessary repairs or improvements.

The HOME regulations do not directly address this program model. It is thus unclear whether CLTs and other nonprofits operating buyer-initiated shared-equity programs would qualify as “developers” under the HOME regulations. If nonprofits administering such programs are not considered developers, HUD would then classify the subsidy given to the homebuyer as down payment assistance, which would require that the nonprofit place recapture provisions on the assistance rather than resale restrictions. This would effectively prevent HOME funds from being used for this type of buyer-initiated program because the HOME regulations require that PJs can only provide home purchase assistance to a homebuyer purchasing a home through a CLT or other shared equity program if resale restrictions are placed on the home being purchased.

The subsidy provided to homebuyers through this type of buyer-initiated program should not be classified as down payment assistance, as it is used to subsidize the price of the home and the subsidy stays with the home to help keep it affordable for future buyers.

**Recommendation:** HUD should clarify CLTs and other nonprofits administering buyer-initiated shared equity programs qualify as “developer” under the HOME regulations. This will clarify that families who purchase a house through such programs can receive HOME assistance.

## 29. Reasonable Return on Investment for Nonprofit Developers (24 CFR 92.250(b))

Currently, HUD has provided guidance that PJs may allow developers to retain sales proceeds as a reasonable return on their investment: “Developers of for-sale properties may keep some or all of the sales proceeds as deemed reasonable by the PJ,” (HUD Notice CPD-15-11, p. 17). PJs may also allow CHDOs to retain sales proceeds of their HOME-assisted units, in recognition that a CHDO must have among its purposes the provision of decent housing that is affordable to low-income and moderate-income persons, as evidenced in its charter, articles of incorporation, resolutions or by-laws (see 92.504(c)(3)(x)). Charitable, nonprofit developers are bound to similar requirements by their IRS-approved charitable organizational (charter docs) and operational parameters.

However, despite HUD's guidance, some third-party consultants or auditors hired by PJs have challenged written agreements with developers that provided the developer would retain the proceeds as a reasonable return on investment, to be used for additional affordable housing activities. In some cases, these challenges were made retroactively, requiring developers to return the HOME investment. Sales proceeds are one of the key incentives for developers of for-sale housing, allowing them to continue participating in the HOME program and serving low-income families.

Recommendation: HUD should reiterate, and clarify for any third party advisors to PJs, that its guidance in HUD Notice CPD-15-11 permits PJs to allow charitable, nonprofit developers (whose tax-exempt status is based on the entities' organizational and operational requirements to engage in charitable purposes, including the provision of affordable housing solutions to income-eligible individuals and families) to retain sales proceeds of a HOME-assisted unit as a reasonable return on their investment, to be used for HOME-eligible or other housing activities to benefit low-income families, in the same manner that PJs may allow CHDOs to retain sales proceeds.

### 30. Income Determination (24 CFR 92.203 and 92.254(a)(7) and (8))

Homeownership assistance programs often include program requirements designed to increase the likelihood of success of their participants, such as homeowner education and financial coaching/counseling, as well as "sweat equity"/ "self-help" requirements. Currently, grantees who administer HOME homeownership programs must determine the income eligibility of participants at the time they commit to the program. If the program requirements take longer than 6 months to complete, PJs must recertify the household's income. Unfortunately, an increase in income over those months could jeopardize program participants' eligibility. It also creates a disincentive for the household to seek an increase.

In addition, more specific HOME regulations (at 92.254) require homebuyers of homes to be constructed or purchased via a lease-purchase program to qualify as income-eligible at the time the contract for such purchase or lease purchase is signed, and specifically provides that a homebuyer should then complete a lease-purchase within 36 months after signing the contract. Often when HOME funds are used to construct a house, an eligible homebuyer is identified at the beginning of the construction process and enters into a contract or other program agreement at that time, rather than once construction is completed.

These requirements run counter to HUD's goal of creating homeownership opportunities and supporting wealth building.

Recommendation: Project sponsors should determine income eligibility for households participating in this sort of program at the time that the applicant enters the program. If the household receives an increase in income between the time they entered the program and the time the HOME assistance is provided (within 60 days before closing), they should continue to be considered eligible so long as their income upon redetermination does not exceed 100 percent of AMI.

### 31. Streamlining Recapture Requirements Between HOME and FHA (CPD 12-003 and FHA Mortgage Letter 94-2)

HUD requires HOME loan documents include a stipulation for any excess loan proceeds after a foreclosure to be returned to HUD. This creates complications for grantees seeking to use funding for down payment and closing cost assistance. This also causes confusion for practitioners, as this requirement is not held under FHA, in fact such a requirement is prohibited.

Recommendation: HUD should streamline requirements for recapture in the event of foreclosure to reflect FHA requirements.

### 32. Resale Restrictions (24 CFR 92.254(5)(i))

HUD requires PJs to establish resale or recapture requirements for HOME homebuyer activities. Under current regulations the repayment risk for PJs, subrecipients, and developers under the resale option is disproportionate to the repayment risk under the recapture option. This creates an incentive to use the recapture option even if the resale option would be preferable to preserve the affordability of a specific housing unit.

Under the resale option, the repayment amount is the full HOME investment. Under the recapture option, the repayment amount is the amount of direct assistance to the homebuyer, and is limited to net proceeds received from the sale after the senior mortgage loan balance and closing costs. In other words, there is a repayment liability only if there are net proceeds from the sale available to cover that repayment.

Under the resale option, when a resale restriction is violated, however, there are no sale proceeds available to repay the obligation. The sale proceeds go to the owner, and neither the developer nor PJ are able to recover those funds.

When attempting to include a monetary remedy for violation of the resale restriction, some PJs, HUD Field Offices, and HUD Technical Assistance have interpreted the inclusion of these remedies in resale restrictions as unallowable because they would burden the homeowner. However, the repayment remedies are only triggered by the breach of a resale restriction (i.e., sale at market) so the remedy would not be burdensome on the homeowner.

In addition, subject in all instances to available net proceeds, PJs have the flexibility to design recapture payment obligations so that, in addition to recapturing the full amount of direct HOME assistance, PJs could opt to (i) forgive the principal over the affordability period, (ii) allow the homebuyer to receive its return on investment first, or (iii) share in the net proceeds.

Furthermore, there appears to be insufficient clarity related to the length of the repayment period (the period during which the developer would be subject to repay the HOME investment under a resale arrangement), with some PJs believing the repayment period is the same as the affordability period. This creates a disincentive for developers to put in place affordability periods that extend beyond what is required by statute and regulation.

Recommendations: HUD should allow PJs flexibility under the resale option to determine an appropriate repayment obligation that may be less than the full HOME investment. The appropriate repayment

obligation should be comparable to the repayment obligation had the recapture option been used rather than the resale option. PJs should be able to allow resale restrictions to contain repayment provisions to the developer/PJ in the event of a transfer during the affordability period, including a cap at available net proceeds to be consistent with repayment amount under recapture instruments.

In addition, HUD should allow for options for determining the repayment obligation to be more comparable to the repayment under a recapture mechanism, including (i) allow for flexible and prorated repayment calculations depending on period of time the unit was owned by the income-eligible homeowner (similar to forgiveness of principal over affordability period in a recapture instrument),

HUD should allow an exception to repayment for extreme hardships; e.g., death or divorce of a homeowner (when title transfer occurs by court order/operation of law and the transferee is not income eligible); (ii) severe decline in neighborhood conditions, so that a developer or PJ would not be acting responsibly to facilitate a resale to a subsequent homebuyer they are trying to assist; (iii) title agent's failure to properly record resale restrictions in the public record on initial sale, or when the title review fails to flag a deed restriction on resale so that a market purchaser is able to complete the purchase without notice to the developer or PJ; or (iv) if the owner/developer/PJ is unable to consummate a resale in compliance with the restrictions after reasonable efforts by the developer or PJ to facilitate such a sale.

In addition, HUD should allow PJs to recapture funds from proceeds of a market sale during the affordability period to satisfy the repayment obligation, and PJs should have the option of allowing the developer to assume the recaptured funds.

HUD should also clarify that developers may impose a longer affordability period without remaining liable for repayment beyond the minimum affordability period (i.e., a developer could impose a 99-year resale restriction but only be required to return HOME funds if there was an ineligible sale during the first 15 years). This would be particularly important for CLTs and other nonprofit developers that opt for permanent affordability

### 33. Preemptive Purchase Options Held by CLTs and Other Non-Profit Shared Equity Programs (Publ. L. 114-113)

As noted in recommendation 8 above, the definition of CLT provided in the statute is meant to be applied to the narrow purposes of determining eligibility to access CHDO resources and technical assistance. In practice, many CLTs do not conform to this definition.

Congress has determined that CLTs, due to the shared equity model these entities use, should be able to have preemptive purchase rights in order to preserve the homeownership housing in which they are involved. As such, preemptive purchase rights by CLTs was codified in law in the 2016 Appropriations Act (Publ. L. 114-113 div. L, title II), which states, "That with respect to funds made available under this heading pursuant to such Act and funds provided in prior and subsequent appropriations acts that were or are used by community land trusts for the development of affordable homeownership housing pursuant to section 215(b) of such Act, such community land trusts, notwithstanding section 215(b)(3)(A) of such Act, may hold and exercise purchase options, rights of first refusal or other preemptive rights to purchase the housing to preserve affordability, including but not limited to the right to purchase the housing in lieu of foreclosure."

It is our contention that Congress meant to apply this to community land trust broadly, and not just to those that adhere to the definition of CLT specific to access to CHDO resources and technical assistance. Yet HUD has taken the narrower definition and applied it to preemptive purchase rights.

Statutory precedent suggests that Congress supports the use of HOME funds to create homeownership units with lasting affordability. Providing permanently affordable homeownership units can be done by community land trusts or other nonprofits with shared equity homeownership programs (collectively referred to as “SEH programs”).

Recommendation: To optimize perpetual affordability after the original low-income owner leaves a HOME-financed homeownership unit, HUD should allow CLTs broadly and similar entities that administer SEH programs to claim a preemptive purchase option for properties in their programs. HUD should not limit preemptive purchase options to only those CLTs that meet the definition for CLT entities that may access CHDO resources and technical assistance. The homeowner should be aware of this option upon entry into the program. Preemptive purchase options should be exercised to comply with resale restrictions and serve a subsequent low- or moderate-income homebuyer in a timely manner.