



# Affordable Housing Alert

## Developments in affordable housing law

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## Recent changes to the HUD 202 Program and Property Disposition Program

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The purpose of this Alert is to inform you of recent legislative changes applicable to certain Section 202 elderly housing loans and HUD disposition of multifamily loans and properties promulgated by the Omnibus Appropriations Act, 2009 (the “FY 2009 Appropriations Act”). These changes permit refinancing of certain low interest rate Section 202 loans that were previously not eligible for refinancing and make Section 8 vouchers and rent increases available in certain Section 202 refinance transactions. In addition, HUD may consider cost of repairs and affordability restrictions when selling multifamily loans or properties supported by project-based Section 8 and these properties may be eligible for post-disposition rent adjustments.

The FY 2009 Appropriations Act provides \$150 million for Section 8 rental assistance for relocation and replacement vouchers and now specifically includes provisions for tenant protection vouchers to prevent the displacement of elderly tenants currently residing in Section 202 properties that were financed between 1959 and 1974 and which are being refinanced. Many of these older Section 202 projects have below market rents that could not be increased in order to meet new rehabilitation debt service and the provision of tenant protection vouchers should make the affordable housing preservation and refinancing of these projects more feasible.

In addition, prior to the enactment of the Act on March 11, 2009, HUD permitted refinancing of Section 202 loans if: (i) the project sponsor agreed to operate the project until the original loan maturity date under terms at least as advantageous to existing and future tenants as required by the original loan agreement or any project-based Section 8 rental assistance contract; and (ii) the refinancing would result in reduction of the interest rate on the original Section 202 loan. The interest savings requirement prevented the refinancing of many older Section 202 loans which carried interest rates below today’s prevailing rates, rendering refinance of such loans infeasible.

The 2009 Appropriations Act eliminates the interest savings requirement for refinancing 202 loans with interest rates below six percent (6%). These loans may now be refinanced if: (i) the owner addresses the physical needs of the project; (ii) the refinancing passes a “cost-benefit” analysis established by the Secretary to ensure that the transaction benefits outweigh the transaction costs (including increases in rents to unassisted tenants); (iii) the overall cost of providing rental assistance to the project under Section 8 (if any) is not increased (except as permitted under applicable mark-up-to-market or mark-up-to-budget authority); and (iv) a use agreement is established for all project units, terminating 20 years from the original Section 202 loan maturity date.

In addition, refinancing a below six percent (6%) Section 202 loan may permit the project owner to charge tenants rent sufficient to meet debt service payments and operating costs requirements, as approved by HUD, if project-based rental assistance is not available or is insufficient to meet debt service and operating cost of the project after refinancing. This approval also allows an owner to terminate an insufficient project-based rental assistance contract and serves as an eligibility event for the project to receive enhanced tenant-based vouchers. Upon termination of an enhanced-voucher tenant's occupancy, the vacated unit shall then be eligible for project-based voucher assistance without regard to the typical twenty percent (20%) cap.

Although HUD has not yet issued any formal guidance with respect to the "cost-benefit" test requirement or the factors to be considered when granting rent increases in connection with 202 refinancings, the Act appears to offer owners of older Section 202 projects with below six percent (6%) loans an important preservation opportunity.

The FY 2009 Appropriations Act also contains changes applicable to disposition of multifamily properties owned by HUD or financed with a HUD-held mortgage and subject to project-based Section 8 contracts. Upon disposition (through foreclosure or otherwise) of such properties during fiscal year 2009, the new legislation expressly provides that post-disposition Section 8 contracts are eligible for rent adjustments other than the operating cost adjustment factor.

The FY 2009 Appropriations Act also provides that in disposition of multifamily real property or multifamily loans in noncompetitive sales to state or local governments in fiscal year 2009, HUD shall consider the cost of repairs needed to bring the property up to local code standards and the cost of maintaining the affordability restrictions imposed by HUD on the property or the loan. This change allows HUD to consider factors which would result in a determination of market value less than the highest and best use of the property. These factors, while common in the loan and property disposition context, have previously been excluded from the market value determination of sale price for multifamily loans and properties disposed by HUD.

The Affordable Housing Group of Nixon Peabody LLP will continue to monitor developments in the Section 202 area, the HUD disposition area and other changes arising under the Act. If you have any questions about this alert please contact Michael Reardon at 202-585-8304 or [mreardon@nixonpeabody.com](mailto:mreardon@nixonpeabody.com), Eliot Reid 202-585-8183 or [ereid@nixonpeabody.com](mailto:ereid@nixonpeabody.com), Monica Sussman at 202-5852-8833 or [msussman@nixonpeabody.com](mailto:msussman@nixonpeabody.com), Anthony Ruvolo at 202-585-8820 or [aruvolo@nixonpeabody.com](mailto:aruvolo@nixonpeabody.com), or your regular Nixon Peabody LLP attorney.