

A. August 4, 1993 Interim Rule

The first subcategory added by the August 4, 1993, interim rule was budget authority as identified in the Operating Plan submitted to the Appropriations Committees. The "Operating Plan" is presented annually to the Appropriations Committees to reflect changes from the budget originally submitted to the Congress by the Administration. Its history dates back to 1987 when the Conference Report accompanying H.J. Res. 395, "Making Further Continuing Appropriations for the Fiscal Year Ending September 30, 1988," stated that "because of the substantial changes in many accounts from the budget estimates (including a number of general reductions), the conferees direct that [HUD and the Independent Agencies covered in the same appropriation] submit a fiscal year 1988 operating plan by February 1, 1988." H.R. Rep. 100-498 (Dec. 22, 1987), at 837. The statement added that "the conferees expect such operating plans to include recommended changes from the budget estimates except that no reductions may be proposed in programs, projects, or activities for which funding has been added by the Congress." Ever since that time, the Department has furnished the Committees an Operating Plan annually which identifies changes from published estimates, including reprogramming within amounts set out in the Conference Report table.

The August 1993 interim rule also added a second subcategory of budget authority incapable of geographic allocation by formula consisting of recently enacted legislation which prescribes that a portion of program assistance be set aside or otherwise mandated for other than general use. Recent HUD authorization statutory amendments contain provisions which have the effect of specifically targeting appropriated funds. For example, section 101(b) of the Housing and Community Development Act of 1992, Pub.L. 102-550 (Oct. 28, 1992), amended the United States Housing Act of 1937 to require funding of \$20 million in both FY 1993 and FY 1994 for section 8 15 year contracts for project-based assistance to be used for a multi-cultural tenant empowerment and homeownership project located in the District of Columbia. This assistance obviously is incapable of geographic allocation by formula because it is expressly authorized for one city only.

In the first year following enactment of set-asides like the one described immediately above, the Operating Plan could be expected to address these

newly established purposes. In subsequent years, however, they would have been incorporated in the Department's budget. For that reason, the interim rule also added to § 791.403(b)(ii) the subcategory of assistance included in an authorization statute, such as set-asides, where the Secretary determines that such assistance is incapable of geographic allocation by formula.

B. July 11, 1994 Interim Rule

The interim rule published on July 11, 1994 (59 FR 35253), increased the amount of funding available under the Headquarters Reserve. In the preamble of that rule, HUD explained that it was further implementing section 213(d) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 1439(d), so as to maximize flexibility in the provision of the Headquarters Reserve authorized under section 213(d)(4) of the Act.

Section 213(d)(4) permits the Secretary of HUD to retain not more than five percent of the financial assistance that becomes available under all programs authorized under the United States Housing Act of 1937 (except for public housing operating subsidy under section 9 and modernization funding under section 14). Prior to the July 11, 1994, interim rule, the Headquarters Reserve at § 791.407 was more delimited—it only permitted a Headquarters Reserve of five percent of the total amount of budget authority which is "fair shared" pursuant to part 791, subpart D. The effect of the regulatory limitation was to narrow considerably the base upon which the five percent Reserve was calculated, as compared to what the statute permits.

The July 11, 1994, interim rule expanded the base by including not only the amount of funding which is fair shared pursuant to the formula at § 791.403(b)(2), but also all budget authority allocated for uses that the Secretary determines are incapable of geographic formula, as spelled out at § 791.403(b)(1). Examples of the latter category include amendments of existing contracts, renewals of assistance contracts, the section 8 loan management and property disposition accounts, assistance earmarked by the Congress in appropriation law line items, and uses of budget authority identified in the Department's Operating Plan submitted to the Appropriations Committee.

While the interim rule increased the amount of funding available under the Headquarters Reserve, it did not change the limited statutory purposes for which

funding may be used. Headquarters Reserve funding can only be used for unforeseen housing needs resulting from natural and other disasters; housing needs resulting from emergencies, as certified by the Secretary, other than such disasters; housing needs resulting from the settlement of litigation; and housing in support of desegregation efforts.

As we stated in the preamble of the July 11, 1994, interim rule, because the incidence of these types of housing assistance funding are unpredictable, the availability of readier resources through an increased Reserve is one which HUD will only call upon as needed. Although a greater amount of budget authority is now available under current regulations, HUD may not use the full statutory maximum in any particular year. The draw upon the Reserve will be carefully tempered to exigencies and real, immediate need.

Finally, as noted in the interim rule, the base upon which the Headquarters Reserve is calculated does not include the section 202 program of supportive housing for the elderly. Section 801(b) of the Cranston-Gonzalez National Affordable Housing Act (NAHA) removed the section 202 program from coverage under section 213(d). However, NAHA did not repeal a previous amendment to section 213(d)(1)(A)(i) made by section 101 of the Department of Housing and Urban Development Reform Act of 1989 (Reform Act). The Reform Act amendment requires that section 202 assistance be allocated in a manner that ensures that awards of that assistance are made for projects of sufficient size to accommodate facilities with supportive services appropriate to the needs of frail elderly residents. Moreover, the Department has elected to continue the fair sharing of section 202 housing assistance in order to promote fair and balanced geographic diversity. (The fair sharing formula for section 202 assistance is specifically tailored at § 791.402(c)(1) to reflect relevant characteristics of the elderly population.) Notwithstanding this retention of section 202 allocations in part 791, and the continued policy of fair sharing section 202 housing assistance, the statutory range for calculation of the five percent Headquarters Reserve is limited to programs under the United States Housing Act of 1937 which are covered by section 213(d).

C. Conforming Changes in Today's Final Rule

In addition to finalizing changes made in the two previously published interim