NHLC

NATIONAL HOMELESSNESS LAW CENTER

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RE: Use of Federal Real Property to Assist the Homeless: Revisions to Regulations (Agency Docket No. FR 6119-P-014, 3090-AK46; RIN Nos. 0991-AC14, 2506-AC49; Docket ID No.: HUD-2023-0021-0001)

The National Homelessness Law Center (NHLC) respectfully submits this comment letter in response to the request of the U.S. Department of Health and Human Services (HHS), the General Services Administration (GSA), and the U.S. Department of Housing and Urban Development (HUD) (collectively, the "Agencies") for comment on proposed regulations governing Title V of the McKinney Vento-Homeless Assistance Act (collectively, the "Proposed Rules"). The Proposed Rules were published in the *Federal Register* on March 23, 2023.[1]

The Agencies find themselves in the unenviable position of updating regulations to legislation first enacted in 1987 to address a crisis that appears even more pressing today. Indeed, the McKinney-Vento Act's original Findings echo today's headlines: "the problem of homelessness has become more severe and, in the absence of more effective efforts, is expected to become dramatically worse, endangering the lives and safety of the homeless."[2] The last Finding states with clarity "the Federal Government has a clear responsibility and an

[1] 88 Fed. Reg. 16834 (proposed Mar. 20, 2023).

[2] 42 U.S.C. § 11301(a)(2).

existing capacity to fulfill a more effective and responsible role to meet the basic human needs and to engender respect for the human dignity of the homeless."[3]

NHLC appreciates the opportunity to comment on the Proposed Rules, which are the first regulatory updates to Title V since 1991. The Title V program allows homeless service providers to put underused federal assets into immediate and productive use to assist unhoused people. By utilizing surplus federal properties for homelessness assistance, including housing,[4] the Title V program offers a unique and significant resource to alleviate the housing crisis in the United States — which is the main driver of homelessness — while simultaneously reducing the federal government's costs to maintain surplus properties. However, the true potential of the Title V program remains presently unrealized due to inefficient and unnecessarily difficult regulatory policy.

NHLC applauds the Agencies' willingness to update Title V's outdated regulatory policy, and commends their effort to optimize Title V's regulations to actualize this vital federal program. However, the Proposed Rules do not address key issues in the Title V program's application and transfer process. Under the Proposed Rules, the Title V program would remain inoperative due to an impracticable and uncertain regulatory burden. This rulemaking process presents an important, once-in-a-generation opportunity to expand homelessness assistance and affordable housing for the growing numbers of unhoused persons in the United States. The NHLC is grateful to the Agencies for creating this opportunity, and mindful of the need to adopt the most-efficacious regulations during the limited period for revisions.

As described in this comment, if the Proposed Rules are adopted, presently-available surplus property assets under federal control will continue to be out of reach for developers, financiers, state governments and service providers for use in homelessness assistance efforts. NHLC has identified three primary issues with the Proposed Rules: First, the Proposed Rules do not allow homeless service providers to use federal tax credits to fund surplus property acquisition. Second, the Proposed Rules do not give Title V applicants enough time to complete necessary renovations to Title V properties. Finally, the Proposed Rules retain strict sanctions and enforcement policies that do not offer Title V transferees with an opportunity to remedy noncompliance.

Fortunately, there are sensible, implementable solutions to each of these issues, and we have outlined these solutions in the sections below. These changes would enable the program to fulfill its statutory purpose, as well as advance Administration-wide efforts to promote equity and affirmatively further fair housing. NHLC respectfully requests that the Agencies resolve these key issues by modifying the Proposed Rules along the lines we propose in Parts II–IV of this comment, including by:

- Defining a reasonable plan to finance;
- Allowing sufficient time for renovation or construction; and
- Providing a reasonable opportunity to cure noncompliance.

[3] 42 U.S.C. § 11301(a)(6).

[4] 42 U.S.C. § 11411(b)(2)(C): "in the case of surplus property, the provision of permanent housing with or without supportive services is an eligible use to assist the homeless under this section."

I. NHLC's Interest in the Proposed Rules

The National Homelessness Law Center is a 501(c)(3) nonprofit organization based in Washington, D.C. NHLC is the only national advocacy organization dedicated solely to using the power of the law to end and prevent homelessness in America. NHLC has been at the forefront of Title V advocacy since the inception of the program in 1987. We have been the primary legislative advocate for Title V, successfully blocking attempts to reduce or eliminate the program. We have served as the sole non-governmental entity monitoring compliance with the Title V program, and we have fought in the courts to secure a permanent injunction setting forth specific steps that must be undertaken by the government to implement and comply with Title V's requirements.[5]

The Title V program has the potential to significantly alleviate homelessness in the United States, and enable the government to better fulfill its statutory obligation to affirmatively further fair housing (AFFH),[6] while simultaneously reducing the United States' expenses to maintain surplus property. The Title V program grants local governments, state agencies, and private non-profit groups free access to land and real property no longer needed by the federal government. Title V is a proven vehicle for assisting America's unhoused residents with no cost to taxpayers. In fact, Title V saves taxpayer dollars by reducing operations and maintenance costs associated with unused and unneeded federal properties. Title V has enabled service providers and local government agencies to acquire and use surplus property to provide meals, shelter, housing, job training, medical care, and mental health treatment for unhoused Americans throughout the country. More than 2 million Americans each year receive assistance in Title V properties, which have provided access to more than 500 buildings and nearly 900 acres of land. The impact of the Title V program is felt from coast to coast, with programs operating in 30 states plus Washington D.C.[7] Thousands more surplus properties are available now for even greater impact.[8] Title V

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[5] NHLC has published a toolkit for service providers seeking to utilize surplus federal property for homelessness assistance, available here: https://homelesslaw.org/wp-content/uploads/2018/10/Public-Property-Public-Need-1.pdf.

[6] 42 U.S.C. § 3608(d): "All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further [fair housing]." According to the February 9, 2023 Proposed Rules for Affirmatively Furthering Fair Housing, the new HUD Equity Plan specifically requires that HUD engage persons experiencing homelessness in the design of the Equity Plan. *See* 88 Fed. Reg. 8516, 8565 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. § 5.154(c)(4)(B)): "Are there other underserved communities or groups (*e.g.*, persons experiencing homelessness) that also have a disproportionately greater need for affordable housing opportunities?"

[7] For example, each year, in Title V properties: 1) Over 30,700 people receive emergency or transitional housing, often with accompanying services such as mental health treatment; 2) Over 3,350 domestic violence survivors and their families are housed; 3) Over 12,500 veterans are housed; 4) Over 146,000 poor and homeless are people provided with other services, such as case management and employment training; and 5) Over 150 million pounds of food delivered to homeless and low-income people.

[8] In one year alone (2015), the Government Accountability Office identified 7,000 excess or underutilized real property assets reported by 23 federal agencies. *Vacant Federal Properties: Hearing Before the H. Subcomm. on Transp. and Pub. Assets*, 114th Cong. 1 (2016) (statement of Dave

empowers the federal government to reduce its costly surplus property inventory, and related operations and maintenance costs, while providing valuable real property assets to housing and homeless service providers who can put those unused property to productive use.

However, since its inception, the Title V program has not fully been utilized due to unnecessary and impracticable regulatory policy governing the implementation of the application and leasing process. As a result, the approval rate of qualified applicants has remained low, even though the need for homelessness assistance is acute and federal surplus properties are readily available. While key improvements to the Title V statute were made in the Federal Assets Sale and Transfer Act of 2016 (FASTA), Title V's regulations have not been updated since 1991. Since FASTA became law, Title V application submissions and approvals have increased, but the overall approval rate for Title V applications remains profoundly low. Since January 2020, approximately 65 properties have been made available for reuse under Title V; only 10 applications were submitted and only 3 were approved.[9]

According to Executive Order No. 13,985, *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, "executive departments and agencies . . . must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity. By advancing equity across the Federal Government, we can create opportunities for the improvement of communities that have been historically underserved[.]"[10] Due to a long history of racist housing, lending, employment and other policies and practices, Black, multiracial, American Indians/Alaska Natives, and Native Hawaiians and Pacific Islanders disproportionately experience homelessness.[11] The challenges and underutilization of the Title V program are well-known. In its November 2002 plan, the U.S. Interagency Council on Homelessness issued a recommendation to "Improve the Title V Federal Surplus Property Program to increase the number of Title V properties that are converted for use by the homeless services system" as part of its strategy to expand affordable housing.[12] The recently released proposed rulemaking on AFFH regulations directs communities to identify "community assets and affordable housing opportunities" for "underserved communities or groups (e.g., persons experiencing homelessness) that also have a disproportionately greater need for affordable housing opportunities." Title V is unquestionably a community asset and affordable housing opportunity that could be leveraged to meet AFFH obligations, advance racial equity, and reduce homelessness.

As the Agencies rightfully recognize, Title V policy must be updated to remove regulatory obstacles that prevent service providers from acquiring and using federal surplus property. NHLC sincerely thanks the Agencies for undertaking this monumental effort to

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E. Wise, Director of Physical Infrastructure, Gov't Accountability Office). Although not all of these 7,000 would be suitable for the homeless services programs, assuredly thousands would be.

[9] General Services Administration Logs submitted monthly to National Homelessness Law Center, Jan. 2020 – March 2023.

[10] Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 01, 2020).

[11] *See, e.g.*, *Racial Inequalities in Homelessness, by the Numbers*, NATIONAL ALLIANCE TO END HOMELESSNESS (June 1, 2020), https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers (last visited May 12, 2023).

[12] *ALL IN: The Federal Strategic Plan to Prevent and End Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, 1, 43–44 (Dec. 19, 2022), https://www.usich.gov/All_In.pdf (last visited May 12, 2023).

clarify and update regulations governing the Title V program, and appreciates the opportunity to contribute our on-the-ground expertise to the rulemaking process. NHLC encourages the Agencies to draft regulations which definitively remove the barriers to accessing the Title V program once and for all. In this comment, NHLC explains the three primary issues with the Proposed Rules and offers solutions which will unlock the full potential of the Title V program to make a measurable, meaningful impact on the national housing and homelessness crisis in the United States.

II. The Proposed Rules Prevent Applicants from Using Low Income Housing Tax Credits.

The Proposed Rules, as interpreted by HHS, require applicants to have all financing in place at the time of final application submission, which prevents applicants from using Low Income Housing Tax Credits (LIHTCs) and other affordable housing financing tools to finance affordable housing developments using Title V property. This section describes significant barriers to the development of plans to finance Title V projects and proposes solutions within HHS' statutory authority, as requested in the Notice of Proposed Rules.[13]

A. Funding Requires Site Control, Site Control Requires Funding

For years, HHS has interpreted the regulations governing Title V as requiring applicants to demonstrate that they have already received full funding for a project before HHS will transfer surplus property. This interpretation has no statutory basis,[14] nor is it required by the plain text of the current regulations, which merely state that applicants must provide a "reasonable plan to finance" demonstrating that the applicant "has the necessary funds" or has the "ability to obtain such funds."[15] HHS has never given meaning to the phrase "the ability to obtain such funds." Instead, as a matter of protocol, HHS has held applicants to an unreasonable and unwritten standard of proving complete financing with hard commitments before approving an application. HHS further requires submission of key legal documents related to the financing as a condition of application approval.

Many Title V applicants cannot meet HHS' unwritten requirement to provide documentation of complete financing prior to obtaining site control. For Title V affordable housing developments, it is often effectively impossible for applicants to meet this requirement because of the methods by which affordable housing projects are typically funded. Projects aimed at alleviating homelessness, such as affordable housing developments, often rely on sources of funding that cannot be committed in advance, such as LIHTCs and city budget allocations. Therefore, applicants relying on these sources of

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13 *See*, 88 Fed. Reg. 16834, 16841 (proposed Mar. 20, 2023). In response to the Agencies additional questions for public comment, NHLC proposes that a property should not be deemed unsuitable if an incidental portion of the property is in a floodway or runway clear zone. Furthermore, NHLC does not oppose the Agencies potential amendment excluding property only available for removal for off-site use from the Title V screening process.

14 42 U.S.C. § 11411(e)(4): "the applicant has 45 days in which to provide a final application that sets forth *a reasonable plan to finance the approved program*." (emphasis added)

15 45 C.F.R. § 12a.9(b)(4): "Ability to finance and operate the proposed program. The applicant must specifically describe all anticipated costs and sources of funding for the proposed program. The applicant must indicate that it can assume care, custody, and maintenance of the property and *that it has the necessary funds or the ability to obtain such funds to carry out the approved program of use for the property*." (emphasis added)

funding will not be able to demonstrate complete funding at the time of their application. As a result, even organizations with a history of successfully running and financing projects similar to what they propose in their Title V applications are denied. Furthermore, HHS has also refused to let applicants supplement the financial portion of their applications. In concert, these requirements put Title V applicants in an impossible position, as they cannot obtain committed funding for a program that is contingent on property they may or may not receive.

Barriers to use of the LIHTC program to create housing for extremely low-income households was identified as a key commitment from the White House Homelessness Prevention Working Group.[16] Requiring Title V applicants to provide documentation of complete financing at the application stage creates a particularly intractable barrier for applicants who intend to make use of LIHTCs to provide housing to unhoused persons. This problem is devastating to efforts to utilize Title V to create affordable housing as LIHTC is the nation's largest affordable housing development program. The LIHTC program requires documentation of site control, such as a long-term lease or deed transfer option agreement, in order to apply for LIHTCs.

The Notice of Proposed Rulemaking clearly intended to assist Title V applicants seeking LIHTCs by providing a lease of one-year when "the financial plan proposes to utilize Low-Income Housing Tax Credits."[17] Indeed, the Preamble to the proposed rulemaking states "[t]his [one-year lease] enables the approved applicant to gain site control of the property that may be required for funding . . . ."[18] The proposed rule, however, fails to meet the application site control requirements of LIHTC programs, setting the Title V applicant on a course for denial of their LIHTC or Title V applications, or both and rendering the intended regulatory improvement inoperable.[19]

As HHS interprets its current regulation, which remains materially unchanged in the proposed regulations, Title V applicants cannot obtain documentation of the kind of site

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[16] U.S. Interagency Council on Homelessness, *supra* note 12 at 69: "the White House convened the White House Homelessness Prevention Working Group from October 2021 through January 2022. The following are some of the commitments that were made through that effort. HUD: Identify barriers — and develop strategies to reduce barriers — to using Low-Income Housing Tax Credits for the creation of housing that serves extremely low-income households and to highlight examples of successful state policies."

[17] 88 Fed. Reg. 16834, 16847 (proposed Mar. 20, 2023) (to be codified at 24 C.F.R. § 5.154(c)(4)(B)).

[18] 88 Fed. Reg. 16834, 16839 (proposed Mar. 20, 2023) (to be codified at 24 C.F.R. § 581.11, 41 C.F.R. § 102-75.1170, and 45 C.F.R. 12a.5).

[19] Cal. Code Regs. titl. 4, § 10325(f)(2) (2023): "Demonstrated site control. Applicants shall provide evidence that the subject property is within the control of the applicant. (A) Site control may be evidenced by: . . . (ii) an executed lease agreement or lease option for the length of time the project will be regulated under this program connecting the applicant and the owner of the subject property; or . . . (iv) a valid, current, enforceable contingent purchase and sale agreement or option agreement connecting the applicant and the owner of the subject property. Evidence must be provided at the time of the application that all extensions and other conditions necessary to keep the agreement current through the application filing deadline have been executed." *See also*, California Tax Credit Allocation Committee Regulations Implementing the Federal and State Low Income Housing Tax Credit Laws, at 61–62 (Feb. 1, 2023), available at https://www.treasurer.ca.gov/ctcac/programreg/regulations020823.pdf (last visited May 12, 2023).

control needed for LIHTC applications without first proving that they have secured complete funding. This conflict creates a "chicken and the egg" problem whereby homeless service providers cannot obtain evidence of Title V site control without documentation of LIHTCs, but cannot obtain LIHTCs without documentation of Title V site control. The end result is that neither the Title V program nor LIHTCs are utilized to their full potential to assist unhoused people and empower homeless service providers. Without changing this proposed regulation, the government's efforts to affirmatively further fair housing by utilizing assets to provide housing to persons experiencing homelessness is severely curtailed.

B. Solution: Define Reasonable Plan to Finance

The Proposed Rules do not create a reasonable standard for demonstrating financing to preempt the current, unfeasible requirement that applicants provide documentation of complete funding at the time of application. The Proposed Rules do not further define "reasonable plan to finance" or "ability to obtain funds," and therefore do not establish a practicable standard for demonstrating site financing.[20] If adopted, the Proposed Rules will not resolve the uncertainty and regulatory burden that HHS' unwritten protocol imposes on applicants, and applicants will remain unable to obtain either Title V properties or the LIHTCs to fund them.

NHLC suggests adding language which expressly allows applicants to submit letters of intent and financing commitments to demonstrate the ability to obtain funds. This would create a standard which reflects the practical reality of funding affordable housing Title V projects and supplants the current, unwritten criteria applied by HHS. Our suggested approach is consistent with the statute's "reasonable plan to finance" language[21] and is necessary to provide realistic meaning to Title V's statutory language permitting affordable housing as an eligible use[22] and meet the underlying statutory purpose of the program.[23] Specifically, we recommend adding the following language, bolded and underlined below, to the Proposed Rules at 24 C.F.R. § 581.11(a)(7), 45 C.F.R. § 12a.5(a)(7), and 41 C.F.R. § 102-75.1170(a)(7):

> (iv) demonstrate that it has secured the necessary dedicated funds, or the ability to obtain such funds, to carry out the approved proposed program and plan of use for the property, including administrative expenses incident to the transfer by deed, lease, or permit. **<u>For Low-Income Housing Tax Credits or other financing requiring evidence of site control at application, letters of intent or financing commitments shall be sufficient to demonstrate ability to obtain funds</u>**;

[20] The Proposed Rules read as follows: "*Ability to Finance and Operate the Proposed Program.* If the applicant's initial application is approved, the applicant must set forth a reasonable plan to finance the approved program within 45 days of the initial approval. To be considered reasonable, the plan must, at a minimum:

> (iv) demonstrate that it *has secured the necessary dedicated funds, or the ability to obtain such funds, to carry out the approved proposed program and plan of use for the property,* including administrative expenses incident to the transfer by deed, lease, or permit;" (emphasis added). 24 C.F.R. § 581.11(a)(7); 45 C.F.R. § 12a.5(a)(7); 41 C.F.R. § 102-75.1170(a)(7).

[21] 42 U.S.C. § 11411(e)(4).

[22] 42 U.S.C. § 11411(b)(2)(C).

[23] 42 U.S.C. § 11301(a)(6): "the Federal Government has a clear responsibility and an existing capacity to fulfill a more effective and responsible role to meet the basic human needs . . . of the homeless."

The above-suggested regulatory language is consistent with the Agencies underlying statutory authority. This language would allow the Agencies to approve more applications for surplus property and better-implement the underlying purpose of the Title V program: to affirmatively further fair housing.

C. *Case in Point*: Wellness Center and Housing in Alameda, CA

The Alameda Point Collaborative (APC) is a homeless service provider in the California Bay Area. APC is currently working on a project called the Alameda Wellness Campus, which will provide housing, medical, and other services to unhoused Alameda County residents. APC has submitted a comprehensive plan with funding commitments and anticipated financing to secure the Alameda Wellness Campus project, but HHS has refused to approve it and transfer the property to APC. Although APC uses the types of financing that are now common for affordable housing and related service delivery developments (*e.g.*, new markets and low-income housing tax credit equity, conventional loans, grants, and other government funding), the Title V program as administered by HHS does not have the flexibility needed to move the project forward to a point where HHS will transfer the deed to APC.

For example, HHS has refused to execute an option for site control — documentation that is necessary for an LIHTC application approval — before the property has been transferred to APC. HHS has also refused to allow APC to subdivide the property prior to transfer via deed, a necessary precursor to executing the financing for each subcomponent of the project. This much-needed project is thus caught in a circular problem in which it cannot take steps to finalize the level of funding commitment and legal documentation HHS requires it to submit in order to obtain the deed, but HHS will not exhibit any flexibility in its complete-financing requirement so that the property can be transferred to APC.

The Alameda Wellness Center has the potential to provide substantial, meaningful assistance to the Bay Area's unhoused residents. APC's plans for the project include a 50-bed Medical Respite Program, which will provide recuperative care stays for an estimated 400 unhoused Alameda County residents yearly to resolve acute medical conditions and stabilize chronic conditions.[24] These individuals are too sick or fragile to recover from an illness or injury on the streets or in a shelter. The program will provide medical respite care stays, with intensive medical and behavioral health care, to improve their health and well-being. Furthermore, the Alameda Wellness Center would provide permanent supportive housing for seniors by developing 100 studio apartments for homeless seniors, connected with services and on-site healthcare, to enable homeless residents to successfully age in a supportive community environment. Between these two components and an additional homelessness prevention program housed on site, the Alameda Wellness Center has the potential to benefit approximately 700 unhoused Alameda County residents annually, reaching nearly 10% of the unhoused population in Alameda County. However, the program will not be able to move forward and make use of federal surplus property without necessary amendments to the Proposed Rules.

D. *Case in Point:* Federal Reserve Bank Building, Seattle, WA

In April 2014, Compass Housing Alliance, an experienced developer and homeless services provider, together with Catholic Community Services and the Downtown Emergency Services Center, submitted a Title V application to create a homeless services hub and drop-

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[24] *Achievements*, ALAMEDA WELLNESS CAMPUS, https://www.alamedawellnesscampus.org/achievements/ (last visited May 12, 2023).

in center, including a primary health clinic in the Federal Reserve Bank Building. Though the application was extensive, HHS determined it was incomplete and requested additional information, including regarding the financing structure. The financing aspect of the proposal discussed an intention to use New Markets Tax Credit and Historic Rehabilitation Tax Credit financing, including a master leasing structure. Extensive information regarding the financing plan was provided. However, HHS denied the application in June 2014.

E. *Case in Point:* Appraisers' Building, Baltimore, MD

In 2010, the Appraisers' Building on S. Gay Street in Baltimore was listed as suitable under the Title V process. An experienced homeless services provider and permanent supportive housing developer, Marian House, Inc., formally expressed interest in the property to provide permanent supportive housing, job training and other services to unhoused women. Marian House planned to seek LIHTCs and/or New Markets Tax Credits for the redevelopment, but would have been required to set up a for-profit entity to utilize the credits. Due to restrictions of the Title V program and its lack of coordination with Tax Credit financing, among other issues, Marian House decided to proceed with property acquisition at another site. Furthermore, because of the challenges with the Appraisers' Building site, when a Social Security Administration building became available under Title V a few years later, no homeless services organizations submitted proposals despite a significant need for permanent supportive housing in Baltimore.

III. The Proposed Rules Do Not Provide Sufficient Time For Affordable Housing Development.

Neither the current Title V regulations nor the Proposed Rules provide applicants with enough time to renovate surplus property for use in homelessness assistance programs. Current HHS regulations require a successful applicant to place the acquired property "into use" within 12 to 36 months.[25] In practice, HHS interprets this rule to require that applicants have their proposed program fully operable, and use the entirety of the transferred property, within no more than three years, or the property will be subject to reversion to the government. This regulatory requirement is impossible to meet for many housing programs. Affordable housing developments typically take four to seven years from acquisition to completion to bring into use.[26] Affordable housing developments are one of the most effective tools to assist unhoused people, and FASTA expressly states that permanent housing, with or without supportive services, is an eligible use of property acquired through Title V.[27]

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[25] 45 C.F.R. § 12.3(c): "Where construction or major renovation is not required or proposed, the property must be placed into use within twelve (12) months from the date of transfer. When construction or major renovation is contemplated at the time of transfer, the property must be placed in use within 36 months from the date of transfer."

[26] *See*, *The Affordable Housing Process*, LOCAL INITIATIVES SUPPORT COALITION BAY AREA, 2 (2019), https://www.lisc.org/media/filer_public/c8/67/c8679790-7bda-484b-9810-9e504a1caf95/the_affordable_housing_development_process_english.pdf ("Affordable housing project development is a complicated and challenging process that typically takes between 4-7 years depending on a project's complexity.")

[27] Federal Assets Sales and Transfer Act of 2016, Pub. L. No. 114-287: "Section 501 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11411) is amended — (1) in subsection (b)(2)(C) in the case

If adopted, the Proposed Rules would continue to impose this unfeasible and unnecessary time constraint on Title V transferees. As written, the Proposed Rules provide only thirty-six months for transferees to put surplus properties into use.[28] The Agencies have not demonstrated why this short timeframe is necessary in the Notice of Proposed Rulemaking. Allowing applicants sufficient time to develop surplus properties will not appreciably increase the risk or administrative burden for the Agencies, especially when balanced against the Agencies' statutory obligation to fulfill the purpose of the Title V program. Years spent operating under the current regulatory regime have demonstrated that thirty-six months is not enough time to complete necessary renovations on affordable housing developments. Therefore, the Proposed Rules would continue to frustrate one of the key purposes of the Title V Program, as well as Congress' express encouragement of affordable housing projects in FASTA. The time limit on the development of a transferred property in the Proposed Rules significantly limits the ability of service providers to use Title V properties for housing, which is the single largest unmet need among the homeless population.

A. Solution: Allow Sufficient Time for Renovation or Construction

By simply increasing the amount of time transferees have to put surplus property into use, the Agencies would significantly expand the number and types of affordable housing developments available to unhoused people through the Title V program. The most efficacious way to increase the amount of time transferees have to put a property into use is to expressly define a reasonable time limit for renovations and constructions in the text of Title V's regulations. Accordingly, NHLC recommends that agencies modify the Proposed Rules at 24 C.F.R. § 581.14(f)(1)(ii), 45 C.F.R. § 12a.7(f)(1)(ii), and 41 C.F.R. § 102-75.1172(f)(1)(ii) to include the language bolded and underlined below, and remove the language which has been struck out:

> ~~Where construction or major renovation is not required or proposed, the property must be placed into use within twelve (12) months from the date of transfer. When construction or major renovation is contemplated at the time of transfer, the property must be placed in use within 36 months from the date of transfer.~~ <u>**If the approved project has not begun operation within eight (8) years of the date of the deed or lease, the Department will have the right to cause the transfer of title to another qualified entity. For multi-phase approved projects, only the first phase must be operable within this timeline.**</u>

IV. The Proposed Rules Create an Unnecessary Risk of Property Loss.

HHS is responsible for oversight of properties transferred under Title V to ensure those properties are used to house and serve unhoused people. In practice, it can be difficult to impossible for Title V applicants and transferees to comply with HHS' rigid approach to oversight. Furthermore, the current Title V regulatory structure empowers HHS to unilaterally determine whether a transferee is complying with the conditions of transfer, and

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of surplus property, *the provision of permanent housing with or without supportive services is an eligible use to assist the homeless* under this section." (emphasis added)

[28] 24 C.F.R. § 581.14(f)(1)(ii); 45 C.F.R. § 12a.7(f)(1)(ii); 41 C.F.R. § 102-75.1172(f)(1)(ii): "The transferee has 36 months from the date of transfer to place the surplus property into use, if the transferee proposes construction of new facilities or major renovation of the property and HHS approves it in writing at the time it approves the final application;"

to revert the property to the government if a transferee is found to be noncompliant.[29] HHS has sole discretion over whether to seek reversion of the property, even for minor technical violations of program rules. HHS also has unfettered discretion to seek reversion of the property even when forces outside of the transferee's control have caused a temporary interruption in approved services.

Title V's current regulations, therefore, do not provide transferees with a reasonable opportunity to cure potential issues before sanctions are enforced, nor do they create a process for transferees to appeal HHS' determinations. As a result, transferees face a significant risk of a Title V property reverting to the government without any ability to recover the property or cure the issues identified by HHS. The inherent punitive danger of reversion to the government serves as a deterrent to potential project managers and their potential partners. The risk of property reverting to the federal government creates problems with financing, especially with tax credit investors and lenders.

The Proposed Rules continue to authorize HHS' sole discretion to determine whether a transferee is noncompliant and impose sanctions, including reversion. The Proposed Rules do not establish a hearing or appeals process for transferees, and do not clarify HHS' unwritten protocols. For example, the Proposed Rules do not define which types of noncompliance would constitute "substantial" noncompliance, therefore triggering the possibility of reversion.[30] Under the Proposed Rules, transferees will continue to face the risk of reversion for violating unclear, unstated policies and will not have access to a process for recovering reverted property. In sum, the Proposed Rules will not alleviate the financial risks associated with Title V property and will not encourage lenders and investors to fund projects assisting unhoused people. The current and proposed regulations prioritize sanctions over the ability of the program to function and meet its statutory purpose to assist unhoused people.

A. Solution: Provide Reasonable Opportunity to Cure

To resolve these issues, we recommend adding the bolded language below to the Proposed Rules at 24 C.F.R § 581.18(a), 41 C.F.R. § 102-75.1176(a), and 45 C.F.R. § 12a.10(a):

> (a) Sanctions. For instances of substantial noncompliance relating to surplus property transfers, HHS may impose, **after providing a reasonable opportunity to cure to both the transferee and any investors or lenders providing financing to the approved use**, any or all of the following sanctions in its sole discretion, as applicable:

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[29] 45 C.F.R. § 12.9(c)(6): " . . . in the event of noncompliance with any of the conditions of the transfer as determined by the Department [HHS], title to the property transferred and the right to immediate possession shall, at the option of the Department [HHS], revert to the Government . . . "

[30] 24 C.F.R. § 581.18; 45 C.F.R. § 102-75.1176(a); 45 C.F.R. § 12a.10 — "*Sanctions*. For instances of substantial noncompliance relating to surplus property transfers, HHS may impose, in its sole discretion, any or all of the following sanctions . . . (i) Place the property into immediate use for an approved purpose and extend the period of restriction in the transfer document . . . (ii) Hold in trust all revenues and the reasonable value of other benefits received by the transferee directly or indirectly from that use for the United States subject to the direction and control of HHS; (iii) Return title to such property to the United States or to relinquish any leasehold interest therein; (iv) Abrogate the conditions and restrictions of the transfer. . . "

This suggested language preserves HHS' ability to impose sanctions on willfully non-compliant transferees, while also creating an opportunity for good-faith transferees to understand and cure inadvertent noncompliance. The language suggested above also enables the participation of lenders and investors in the process of complying with Title V's requirements, which will encourage investment in Title V properties. This suggested regulatory structure allows transferees to demonstrate secure site control to investors, lenders, and other project partners while simultaneously relieving the risk of arbitrary reversion. This will facilitate better partnership and collaboration between the federal government and Title V participants to achieve the program's intended purpose.

NHLC also proposes that reversion is a wholly unnecessary sanction in the Title V program, as there are other effective methods to enforce the use of property to support people experiencing homelessness. For example, investors and lenders could implement a deed restriction requiring that a transferred property be operated to support unhoused people. In the event that a property was no longer being operated as such, investors could reserve the right to replace the property owner with an entity capable of complying with the operating requirements. Lenders could reserve the right to foreclose and replace the noncompliant transferee with an owner capable of implementing a program to assist unhoused people. Though replacing a property owner can remedy noncompliance without reverter, it is not allowed under the current regulatory policy or the Proposed Rules. Instead, HHS requires the property to revert back to the government with no recourse for investors or lenders to recoup their investment. If the regulations were revised to eliminate the reverter but to retain a recorded restriction to operate the property to assist the homeless, investors and lenders would be far more comfortable with the provisions as they would be consistent with other affordable housing restrictions, such as HUD affordability restrictions. While retaining a reversion penalty would continue to raise concerns among investors and lenders, HHS should, at minimum, modify the Proposed Rules to add the option to replace a property owner to the current list of actions HHS may takes in response to noncompliance.

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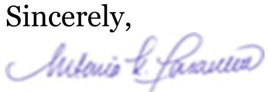
NHLC appreciates the opportunity to submit this comment for your consideration, and we stand ready to work with the Agencies to address the impracticable application requirements and uncertainty that would otherwise be imposed on homeless service providers as a result of the Proposed Rules. We would welcome the opportunity to discuss the issues in this submission. If you have any questions concerning this comment, or if the National Homelessness Law Center can be of further assistance, please do not hesitate to contact Antonia Fasanelli at afasanelli@homelesslaw.org or (202) 638-2535 x103.

Sincerely,



Antonia Fasanelli
Executive Director
National Homelessness Law Center

The following additional organizations sign-on in support of this comment letter:
Aiden Anthony LLC
A Way Home America
Colorado Coalition for the Homeless
Corporation for Supportive Housing
Funders Together to End Homelessness

National Alliance to End Homelessness
National Coalition for the Homeless
National Coalition for Homeless Veterans
National Health Care for the Homeless Council
National Low Income Housing Coalition
True Colors United
Youth Collaboratory

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