



U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT
OFFICE OF INSPECTOR GENERAL

June 16, 2016

MEMORANDUM NO:
2015-FO-0801

Memorandum

TO: Joseph I. Hungate
Deputy Chief Financial Officer, F

/s/

FROM: Thomas R. McEnanly
Director, Financial Audits Division, GAF

SUBJECT: Potential Antideficiency Act Violation
HOME Investment Partnerships Program

INTRODUCTION

We reported in fiscal years 2013¹ and 2014² that the U.S. Department of Housing and Urban Development's (HUD) formula grant accounting did not comply with generally accepted accounting principles (GAAP), resulting in misstatements on the financial statements, and that HUD did not comply with the HOME Investment Partnership Act (also known as the HOME Statute). Further analysis indicated that HUD may also have incurred an Antideficiency Act violation as a result of this noncompliance. We were particularly concerned about a potential Antideficiency Act violation regarding HOME Investment Partnerships Program funds based on HUD's implementation of the cumulative method to meet commitment deadlines; specifically, its use of the first-in, first-out (FIFO) method to commit and disburse funds for this program.³

¹ Additional Details To Supplement Our Report on HUD's Fiscal Years 2013 and 2012 (Restated) Financial Statements, Finding 1: CPD's [Office of Community Planning and Development] Formula Grant Accounting Did Not Comply with GAAP, Resulting in Misstatements on the Financial Statements, pages 4-8, and Finding 15: HUD Did Not Comply With the HOME Investment Partnership Act, pages 93-95, Audit Report 2014- FO-0003, issued December 16, 2013

² Interim Report on HUD's Internal Controls Over Financial Reporting, Finding 1: CPD's Formula Grant Accounting Did Not Comply With GAAP, Resulting in Misstatements on the Financial Statements, pages 4-6, and Finding 11: HUD Did Not Comply With the HOME Investment Partnership Act, pages 56-57, Audit Report 2015-FO-0002, issued December 8, 2014

³ The Federal Accounting Standards Advisory Board (FASAB) Handbook defines FIFO as a cost flow assumption; the first goods purchased or produced are assumed to be the first goods sold (FASAB Handbook Version 13, appendix E, page 30, dated June 2014). In addition, the Financial Audit Manual (FAM) states that the use of "first-

These methods have incorrectly permitted some jurisdictions to retain and commit HOME program grant funds beyond the statutory deadline. The Antideficiency Act prohibits Federal agencies from obligating or spending Federal funds in advance or in excess of an appropriation, apportionment, or certain administrative subdivisions of those funds. Our objective was to determine whether grant funds were obligated and spent in accordance with statutory requirements.

HUD Handbook 2000.06, REV-4, sets specific timeframes for management decisions on recommended corrective actions. For each recommendation without a management decision, please respond and provide status reports in accordance with the HUD Handbook. Please furnish us copies of any correspondence or directives issued because of the audit.

METHODOLOGY AND SCOPE

To accomplish our objective, we

- Researched accounting literature directly applicable to Federal agency accounting, such as the Statement of Federal Financial Accounting Standards; Federal financial management statutes; and authoritative literature from the U.S. Government Accountability Office (GAO), the U.S. Department of the Treasury's Financial Management Division, and the Office of Management and Budget (OMB);
- Obtained expert opinions from relevant parties at GAO and OMB;
- Obtained legal advice from the HUD Office of Inspector General's (OIG) Office of Legal Counsel and HUD's Office of General Counsel;
- Interviewed HUD employees; and
- Reviewed obligation and expenditure reports from HUD's Integrated Disbursement and Information System (IDIS) Online, Program Accounting System, and Line of Credit Control System for fiscal years 2013 and 2014.

BACKGROUND

The HOME Statute requires HUD to establish a HOME Investment Trust Fund for each participating jurisdiction (grantee), with a line of credit that includes the grantee's annual allocation. Section 218(g) of the Statute requires each grantee to place all of its annual allocation's funds under a binding commitment within 24 months after it receives its line of credit. Failure to do so would result in the grantee's losing its right to draw any funds that were

in, first-out" or other arbitrary means to liquidate obligations based on outlays is not generally acceptable (GAO-PCIE (President's Council on Integrity and Efficiency) FAM, Internal Control Phase, Budget Control Objectives, page 395 F-3). In the context of HUD's use of this method, the first funds appropriated and allocated to the grantee are the first funds committed and disbursed, regardless of the source year in which grant funds were committed for the activity.

not placed under binding commitment within the 24 months and require HUD to make such reductions and reallocate the funds as soon as possible.

HUD uses a process, called the cumulative method, to determine a grantee's compliance with the requirements of the HOME Statute and determine the amount to be recaptured and reallocated in accordance with section 217(d) of the Statute. HUD measures compliance with the commitment requirement cumulatively, disregarding the allocation year used to make the commitments. For the cumulative method, HUD considers all commitments made by the grantee from the program's beginning in 1992 to the current 24-month commitment deadline to determine whether the grantee has committed the required amount of funds. On the other hand, the use of a noncumulative method, or determining compliance on a grant year basis only, would result in a number of grantees not meeting the 24-month commitment deadline per grant year. Thus, a noncumulative method would likely result in an increased amount of grant funds that could be recaptured and reallocated to compliant grantees.

The cumulative method described above is used because of HUD's use of the FIFO method. The FIFO method that is embedded within IDIS Online does not allow commitments to be separated or identified by the dates on which the commitments were made, making it difficult to determine what commitments were made during the 24-month period in question. OIG reported that the FIFO method to commit and disburse Office of Community Planning and Development (CPD) formula grant program funds, including the HOME program, is a departure from Federal GAAP because disbursements are not matched to obligations (or commitments) and, thus, obligations are improperly liquidated. Specifically, the use of FIFO by IDIS Online makes it noncompliant with OMB Circular A-127, Federal Financial Systems Requirements, due to the inadequate budget controls and misuse of United States Standard General Ledger (USSGL) attributes at the transaction level for CPD's formula grant disbursements.

In OMB's role of ensuring that agency reports, rules, testimony, and proposed legislation are consistent with the President's budget and the Administration's policies and through its oversight and coordination of the Administration's procurement, financial management, information, and regulatory policies, OMB notified HUD in fiscal year 2013 to discontinue the use of FIFO for commitments and disbursements of CPD grant funds.

Additionally, GAO shares OIG's opinion that the language in the HOME Statute is clear regarding how HUD should determine compliance with the commitment requirement of the HOME Statute and recapture funds from noncompliant grantees.⁴ Therefore, HUD's cumulative method does not comply with the Statute. Accordingly, GAO advised HUD, in a formal opinion, to stop using the cumulative method, take steps to identify and recapture funds that remain uncommitted after the statutory commitment deadline, and reallocate such funds in accordance with the Statute.

⁴ Title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, section 218(g), states, "If any funds becoming available to a participating jurisdiction under this title are not placed under binding commitment to affordable housing within 24 months after the last day of the month in which such funds are deposited in the jurisdiction's HOME Investment Trust Fund shall expire. The Secretary shall reduce the line of credit in the participating jurisdiction's HOME Investment Trust Fund by the expiring amount and shall reallocate the funds by formula in accordance with section 217(d)."

CPD has stated that once the applicable changes are made to the HOME regulations and IDIS Online, HUD will stop using the cumulative method for determining compliance with the HOME 24-month commitment requirement for fiscal year 2015 and future grants and will comply with section 218(g) of the HOME Statute for grants obligated after the system changes are implemented. However, compliance with the 24-month statutory commitment requirement for funds obligated before the system and regulatory changes are fully implemented will continue to be determined on a cumulative basis.

OIG's Office of Legal Counsel met with HUD's Office of General Counsel in 2014 to discuss OIG's concerns regarding HUD's potential for an Antideficiency Act violation for the HOME program due to CPD's continued use of the cumulative method for HOME appropriations up to fiscal year 2015. The Office of Legal Counsel suggested to HUD during the discussions that it update its opinion to address this issue. Instead, the information and documents provided by HUD have not addressed whether there was a violation of the Antideficiency Act specifically in this case but, rather, the general position that the Office of General Counsel and not GAO is the legal arbiter for executive agencies and that the Office of General Counsel has opined that there is no violation if the statutory provision violated (HOME Statute) is not part of an appropriations act.

However, in a memorandum issued in October 2014, OIG's Office of Legal Counsel warned that GAO and OMB would likely not agree that HUD's good faith misinterpretation of the HOME Statute or an explanation of the cost or difficulty of retroactive FIFO correction would avoid a violation according to OMB guidance, GAO precedent, and appropriations law. The Office of Legal Counsel stated that both OMB guidance and GAO precedent suggest that a request for supplemental appropriation is a solution when the discontinuation of the activity is an issue. The Office of Legal Counsel also stated in the memorandum, "It is unclear how HUD can simply continue to obligate funds which exceed statutory limitations, in violation of the Anti-Deficiency Act, without disclosing the violation and taking steps to mitigate it."

Federal employees who violate the Antideficiency Act are subject to two types of sanctions: administrative and penal. Employees may be subject to appropriate administrative discipline, including when circumstances warrant, suspension from duty without pay or removal from office. In addition, employees may be subject to fines, imprisonment, or both.

Further, we were informed that CPD systems were not approved to receive development, modernization, and enhancement funds for fiscal year 2015 or 2016. Therefore, CPD has had to stop work on the FIFO elimination plan. The work stoppage leaves IDIS Online in a state of partial implementation. Thus, changes to IDIS Online according to the FIFO elimination plan, including the removal of the cumulative method for HOME commitment compliance for fiscal year 2015 grants and forward, will be shelved and restarted months or years later when funding is made available.

RESULTS OF REVIEW

During the fiscal year 2013 financial statement audit, we determined the commitment status, based upon a noncumulative approach, for 287 HOME grantees for the 2011 annual allocation commitment requirement.⁵ We noted that 132 grantees had met the commitment requirement based upon HUD's cumulative method but did not meet the requirement based upon OIG's noncumulative method. Further, we found that 36 grantees did not meet the requirement based upon either method. These findings resulted in a total net difference of \$54.86 million, which could possibly have been recaptured and reallocated if HUD had used the noncumulative calculation and grantees did not provide evidence to support commitments that were not entered into IDIS Online.

Further, we reviewed fiscal year 2010 grantees with a commitment deadline of April 30, 2012, which included 73 grantees. Of the 73, we followed up on a sample of 12 to determine whether HOME funds had been committed after the statutory deadline. We found that 3 of the 12 grantees committed \$784,739 after the April 30, 2012, deadline. Additionally, we noted that 1 grant year can overlap 2 fiscal years within a 24-month commitment period. If this overlap occurs and recapture is necessary because the full commitment requirement is not met by the grantee, the recapture can take place from another year's annual allocation. However, the recapture must be taken from an annual allocation within the same 24-month window, typically the following allocation year in question. Thus, HUD allowed reductions to grant allocations outside the 24-month annual allocation window to resolve findings of noncompliance.

The Antideficiency Act prohibits Federal agencies from making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation. It also prohibits HUD from involving the Government in any obligation to pay money before funds have been appropriated for that purpose unless otherwise allowed by law (31 U.S.C. (United States Code) 1341(a)(1)(B)); accepting voluntary services for the United States or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property (31 U.S.C. 1342); or making obligations or expenditures in excess of an apportionment or reappropriation or in excess of the amount permitted by agency regulations (31 U.S.C. 1517(a)).

The cumulative method to determine compliance with the HOME Statute's 24-month commitment deadline incorrectly permitted some jurisdictions to retain and commit HOME program grant funds beyond the statutory commitment deadline. If funds are retained by grantees beyond the statutory deadline, HUD may incur an Antideficiency Act violation if the funds that are inappropriately retained and not recaptured remain available for obligation or expenditure by the grantee.

In fiscal year 2014, we found that HUD continued to use the cumulative and FIFO methods for commitments and disbursements. Therefore, we concluded that the conditions remained and the potential for an Antideficiency Act violation continued to exist.

⁵ Audit Report 2014-FO-0003, Additional Details To Supplement Our Report on HUD's Fiscal Years 2013 and 2012 (Restated) Financial Statements, page 94, issued December 16, 2013

CONCLUSION

While the system changes to IDIS Online are in process, HUD will continue to be noncompliant with the HOME Statute until the cumulative method is no longer used for all grant years. Our analysis in fiscal year 2013 indicated that funds that should have been recaptured were later recommitted and obligated, meeting the definition of an Antideficiency Act violation.

RECOMMENDATIONS

We recommend that the Chief Financial Officer

- 1A. Open an investigation and determine the impact of FIFO and the cumulative method for commitments for the HOME program on HUD's risk of an Antideficiency Act violation.
- 1B. As part of the investigation, obtain a legal opinion from GAO and OMB to determine whether maintaining the cumulative method for determining compliance with the HOME Statute results in noncompliance with the Statute and potential Antideficiency Act violations.
- 1C. If HUD incurred an Antideficiency Act violation, comply with the reporting requirements at 31 U.S.C. 1351 and 1517(b) and OMB Circular No. A-11, Preparation, Submission, and Execution of the Budget, section 145 (June 21, 2005).

APPENDIXES

Appendix A

AUDITEE COMMENTS AND OIG'S EVALUATION

Ref to OIG Evaluation

Auditee Comments



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-3000

CHIEF FINANCIAL OFFICER

Memorandum

MAY 27 2015

TO: Thomas R. McEnanly
Director, Financial Audits Division, GAF

FROM: Brad Huther
Chief Financial Officer, F

SUBJECT: Response to OIG Draft Memo on Potential Anti-deficiency Act Violation in Home Program

Comment 1

This is in response to your letter, dated May 11, 2015, in which you requested our review and any comments on your draft memorandum in which you write about a potential Anti-deficiency Act (ADA) violation in the HOME program. We appreciate the opportunity to review the draft memo, but we are concerned about the content and have a few general and specific comments. In general, the Department continues to maintain that we have always had a sound legal, financial, and rational basis for our use of the cumulative method for the HOME commitment requirement and the first-in-first-out method of accounting. Both practices have been formally documented and part of the HOME program regulations for years and our grantees have been duly relying on and following this official and transparent guidance. It would be beyond reason and, in the end, legally indefensible to punish them for having followed these well-founded and properly established program regulations. Instead of repeating detailed substantive and procedural comments and concerns we have shared with OIG in the past on similar written documents, this general comment is meant as a restatement of all prior and current concerns the Department has had and continues to have with OIG's position on the Department's prospective changes to these practices generally and this draft memo.

Comment 2

We understand OIG concerns expressed with both practices, beginning many years after the rules were first put in place, and the guidance ultimately provided by GAO and OMB, and we have agreed to change such practices prospectively. A prospective application gives HUD time to make necessary and appropriate changes to its systems and program administration, as well as time to provide fair notice and training to grantees, which need to alter the administration and even the types of programs they operate. Even if the Department were to accept that its use of the cumulative method was not in compliance with the statute, the Department maintains that our prospective change is consistent with footnote 10 of the GAO Decision (B-322077), since it states that if "an agency fails to comply with a statutory requirement, it is incumbent upon the agency to correct, or otherwise minimize, the noncompliance if it is able to do so."

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Comment 3

In your draft memo, OIG has expressed concern that HUD may have violated, or may be at risk of violating the Anti-deficiency Act, but it is unclear to HUD from the draft how we may have technically and specifically violated such Act. Although HUD and OIG continue to have a fundamental disagreement about our legal and financial authority with respect to the cumulative method and FIFO, could OIG, from its perspective, please clarify how HUD may have specifically violated the ADA? To open up and conduct an ADA investigation, the Department must have credible evidence and a clear indication of the specific potential violation that needs to be investigated.

Comment 4

In addition, the Department would like to make a few specific comments. First, the draft memo's description of the interactions between OIG and HUD OGC is partially inaccurate. HUD OGC never received a request from OIG regarding the continued operation of FIFO for grant funds from fiscal years before 2015. It is therefore wrong to state that they failed to respond to such a request. Instead, at the invitation of the HUD OIG, HUD OGC met with OIG's Office of Legal Counsel last October to discuss, in general terms, the potential for an Anti-deficiency Act violation. Please correct the characterization in the draft memo.

Comment 5

Second, the draft memo includes a paragraph about the lack of available information technology funding to make the necessary and appropriate CPD systems changes. Please revisit this issue with CPD since the status of such funding appears to be different than what is described in the draft memo.

In conclusion, we continue to encourage OIG to take a prospective view of the changes to the cumulative method for the HOME commitment requirement and FIFO for the reason discussed above and throughout our many conversations and written exchanges with OIG. If, however, you choose to finalize this draft memo and to clarify the specific potential ADA violation that needs to be investigated, OCFO is prepared, if so requested, to open and conduct an ADA investigation, consult with OMB and GAO as necessary and appropriate, and report any such violation or respond to OIG as to why no such violation exists.

If you have any questions or would like to discuss any of these comments or concerns, please contact me or Mike Moran from my Office.

cc:

Nani A. Coloretti, Deputy Secretary, SD
Cliff Taffet, General Deputy Assistant Secretary, D
Joseph Hungate, Deputy Chief Financial Officer, F
Marion Mollegen McFadden, Deputy Assistant Secretary for Grant Program, CPD, DG
Lisa Abel, Director of Budget, CPD, DOTB
Virginia Sardone, Director of Office of Affordable Housing Program, CPD, DGH
Peter Huber, Director of Financial and Information Services Division, CPD, DGH
Marcia Sigal, Director, Program Policy Division, CPD, DGHP

OIG Evaluation of Auditee Comments

Comment 1 HUD’s general comment is that it continues to be concerned about OIG’s position on HUD’s prospective changes to eliminate the FIFO method for disbursements and the cumulative method for HOME commitments. HUD continues to maintain that it has always had a sound legal, financial, and rational basis for its use of the cumulative method for the HOME commitment requirement and the FIFO method of accounting.

OIG does not agree that HUD’s good faith misinterpretation of the HOME statute or its rationale for the FIFO method of accounting excuses it from the impact of billions of dollars annually in program disbursements from fiscal year 2014 and prior-year funds that are still at risk of practices that do not comply with GAAP or Federal laws and regulations.

Comment 2 HUD maintains that its prospective change is consistent with footnote 10 of the GAO Decision (B-322077), since it states that if “an agency fails to comply with a statutory requirement, it is incumbent upon the agency to correct, or otherwise minimize, the non-compliance if it is able to do so.”

As we stated in the background section of this memorandum, the OIG does not agree that the cost or difficulty of retroactive FIFO correction would avoid a violation according to OMB guidance, GAO precedent, and appropriations law. We have reported that the effects of not removing the FIFO and cumulative methods retroactively will continue to have implications for HUD’s future years’ financial statement audit opinions until the impact of these methods is assessed to be immaterial.

Comment 3 HUD states that it is unclear from the draft how it may have technically violated the Antideficiency Act.

The draft memorandum states that the cumulative method to determine compliance with the HOME Statute’s 24-month commitment deadline has incorrectly permitted some jurisdictions to retain and commit HOME program funds beyond the statutory commitment deadline. The memorandum states that OIG’s analysis indicated that due to its use of the cumulative method, HUD allowed reductions to grant allocations outside the 24-month allocation window. Specifically, OIG’s analysis in fiscal year 2013 indicated that funds that should have been recaptured after the 24 month statutory deadline were instead later retained, committed and obligated by the grantee. HUD may have violated the parts of the Act that prohibit Federal agencies from making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation and that prohibit Federal agencies from making obligations or expenditures in excess of an apportionment or reapportionment or in excess of the amount permitted by agency regulations.

If funds are retained and committed by grantees beyond the statutory deadline, OIG concluded that HUD may incur an Antideficiency Act violation.

Comment 4 HUD states that it did not receive a request from OIG regarding the continued operation of FIFO for grant funds from fiscal years before 2015 and that it is, therefore, wrong to state that it failed to respond to such a request.

We consulted with the Office of Legal Counsel and revised the paragraph in the draft memorandum to portray the events that occurred. See paragraph 7 under the Background section for the revised language.

Comment 5 HUD stated that CPD's funding status regarding the necessary and appropriate changes to IDIS is different from that described in the draft memorandum.

OIG obtained HUD's most recent expenditure plan (updated May 2015) for the FIFO elimination project for IDIS. The plan confirms that work on this project ceased in May 2015 as an additional \$1.9 million is needed to complete the project. The plan states that necessary changes related to FIFO, including the removal of the cumulative method for HOME commitment compliance for fiscal year 2015 grants and forward, are on hold until additional funding to complete the project is obtained. Thus, OIG finds the statements in its draft memorandum regarding the projects' funding status to be accurate.

cc:

Cliff Taffet, General Deputy Assistant Secretary, Community Planning and Development, D
Harriet Tregoning, Principal Deputy Assistant Secretary, Community Planning and
Development, D

Bcc:

GA ROKOSZ
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H:\AUDIT\FINANCIAL AUDIT DIVISION (GAF)\2015-FO-0801 ADA FIFO HOME
Cumulative Method - Final