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Report to the Chairman, Subcommittee on Housing and Community Development, Committee on Banking, Finance, and Urban Affairs, House of Representatives

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RESOLUTION TRUST CORPORATION

Affordable Multifamily Housing Program Has Improved but More Can Be Done

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The Honorable Henry B. Gonzalez
Chairman, Subcommittee on Housing
and Community Development
Committee on Banking, Finance,
and Urban Affairs
House of Representatives

Dear Mr. Chairman:

Following our April 17, 1991, discussion with the Subcommittee, we reviewed Resolution Trust Corporation (RTC) efforts to preserve affordable housing for moderate- to very low-income families. Specifically, we assessed RTC progress in (1) preserving affordable rental properties; (2) developing a national program and strategy for selling multifamily properties, including assisting nonprofit organizations and public agencies with special financing and price discounts; and (3) complying with statutory provisions pertaining to bulk and individual property sales.

This report addresses RTC's disposal of affordable multifamily properties. As agreed with the Subcommittee, we are reporting on single-family affordable housing in a separate report (GAO/GGD-92-136, Sept. 29, 1992).

Results in Brief

RTC's sales of multifamily affordable housing properties have been slow, although there has been an increase in sales activity since the special treatment for public agencies and nonprofit organizations authorized by the RTC Improvement Act were implemented. RTC reported that as of February 29, 1992, it completed sales on 127, or about 17 percent, of the 744 affordable multifamily properties it had offered for sale to eligible buyers. As of June 30, 1992, RTC reports that these figures had increased to 184 (about 21 percent) of the 865 properties offered. February's report also showed that offers had been accepted for another 84, or about 11 percent, of the total affordable multifamily properties offered for sale; in RTC's June report, these figures were 222 and about 26 percent, respectively.

It has taken RTC time to come to terms with competing mandated goals and put together a well-defined, integrated corporatewide multifamily program that included special financial assistance for nonprofit organizations and public agencies. In the interim, lacking such a structure, RTC's field offices designed and implemented diverse marketing and sales procedures to fill the void. These different approaches resulted in sales that may have excluded eligible buyers, and allowed qualified housing units to pass through the affordable housing program without being sold. Between January and June 1992, RTC established various new corporatewide program policies and procedures that, if properly implemented, should resolve many of the problems we noted during our review.

Although RTC's recent changes may improve program results, RTC policies and practices pertaining to bulk versus individual sales remain inconsistent with the statute. The statute prohibits the acceptance of a bulk offer if an eligible purchaser offers to buy one of the individual properties. Yet, in making some of its property sales, RTC has given preference to buyers who offer to buy in bulk over those who wish to buy individual properties. RTC also has marketed and sold properties in bulk sale packages that exclude buyers who wish to bid on individual properties.

Background

RTC's Affordable Housing Disposition Program was mandated by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). This was a new program that had to be fully developed by the new corporation created by FIRREA to manage and sell the assets of failed thrifts. The requirement to preserve affordable housing added a goal to RTC's mandate that competes with another major mandated goal—to maximize the net present value return on the sale or other disposition of the assets of failed thrifts. In dealing with the tension set up by these two goals, RTC was in uncharted waters. Neither the Federal Savings and Loan Insurance Corporation nor the Federal Deposit Insurance Corporation had an affordable housing disposition program for RTC to use as a model to get its own program off to a quick and smooth start.

FIRREA added section 21A(c) of the Federal Home Loan Bank Act (FHLBA),[1] charging RTC with preserving affordable housing for moderate- to very low-income families. In FHLBA and the accompanying affordable housing program regulations, moderate income is defined as income that exceeds 80 percent and less than 115 percent of the area median income; lower income is defined as less than 80 percent of the median; and very low income is defined as income of less than 50 percent of the area's median. RTC defines area as the locality in which the property is located. For example, the median income for a family of four in Abilene, Texas, is

[1] Section 21A(c) of the FHLBA was also amended by the Resolution Trust Corporation Funding Act of 1991, Public Law 102-18, 105 Stat. 58 (Mar. 23, 1991). It was further amended by the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (the RTC Improvement Act), Public Law 102-233, 105 Stat. 1761 (Dec. 12, 1991).

$30,600; in Denver, Colorado, it is $43,200. In each area, qualifying income is adjusted for family size.

FIRREA also created an oversight board to give RTC overall policy guidance and direction on issues, including affordable housing, and to approve its funding requests.[2] The RTC Improvement Act created the National Housing Advisory Board under the Oversight Board to advise RTC on affordable housing programs and policies.[3]

Further, FHLBA contains specific rules governing the marketing and sale of qualifying property either individually or in bulk to eligible purchasers under the program. For example, section 21A(c) contains eligibility requirements for properties based on their size and value. For a multifamily property to be eligible for the program, (1) RTC must have acquired title to the property either in its corporate capacity or as receiver; [4] (2) the property must have five or more apartments or units; and (3) the property must have an appraised value that does not exceed the sum of the eligibility limit for all units, by type, within the property. These limits are shown in table 1.

Table 1: Eligibility Limits for Affordable Multifamily Housing by Apartment Type

Apartment type	Eligibility limit
Efficiency	$29,500
One bedroom	33,816
Two bedroom	41,120
Three bedroom	53,195
Four bedroom	58,392

The act also contains eligibility requirements for purchasers. Nonprofit organizations, public agencies, and for-profit organizations may buy multifamily property if they promise to set aside at least 35 percent of the units for lower and very low-income tenants. Deeds for properties sold under this program are restricted, requiring buyers or their successors in

[2]Section 302 of the RTC Improvement Act redesignated the RTC Oversight Board as the Thrift Depositor Protection Oversight Board (Oversight Board).

[3]The RTC Improvement Act also required RTC to report to Congress every 6 months on the properties it sells, including appraised value, sales price, and affordable rental units preserved.

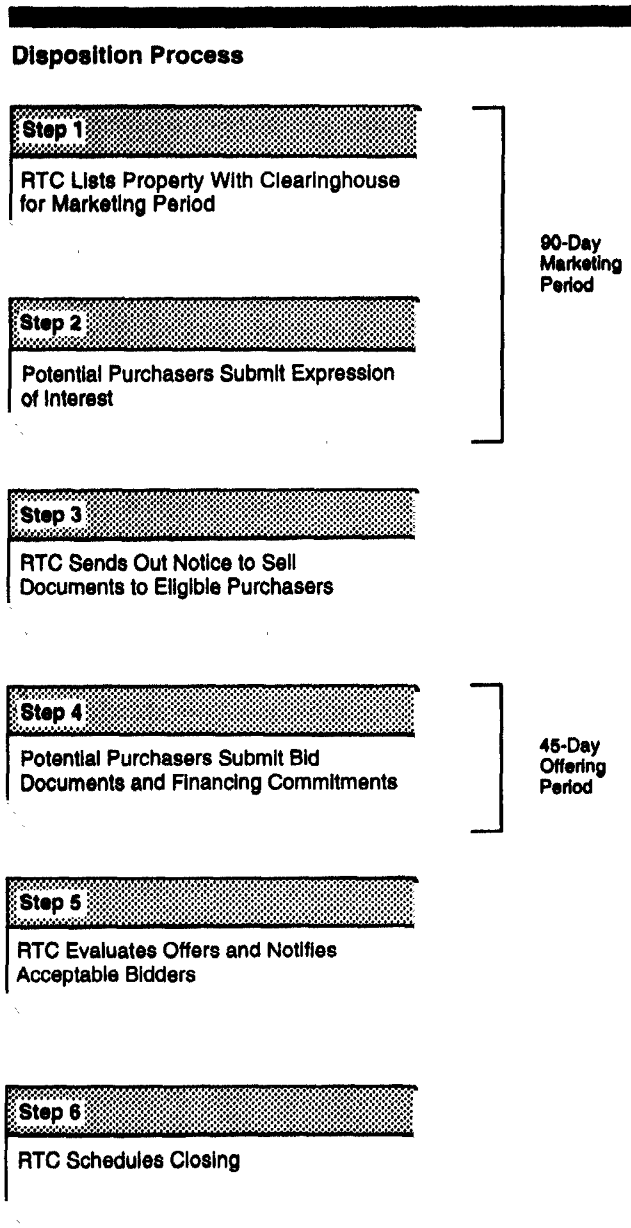
[4]Section 601 of the RTC Improvement Act expands the definition of eligible multifamily properties to include conservatorship properties, provided that Congress appropriates additional funds to cover RTC's associated costs and losses.

interest to fulfill the affordable housing commitment for the remaining useful life of the property.[5]

Eligible properties flow through the affordable housing program during exclusive 90-day marketing and 45-day offer periods. The property disposition process begins once a failed thrift has moved into receivership and RTC has identified properties that qualify for the program. Figure 1 shows the disposition process for these properties.

[5]RTC has defined "useful life" to mean the later of 40 years from the date of the sales contract or 50 years from the date the property was initially occupied as multifamily housing.

Figure 1: Affordable Housing Multifamily Property Disposition Process



Source: RTC documents.

In evaluating the offers it receives, RTC is to choose the offer that will yield the greatest return and maximize the number of affordable rental housing units preserved. If RTC receives no expressions of interest during the marketing period, or no offers during the offer period, the property may be sold to any buyer without a deed restriction.

Finally, the RTC Improvement Act authorizes special financing and pricing discounts to assist nonprofit organizations and public agencies in their purchase of qualifying properties. In addition, the act authorizes RTC to provide a special marketing period for nonprofit organizations and public agencies. To implement this provision, on May 20, 1992, RTC issued a directive providing for the sale of eligible properties through exclusive marketing periods first to public agencies and then to nonprofit organizations. If the property is not sold during these 30-day exclusive marketing periods, it will then be marketed and sold through the normal affordable housing program disposition process previously described.

Objectives, Scope, and Methodology

Our objectives were to examine RTC's efforts in (1) preserving the stock of affordable rental properties included among the assets of failed thrifts; (2) developing a corporatewide program and strategy for selling multifamily properties, including special financing and discounts for nonprofit and public agencies; and (3) complying with statutory provisions pertaining to individual property sales. To measure RTC's success in preserving affordable rental units, we gathered, analyzed, and summarized RTC's reported inventory and sales data for the periods ending February 29, 1992, and June 30, 1992.

To assess RTC's efforts in developing an overall strategy for selling multifamily properties, we reviewed existing program regulations, policies, and procedures and interviewed the affordable housing director and Oversight Board officials. We discussed existing program guidance, goals, policies, and procedures for marketing multifamily properties with staff in RTC's North Central (Kansas City), Southwest (Dallas), and Western (Denver) Regional Offices and in its Coastal (Newport Beach), Central Western (Phoenix), Intermountain (Denver), Metroplex (Dallas), Northeast (Valley Forge), and Southeast (Tampa) Consolidated Field Offices. These offices were collectively responsible for about 88 percent of the book value of affordable housing program multifamily properties.

We analyzed new regulations, which RTC developed during and after our field work was completed. In addition, we discussed national RTC policies and procedures with officials of organizations having affordable housing missions.

To assess RTC's efforts to assist nonprofit organizations and public agencies with special financing and price discounts, we documented oversight board and RTC staff deliberations about the need for seller financing and reviewed the seller financing guidance that RTC issued on January 9, 1992. We also discussed the need for seller financing with officials of organizations that had affordable housing missions.

To assess RTC's compliance with statutory affordable housing provisions, we analyzed RTC's program regulations, reviewed its sales practices in light of these provisions, and obtained RTC's general counsel's opinion of RTC's implementation of certain statutory provisions.

We also obtained and analyzed data from RTC information systems. However, due to time and staff constraints, we used RTC data as provided to us; we did not verify the accuracy or reliability of data we obtained from these sources.

Lastly, to determine how RTC was handling property sales, we analyzed RTC's first major offering of multifamily properties under the affordable housing program—199 eligible properties offered by RTC's Southwest Regional Office in September 1990. The major sale from this offer was closed in November 1991, and as of February 1992 some property sales had not been completed. The results of our analysis are contained in appendix I.

We did our work between May 1991 and July 1992 in accordance with generally accepted government auditing standards.

RTC Has Had Limited Success Preserving Multifamily Affordable Housing

Through February 29, 1992, RTC had limited success selling and preserving multifamily affordable housing through its affordable housing program. It reported offering 744 eligible multifamily properties, with an original book value of about $1.2 billion, for sale through the end of February. Of those, RTC said it had completed (closed) sales transactions on 127 properties, or about 17 percent, and accepted offers on another 84 properties, or about 11 percent. These closed sales had an original, combined book value of about $279.3 million, and the additional properties on which RTC accepted offers had a book value of about $193.9 million. About 20 percent of the 744 properties were still in the 90-day marketing period, and 37 percent had passed through the marketing period but remained unsold. Lastly, about 15 percent of the properties did not sell while in the program and were subsequently sold without affordable housing restrictions. Table 2 summarizes RTC's affordable multifamily housing sales.

Table 2: Results of Affordable Multifamily Housing Offered for Sales as of February 29, 1992[a]

	Properties		Original book value (millions)
	Number	Percent	
Cumulative properties offered for sale	744	100.0	$1192.7
Cumulative closed sales	127	17.1	279.3
Cumulative accepted offers on which sales have not yet closed	84	11.3	193.9
Properties within the 90-day marketing period	147	19.7	281.4
Properties sold outside the program without affordable housing restrictions	111	14.9	119.1

[a]We did not verify the accuracy of the data in this table. Total book values were inaccurate because RTC records were not complete.

Source: RTC reported data.

As of February 29, 1992, 275 properties had passed through the 90-day marketing period and remained unsold. RTC officials told us that many of these properties were in some stage of serious negotiation, but they could not tell us how many. Although RTC may still sell these properties in the program, RTC records showed that 197, or about 70 percent, of the properties were more than 100 days beyond their active marketing period.

Some of these properties went unsold despite expressions of serious interest from some organizations. For example, in January 1991, RTC rejected a national nonprofit organization's bid because it requested seller financing on property that RTC offered to sell for cash. This organization offered to preserve more affordable housing units than the required minimum of 35 percent. In another example, RTC did not spend the additional time required to negotiate with secondary bidders after the winning bidder was unable to arrange financing. Instead, RTC marketed the properties outside the program. The program director told us that, in his opinion, these examples illustrate the difficulty the field staff were experiencing dealing with the conflicting goals—preserving affordable housing versus maximizing the return of the sale of the assets.

RTC's June figures show that during the period March 1 through June 30, 1992, there was an increase in property sales. As of June 30, 1992, RTC reported that there had been 184 closed transactions, or about 21 percent of the 865 properties, with an original book value of about $1.6 billion, it had offered for sale through the program. Offers had been accepted on another 222 multifamily properties, or about 26 percent; 42 properties, about 5 percent, were still being marketed within the program.

Past Program Problems Should Be Resolved by Recent RTC Actions

Until the spring of 1992, RTC had not developed all the necessary elements of a consistent, comprehensive, corporatewide strategy for disposing of eligible properties. The policies and procedures used to operate the program have evolved since the program began.

Early in our review, we noted various problems with RTC's multifamily affordable housing program, and in June 1991 we apprised the program director of our concerns. Among these problems were (1) a lack of guidance on how to identify and evaluate substantially similar offers and (2) the lack of special seller financing and discounts for nonprofit organizations and public agencies. In January, May, and June of 1992, RTC issued program policies and procedures that should help resolve these problems.

In December 1989, the RTC Oversight Board directed RTC to develop comprehensive guidelines and procedures for selling its affordable housing properties. The Board asked RTC to develop a marketing strategy and rules for determining such things as how to choose between similar bids and how to maximize affordable housing. Over 2 years later, in January 1992, RTC began issuing written policies and procedures for its sales offices in such areas as offering special financing for nonprofit and public agencies and making awards to buyers with substantially similar bids.

RTC and Oversight Board officials we talked to had different views on why it took RTC so long to develop its multifamily program. According to RTC officials, one reason for the lack of multifamily sales was that the Oversight Board asked RTC in January 1990 to focus on single-family sales. Oversight Board documents confirm that the Board wished RTC to proceed only with a pilot program for 100 single-family properties. However, about 2 months later, the Oversight Board authorized RTC to implement its interim rule, which covered both single- and multifamily properties. At that time, it authorized RTC to sell 1,000 eligible properties under the program without regard to whether they were single- or multifamily.

The affordable housing program staff told us that, given the magnitude of the task that they had to do, they do not feel that they have been slow in developing the program.

RTC Failed to Define How Substantially Similar Bids Should Be Compared for Awarding Sales

Before it published its May 16, 1992, rule that provides a formula to evaluate "substantially similar" bids, RTC failed to properly assess substantially similar bids. The statute requires that when RTC receives competing bids that are "substantially similar," it should select the bid that preserves the highest percentage of affordable housing units. However, its initial final rule that implemented the statute did not contain a complete definition of "substantially similar." Rather, it defined "substantially similar" offers as those that would result in comparable net proceeds. However, because RTC did not define what "comparable" meant, it may have accepted some bids that set aside fewer affordable housing units, thereby resulting in a loss of affordable housing.

For example, we reviewed competing offers on 5 of the 80 properties in RTC's first large bulk sale in Dallas, Texas. RTC sold these 5 properties for $10.2 million and preserved 315 affordable housing units. We found that RTC could have preserved an additional 585 affordable rental units by selling these properties to other eligible buyers for $9.9 million (or about 3 percent less than the combined offers it accepted).

For each of the five properties, the alternative buyer was willing to commit 100 percent of the units to affordable housing (20 percent for very low-income and 80 percent for low-income families), and the dollar amounts of the bids were within 95 percent of the winning bid.

Authority to Offer Special Assistance to Nonprofit Organizations and Public Agencies Not Used Until Recently

Because RTC did not offer special assistance to nonprofit organizations and public agencies until recently, it likely sold less property, preserved less affordable housing, and received lower sales prices. To expedite sales, the FHLBA authorized RTC to offer nonprofit organizations and public agencies (1) seller financing for up to 100 percent of a property's purchase price, (2) below-market interest rate, and (3) price discounts. RTC began offering this special assistance in January 1992—nearly 2-1/2 years after the passage of FIRREA—but, as of June 10, 1992, had not completed any multifamily property sales using the special financing.

RTC's initial delay in offering special assistance appears to stem from an Oversight Board requirement that RTC not offer subsidies on affordable housing assets until there was evidence that subsidies were needed.[6] The Oversight Board wanted RTC to wait and assess whether the 90-day marketing period would be sufficient to achieve the affordable housing objective. In January 1991, RTC requested that the Oversight Board authorize special assistance to enable nonprofit organizations and public agencies to purchase properties. After 5 months of discussions with RTC staff, the Board approved special assistance on June 26, 1991. However, RTC did not issue program guidance to field offices until January 1992. The program director told us that it took this long to get the underwriters needed to operate the seller financing program, to write the program manual, and to develop and administer a nationwide training program for the underwriters.

Without special assistance, RTC likely missed opportunities to sell properties, preserve affordable housing, and maximize returns. For example, our review of the 80 properties RTC sold in its first large bulk sale in Dallas, Texas, showed that with seller financing, RTC could have sold the same 80 properties for $198.9 million—or $11.3 million more than it received[7] preserved an additional 1,894 affordable housing units. It could also have sold 1 additional property (that went unsold) for about $731,000, thereby preserving 64 more affordable units. Our analysis of this bulk sale is provided in appendix I. Using other sales assumptions discussed in appendix I, we believe that RTC could also have sold an additional 5 properties for about $11.9 million and thereby preserved another 593 affordable units.

Recent RTC Actions May Address Many of Its Problems

Between January and June 1992, RTC issued policies, procedures, and regulations that, among other things, addressed the problems of evaluating comparable bids and providing special assistance to nonprofit organizations and public agencies. The new rules for comparing bids establish a weighting formula that, when applied, gives a slight advantage to buyers who set aside more than the required minimum of the rental units in the property for affordable housing. In addition, RTC's January directive on special assistance to nonprofit organizations and public agencies provided the needed framework and procedures to offer

[6] Strategic Plan for the Resolution Trust Corporation, Dec. 31, 1989.

[7] These amounts represent expected gross sales proceeds, not adjusted for RTC costs of providing seller financing.

5-percent downpayment first mortgages, second mortgage loans, and below-market interest rate loans.[8]

RTC directives published in May and June 1992 also addressed several other problems. For example, they

- established rules for negotiating with backup bidders after bids RTC initially accepted are rejected or fail;
- provided for remarketing of eligible properties within the program if they do not sell within the original clearinghouse period or already had been marketed outside the program;
- required that not less than 15 percent of the units in any property sold as part of a bulk sale be preserved for affordable housing; and
- put in place a new program whereby (1) RTC first offers eligible properties to public agencies during an exclusive 30-day marketing period; and (2) assuming the property is not sold, RTC next offers the property to nonprofit organizations during an exclusive 30-day marketing period; and (3) if the property remains unsold, it will then be offered under the normal clearinghouse process.

If implemented, these recent policies, procedures, and regulations should address the problems we noted during our work. However, RTC must oversee and monitor their implementation to ensure that they are implemented properly and consistently throughout the Corporation.

RTC Bulk Sale Policy Is Inconsistent With the Statute

Although RTC has taken steps in recent months to improve the policies and practices governing the affordable housing program, its bulk sales practices are still at odds with the statute. The FHLBA provides that during the 45-day offer period, RTC

"... may not sell in combination with other properties any property which a qualifying multifamily purchaser has expressed serious interest in purchasing individually."[9]

[8]RTC Circular 10100.8 (Jan. 9, 1992).

[9]12 U.S.C. section 1441a(c)(3)(F)(ii)(Supp. II 1990).

This provision prohibits RTC from closing on a bulk sale of eligible properties if a qualifying purchaser offers to buy the property on an individual basis.[10]

Even though it is prohibited, RTC's current affordable housing disposition rules permit it to sell a property as part of a bulk package, even if a qualifying purchaser has expressed serious interest in buying the property and makes an acceptable individual offer during the offer period.

Furthermore, RTC has marketed specified properties in bulk without considering the expressed interests or offers on individual properties in those packages. For example, in December 1990, RTC's National Sales Center marketed three Florida multifamily properties in a bulk sale. It specified in the sale terms that it would consider only bids for the entire package—excluding any qualified buyer not interested in the full package. In another case, after receiving expressions of serious interest in individual multifamily properties from various qualified purchasers, the Intermountain Consolidated Office designed a package of several properties intended for sale to a specific buyer. The Office did not consider individual offers on the properties.

In a letter dated February 28, 1992, we informed RTC of our opinion that its sales practices—comparing individual with bulk offers and marketing and selling exclusionary bulk packages—were inconsistent with the statutory preference for individual sales. We recommended that RTC amend its rules to conform with the individual sales preference. To permit sale of a greater number of properties within the program while still complying with the individual sales preference, we also recommended that RTC revise its rules to allow qualifying bulk purchasers to bid on properties if individual sales fall through, rather than letting the properties leave the program.[11]

In its May 4, 1992, reply to our letter, RTC reiterated its position that it is not required to give a preference to individual sales. However, none of RTC's arguments, in our opinion, provide it with a basis for not implementing the individual preference requirement. (Our complete legal opinion is included in app. II and RTC's reply is included in app. III.)

[10]RTC adopted this interpretation in its interim rule (55 Fed. Reg. 14801 (Apr. 16, 1990)) but abandoned it in its final rule (55 Fed. Reg. 35565 (Aug. 31 1990)) and the current, interim rule (57 Red. Reg. 19500 (May 6, 1992)). The reasons RTC gave for this change are examined in appendix II.

[11]Under RTC's original interim rule, properties would leave the program if no acceptable individual offers were received during the 45-day period.

RTC believes that applying the individual sales preference would hamper its ability to carry out its basic statutory mandate to preserve affordable housing for low-income families. It states that bulk sales result in more affordable housing being preserved than individual sales, and therefore it can best meet its affordable housing mandate by using a bulk sale approach. However, RTC did not produce any comparative data to support this conclusion. Further, there is disagreement within RTC on the benefits of bulk sales.

RTC headquarters officials told us that bulk sales result in more property sales, and therefore more affordable rental units being preserved. They believe that bulk sales allow RTC to package less desirable properties along with the more desirable ones, thus selling and preserving more property for affordable housing by selling undesirable properties that might otherwise leave the program. In addition, they argue that bulk sales should be encouraged because these sales ease RTC's administrative burden and reduce its holding costs.

In contrast, officials in RTC's Southwest Region Sales Center told us that bulk sales ultimately result in lower demand for properties because individual buyers cannot participate. They have found that in selling affordable housing property, individual property sales result in higher sales prices than bulk sales because once RTC decides to sell properties in bulk, it loses much of its leverage to negotiate price. As a result, Southwest Region officials decided to offer multifamily properties on an individual basis only, and they believe that this decision has resulted in the sale of more property at higher prices through the program.

RTC provided us with no empirical data to support its position regarding the merits of bulk sales. To evaluate the individual and bulk sales options available to RTC, we analyzed sales data from RTC's first major bulk sale of multifamily properties under the program. We found that alternative sales options that relied on more individual bids were available and, if successfully completed, could have resulted in higher sales proceeds and in the preservation of more affordable housing. (Our complete analysis is included in app. I.) We recognize, however, that our analysis of one sale cannot be generalized to the entire program.

Conclusions

During its first years of operation, RTC did not develop a well-defined, integrated multifamily program and had limited success in preserving affordable housing for lower and very low-income families. Without comprehensive policies and procedures for selling affordable multifamily housing properties, RTC field offices developed their own sales procedures and marketing processes. In some cases, this resulted in eligible buyers being excluded from some sales and housing units being lost to the program.

The statute requires RTC to select between substantially similar bids and choose the one that preserves the most affordable housing. However, RTC did not give its offices adequate guidance on comparing similar bids, and as a result, RTC completed sales that resulted in lost affordable housing units.

RTC was also slow to implement the special financing and pricing options authorized by FIRREA for nonprofit organizations and public agencies. Because it did not provide the special financing earlier, RTC may have sold fewer properties, preserved less affordable housing, and received less sale proceeds than it could have. In January 1992, almost 2-1/2 years after FIRREA's passage, RTC published guidelines for its offices on providing seller financing for nonprofit organizations and public agencies.

In addition, RTC recently took a number of other steps that address many of our concerns. For example, in May and June 1992, RTC published various rules, policies, and directives on marketing and sale of property in its affordable housing program. These recent changes represent a major step forward in RTC's ability to manage and direct the program and provide a consistent framework for all its offices to follow. If implemented nationwide, the recent policies, procedures, and directives should address many of the problems we noted during our review. However, more needs to be done. Now that operating procedures have been issued, RTC must focus on the other major element of an effective internal control system—that of monitoring and overseeing the implementation of the procedures to ensure that they are being implemented properly and consistently throughout RTC.

Further, despite the recent improvement in several other policy and procedural areas, RTC's bulk sale practices remain inconsistent with the statute because they inhibit or prevent qualified multifamily purchasers from buying an individual property if RTC markets it as part of a bulk package. In addition, affordable housing program rules for considering and comparing individual and bulk sale offers are incompatible with the statute's preference for individual sales.

While our analysis of one RTC sale showed that individual property sales could yield higher sale proceeds and preserve more affordable housing, RTC has offered no empirical data on the relative benefits of bulk sales. RTC officials also disagreed over which approach best achieves RTC's affordable housing goals. RTC needs to analyze the effect of bulk and individual sale methods on preserving affordable housing and on the price it receives for the properties in the program.

If RTC determines that bulk sales yield a greater benefit, it needs to also examine whether there are ways to achieve the benefits of bulk sales while accommodating the statutory individual sales preference. If RTC concludes that affordable housing can best be preserved by bulk sale methods that cannot be structured consistent with a preference for individual sales, it needs to seek an appropriate amendment to the individual sale preference provision in section 21A(c) of the FHLBA.

In the meantime, however, we believe RTC is legally obligated to implement this provision of the statute.

Recommendations

We recommend that RTC's Chief Executive Officer:

- Implement corporatewide procedures and systems to monitor and oversee the implementation of the program directives.
- Amend the Affordable Housing Disposition Program rules to conform with the individual sales preference provision contained in section 21A(c) of the FHLBA.
- Analyze bulk and individual sales methods to determine their effect on preserving affordable housing and on sales prices for properties in the program.
- If, after conducting an appropriate analysis, empirical data show that affordable housing can best be preserved through bulk sales, seek an appropriate amendment to this provision of the law.

Agency Comments

In August 1992, we met with the Program Director and his staff to discuss a draft of this report. They provided us with oral comments on the draft. They agreed that they needed to strengthen their oversight of the program to ensure that issued policies and procedures are being implemented properly and consistently thoughout RTC. However, they reiterated their belief that their bulk sales practices are not inconsistent with the statute. Their comments have been incorporated in the report where appropriate.

We are sending copies of this report to other interested congressional committees and members, the President and Chief Executive Officer of RTC, and the President of the Thrift Depositor Protection Oversight Board. We will also provide copies to others upon request.

Major contributors to this report are listed in appendix IV. Please contact me on (202) 736-0479 if you or your staff have any questions concerning this report.

Sincerely yours,

Gaston L. Gianni

Gaston L. Gianni, Jr.
Associate Director,
Federal Management Issues

Contents

Abbreviations

FHLBA	Federal Home Loan Bank Act
FIRREA	Financial Institutions Recovery, Reform, and Enforcement Act of 1989
RTC	Resolution Trust Corporation

Results of RTC Multifamily Bulk Sale in Dallas, Texas

In September 1990, RTC's Southwestern Regional Office offered 199 multifamily properties for sale under its affordable housing program. This was the program's first major bulk sale of multifamily properties, and it resulted in offers for 90 of the 199 properties. RTC accepted offers on 80 of the properties for a total of about $188 million. When the sales are completed, 6,583 units, about 42 percent of the 15,742 rental units in the 80 properties, will be preserved for affordable housing.

Our analysis of the sale showed that RTC had other sales options available that may have resulted in even higher sales proceeds and preserved more affordable housing. For example, it rejected an alternative proposed by its field staff that may have realized $27.1 million more in sales proceeds than the offers it accepted, disposed of 6 more properties, and preserved 378 more affordable rental units. Further, on the basis of our analysis, we believe that other available alternatives could have yielded between $23.9 million and $26.3 million more than RTC's final decision and preserved between 745 and 2,551 more affordable rental units.

Sale Overview

For this bulk sale, the Southwest Region offered 199 properties from its 3 consolidated field offices—Gulf Coast, Metroplex, and Southern. The properties were located in Texas, Arizona, Colorado, Florida, Georgia, Kansas, Oklahoma, and Tennessee and had a combined asking price of over $375 million. The region offered to sell these properties for cash because, according to one official, seller financing had not been approved by the Oversight Board. It designed this sale as a sealed-bid offering under its general sales guidelines. These guidelines allowed it to set each property's reserve, or minimum acceptable price, at 70 percent of market value.

The offering was structured to allow buyers to bid on any individual property or make an offer for a group or bulk package of properties. Allowing buyers to define their own bulk packages, however, complicated the sale because RTC received overlapping individual and bulk bids for the same properties. Because RTC had not asked bulk bidders to price each individual property in their bid, it did not have the information it needed to compare bids on a property-by-property basis. As a result, RTC had to develop a formula that took the total amount offered in a bulk bid and prorated it to each property making up the bid.

Upon opening the bids, Southwest Region officials determined that none complied with the bid specifications for various reasons, including bidders' failure to enclose proper earnest money deposits and lack of adequate financial documents. As a result, all the bids were set aside and RTC began negotiating with individual buyers.

RTC staff subjectively assessed bidders' abilities to complete sales quickly. Using a committee approach, regional staff reviewed the bids and graded each bidder on its ability to complete the sale transaction. These assessments evaluated such factors as (1) whether buyers submitted the required 3 percent earnest money; (2) the amount of time buyers requested for feasibility studies; (3) the time required to close; (4) the impact on RTC of any buyer-imposed sales contingencies; (5) the purchaser's financial statements; (6) the type of financing or source of funds; and (7) the purchaser's history in managing multifamily, affordable housing. They assigned each bidder a grade of A through E, with an "A" having the highest and an "E" the lowest likelihood of closing.

The committee also assessed each bidder's commitment to meeting the minimum 35 percent affordable housing requirement. However, no extra credit was given to bidders offering to preserve more than the minimum. According to one official, a larger commitment to affordable housing would have affected RTC's final decision in the case of "substantially similar" bids. However, because RTC had not defined "substantially similar," those bids offering commitments greater than the minimum 35 percent were not given added consideration.

Bids were received on 90 of the 199 properties offered for sale. Three of the 90 properties were subsequently determined ineligible for sale. In analyzing the bids on the remaining 87 properties, regional staff developed a decision matrix to compare bids on individual properties. On the basis of a comparison of the bids, they developed a sales proposal and presented it to a committee composed of both field and headquarters RTC staff. The proposal was based on the following underlying principles:

- Sell individual properties receiving only one bid when that bid was at or above the minimum acceptable price.
- Sell individual properties, selecting between competing bids, based on the highest price offered and the bidder's ability to fund and close.
- Sell bulk groups of properties when the sales constitute the best offers, taken as a whole, and result in the highest overall return to RTC.

The proposal suggested negotiating higher prices for certain properties and letting bidders compete for properties in overlapping bulk sale bids.

The committee accepted a part of the proposal—to sell five individual properties that had no competing bids and four properties to the highest bidders. However, it rejected the rest of the proposal. It decided to deal first with one buyer who it believed was likely to be able to quickly close sales.

To pursue this strategy, the committee revised the rules it used for reviewing the bulk bids. It decided to negotiate with the highest graded bidder first for virtually all the remaining properties offered in the sale, and counter at a price higher than the minimum acceptable bid. This buyer's original $83.4 million bid was 97.3 percent of the required $85.7 minimum acceptable price on the properties in its bid. If this approach was accepted, negotiations would be initiated with the next two highest graded bidders in the same manner for remaining properties. When all negotiations were completed with these three buyers, any remaining unsold properties were to be offered to other bidders.

In our review of the bids RTC received, we found offers from several other higher graded bidders whose bids exceeded the minimum acceptable price and who offered higher prices than the selected buyer for many of the properties. For example, bids from other higher graded buyers for 14 of the 28 properties totalled $41.8 million—$6.4 million more than the selected buyer's $35.4 million bid. Bids from lower graded buyers for 12 of the remaining 14 properties totalled about $11.0 million more than the selected $34.8 million bid. [1]

Sale Results

RTC accepted offers for about $188 million on 80 of the 87 available properties for which it received bids. The sold properties contained 15,742 rental units, and this sale will preserve 6,583, or 41.8 percent, of them for affordable housing.

Alternative Sales Decisions

RTC could have sold more property, received higher sales proceeds, and preserved more affordable housing had it made different sales decisions. Table I.1 compares RTC's final sales decision to three other possible outcomes: the initial proposal by local RTC staff and two other sale possibilities we developed based on our analysis of the bids, other sale records, and interviews with RTC staff involved with the sales process.

[1]The remaining two properties may not have been sold during this sale. If unsold, they could have been remarketed in RTC's next sale.

Table I.1: Alternatives Compared to RTC's Final Sales Decision

Sales decisions	Number of properties	Estimated sales proceeds (millions)	Affordable units preserved
RTC final decision	80	$187.7	6,583
Alternatives:			
RTC staff proposal	86	214.8	6,961
GAO alternative 1	86	214.0	7,328
GAO alternative 2[a]	86	211.6	9,134

[a]Assumes that seller financing was available for buyers who requested it. Estimated sales proceeds are expected gross sales proceeds; we did not adjust the prices based on RTC's cost of financing.

Source: RTC documents and GAO analysis.

Alternative Sale Rejected by RTC May Have Yielded Higher Proceeds and More Affordable Housing

RTC rejected one sale alternative that could have resulted in greater proceeds, more units of affordable housing, and fewer unsold properties. The proposal was developed by RTC's regional staff but was not completely finalized before it was rejected. However, we worked with the regional staff to identify the possible outcomes considering anticipated counter proposals and other bids received. Counter offers were assumed to be at the minimum acceptance bid or highest bid received. Our analysis assumed that if the preferred bidder did not accept the counter offer, the property would be sold to the highest bidder for the property or, if no minimum acceptable bid received, would not be sold. A comparison of this alternative with the final decision shows that, if successfully completed, this sale could have resulted in proceeds of $214.8 million and 6,961 affordable rental units preserved—a net gain of $27.1 million and 378 affordable housing units.

A principal difference between this option and RTC's final sales decision was RTC's decision to negotiate a bulk sale first with the preferred buyer and then sell the remaining properties to other buyers. According to the sales justification, RTC sold the 28 properties to the preferred buyer because

- the transaction would sell the largest amount of property, at the best possible aggregate price, and provide the highest return to RTC;
- closing the transaction would be significant in meeting RTC's general asset sales and affordable housing program goals; and

- the preferred buyer's financial ability to fund and close the sale was as high as any offers RTC received.

Our analysis of the region's proposal, however, showed that it could have sold more property at a higher aggregate price. It would also have had a greater impact on RTC's general asset sales and affordable housing program goals. To get the greater impact, the proposal relied on selling 17 of the properties to 2 other, highly qualified buyers and the rest to lower graded buyers. Although this option has a higher risk than RTC's final decision, the $27.1 million increase and 378 added affordable housing units resulting from this transaction appear to compensate for this risk.

GAO Alternatives

We also examined other alternatives that RTC could have considered using various assumptions not made by RTC. Our analyses showed that RTC could have made sales (assuming successful completion) resulting in proceeds of between $23.9 million and $26.3 million more than its final decision. These alternatives could have sold 6 more properties and preserved between 745 and 2,551 more affordable rental units.

We performed two analyses: one that assumed seller financing was not available and the other that assumed seller financing was available to bidders who requested it. Apart from seller financing, both cases use the same rules and assumptions in awarding property sales.

On the basis of a review of the bids, other sale documents, discussions with RTC officials, and RTC decisions in evaluating bids, we established general criteria we would have used to make sales decisions. Our criteria, which differ from RTC's, were based on bidders' abilities to close the sales transactions and the amounts they bid for individual properties. The criteria are detailed beginning on page 25.

Alternative Without Seller Financing

For this alternative we assumed properties would be sold to the bidder who offered the highest price and preserved the most affordable housing. However, unlike RTC, which selected a principal bulk purchaser to build its sale around, we developed our sales alternative on the basis of a comparison of all bids received for each property and awarded sales on a property-by-property basis. In comparing competing bids, we assumed the property would be sold to the highest graded bidder first. For bids within 10 percent of each other, we assumed the property would be sold to the buyer preserving the largest amount of affordable housing. The net increase of $26.3 million and 745 more affordable housing units reflect these differences.

Alternative With Seller Financing

As an integral part of the affordable housing program, Congress attempted to help nonprofit organizations and public agencies buy multifamily properties. Specifically, the law permitted RTC to give them seller financing, special below-market interest rates, and price discounts to help them purchase these properties.

Although authorized by Congress, RTC did not have the procedures in place to offer these incentives at the time of this sale. Nonetheless, one highly qualified, nonprofit organization offered to buy many of the properties if RTC would provide seller financing. Although this organization's bid on many of the properties was higher than the one RTC ultimately accepted, its bid was rejected. [2] Further, this bidder offered to make the largest commitment to affordable housing among the bidders participating in the sale.

We developed this alternative because Congress authorized seller financing and this bidder offered highly competitive prices on many properties and made a strong commitment to affordable housing. Using the same assumptions as the prior alternative, we again analyzed the bids RTC received and offered seller financing to bidders who requested it. If a seller financing alternative were successfully completed, RTC could have sold 86 properties. With this approach, sale proceeds could have been $23.9 million more than RTC's final decision [3] and RTC may have preserved an additional 2,551 affordable housing rental units.

GAO Assumptions and Criteria for Evaluating Property Bids

On the basis of a review of the bids and other sale documents, discussions with RTC officials, and RTC actions in evaluating bids, we established the following general criteria that we would have used for making sales decisions. Some of these were used by RTC or RTC local staff in selecting bids and making sales. Our criteria, however, emphasize meeting and exceeding minimum affordable housing requirements, maximizing price, and selling properties on an individual basis.

[2]This comparison was made on expected gross sale proceeds. We did not adjust the prices based on RTC's cost of financing, and RTC did not determine the cash equivalent of this offer when making its sales decisions.

[3]sale proceeds not adjusted for the cost of financing.

1. Eliminate any bidder who does not commit to meeting the minimum affordable housing requirements.

2. Do not sell a property if it cannot be sold at or above minimum acceptable price.

3. Consider and award each sale on a property-by-property basis. Use the formula that RTC developed to determine an individual price for each property contained in a bidder's bulk package. Rely on the price that RTC had arrived at when comparing bids on a property-by-property basis.

4. Select among substantially similar bids the bid that will result in the highest number of affordable rental units preserved. Because RTC did not define substantially similar bids until recently, on the basis of interviews of RTC field staff we decided to treat bids within 10 percent of each other from bidders of the same quality (e.g., A through C and D through E) as substantially similar. Ten percent is the midpoint between a 5-percent definition under consideration by RTC in November 1991 and the 15-percent criterion Congress set in December 1991 for the Federal Deposit Insurance Corporation's affordable housing program. Subsequent to our completing this case study, RTC defined substantially similar bids. (See p. 10.)

5. Using RTC's bidder grading system, sell first to bidders who are graded A through C, and consider any bidder who received an A through C grade as having a comparable ability to close the sale. We considered bidders with A through C grades to have comparable ability to close the sale because they had an average or better risk of closing. If the property cannot be sold to a bidder graded A through C, next offer the property to bidders who are graded D through E, and consider any bidder who received a D through E grade as having a comparable ability to close the sale. We considered bidders with D and E grades to have comparable ability to close the sale because they had more than an average risk of closing.

The following criteria would be used to award property sales. This would be a two stage process, first emphasizing sales to bidders graded A through C, and then to bidders graded D through E.

- Use RTC's prorated bid prices (i.e., method for imputing the price of an individual property when the property was part of a bulk bid) for individual properties. Select the highest bid in order to maximize return.

We used RTC's prorated prices because RTC did not obtain pricing on all individual properties.

- In cases where a bulk bidder's total bid equaled or exceeded the minimum acceptable price for the properties in the bulk, for each individual property, we would accept the highest bid that is equal to or in excess of the property's minimum acceptable price. If the highest bid was less than the minimum acceptable price for that property, counter at the minimum acceptable price. This criterion assumes that at least the minimum acceptable price is received for all properties.
- In cases where a bulk bidder's total bid was less than the minimum acceptable price for the combined properties, for each individual property in the bid (1) counter the prorated bid at the minimum acceptable price if there were no other bidders for this property and the bid was less than the property's minimum acceptable price; (2) accept the prorated bid if it was the sole bid for this property and it was at or above the minimum acceptable price; and (3) if there are competing bids, counter at the highest bid received. This criterion generally gives priority to buyers who complied with the sale requirements that bids meet or exceed minimum acceptable price, and assures that RTC receives these minimum prices for all properties.

GAO General Counsel's February 28, 1992, Opinion on RTC's Statutory Authority Concerning Bulk Sales

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-247496

February 28, 1992

Mr. Gerald L. Jacobs
Senior Vice President and
General Counsel
Resolution Trust Corporation

Dear Mr. Jacobs:

The General Accounting Office is in the process of reviewing the disposition of multifamily property by the RTC under its Affordable Housing Disposition Program (AHDP). In connection with this review, we have examined whether the RTC has the statutory authority (1) to accept a bulk offer that it receives on eligible properties over an individual offer for a particular property contained in the bulk package, and (2) to market and sell certain eligible properties in bulk only. We are providing you with our analysis of these issues for your consideration in connection with the revision of your AHDP regulations now being undertaken to incorporate the changes to the program contained in the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991.

By way of background, section 21A(c) of the Federal Home Loan Bank Act (FHLB Act) requires that in disposing of certain multifamily properties the RTC give a preference to "qualifying purchasers" -- public agencies, nonprofit organizations and for-profit entities that commit to use specified proportions of the properties for lower-income housing. Properties sold to qualifying purchasers under the AHDP must contain deed restrictions requiring the owner to maintain specified percentages of all dwelling units purchased for lower and very-low income families. During an initial 90-day marketing period, qualifying purchasers have the exclusive option to express "serious interest" in acquiring eligible properties. The statute then provides a 45-day period during which only qualifying purchasers who have expressed serious interest can submit a purchase offer.

The statute further provides that, during the 45-day period, the RTC--

> "may not sell in combination with other properties any property which a qualifying multifamily purchaser has expressed serious interest in

> purchasing individually." 12 U.S.C. § 1441a(c)(3)(F)(ii) (Supp. II 1990).

Under the above-quoted language, the RTC is prohibited from consummating a bulk sale if a qualifying purchaser offers to purchase the property on an individual basis.

The RTC's current AHDP rules permit the RTC to sell a property as part of a bulk package even if a qualifying purchaser has expressed serious interest in purchasing the property and makes an acceptable individual offer during the offer period. In addition, we understand that the RTC has decided in certain cases to market specified properties in bulk and to not entertain expressions of serious interest or offers on individual properties contained in those bulk packages.

As discussed in detail in the enclosure to this letter, we believe that both of these sales methods -- allowing comparisons of individual and bulk sales, and marketing and selling exclusionary bulk packages -- are inconsistent with section 21A(c)(3)(F)(ii) of the FHLB Act, quoted above. Accordingly, we recommend that the RTC amend the AHDP rules to give effect to the individual sale preference provision contained in the statute. Further, we recommend that the exclusionary bulk packaging method described above be discontinued because this method effectively bars an individual purchaser from either expressing serious interest or making an offer on properties contained in the bulk package.

We note that the RTC's interim AHDP rule did give effect to the statutory individual sale preference provision.[1] The interim rule provided that in cases where the RTC received an expression of serious interest in an eligible multifamily property from both an individual and bulk purchaser, the RTC would inform the bulk purchaser that it would consider bids on the subject property only on an individual basis during the applicable offer period. The bulk purchaser would then be permitted to submit an individual bid on the property and bid on any combination of the remaining properties contained in the bulk package. Upon the expiration of the 45-day offer period, if no qualifying multifamily purchaser had made an offer to purchase the subject property individually, the RTC would then be able to sell the property individually or in combination with other properties to any purchaser without occupancy restrictions.

If the RTC decides to incorporate the interim rule provisions in its new regulations to comply with section

[1]55 Fed. Reg. 14,081 (April 16, 1990).

21A(c)(3)(F)(ii), we believe that certain aspects of those provisions should be changed in order to keep a greater number of properties within the AHDP. Specifically, in the event that an individual purchaser does not submit an offer during the 45-day offer period, we believe that the RTC has the authority to sell the individual property as part of a bulk sale to another qualifying purchaser. The interim rule did not appear to provide for this type of sale. We believe that this change would allow the RTC to sell the entire original bulk package in the event that the RTC did not receive any acceptable individual offers during the 45-day period.

We would appreciate your response to our analysis of this issue. If you have any questions regarding this issue, please do not hesitate to contact Rosemary Healy at 202-275-5422.

Sincerely yours,

James F. Hinchman
General Counsel

Enclosure

Enclosure

I. DESCRIPTION OF THE AHDP STATUTORY PROVISIONS

Section 21A(c) of the Federal Home Loan Bank Act (FHLB Act), 12 U.S.C. § 1441a(c) (Supp. II 1990), requires the Resolution Trust Corporation (RTC) to implement a program to preserve the availability and affordability of residential real property for lower- and moderate-income families as part of its disposition of eligible residential properties.[1] To implement its affordable housing mandate, the RTC has developed the Affordable Housing Disposition Program (AHDP). Section 21A(c) of the FHLB Act contains specific provisions governing the sale by the RTC of eligible multifamily housing property[2] to qualifying purchasers.[3]

Section 21A(c)(3)(E) of the FHLB Act provides that eligible multifamily properties sold to qualifying purchasers must contain deed restrictions requiring the owner to maintain specified portions of dwelling units purchased for lower- and very low-income families (referred to herein as the "Affordable Housing Requirement")[4] during the remaining

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[1]Section 21A(c) of the FHLB Act was added by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989), and amended recently by the Resolution Trust Corporation Refinancing, Restructuring and Improvement Act of 1991 (RTC Act), Pub. L. No. 102-233, 105 Stat. 1761 (1991).

[2]Eligible multifamily properties that the RTC acquires in its corporate capacity or as receiver are buildings containing five or more dwelling units each having an appraised value not in excess of value limitations prescribed by the National Housing Act. 12 U.S.C. § 1441a(c)(9)(D). Section 601 of the RTC Act expands this definition to include qualifying buildings that the RTC acquires in its capacity as conservator as long as Congress appropriates additional funds to cover the costs associated with this provision.

[3]Qualifying multifamily purchasers include public agencies, nonprofit organizations and for-profit entities that make a commitment to satisfy the lower-income occupancy requirements described below. 12 U.S.C. § 1441a(c)(9)(L).

[4]The statute requires that 35 percent of all dwelling units be maintained for "lower-income families," and that not less than 20 percent of all such units be maintained for "very

useful life of the property in which the units are located.[5] Qualifying property may be sold either individually or in bulk (i.e., in combination with other eligible properties) to eligible purchasers. If eligible property is sold as part of a bulk sale, the Affordable Housing Requirement applies in the aggregate to the properties purchased.[6]

Section 21A(c) of the FHLB Act also contains specific rules governing the marketing and sale of qualifying property. State housing finance agencies and nonprofit organizations serve as clearinghouses which disseminate property information to eligible purchasers. During a 90-day marketing period, qualifying multifamily purchasers may give the RTC written notice of serious interest in a property. Upon the expiration of the 90-day marketing period, the RTC will notify all purchasers who expressed serious interest during the marketing period and specify minimum terms and conditions for its sale. Eligible purchasers then have 45 days to make a purchase offer.

If no qualifying multifamily purchaser expresses interest in a property during the "serious interest" period or makes an offer during the offer period, the RTC may market and sell the property to any purchaser without occupancy restrictions. Section 21A(c)(3)(F) of the FHLB Act specifically provides in this regard:

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low-income families" during the remaining useful life of the property. See 12 U.S.C. § 1441a(c)(3)(E).

[5]The RTC has defined "useful life" to mean the later of 40 years from the date of the sales contract or 50 years from the date the property was initially occupied as multifamily housing. 12 C.F.R. § 1609.2(dd) (1991).

[6]Section 607 of the RTC Act contains an amendment to the aggregation provision that would require a bulk purchaser to maintain (a) 40 percent of all units purchased as part of a bulk sale as affordable for lower-income and very low-income families (20 percent of which must be devoted to very low-income families) and (b) set aside not less than 10 percent of the units in each separate building to meet the above occupancy requirements. However, this more stringent aggregation requirement is conditioned upon Congress appropriating funds to cover additional costs and losses to the RTC resulting from the provision taking effect.

"(F) Sale of Multifamily Properties to Other Purchasers.--

"(i) If, upon the expiration of the [90-day serious interest] period referred to in subparagraph (B), no qualifying multifamily purchaser has expressed serious interest in a property, the Corporation may offer to sell the property, individually or in combination with other properties, to any purchaser.

"<u>(ii) The Corporation may not sell in combination with other properties any property which a qualifying multifamily purchaser has expressed serious interest in purchasing individually</u>.

"(iii) If, upon the expiration of the [45-day offer] period referred to in subparagraph (D), no qualifying multifamily purchaser has made an offer to purchase the property, the Corporation may sell the property, individually or in combination with other properties, to any purchaser." (Emphasis added.)[7]

II. INDIVIDUAL PREFERENCE VERSUS BULK SALE

As indicated above, clause (ii) of section 21A(c)(3)(F) grants a preference for individual over bulk sales. The conference report accompanying the legislation does not explain why the statute distinguishes between individual and bulk sales in clause (ii). As part of a general discussion of bulk sales, however, the report does address the individual sale preference as follows:

"If a multifamily property has been identified during the serious interest period for an individual purchase it may not be considered as

[7]The time during which eligible property may stay within the AHDP has been expanded by the RTC Act. Specifically, section 608 of the RTC Act permits the RTC to put any eligible property back through the serious interest and offer periods in the event that no qualifying purchaser either expresses serious interest or makes an offer during the respective periods. This section further provides that the RTC, in its discretion, may alter the duration of the serious interest and offer periods governing those properties that the RTC decides to put back through the AHDP.

> part of a bulk sale unless no purchase offer is subsequently made during the bona fide offer period."[8]

In addition, the conference report alludes to the preference for individual bids in the context of its discussion of a specific type of portfolio sale to a qualifying nonprofit foundation. The report states that the law would permit this type of sale after the expiration of the serious interest period as long as a qualifying multifamily purchaser had not identified any of the subject properties for individual purchase.[9]

Accordingly, the statute, as supported by the accompanying legislative history, prohibits the RTC from consummating a bulk sale if a qualifying purchaser offers to purchase the property on an individual basis. As discussed below, the RTC initially adopted this interpretation in its AHDP interim rule but abandoned it in its final rule.

II. RTC'S INTERIM AND FINAL RULES

On April 16, 1990, the RTC adopted an interim rule governing the operation of the AHDP which specifically addressed the issue of whether the RTC could sell a property as part of a bulk sale if it had received an offer to purchase the property on an individual basis.[10] The rule provided that in cases where the RTC received an expression of serious interest in an eligible multifamily property from both an individual and bulk purchaser, the RTC would inform the bulk purchaser that it would consider bids on the property only on an individual basis during the applicable offer period. The bulk purchaser would then be permitted to submit an individual bid on the property and bid on any combination of the remaining properties contained in the bulk package. Upon the expiration of the 45-day offer period, if no qualifying multifamily purchaser had made an offer to purchase the subject property individually, the RTC would then be able to sell the property individually or in combination with other properties to any purchaser.[11]

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[8] H.R. Rep. No. 209, 101st Cong., 1st Sess. 422 (1989).

[9] _Id_. at 422-23.

[10] 55 Fed. Reg. 14,081 (April 16, 1990).

[11] _Id_. at 14,088-89.

The absolute preference for an individual sale to a qualifying multifamily purchaser contained in the interim rule described above was eliminated from the AHDP final rule. Rather, the final rule permits the RTC to sell a multifamily property as part of a bulk package to a qualifying purchaser even if another qualifying purchaser has expressed serious interest in purchasing the property individually and has made an acceptable individual offer during the offer period.[12] The rule allows the RTC to market bulk packages during the serious interest period, and in this connection, a qualifying purchaser may identify its own bulk package. Finally, a qualifying purchaser interested in purchasing individually a property that is contained in a bulk package may also express serious interest and make an individual offer. In this event, the rule contemplates that the RTC would then compare the individual and bulk offers.[13]

The preamble to the final rule explains that the RTC received one comment criticizing the interim rule's absolute preference provisions.[14] While the preamble acknowledges that the absolute preference for individual purchases as set forth in the interim rule was based on section 21A(c)(3)(F)(ii) of the FHLB Act and the conference report accompanying that provision, the RTC nevertheless concluded that this statutory provision "should not be construed to preclude the RTC from comparing individual and bulk offers for the same eligible multifamily property and accepting the best offer."[15]

III. ANALYSIS OF REASONS FOR RULE CHANGE

The preamble to the final rule sets out three reasons for the RTC's conclusion that a change from the interim rule's absolute preference for individual sales was warranted.

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[12]12 C.F.R. § 1609.8(a).

[13]12 C.F.R. § 1609.8(c)(3).

[14]Specifically, the commentator (National Corporation for Housing Partnerships, a Congressionally mandated for-profit corporation that provides affordable housing) wrote "[t]he Interim Rule seems to suggest that the RTC must effectuate a sale of a property to a purchaser who is only buying one asset, no matter how poor the price and terms are." 55 Fed. Reg. 35,565, 35,567 (August 31, 1990).

[15]Id.

First, the RTC argues that section 21A(c)(3)(F)(ii) of the FHLB Act is inconsistent with section 21A(c)(5).[16] The latter provision requires the RTC to give a preference to an offer for any eligible multifamily property that would reserve the highest percentage of dwelling units for occupancy by low-income families who would retain such units for the longest term. Section 21A(c)(5) specifies that this preference is to be given "among substantially similar offers." Accordingly, these provisions are potentially inconsistent only if an individual offer and a bulk offer are deemed to be "substantially similar."

The final rule defines "substantially similar purchase offers" to mean "purchase offers whose terms result in comparable net proceeds to the RTC after deductions for sales expenses."[17] It is unclear how the RTC has made the determination that an individual and a bulk offer result in comparable net proceeds to the RTC. A strong argument may be made that individual and bulk offers, by definition, are not substantially similar.

Even assuming that the two types of offers are comparable, the only way to compare an individual and bulk offer would be if the bulk offer contained a property-by-property price and an Affordable Housing Requirement allocation breakdown. The RTC does not currently receive a property-by-property price breakdown from the bulk bidder. Furthermore, an Affordable Housing Requirement allocation on a property-by-property basis for a bulk sale bid is not feasible based on the RTC's approach to the aggregation provision.[18] Accordingly, it does not appear that individual and bulk offers can be viewed as "substantially similar" for purposes of section 21A(c)(5).

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[16]Id.

[17]12 C.F.R. § 1609.2(bb).

[18]The RTC has developed two approaches to implementing the aggregation provision, which allows a bulk purchaser to apply the Affordable Housing Requirement in the aggregate to the properties purchased. Under the "floating" aggregation approach, a purchaser may shift the restricted units from building to building as long as the Affordable Housing Requirement is met in the aggregate in accordance with a master agreement. Under an alternative approach referred to as the "fixed" aggregation requirement, a bulk purchaser is required to indicate at the time of closing which properties will contain the units with the Affordable Housing Requirement and the specific number of units in each property. At this time, it is unclear which approach will prevail.

Second, the RTC takes the position that the heading, "Sale of Multifamily Properties to Other Purchasers," preceding section 21A(c)(3)(F) suggests that this provision was intended "to limit sales to purchasers other than qualifying and not to limit bulk sales to qualifying multifamily purchasers where such sales are in the best interest of the RTC."[19] In other words, according to the RTC, the individual sale preference in clause (ii) of subparagraph 21A(c)(3)(F) is intended to apply only with respect to sales to nonqualifying purchasers, not to qualifying purchasers making bulk offers.

In order to understand the RTC's position more fully, it is necessary to put clause (ii) in context and briefly explain the two other clauses of subparagraph (F). Clause (i) states that if no qualifying multifamily purchaser has expressed serious interest in a property during the 90-day marketing period, the RTC may offer that property individually or in combination to any purchaser. Clause (iii) states that if no qualifying multifamily purchaser has made an offer to purchase the property during the 45-day offer period, the RTC may sell the property individually or as part of a bulk sale to any purchaser. In the event that the property is sold to a nonqualifying purchaser outside of the AHDP, the Affordable Housing Requirement will not apply to such a sale.

The remaining clause in subparagraph (F) and the one at issue here -- clause (ii) -- prohibits the RTC from selling in combination with other properties any property which a <u>qualifying multifamily purchaser</u> has expressed a <u>serious interest</u> in purchasing individually. Based upon clause (i), the RTC may offer eligible property to a nonqualifying purchaser (or "other purchaser") only if no qualifying multifamily purchaser has expressed a serious interest in purchasing the subject property. If a qualifying purchaser has expressed a serious interest in purchasing a property individually as contemplated in clause (ii), the only competing offers RTC would be able to consider under clause (iii) during the 45-day offer period would be those made by qualifying purchasers. Therefore, the serious interest period referred to in clause (ii) would have no applicability to a sale to a nonqualifying purchaser because at the time of such a sale the serious interest period necessarily would have already expired.

Accordingly, in the context of subparagraph (F) as a whole, clause (ii) can only be construed to limit the ability of a qualifying multifamily purchaser (as opposed to "any purchaser" as the RTC argues) to purchase as part of a bulk

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[19] 55 Fed. Reg. 35,565, 35,568 (August 31, 1990).

sale property in which a qualifying multifamily purchaser has expressed a serious interest in purchasing individually. The heading of the section, referring to nonqualifying or "other" purchasers, cannot limit the plain meaning of the text.[20] The Supreme Court has held that a section heading may serve as an aid to arrive at legislative intent only where the language in the body of the text is ambiguous.[21]

Finally, the RTC states in the preamble to its final regulation that it believes comparing individual and bulk bids will best serve the fundamental purpose of section 21A(c)-- to preserve affordable housing for low-income households. The preamble does not elaborate on why the RTC believes that this approach best serves the affordable housing statutory mandate. However, in discussions with our Office, RTC officials stated their belief that bulk sales are essential to the success of the AHDP. They asserted that bulk sales should be encouraged because they ease the agency's administrative burden in carrying out the program and reduce holding costs. In addition, the RTC officials emphasized that bulk sales may result in RTC selling undesirable properties that it otherwise may be unable to sell, and that higher sales might be achieved by combining certain undesirable properties with very desirable properties.

Similarly, the National Corporation for Housing Partnerships (NCHP), which was the advocate for the change in the final rule, believes that bulk sales will aid the RTC in meeting its affordable housing objectives, liquidating assets in a timely fashion, and disposing of undesirable as well as desirable properties. The NCHP claims that it is too expensive and time-consuming to purchase properties individually and that bulk sales result in a reduction in transaction and due diligence costs. Perhaps most importantly, the NCHP points out that the bulk sale procedure allows the buyer to meet its Affordable Housing Requirement in the aggregate, as opposed to on a property-by-property basis.

However, the individual sales preference provision does not eliminate the bulk sale concept. Rather, it prohibits the bulking of any property only in those instances in which there has been individual interest expressed. Bulk sales

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[20] 2A Sutherland, Statutory Construction, at § 47.14 (5th ed.).

[21] Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-529 (1947).

are still permitted with respect to any property for which there is no individual interest. Furthermore, bulk purchasers who are interested in a property in which there has been individual interest expressed may still submit an individual bid which if selected would allow the purchaser to acquire potentially all of the properties contained in the original bulk package. Accordingly, even if the individual sale preference provision were given effect, the benefits of bulk sales identified above still may be achieved.

Based on the analysis set forth above, it appears that the RTC does not have the statutory authority to compare individual and bulk offers, as is currently provided for in the AHDP rule. Furthermore, as described below, the RTC is moving away from the final rule that provides for a comparison of individual and bulk offers because it claims that such a comparison is overly burdensome. Instead, the RTC has begun to market bulk packages on an exclusionary basis. Under this approach, the RTC will not entertain individual offers on any property that it has included in a bulk package.

IV. EXCLUSIONARY BULK PACKAGES

A draft RTC directive entitled "Procedures for Marketing Multifamily Affordable Housing" (hereinafter referred to as the AHDP Directive) contains a description of RTC-structured bulk packages. Based on this description, once the RTC has made the determination to market particular properties in bulk, the RTC will not entertain offers or expressions of serious interest on individual properties in that bulk package. Although the AHDP Directive is still in draft form, there are existing examples of this practice. In fact, we understand that RTC officials have begun favoring exclusive bulk packaging partly because they have been unable to compare individual and bulk bids. However, the sales method appears to be directly at odds with section 21A(c)(3)(F)(ii) of the FHLB Act because it prevents a qualifying multifamily purchaser from ever expressing a serious interest in any individual property if the RTC has decided to market that property as part of a bulk package. Therefore, this practice should be discontinued.

V. CONCLUSIONS

The purpose of section 21A(c) of the FHLB Act is to provide for affordable housing as an integral part of RTC's asset disposition function. To achieve this purpose, the statute contains specific requirements governing the sale of eligible properties to qualifying purchasers. With respect to the individual sale preference provision, the plain terms of section 21A(c)(3)(F)(ii) of the statute, confirmed by the explanatory language in the accompanying conference report, require RTC to sell eligible property on an individual basis rather than as part of a bulk package if a qualifying purchaser has expressed individual interest and has made an offer in accordance with the rights of first refusal afforded by the statute.

In our view, RTC is not giving effect to section 21A(c)(3)(F)(ii). The RTC does not have the authority to interpret the statute so as to make any provision inoperable if such an outcome is avoidable. See e.g., Ginsberg & Son, Inc. v. Popkin, 285 U.S. 204, 208 (1932). Such an outcome is avoidable if the RTC gives a preference to individual purchasers as it had proposed, for example, in its interim rule. By removing this preference from the final rule, the RTC has effectively read section 21A(c)(3)(F)(ii) out of the law.

Accordingly, we believe that the RTC should amend the AHDP rule to give effect to the individual sale preference mandated by the statute. Further, we believe the exclusionary bulk packaging method described in the draft AHDP Directive also undercuts the statutory preference for individual sales and, therefore, should be prohibited.

RTC Response to GAO's February 28, 1992, Letter

Resolution Trust Corporation
General Counsel
801 17th Street, NW
Washington, DC 20434-0001

May, 4, 1992

Mr. James F. Hinchman
General Counsel
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Hinchman:

Thank you very much for your letter regarding the RTC's Affordable Housing Disposition Program (AHDP). We have given great consideration to the issue raised in your letter regarding the bulk sale of eligible multifamily property under the AHDP.

As you know, this issue is not new to the RTC. We invited and received public comment on this issue during the rulemaking process in 1990. After careful consideration and a thorough analysis of the issue, the legal staff of the RTC concluded that section 21A(c)(3)(F)(ii) of the Federal Home Loan Bank Act, as amended by FIRREA, should not be construed to preclude the RTC from comparing individual and bulk offers for the same eligible multifamily property (see the *Discussion of Comments* section of 12 C.F.R. Part 1609, August 31, 1990). The RTC's policy, as set forth in 12 C.F.R. § 1609.8(c)(3), permits a qualifying multifamily purchaser, in its discretion, to submit both individual and bulk sales offers for each multifamily property for which the RTC received an expression of serious interest from a purchaser interested in an individual sale. As our legal staff indicated in discussions with your staff in the fall of last year, we believe that the RTC's position on the bulk sale of eligible multifamily property is defensible under the statute and best evidences the intent of Congress.

If you have any further questions on this matter, please feel free to call Pamela M. Smith at 202-736-0307.

Sincerely,

Gerald L. Jacobs

cc: Lamar Kelly, Jr.
Thomas Horton
Steve Allen

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