

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: HUD Home Program Grants—Statutory Commitment Deadline

File: B-322077

Date: July 17, 2013

DIGEST

Section 218(g) of the HOME Investment Partnership Act (Act), 42 U.S.C § 12748(g), imposes a two-year deadline by which participating jurisdictions must commit grant funds allocated to them under the HOME Investment Partnership Program (HOME program). Section 218(g) requires the Department of Housing and Urban Development (HUD) to recapture grant funds that remain uncommitted by participating jurisdictions after the statutory deadline and reallocate such funds through additional formula grants to participating jurisdictions. HUD's Office of Inspector General has identified instances where HUD has permitted some jurisdictions to retain and commit HOME program grant funds beyond the statutory deadline. By failing to recapture and reallocate uncommitted grant funds from the jurisdictions at issue, HUD has not complied with the requirements of section 218(g).

DECISION

In May 2011, the Office of Inspector General (OIG) for the Department of Housing and Urban Development (HUD) requested our decision regarding HUD's compliance with section 218(g) of the HOME Investment Partnership Act,¹ which requires that grantees commit grant funds under the HOME Investment Partnership Program (HOME program) within 24 months of receipt. Letter from Acting Inspector General, HUD Office of Inspector General (HUD OIG), to General Counsel, GAO, May 17, 2011 (Request Letter). Over the course of the next year, HUD OIG further developed

¹ Pub. L. No. 101-625, title II, 104 Stat. 4079, 4096 (Nov. 28, 1990), *codified as amended at* 42 U.S.C. §§ 12741–12746. Section 218(g) is codified at 42 U.S.C. § 12748(g).

the legal issues and factual background for the record.² HUD OIG asserts that HUD has not complied with the requirements of section 218(g) because HUD's method of assessing a grantee's compliance with section 218(g) has, in some instances: (1) resulted in HUD's failure to recapture HOME grant funds that remain uncommitted after the statutory deadline; and (2) permitted grantees to access grant funds beyond the period that such funds were available to the grantee. May 18 E-mail; June 13 E-mail. As we explain below, HUD must adjust grantees' accounts to comply with section 218(g), and recapture and reallocate funds that remain uncommitted after the statutory deadline.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, [GAO-06-1064SP](#) (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. In this case, HUD provided us with several letters setting out its legal views. See Letter from Acting Chief Financial Officer, HUD, and General Counsel, HUD, to Assistant General Counsel, GAO, Feb. 17, 2012 (HUD Response); Undated Letter from Acting Chief Financial Officer, HUD, and General Counsel, HUD, to Assistant General Counsel, GAO, received Jan. 7, 2013 (HUD First Supplemental Response); Undated Letter from Deputy Chief Financial Officer, HUD, and General Counsel, HUD, to Assistant General Counsel, GAO, received Apr. 5, 2013 (HUD Second Supplemental Response). In light of the extensive development of this record, a detailed chronology is set forth in the Appendix.

BACKGROUND

The HOME program authorizes HUD to make formula grants to participating state and local jurisdictions (participating jurisdictions). See 42 U.S.C. §§ 12741, 12746. The participating jurisdictions must utilize HOME grant funds to invest in a wide range of affordable housing projects or to provide direct rental assistance to low-income people. 42 U.S.C. § 12742. Historically, Congress has appropriated a lump sum for the HOME program in HUD's annual appropriation, and since fiscal year

² Letter from Assistant Inspector for General Audit, HUD OIG, to Assistant General Counsel, GAO, Nov. 30, 2011 (Supplemental Request Letter); E-mail from Audit Manager, HUD OIG, to Assistant General Counsel, GAO, May 18, 2012 (May 18 E-mail); E-mail from Audit Manager, HUD OIG, to Assistant General Counsel, GAO, June 13, 2012 (June 13 E-mail).

2002, such funds have been 3-year funds.³ Prior to fiscal year 2002, the HOME appropriations were no-year funds.⁴

The Act requires HUD to establish for each participating jurisdiction a HOME Investment Trust Fund (trust account) in the U.S. Treasury with a line of credit that represents its annual HOME grant allocations.⁵ 42 U.S.C. § 12748(b). Among the statutory terms and conditions of the grant is a period of availability by which a participating jurisdiction must commit its HOME grant allocation to permissible projects.

Specifically, section 218(g) of the Act provides as follows:

“(g) EXPIRATION OF RIGHT TO DRAW FUNDS. If any funds becoming available to a participating jurisdiction under this subchapter 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, the jurisdiction's right to draw such funds from the 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).”

42 U.S.C. § 12748(g). Section 217(d)(1) specifies that the Secretary of HUD “shall make any reallocations periodically throughout each fiscal year so as to ensure that all funds to be reallocated are made available to eligible jurisdictions as soon as possible, consistent with orderly program administration.” 42 U.S.C. § 12747(d)(1).

HUD has implemented regulations for the HOME program that define a binding commitment as: (1) a legally binding agreement between the grantee and a contractor or local government to use a specific amount of HOME grant funds toward affordable housing or rental assistance; (2) a written agreement between the

³ See, e.g., Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. C, title II, 125 Stat. 552, 683-4 (Nov. 18, 2011); Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 2242, 125 Stat. 38, 196 (Apr. 15, 2011); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. A, title II, 123 Stat. 3034, 3085 (Dec. 16, 2009).

⁴ See, e.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2000, Pub. L. No. 106-74, 113 Stat. 1047, 1063 (Oct. 20, 1999).

⁵ The annual allocation amount is adjusted for grant reductions or reallocations, as applicable. 42 U.S.C. § 12748(b).

grantee and a community housing development organization (CHDO) that commits grant funds to the CHDO; or (3) a written agreement between the grantee and a family or purchaser to acquire or rehabilitate housing within a certain period of time set out in the regulations. 24 C.F.R. § 92.2 (2012).

HUD administers the HOME grants via its Integrated Disbursement Information System On-line (IDIS) and assesses compliance with section 218(g) based on reports generated from IDIS. When HUD awards a grant and credits the amount to a jurisdiction's trust account, the amount is also recorded in IDIS. Upon review of several IDIS reports, HUD OIG identified several instances in which: (1) a participating jurisdiction did not fully commit its 2010 HOME grant allocation within the statutory deadline of 24 months of receipt, and (2) HUD did not recapture the amount of the shortfall in accordance with section 218(g). May 18 E-mail; see also June 13 E-mail; E-mail from Audit Manager, HUD OIG, to Assistant General Counsel, GAO, May 1, 2012.

HUD OIG reviewed the relevant IDIS reports for the 73 participating jurisdictions that received fiscal year 2010 HOME grant allocations in April 2010, and thus had a statutory commitment deadline of April 30, 2012. May 18 E-mail. By comparing the fiscal year 2010 HOME grant allocation with the total commitments recorded in IDIS as charged to the 2010 grant allocation, HUD OIG determined that 44 of the 73 jurisdictions committed less than 100 percent of their 2010 HOME grant allocation as of April 30, 2012. For these 44 jurisdictions, HUD OIG calculated that approximately \$22,937,036 remained uncommitted as of April 30, 2012. HUD OIG subsequently examined a small subset of the 44 jurisdictions and determined that a number of them had committed 2010 grant funds after the April 30 statutory deadline. June 13 E-mail.

HUD OIG asserts that HUD's failure to recapture uncommitted funds is a direct result of HUD's method of determining grantees' compliance with the statutory deadline. HUD determines a grantee's compliance with this statutory commitment deadline by applying what it calls a "cumulative method of calculation." For each participating jurisdiction, HUD compares the "cumulative commitment amount" with the "cumulative allocation amount." The cumulative commitment amount is that jurisdiction's total commitments from the start of its participation in the HOME program *through the applicable statutory deadline date*. The cumulative allocation amount is the jurisdiction's total HOME grant allocations that it has received each year from the start of its participation in the HOME program *through the allocation year being examined for compliance*.⁶ HUD Response, at 1; see 24 C.F.R. § 92.500(d)(2) (2012). For example, the cumulative allocation amount of a

⁶ This cumulative allocation amount is represented as "Total Authorization" on the IDIS status of grants report (PR27 Report) for each participating jurisdiction. The "Total Authorization" consists of the jurisdiction's allocation for each fiscal year, plus or minus any adjustments. HUD Second Supplemental Response, at 1.

jurisdiction that has participated in the program since 1992 would comprise all of the grant funds that it has received from 1992 through 2010, while the cumulative commitment amount would comprise all of the commitments it has made from 1992 to 2012 (which is the deadline for committing 2010 funds).

HUD deems the jurisdiction compliant with the section 218(g) deadline, and recaptures no grant funds, as long as the jurisdiction's cumulative commitment amount is equal to the cumulative allocation amount. HUD Response, at 3. However, if the cumulative commitment amount is less than the cumulative allocation amount, HUD will recapture the shortfall from the most recent year's or next previous year's HOME grant allocation, as opposed to the specific fiscal year allocation for which funds remain uncommitted after the statutory deadline. HUD Response, at 2.⁷ Applying this methodology, HUD deemed these 44 jurisdictions (that had received April 2010 grants) compliant with section 218(g) because their respective cumulative commitment amount as of the statutory deadline of April 30, 2012, exceeded their respective cumulative allocation amount as of the grant year 2010. Therefore, according to HUD, no recapture from these 44 jurisdictions is required. HUD Second Supplemental Response, at 1; May 18 E-mail.

HUD believes that section 218(g) makes clear that Congress wanted not only timely commitments by grantees, but also, through reallocations, appropriated funds to continue to be used for program purposes rather than be returned to the Treasury. HUD Second Supplemental Response, at 2. In HUD's view, the cumulative method of assessing compliance with section 218(g) represents a reasonable and integrated implementation of an administratively complex statute that furthers congressional intent. HUD First Supplemental Response, at 1.

DISCUSSION

At issue here is whether HUD has acted in accordance with the section 218(g) requirement to recapture HOME grant funds that remain uncommitted by a grantee after the 24-month deadline and to reallocate such funds to other jurisdictions.

As with any question involving statutory interpretation, the analysis begins with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113 (2009). This is because the "starting point in discerning congressional intent is the existing statutory text." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). When the language of a statute is clear and unambiguous on its face, it is the plain meaning of that language that controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); B-307720, Sept. 27, 2007; B-306975, Feb. 27, 2006.

⁷ See also HUD Community Planning and Development Notice: CPD 07-06 (2007) (HUD CPD Notice 07-06) (current procedures for ensuring compliance with the statutory deadline).

Section 218(g) provides that if a participating jurisdiction fails to place its annual HOME grant allocation under binding commitment within 24 months after HUD deposits the allocation into its trust account, “the jurisdiction’s right to draw such funds from [its trust account] *shall expire*.” 42 U.S.C. § 12748(g) (emphasis added). HUD “*shall reduce* the line of credit in the participating jurisdiction’s [trust account] by the expiring amount and *shall reallocate* the funds by formula.” *Id.* (emphasis added). By this language, Congress has clearly and unambiguously imposed a statutory commitment deadline that HUD must enforce. If a grantee does not fully commit grant funds by the 24-month deadline, such funds are no longer available to that grantee, and HUD must recapture and reallocate such funds.

HUD asserts that its cumulative method of assessing compliance with the 24-month commitment deadline is “a reasonable and prudent effort to give effect, consistent with congressional intent,” to the many provisions, requirements and flexibilities provided by the Act. See HUD Second Supplemental Response, at 2–5. HUD notes, for example, that the Act requires grantees to use 15 percent of the annual allocation for projects owned, developed, and sponsored by CHDOs. According to HUD, most CHDOs perform more slowly than for-profit developers and larger nonprofit developers; consequently, the grantees commit the 15 percent more slowly than the rest of the allocation. HUD Response, at 4. HUD argues that recapture would penalize a grantee for the slow performance of CHDOs, and that by measuring a jurisdiction’s performance using the cumulative method, HUD permits jurisdictions to have more time to commit the 15 percent dedicated to CHDOs. HUD states that it will not recapture funds from the 2010 HOME grant allocation that a grantee had reserved for CHDOs and that remained if the jurisdiction has made other commitments from other HOME grant allocations that offset the uncommitted amounts.⁸

⁸ HUD also notes that its implementation of section 218(g) is modeled after the performance standard imposed by HUD by regulation under the now-repealed Rental Rehabilitation Program. HUD Response, at 1; see 42 U.S.C. § 12839 (repealing the Rental Rehabilitation Program). However, the Rental Rehabilitation Program statute and the Act are different in a key respect. The Rental Rehabilitation Program statute “*authorized* [HUD] to reallocate such amounts among grantees on the basis of the Secretary’s assessment of the progress of grantees in carrying out activities under this section in accordance with their specified schedules.” Pub. L. No. 98-181, § 301, 97 Stat. 1175, 1197 (Nov. 30, 1983). The Rental Rehabilitation Program statute did not require HUD to recapture and reallocate funds that remain uncommitted by grantees as of a specific deadline. Rather, HUD was conferred some discretion to impose a performance standard on grantees. In exercising this discretion, HUD imposed a commitment deadline *by regulation* and established a method for identifying funds subject to recapture and reallocation. Conversely, with respect to the HOME program, Congress imposed a statutory commitment deadline that HUD must enforce.

However, the mandatory nature of section 218(g) serves to limit HUD's administrative discretion in implementing the Act. See 18 Comp. Gen. 285, 292 (1938) ("[A]dministrative discretion may not transcend the statutes, nor be exercised in conflict with the law, nor for the accomplishment of purposes unauthorized by the appropriation . . .").⁹ In the Act, Congress directed HUD to recapture and reallocate to other participating jurisdictions HOME program grant funds that remain uncommitted as of the statutory deadline. Section 218(g) specifies the post-grant actions that participating jurisdictions must take, as well as the remedial action that HUD must take should a participating jurisdiction fail to satisfy the condition. When HUD does not recapture and reallocate funds as required by statute, other jurisdictions are deprived of the additional grant funds to which they are entitled through the reallocation process. By failing to recapture and reallocate uncommitted grant funds from the jurisdictions at issue, HUD has not complied with the requirements of section 218(g).

HUD should measure compliance with section 218(g) by examining the grant year allocation against which each commitment is assigned by IDIS rather than measuring compliance on a cumulative basis. If a grantee has not fully committed each year's allocation by the 24-month deadline with specific commitments that match that grant year, section 218(g) requires HUD to perform a recapture. In calculating the amount to be recaptured, HUD must ensure that all commitments assignable to a grant year indeed have been assigned to that grant year.¹⁰ Because HUD disburses HOME grants on an annual basis and the amounts are available for commitment for two years, grantees have overlapping allocations to which they may charge any individual commitment. In determining the amount to be recaptured, HUD should assess whether any commitments assigned to an overlapping allocation might properly be reassigned to the expiring allocation, and make adjustments in IDIS accordingly.

The Army faced a similar situation when it had two overlapping 2-year appropriations that were both available for repair projects. One of the appropriations expired in 1993, while the other expired in 1994. In 1993, the Army charged obligations for repair projects against both appropriations. In 1994, after one of the appropriations had expired, the Army adjusted its accounts and reallocated some of the obligations made against the still current appropriation to the now expired appropriation. We held that the Army was authorized to perform this adjustment, because the repair project obligations were properly chargeable to either appropriation at the point of

⁹ For a more detailed discussion on administrative discretion, see GAO, *Principles of Federal Appropriations Law*, Vol. I, 3rd ed., ch. 3, § C, GAO-06-382SP (Washington, D.C.: Feb. 2006), available at www.gao.gov/legal/resources.html.

¹⁰ Whenever 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. See B-307382, Sept. 5, 2006; B-255831, July 7, 1995.

obligation. B-272191, Nov. 4, 1997. HUD, similarly, may reassign commitments made within overlapping allocations to maximize assignments to an expiring allocation in order to minimize the amount of recapture.

CONCLUSION

Section 218(g) of the Act requires HUD to recapture and reallocate HOME program grant funds that have not been committed by grantees after 24 months. HUD OIG found that HUD has failed to recapture uncommitted fiscal year 2010 allocations in certain instances. Therefore, HUD must take steps to identify and recapture funds that remain uncommitted after the statutory commitment deadline and reallocate such funds in accordance with the Act.

A handwritten signature in black ink, appearing to read "S. Poling", with a stylized, cursive script.

Susan A. Poling
General Counsel

APPENDIX

In May 2011, HUD OIG requested a decision on “possible violations” of title 31 of the U.S. Code. Request Letter, at 1. HUD OIG asserted that HUD, as a result of its grant management practices, including its method for assessing grantee compliance with section 218(g), was violating provisions of title 31. Given this broad request, we met with HUD OIG officials in June 2011 to obtain clarification. At that time, we explained to HUD OIG that GAO’s appropriations law jurisdiction comprises the obligation and use of appropriated funds. See 31 U.S.C. § 3529. Accordingly, we asked HUD OIG to refine its request by identifying and articulating a specific appropriations law issue.

In November 2011, because we lacked documentation evidencing a potential appropriations law violation, we closed this matter without action. Letter to Inspector General, HUD OIG, from Managing Associate General Counsel, GAO, Nov. 29, 2011. We advised HUD OIG that we would re-open our case if and when it did submit findings of a potential appropriations law violation. Subsequently, HUD OIG submitted the Supplemental Request Letter. The Supplemental Request Letter described HUD OIG’s findings that HUD had permitted participating jurisdictions to commit HOME grant funds beyond the 24-month statutory deadline. Supplemental Request, at 1. In February 2012, HUD provided its legal views on the issues raised by HUD OIG, and in particular, HUD OIG’s assertions regarding the participating jurisdictions identified in the Supplemental Request Letter. See HUD Response.

After reviewing HUD’s response, GAO requested additional follow-up work from HUD OIG, and the OIG provided this data in May and June 2012. See May 18 E-Mail; June 13 E-mail. HUD supplemented its views on HUD OIG’s June 2012 submission in January 2013 and in April 2013. See HUD First Supplemental Response; HUD Second Supplemental Response.