New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Capital One Bank Accounts

Metropolitan Transportation Authority

Report 2011-S-49 January 2014

Executive Summary

Purpose

To determine the purpose of 15 unauthorized bank accounts established by the Metropolitan Transportation Authority (MTA) at Capital One Bank and to assess the appropriateness of financial transactions involving these accounts. Our audit covered January 1, 2008 through May 31, 2012.

Background

The Metropolitan Transportation Authority (MTA) is a public benefit corporation providing transportation services in and around the New York City metropolitan area. The MTA is governed by a 23-member Board of Directors, whose members are nominated by the Governor and confirmed by the State Senate. The MTA has six constituent agencies. During our audit of MTA's management of cash and investments (Report 2009-S-102 issued February 13, 2013), we identified 15 bank accounts that were established at Capital One Bank and were not on the MTA's list of authorized bank accounts. As of February 29, 2012, these accounts had a balance of about $3.8 million.

Key Findings

- The 15 bank accounts included 13 that were opened by a property management consultant hired by the MTA in connection with acquisition of certain properties required for MTA capital projects and the management of other real estate holdings. The remaining two accounts had been opened by New York City Transit Police units prior to the merger of the units into the New York City Police Department. The accounts were established for appropriate business purposes but did not appear on the list of authorized accounts because of lax MTA oversight and non-compliance with procedures.
- The transactions processed through the accounts opened by the consultant were for appropriate business purposes. However, about $39,000 of the account expenditures took place without evidence of required competitive bidding. Also, about $35,000 of rental income due for acquired properties had not been collected.
- The MTA consultant expended about $773,621 more from the accounts than it should have because payments to displaced tenants exceeded a 42-month limit for the use of federal funds. MTA officials claim they use non-project local funds for the additional amounts.

Key Recommendations

- Ensure MTA constituent agencies and headquarter departments comply with procedures for opening bank accounts, including instructions that are to be followed by consultants and contractors who handle banking activity for the MTA.
- Determine and document whether it is cost effective to pursue the collection of rental incomes owed from tenants of acquired properties. Pursue collections where warranted.
- Ensure that consultant payments for tenant relocation assistance conform to federal requirements setting forth limitations for the number of months that payments can be made.

State of New York
Office of the State Comptroller

Division of State Government Accountability

January 27, 2014

Mr. Thomas F. Prendergast
Chairman and Chief Executive Officer
Metropolitan Transportation Authority
347 Madison Avenue
New York, NY 10017

Dear Mr. Prendergast:

The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Capital One Bank Accounts* at the Metropolitan Transportation Authority. The audit was performed pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

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Background

The Metropolitan Transportation Authority (MTA) is a public benefit corporation providing transportation services in and around the New York City metropolitan area. The MTA is governed by a 23-member Board of Directors whose members are nominated by the Governor and confirmed by the State Senate. The MTA oversees six constituent agencies: New York City Transit, Long Island Rail Road, Metro-North Railroad, MTA Bridges and Tunnels, MTA Capital Construction Company, and MTA Bus Company.

During our audit of MTA's management of cash and investments (Report 2009-S-102 issued February 13, 2013), we identified 15 bank accounts with a balance of about $3.8 million. These accounts were established at Capital One Bank in the name of the MTA (or an MTA constituent agency), but did not appear on MTA's list of authorized bank accounts.

Audit Findings and Recommendations

The 15 bank accounts were established for appropriate business purposes. An MTA consultant established 13 of the accounts in connection with work it contracted to complete for the MTA. The remaining two accounts had been established by New York City Transit (Transit) Police districts prior to the Districts' merger with the New York City Police Department (NYPD). The 15 accounts did not appear on the MTA's authorized list because they were not established in accordance with MTA requirements. The transactions we tested showed that the accounts were generally used for proper business purposes. However, certain expenses did not comply with required procedures.

Account Authorization

According to MTA policy and procedures, only the chairman, the chief executive officer or the chief financial officer of the MTA is authorized to open bank accounts, and all such accounts must be established either with the Bank of New York or JP Morgan Chase Bank. Accounts opened under these procedures should appear on the MTA's official list of authorized bank accounts.

Of the 15 bank accounts that our prior audit confirmed were not on the MTA authorized list, 13 were established by an MTA property management consultant. The MTA contracted with the consultant to manage acquired real estate assets and the relocation of commercial and residential tenants in connection with MTA capital projects. One of the projects was the Second Avenue Subway project to construct a new subway line on the Upper East Side of Manhattan. The other project was the Eastside Access project to connect the Long Island Rail Road to Grand Central Terminal via the 63rd Street Tunnel. These projects are managed by the MTA Capital Construction Company (CCC). In addition, the MTA Real Estate Department (RED) had responsibility for the relocation of residential and commercial tenants. In accordance with contract terms, and with MTA procedures, the consultant should have only established accounts with MTA Treasury Department knowledge and approval at designated banks and the accounts should have been opened in the consultant's name as trustee for the MTA.

We found that the consultant established accounts without the prior approval of the Treasury Department at a bank (Capital One Bank) that was not designated by the MTA. In addition, the accounts were not named in the manner required by the contract. As a result, the accounts did not appear on the official list of authorized accounts. Proper monitoring of the consultant contract by RED and CCC would have ensured the accounts were properly established with the approval of the Treasury Department.

The two remaining accounts at Capital One Bank were established using New York City Transit identifying information. The accounts were opened by two Transit police districts without the knowledge and approval of the MTA Treasury. The police districts subsequently merged with the New York Police Department. The accounts have now been closed.

Recommendation

1. Ensure MTA constituent agencies and headquarter departments comply with the procedures for opening bank accounts, including instructions that are to be followed by consultants and contractors who handle banking activity for the MTA.

Account Use

We examined revenue and expense transactions involving the accounts established by the consultant. For example, we examined a judgmental sample of 25 expenses totaling $37,903 charged to the accounts from May 2009 to February 2012 in connection with the management of properties acquired for the Second Avenue Subway project. Our sample was from a population of 775 expenses totaling $386,141. The sampled expenses were supported with appropriate documentation indicating the expenses were for appropriate business purposes. In the course of our testing, we did, however, note some compliance problems as follows:

- As part of the Second Avenue Subway project, the MTA acquired buildings with 60 residential units. The tenants were required to pay rent to the MTA after the properties were acquired from other landlords. While the rent that was collected appeared to be properly recorded into the accounts established by the consultant, our analysis identified about $35,000 in rental income was due but had not been collected. In response to our findings, MTA officials indicated that they have collected $8,281 of the amount owed, and that it may be cost prohibitive to pursue collection of the remaining amount based on anticipated legal costs. However, MTA officials did not provide any information to support this position.
- The consultant contract required that all goods and services required to manage the property must be obtained by receiving the most competitive pricing, and that the property manager shall not issue any purchased orders in excess of $1,000 without the approval of MTA. Nevertheless, we found 61 payments totaling $11,560 were made to a pest control company and 22 payments totaling $27,414 were made to a boiler maintenance firm without any evidence of competition or MTA prior approval.

  (MTA replied to our draft report that the consultant sought and received MTA approval to enter into contracts without competition as required by the task order. They also indicated that the boiler maintenance work was bid and awarded to the lowest bidder.)

  Auditor's Comments: The MTA did not provide any documents to the auditors to support statements in the response. In fact, the exchange of information during the field work contradicts the response.

- We noted that 138 checks totaling $2,237 were paid to the consultant from the accounts, although the contract with the consultant prohibits this.
- MTA RED took over the administration of the contract with the consultant despite the fact that the contract task order clearly stated that the CCC was the Project Manager. As

such, the consultant was responsible for areas such as leases, contracts for services and ensuring that purchase orders in excess of $1,000 were pre-approved by the MTA. As a result of RED's taking over these activities without any approval, there was a breakdown in the system of internal controls. In addition, when tenants in buildings acquired by the MTA must relocate and pay rent because of construction projects, they may be entitled to replacement housing payments in accordance with federal regulations under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act). For example, displaced tenants may obtain rental assistance which consists of the amount necessary to enable them to lease a comparable dwelling for a period not to exceed 42 months. Certain of the accounts managed by the consultant were used to make these relocation payments. We examined payments made on behalf of six individuals who received lump sum payments covering periods beyond 42 months. The actual periods to which these payments relate ranged from 19 years to 48 years and were based on life expectancy. These individuals received relocation payments totaling $1,054,637, but would have only been entitled to $281,016 based on the 42-month limit. The FTA did not object to the larger amounts because the MTA used non-project local funds for the $773,621 beyond the limit.

In responding to our findings, MTA officials stated that the pest control company was a vetted Minority- and Women-Owned Business Enterprise (MWBE), which the consultant utilized to meet MWBE contract requirements. We acknowledge the effort to use an MWBE firm, but the MTA should have sought competition within the MWBE firms. MTA officials maintained that boiler maintenance payments were made under a competitive contract; however, the consultant was unable to provide records to support that competition was sought. Also, officials indicated that the checks payable to the consultant were for reimbursement of postage expenses, but agreed that such expenses should have been submitted to the MTA for payment.

One of the two accounts established for the Transit police districts had been closed at the time of our field work. The second account was still open, but no records were available for our review because the custodian was on military leave. NYPD officials informed us that, in September 2012, the second account was closed, reopened at JP Morgan Chase Bank and is no longer associated with an MTA identification number.

At the closing conference for this audit, MTA officials indicated that they had obtained permission from the Federal Transit Administration to make relocation payments which exceeded those provided in the Uniform Act. The Federal agency, in a letter to MTA, indicated these excess payments are provided as "Housing of Last Resort" under Section 24.404 of the Uniform Act. However, the letter also indicated that MTA would have to bear the full cost of the payments covering periods beyond 42 months and advised MTA to come up with a plan to add appropriate controls over these excess payments, including making installment or annuity-type payments rather than lump sum distributions. MTA did not institute these controls and instead directed the consultant to make one-time payments to the tenants based on their estimated life expectancy.

Recommendations

2. Determine and document whether it would be cost effective to pursue collection of unpaid rent from tenants of acquired properties. Pursue collections where warranted.

3. Ensure that consultants adhere to MTA requirements when establishing and using bank accounts to conduct business on behalf of the MTA.

4. Ensure that consultant payments for tenant relocation assistance conform to federal requirements setting forth limitations for the number of months that payments can be made, and where excess payments are permitted, institute appropriate controls to ensure payments are timed to match each tenant's needs rather than as lump sum distribution.

Audit Scope and Methodology

The objective of our audit was to determine the purpose of 15 unauthorized bank accounts established at Capital One Bank and to assess the appropriateness of financial transactions involving these accounts. The audit covered from January 1, 2008 through May 31, 2012.

To accomplish our objective, we met with MTA officials to gain an understanding of their policies and procedures for authorizing and opening bank accounts, for overseeing the work of the property management contractor, and for making relocation and move payments and other expenses through the accounts. In addition, we reviewed the supporting documentation for 175 sample expenditures. We contacted the NYPD Transit Police and the Federal Transit Administration. We met with the property management contractor and the tenant relocation consultant. We reviewed Capital One Bank statements and the property management contractor's check register pertaining to each of the accounts, MTA's relocation and fixture folders pertaining to the Second Avenue Subway project, procurement files for selected vendors, and project meeting minutes and visited buildings acquired for the capital construction projects.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

Reporting Requirements

A draft copy of this report was provided to MTA officials for their review and comment. Their comments were considered in preparing this final report and are included in their entirety at the end of the report.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Chairman and Chief Executive Officer of the Metropolitan Transportation Authority shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

A team of accountability experts respected for providing information that decision makers value.

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To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Agency Comments

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Thomas F. Prendergast
Chairman and Chief Executive Officer

Metropolitan Transportation Authority
State of New York

December 13, 2013

Ms. Carmen Maldonado
Audit Director
The Office of the State Comptroller
Division of State Government Accountability
123 William Street – 21st Floor
New York, NY 10038

Re: Draft Report #2011-S-49 (Capital One Bank Accounts)

Dear Ms. Maldonado:

This is in reply to your letter requesting a response to the above-referenced draft report.

I have attached for your information the comments of Robert Foran, Chief Financial Officer, MTA, which address this report.

Sincerely,

Thomas F. Prendergast
Chairman and Chief Executive Officer

Attachment

347 Madison Avenue
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Metropolitan Transportation Authority
State of New York

December 4, 2013

Mr. Myron Goldmeer, Audit Supervisor
Office of the State Comptroller
Division of State Government Accountability
123 William Street, 21st Floor
New York, New York 10038

Re: Draft Audit Report 2011-S-49 Dated: November 2013
Metropolitan Transportation Authority – Capital One Bank Accounts

Dear Mr. Goldmeer:

The following is our writen response to the Office of the State Comptroller's (OSC) Capital One Bank Accounts at the Metropolitan Transportation Authority Draft Audit Report 2001-S-49 dated November 2013. Please note this response is limited to the 13 bank accounts opened by MTA's consultant for property acquisition and management, the 2 accounts which were opened by New York City Transit Police which were noted in your report have been closed.

The OSC's draft audit findings and recommendations are below in black and the MTA's responses are in italicized blue.

OSC Audit Findings and Recommendations

1- Findings - Account Authorization:
As per MTA policy and procedures, all bank accounts must be established either with the Bank of NY or JP Morgan Chase and should appear on the MTA's official list of authorized bank accounts.

Recommendation: Ensure MTA Constituent agencies and HQ departments comply with the procedures for opening bank accounts, including instructions that are to be followed by consultants and contractors who handle banking activity for the MTA.

MTA's Response: MTA agrees with your recommendation and has already taken action to implement the recommendation. All of the 13 MTA Capital One Bank accounts have been closed. The opening of any new bank accounts will adhere to the MTA's policy and procedures for establishing new bank accounts, all consultants and contractors will be provided specific instructions.

2- Findings - Account Use:
a) MTA acquired residential buildings with 60 residential tenants. Rent was collected and properly recorded, although a total of about $35,000 was never collected.

Recommendation: Determine and document whether it would be cost effective to pursue collection of unpaid rent from tenants of acquired properties. Pursue collections where warranted.

MTA's Response: MTA agrees with your recommendation and has already taken action to implement the recommendation.
Although Eminent Procedure Law § 305 permits a condemnor to collect use and occupancy charges from occupants who temporarily remain on the site after it is condemned, courts have discretion as to what is fair under the circumstances and have recognized that the value of the use and occupancy may be less than the rent reserved under the last lease because, among other things, "such use and occupancy ..., can be terminated at the condemnor's will, is temporary and of uncertain duration." See, e.g., Village of Port Chester v. Martinez, 18 A.D.3d 564, 565 (2d Dep't 2005). Notwithstanding this principle, MTA attempted to collect use and occupancy in the amount of the rent that would have been due under the leases that were terminated by condemnation and was able to collect $8,281 of MTA's $33,356 in use and occupancy claims, leaving $25,075 uncollected. In order to re-coup the $25,075 from the six separate parties involved, MTA would have had to spend significantly more than the $25,075 on legal fees with no guarantee of ever collecting the money. Assuming that collection and judgment enforcement efforts against the former tenants would require approximately 100 hours of billable hours from MTA's outside condemnation counsel, whose billing rates average about $300 per hour, it would have cost MTA $30,000 to pursue MTA's claims for $25,075 (MTA would use condemnation counsel because our right to collect use and occupancy following condemnation is governed by Section 305 of the Eminent Domain Procedure Law and our claims must be adjudicated in the condemnation part of the New York State Supreme Court.)

b) The consultant contract required goods and services required to manage the properties be competitively bid and no purchase order in excess of $1,000 be issued without approval. OSC found a 61 payments, totaling $11,560 for pest control and 22 paymrents totaling $27,414 for boiler maintenance, without evidence of a competitive bid.

MTA's Response: MTA's consultant sought and received the MTA's approval to enter into a contract with a pest control company, who was a vetted MTA contractor that had been used for other MTA properties including 2 Broadway. Our consultant advised the MTA that Black Widow's pricing was reasonable and that it knew the firm to be reliable. Moreover, the pest control company is a WBE/MBE contractor, and our consultant was required to fulfill a minimum WBE/MBE goal as part of its contract.

Our consultant confirmed via emails to the MTA that it bid out the boiler maintenance work and awarded it to the company that bid the lowest price and our consultant deemed them to be an acceptable and reliable company.

c) OSC noted that a 138 checks totaling $2,237 were paid to the consultants from the accounts although the contract prohibits it.

Recommendation: Ensure that consultants adhere to MTA requirements when establishing and using bank accounts to conduct business on behalf of the MTA.

MTA's Response: MTA agrees with your recommendation and has already taken action to implement the recommendation. Our consultant was advised that, although it was entitled to be reimbursed for this expenditure (postage), the procedure used was incorrect; the MTA agrees that our consultant should have included this expenditure as a reimbursable on its monthly bill.

d) MTA Real Estate took over administration of the contract despite the fact that the task order stated MTA CCC was the Project Manager.

MTA's Response: While we acknowledge that the task order should have been amended to change the official project manager from MTA CCC to MTA RE, our consultant was advised, at the kick off meeting that MTA RE and not MTA CCC would act as the day to day project manager for this contract. Since the handling of tenant matters as well as tenant relocation was being handled by MTA Real Estate, it made sense that MTA Real Estate take over the project management role. We disagree that there was a breakdown of internal controls; our consultant complied with this directive as evidenced in their first monthly report which was addressed to MTA RE, as directed.

e) MTA was required to pay relocated residential tenants in accordance with the federal regulations under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act). The Uniform Act provides for a period of 42 months for assistance. The MTA exceeded this, based on the FTA's "Housing of Last Resort" policy, received the FTA's approval contingent upon the use of local funds for the payments beyond the 42 month period (see attached letter dated March 4, 2009).

Recommendation: Ensure that consultant payments for tenant relocation assistance conform to federal requirements setting forth limitations for the number of months that payment can be made, and where excess payments are permitted, institute appropriate controls to ensure payments are timed to match each tenant's needs rather that as a lump sum.

MTA's Response: While we agree with the intent of the recommendation, the following summarizes MTA's Housing of Last Resort Program for the Second Avenue Subway Project and explains why MTA's provision of rental assistance payments was legally permissible and appropriate from both a fiscal and public policy perspective.

Background:
Because the Second Avenue Subway Project is a federally assisted project, MTA was required to develop a relocation assistance program in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. §4601 et seq.) and applicable federal regulations (49 C.F.R. Part 24) (collectively, the "Uniform Act"). The Uniform Act requires MTA to provide each commercial and residential occupant displaced by such a project with

relocation advisory assistance and certain compensation to ameliorate the cost and hardship of moving to a new location.

The Act requires, among other things, that federal grant recipients like the MTA identify comparable replacement dwellings for eligible residents displaced by a project. See, e.g., 42 U.S.C. §4625(c)(2). Under ordinary circumstances, rental assistance payments to displaced residents are limited to the difference between a displaced person's monthly rent at the apartment from which a tenant is relocated (the "displacement site") and the lesser of the monthly rent (including utilities) for a comparable replacement dwelling or the tenant's new rent (including utilities), calculated over a period of 42 months, with a maximum payment of $5,250. 49 C.F.R. §§24.402(b).

MTA's Housing of Last Resort Program for the Project

MTA, however, determined that the $5,250 cap under the Uniform Act could be too limiting in the New York City housing market for addressing mitigation of rent differentials between a tenant's current rent at the displacement site and rents in comparable replacement apartments. To address serious concerns raised by the community and by elected officials, and to ameliorate potential financial hardships in connection with displaced tenants' relocations (particularly for rent regulated tenants forced to move to non-rent regulated apartments), MTA developed, and the Federal Transit Administration ("FTA") approved, a residential relocation program under the "Replacement Housing of Last Resort" ("HLR") provisions of the Uniform Act regulations. 49 C.F.R §24.404. Those provisions of the Uniform Act are available when it is determined that a project cannot proceed on a timely basis because there is a lack of comparable replacement housing in the project area within the monetary limits of the affected tenants.

Under the MTA's HLR Program, the calculation of a displaced tenant's Relocation Assistance Payment ("RAP") is based on the difference, or "Rent Delta," between the tenant's monthly rent at the displacement site and the rent that the tenant would have to pay for an available, comparable dwelling identified by MTA. A tenant is not obligated to move to an identified comparable apartment. However, the RAP that is derived by using the rent for this comparable apartment sets the ceiling for relocation assistance if the tenant instead chooses to move into an apartment with a higher rental. If the tenant chooses to move into a replacement unit with a lower rental, the RAP is calculated based on the lower rent.

For low-income individuals, the Rent Delta under the HLR program is calculated as the difference between the monthly rent at the comparable replacement dwelling and the lesser of (a) the tenant's monthly rent at the displacement unit, or (b) 30% of the tenant's monthly income. For all other individuals, the Rent Delta is the difference between the monthly rent at the comparable replacement dwelling and their current monthly rent.

MTA's HLR program also takes into account the greater value of a rent-regulated apartment in New York City (and the correspondingly greater

financial hardship experienced by certain displaced tenants who occupy rent-regulated apartments) by adopting the following methodology, which reflected its determination as to the most appropriate way to achieve the HLR's program's goal of lessening the financial impact of displacement:

- *Non-Rent-Regulated Tenants: Residents of non-regulated apartments receive a RAP that is calculated by the taking the sum of their monthly Rent Delta over 42 months.*

- *Rent-Regulated Tenants: Residents of rent regulated apartments receive a RAP that is calculated based on their Rent Delta (increased at 3% per year if relocating into a replacement dwelling that is not rent regulated) for a period of time that can be much longer than 42 months, and in some cases, for the rent-regulated tenant's entire lifetime. For rent-regulated tenants in MTA's HLR Program, the Rent Delta is multiplied by (a) the projected number of years until the tenant (had he/she been able to continue living in the displacement dwelling) would have been subject to High Income/High Rent decontrol,[1] or (b) the projected number of years of the tenant's remaining life expectancy, as determined by reference to the Social Security Administration's Actuarial Period Life Table (2005), in the case of those rent-regulated tenants who would not have been subject to theoretical rent deregulation prior to reaching age 63. In each case, the RAP is equal to the Net Present Value ("NPV") (discounted at 6%) of the sum resulting from the multiplication of the Rent Delta times the projected number of years.*

Why MTA's HLR Program is Consistent with the Uniform Act

The Uniform Act's regulations provide that replacement housing of last resort is granted on "a case-by-case basis, for good cause" and that "no person shall be required to move from a displacement dwelling unless comparable housing is available." 49 C.F.R. § 24.404(a). The Uniform Act provides the following methods of providing comparable replacement housing: a replacement housing payments (in installments or in a lump sum at the agency's discretion); rehabilitation and/or additions to an existing replacement dwelling; construction of a new replacement dwelling; provision of a direct loan; relocation and rehabilitation of a dwelling; and purchase of a dwelling by an agency which in turn leases to displaced person. 49 C.F.R. §24.404(c).

Under the Uniform Act, MTA had the option of making the replacement housing payments to recipients in installments over time or as a lump sum, but chose the lump sum method. Lump sum payments gave the recipients freedom to purchase or rent comparable accomdations of their choice and were appropriately discounted (at 6%) back to present value, thus reducing the overall cost over time to MTA. By making lump sum payments, MTA also

[1] In order to evaluate the value of a tenant's "life estate" interest in a rent regulated unit, the projected number of months until a rent regulated apartment would be removed from the New York City's Rent Stabilization program under what is known as "High Rent/High Income" decontrol is taken into account. Under High Rent/High Income decontrol, apartments with a legal regulated or maximum rent of $2,000 or more per month, and occupied by persons with total annual federal adjusted gross incomes in excess of $175,000 for each of the two preceding calendar years, could be permanently decontrolled. The Rent Act of 2011 increased both the rent and annual income levels for high-rent/high income vacancy decontrol. See, e.g., http://nyshcr.org/Rent/RentAct2011.htm.

saved administrative costs it otherwise would have incurred in setting up payment accounts and making and monitoring payments to many recipients, many of whom were eligible to receive subsidies for their entire lifetimes.

In a letter dated March 4, 2009 (copy attached), FTA notified MTA that it concurred with MTA's HLR Program, with the caveat that FTA's financial participation in the program "will be limited to payments calculated based on a 42 month period." Essentially, FTA approved MTA's HLR Program and gave MTA permission to exceed the 42 month limitation on rent subsidies, provided that MTA fund the portion of any subsidies that extended beyond 42 months. Our understanding is that FTA's determination is consistent with its policy to place a 42 month cap on federal reimbursements to state and local grant recipients with respect to relocation payments.

Notwithstanding FTA's fiscal policy, the Uniform Act itself neither mandates nor prohibits an agency from developing a HLR Program that provides for replacement housing subsidies beyond the 42 month limitation set forth in 49 C.F.R. § 24.402(b)(1). The Uniform Act's regulations clearly state that agencies "shall have broad latitude" in implementing their respective HLR programs, including but not limited to authority to make a "replacement housing payment in excess of the limits set forth in § 24.401 or § 24.402." 49 C.F.R. § 24.404(c)(1)(i). (Emphasis added.) As noted above, the applicable "limits" under 49 C.F.R. § 24.402(b)(1) are the financial cap limit of $5,250 and the time limit of 42 months for rent subsidies. With one limited exception not applicable to any displaced tenant under MTA's HLR Program[2], nothing in the "Replacement Housing of Last Resort" provisions of 49 C.F.R. § 24.404 prohibits an agency, in its sound discretion, from extending rental assistance payments beyond 42 months.

In summary, MTA's extension of rental assistance beyond 42 months for certain rent-regulated tenants who were discplaced by the Second Avenue Subway Project was permissible under the Uniform Act and approved by FTA. Although FTA's policy is not to provide federal funding beyond 42 months, MTA determined that extending benefits for certain rent-regulated tenants, particularly the elderly, infirm, and those on fixed-incomes, was fair and equitable because of the lack of comparable rent-regulated replacement housing in New York City. Indeed, if MTA had not extended benefits for such rent-regulated tenants beyond 42 months, there was considerable risk that the relocations would have been challenged in the courts, by elected officials, and in the courts of public opinion, thus delaying and adding additional litigation and delay-related costs to the Project.

[2] The one exception is that when a resident who is to be displaced under a Housing of Last Resort program fails to meet prior length of occupancy requirements under the Uniform Act (180 days for homeowner occupants and 90 days for tenant occupants), such a resident's assistance is limited to a period of 42 months. See 49 C.F.R. §24.404(c)(3).

If you have any questions, please do not hesitate to contact me at 212-878-7438 or Helene Cinque at 212-878-7102.

Sincerely,

Robert Foran
Chief Financial Officer

Attach.

Attachment

March 4, 2009

U.S. Department
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Federal Transit
Administration

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New Jersey

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March 4, 2009

Mr. Michael Horodniceanu
President
MTA Capital Construction Company
2 Broadway
New York, New York 10004

Dear Mr. Horodniceanu:

The Federal Transit Administration (FTA) has reviewed the Metropolitan Transportation Authority's (MTA) Relocation Plan, revision 2, for the Second Avenue Subway Phase 1 (SAS-1) project, submitted by Ms. Sarah Rios on December 1, 2008. The plan also includes MTA's Housing of Last Resort proposal and FTA approval is sought for the relocation plan. As a result of our review, we agree MTA has demonstrated that Last Resort Housing will be required to provide comparable housing for the displaced tenants. Therefore, we concur in your proposal to provide additional assistance to the displaced tenants as comparable housing within the monetary limits set by the Uniform Relocation Act (The Act) is not available. Please note that FTA's concurrence is limited to the portion of your plan that conforms to the Uniform Act, relocation assistance payments calculated based on a 42 months period. The reasons for our decision are explained below.

In making a determination to provide Housing of Last Resort, the Act, under Section 24.404, states "Any decision to provide Last Resort Housing must be adequately justified ... by a determination that there is little, if any, comparable replacement housing available to displaced persons within an entire program or project area; and, therefore, last resort housing assistance is necessary for the area as a whole". Section 3.3 of your relocation plan provided an analysis of the New York City housing market, and included information on page 38 discussing MTA assessment of available comparable housing in the project area. Section 4.1 of the relocation plan, page 47, also discusses the results of a comparable market study conducted for residential units in the project area. We believe, therefore, that you have demonstrated the need to provide housing of last resort.

However, while we agree on the need to provide housing of last resort, FTA participation will be limited to payments calculated based on a 42 month period. MTA presented an alternate method for determining the maximum Rental Assistance Payment for the displaced residential tenants in rent control units, which was based on high income/high rent de-control . FTA has determined that it cannot participate in the portion of your plan which exceeds the 42 month limitation in the Act. Congress intended for assistance to be temporary and set a time limitation for displaces to adapt to the financial requirements of rental housing or to establish more permanent housing by

moving on to ownership status. FTA will participate in payments beyond the monetary limit ($5,250) set in the law based on a direct rent to rent delta for a period of 42 months for both rent regulated and non-rent regulated housing. If you choose to make relocation assistance payments above what is required by the Act, you must use non-project local funds (an amount above the local match required in the FFGA).

It is also our understanding that you plan to disburse relocation payments in one lump sum and we wish to share with you a national perspective based on DOT's experience with mega projects, where large rental subsidies were paid without strict controls and had poor results. MTA and FTA, as a funding partner, share the goal of being good stewards of the public funds and should diligently avoid negative media articles concerning large lump sum rental supplement payment. I am providing, under separate cover, the results of an FHWA retrospective study on this issue, as well as recent experience in the State of Colorado.

We recognize the challenge that MTA will face in relocating tenants currently in rent regulated housing due to the high demand for such housing in the New York City area. While you may immediately begin to undertake relocation activities consistent with this letter, please also update your relocation plan within the next 30 days to address the following comments in this letter:

- Provide evidence of a direct correlation of the available residential market versus the needs of the displaced residents. This could be done by adding a column showing the number of dwelling units, by type, displaced on the Housing Options tables in Section 4.2. A study could then be performed by the relocation consultant attempting to locate as many units, by type, as possible. The study should also determine turn-over and conversion rates in areas judged comparable, as well as the production rates of new units of "affordable housing".
- Identify similar neighborhoods that will be considered in providing comparable replacement dwellings, even if such units are located outside the project area. Identification of these neighborhoods should be based upon the definition of comparable replacement dwellings in section 24.2 (a)(6). Computations of last resort housing payments for tenants should be based on other comparable replacement dwellings even if the tenant chooses to live outside the project area.
- Identify any type of payment controls (installments, annuities, etc.) that MTA will use to provide large lump sum supplemental payments.

As always, we are available to provide clarifications as necessary on the issues raised. For further discussions, please contact me or Hans Point Du Jour of my staff.

Sincerely,

Brigid Hynes-Cherin
Regional Administrator

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