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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Docket No. FR 5585-P-01: "Tenant-Based Assistance: Enhanced Vouchers"

Dear Regulations Division, Office of General Counsel, HUD:

The following comments are submitted on behalf of the National Housing Law Project (NHLP) and the Housing Justice Network (HJN) regarding the proposed rule published on October 26, 2016, entitled "Tenant-Based Assistance: Enhanced Vouchers."

NHLP is a national housing and legal advocacy center established in 1968, whose mission is to advance housing justice for low-income people by increasing and preserving the supply of decent, affordable housing; minimizing involuntary displacement; and ensuring tenants' rights to fair treatment. NHLP partners with a host of individuals and organizations working in the affordable housing arena, including local and national advocates, tenant and advocacy networks, nonprofit developers, and allied housing organizations. NHLP also provides technical assistance to public housing authorities and other agencies and officials within local and state governments, and to federal policymakers who develop and implement the housing policies affecting our nation's most vulnerable residents. Through policy advocacy and litigation, NHLP has contributed to many critically important changes to federal housing policy and programs that have resulted in increased housing opportunities and improved housing conditions for low-income people, including tenants with enhanced vouchers and tenants in affordable housing subsidized by the United States Department of Housing and Urban Development (HUD).

In addition, NHLP hosts the national Housing Justice Network, a vast field network of over 800 community-level housing advocates and tenant leaders. HJN member organizations are committed to protecting affordable housing and housing rights for low-income families and individuals nationwide. The following comments draw on NHLP and HJN's extensive experience working for decades with advocates, residents, and public housing authorities (PHAs), including direct experience with enhanced voucher issues, reaching back to equivalent

vouchers issued since 1995 for HUD prepayments, even before the unified enhanced voucher authority was enacted.

To protect tenants facing displacement from market-rate conversions, Congress passed unified authority in 1999 requiring HUD to provide “enhanced vouchers” for all tenants facing housing conversion actions, including owner opt-outs and prepayments. After Congress further clarified in 2000 that tenants receiving enhanced vouchers may “elect to remain” in their units, HUD issued sub-regulatory guidance (Notices, the Section 8 Renewal Policy Guide and policy letters) properly clarifying that owners must accept the enhanced vouchers, requiring owners to so certify, and stating that this protection lasts until there is good cause to terminate the lease, not just for one year. However, many owners, managers, HUD and PHA staff, and tenants, remain sufficiently uncertain about these requirements that tenants and their legal counsel have had to repeatedly resort to federal court litigation to remain in their homes. Fortunately, almost all courts have uniformly recognized and enforced these rights, despite the absence of agency regulations or required lease terms.

When a family receives an enhanced voucher after an owner terminates project-based rental assistance or prepays a qualifying HUD-subsidized mortgage, federal law -- the enhanced voucher statute, HUD guidance and judicial interpretations -- requires the project owner to honor the tenants’ right to remain in their unit. The enhanced voucher family has a right to continued occupancy, both during and at the end of the lease term, as long as the family does not violate the lease. Additionally, for project-based Section 8 properties, an owner must provide tenants and HUD with an opt-out notice meeting both statutory and HUD requirements at least one year before terminating or not renewing the contract, and cannot evict tenants or increase tenants’ rents until one year after providing such legally compliant notice. These rights, among others discussed below, are critical to protecting subsidized or assisted tenants upon the occurrence of certain eligibility events, and were created by Congress in the 1990s in response to a growing number of HUD-subsidized and project-based Section 8 owners who had become eligible to prepay their subsidized mortgages or to terminate or not renew their contracts with HUD.

Our comments below seek to significantly strengthen and clarify HUD’s proposed rule, in light of existing federal statutes, regulations, and HUD guidance regarding enhanced vouchers, court rulings, and our varied experiences.

Right to Remain

One of the most critical rights for enhanced voucher families is their right to remain at the same property after an eligibility event, both at the time of an eligibility event and subsequently thereafter. This right to remain was created by the FY 2001 Military Construction and FY 2000 Emergency Supplemental Appropriations law, Pub. L. No. 106-246, Section 2801 (July 13, 2000), which specifically amended Section 8(t), which itself had been enacted less than one year previously, to state that “the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event.” The right to remain is specific to enhanced voucher recipients and was explicitly enacted by Congress to recognize and protect families facing the threat of displacement.

Importantly, this right to remain for enhanced voucher families exists *both* at the time of the eligibility event (*Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008); *Jeanty v. Shore Terrace Realty Ass'n*, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004)), as well as subsequently thereafter (*Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005); *Barrientos v. 1801-1825 Morton, LLC*, 2007 WL 7213974 (C.D. Cal., orders Sept. 11 and Oct. 24, 2007), *aff'd on other grounds*, 583 F.3d 1197 (9th Cir. 2009)).

Although this is the direct implication of the proposed language in § 982.309 (d)(1) that contains no durational limitation, and the prior HUD guidance and letters, the proposed rule contains no specific clarification of the fact that the right to remain exists both at the time of the eligibility event, as well as subsequently thereafter. HUD should clarify this in its final rule by adding appropriate text in subsections (d)(1) and (2).

The proposed rule (in 24 C.F.R. § 982.309(d)(1)) would state that an enhanced voucher recipient has the right to remain in the project, but then continues to qualify that right by imposing continuing rental use and voucher eligibility requirements on the unit. Although these limitations are not specified by the statute, HUD has imposed them in prior guidance. Any such limitations should not be interpreted to create opportunities for owner evasion of the tenants' statutory right to remain, discussed *infra*.

Contrary to the federal statutory right to remain, the proposed rule would amend 24 C.F.R. § 982.309(d)(2) to state that “[t]he owner may not terminate the tenancy of a family that exercises its right to remain except as provided in § 982.310.” HUD has specifically requested comment on this regulatory text. Although perhaps unintentional in light of both the clear language of (d)(1) and the explanatory preamble,¹ this unqualified reference to 24 C.F.R. § 982.310 directly violates the statutory right to remain and fails to provide necessary clarity to tenants, owners, PHAs and judges. It has two deficiencies that undercut the right to remain: (1) it would possibly permit nonrenewal without good cause at the end of the lease term; and (2) some of the permissible good causes stated in § 982.310 are unrelated to tenant misconduct and thus overbroad in view of the statutory text and purpose of the right to remain. We next provide more detail on these two issues.

First, incorporating the terms of the ordinary voucher rule on evictions (§ 982.310), which does not require good cause after the initial lease term, would allow enhanced voucher families' tenancies to be terminated at the end of the lease term without good cause, directly contradicting

¹ “The proposed rule would amend § 982.309 to add a new paragraph (d) that would provide that, absent repeated lease violation or other good cause, a family that receives an enhanced voucher has a right to remain in the project in which the family qualified for the voucher at the time of the eligibility event. This new paragraph (d) would implement the statutory requirement at section 8(t)(1)(B) of the 1937 Act (42 U.S.C. 1437f(t)(1)(B), which provides that the assisted family may elect to remain in the same project in which the family was residing at the time of the eligibility event, which has been HUD's policy to date. HUD plans to issue a new tenancy addendum ... to reflect this right....” 81 Fed. Reg. 74375, col. 3 (Oct. 26, 2016).

the right to remain. Federal courts have so ruled. *See, e.g., Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005) (enjoining evictions for nonpayment of rent based on owner's refusal to renew enhanced voucher assistance). HUD's own current guidance (Section 8 Renewal Guide, ¶ 11-3) acknowledges this essential point and specifically states that ". . . [subject to rental use, no good cause and rent reasonableness], Owners must continually renew the lease of an enhanced voucher family." Similarly, the final rule should expressly state the tenant's right to a renewal lease.

Second, referencing § 982.310 without qualification is also inappropriate because subsection (d)(1) of that rule identifies several situations where the owner may terminate the tenancy that are impermissible for enhanced voucher families under the enhanced voucher statute, such as the owner's desire to use the unit for personal or family use, or a business or economic reason such as sale or renovation of the property or desire for a rent increase. In order for the tenant to exercise their federal right to remain at the property, any terminations for good cause of the tenancies of enhanced voucher families must be related to a tenant breach of lease.

Giving effect to the enhanced voucher statute, courts have recognized the enhanced voucher family right to remain in cases such as *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008), and *Barrientos v. 1801-1825 Morton, LLC*, No. CV 06-06437, 2007 WL 7213974 (C.D. Cal., orders Sept. 11 and Oct. 24, 2007), *aff'd on other grounds*, 583 F.3d 1197 (9th Cir. 2009). In *Feemster*, the court specifically noted that "it is clear that 'families renting at the time of the termination of [a] project-based subsidy contract [have] the right to remain in their units, using enhanced vouchers, for so long as the tenant remains eligible for the vouchers or until the tenant is evicted.'"

For these reasons, the reference in the proposed rule to 24 C.F.R. § 982.310 is therefore inappropriate and should be removed. Instead, we suggest that HUD state:

[§ 982.309 (d)(2)] The owner may not terminate the tenancy of a family that exercises its right to remain in the same project in which the family was residing on the date of the eligibility event for the project, unless there is good cause related to the tenant's breach of the lease. Absent such good cause, the owner must continually renew the lease of an enhanced voucher family.

On this point, the Department may determine that there are some provisions of § 982.310 (i.e., other important substantive and procedural requirements for evictions of both voucher and enhanced voucher tenants, such as notice and criminal activity provisions, PHA nonpayment and domestic violence protections, owner discretion, etc.) that should be preserved in the enhanced voucher context. If so, one alternative would be to clarify that §982.310(d)(1)(iii) and (iv) and any other provisions of § 982.310 which allow or could be interpreted to permit tenancy terminations without cause at the end of a lease term are inapplicable to enhanced voucher tenancies. In the PBV program, HUD has recognized this and specifically made §982.310(d)(1)(iii) and (iv) inapplicable. *See* 24 C.F.R. § 983.257(a) (2016).

In addition, the rule should affirmatively state that an owner must honor the right to remain by accepting the enhanced voucher and taking all reasonable steps necessary to execute a HAP contract at a PHA-approved market-reasonable rent, as determined in accordance with § 982.504 (as revised per our recommendation, *infra*). The rule should also state that, if the owner fails to do so, the tenant can exercise their right to remain by paying their share of rent as determined under enhanced voucher rules (generally 30% of adjusted income, or the enhanced voucher minimum rent, if applicable). One federal appellate court has thus properly interpreted the enhanced voucher statute. *Park Vill. Apt. Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150 (9th Cir. 2011). Stating this in the rule will clarify the rights and remedies for all parties involved, and thus encourage compliance.

Enhanced Voucher Lease Addendum

The proposed rule states that HUD “plans to issue a tenancy addendum to be incorporated into the owner’s lease to reflect [the] right to remain,” but it does not provide any other information about the content or timing of such a notice. We strongly support HUD’s stated intention to issue a required addendum. An enhanced voucher lease addendum should be implemented simultaneously with the issuance of a final rule, because it is required by law and is also supported by policy reasons, as explained below.

An enhanced voucher lease addendum has long been required by statute, which HUD has not yet properly implemented. The tenant participation statute, 12 U.S.C. § 1715z-1b, which applies to projects with enhanced vouchers² states:

“The Secretary shall assure that— . . . (3) leases approved by the Secretary provide that tenants may not be evicted without good cause or without adequate notice of the reasons therefor and do not contain unreasonable terms and conditions;”

The HUD form voucher lease addendum (HUD Form 52641-a, ¶ 8) that is commonly used for both ordinary and enhanced vouchers limits the good cause protection to the initial term of the lease and any extension. As previously described, it also includes a definition of good cause that is inconsistent with the right to remain. At the very least, such terms are therefore “unreasonable.” Use of the regular voucher lease addendum for tenants with enhanced vouchers is contrary both to the tenant participation statute and to the tenant’s enhanced voucher statutory right to remain. Although the latter has long been recognized by HUD in the Section 8 Renewal Guide, § 11-3 B, the tenant participation statute has been overlooked when HUD has issued regulations or clarifying guidance for both that statute and the enhanced voucher statute.

In addition to being required by statute, an enhanced voucher lease addendum stating the right to remain is also necessary to protect the rights of thousands of current enhanced voucher families.

² By virtue of subsection (a), as amended in 1998 (“(a) For the purpose of this section, the term “multifamily housing project” means a project . . . which receives . . . enhanced vouchers [under LIHPRHA, ELIHPA or MAHRAA].”).

Only a lease addendum can inform tenants, owners, and judges of the unique rights and requirements for enhanced voucher families and permit effective enforcement of the tenants' right to remain. Without an enhanced voucher lease addendum, it is extremely difficult to hold owners accountable for compliance with the statutory requirements for enhanced voucher families. Because this right to remain does not exist in the ordinary voucher program and is not set forth in the lease, most tenants, PHAs, and owners are unaware that the right to remain for enhanced voucher families necessarily requires good cause eviction protections. As a result, tenants have had to repeatedly resort to federal court litigation to remain in their homes. HUD should act swiftly to require an enhanced voucher lease addendum stating the tenant's right to remain, including lease renewal, absent good cause for termination of tenancy, and any other enhanced voucher family rights. HUD should also translate this lease addendum in order to ensure accessibility for Limited English Proficient (LEP) tenants, pursuant to Title VI of the Civil Rights Act of 1964, Executive Order 13166, and other federal statutes and guidance.

Many other federal housing programs require a lease addendum to be attached to the tenant's lease in order to educate tenants, owners, and judges about the existence of certain rights and requirements. A lease addendum should be required both at the time of the eligibility event (for new enhanced voucher families) and at the time of recertification or lease renewal (for current enhanced voucher families).

A sample enhanced voucher lease addendum has been attached at the end of these comments.

Eligibility Issues: Tenant Rescreening

HUD has also requested specific comments on this important issue. Contrary to federal law, the proposed rule specifically authorizes PHA re-screening of prior project-based Section 8 or Section 236 tenants that are prospective enhanced voucher recipients. The preamble states:

By agreeing to administer enhanced vouchers for families affected by conversion actions, the PHA does not relinquish its responsibility for screening potentially eligible families or its ability to deny assistance for any grounds allowed or provided by 24 CFR 982.552 and 982.553. The screening of families and decisions to deny admission to the program must be consistent with the PHA policy for screening regular admissions of families from the PHA waiting list. The PHA must provide a family with an opportunity for an informal review if it denies the family admission to the voucher program in accordance with the housing choice voucher regulations. 81 Fed. Reg 74374.

This language would leave unaltered HUD regulations and policy that specifically allow for an unnecessary and illegal re-screening of tenants. It is both contrary to federal law and unfair to tenants who face loss of their affordable homes through no fault of their own.

For former project-based Section 8 tenants facing conversion, authorizing re-screening by PHAs would violate the statute. Section 524(d) of MAHRAA, as amended by Pub. L. No. 106-74, §531(a), 113 Stat. 1113 (Oct. 20, 1999), states that:

to the extent that amounts for assistance under this subsection are provided in advance in appropriation Acts, upon the date of the expiration of such contract the Secretary shall make enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)) available on behalf of each low-income family who, upon the date of such expiration, is residing in an assisted dwelling unit in the covered project.

HUD thus has a clear statutory duty to provide enhanced voucher assistance to each family residing at contract expiration or termination. Permitting any re-screening by PHAs for issues other than low-income status directly violates this duty.

Similarly, 12 U.S.C. § 4113(a) states:

Each low-income family that is displaced as a result of the prepayment of the mortgage or voluntary termination of an insurance contract on eligible low income housing *shall*, subject to the availability or amounts provided under appropriations Acts, receive tenant-based assistance under section 1437f of title 42. (emphasis added).

Under both of these statutes, income-eligible tenants facing an eligibility event have the unqualified right to receive enhanced vouchers if funds are appropriated. Any other limitation placed on this right, such as re-screening under PHA voucher selection criteria, violates these laws.

Re-screening potential enhanced voucher recipients as if they were new Section 8 voucher applicants, under different criteria than those used to determine continued occupancy under their project-based lease, is also fundamentally unfair. This re-screening could deny enhanced vouchers to tenants in good standing under their prior lease. There is no sound reason to allow a change in the form of subsidy to trigger a PHA's re-evaluation of the recipient's suitability for tenant protection assistance, when a tenant was previously assisted or HUD-supported. Congress has already appropriated funds for these tenant protection vouchers, and existing law does not allow HUD and PHAs to establish additional eligibility conditions for tenants facing housing conversion actions. Policy decisions by HUD have recently recognized this injustice, and the recent approach (i.e. through the Rental Assistance Demonstration program) has been for HUD to recognize the unfairness of using subsidy conversion as a reason to potentially deny replacement assistance and cause a tenant under lease to lose their affordable home. The language about rescreening and reference to 24 CFR §§ 982.552 and 982.553 in the preamble of the proposed rule are therefore both illegal and inappropriate and should be removed. HUD should add appropriate language in part 982 to clearly prohibit re-screening for any grounds aside from income-eligibility for the enhanced voucher under governing authorities.

Eligibility Issues: Lookback Period Following Conversion Event

The final rule should codify HUD's existing policy (PIH 2001-41, at p. 25) addressing situations where tenants are initially income-ineligible for enhanced voucher assistance, recognizing that low-income tenants' economic circumstances often change significantly:

- (4) Family eligibility for enhanced voucher assistance in cases where there would be no initial housing assistance payment and the family wishes to stay in the project.

If the PHA determines that a family is income-eligible for an enhanced voucher but that there is no HAP payment because the family's total tenant payment equals or is greater than the gross rent, the PHA must maintain a record of the eligibility determination for that family. The PHA must inform the family that should the family's income decrease or the family's rent increase within three years of the eligibility event, the family may contact the PHA. Should the PHA then determine that the change in income would result in a housing assistance payment, the PHA will execute a housing assistance payment contract on behalf of the family at such time (assuming the unit is approved for leasing in accordance with the housing choice voucher program requirements). It is the family's responsibility to contact the PHA when there is a decrease in family income or an increase in the family rent.

Reasonable Rents for Enhanced Vouchers

Though enhanced vouchers provide tenants a right to remain in their homes and are required to provide enhanced payment standards equal to market rents, those rents are also subject to the ordinary voucher program's rent reasonableness requirement. The rents must be reasonable in comparison with rents charged for comparable housing in the private, unassisted local market. Comparability is generally determined by considering the characteristics and amenities offered by the owner at the contract unit to comparable, unassisted units. The purpose of this rent reasonableness requirement is to avoid overpayments by PHAs (if the requested gross contract rent is less than or equal to the ordinary payment standard) or by tenants (if the requested rent exceeds the payment standard).

The proposed rule discusses rent reasonableness, including the following statement:

“The gross rent for a unit leased by an enhanced voucher holder is subject to the limitation in section 8(o)(10)(A) of the 1937 Act (42 U.S.C. § 1437f(o)(10)(A)) that rents shall be reasonable in comparison to rents charged for comparable, unassisted units in the private market, and any other reasonable limits prescribed by the Secretary, such as a use agreement that restricts the rent to an amount below the PHA-determined rent reasonableness cap, State rent controls, or any other similar legally binding, reasonable limitation.” 81 Fed. Reg. 74372, col. 2.

Although clarifying the existing definition of assisted units for comparability purposes (which should then be excluded), the proposed rule does not provide any specific guidance to ensure that PHAs take special care that application of whatever reasonable rent policy they use for the ordinary voucher program is consistent with the enhanced voucher tenant's statutory right to remain. HUD must provide further guidance ensuring reasonable rents to owners so that tenant families may realistically exercise their right to remain at the property if they elect to do so. Ordinary voucher rent reasonableness policy and practice may often be insufficient, especially where the owner is already receiving specific rents for other comparable unassisted units *on the*

same premises. We have encountered this situation numerous times, where PHAs have refused to recognize as “market reasonable” those rents being collected by owners from unassisted tenants in comparable units on the very same premises as the enhanced voucher unit, instead relying on lower rents being charged for units in the general market area, outside of the property. Such PHA practices directly violate the tenant’s statutory right to remain and should be foreclosed by specific guidance in the final rule.

HUD should affirmatively state that the rental amounts being received for the same-size comparable unassisted units on the property provide at least a rebuttable presumption for reasonableness of rents for enhanced voucher units, and that the PHA must approve such rents as reasonable, unless vacancies or other circumstances indicate that the requested rents are not reflective of the actual market.

We also support HUD’s proposed rule (at § 982.504(b)(3)) that clarifies the statutory amendment requiring enhanced voucher payment standards to cover subsequent gross rent increases legally levied by the owner, subject to rent reasonableness, as revised per the foregoing comments.

Minimum Rent

Enhanced vouchers have a specific minimum rent requirement. According to the Section 8 Renewal Guide, the enhanced voucher family must continue to contribute towards rent at least the same amount they were paying for rent on the date of the housing conversion action, unless the family suffers a decrease in gross family income of at least 15 percent from gross family income on the date of eligibility event. *See* PIH Notice 2001-41 (HA), Part II C(3)(c) (“Significant Decline in Family Income –Effect on Enhanced Voucher Minimum Rent”).

The proposed rule would provide that, under 24 C.F.R. § 982.518(d), “if the gross income of the family declines significantly, the enhanced voucher minimum rent shall be revised to an amount calculated based on a percentage of current monthly adjusted income, which is the greater of 30 percent or the percentage of monthly adjusted income the family was paying on the date of the eligibility event.” Nowhere in the proposed rule does HUD define when it will consider the gross income of the family to have declined “to a significant extent.” HUD should specifically include the language in the Section 8 Renewal Guide and other guidance to this effect, where the required rent contribution of the enhanced voucher family is reduced when the gross family income declines by at least 15 percent.

Also, HUD states that “if the enhanced voucher minimum rent exceeds 40 percent of the family’s monthly adjusted income, a family shall still pay at least the enhanced voucher minimum rent.” HUD should utilize any available statutory authority to provide some relief for tenants who are already rent overburdened at the time of the eligibility event, especially for those with rent burdens in excess of 40% of adjusted income, in order to avoid the destabilizing effects to both tenants and the property of tenants moving out to secure lower rent burdens.

Additionally, for those minimum rent tenants who do experience a loss of income exceeding 15% and shift to the alternative minimum rent formula, they should not forever be saddled with

the financial consequences of that overburden snapshot, when their income later increases so that they would pay more than the original dollar amount of the minimum rent. At that point, although they should pay more, it should never be more than 30% of adjusted income.

The minimum rent provision of the enhanced voucher statute requires that a tenant pay no less than they were paying on the date of the eligibility event. It then provides the exception, which reads:

(D) if the income of the assisted family declines to a significant extent, the percentage of income paid by the family for rent shall not exceed the greater of 30 percent or the percentage of income paid at the time of the eligibility event for the project.

This was intended as a safeguard where the old dollar minimum rent caused hardship upon significant decreases in income.

Properly interpreted, this provision of the statute applies only DURING the period of the decline in the family's income from its level at the point of conversion, and when tenant income recovers to reach its prior level, the policy should return to the former dollar minimum rent. Subsequently, that rent amount can be increased only when tenant income increases to the point where 30% of adjusted income surpasses the former enhanced voucher dollar minimum rent, and only by that amount. Contrary to HUD's current guidance (PIH 2001-41, p. 31), the rent should not be determined forevermore by a predetermined percentage of rent overburden in these circumstances, which extends tenant hardship far beyond the statutory directive. HUD should make this clear in the final rule.

Timeliness of the Issuance of Enhanced Vouchers

The proposed rule should be amended to ensure that tenants receive their enhanced voucher benefits in a timely fashion, certainly no later than the effective date of the conversion event, if not sooner, so that they can exercise true housing choice and be protected from increased rent burdens or possible displacement, as Congress intended and has required.

Section 524(d) of MAHRA states that:

In the case of a contract for project-based assistance under section 8 for a covered project that is not renewed under subsection (a) or (b) of this section (or any other authority), to the extent that amounts for assistance under this subsection are provided in advance in appropriation Acts, upon the date of the expiration of such contract the Secretary *shall* make enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)) available on behalf of each low-income family who, *upon the date of such expiration*, is residing in an assisted dwelling unit in the covered project. (emphasis added).

As such, HUD has an obligation to provide enhanced vouchers to tenants at the time of the eligibility event. In practice, tenants have encountered situations where enhanced vouchers have not been provided prior to or at the time of the eligibility event, despite the eligibility of the tenants to receive enhanced vouchers, which has risked the housing stability of these families. Whether the problem in these situations lies with HUD or the PHA, or some of both, does not absolve the Department of its statutory responsibility or any other duty to ensure that tenants are protected.

The proposed rule does not provide any guidance regarding the timing of providing enhanced vouchers to tenants upon an eligibility event. The timing of such issuance is critical to tenants being able to utilize this required assistance to stay in place or make arrangements to move if they so choose at or prior to the effective date of the conversion event. Failure to provide the enhanced vouchers in such timely fashion exposes tenants to unwarranted rent increases or eviction, directly threatening their right to remain

In the final rule, HUD should include the provisions necessary to ensure that assistance is promptly provided to tenants, as Congress has intended and required. Some of these provisions can be taken from HUD's prior guidance (PIH 2001-41), such as different effective dates for the enhanced voucher assistance for different types of conversion and for stayers and movers, necessary approval dates, reiterating the 60-day window of flexibility for HAP contract execution following tenancy approval, etc. For delays in processing enhanced vouchers, including both HUD funding and PHA and owner actions necessary to reach unit approval and actual flow of assistance, the final rule should also (per the Section 8 Renewal Policy Guide, para. 11-3 D) require HUD to offer owners a short-term project-based renewal contract to cover any gap. Also, the final rule should state that if all of the steps required for enhanced voucher assistance to flow have not been completed prior to the date when owners can increase rents or subsidy can be retroactively paid for tenant families, tenants cannot be held liable for any increased rent amounts demanded by the owner. If necessary, HUD should state that exceptions will be made to any regulatory deadline or requirement necessary to permit assistance to flow to the owner as of the effective date of any legal rent increase.

Unit Size

The proposed rule also states that if an enhanced voucher family is over-housed and wishes to remain at the project with enhanced voucher assistance, and an appropriate-sized unit becomes available, the family must move to the appropriate-sized unit (per the preamble, within 30 days). If the family wishes to stay in the larger unit, their assistance payment will be based on a regular voucher for the appropriate-sized unit and the family will have to pay the remainder of the gross rent. If no appropriate-sized unit is available, the subsidy calculation will continue to be based on the gross rent (including subsequent rent increases) for the oversized unit until an appropriate-sized unit in the project becomes available.

HUD's guidance (Notice PIH 2008-12 and Notice PIH 2016-02) contains other important policies that HUD should consider stating in the final rule:

- once the PHA determines the family is over-housed, the PHA must inform the family and:
 - explain that if the family indicates it wishes to remain at the project with enhanced voucher assistance, the PHA must inform the owner of the project that the family is in an over-sized unit;
 - the PHA must provide the owner with the bedroom size for which the family actually qualifies under the PHA subsidy standards (i.e., the appropriate size unit); and
 - the owner must then identify all appropriate-sized units that are available in the project;
- when an appropriate-sized unit becomes available in the project, the family and owner will enter into a new lease and the PHA will execute a new voucher HAP contract with the owner for the appropriate-sized unit, with the subsidy calculation based on the enhanced payment standard equal to the gross rent (including subsequent rent increases) for the appropriate-sized unit;
- a PHA must approve requests for a larger bedroom size to permit additional bedrooms if it may be necessary as a reasonable accommodation for a household with a family member with a disability, such as for example, to accommodate the need for a live-in aide or for medical equipment (see 24 CFR part 8);
- if more than one over-housed enhanced voucher family residing at the project qualifies for the same size unit under the PHA’s subsidy standards, and the number of appropriate size units that become available at any given time is less than the number of units necessary to accommodate the number of over-housed families, the PHA must develop a fair method by which to offer the units to families. The PHA may wish to consider such methods as date and time, (i.e. families living in over-sized units for the longest period of time are offered appropriate sized units first); lottery for families with the same voucher anniversary date; request that families volunteer to move; age; frailty or any other fair nondiscriminatory method the PHA chooses to implement; and
- if there is a decrease in family size or change in family composition, until such time that an appropriate-size unit becomes available for occupancy by the family in the project, the family should continue to receive enhanced voucher assistance in the oversized unit.

The final rule should also address situations where the family is “underhoused” (overcrowded) according to the PHA’s family/unit size standards. Because of the tenant’s statutory right to remain, contrary to HUD’s current guidance (PIH 2001-41, p. 35), tenants should be afforded the opportunity to move to units of appropriate size on the premises, with enhanced payment standards set accordingly. If no such units are available, they should have the right to remain in their units (with appropriate gross rent payment standards) if they so choose, until such appropriate-size units become available. Similar to the implementation of other HUD programs (i.e. the Rental Assistance Demonstration), in the final rule HUD should require PHAs and owners to create an opportunity for family members to be added to the lease prior to or at the time of the eligibility event. Such a policy would significantly reduce the burden on the PHA and owner to move tenant families because of under- or over-housing at the time of the eligibility event and could prevent over- or under-paid subsidies provided to enhanced voucher families.

Tenant Notice

Section 8(c)(8) of the United States Housing Act and 24 C.F.R. § 402.8 require that owners give a one-year written notice to tenants and HUD of the contract's termination or expiration. The one-year notification must state the owner's intentions (i.e., to renew or not renew) at the time of the contract's expiration. An owner cannot evict tenants or increase tenants' rents until one year after providing such notice and must comply with additional notice requirements established by the HUD Secretary, including those in the Section 8 Renewal Guide concerning the content of the notice.

The proposed rule only briefly mentions these requirements in a footnote in the preamble. Because noncompliance with these requirements has a direct impact on the rights of enhanced voucher tenants, HUD should more clearly address these requirements in a rule, whether here or in § 402.8. If they are stated somewhere else, those sources should be explicitly cross-referenced in the final enhanced voucher rule. Those provisions should include all of the applicable notice requirements stated in the statute, the current regulation, and the Renewal Guide, as well as translation requirements under applicable federal civil rights laws. The owner certification concerning honoring the tenant's enhanced voucher right to remain should be further clarified that it means that the owner must take appropriate steps to enable tenants to use their enhanced vouchers to remain, including making repairs necessary to satisfy HQS and charge reasonable market rents as determined by the PHA (per the revisions concerning use of unassisted units in the same project recommended *supra*).

At the very least, in addition to any appropriate cross-references, this final rule should state the implications of any owner noncompliance with those federal notice requirements for tenants entitled to enhanced vouchers. Pursuant to 24 C.F.R. § 402.8 and the Section 8 Renewal Guide, this final rule should state that:

- If an owner does not provide a legally sufficient one year's notice, the owner must permit the tenants to remain in their units at a rental rate no higher than the tenant rent payable for the tenants' last month of assisted occupancy under the terminated HAP contract until one year after legally sufficient notice has been given, even if HUD does not continue to make housing assistance payments with respect to such units, and cannot evict such tenants.
- During any period of noncompliance, HUD and the PHA will not make enhanced voucher assistance payments for formerly assisted tenants remaining in these units (since owners should not be financially rewarded for violations);
- Upon properly notifying all affected tenants, HUD may offer a short-term project-based contract to the owner to permit fulfillment of the notice requirements;
- When a HAP contract expires without the proper notice requirements being met, the PHA must still make a determination regarding family eligibility for enhanced voucher assistance.
 - if the family is eligible and wishes to move from the project, the PHA must immediately provide the family with a voucher in order to do so.
 - if the family is eligible and wishes to stay in the project, the PHA must inform the family and the owner that the assisted tenancy with enhanced voucher

assistance will commence as soon as the owner satisfies the proper one-year notice requirements. If the family is not eligible for enhanced voucher assistance, the family may remain in the unit with no increase in their rent payment until the owner satisfies the notice requirements.

In situations where enhanced vouchers are triggered by an owner's intended nonrenewal of a project-based Section 8 contract, owners are required to serve a 120-day notice of nonrenewal to HUD, which reportedly triggers HUD's internal processing of enhanced voucher assistance. At this point in the process, the final rule should require the PHA to provide a notice to all tenants explaining their enhanced voucher rights, based upon a HUD-developed form. We offer our assistance to HUD in developing such a form notice for PHAs.

Right to Return After Temporary Rehabilitation

The proposed rule does not mention the right to return to the property after any rehabilitation of the property that requires temporary displacement of enhanced voucher families. Because tenants with enhanced voucher have a statutory right to remain, where properties undergo rehabilitation for continued rental use that cannot be completed with tenants on the premises, the final rule should state that tenants can be temporarily relocated during a reasonable period of time in other units on or off the premises, and that tenants have the right to return to their homes when the units are ready for re-occupancy.

Type of Tenant-Based Vouchers in a Section 8(bb) Transfer

The proposed rule does not mention the type of tenant protection vouchers that tenants will receive in a Section 8(bb) transfer. HUD must clarify in the final rule that tenants in a Section 8(bb) transfer will receive enhanced vouchers.

Where a project-based contract is terminated or not renewed, Section 8(bb) allows for transfer of the remaining budget authority to another contract and development. 42 U.S.C. § 1437f(bb). Notice H 2015-03 outlines the Section 8(bb) procedure owners and HUD must follow for a proposed transfer of the budget authority. Under the terms of the notice, tenants have the opportunity to comment on a proposal prior to its submission to HUD. In order for the residents to make informed comments, tenants must know whether they will have the right to remain at the property with all the protections an enhanced voucher provides.

The enhanced voucher statute requires that tenants be provided enhanced vouchers when certain eligibility events occur. 42 U.S.C. § 1437f(t). An eligibility event is defined as the "termination or expiration of the contract for rental assistance" so long as the residents are eligible for enhanced vouchers under Section 524(d) of the Multifamily Housing Assistance Reform and Affordability Act (MAHRA). 42 U.S.C. § 1437f(t)(2). Section 524(d) of MAHRA provides for enhanced vouchers "in the case of a contract for project-based assistance... that is not renewed [under MAHRA]."

A Section 8(bb) transfer can occur only when the Contract Administrator and the owner “mutually agree to the *termination* of all or a portion of the existing Section 8 HAP contract and to the transfer of any remaining budget authority.” Notice H 2015-03 (emphasis added). If the contract is not renewed under MAHRA and instead, the budget authority (not the contract itself) is transferred to the receiving development, the governing statutes require that tenants receive enhanced vouchers under 42 U.S.C. § 1437f(t).

Section 8(bb) has the potential to preserve project-based Section 8 housing assistance for the long-term when current owners withdraw from the program. This must not, however, occur at the expense of tenants who have the right to remain in their homes if they so choose. When owners terminate their participation in the project-based Section 8 program, tenants are entitled to, and owners must accept enhanced vouchers so long as they continue to provide rental housing at the development. The right to an enhanced voucher protects the individual tenants who would otherwise be displaced as a result of the contract termination

Thank you for your consideration of our comments and recommendations. We look forward to working with HUD to implement a final rule and remain available to further discuss these recommendations. Please contact Jim Grow at jgrow@nhlp.org for any clarifications of our position on these important issues.

Sincerely,

James Grow and Jessica Cassella, National Housing Law Project, *On behalf of the Housing Justice Network*

Michael Kane, National Alliance of HUD Tenants

Ed Gramlich, National Low-Income Housing Coalition

George Gould and Rachel Garland, Community Legal Services (Philadelphia)

Emily Coffey and Kate Walz, Shriver Center on National Poverty Law

Ellen Davidson and Judith Goldiner, Legal Aid Society (New York City)

Jack Cann, Housing Justice Center (St. Paul)

Lorrie Schwartz, Legal Aid Service of Broward County (Florida)

SAMPLE ENHANCED VOUCHER LEASE ADDENDUM

This Addendum, dated _____, amends the attached Lease and (Housing Choice) Voucher Lease Addendum signed on _____. In the event of a conflict between this Enhanced Voucher Lease Addendum and the provisions of the attached Lease or (Housing Choice) Voucher Lease Addendum, the provisions of this Enhanced Voucher Addendum shall control.

1. **Parties.** The parties to this Addendum are _____, Landlord, and _____, Tenant.

2. **Term of Lease; Termination by Owner.** Following the prepayment of the mortgage or termination of the Section 8 contract for the property, the Tenant has received an Enhanced Voucher from the Housing Authority for use at the rental unit owned by Landlord. Under federal law, Tenant has the right to remain in the unit, subject to compliance with the Lease, so long as the property is offered for rental use and the Housing Authority determines the rent to be reasonable under the Voucher program rules. The Landlord shall not terminate the tenancy of the Tenant, either during the term or at the end of the term, except for good cause, which shall be defined as a serious or repeated violation of the Lease. This requirement of good cause for termination shall continue after the initial Lease term. Unless good cause exists, Landlord must offer to renew the Tenant’s Lease upon expiration. Any termination of the tenancy, whether during the Lease term or at the end of the term, shall be preceded by [at least 30 days, or whatever period is required by state law] advance written notice specifying the Lease provision allegedly violated, and facts sufficient to enable the tenant to present a defense in any judicial eviction action.

3. **Termination of the Lease by Tenant.** Tenant may terminate the Lease by giving at least [30 days] written notice to Landlord.

4. **Successor Owner.** The responsibilities and requirements of the Landlord shall apply to any successor owner(s).

Landlord

Tenant