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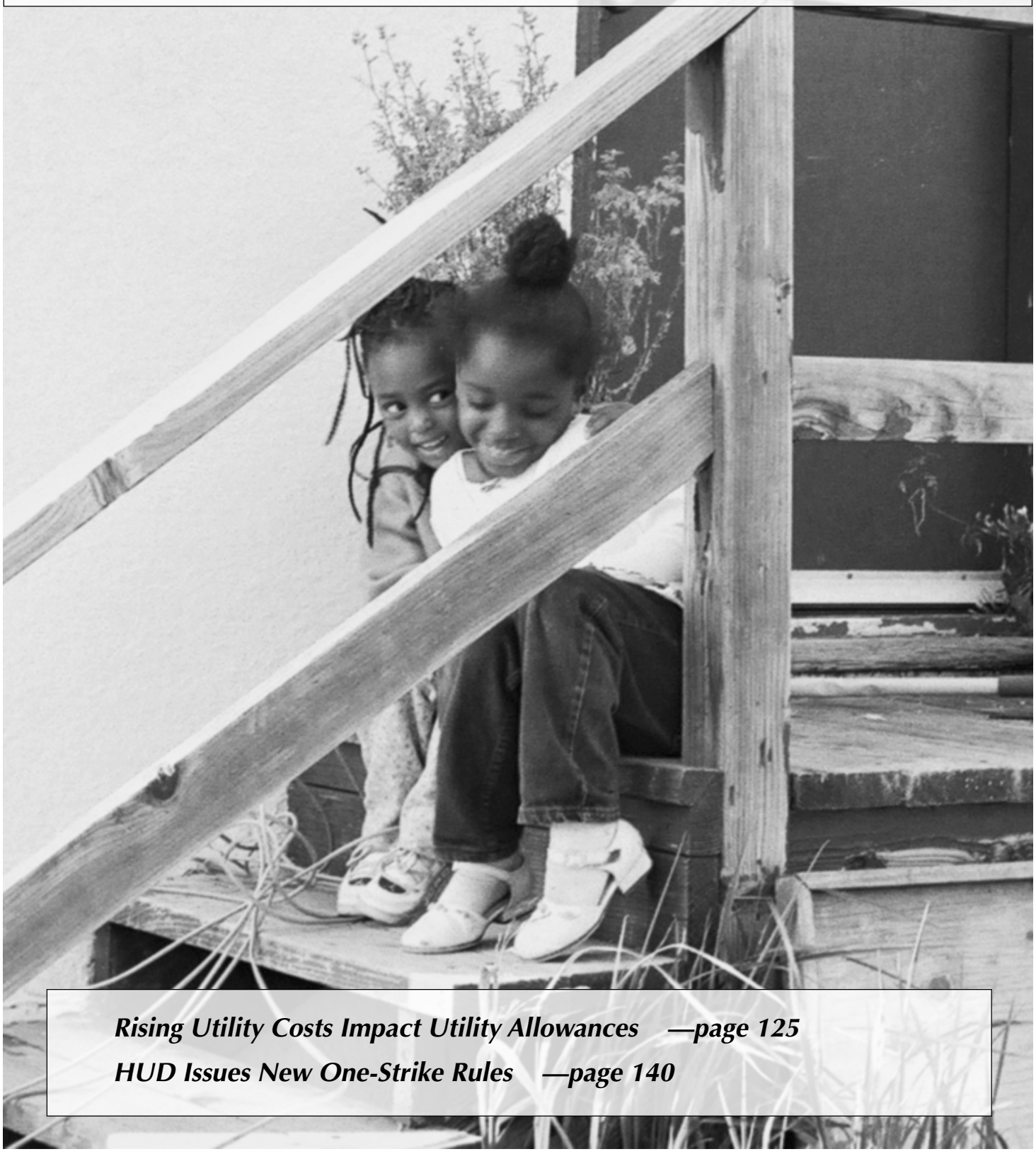

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Rapidly Increasing Energy Costs Raise Utility Allowance Issues

Introduction

Energy costs have a substantial impact upon the affordability of shelter and play a critical role in a low-income household's budget, along with direct housing costs. Under federal housing programs providing income-based subsidies, tenant rent contributions should theoretically cover both shelter and a reasonable quantity of utilities. To insure affordability, these contributions are also supposed to be limited to a certain percentage of the tenant's income, typically 30 percent. Thus, many federal housing programs must include methods of subsidizing tenants for some or all of the cost of their utilities.

Unfortunately, these methods often fail to address adequately the needs of tenants who pay for any of their own utilities, forcing them to pay unreasonable and unsustainable proportions of their income for shelter and utilities. These tenants face the Hobson's choice of continuing to pay their utility bills or foregoing or reducing some other necessity, such as food, clothing or rent. In light of the recent and ongoing steep escalation of utility costs, tenants are finding it even more difficult to keep pace with their rent and utility bills, even with the help of the subsidies, as that assistance has failed to keep up with the costs. This article summarizes the problem as it relates to public housing, the Section 8 Voucher program, and project-based Section 8 units and reviews the recent actions that the Department of Housing and Urban Development (HUD) has taken to address the issue.

Utility Allowances and Metering Systems

In order to subsidize tenants' utilities,[1] HUD has established allowance and surcharge systems that differ from program to program. The manner in which federal housing tenants pay for utilities and are charged for "excess" consumption also differs depending upon the type of metering system. There are three types of metering systems: master-metered, check-metered,[2] and retail-metered.[3] Each combination of

[1]Note that the word "utilities" encompasses more than one type of service. "Utilities" may include water, gas, electricity, heating oil, sewage services, and trash collection services (phone service is not included). There may be a separate provider for each of these services, and each provider may separately bill the responsible party (the tenant, owner, or PHA). Throughout this article, for purposes of simplicity, phrases such as "cost of utilities" and "utility rates" refer to all the utilities as if they were billed as one.

[2]"Check-metered" buildings are buildings that actually have a master-meter, but also have individual "check-meters" to measure each unit's utility consumption. Again, for purposes of simplicity, this article will refer to master-metered buildings without check-meters as "master-metered," and refer to master-metered buildings *with* check-meters as "check-metered."

[3]Note that any one project might have different metering systems for different utilities (*e.g.*, retail-metered electricity but master-metered gas, water and sewer).

program and metering type leads to a different system of subsidization and a different method of paying the utility bills.

Master-Metered

In master-metered projects, each building contains only one meter that measures the entire utility consumption for that building. Thus, there is no way to measure utility consumption for individual units and no way to assess exactly how much a single household should pay for their utilities. The public housing authority (PHA) or owner therefore pays the utility bills, and the costs of utilities are included in the tenants' rent. For public housing, the regulations provide that tenants may be charged a flat fee—monthly or perhaps seasonally—for having certain tenant-supplied appliances that may dramatically increase utility usage in a given unit.[4] The other programs' regulations contain no similar language. Laundry appliances and window-unit air conditioners are typical examples of items using "excessive" electricity that a PHA might surcharge. Other than this surcharge paid to the PHA, the tenants are not directly responsible for paying their utility bills to the providers.

Check-Metered

Check-metered projects not only have a master-meter for each building that measures the overall utility usage for the building, but also have individual check-meters for each unit. These check-meters permit the landlord to monitor utility usage on a household-by-household basis. In check-metered projects, the PHA or owner pays the utility bills of the entire building based on the master-meter in the project. The utility costs are not necessarily all included in the tenant's rent; instead, the tenant is allocated a "utility allowance" based on "reasonable" consumption for the size of the family and the unit.[5] If a household exceeds this preset allowance, the PHA or owner assesses the tenant with a surcharge for the excess amounts based on the average utility rate.[6] Check-meters are apparently unusual in the Section 8 programs and are not mentioned in the rules, although some older or rehabilitated projects may be equipped with them.

Retail-Metered

In projects where each unit has an individual retail utility meter, the providers of the utilities can measure each household's exact utility usage. The providers bill each household separately, and each tenant pays those bills directly to the utility provider. As a subsidy, tenants may receive a utility allowance based on "reasonable" consumption.[7] This allowance amount is then given to the tenant in the form of a deduction from the amount of the tenant's portion of the rent each month. The tenant then pays the difference as her portion of the rent to the owner or PHA. Since the tenant alone is responsible for paying the utility bills directly to the provider, the cost of any "excess" usage (consumption higher than the dollar figure of the utility allowance) is borne directly by the tenant.

PHA and Owner Review and Adjustment of Utility Allowances

The problem, simply stated, is that too often the existing rules covering reasonable utility costs of low-income subsidized tenants are either not working or not being followed. Thus, thousands of tenants may be forced to choose between paying for utilities or food, rent or medication. In extreme situations, tenants would be forced to do without basic necessities such as heat and light, or find themselves under threat of eviction from their homes for nonpayment of rent. Tenants may face these choices in spite of regulations designed to protect them from dramatic increases in utility costs.[8] The issue is complicated by the fact that it affects participants of each major housing program in a slightly different way. As discussed above, the three different metering systems also create further difficulties.

The problem essentially boils down to three basic issues. First, utility allowances are often set at inadequate base levels. Second, the allowances are rarely adjusted promptly when rates change. Third, any adjustments that PHAs and owners do make to the allowances might not be promptly reflected in the tenant's portion of the rent.

Utility Allowance Base Levels

For public housing units, PHAs set the base level utility allowances based on "reasonable consumption of utilities by an energy-conservative household of modest circumstances," taking a number of factors into account, including the weather in the area of the development, the energy efficiency of the appliances, the size of the units and the number of occupants, etc.[9] For Section 8 voucher-holders the PHA "must use normal patterns of consumption for the community as a whole and current utility rates" in setting the base

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[4] 24 C.F.R. § 965.506(b)(2000).

[5] *Id.* § 965.505(a).

[6] *Id.* § 965.506(a)(public housing). In check-metered units, the allowance is usually set in units of fuel consumption (e.g., kilowatt hours or therms), but occasionally these units are expressed as a dollar amount by factoring in the applicable rates. For check-metered apartments, the allowance can be set in one of two ways. If more than one utility is check-metered, the allowance may be set separately for each utility without an overall allowance for consumption of all utilities in the unit. Under this system, a tenant cannot avoid a surcharge on one utility by "under-using" another. For example, a tenant could receive an allowance of $50 per month for electricity and $50 per month for gas. If the tenant used $60 for electricity, but only $40 for gas in a given month, she would be assessed the $10 surcharge on the electricity, but be afforded no benefit from the under-consumption of the gas. This method is reportedly used in public housing in New York City, for example. The other method is for a PHA to set an overall utility allowance, such that "under-use" of one utility could make up for "over-use" of another (where the allowance in fuel units is converted to a dollar amount). Regardless, in the interest of simplicity, this article will assume that only one utility is being check-metered for each unit.

[7] 24 C.F.R. §§ 965.505 (public housing) and 982.517(b)(2000)(Section 8 Vouchers).

[8] *See, e.g., id.* §§ 982.517(c)(Housing Voucher Program), 965.507(b)(Public Housing), 880.610(Section 8 New Construction), 886.126(HUD-insured and HUD-held mortgages); and 886.326 (HUD-owned projects).

[9] *Id.* § 965.505.

Section 8 Homeownership
Audio Teleconference Tapes Available

On May 31 and June 5, the National Housing Law Project (NHLP) conducted two 90-minute audio teleconferences on the new Section 8 Homeownership program. The first of these provided an overview of the program and the Department of Housing and Urban Development's (HUD) final program regulations and discussed the experiences of several public housing authorities that have implemented a homeownership program when it was first authorized as a demonstration program. Presenters for this first teleconference were: Gerald Benoit, HUD Office of Public and Indian Housing; Emily Vaupel, Program Coordinator, Burlington Housing Authority; Mike Flo, Executive Director, Benicia Housing Authority; Deborah Collins, Managing Attorney, Legal Services of Northern California.

The second teleconference focused on details of the program and the partnerships that need to be formed to implement a successful program. Presenters at the second teleconference were: Lynn Martinez and Gideon Anders of NHLP; Fran Eizenstat, Senior Business Developer, Community Lending Group, Fannie Mae Corp.; Lillia Vilasenor, Regional Manager for Community Development Bank of America; and, Mary Pauman, Director of the Housing Authority Resource Center, Local Initiative Support Corporation (LISC).

Audio tapes of both teleconferences are available now from NHLP at a combined price of $25. Individual tapes of each teleconference are available for $15. Please use the following order form to order the tapes from NHLP. All orders must be prepaid either by check or credit card.

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level utility allowances.[10] For project-based Section 8, the regulations governing how the owner sets the base utility allowances contain language identical to that for public housing, but without the list of factors to consider.[11] Thus, the regulations offer no definitive guidance to PHAs, owners and contract administrators as to how to set the base allowances, and many such allowances arguably have been set too low.

Utility Allowance Adjustments

The base allowances only mark the beginning of the problem, however. As energy costs increase, the utility allowance calculations can become outdated if they are based on dollar amounts and if the PHA, owner or contract administrator does not adjust them. When energy costs rise dramatically, as they have in many areas during the past year and continue to do so, inadequate utility allowances create even more financial pressure for tenants. However, the regulations do anticipate the possibility of increasing utility costs and include provisions, described below, that attempt to address the problem.

Public Housing

For public housing, the PHA must review its utility allowance schedules at least annually.[12] However, the regulations do not require utility allowances to be adjusted on an annual basis. Only if utility rates have increased by 10 percent or more since the PHA last established or adjusted the utility allowances is the PHA required to adjust the utility allowances again.[13] This leaves tenants with the burden of paying any cumulative rate increase under 10 percent until the PHA is required to (and actually does) adjust the allowances.

Voucher Program

For the Section 8 voucher program, the PHA must review its utility allowances schedules at least annually.[14] The regulations provide only slightly more detailed guidance regarding these annual reviews, requiring merely that the PHA check that the allowances meet the reasonableness requirements of 24 C.F.R. § 965.505. As with public housing, the regulations only require a utility allowance adjustment when the utility rates have risen 10 percent or more since the allowances were last established or adjusted.[15]

Project-Based Section 8

Project-based Section 8 is subject to slightly different regulations. The owner must annually submit to the contract administrator of the project an analysis of the project's utility allowances for possible adjustment, as part of the annual or special contract rent adjustment process. Owners must actually request approval of a new utility allowance when utility rates change to such an extent as to result in a cumulative increase of 10 percent or more over the most recently approved utility allowances. After an increase, they must "promptly" notify any affected families and adjust their share of the rent and the housing assistance payment (HAP) accordingly.[16]

When energy costs rise dramatically, inadequate utility allowances create even more financial pressure for tenants.

Utility Allowance Adjustment Delay

Even assuming that regular review and adjustment of the utility allowances would fully solve the problem for tenants, the rules can result in a delay of up to two years before some tenants can benefit from increased allowances. Consider the following example—admittedly a worst-case scenario. A tenant recertifies for her unit on August 1, 2001, thereby establishing her rent contribution. In September 2001, the PHA reviews the utility allowances and determines that no change is required. In October 2001, the utility rates increase dramatically. In August 2002, the tenant recertifies again, but receives no change in her rent or utility allowance, since the PHA is only required to review the allowances once a year[17]—the next review is set for September 2002. In September 2002, the PHA determines that the utility allowances must be increased. This increase may be delayed until the tenant recertifies again in August 2003. Thus, this hypothetical tenant has had an inadequate utility allowance from August 2001 through August 2003, or over two full heating seasons.[18] This situation is even more egregious if utility rates increase dramatically again in October 2002, as those changes would not be reflected in the tenant's utility allowance until August 2003. Finally, any delay by PHAs and owners in complying with the utility allowance adjustment regulations discussed above only intensifies the problem.

Below is a closer look at the utility allowance problem as it relates to different federal housing programs. In addition to raising utility allowances promptly, other steps may also need to be taken to fully address the problems presented, including the adjustment of voucher payment standards and the provision of additional funds by HUD and Congress.

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[10] *Id.* § 982.517.

[11] *Id.* § 5.603(b).

[12] *Id.* § 965.507(a).

[13] *Id.* § 965.507(b).

[14] *Id.* § 982.517(c).

[15] *Id.*

[16] *See e.g.*, 24 C.F.R. §§ 880.610 (2000)(Section 8 New Construction), 886.126 (HUD-insured and HUD-held mortgages), 886.326 (HUD-owned projects).

[17] *See e.g.*, 24 C.F.R. § 965.507(a)(Public Housing), 982.517(c)(Housing Voucher Program), and 880.610 (Section 8 New Construction).

[18] Because the project-based Section 8 regulations require prompt notice to tenants of increases and adjustments of tenant rents, this delay should not occur for them. *See e.g.*, 24 C.F.R. § 880.610 (2000)(Section 8 New Construction).

A Program-by-Program Analysis of the Utility Problem

Each program is affected by the utility crisis in a slightly different way, and will require varied responses by HUD to address the problem. This section provides a more specific analysis of how the utility allowance problem arises under the different federal housing programs with income-based subsidies.

Public Housing

Public housing presents two basic situations. The first and simplest is where the utilities are included in the tenant's rent (i.e., the building is master-metered), and the tenant pays 30 percent of her adjusted gross income for rent. As utility costs increase, the tenant's portion of the rent should remain constant, but the PHA will be forced to shoulder the excess costs. As for the tenants of master-metered public housing units, although their rents would not change and they are not directly paying utility costs, they still could be negatively affected by rising utility costs if the PHA increased its surcharge on certain major appliances such as dishwashers or air conditioners. As explained above, this surcharge is permitted to offset the costs of tenants using more than a "reasonable" amount of energy for their unit size due to their use of the "extra" appliance.[19]

The more serious situations, from the tenant's perspective, arise when tenants are responsible for utility costs under either a retail-metered or a check-metered system. As described above, public housing tenants with retail-metered units pay their own utilities directly to the providers, but receive a utility allowance as a credit against the amount of rent they must pay in order to offset those costs. For example, 30 percent of a tenant's adjusted gross income may amount to $200. The PHA may have set the utility allowance (based on "reasonable consumption of utilities by an energy-conservative household of modest circumstances" pursuant to 24 C.F.R. § 965.505) at $80. The $80 utility allowance is subtracted from the tenant's rent obligation each month so that such a tenant would pay $120 per month as rent. The tenant, in turn, would then pay the utility bills directly to the provider. These bills may or may not equal the $80 utility allowance. If the tenant has used less energy than the PHA's allowance, and her utility costs amount to less than $80, she benefits. A far more likely scenario is that the tenant has either exceeded the consumption level underlying the allowance or that the rates have risen to a point that makes the cost of the expected level of consumption exceed $80. Any amount over the $80 is money directly out of the tenant's pocket, thus bringing the total tenant expense for rent and utilities above the 30 percent of income that she is supposed to be paying. Thus, rising utility costs both reduce the value of the allowance, by reflecting the cost of the utilities for a given unit less accurately, and increase the amount of money tenants must themselves pay for any "excess" usage.

For public housing tenants in check-metered apartments, the problem presents itself slightly differently. For such units, the PHA pays the utility providers the cost of the utilities, rather than the tenants, and the utilities are included in the tenants' rent—to an extent. Each tenant is allocated allowances for reasonable consumption for the unit.[20] If the check meter shows that the tenant's utility usage has exceeded the allowance, the PHA assesses the tenant with a surcharge for the excess consumption at a rate based on the PHA's average utility rate.[21] If the utility allowance has been set in a dollar (as opposed to unit) amount, rising utility costs cause the tenant's consumption to reach that amount more rapidly and cause the surcharge to be greater. Thus, a tenant who is paying $200 per month for rent as 30 percent of their adjusted gross income, may also pay more to cover their utilities surcharge. The HUD regulations do not consider the surcharge to be part of the tenant's official rent total, thus HUD contends that such tenants are not being charged more than 30 percent of their adjusted gross income for rent and utilities, which would be in violation of the *Brooke Amendment*.[22] Regardless of whether it is legally a violation of the *Brooke Amendment*, the reality in such a situation is that the tenant is paying more than she can sustain for rent and utilities.

It is crucial that PHAs revise their utility allowances when their current utility costs reflect an increase of 10 percent or more since the utility rates were last calculated.

However, in either the individually or check-metered situation, if the utility allowance is recalculated to reflect higher rates, the tenant will be brought into compliance with the *Brooke Amendment* and find herself far more capable of maintaining her rent and utility payments. Thus, it is crucial that PHAs follow the edict of 24 C.F.R. § 965.507(b), which requires that PHAs revise their utility allowances when their current utility costs reflect an increase of 10 percent or more since the utility rates were last calculated. It is also critical that Congress and HUD provide the necessary operating subsidy funding to cover these costs.

The Section 8 Voucher Program

The Section 8 Voucher program presents a different set of issues, also dependent on the type of metering system used. In the rare instance where the tenant's utilities are included in the rent for the unit (master-metered buildings), the problem

[19] *See id.* § 965.506(b).

[20] *Id.* § 965.502(a).

[21] *Id.* § 965.506(a).

[22] 42 U.S.C.A. § 1437a (West 1994).

and solution are relatively simple, at least in the analysis. In such situations, the landlord will charge a greater amount of rent for the unit to offset the greater utility costs. The tenant's rent is typically based on the tenant's income (usually 30 percent), so the increase in rent should only affect the amount of the PHA's portion of the total rent (the HAP), so long as the unit rent is within the local voucher payment standard. (If it exceeds the standard, the tenant must make up the additional payment herself). The tenant, though, may still be affected by the increased costs. The landlord could price the tenant out of the unit if he raises the rent too much beyond the voucher payment standard for the tenant to be able to afford, yet still be within "reasonable" boundaries, considering the higher cost of utilities for the unit. Under such circumstances, the landlord might keep the rent for the property within HUD's limits, and HUD would not exclude the owner from the program for having unreasonable rents. The tenant, however, would be responsible for any amount of rent beyond the payment standard, which could mean that the tenant simply could not afford the unit. Accordingly, Section 8 voucher-holders who do not pay their own utilities may still need higher payment standards to deal with rising utility costs.

The payment standard also comes into play for voucher-holders who pay their own utilities, although at first blush it seems that only the amount of the utility allowance would be relevant.[23] Section 8 voucher-holders with retail-metered apartments also receive utility allowances.[24] Much like retail-metered public housing tenants, Section 8 voucher-holders also must pay the extra cost of utilities if their utility allowances are set too low. However, for Section 8 voucher-holders, simply raising the utility allowances will not necessarily cure the problem because these tenants are also subject to PHA-set payments standards that dictate what the PHA considers to be a maximum, reasonable amount of rent and utilities for a given unit in a specific market area. If the total lease rent for a property plus the actual cost of utilities exceeds the payment standard,[25] the tenant must pay any additional amount over the payment standard, in addition to the 30 percent of their adjusted income that HUD requires them to pay for their portion of the rent.[26]

Some examples may help to clarify the interrelationship between voucher payment standards, utility allowances and the utility costs for retail-metered units. The following are hypothetical rental situations that show the impact that raising the utility allowance and/or the payment standard for a unit will have on the tenant's cost for the unit (tenant rent plus the cost of utilities to the tenant). This explanatory narrative should be read in conjunction with the chart on page 133. For each example, the family's adjusted gross monthly income is $667, so 30 percent of that—the amount charged for tenant rent by the PHA—is $200 per month.[27]

Example A: Utility Allowance Adequate; Payment Standard Higher than the Sum of Total Lease Rent and Utility Allowance

Example A is the simplest, where both the payment standard and the utility allowances are appropriately set. In this example, the tenant has a payment standard of $710, and the unit's total lease rent is $650 (less than the payment standard), not including utilities. The actual utility costs for the unit are $50 per month, and the utility allowance ($50) matches those costs. That utility allowance is subtracted from the tenant portion of the rent. Thus, the tenant pays $150 ($200 minus $50) to the landlord for rent. The PHA pays $500 to the landlord to reach the total of $650 rent to the landlord. The tenant then pays the utility bills, in this example $50, to the utility providers. Thus, the tenant has paid a total of $200 or 30 percent of adjusted gross income as the "family share"—the total cost to the family of rent and utilities ($150 to the landlord, plus $50 to the utility companies). The payment standard does not pose a problem, as the sum of the lease rent ($650) plus the utility allowance ($50) is less than the $710 standard. In this example, then, the system is working properly.

Example B: Utility Allowance Inadequate; Payment Standard Higher than the Sum of Total Lease Rent Plus Utility Allowance

Example B is the same as Example A except that it incorporates a dramatic rise in the cost of utilities to $150. The payment standard remains $710, and the tenant's income, the total lease rent for the property, and the utility allowance are all unchanged. In fact, the amount of money that the tenant and the PHA pay to the landlord also remains constant, as the change in actual utility costs has no effect on the PHA's calculations of the tenant rent charges. The negative impact of the increased utility costs is borne by the tenant's extra payments to the utility providers. After paying the $150 to the landlord, the tenant still must pay the $150 to the utility companies, thus paying $300 total for rent and utilities. This is 45 percent of the tenant's total income. Thus, in this example, the tenant must be afforded some relief in order to maintain the payments for the unit and keep

[23]Much of the information in this section is drawn, with permission, from work completed by Michael Hanley of Greater Upstate Law Project, Inc. Additional discussion is contained *at* www.gulpny.org/Housing/utility_Allowances.html.

[24]*See* 24 C.F.R. § 982.517 (2000).

[25]The PHA sets the payment standard at an amount that is no less than 90 percent of the published Section 8 fair market rents for an appropriately sized unit in the area, in effect on the date the payment standard is approved. *Id.* § 887.351(b).

[26]For the purpose of these examples, further assume that 30 percent of this household's adjusted gross income is greater than 10 percent of their gross income. Also assume that this family does not receive a welfare shelter allowance, and that 30 percent of the household's adjusted income is greater than the "minimum rent" set by the PHA.

[27]Throughout these examples, there are several possible causes for the tenant's actual utility costs exceeding the utility allowance. The unit may have poor thermal quality or there may be leaks; the base may be set too low or adjustments not made appropriately or quickly; or the tenant may just have an aberrant consumption of utilities. The assumption here is that the cause lies not with the tenant or problems with the unit, but with improperly set utility allowances for reasonable consumption in the unit.

up with utility bills and other living expenses. As demonstrated by the next example, there is only limited relief available by increasing the utility allowance within the current payment standard. Full relief requires both an increased utility allowance and an increase in the payment standard.

Example C: Utility Allowance Inadequate, but Higher; Payment Standard Equals the Sum of Total Lease Rent Plus Utility Allowance

Example C provides a clearly inadequate solution of raising the utility allowance from $50 to $60. With all the other numbers the same as in Example B, including the now too-high utility costs of $150, raising the utility allowance from $50 to $60 provides only the relief to the tenant one might expect: $10. The tenant will pay $140 ($200 minus the utility allowance of $60) to the landlord. The PHA will now pay $510 to the landlord to reach the total lease rent of $650. The tenant must still pay the $150 utility bill, however, for a total tenant payment of $290, or 43 percent of her adjusted gross income. Note that the total lease rent for the property ($650) plus the new utility allowance ($60), does not exceed the $710 payment standard in this example.

Example D: Utility Allowance Inadequate, but Higher; Payment Standard Less than the Sum of Total Lease Rent Plus Utility Allowance

Example D also provides a clearly inadequate solution by raising the utility allowance to $75. It is included to show the impact where the total lease rent ($650) plus the utility allowance (now $75) exceeds the $710 payment standard: here, the total lease rent plus utility allowance is $725. However, the tenant's payment to the landlord is not changed by this increase in the utility allowance because the PHA will only pay up to the level of the payment standard for a unit. The PHA's payment will remain $510—the payment standard ($710) minus the total tenant payment ($200). Thus, the tenant share remains $140 ($650 total lease rent minus the $510 from the PHA). The tenant must still pay the $150 to the utility providers, as well, for an actual cost to the tenant of $290, or 43 percent of her adjusted gross income. Note that now the PHA will consider the family share to be $215, the sum of the family's portion of the rent ($140) and the utility allowance ($75). Thus, this example shows that the additional increase in the utility allowance provides no benefit at all to the tenant because the increase caused the rent, plus utilities, for the unit to exceed the payment standard. Once the sum of the market rent plus the utility allowance reaches the payment standard, any further increase in the utility allowance provides absolutely no relief to the tenant. Only increasing both the utility allowance and the payment standard will help.

Example E: Utility Allowance Adequate; Payment Standard Less than the Sum of Total Lease Rent Plus Utility Allowance

Example E demonstrates that even increasing the utility allowance to equal the utility costs does not solve the problem for Section 8 Voucher holders because of the factors also present in Example D. If the utility allowance is raised to $150, the total lease rent ($650) plus the utility allowance ($150) for the property totals $800—significantly higher than the $710 payment standard. The PHA's payment to the landlord will remain at $510, the difference between the payment standard ($710) and the official total tenant payment ($200). Thus, the tenant still pays $140 ($650 total lease rent minus the $510 PHA payment) to the landlord, and the $150 to the utility providers, for a total of $290 actual costs, or that same 43 percent of adjusted gross income. Raising the utility allowance again provides no benefit to the tenant under these circumstances. Additionally, in this example, the increase in the utility allowance actually harms the tenant, because the PHA now considers the family share to be $290—the tenant's portion of the rent ($140) plus the utility allowance ($150). Since $290 is 43 percent of the tenant's adjusted gross income, a new tenant would be precluded from leasing-up this apartment.[28]

In the voucher program, increasing the utility allowance to accurately reflect utility costs only reduces the tenant's housing costs if the sum of the total lease rent plus the utility allowance does not exceed the payment standard.

Example F: Utility Allowance Adequate; Payment Standard Equal to the Total Lease Rent Plus Utility Allowance

Finally, Example F demonstrates that increasing the payment standard can fully alleviate the problem. If the utility allowance remains at $150, and the payment standard is increased to $800, the tenant's burden returns to 30 percent. The PHA's payment will now be $600 (the $800 payment standard minus the $200 total tenant payment). The tenant will pay $50 as rent to the owner ($650 total lease rent minus the $600 PHA payment), and $150 of utilities to the providers. The $150 utility allowance takes its full effect, as the actual family share is $200 ($50 rent to owner plus $150 in utility costs), or 30 percent of adjusted gross income. The PHA also will consider the family share to be $200 (the $50 to the landlord plus the $150 utility allowance), so a new tenant would no longer be precluded from renting the unit. Essentially then, the situation has come full circle to be equivalent of that in Example A.

To summarize, in the voucher program, increasing the utility allowance to accurately reflect utility costs only alleviates the tenant's housing cost burden to the extent that the sum of the total lease rent plus the utility allowance does not exceed the payment standard. Any further increase in utility allowance provides no benefit to the tenant, unless there is a corresponding increase in the payment standard. If both the payment standard and utility allowance are increased to appropriate levels, the tenant's rent burden is reduced to the

[28]24 C.F.R. § 982.305(a)(5)(2000)(establishing a 40-percent-of-income cap on tenant contributions for new tenancies).

intended, theoretically affordable level of 30 percent of adjusted gross income. Therefore, in many cases, additional funding to support necessary increases in the payment standard from the PHA, HUD or Congress must be provided.

Project-Based Section 8

Yet again, the problem varies slightly for project-based Section 8 tenants. If the units are master-metered and the utilities are included in the rent, the problem is similar to that in public housing master-metered apartments. Since the tenants are typically paying 30 percent of their income as their portion of the rent, regardless of the actual total rent for the property, master-metered tenants should remain relatively unaffected by the utility cost increase.

However, in the more common situation where each unit is retail-metered, the problem is similar to that discussed above regarding retail-metered public housing tenants. The tenant's rent contribution is based on 30 percent of adjusted gross income. First, however, the utility allowance is subtracted from that 30 percent figure to arrive at the tenant's portion of the rent. For example, if the tenant's adjusted gross income is $667, 30 percent of that is $200. If the utility allowance is $50, the tenant will pay $150 to the landlord, then pay the utility providers directly for electricity, gas, etc. If the rapidly rising utility rates have led to the actual cost of utilities being $150, the tenant would pay a total of $300, which is 45 percent of her income for rent plus utilities. Unlike voucher holders, however, project-based Section 8 tenants can be brought back down to paying 30 percent of their income through a simple raise in the utility allowance.

Both situations apparently present a potentially more complicated issue if the available subsidies under the contract are at or near exhaustion. The limits are apparently both the annual contract authority and the total budget authority obligated for the contract. The annual limit is established by the maximum annual commitment, which is the total of the contract rents and utility allowances for all assisted units in the project (plus administrative fees where the contract administrator is other than HUD).[29] To the extent that the total annual limit exceeds the actual payments made (e.g., due to tenant rent contributions), the balance goes to a project account[30] established and maintained by HUD. Any positive balance in the account could theoretically be used to cover increases in the allowances. If this account lacks sufficient funds to cover contract rent and utility allowance adjustments, HUD must take such steps as may be necessary, such as seeking amendment authority from Congress, "within a reasonable time" to assure that the account has sufficient funding to make all necessary payments.[31] Projects nearing the end of their original contract term may require amendment to obtain additional budget authority to enable them to complete their original term, due to total contract costs that were higher than the budget authority obligated at the outset. Thus, despite the regulatory requirements to request the approval of higher allowances, owners with low project account balances may be reluctant to do so if they believe that HUD will not seek, or Congress will not provide, amendment authority, or if they believe that the account balance will be needed for other project purposes.

Many PHAs and owners are not responding quickly—or at all—to the recent rapid rise in utility costs and are failing to raise utility allowances pursuant to the regulations.

Additionally, if owners desire special additional rent adjustments in order to raise sufficiently the subsidy levels to address rapidly rising utility costs, they must request such an adjustment from HUD and must submit to the contract administrator supporting data, financial statements and certifications.[32] Many owners may view this process as overly burdensome and thus may be slow to adjust the utility allowances, especially in the retail-metered buildings where the hardship falls on the tenants, rather than the owners themselves. Additionally, as discussed above, only when the utility rates change to such an extent as to result in a cumulative increase of 10 percent or more over the most recently approved allowances must the owner actually request the adjustment in allowances.[33]

The HUD Response to the Problem

Many PHAs and owners are not responding quickly—or at all—to the recent rapid rise in utility costs and are failing to raise utility allowances pursuant to the regulations. Additionally, HUD has been slow to react to the growing crisis and only recently began to provide incentives for owners and PHAs to increase utility allowances and payment standards to address the problem.

For conventional public housing, on March 19, 2001, HUD issued a notice announcing the first phase of utility

[29] *E.g., id.* § 880.503.

[30] *See, e.g., id.* §§ 880.503(b), (c).

[31] *Id.*

[32] *E.g., id.* § 880.609(b).

[33] *E.g., id.* § 880.610. Owners seeking annual contract rent adjustments are not mandated to adjust allowances, but only to submit a review. The utility allowance issue for vouchers that start out as "tenant-based" subsidies but later become "project-based" is different. Under amendments to the Section 8 statute passed last year, Section 232 of Pub. L. 106-377, amending 42 U.S.C.A. 1437f(o)(13)(West Supp. 2000), a PHA may now "project-base" up to 20 percent of its voucher allocation for particular rental units. The statute requires that the tenant's total rent share include an allowance for utilities. Consequently, the contract with the landlord for these units will set a fixed "gross rent." If the utility allowance goes up, the tenant's share should go down automatically and the assistance payment should increase. Although this may result in additional costs for the PHA's voucher program, to be reimbursed under HUD's renewal funding formula, revision of the PHA's payment standard for any increase in the allowance is apparently immaterial for these units. *See id.* § 1437f(o)(2)(C), and *HUD Guidance at* 66 Fed. Reg. 3605, *at* 3609 (Jan. 16, 2001).

Utility Allowances and Payment Standards Comparison for Section 8 Voucher Holders

Column Number	1	2	3	4	5	6	7	8	9	10	11	12
Summary of Situation[1]	**Utility Allowance**	**Actual Cost of Utilities**	**Total Rent to Owner without Utility Costs**	**Gross Rent** **(1+3)[2]**	**Payment Standard**	**Total Tenant Payment**	**Housing Assistance Payment** **(lesser of (4-6) or (5-6))[2]**	**Family Rent to Owner** **(3-7)[2]**	**Family Share per HUD[3]** **(8+1)[2]**	**Family Share[4] as % of Adjusted Income** **(9/$667)[2]**	**Actual Family Share** **(2+8)[2]**	**Actual Family Share as % of Adjusted Income** **(11/$667)[2]**
Example A: UA adequate; PS >UA+RTO	$50	$50	$650	$700	$710	$200	$500	$150	$200	30%	$200	30%
Example B: UA inadequate; PS >UA+RTO	$50	**$150**	$650	$700	$710	$200	$500	$150	$200	30%	$300	45%
Example C: UA inadequate, but improved; PS=UA+RTO	**$60**	$150	$650	$710	$710	$200	$510	$140	$200	30%	$290	43%
Example D: UA inadequate, but improved; PS<UA+RTO	**$75**	$150	$650	$725	$710	$200	$510	$140	$215	32%	$290	43%
Example E: UA adequate PS<UA+RTO	**$150**	$150	$650	$800	$710	$200	$510	$140	$290	43%	$290	43%
Example F: UA adequate PS=UA+RTO	$150	$150	$650	$800	**$800**	$200	$600	$50	$200	30%	$200	30%

Legend

UA = utility allowance

UA Adequate = utility allowance is equal to or greater than the actual costs of utilities

UA Inadequate = utility allowance is less than the actual cost of utilities

PS = payment standard

RTO = total rent to owner

Footnotes

[1]The following applies to each of the examples in this chart:

(a) The dollar amounts shown in columns 1-3 and 5 are all hypothetical. The dollar amount and percentages in all other columns are calculated using the hypothetical amounts. Only one hypothetical amount is changed in each example. That number appears in the shaded boxes within the table;

(b) The household's monthly adjusted income is assumed to be $667, hence 30 percent of income is equal to $200 (see, column 6);

(c) Thirty percent of household adjusted gross income is greater than 10% of gross income, the household is not receiving a welfare shelter allowance and 30 percent of the household's adjusted income is greater than the "minimum rent" set by the PHA;

(d) The household's Total Tenant Payment (column 6) is greater than of any of the utility allowances, thus, there is no utility reimbursement from the landlord to the tenant (see, 24 C.F.R. §§ 982.514 and 982.4) and the total HAP will equal the HAP payment to the owner.

[2]The numbers in the parentheticals in this column and those in columns 7-10 refer to the columns in this table. The parenthetical itself describes the calculation that was made to arrive at the numbers in each of these columns.

[3]This is the family share as it would be calculated by the PHA.

[4]This the actual amount of money the family is paying for rent and utilities.

subsidy for public housing.[34] In this first phase, HUD made $50 million available to PHAs with fiscal years ending June 30, 2001 and September 30, 2001. These PHAs were permitted to submit revised budgets to HUD to reflect increased utility costs. In order to qualify, PHAs had to demonstrate that their current utility rates were at least 20 percent higher than those used in the original calculations and that the PHA could not absorb the extra costs. The likely effect of this notice is that it will help those PHAs with master-meters and/or common areas for which they pay the utilities. The notice, however, provides no incentive to PHAs to increase their utility allowances, thus leaving the PHAs themselves, rather than the tenants, as the greatest beneficiaries of the notice.

Acknowledging that owners of Section 8 properties will usually need to request rental adjustments to cover increased utility costs, on April 20, 2001, HUD also issued a *Guidance* for field offices to use when owners request these adjustments.[35] HUD clarified some issues from this *Guidance* with a *Frequently Asked Questions* (FAQ) posted on HUD's Web site in June 2001.[36] The *Guidance* suggests that HUD will provide one-time, emergency utility cost relief for units governed by a HAP contract that has been renewed under the *Multifamily Assisted Housing Reform and Affordability Act* (MAHRAA).[37] These are properties where HUD has made short-term funding commitments, usually of one year. Subject to Section 8 funding availability, owners may submit requests to HUD to receive a one-time lump sum amount to cover increases in utility costs that occurred between September 1, 2000 and March 31, 2001. HUD encourages such owners to submit their requests by July 31, 2001, but the absolute deadline for the requests is September 28, 2001.[38] The owners also must first certify that they do not have any other available sources of funds.[39] The properties must also be acceptably managed and the owner must be in good standing with HUD.[40] This particular form of relief will assist only owners, not tenants, because it only covers owner-paid utility charges, not tenant-paid utility charges. Additionally, if HUD has established that a property has rents above comparable market rents and has referred it to the Office of Multifamily Housing Assistance Restructuring, the property is not eligible for the lump-sum emergency payment.

The *Guidance* also addresses units that are without HAP contracts or with HAP contracts that have yet to be renewed under MAHRA. Such units where the rents are adjusted by the budget-based method must follow the preexisting guidance found in Chapter Seven of *HUD Handbook 4350.1* or *Notice 99-13.* In short, if the owner wishes to increase the rents to a level less than or equal to the Maximum Allowable Rent Potential, owners need only submit a new Rent Schedule 92458.[41] If the proposed increase is in excess of the Maximum Allowable Rent Potential, the procedures outlined in 24 C.F.R. § 245 apply, and the owner must issue a notice to the tenants if proposing to raise the rent in a budget-based development. The tenants must then have an opportunity to comment on the potential increase.[42]

For owners of properties whose initial long-term Section 8 contracts have not yet expired[43]—where rents are adjusted by the *Automatic Annual Adjustment Factor*[44]—the *Guidance* notes that there are no changes to the procedures for owners to request rent increases based on increased utility costs. The owners must again submit such a request to HUD pursuant to HUD procedures.[45]

Contracts for properties with Rent Supplement and RAP contracts that are insured by the Federal Housing Administration (FHA) cannot be amended, thus HUD cannot provide similar relief to such properties. In its April 20, 2001 *Guidance*, HUD suggests that contracts for properties that are not FHA-insured can be amended and that the agency "is investigating the possibilities" for addressing the utility allowance problem.[46]

For tenant-paid charges in retail-metered units, the owners must submit up-to-date utility surveys to HUD in order to adjust the utility allowances.[47] Nowhere does the *Guidance* directly mention the mandatory utility allowance adjustments when utility rates change to such an extent as to result in a cumulative increase of 10 percent or more over the most recently approved utility allowances, as discussed above. The incentive, then, is for owners to request funds first to provide themselves with relief, and second (if at all) to provide relief for tenants. It is unknown at this time how many PHAs and owners have taken or will take advantage of the lump sums offered through these recent HUD issuances.

Most recently, HUD issued an Interim Rule to address the Section 8 voucher holders' utility allowance/payment standard problem discussed above.[48] The Interim Rule provides for temporary HUD approval of exception payment standards of 110 percent to 120 percent of FMR (without requiring the PHA to seek HUD approval) for certain PHAs

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[34]PIH 2001-09 (HA), *Funding of Dire Emergency Utility Costs in the Low Rent Public Housing Program,* (Mar. 19, 2001).

[35]*Memorandum for Multifamily Hub Directors et al.* from Sean G. Cassidy, General Deputy Assistant Secretary for Housing, re: *Guidance for Processing Rental Adjustments for Escalating Energy Costs* (Apr. 20, 2001) (hereafter *HUD Guidance*).

[36]*At* www.hud.gov/fha/mfh/exp./faq_energy.pdf.

[37]*Multifamily Assisted Housing Reform and Affordability Act of 1997;* Title V of Pub. L. No. 105-65 (Oct. 27, 1997).

[38]*Id.*

[39]*Id.*

[40]*HUD Guidance at* 5 (Apr. 20, 2001).

[41]*HUD Handbook 4350.1*, Rev. 1, Ch. 7, § 7-21 (Jan. 23, 1996).

[42]*Id.*

[43]*E.g.*, long-term contracts for new construction pursuant to 24 C.F.R. § 880 (2000), whose 20-year terms have not yet expired.

[44]*See e.g.*, *id*. § 880.609. *See also id*. § 880, Subpt. B for regulations on annual adjustment factors.

[45]*Id. See HUD Handbook 4350.1*, Ch. 7.

[46]*HUD Guidance at* 5 (Apr. 20, 2001).

[47]*Id.*

[48]*Exception Payment Standard to Offset Increase in Utility Costs in the Housing Choice Voucher Program*; Interim Rule, 66 Fed. Reg. 30,565 (June 6, 2001) (to be codified at 24 C.F.R. Part 982).

that have adopted a new utility allowance schedule after October 1, 2000. Prior to the issuance of this Interim Rule, PHAs were only permitted to raise the payment standards to 110 percent of FMR without HUD approval.[49] In order to qualify for the new exception payment standards, the PHA's current payment standard amounts must be inadequate to cover the increased utility costs at 100 percent of FMR.[50] The PHA must also determine whether there has been a recent increase in utility costs of 10 percent or more and determine that the increase is reflected in the utility allowance schedule adopted by the PHA after September 30, 2000. Additionally, HUD will calculate these exception payment standards using new rental data[51] with the result that the new payment standards will account for recent substantial increases in energy costs and more accurately reflect the FMRs for the area. As demonstrated in Example E in the chart, and discussed above, raising the utility allowance to an appropriate level alone without the increase in payment standards provides little or no benefit to the tenant who pays her own utility bills. This rule, permitting the increase of the payment standards without having to seek HUD approval, will hopefully produce situations more similar to Example F, where both the utility allowance and the payment standard are set at appropriate levels. But even with this new rule, PHAs may be reluctant to increase payment standards because they may have to use their reserves to pay the higher payment standards and they may lack the confidence that HUD will provide eventual reimbursement through the second-year renewal formula.[52]

Conclusion

Considering that energy costs have continued to rise, these issues are likely to be at the center of debate for some time. HUD has started to respond to the crisis in a way that seems to alleviate some of the pressure on PHAs and owners, but not tenants. Advocates and tenants must remain active in their efforts with HUD, PHAs owners and Congress to identify problems and take responsive action to ensure compliance with the statutory and regulatory framework. The *Bulletin* will continue to closely monitor new developments, and publish updates in the months to come. ■

[49]24 C.F.R. § 982.503(b)(2000).

[50]66 Fed. Reg. 30,566 (June 6, 2001) (to be codified at 24 C.F.R. § 982.503(b)(2)(D) (2002).

[51]Data published at 66 Fed. Reg. 23,770 (May 9, 2001).

[52]*See Tenant-Based Section 8 Renewal Rule and Section 8 Vouchers: Effect of Payment Standard at 90 Percent, 100 Percent and 110 Percent of Fair Market Rent*, 30 HOUS. L. BULL. pp. 4-9 (Jan. 2000).

Public Housing Community Service Policies: Requirements and Advocacy Tips

The Quality Housing and Work Responsibility Act of 1998 (QHWRA) requires all adult residents of federally funded public housing, unless exempt, to perform community service activities, participate in economic self-sufficiency activities or work. Nonexempt residents must fulfill eight hours per month or a total of 96 hours per year of public housing community service.[1] All PHAs whose fiscal year began after October 2000 are required to implement the community service policy and to include a description of that policy in their Annual Plans.[2] This article reviews the community service requirements and makes suggestions regarding policy decisions that may arise when PHAs are adopting, revising or implementing the community service requirement.

Activities that Qualify as Community Service

Public housing community service is defined as voluntary work for the public benefit that improves the quality of life, enhances self-sufficiency, or increases resident self-responsibility in the community.[3] Participation in an economic self-sufficiency program also fulfills the community service requirement.[4] HUD defines an economic self-sufficiency program as:

> [a]ny program designed to encourage, assist, train, or facilitate the economic independence of HUD-assisted families or to provide work for such families. These programs include programs for job training, employment counseling, work placement, basic skills training, education, English proficiency, workfare, financial or household management, apprenticeship, and any program necessary to ready a participant for work (including a substance abuse or mental healthy treatment program) or other work activities.[5]

Community Service is not limited to a particular type of activity or location[6] and may include volunteer work at a school, nonprofit, hospital, child care or youth center. Working with neighborhood groups also qualifies as community service.

[1]42 U.S.C.A. § 1437j(c)(West Supp. 2000).

[2]24 C.F.R. § 960.600 (2000). A PHA may not implement the community service requirement prior to the approval of its Annual Plan. A PHA cannot implement the community service provision prior to the start of its fiscal year after October 2000 without complying with the provisions found at 24 C.F.R. § 903.21 regarding a significant amendment to the PHA's current Annual Plan. 24 C.F.R. § 903.21 (2000); *Admissions and Occupancy Frequently Asked Questions*, IV Q1, Feb. 5, 2001, *Available at* www.hud.gov/pih/legis/ao_faq.pdf (herein after referred to as FAQ).

[3]24 C.F.R. § 960.601 (2000).

[4]*Id.* A tenant may perform a series of activities to fulfill the community service requirement. 65 Fed. Reg. 16,692, 16,710 (Mar. 29, 2000).

[5]24 C.F.R. § 5.603 (2000); 42 U.S.C.A. § 1437j(g)(West Supp. 2000).

[6]42 U.S.C.A. § 1437j(c)(6)(West Supp. 2000).

Community service does not have to be performed at the public housing site. However, a PHA may sponsor community service opportunities or make them available through a contractor.[7] Opportunities that a PHA may provide include the full range of education/training programs, job skill programs and volunteer work.

HUD encourages PHAs to work with resident councils to implement the community service requirement by identifying activities that meet the community service requirement and increase the capacity of the resident organization.[8] Activities may include passing out fliers for meetings, making telephone reminder calls, providing child care for residents who attend resident meetings, working to maintain the resident office, attending organizing classes, and attending tenant organization meetings.

A PHA cannot require a resident to perform more than eight hours of community service per month[9] except when the resident has not complied with the requirement during the prior 12-month period. In that case, the resident, as well as any member of the resident's family who has not complied with the requirement, must enter into an agreement to complete the unfinished community service in the next 12-month period, during which the resident must also complete any new community service obligations.[10]

Advocates should encourage PHAs to provide tenants, through postings and individual distributions, a list of acceptable community service activities, the groups that sponsor the activities and ways to contact them.[11] The list of acceptable activities should include a broad range of placements and activities that are appropriate for persons with disabilities and limited English proficiency. If these individuals are not exempt, they should be assisted in carrying out their community service activities.

In addition, PHAs should be encouraged to create a system that allows tenants to request and receive prompt approval, or disapproval, for community service activities that are not already identified by the PHA.[12] A simple form, to be completed by tenants or providers of community services, could be created for this purpose.

Public housing community service may not include political activities or work ordinarily carried out by a PHA employee.[13] Political activities are not defined in the HUD regulations. PHAs should, therefore, be encouraged to define political activities narrowly. They should be limited to partisan political activities on behalf of candidates for public office or on behalf of a political party. They should not include activities related to the election of members or officers to the local tenants' organization. Activities such as legislative or administrative advocacy before Congress, state and local legislators and/or administrative agencies for increased funding or administrative changes to the public housing program that will benefit all or a substantial number of public housing residents should also qualify for community service.

There is no federal requirement governing when the community service work must be performed as long as it is completed within the year. HUD urges PHAs to allow tenants who cannot perform the service monthly to complete the requirement within a reasonable time frame.[14] A PHA's community service policy should allow community service to be performed over various time intervals, such as all at one time (e.g., over a two or three-week period) or monthly over a 12-month period.

Which Public Housing Residents Are Exempt from the Community Service Requirement?

Residents of public housing are exempt from community service if they are:[15]

- elderly (62 years of age or older);[16]
- blind or disabled and certify that they are unable to comply with the service requirements;[17]
- a primary caretaker of a blind or disabled person even if the blind and disabled person is not a resident of public housing;
- engaged in work activities;
- exempt from the work requirements of a state welfare program, including Welfare-to-Work (e.g., in many states pregnant women are exempt from work requirements for a period of time);[18] or

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[7] *Id.* at § 1437j(c)(8)(West Supp. 2000); 24 C.F.R. § 960.605(b)(2000).

[8] 65 Fed. Reg. 16,692, 16,710 (Mar. 29, 2000); *See also* 42 U.S.C.A. § 1437j(c)(8)(West Supp. 2000).

[9] 65 Fed. Reg. 16,692, 16,710 (Mar. 29, 2000).

[10] 42 U.S.C.A. § 1437j(c)(3)(C)(ii)(West Supp. 2000); 24 C.F.R. § 960.607 9(c)(2000).

[11] 65 Fed. Reg. 16,692, 16,709 (Mar. 29, 2000).

[12] *Id.*

[13] 42 U.S.C.A. § 1437j(c)(7)(West Supp. 2000); 24 C.F.R. § 960.601 (2000).

[14] 65 Fed. Reg. 16,692, 16,710 (Mar. 29, 2000).

[15] 42 U.S.C.A. § 1437j(c)(2)(West Supp. 2000); 24 C.F.R. § 960.601 (2000).

[16] Any tenant who is subject to the community service requirement who is 61 years old at the time of the determination of nonexempt status should also be exempt as that person will turn 62 during the next 12 months and become prospectively exempt by virtue of his or her age. As noted below, the PHA community service policy ought to be that if the resident becomes exempt at any time during the 12-month lease period, the resident's exemption should be retroactive to the beginning of the lease term for which eligibility was determined.

[17] The definition of a "blind or disabled person" is found in sections 216(i)(1) and 1614 of the *Social Security Act*. 42 U.S.C.A. §§ 416(i)(1) and 1382c (West Supp. 2000). 24 C.F.R. § 960.601(b)(Exempt Individual).

[18] Congress recognized that the community service requirements would be coordinated with the state welfare agency exemption requirements. In the legislative history, it noted that "the welfare reform law prohibits states from penalizing a single parent caring for a child under 6 for refusal to work if the parent is able to prove that child care was unobtainable. States can also exempt single parents who are caring for a child under 12 months of age. Lastly, State funded only programs could have additional exemption requirements." S. Rep 21, 105 Cong., 1st Sess. 24 (1997).

- members of a family which receives Temporary Assistance for Needy Families (TANF) assistance and have not been found to be in noncompliance with TANF or other work requirements.[19]

HUD defines "work activities" as those activities found in section 407(d) of the *Social Security Act*.[20] These activities include:[21]

- unsubsidized employment;
- subsidized private-sector employment;
- subsidized public-sector employment;
- work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;
- on-the-job-training;
- job-search and job-readiness assistance;
- community service programs;
- vocational educational training (not to exceed 12 months with respect to any individual);
- job-skills training directly related to employment;
- education directly related to employment in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;
- satisfactory attendance at a secondary school or in a course of study leading to a certificate of general equivalence (in the case of a recipient who has not completed secondary school or received such a certificate); and
- the provision of childcare services to an individual who is participating in a community service program.

HUD guidance makes it clear that the list of work activities is exclusive to HUD and that the PHA may not adopt additional requirements, such as adding a qualifier as to the number of hours required of each activity.[22]

PHAs determine whether or not a resident is exempt and the determination process may be contracted out to a third party. Exemptions will vary from state to state depending upon the local welfare rules. State welfare departments may be involved in verifying whether a resident is exempt from work activity under the state welfare program. The vast majority of adult public housing residents should be exempt from the community service requirement because they are working, elderly or disabled. Disabled residents who receive Supplemental Security Income (SSI) may self-certify that they cannot comply with the service requirements.[23] A stay-at-home mother is not exempt from the community service requirement.[24] However if the state welfare law provides, for example, that a mother of children under a certain age is exempt from work requirements, any resident meeting the state definition would be exempt.

Advocates and tenants should work with PHAs and state welfare departments to develop a checklist to ensure that PHAs identify all classes of individuals who are exempt from the community service requirement. HUD suggests that PHAs include the determination of welfare status in the cooperation agreements that they enter into with the local welfare agency.[25]

PHAs must give residents notice of the community service requirement, the exemptions, and the PHA's process for verifying a resident's status.[26] In addition, PHAs must identify family members who are subject to the requirement or are exempt.

PHAs' Notice to Residents of the Community Service Obligation and Determination of Exempt or Nonexempt Status

PHAs must give residents notice of the community service requirement, the exemptions, and the PHA's process for verifying a resident's status.[26] In addition, PHAs must identify family members who are subject to the requirement or exempt.[27]

Tenants who must fulfill the community service requirement should be notified of their nonexempt status prior to the commencement of their obligation. The notice should be timed so that the resident has a full 12 months within which to meet the obligation.

Each PHA must include in its annual plan how it intends to implement the community service requirement, including whether implementation of the requirement will be coordinated with the family's annual reexamination.[28] To ensure that the family has a full year's notice of the community service obligation, the best time to implement the requirement is likely to be during the annual recertification process. At that time,

[19]It is important to note that if any member of a family (*i.e.* part of the household) receiving assistance, benefits or service under TANF or any other state welfare program, all members of the family are exempt. It is not necessary for the particular individual claiming the exemption to be receiving the public assistance or to be a member of the "TANF or welfare assistance unit." 24 C.F.R. § 960.601(b)(2000).

[20]42 U.S.C.A. § 607(d); *see* 24 C.F.R. § 5.603 (2000).

[21]FAQ, IV, Q7.

[22]*Id*. (HUD also declined to add to the regulations a suggestion that tenants be required to verify that they applied for employment in three different locations each week. 65 Fed. Reg. 16,692, 16,711 (Mar. 29, 2000)).

[23]24 C.F.R. § 960.601(b)(Exempt Individual), 65 Fed. Reg. 16,692, 16,711 (Mar. 29, 2000).

[24]FAQ, IV, Q9.

[25]65 Fed. Reg. 16,692, 16,711 (Mar. 29, 2000).

[26]24 C.F.R. § 960.605(c)(2000).

[27]*Id.*

[28]FAQ, IV, Q6.

the obligation of each family should be established and the head of the household, as well as all adult members, informed of those obligations.

Advocates should make sure that PHAs' community service policies provide that all members of a household receive adequate notice of the status of each family member. This may include an initial notice 12 months in advance and reminders throughout the year. It is especially important that all members of the household, especially the head of household, are aware of the obligation and the status of each family member because the family may be evicted for the failure of any one member to comply with the requirement. Alternatively, the noncomplying family member may be excluded from the public housing unit. The PHA's community service policies must also describe the process for determining any changes to the exempt or nonexempt status of family members.[29]

PHAs' policies for addressing the changes to the exempt and the nonexempt status of tenants should provide that if a nonexempt member of the family becomes exempt during the lease term, he or she should be exempt for the entire year. As a corollary, if a tenant is determined to be exempt initially, he or she should not be required to report a change in circumstances prior to the next recertification.[30] For example, if a family member is unemployed and is determined to be subject to the community service requirement but subsequently becomes employed or enters a training program, that individual should be exempt from the community service requirement for the term of the lease, which is 12 months.

Likewise, if a tenant is exempt because of employment or participation in a training program and the tenant's employment status changes, that individual should not be required to report the change for the purpose of redetermining community service obligations. Such a policy has the advantage of being simple to administer. Overall, the policy encourages work and efforts to engage in economic self sufficiency by eliminating any community service requirement that might interfere with these efforts. It also recognizes that work and economic self-sufficiency efforts may not always be consistent or within the tenant's ability to control. Accordingly, such a policy does not require community service when a tenant has worked or participated in an economic self-sufficiency program that may terminate within a 12-month period.

Verification of Residents' Community Service Activity

PHAs must review a family's compliance with the community service requirement at least annually.[31] The review and verification must occur at least 30 days prior to the end of the 12-month lease and the verification must come from a third party. Self-certification is not acceptable to prove that the resident complied with the requirement.[32]

The verification process for both exempt status and compliance with the community service obligation should be as simple as possible to minimize the PHA's paperwork, the resident's burden and the documentation burden of any organization to which the resident provides volunteer services or which administers an economic self-sufficiency program. For households receiving TANF, PHAs should adopt a verification policy that recognizes that TANF agencies do not typically report families as being in compliance with TANF work requirements. Indeed, TANF agencies routinely report that a family is in non-compliance with the work requirements and then reduce the family's benefits. In recognition of this practice, PHAs should adopt a policy that makes residents automatically exempt from community service requirements whenever they are receiving TANF assistance and have not received a notice from the TANF program that they are not in compliance with that program's work requirement.[33] Once the family is determined to be in compliance, all family members are exempt from the community service requirements.[34] This policy has the added advantage that it may be the simplest and least burdensome to administer.

A PHA's Determination that a Resident Is not in Compliance with the Community Service Requirement

Thirty days before the end of the tenant's 12-month lease term, PHAs must review and determine the compliance of each family member who is not exempt from the community service requirement.[35] If the PHA determines that there is a family member who is in violation of the community service requirement, the PHA must notify the head of household and should notify the noncompliant family member. The notice should:

- briefly describe the noncompliance. The description should identify the noncompliant family member and the basis of the determination. For example, the description could state that the named family member has documented only some of the required community service hours required;
- notify the recipients that the lease will not be renewed at the end of the 12-month period as a result of the noncompliance unless there is a written agreement with the head of household and the noncompliant family member (if it is someone other than the head of household) to correct the noncompliance or a written statement that the resident or noncompliant family member has moved out; and
- advise the head of household or other adult member that there is a grievance procedure that they may use to contest the noncompliance decision or any decision to terminate the tenancy.

[29]24 C.F.R. § 960.605(c)(2000).

[30]Boston Housing Authority, Community Service Policy (no date).

[31]24 C.F.R. § 960.605(c)(3)(2000).

[32]65 Fed. Reg. 16,709 (Mar. 29, 2000).

[33]65 Fed. Reg. 16,692, 16,711 (Mar. 29, 2000).

[34]24 C.F.R. § 960.601(b)(2000).

[35]*Id.* § 960.605(c)(3).

If, after the notification, the PHA continues to believe that the community service requirement has been violated, it may not renew the lease at the expiration of the term unless the head of household and any other noncompliant family member enters into an agreement with the PHA to complete the overdue community service in the following 12-month period.[36]

Lease Amendments

Residents' leases must be amended to:

- extend the term of the lease to 12 months;
- state that the failure of a family member to comply with the community service requirement is grounds for nonrenewal of the lease; and
- state that the termination of tenancy, for non-compliance with the community service requirements, may occur only at the end of the 12-month lease period.[37]

Moreover, PHAs that begin to implement community service policies and require residents to sign leases before the approval of their Annual Plans must include a clear statement in their leases that the community service requirement does not become effective until approval of the Annual Plan.[38]

Advocates should ensure that the lease also provides for a written notice to the head of household and each adult family member of the exempt or nonexempt status of the resident and each adult family member. In addition the lease should include the notice provisions described above. Advocates should also make sure that the notice of termination for failure to comply with the community service requirement should be, at least, a 30-day written notice sent separately to the resident head of household and the noncomplying adult member. It should provide an opportunity for the resident or noncompliant member to correct the noncompliance and inform both parties of the availability of the grievance procedure. The notice should also inform both that if the noncompliant member moves out, the remainder of the family may continue in occupancy.

What Information Must Be Included in the PHA Plan?

PHAs are not required to submit their complete policy regarding the administration of the community service requirements (pursuant to 24 C.F.R. § 960.605) as part of their Annual Plan. Rather, the description in the plan may be abbreviated to one page or less.[39] However, it must address the administrative steps being taken to implement the community service requirement, such as:[40]

- when scheduled changes will be made to leases;
- when a written description of the service requirement will be made;
- when written notification will be made to the residents regarding the community service requirement and the status of each adult family member;
- when cooperative agreements with TANF agencies will be entered into to assist the PHA in verifying residents' status; and
- whether the PHA or another entity will administer the program.

In addition the plan must include the programmatic aspects of the requirements such as:

- the types of activities that residents who are subject to community service requirements may participate in to fulfill their obligations;
- which partner-agencies may offer residents the opportunity to fulfill the requirements; and
- the process for correcting noncompliance.

Although PHAs may submit an abbreviated version of their community service requirement in their PHA plan, the full policy on the administration of the community service requirements must become a supporting document of the PHA Plan. As a supporting document, the policy should be available to the public and subject to review and comment.

Resident Councils' Role

Resident councils may partner with PHAs to make community service opportunities available. If a resident council makes such opportunities available, it must document the services provided by each nonexempt tenant and verify the community service to the PHA. Resident councils may also work with Resident Advisory Boards (RABs) to ensure that the community service policies comply with all of HUD's regulatory requirements and address the issues that are not covered by the regulations but need clarification to avoid future problems.

Because the community service requirement must be incorporated into resident leases, resident councils and residents must be given a 30-day notice whenever there is a change in the resident lease. As part of the process, residents and resident councils are given an opportunity to comment on the proposed changes and the PHAs must consider those comments. Resident council should, therefore, actively review changes whenever they are proposed and make comments when appropriate. ■

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[36] *Id.* at § 960.607(c)(2000). During the subsequent 12 months, the tenant may also have to comply with another 96 hours of community service.

[37] 24 C.F.R. §§ 966.4(1)(2)(iii) and 960.603(b)(2000).

[38] FAQ, IV, Q 6.

[39] *Exemption for High-Performing and Small PHAs Completing Streamlined Plans*: Public housing high-performers and small PHAs are not required to complete the community service component of the PHA Plan template and thus need not submit anything to HUD with respect to the community service requirement. However these PHAs are still required to implement the community service requirements, develop a policy on administration of community service requirements, and make that policy a locally available supporting document to the PHA Plan. HUD Notice PIH 2000-43 (Sept. 18, 2000), Attachment A, ¶ 6, at 10.

[40] HUD Notice PIH 2000-43 (Sept. 18, 2000), Attachment A, ¶ 6, at 10.

Screening and Eviction for Drug Use and Other Criminal Activity in HUD-Assisted Housing

Introduction

On May 24, 2001, HUD published the final rule on "one-strike" policies implementing the Quality Housing and Work Responsibility Act of 1998 (QHWRA) amendments pertaining to the screening and eviction of, and termination of benefits for, tenants of federally assisted housing.[1] The regulations provide that public housing authorities (PHAs) and project owners may deny admission for criminal activity or drug abuse and must deny admission to applicants for certain types of activity. In the case of evictions, the regulations provide that drug possession (use or sale), other criminal activity or abuse of alcohol are grounds for eviction from federally assisted housing.

The regulations make distinctions between actions that PHAs and owners are required to take and those that are discretionary. Distinctions are also made between the programs because the regulatory provisions are not always applicable to every program.[2] Distinctions are also made between what is authorized or required for the termination of subsidy versus eviction in the Section 8 moderate rehabilitation and voucher programs. Depending upon the nature of the offending activity, a tenant may or may not be held responsible for the acts of household members and/or guests or others under the tenant's control.

This article provides an overview of the regulations and highlights some of the changes from prior laws. These changes focus on the requirement that housing providers adopt certain standards governing the admission and eviction of tenants and act to deny admission or evict them in specific cases, while restating and clarifying HUD's position on "one-strike" evictions, which holds tenants responsible for the conduct of others.

Screening for Admission

The Scope of the Regulations

The regulations cover a spectrum of admission issues including the standards that must be applied and the process for obtaining information. In general, applicants may be rejected if they have engaged in drug-related criminal activity, other criminal activity, or alcohol abuse. Applicants must be denied admission, either for a period of time or permanently, if they have been evicted from any federally assisted housing for drug-related criminal activity, are registered, lifetime sex offenders or convicted of methamphetamine production.

The regulations also set forth guidelines regarding PHA access to an applicant's records regarding criminal conviction, sex offender status, and drug rehabilitation.

Applicants Convicted of, or Evicted for, Drug-Related Activity

There is a mandatory three-year ban on admission for families if any member of the applicant household has been previously evicted from any federally assisted housing for drug-related criminal activity. Applicants for all federally assisted housing are affected by this ban.[3] However, the PHA or owner may admit the household if the previously evicted household member who engaged in drug-related activity has successfully completed an approved, supervised drug rehabilitation program, or the circumstances leading to the eviction no longer exist ("for example, the criminal household member has died or is imprisoned").[4] The regulations authorize owners and PHAs to extend the ban beyond three years at their discretion.[5] If any member of the household

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[1] 66 Fed. Reg. 28,776-28,806 (May 24, 2001)(*Screening and Eviction for Drug Abuse and other Criminal Activity*). The regulations are effective June 25, 2001. The proposed regulations are found *at* 64 Fed. Reg. 40,262, 40,280 (July 23, 1999) (*"One-Strike" Screening and Eviction for Drug Abuse and Other Criminal Activity*). *See* QHWRA, Pub. L. No. 105-276, 112 Stat. 2518, §§ 575-579 (1998). Hereinafter all citations to the *Federal Register* will only list the section of the regulation that is affected. Each section cited will ultimately be codified in 24 C.F.R. (2002).

[2] In general there are separate regulations for federally assisted housing (*see* §§ 5.850-5.861), public housing (*see* §§ 960 and 966) and the Section 8 Moderate Rehabilitation (*see* § 882) and voucher programs (§ 982). For Section 8 Moderate Rehabilitation housing, it appears that there may be two sets of regulations that govern (§§ 5.850-5.861 and 882). The PHA administration of the Section 8 Moderate Rehabilitation program is governed by § 882. Although the regulations for the various programs are often identical, there are occasional important distinctions which are noted in this article. The term "federally assisted housing" is defined broadly in § 5.100 to include practically all federally assisted rental housing. At the same time, however, the regulations pertaining to specific programs do not always apply to all the programs included in the § 5.100 definition. For example, the §§ 5.850-5.861 regulations are not applicable to public housing, tenant-based Section 8, or housing assisted by the Rural Housing Services (RHS) under Sections 514 or 515 of the *Housing Act of 1949* (§ 5.850). In fact, with the following two exceptions, the regulations are not at all applicable to RHS housing: (1) the provisions regarding termination of tenancy for criminal activity and alcohol abuse are applicable to Section 514 or 515 projects that have Section 8 housing assistance payment contracts pursuant to the New Construction Set-Aside Program (§ 884.216); (2) the regulations appear applicable to tenants in Section 514 and 515 housing that are assisted by the Section 8 Tenant-based assistance programs (see amendments to § 982 *et. Seq.* 66 Fed. Reg. 28,804-6).

To avoid confusion in this article, "federally assisted housing" is used to refer to housing covered only by §§ 5.850-5.861; if a broader coverage is intended, the other housing programs are enumerated or the reference to federally assisted housing is preceded by "all" or "any."

[3] §§ 5.854(a)(federally assisted housing, excluding RHS Sections 514 and 515 housing, *see id*. § 5.850(c)); § 882.518(a)(1)(i)(Section 8 moderate rehabilitation); § 960.204(a)(1)(public housing); § 982.553(a)(1)(i)(Section 8 voucher).

[4] *Id*. HUD declined to expand the list of examples, preferring to allow PHAs and owners the discretion of determining when "circumstances leading to eviction no longer exist." 66 Fed. Reg. *at* 28,779; 42 U.S.C.A. § 13,661 (West Supp. 2000).

[5] § 5.852(d)(federally assisted housing); §§ 960.203(c)(3)(ii), 966.4(1)(5)(vii)(e) (public housing). HUD justifies this extension on the grounds that the regulations allow the establishment of a "reasonable period, which may vary [for example] depending upon the type of drug-related criminal activity involved." 66 Fed. Reg. *at* 28,779.

has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of any federally assisted housing, PHAs must deny the household admission to public housing and the Section 8 voucher and moderate rehabilitation programs permanently. This ban does not apply to applicants for other federally assisted housing.[6]

Applicants Who Have Engaged in "Other" Criminal Activity

For all federally assisted housing, except public housing, the regulations establish new guidance on admission policies that may be used to deny housing to applicants based on other criminal activity which a household member is currently engaging in, or has engaged in during a reasonable period of time before the admission decision.[7] The activities covered include drug-related criminal activity, violent criminal activity[8] , and other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.[9] It also includes criminal activity that would threaten the health or safety of the owner, property management staff, or persons performing a contract regarding the operations, or, where applicable, PHA staff.[10]

The term "reasonable time" is not defined in the regulations. HUD suggests that "five years may be reasonable for serious offenses" and suggests that PHAs and owners may want to differentiate what is a reasonable period for different categories of criminal activity. Ultimately, however, the final determination is up to the local decision-makers.[11]

The term "currently engaged in" is defined to mean the individual has engaged in "the behavior recently enough to justify a reasonable belief that the individual's behavior is current."[12] For applicants who have been previously denied admission for "other criminal activity," the regulations specifically authorize PHAs and owners to reconsider an applicant if there is evidence that the household has not engaged in criminal activity for a reasonable time as determined by the PHA or owner.[13]

Access to Criminal Records

The final rule authorizes PHAs to obtain adult[14] criminal conviction records from law enforcement agencies for the purpose of preventing the admission of criminals to public housing and project and tenant-based Section 8 housing.[15] The regulations, which also prescribe the procedural requirements that PHAs must follow in obtaining the records, are only applicable to criminal conviction record searches under the authority of section 6(q) of the *United States Housing Act of 1937*[16] and under the authority of 42 U.S.C.A § 13633. The regulations, and thus the procedural requirements, do not apply to any criminal conviction information searches, whether by a PHA or others, or to searches for arrest records, where such information searches are authorized by other laws. These regulations also do not apply to information received by a PHA from other sources.[17] Thus, information that a PHA may obtain from an agency that performs tenant screening searches, information from the news media or information obtained in accordance with state law procedures is not subject to the restraints of these regulations.

The final rule authorizes PHAs to obtain adult criminal conviction records from law enforcement agencies for the purpose of preventing the admission of criminals to public housing and project and tenant-based Section 8 housing.

PHAs may collect the criminal conviction records to screen applicants for public housing and the Section 8 programs, including both project-based and tenant-based. Prior to obtaining any information, the adult subject of each search must submit a signed consent form.

Owners of Section 8 project-based housing do not have direct access to the information obtained by the PHA, but they may make arrangements with the PHA to have the PHA obtain the information and have the PHA review the records for an applicant and to make appropriate determinations applying the owner's tenant selection criteria.[18]

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[6]§ 882.518(a)(1)(ii)(Section 8 moderate rehabilitation); § 960.204(a)(3)(public housing); § 982.553(a)(1)(ii)(c)(Section 8 voucher).

[7]§ 5.855(a)(federally assisted housing); § 882.518(b)(1-3) (Section 8 moderate rehabilitation); § 982.553(a)(2)(ii)(Section 8 voucher); The public housing regulation does not adopt language similar to that adopted in the regulations for virtually all the other federally assisted housing programs, regarding "other criminal activity," but PHAs have broad pre-existing authority to deny applicants for "other criminal activities" under 24 C.F.R. § 960.203(c).

[8]The regulations define "violent criminal activity." *See* § 5.100.

[9]For the Section 8 voucher program, the regulations also add that denial may be based upon a determination that the criminal activity will have an adverse impact upon "persons residing in the immediate vicinity." § 982.553(a)(2)(ii).

[10]§ 5.855(a)(federally assisted housing); § 882.518(b)(1)(Section 8 moderate rehabilitation); § 982.553(a)(2)(ii)(Section 8 voucher).

[11]66 Fed. Reg. *at* 28,779 (*HUD comments*).

[12]§ 5.853 (federally assisted housing); § 882.518(a)(1)(iii)(Section 8 moderate rehabilitation); § 960.204(a)(2)(public housing); 982.553(a)(2)(ii)(C)(2)(Section 8 voucher).

[13]§ 5.855(c)(federally assisted housing); § 882.518(b)(3)(Section 8 moderate rehabilitation); § 982.553(a)(2)(ii)(c) (Section 8 voucher).

[14]"Adult" records are those for persons 18 years of age or older, or where the person was convicted of a crime as an adult under any federal, state, or tribal law. § 5.902(b).

[15]§§ 5.901(a), 5.902 (Project based Section 8 housing includes new construction and substantial rehabilitation projects).

[16]42 U.S.C.A. § 1437d(q) (West Supp. 2000).

[17]§ 5.901(c).

[18]§ 5.903(d)(e).

If a PHA decides to take action based upon information obtained pursuant to the authority granted in the regulation, the PHA must notify the household of the proposed action and must provide a copy of the information to the subject of the record (and to the applicant, if different), and provide an opportunity for the subject to dispute the accuracy and relevance of the information.[19] This opportunity must be provided before admission is denied on the basis of that information.[20] In the case of public housing or tenant-based Section 8, the applicant will have access to an informal hearing to dispute the information.[21] Providing access to the PHA's hearing process for applicants to project-based Section 8, including Section 8 moderate rehabilitation housing, is somewhat unusual[22] as these applicants traditionally have not had hearing rights before the PHA. The PHA may pass along the cost of the obtaining the criminal records (and perhaps any hearing) to a project owner, but in no event may the cost of obtaining criminal records be passed along to the applicant.[23]

Applicants Who Abuse Alcohol or Who Are Using Illegal Drugs

PHAs and owners must establish standards to deny admission to households if there is reasonable cause to believe that any household member has a pattern of alcohol abuse that may interfere with the health, safety, or the right to peaceful enjoyment of the premises by other residents.[24] Additionally, PHAs and owners must establish admission standards that prohibit the admission of applicants if any member of the household is currently engaging in[25] the illegal use of a drug, or if there is cause to believe that a household member's illegal use or pattern of illegal use may interfere with the health, safety or the right to peaceful enjoyment of the premises by other tenants.[26] How a PHA or owner interprets and applies these standards is apparently up to the PHA or owner.

Access to Information from Drug-Treatment Programs

In the public housing program, PHAs have the authority to request and obtain limited information from drug abuse treatment facilities concerning applicants.[27] The PHA must obtain the applicant's signed authorization, which requests that the PHA be told only whether the facility has reasonable cause to believe that the applicant or household member is currently engaging in illegal drug use.[28] The consent form must expire automatically after the PHA has made a final decision to either approve or deny admission.[29]

If PHAs request information from drug treatment facilities, they must adopt and consistently follow a nondiscriminatory policy that must be included in the PHA administrative plan and in the PHA Plan.[30] That policy must either be applied uniformly to all applicants for admission, or to those applicants whose prior tenancy records indicate that a proposed household member engaged in destruction of property, violent activity against another person, or interfered with the right of the other residents' to the peaceful enjoyment of the premises.[31]

Ineligibility of Registered Sex Offenders

PHAs and owners of federally assisted housing must deny admission if any member of the household is subject to a lifetime registration requirement under a state sex offender registration program. During screening, an applicant's status must be checked both in the state where the housing is located and in other states where the household is known to have resided.[32]

Access to Sex Offender Registration Information

PHAs are authorized to obtain sex offender registration information from state and local agencies.[33] The restrictions on this authorization are the same as those discussed above regarding access to criminal conviction records.[34]

Discretion

To assist owners and PHAs in exercising discretion whenever the regulations are not mandatory, the federally assisted and public housing regulations list a series of factors that the PHA or owner may consider in making a discretionary

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[19]There are conflicting interests involved in such action. The Federal Bureau of Investigation "commented that dissemination of criminal records is limited to those with authorization (such as the PHA) and the person who is the 'subject' of the record, not to other persons in the household." 66 Fed. Reg. *at* 28,789. HUD disagreed, contending that under its statutory authority, 42 U.S.C. § 1437d(q) and § 13663(d), it is required to provide the information to the applicant or tenant so that the applicant or tenant may dispute the determination.

[20]§ 5.903(f). *See also* §§ 960.204(c), 966.4(1)(5)(iv)(public housing); § 982.553(d) (Section 8 voucher). The notice and opportunity to contest must also be provide in the case of an eviction or lease enforcement action.

[21]§ 960.208(a)(public housing); § 982.553(d)(Section 8 voucher).

[22]§ 5.903(f).

[23]§ 5.903(d)(4).

[24]§ 5.857 (federally assisted housing); § 882.518(a)(1)(iii), (4)(Section 8 moderate rehabilitation); § 960.204(a)(2), (b)(public housing); § 982.553(a)(3)(Section 8 voucher).

[25]The term "currently engaging in" means that "the individual has engaged in the behavior recently enough to justify a reasonable belief that the individual's behavior is current." § 5.853(b).

[26]§ 5.854 (federally assisted housing); § 882.518(a)(1)(ii)(Section 8 moderate rehabilitation); § 960.204(a)(2)(public housing); § 982.553(a)(1)(ii)(Section 8 voucher).

[27]§ 960.205.

[28]§ 960.205(c)(1).

[29]§ 960.205(c)(2).

[30]§ 960.205(e). Presumably the PHA Administrative Plan refers to the Admission and Continued Occupancy Plan (ACOP).

[31]*Id.*

[32]§ 5.856 (federally assisted housing); § 882.518(a)(2)(Section 8 moderate rehabilitation); § 960.204(a)(4)(public housing); § 982.553(a)(2)(i)(Section 8 vouchers).

[33]§ 5.901(a) and (b).

[34]§§ 5.901(c), 5.905(b) and (d).

decision.[35] In the language of the regulations and in the introductory comments, HUD emphasizes that merely because PHAs and owners are granted discretion does not mean that the discretion must be exercised.[36]

Eviction and Termination of Assistance

The Scope of the Regulations

The regulations establish rules governing the eviction of residents and the termination of their assistance if:

- there is drug-related criminal activity;
- there is alcohol abuse;
- the tenant is fleeing prosecution, incarceration or is in violation of probation or parole;
- there is other criminal activity; or
- any household member is convicted of the manufacture of methamphetamine on the premises of federally assisted housing.

They also address the issue of the tenant's responsibility for the conduct of others and, in eviction and lease compliance actions, the use of criminal conviction records obtained by the PHA. The regulations for public housing include an expanded list of activities excluded from the grievance procedure and shortening the notice periods for eviction.

Evictions for Drug-Related Criminal Activity

Tenants may be evicted or have their subsidies terminated due to drug-related criminal activity. "Drugs" are controlled substances as defined by the *Controlled Substances Act*. "Drug-related criminal activity" is defined as the illegal manufacture, sale, distribution or use of a drug or possession with the intent to manufacture, sell, distribute or use the drug.[37]

The regulations provide that the leases for public housing, federally assisted housing and the Section 8 voucher and moderate rehabilitation programs must include a provision that drug-related criminal activity is grounds for eviction.[38] For the Section 8 voucher and moderate rehabilitation programs, the PHA must establish standards that provide that drug-related criminal activity is grounds for termination of the subsidy.[39] The regulations amend the list of obligations of a voucher participant to include a prohibition against engaging in drug-related criminal activity.[40]

In public housing, drug-related criminal activity constitutes grounds for eviction regardless of whether it occurs on or off the premises.[41] For federally assisted housing, as well as the Section 8 voucher and moderate rehabilitation programs, drug-related criminal activity is grounds for eviction if engaged in on *or* near the premises.[42] For Section 8 moderate rehabilitation, the PHA may terminate assistance for drug-related activity on or near the premises.[43] For the voucher program, the regulations do not geographically limit the activity in order to establish cause for the termination of the subsidy by the PHA.[44]

In the Section 8 voucher and moderate rehabilitation programs, as well as in public housing, the PHA is required to evict or terminate assistance to the household if any member

[35] § 5.852 (federally assisted housing)(the list of factors is also applicable to eviction actions); § 960.230 (public housing)(for public housing the factors to consider for eviction are at § 966.49l(5)(vii)(b)). There are no regulations setting forth the factors that a PHA should consider in screening for the Section 8 voucher or moderate rehabilitation programs. The factors to be considered in the event of an eviction from the Section 8 voucher program are identical to those for the federally assisted housing programs. *See* § 982.310(h)(1).

[36] 66 Fed. Reg. 28,783; *see also* § 5.852(a)(federally assisted, admission and eviction) and § 982.310 (Section 8 voucher, eviction).

[37] § 5.100.

[38] § 5.858 (federally assisted housing); § 966.4(l)(5)(b)(public housing); § 882.511(Section 8 moderate rehabilitation); § 982.310 (Section 8 voucher).

[39] § 882.518(c)(1)(i)(Section 8 moderate rehabilitation); 982.553(b)(1)(Section 8 voucher).

[40] § 982.551(l).

[41] § 966.4(f)(12).

[42] § 5.858 (federally assisted housing); § 982.310(c)(Section 8 voucher); § 882.511 (Section 8 moderate rehabilitation).

[43] § 882.518(c)(1)(i).

[44] *See* § 982.533(b).

Writ of Certiorari Sought in *Rucker*

The Oakland Housing Authority (OHA) and the Department of Housing and Urban Development (HUD) have filed petitions for a *writ of certiorari* with the U.S. Supreme Court seeking review of the *en banc* decision of the Court of Appeals for the Ninth Circuit in *Rucker v. Davis*, 237 F.3rd 1113 (9th Cir. 2001). In that case, the appeals court upheld the district court's decision to preliminarily enjoin the OHA from evicting four public housing residents on the grounds that they violated OHA's and HUD's "one-strike"policy.[1] The Supreme Court is likely to announce its decision on the petitions in early October. If it accepts the case, briefs are likely to be filed and arguments made in the early part of 2002.

[1] For a detailed report on the decision, *See En Banc 9th Circuit Rules that "One-Strike" Law Does Not Permit Eviction of "Innocent Tenants,"* 31 HOUS. L. BULL. 29 (Feb. 2001).

has ever been convicted of manufacture or production of methamphetamine on the premises of any federally assisted housing.[45] There is no similar requirement applicable to tenants of other federally assisted housing.

Evictions for Other Criminal Activity

Criminal activity is grounds for eviction from federally assisted housing, public housing, and the Section 8 voucher program if such criminal activity threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, other persons residing in the immediate vicinity, or on-site property management staff.[46] PHAs' and owners' leases must include a statement to that effect. In the Section 8 voucher and moderate rehabilitation programs, "other" criminal activity constitutes grounds for both an eviction by the owner and PHA termination of assistance.

For the Section 8 voucher program, "violent criminal activity"[47] is grounds for eviction if it occurs on or near the premises, and violent criminal activity is grounds for the PHA to terminate the subsidy if it threatens the health, safety or the right to peaceful enjoyment of residents and others.[48] The PHA must establish standards for termination of the subsidy and the lease must allow eviction for such violent criminal activity.[49] HUD has stated in the introductory comments that, at least for the Section 8 voucher program, an owner's lease may authorize eviction for other types of criminal activity not associated with the premises, so long as the lease is consistent with state and local law and is applied equally to voucher holders and other tenants.[50]

All relevant circumstances may be considered by PHAs and owners of federally assisted housing, public housing, and the owners of units with Section 8 voucher assistance before a decision to evict is reached.[51] The PHA or owner may require a tenant to exclude a household member from continuing to reside in the unit, if that household member has participated in, or been culpable for, an action or a failure to act that would warrant eviction.[52] Criminal arrest or conviction is not required, nor is the PHA or owner required to use the standard of proof used in criminal convictions.[53] For the termination of a voucher or moderate rehabilitation subsidy, the standard of proof is an ordinary civil standard of a preponderance of the evidence.[54]

Eviction for Use of Illegal Drugs and Abuse of Alcohol

PHAs and owners must include a lease provision that the tenancy may be terminated if any household member's alcohol abuse or pattern of alcohol abuse interferes with the health, safety, or right to the peaceful enjoyment of the premises by other residents.[55] For the Section 8 voucher and moderate rehabilitation programs, the PHA must establish standards that permit the termination of assistance for such reasons.[56] The regulations amend the obligations of a voucher participant to include a prohibition against abusing alcohol in a manner that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises.[57] For alcohol abuse, the scope of the regulations is limited to the tenant and household members, and does not require the PHA to establish standards regarding alcohol abuse by guests or others under the control of the tenant.

PHAs and owners must include a lease provision that the tenancy may be terminated if any household member's alcohol abuse or pattern of alcohol abuse interferes with the health, safety, or right to the peaceful enjoyment of the premises by other residents.

Alcohol abuse is not mentioned in the regulations as a ground for the eviction of a tenant from Section 8 voucher housing. But if such a provision is included in the lease, the owner may consider mitigating factors such as rehabilitation.[58] PHAs and owners are required to incorporate into their leases provisions that allow the eviction of tenants if any member of the household is illegally using a drug, or if there is a pattern of illegal use that may interfere with the health, safety or right to peaceful enjoyment of the premises by other tenants.[59]

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[45] § 882.518(c)(1)(ii) (Section 8 moderate rehabilitation); § 966.4(1)(5)(i)(a)(public housing); § 982.553(b)(1)(ii)(Section 8 voucher).

[46] § 966.4(l)(5)(public housing); § 982.310(c)(Section 8 voucher); § 247.3(a)(3) (Section 8 project-based); § 5.859(federally assisted housing); § 880.607(b)(1)(iii) (Section 8 new construction).

[47] This term is defined in the regulations, *see* § 5.100.

[48] *Compare* § 982.310(c)(2)(Section 8 voucher eviction) *with* § 982.551(obligations of Section 8 voucher participant, violation of which is grounds for termination).

[49] § 982.553(b)(1)(iii)(Section 8 voucher termination) and § 982.310(c)(2)(Section 8 voucher, eviction).

[50] 66 Fed. Reg. *at* 27,783, col. 2 (*HUD comments*).

[51] § 5.852(a)(federally assisted housing); §§ 966.4(1)(5)(vii)(public housing); § 982.310(h)(1)(Section 8 voucher).

[52] § 5.852(b)(federally assisted housing); § 966.4(1)(5)(vii)(C)(public housing); § 982.310(h)(2)(Section 8 voucher).

[53] §§ 5.861 (federally assisted housing) and 966.4(l)(5)(iii)(public housing).

[54] § 982.553(c)(Section 8 voucher); § 882.518(c)(3)(Section 8 moderate rehabilitation).

[55] § 5.860 (federally assisted housing); § 966.4(l)(5)(vi)(public housing).

[56] § 882.518(c)(4)(Section 8 moderate rehabilitation); § 982.553(b)(3)(Section 8 voucher).

[57] § 982.551(m). A voucher participant may be terminated for violation of the family obligations. § 982.553(b)(1)(iii).

[58] § 982.310(h)(2).

[59] § 5.858 (federally assisted housing); § 982.310 (Section 8 voucher eviction), § 982.553(b)(1)(Section 8 voucher termination); § 882.511(a)(2) (Section 8 moderate rehabilitation eviction), § 882.518(c)(1)(i)(Section 8 moderate rehabilitation termination); § 966.4(l)(5)(i)(b)(public housing).

Rehabilitation may be considered in the case of both alcohol abuse and drug use. In that event, the tenant and/or household member may be required to submit evidence of current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having undergone successful rehabilitation.[60] PHAs are further instructed to establish standards for public housing that allow the eviction of a household for furnishing false or misleading information regarding alcohol abuse, illegal drug use or rehabilitation.[61]

Fleeing Felons or Probation or Parole Violators

Fleeing felons and probation or parole violators may be evicted from federally assisted housing, including public housing, Section 8 Moderate Rehabilitation, and tenant-based Section 8 housing,[62] and leases under these programs must include a provision that permits eviction under these circumstances. Section 8 moderate rehabilitation leases also must contain such a provision.[63] Eviction under these circumstances is discretionary, not mandatory. Thus, it is possible that a PHA or owner may decide not to evict a tenant or terminate his or her assistance. The regulations do not authorize termination of Section 8 voucher assistance for these reasons, but they do authorize the termination of Section 8 moderate rehabilitation assistance.[64]

Note that, unlike other QHWRA provisions which focus on household members or guests or others under the tenant's control, this provision is solely directed at the tenant.[65] Therefore, if the violation were by a household member who was not the tenant, this provision would not apply.

Those Subject to Lifetime Sex Offender Registration

There is no eviction or termination of assistance requirement for those subject to lifetime sex offender registration requirements, even though there is a mandatory permanent ban on admission to federally assisted housing, including public housing and the Section 8 voucher and moderate rehabilitation programs.[66]

Access to Criminal Conviction Records and Sex Offender Registration Information

The final rule also authorizes PHAs to obtain adult criminal conviction records and sex offender registration information to assist in lease enforcement and eviction.[67] The restrictions on this are the same as those discussed above under *Screening for Admission* with one additional provision. In an eviction, a PHA may disclose the criminal conviction records to PHA employees and hearing officers involved in an eviction action, or an owner of project-based Section 8 housing for use in a judicial eviction proceeding.[68] The regulations provide further guidance regarding the use of the criminal conviction records to ensure that the information is disclosed only if it may be a basis for an eviction from a Section 8 unit and is not used improperly.[69]

To the extent that tenants are liable for the acts of other persons, they can only be held liable for the acts of temporary visitors when offending activity occurred on the premises and the temporary visitor was on the premises with the tenant's authorization at the time the event took place.

For Whose Conduct May the Tenant Be Held Liable?

The regulations set forth some guidelines regarding the liability of tenants for the misconduct of household members, guests and others under the tenant's control. A "guest" is defined as someone who is temporarily staying in the unit with the consent of the tenant.[70] The designation of "other person under the tenant's control" is limited to an invitee, someone on the premises with the consent of the tenant or other member of the household at the time of the activity in question.[71] Thus, to the extent that tenants are liable for the acts of other persons (not guests), they can only be held liable for the acts of temporary visitors (invitees not staying in the unit) when offending activity occurred on the premises and the temporary visitor was on the premises with the tenant's authorization at the time the event took place.

As noted above, the regulations authorize evictions for certain activities engaged in by the tenant, household members or guests or others under the control of the tenant. If

[60] § 5.852(c)(federally assisted housing); §§ 960.203(d)(2) and 966.4(1)(5)(vii)(d) (public housing); § 982.310(h)(2) (Section 8 vouchers).

[61] § 966.4(l)(5)(vi)(b) and 966.4(l)(2)(i)(b) and (c).

[62] § 5.859(b)(federally assisted housing); § 966.4(1)(5)(iii)(B)(public housing); § 982.310(c)(2)(ii)(Section 8 voucher); § 882.518(c)(2)(ii)(Section 8 moderate rehabilitation termination of assistance).

[63] *Compare* § 5.859(b)(applies to Section 8 moderate rehabilitation housing and requires such a lease provision) *with* § 882.511 (applies to Section 8 moderate rehabilitation housing leases but does not require such a lease provision). Despite the confusion of the regulations, it would appear that no tenant who is in good standing could be evicted for fleeing prosecution or probation or parole violations, unless specifically provided for in the lease.

[64] § 882.518(c)(2)(ii)(Section 8 Moderate Rehabilitation).

[65] 66 Fed. Reg. *at* 28,784 (*HUD comments*).

[66] § 5.856 (federally assisted housing); § 882.518(a)(2)(Section 8 moderate rehabilitation); § 960.204(a)(4)(public housing); § 982.553(a)(2)(i)(Section 8 voucher).

[67] § 5.901(a)(criminal) and § 5.901(b)(sex offender).

[68] § 5.903(e)(note that the information may not be provided to a Section 8 voucher landlord).

[69] *Id.*

[70] § 5.100 (definition of "guest"and "other person under the tenant's control").

[71] *Id.*

the offending activity is engaged in by a household member, a guest or others under the tenant's control, there is no required showing of a tenant's participation, knowledge, or ability to control or prevent the activity.[72]

In the introductory comments to the regulations, there is extensive discussion of the issue of tenant control and responsibility for the acts of others.[73] HUD's position is that the tenant has control if the tenant allowed the person committing the offending activity access to the premises. (As noted previously, not all offending activity must occur on the premises.[74]) In the discussion of tenant control, HUD acknowledged that:

> Some courts have disagreed with HUD's concept of legal control and have read into 42 U.S.C. § 1437d(l)(6) a requirement that the tenant have some degree of knowledge or ability to control the unlawful behavior. See, for example, *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*).
>
> If individual PHAs are subject to binding court decisions, of course they should follow them even though HUD's interpretation may differ. Quite apart from these decisions, PHAs may conclude in particular instances that no useful purpose would be served by terminating a tenancy on the basis of a crime committed by a guest or other person with whom the leaseholder only had a minimal connection. The fact that statutorily required lease provisions would allow PHAs to terminate tenancy under certain circumstances does not mean that PHAs are required to do so in each case where the lease would allow it.[75]

As with screening for admissions, the regulations provide a list of factors that a PHA or owner may consider in deciding whether to evict or terminate the subsidy.[76] In addition, the regulations suggest ways that a PHA or owner may craft solutions short of evicting an entire household (such as requiring an offending household member to leave). Significantly, however, HUD has indicated that it does not think a court can exercise similar discretion, or that the tenant can challenge how the owner or PHA has exercised its discretion. It is HUD's belief that a court's role is limited to determining if there has been a breach of the lease and if federal law has been followed.[77]

Public Housing Grievance Procedure and Notice Periods for Lease Termination

The final regulations expand the grounds under which a PHA may exclude certain types of evictions from the grievance procedure for federal public housing. Evictions may be excluded if they involve:

- any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other residents or employees of the PHA; or
- any violent or drug-related criminal activity on or off such premises; or
- any violent criminal activity that resulted in felony conviction of a household member.[78]

While a PHA is authorized to exclude such evictions from its grievance procedure, the decision is purely discretionary. If the PHA decides to use this expanded authority, it must change its grievance procedure. The PHA must give written notice of proposed changes to all affected residents and at least a 30-day opportunity to comment on the proposed changes, just as is the case with lease changes or changes in PHA policies that affect residents.[79]

The regulations also expand the circumstances under which the PHA may terminate the tenancy with a termination notice of "a reasonable period of time considering the seriousness of the situation."

The regulations also expand the circumstances under which the PHA may terminate the tenancy with a termination notice of "a reasonable period of time considering the seriousness of the situation (but not to exceed 30 days)." PHAs may use such shorter notices in cases where the health or safety of persons residing in the immediate vicinity, other residents, or PHA employees is threatened, if any member of the household has engaged in any drug-related criminal activity or violent criminal activity, or if any member of the household has been convicted of a felony.[80] The regulations also preserve the prior requirement of 14-day termination notices for failure to pay rent. For all other cases not expressly mentioned, in place of the prior 30-day notice requirement, the regulations now add that "if a State or local law allows a

[72] § 247.3(a)(3), and § 5.859 (federally assisted housing); § 880.607(b)(1)(iii) (Section 8 new construction); § 966.4(l)(5)(public housing); § 982.310(c) (Section 8 voucher).

[73] 66 Fed. Reg. *at* 28,782 (*HUD comments*).

[74] The term *premises* is defined in the regulations for purposes of Parts 5, 960 and 966 to include the unit's common areas and grounds.

[75] *Id.*

[76] § 5.852 (federally assisted housing); § 966.4(l)(5)(vii)(b)(public housing); § 982.310(h) (Section 8 voucher).

[77] *Id.* citing *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700 (Minn. 1999).

[78] § 966.51(a)(2)(i)(a-c).

[79] 24 C.F.R. § 966.52(c).

[80] § 966.4(l)(3).

shorter notice period, such shorter period shall apply."[81] Thus, for evictions based on breach of lease (e.g., an alleged unauthorized guest or a violation of the pet provisions), the notice must only satisfy the time period prescribed by state law, which in many cases is substantially less than 30 days.

Conclusion

Next Steps

These new regulations require implementation at the local level. As a result, leases may be changed and new policies adopted. Any change in a lease will be subject to the provisions of the existing lease and the regulations regarding lease amendments for the applicable program and tenancy. For federally assisted housing units, such as project-based Section 8 (not Section 8 moderate rehabilitation), and the Federal Housing Administration (FHA) programs (such as Section 236, 221(d)(3) units) for which the model lease is applicable, a lease amendment requires prior HUD approval and often a 60-day notice to the tenant.[82]

For PHAs administering public housing, and Section 8 moderate rehabilitation and voucher programs, these regulations may also trigger a change in the Admission and Continued Occupancy Policy (ACOP) and the Section 8 Administrative Plan. Changes to these documents should be part of the PHA Plan process. Certain policies, if adopted, must be incorporated into the PHA Administrative Plan and PHA Plan.[83] Changes undoubtly will be made in response to the regulations, as there is increased pressure for PHAs to modify their plans and policies. PHAs are graded and receive points under the Public Housing Assessment System (PHAS) for implementing screening and eviction policies and documenting that they screened-out applicants with unfavorable criminal histories and evicted residents who engage in detrimental activity.[84] Any change in a public housing lease must be preceded by notice and opportunity to comment.[85]

Once PHAs implement these rules, litigation surrounding their legality and application to specific fact situations will undoubtedly continue. The *Bulletin* will report on any significant new developments. ■

[81]§ 966.4(l)(3).

[82]*Model Lease for Subsidized Programs*, ¶ 22 (provides for 60-day notice); 24 C.F.R. § 247.4(d) (provides for 30-day notice).

[83]§ 960.205(e)(admission policy regarding drug abuse treatment).

[84]§ 966.4(l)(vii)(PHAS points for eviction); § 960.203(b)(PHAS points for admission); *see also* 24 C.F.R. § 902.43(a)(5)(PHAS regulations).

[85]24 C.F.R. § 966.3.

The Case for Applying California's Source of Income Anti-Discrimination Statute to Section 8 Tenants

Introduction

California's Fair Employment and Housing Act (FEHA) prohibits an owner of housing or any person, organization or entity engaged in any provision of housing from discriminating against persons on the basis of race, color, religion, sex, marital status, sexual orientation, national origin, ancestry, family status, or disability.[1] "Source of Income" was added as a new protected category as of January 1, 2000. It is defined as "lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant."[2]

FEHA also prohibits landlords from utilizing practices that would exclude applicants with Section 8 subsidies from renting housing by making it unlawful "[i]n instances where there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant."[3] In other words, for example, landlords may not deny housing to Section 8 voucher holders because their household income is not some multiple of the total rent for the unit. Under FEHA, a landlord may, however, make a written or oral inquiry regarding the level or source of the household's income.[4] At the same time, however, a landlord or owner of property may not discriminate against an applicant or tenant based on the knowledge that the tenant has a certain source of income.

Legislative History Supports the Conclusion that the Statute Prohibits Discrimination Against Persons with Section 8 Vouchers or Certificates

There has been confusion among housing advocates in California about whether the source of income provisions of Senate Bill (SB)1098—introduced by State Senator John Burton—protect tenants receiving Section 8 housing subsidies and the California Department of Fair Employment and Housing (DFEH) routinely rejects fair housing discrimination complaints filed by persons assisted by the Section 8

[1]Cal. Gov't Code § 12955 (2001). Housing activities covered by FEHA include, but are not limited to, the rental, sale, real estate transacting or financing of housing and the publication or advertisement of the rental or sale of housing. Moreover, FEHA protects against discrimination based upon the perception that a person has any of the characteristics enumerated in the statute or that the person is associated with a person who has, or is perceived to have, any of those characteristics. *Id.* § 12955(m).

[2]Cal. Gov't Code § 12955, as amended by SB 1098, effective Jan. 1, 2000. "Source of Income" is defined in § 12955(p)(1).

[3]*Id.* at § 12955(o).

[4]*Id.* at § 12955(p)(2).

program on jurisdictional grounds. However, a review of the legislative history underlying the statutory amendments to Government Code §12955 clearly supports the conclusion that the provisions of FEHA prohibiting Source of Income discrimination apply to tenants and prospective tenants participating in the Section 8 certificate and voucher programs.

SB 1098, the original proposed amendment to the FEHA, did not address "source of income" discrimination. Rather, it simply prohibited the use of a financial or income standard to calculate the minimum income that a tenant must have based on anything other than that portion of the rent that is to be paid by the tenant.[5] This provision, now codified as §12955 (o), was intended to solely prohibit discrimination against tenants with Section 8 assistance. As stated in the Senate Judiciary Committee's comments, section (o) arose:

> out of the growing trend among landlords to flatly refuse to rent to anyone on Section 8 housing, or more blatantly, to evict an existing Section 8 tenant because the landlord no longer wants to accept Section 8 vouchers . . . . This form of discrimination is creating tremendous hardships for the disabled and the elderly, who now find that they are being lawfully discriminated against because they are recipients of Section 8 assistance. The discrimination is also making it hard for people trying to transition from welfare to work, and for working families with low or modest income. . . [6]

Significantly, protecting Section 8 tenants from other discriminatory practices did not appear to be an issue. While landlord groups opposed an earlier, stronger version of the financial or income standards provision, which would have prohibited the use of "arbitrary" financial or income standards, no landlord groups or any other organization was formally listed in opposition to the bill as originally written. On the other hand, over 100 organizations were listed in support of SB 1098.

Later, in a hearing before the Assembly Committee on Judiciary, SB 1098 was amended to specifically prohibit a landlord from discriminating against a tenant or prospective tenant based on the tenant's source of income. This amendment was an addition to the already included provision that required landlords that sought to impose income/rent ratio standards on tenants receiving rent subsidies to calculate the minimum income solely on the portion of rent to be paid by the tenant.[7] The Assembly Committee also amended SB 1098 by broadly defining "income" to include all sources of lawful and verifiable income which are paid directly to a tenant or to a representative of a tenant.[8]

These amendments sought to expand the classes of persons protected by FEHA and to address existing case law, namely, *Harris v. Capitol Investors*,[9] in which the California Supreme Court held that a landlord's use of minimum income standards in making a rental decision was not unlawful discrimination. Thus, while there were some landlord representatives that opposed earlier provisions that proposed to prohibit arbitrary source of income discrimination, it is clear that the Legislature intended to include Section 8 subsidies within the Source of Income definition that was ultimately adopted by providing a broad definition of "income." This conclusion is buttressed by the fact that during each committee hearing, proponents of SB 1098 pointed out "that at least 12 other states prohibit 'source of income' or Section 8 discrimination."[10] The Senate subsequently approved the Assembly amendments by majority vote.[11]

Thus, the legislative history of SB 1098 clearly supports the conclusion that the statute was intended to protect Section 8 tenants from discrimination. The legislative intent is clear that financial or income standards may not be used to discriminate against Section 8 tenants.

The Definition of "Income" Can Be Reasonably Interpreted to Include Section 8 Funds Received on Behalf of the Tenant for Rental Subsidies

The statutory definition of income clearly applies to a number of different types of income sources, including pensions, child and spousal support, and self-employment. It also includes governmental assistance programs such as Temporary Assistance for Needy Families (TANF) and Supplemental Security Income (SSI). The income source must be "lawful" and "verifiable;" there is no requirement that the source of funds must be related to employment or constitute "taxable income."[12]

Under the statutory definition, the funds must be paid directly to a tenant or to a representative of a tenant.[13] In some cases, such as TANF assistance, the funds are paid directly to the recipient. In other circumstances, however, federal law may require that the funds be paid to another

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[5] *Analysis, Senate Judiciary Committee*, 1999-2000 Regular Session, SB 1098, Hearing Date: Apr. 13, 1999 at 6.

[6] *Id.*

[7] *Analysis*, Assembly Committee on Judiciary, SB 1098 (Burton), Hearing Date: July 13, 1999.

[8] *Id.*

[9] 52 Cal. 3d . 1142 (Ca. 1991).

[10] *Analysis*, Assembly Committee on Judiciary, SB 1098 (Burton), Hearing Date: July 13, 1999.

[11] *Senate Third Reading*, SB 1098 (Burton), Sept. 7, 1999.

[12] For example, child support payments are not considered "taxable" income. Similarly, government benefits, such as SSI and TANF, are also deemed to be nontaxable income. Indeed, under the new Section 8 homeownership option, loan underwriting guidelines utilized by the secondary market and direct lenders consider the Section 8 HAP paid by the Housing Authority on behalf of the Section 8 homeowner as nontaxable income to the homeowner in determining loan eligibility. *See Fannie Mae and the Section 8 Homeownership Program: Breaking New Ground With Public Housing Authorities* (May 2001); *see also* Memorandum to State Directors, Rural Development [USDA Rural Housing Services], *RE: Using Section 8 for Homeownership with Section 502 Loans*. Both guidelines are available at www.nhlp.org.

[13] Cal. Gov't Code § 12955(p)(1).

person or entity on behalf of the recipient. For example, SSI funds may be paid directly to a "payee" (either an organization or an individual) when a SSI recipient is deemed unable to manage his or her funds.[14] Similarly, HUD-Section 8 rental subsidies are provided to the public housing authority (PHA) to administer for eligible families.[15] Thereafter, the PHA enters into a Housing Assistance Payment (HAP) contract with a private landlord in order to pay a portion of the rent on behalf of the Section 8 tenant.[16] In both circumstances, the payee and the Housing Authority are acting as a representative of the tenant.[17]

A broad interpretation of "income" is also supported by the California Legislative Counsel who, in a June 2, 2000 memorandum to Sen. John Burton, discusses the "source of income" provisions of FEHA. In that memorandum, the Legislative Counsel states that the provisions relating to Source of Income "were enacted as part of a legislative scheme intended generally to prevent landlords from terminating tenants on the basis that all or part of their rent payments were derived from federal assistance, known as Section 8 housing vouchers . . ."[18] The Legislative Counsel memorandum concludes that:

> It is presumed that the Legislature adopted the proposed legislation with the intent and meaning expressed in committee reports. The FEHA does not define "income." While a governmental subsidy such as a Section 8 voucher . . . is, of course, not income from a person's employment, it is our opinion that, in light of the evident purpose of subdivision (p) of Section 12955, to the extent that it would constitute funds paid to a tenant or his or her representative and applied toward housing, the subsidy would be "income" within the meaning of Section 12955.[19]

The Purpose of the Statute Would Be Frustrated if Discrimination Against Section 8 Tenants Was Permitted

When read in its entirety, the *Source of Income* statute clearly seeks to protect Section 8 tenants from discrimination. Any other interpretation of its various provisions would lead to the inconsistent result of both permitting and prohibiting discrimination against Section 8 tenants. Such a conclusion is absurd and is not compatible with the stated purpose of SB 1098; it is intended to provide increased access to affordable housing for low-income tenants.

As stated by Sen. Burton, thousands of California families struggle to secure decent, affordable housing and increasing rents are putting more housing out of reach for tenants with fixed incomes. Thus, according to Sen. Burton, SB 1098 was brought forward to "address some of the issues affecting low-income renters,"[20] a term encompassing practically all Section 8 tenants.

In an effort to change landlords' practice of refusing to rent to tenants solely because they receive a Section 8 housing subsidy, the legislature prohibited landlords' use of standards that failed to address the tenant's portion of the rent after receipt of the government subsidy. This provision was added to address a "growing trend" among landlords who were lawfully discriminating against Section 8 tenants simply because they are recipients of Section 8 funds, and were creating extreme hardships for low-income people, including the disabled and the elderly, and for families trying to transition from welfare to work.[21]

Finally, the statute does not define specific types of "income," such as governmental or welfare benefits, or nontaxable income. Rather, the Legislature chose to require that the funds be lawful and verifiable. Section 8 assistance is both lawful and verifiable. As such, Section 8 funds must be included under the statutory definition of "income."

Conclusion

At a time when rising rents and low vacancy rates make housing even more unaffordable for low-income California tenants, it is increasingly important that persons seeking housing be free from discrimination. Housing advocates, PHAs and state enforcement agencies must recognize the protections afforded to Section 8 tenants under FEHA and utilize these provisions to promote the rental of homes to Section 8 participants. Indeed, the plain language of the statute, a reasonable interpretation of its legislative history, and a reading of the statute as a whole, support a determination that Section 8 tenants are protected from discriminatory practices under the Source of Income statute and other provisions of the California Fair Employment and Housing Act. ■

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[14]42 U.S.C.A. § 1383(a)(2)(A)(West Supp. 2000).

[15]*See* 24 C.F.R. § 982.1 *et seq*. (2000).

[16]24 C.F.R. § 982.1(a)(2). *See also* Part B, ¶7(a)(1) and Part C, ¶5(b), *Housing Assistance Payments Contract, Section 8 Tenant-Based Assistance Housing Choice Voucher Program*, HUD Form 52641 (10/99).

[17]Indeed, it is arguable that the landlord is also the representative of the tenant in as much as the HAP is made specifically by the authority to the landlord on behalf of the resident.

[18]Memorandum dated June 2, 2000, to Honorable John L. Burton from Bion M. Gregory, Legislative Counsel of California at 4. A copy of this memorandum is available from NHLP.

[19]*Id*. at 4-5. (*emphasis added, internal citations omitted*).

[20]*Analysis*, Assembly Committee on Judiciary, SB 1098 (Burton), Hearing Date: July 13, 1999 at 3.

[21]When representing Section 8 recipients, it is important to ascertain if tenants are discriminated against solely because of a stereotypical perception of who is eligible to receive Section 8 assistance. These stereotypes may include, among other things, that Section 8 tenants are individuals of certain races or colors and that they consist of large families or single mothers with children. Private landlords may embrace an erroneous assumption that Section 8 is only available to unemployed families or for people receiving welfare benefits. As noted earlier, the refusal of a landlord to rent to a family based on a perception that Section 8 tenants are members of a protected class, or are associated with a member of a protected class, constitutes unlawful discrimination under FEHA. Cal. Gov't Code § 12955(m).

Recent Housing Cases

The following are brief summaries of recently reported federal housing cases that should be of interest to housing advocates. Copies of the opinions can be obtained from a number of sources including the cited reporter, Westlaw,[1] Lexis,[2] or, in some instances, the court's Web site.[3] Copies of the cases are not available from NHLP.

Thompson v. Mayor, City of Knoxville, 250 F.3rd 399 (6th Cir., 2001). A nonresident arrested for trespassing on a public housing development from which he was banned for criminal activity filed a Section 1983 action against the housing authority and the other public defendants challenging the banning and no-trespass policy. The Court of Appeals for the Sixth Circuit found that the plaintiff had not been invited onto the property by a resident and that entering the property to look for a resident, and soliciting a resident to use a phone was not a sufficient invitation to give him standing to challenge the banning and no-trespass policy. The Court of Appeals thus affirmed the lower court's grant of summary judgement in favor of the defendants. Public housing residents were not parties in the litigation and their rights were not adjudicated.

Young v. Halle Housing Associates, 2001 WL 487,446 (S.D.N.Y., May 7, 2001). Tenants of Halle Housing, a privately owned and operated single-room occupancy facility that receives significant funding from federal and state sources, challenged the owner's overnight guest restriction under 28 U.S.C. § 1983. The tenants claimed that there is a sufficiently close nexus between the state and Halle Housing to maintain a Section 1983 suit because Halle Housing is subject to extensive government regulation and benefits from extensive government funding. The district court held that Halle Housing does not, by virtue of its government funding and regulation, or its provision of low-cost housing for the needy, automatically become an agent of the state sufficient to bring it within the ambit of Section 1983. According to the court, low-cost housing is also provided by the private sector. Therefore, the court held that absent a showing that a state actor directly enforced, or was aware of, Halle Housing's overnight guest policy, that the maintenance and enforcement of the policy does not constitute state action and cannot be challenged under § 1983.

HUD v. K. Capolino Construction Corp., 2001 WL 487,436 (S.D.N.Y., May 7, 2001). The District Court for the Southern District of New York granted the Department of Housing and Urban Development (HUD) a preliminary injunction to prevent the White Plains Housing Authority from using federal public housing funds—earmarked and secured solely for the operation, maintenance and rehabilitation of public housing—to satisfy a defamation judgment obtained by the Capolino Construction Co.

Chancellor Manor v. Thibodeaux, 2001 WL 537,002 (Minn. App., May 22, 2001). In a Minnesota eviction proceeding, the Court of Appeals held that in order to evict a tenant from a project-based Section 8 unit for noncompliance with the lease, the landlord must prove that the noncompliance was fraudulent and therefore material. The tenant in this case was accused of violating the provision of the lease requiring her to report a change in her circumstances if she obtained employment, or her household's income cumulatively increased by $40 or more per month. The tenant was receiving income from the Minnesota Family Investment Program (the local welfare program) when she entered her lease. She was subsequently employed for five months during 1999. The income from this job was about the same as her welfare checks. She alleges that she did not think she had to report her employment because her income did not change. The trial court found her failure to report the job amounted to noncompliance with her lease agreement and granted the eviction. The Court of Appeals found error by recognizing an exception in cases involving HUD-subsidized housing. Relying on Section 5-19 of *HUD Handbook 4350.3*, dealing with income recertification, the court found that material noncompliance in the recertification context has to have been fraudulent. It held that it must be an intentional deception, not a tenant's misunderstanding of the rules or forgetfulness in reporting a change. The court then concluded that the landlord must prove by a preponderance of the evidence (not the clear and convincing standard argued for by the tenant) that the noncompliance was fraudulent, and thereby material. Accordingly, it remanded the case for a specific finding as to whether the failure to report the employment was fraudulent.

Faison v. New York City Housing Authority, 2001 WL 579,890 (N.Y.A.D. 1 Dept., May 31, 2001). A New York State Appellate Court upheld the New York City Housing Authority's denial of a public housing occupant's succession to his mother's public housing lease after her death in 1995 because of his criminal record. The authority's Management Manual allows remaining family members to succeed to a lease only if they are otherwise eligible for public housing. The authority's standards for admission provide that persons who have been convicted of three or more Class A misdemeanors within the last 10 years are ineligible for admission until five years have elapsed since the end of their sentences without further convictions or pending charges. Faison pleaded guilty to six Class A misdemeanors between 1993 and 1994 making him ineligible for public housing tenancy until at least 1999. Notwithstanding, the lower court held that Faison should be recognized automatically as a tenant based on its interpretation of 42 U.S.C.A. § 1437a(b)(3)(a), which includes single individuals in the definition of a "family" when they are the

[1]www.westlaw.com

[2]www.lexis.com

[3]For a list of courts that are accessible through the World Wide Web, *see* www.uscourts.gov/links.html (federal courts) and www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). *See also* www.courts.net.

remaining members of a tenant family. The lower court reasoned that Faison was already a tenant and that his criminal record was not sufficient grounds for terminating that tenancy. The Supreme Court, Appellate Division, reversed and upheld the housing authority's denial of succession. It found that the federal statute, federal regulations, and the authority's own regulations did not recognize every member of a tenant's household as a tenant entitled to continued occupancy. According to the court, the statute relied on by the lower court merely defined the circumstances under which a single person may be classified as a family in order to reside in public housing. It did not establish that person's eligibility to reside in the housing. To support its conclusion, the court favorably cited 24 C.F.R. § 960.205 (b)(3), which allows a housing authority, when selecting tenants, to consider a history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety, or welfare of other tenants. Therefore, it concluded that the housing authority's admissions standards, which included consideration of criminal background, are applicable to remaining family members seeking to assume a lease. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), the Department of Agriculture's (USDA) Rural Housing Service (RHS) and the Department of Labor issued in May of 2001. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's Web site on the World Wide Web,[1] (2) bound volumes of the *Federal Register*, (3) HUD Clips,[2] (4) HUD,[3] and (5) USDA's/Rural Development Web page.[4] Citations are included with each document to help you secure copies.

[1]*At* www.access.gpo.gov/su_docs.

[2]*At* www.hudclips.org/cgi/index.cgi.

[3]To order notices and handbooks from HUD, call (800) 767-7468 or fax (202)708-2313.

[4]*At* www.rdinit.usda.gov/regs.

HUD Regulations

Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program: Fiscal Year 2002; Proposed Rule
66 Fed. Reg. 23,770 (May 9, 2001)

Summary: Section 8(c)(1) of the *United States Housing Act of 1937* requires the Secretary to publish Fair Market Rents (FMRs) annually to become effective on October 1 of each year. FMRs are used to determine the payment standard amounts for the Housing Choice Voucher program, to determine the initial renewal rents for some expiring project-based Section 8 contracts, and to determine the initial rents for HAP contracts in the Moderate Rehabilitation Single Room Occupancy program. Other programs may require use of FMRs for other purposes. This notice proposes revised FMRs that reflect estimated 40th and 50th percentile rent levels trended to April 1, 2002.

***Comments Due Date*:** July 9, 2001.

Affordable Housing Program Amendments; Proposed Rule
66 Fed. Reg. 23,864 (May 10, 2001)

Summary: The Federal Housing Finance Board (Finance Board) is proposing to amend its regulation governing the operation of the Affordable Housing Program (AHP) to improve the operation and effectiveness of the AHP. The proposed changes include: increasing the maximum amount of money that may be set aside annually, in the aggregate, under a Federal Home Loan Bank's (Bank) home ownership set-aside programs to the greater of $3.0 million or 25 percent of the Bank's annual required AHP contribution; removing one of the criteria for use of home ownership set-aside funds to pay for counseling costs in order to equalize the criteria with that of the competitive AHP application program; permitting members drawn from community and not-for-profit organizations actively involved in providing or promoting community lending in a Bank's District to serve on the Bank's Advisory Council; making the reconciliation of AHP fund requirements applicable to any reduction or increase in the amount of AHP subsidy approved for a project, regardless of whether a direct subsidy writedown is involved; removing the requirement for annual project sponsor certifications on household income eligibility for owner-occupied projects; and removing the requirement for member certifications on habitability and tenant income and rent targeting commitments within the first year of completion of a rental project.

Comments Due Date: June 11, 2001.

Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule
66 Fed. Reg. 28,776 (May 24, 2001)

Summary: This final rule amends the regulations for the public housing and Section 8 assisted housing programs, and for other HUD assisted housing programs, such as the Section 221(d)(3) below market interest rate (BMIR) program, the Section 202 program for the elderly, the Section 811

program for persons with disabilities, and the Section 236 interest reduction program. All of these programs were affected by 1998 amendments to the statute authorizing the public housing and Section 8 programs. These amendments give Public Housing Agencies (PHAs) and assisted housing owners the tools for adopting and implementing fair, effective, and comprehensive policies for screening out programs applicants who engage in illegal drug use or other criminal activity and for evicting or terminating assistance of persons who engage in such activity.

Effective Date: June 25, 2001

HUD Federal Register Notices

Notice of Regulatory Waiver Requests Granted for the Fourth Quarter of Calendar Year 2000;
66 Fed. Reg. 23,516 (May 8, 2001)

***Summary*:** Section 106 of the *Department of Housing and Urban Development Reform Act of 1989* (the *HUD Reform Act*), requires HUD to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on October 1, 2000 and ending on December 31, 2000.

Notice of Funding Availability: Tribal Colleges and Universities Program; Fiscal Year 2001;
66 Fed. Reg. 24,236 (May 11, 2001)

Summary: The purpose of the program is to assist tribal colleges and universities to build, expand, renovate, and equip their own facilities. There is approximately $3 million in available funds. The only eligible applicants are tribal colleges and universities that meet the definition of a TCU established in Title V of the *1998 Amendments to the Higher Education Act of 1965* (Pub. L. 105-244; enacted Oct. 7, 1998).

Application Deadline: August 3, 2001

Unified Agenda of Federal Regulatory and De-regulatory Actions;
66 Fed. Reg. 26,336 (May 14,2001)

Summary: This notice is given pursuant to the requirements of the *Regulatory Flexibility Act* (Pub. L. 96-354, Sept.19, 1980) and *Executive Order 12866* (*Regulatory Planning and Review*, Sept. 30, 1993), which require the publication of a semiannual agenda of regulations.

Semiannual Agenda of Regulations;
66 Fed. Reg. 25,478 (May 14, 2001)

Summary: In accordance with section 4(b) of *Executive Order 12866*, *Regulatory Planning and Review*, HUD is publishing its agenda of (1) regulations already issued or expected to be issued, and (2) currently effective rules that are under review. As permitted by law, the agenda also describes regulations affecting small entities as required by section 602 of the *Regulatory Flexibility Act*. The purpose of publishing the agenda is to encourage more effective public participation in the regulatory process by providing the public with early information about pending regulatory activities.

FY 2001 Super Notice of Funding Availability (SuperNOFA) for HUD's Housing, Community Development and Empowerment Programs and Section 8 Housing Voucher Assistance; Technical Corrections;
66 Fed. Reg. 27,987 (May 21, 2001)

Summary: On February 26, 2001, HUD published its Fiscal Year (FY) 2001 SuperNOFA for HUD's Housing, Community Development, and Empowerment Programs and Section 8 Housing Voucher Assistance. This document makes certain technical corrections to the general section of the SuperNOFA and to the following programs: Housing Counseling, HOPE VI, *Economic Development Initiative* (EDI); *Brownfields Economic Development Initiative* (BEDI); Continuum of Care; Housing Opportunities for Persons With AIDS (HOPWA); Youthbuild; Resident Opportunities and Self Sufficiency (ROSS) Program, Section 202 Supportive Housing for the Elderly Program, Section 811 Supportive Housing for Persons with Disabilities Program, and Assisted Living Conversion Program. This document also extends the application due date for tribes and Tribally Designated Housing Entities (TDHEs) applying for funding under the *ROSS Capacity Building and Conflict Resolution* initiative.

Announcement of Funding Award—FY 2001 Lead-Based Paint Hazard Control Tides Foundation;
66 Fed. Reg. 28,192 (May 22, 2001)

Summary: In accordance with section 102(a)(4)(C) of the *Department of Housing and Urban Development Reform Act of 1989*, this announcement notifies the public of a funding decision made by the Department to the Tides Foundation. This announcement contains the name and address of the awardee and the amount of the award.

Privacy Act of 1974; Notification of the Establishment of a New System of Records;
66 Fed. Reg. 28,193 (May 22, 2001)

Summary: Pursuant to the provisions of the *Privacy Act of 1974* (5 U.S.C. 552a), as amended, the HUD is giving notice that it proposes to establish a new system of records entitled *Inspector Quality Assurance/Quality Control Administrative Files*, which will be used in performing quality assurance and quality control reviews of the physical inspections of certain properties performed by inspectors certified in the use of the HUD inspection protocol, and in supporting other administrative requirements related to monitoring inspectors' performance of physical inspections.

Effective Date: June 21, 2001

Comments Due Date: June 21, 2001

Public Housing Assessment System (PHAS); Revised Timetable for Issuance of Management Operations Official Scores and PHAS Advisory Scores; and Notice of Intent To Commence Informal Meetings on PHAS;
66 Fed. Reg. 29,342 (May 30, 2001)

Summary: This document advises that the Management Operations indicator under the PHAS will continue to be the official assessment for PHAs with fiscal years ending on June 30, 2000, through June 30, 2001. Accordingly, HUD will issue these management scores and PHAS advisory scores as provided in the Supplementary Information section of this document. Further, this document notifies the public of the intent of HUD to conduct informal consultations with PHAs, public housing residents, representatives of PHAs and residents, housing advocacy representatives, governmental representatives, and other groups that HUD may identify regarding ways to improve HUD's on-going procedures for assessing the performance of PHAs. It is expected that these informal consultations will commence within the near future and occur periodically through November, 2001, and thereafter as necessary on dates and at locations provided by HUD.

HUD Notices

Section 221(d)(3) Nonprofit Transactions;
HUD Notice H 01-4 (May 30, 2001)

Summary: The Office of Multifamily Housing Development in Headquarters reviewed field office documentation on a number of Section 221(d)(3)nonprofit transactions. It found that in many cases the transaction is controlled by a profit-motivated entity rather than the nonprofit sponsor. This is in direct conflict with instructions in the Mortgage Credit Handbook 4470.1 REV-2 and the MAP Guide. The instructions require HUD to make a determination that the nonprofit sponsor/mortgagor is acting on its own behalf and is not, either knowingly or unwittingly under the influence, control or direction of any outside party seeking to derive a profit or gain from the proposed project such as a landowner, real estate broker, contractor, architect, attorney or consultant. In these transactions, a profit-motivated entity can take advantage of the 100 percent financing, the nonprofit developer's fee, financing alternatives and tax advantages available to a nonprofit sponsor/mortgagor with limited or no risk by the profit- motivated entity. This practice has created a credit subsidy problem for the FHA mortgage insurance programs in FY 2001 because Section 221(d)(3) loans carry a credit subsidy rate of 17.22 percent, over 5 times the Section 221(d)(4) rate of 3.35 percent. Furthermore, it creates additional risk for the General Insurance Fund since the profit-motivated entity that controls the entire transaction may well have collected its fees at closing and have little or no concern about the long term financial and physical health of the project. Thus, the office has altered it's policies for Section 221(d)(3) nonprofit transactions, effective immediately.

Improving Income Integrity in Public and Assisted Housing Applicability: Public Housing, Housing Choice Voucher, and Moderate Rehabilitation Programs;
PIH 2001-15 (HA) (May 2, 2001)

***Summary*:** The purpose of this notice is to emphasize timely, accurate, and fair income and rent determinations by PHAs. This includes the following: assuring that PHAs and residents are in compliance with required statutes and regulations; identifying frequent errors made by PHAs and residents in reporting and calculating income and determining rent; providing ideas and tips to PHAs to improve income integrity; and identifying PHAs with state-of-the-art, up-front techniques to verify income.

Reinstatement—Notice PIH 2000-47 (HA), Public Housing Development Total Development Cost (TDC) and Cost Control Policy;
PIH 2001-16 (HA) (May 2, 2001)

Summary: This notice reinstates Notice PIH 2000-47 (HA) which expired March 31, 2001, until September 30, 2001.

Extension of Notice PIH 2000-20 (HA), which extended Notice PIH 99-21 (HA), Requirements for Designation of Public Housing Projects;
PIH 2001-17 (HA) (May 16, 2001)

This notice extends Notice PIH 2000-20 (HA) which expired May 31, 2001, for another year until May 31, 2002.

RHS Federal Register Notices

Notice of Availability of Funding and Requests for Proposals for Guaranteed Loans Under the Section 538 Guaranteed Rural Rental Housing Program; Correction;
66 Fed. Reg. 21,909 (May 2, 2001)

***Summary*:** The RHS is correcting a notice published December 26, 2000 (65 Fed. Reg. 81,650). This action is taken to correct the authorized purposes of Section 538 guaranteed loans by eliminating the requirement that acquisition loans result in the creation of new units.

RHS Administrative Notices

Appraising Multi-Family Housing Properties;
RD AN No. 3652 (1922-B) (May 18, 2001)

Summary: The purpose of this Administrative Notice (AN) is to provide guidance on Multi-Family Housing appraisal policies, comply with current government-wide appraisal policies and Agency lending practices.

***Expiration Date*:** April 30, 2002

Poverty Line Guidelines for Rural Housing Service; RD AN No. 3654 (1980-D) (May 17, 2001)

Summary: This AN is being issued to notify Rural Development personnel managing the RHS programs of a change in the poverty line income figures. Effective April 15, 2001, and continuing until further notice, the poverty line referred to in 7 C.F.R. part 1942, subpart A, and 7 C.F.R. part 3570, subpart B, is $17,650 per year for all states except Alaska and Hawaii. The applicable poverty line is $22,070 for Alaska and $20,300 for Hawaii.

Expiration Date: May 31, 2002

RHS Unnumbered Letters

Use of the Administrator's Reserve to Fund Innovative Approaches to the Preservation of RRH Projects; Unnumbered Letter (May 15, 2001)

Summary: For FY 2001, an administrator's reserve was established to help encourage the development of innovative approaches to preserve Rural Rental Housing (RRH) projects. Attached is the listing of projects selected from proposals submitted in accordance with AN No. 3606 (1965-B) dated January 18, 2001. Funding was provided to projects with the highest per-unit contribution of non-Agency funds for repair and rehabilitation. Funding was limited to three projects per state to provide greater distribution of funds.

***Expiration Date*:** September 30, 2001

Department of Labor Federal Register Notices

Notice of Availability of Funds and Solicitation For Grant Applications; 66 Fed. Reg. 24,402 (May 14, 2001)

Summary: The Department of Labor, Employment and Training Administration (ETA), announces the availability of $3,666,667 to award competitive grants for projects that assist farm workers in seeking and securing temporary or permanent housing. This program is supported by funds made available pursuant to Section 167, of the *Workforce Investment Act* (WIA).

Application Deadline: June 15, 2001 ■

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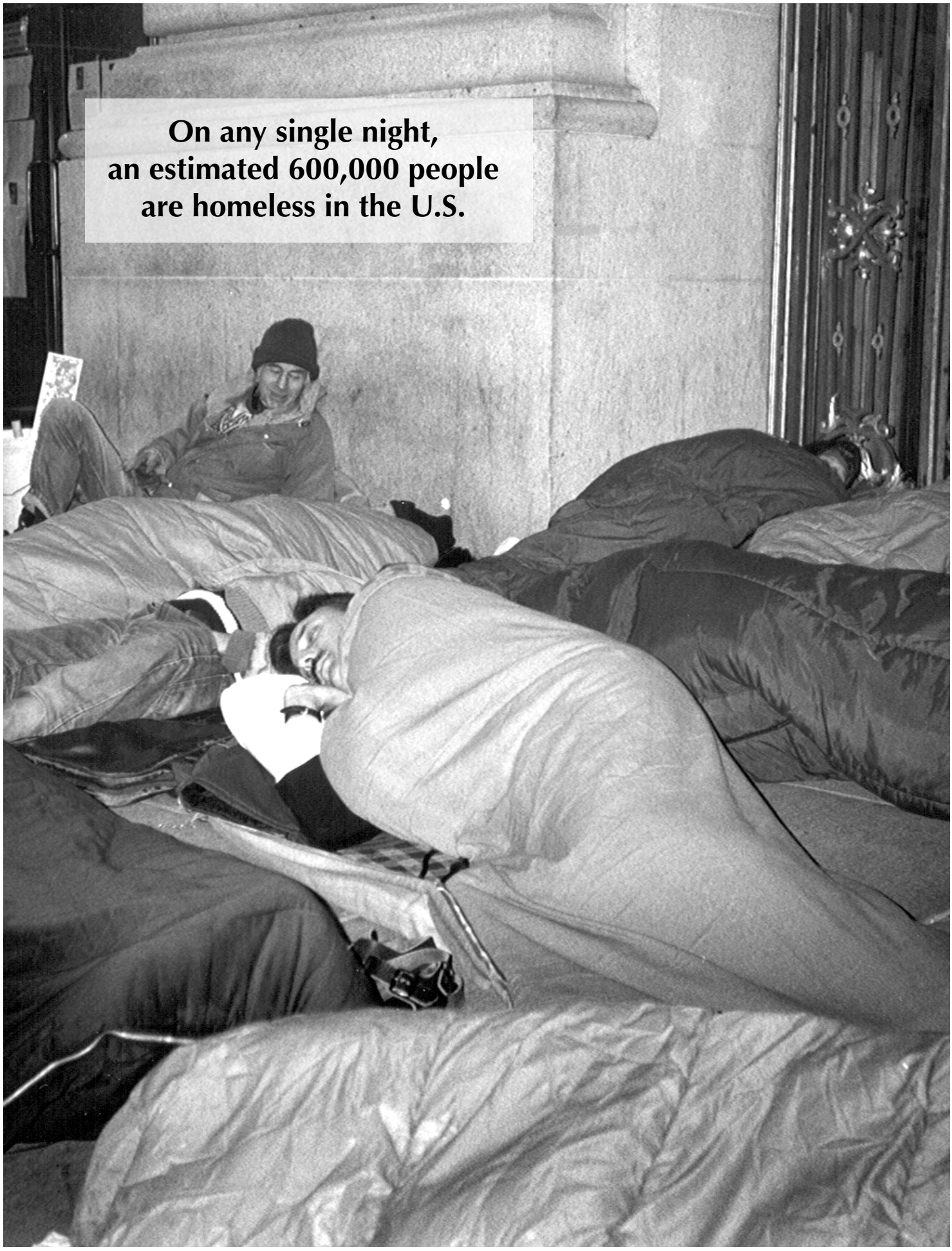
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