July 16, 2012

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th St. SW, Room 10276
Washington, DC 20410-0001
Submitted electronically through www.regulations.gov

Re: Docket No. FR-5242-P-01, Changes to the Section 8 Tenant-based and Project-based Voucher Programs

To whom it may concern:

These comments are submitted by a broad range of housing organizations and housing professionals, many of whom were involved in developing the proposals for changes in section 8(o) that were incorporated in HERA. We are committed to making project-based vouchers an effective tool to produce, preserve and provide decent quality, stable and affordable housing for extremely low-income and other low-income families and elderly and disabled individuals.

The proposed rule is the first revisiting of the rules governing the project-based voucher (PBV) program since HUD promulgated the initial set of program rules in 2005. Experience working with the program in the past seven years — and increased reliance on PBVs as a preservation tool — make it important to take this infrequent opportunity to update the rules to make the program as effective as possible, as well as to implement the statutory changes made by HERA. HUD recognized the need for clarification of some regulatory policies, but other changes discussed below also are needed.

HERA-related Regulations

We recommend changes in five of the proposed rules to implement changes made by HERA.

- **Rent in LIHTC units occupied by tenant-based voucher holders (982.507(c)(2)). .** HUD's proposed 982.507(c)(2) will produce a result contrary to the statute (sec. 2835(a)(2) of HERA, amending section 8(o)(10) of the USHA), and possibly contrary to HUD's intention, in certain situations. Specifically, where an owner requests a rent above the rent for LIHTC units not occupied by voucher-holders, the PHA could be forced to reduce the rent below the existing rent, even if the existing and proposed rents do not exceed comparable rents, undercutting the purpose of the statutory change. This would occur if the PHA payment standard at the time of the requested rent increase is below the rent for other LIHTC units or the requested rent. E.g., if the owner requests a rent increase of $50 to $950 (below the comparable rent of $1,000), the rent for other LIHTC units is $900, and the applicable PHA payment standard is $800, HUD's proposed rule would require the rent to be set at the *lowest* of the 3 amounts – i.e., $800. The statutory language applied to this example yields a rent of $900, because it requires a rent at the *greater* of the LIHTC rent or the payment standard, if otherwise reasonable. HUD should revise the rule to follow the

"greater of" statutory language and avoid this unintended penalty for owners requesting legitimate rent increases that threaten no additional harm to assisted tenants.

We also recommend that HUD remind readers of the final rule, and clarify in any upcoming guidance, that the HERA policy for determination of "reasonable rents" for LIHTC units with tenant-based vouchers, incorporated in 982.507(c)(2), does not apply to project-based vouchers. That will be clearer when the C.F.R. is updated, as the rule will appear in context in Subpart K of §982, which does not apply to PBVs except for specified provisions. But in the context of the rule changes published in the Federal Register, the inapplicability to PBVs is not apparent and the proposed rule appears inconsistent with the HERA provision that allows PHAs and owners to agree not to reduce rents below the initial rent.

- **Term of extension[s] for PBV contracts (983.205(b))**. The proposed rule appears to allow no more than a 30-year contract: an initial 15-year contract plus an advance agreement to one or more extensions totaling no more than 15 years. As such, the proposed rule violates the explicit HERA amendment to the language of sec. 8(o)(13)(G), which permits an advance agreement for a potentially unlimited number of 15-year extensions so long as the property meets HQS and the rents do not exceed applicable limitations. The new sentence added by HERA — intended to reverse the limitations HUD had imposed on agreements for "long-term affordability" that the first sentence of pre-existing 8(o)(13)(G) contemplates — allows PHAs and owners to agree in advance "that such contract shall be extended for renewal *terms of up to 15 years each*…." For HUD to limit the advance agreement to a renewal term of no more than 15 years, in one or more extensions, violates both the letter and the purpose of the statutory change.

  Recommendation: HUD should revise 983.205(b) to comply with the explicit command of the statute, by making the following changes:

  (1) Revise the first sentence as follows:

  "A PHA may agree to enter into <u>one or more extensions</u> at the time of the initial HAP contract or any time before expiration of the contract, for an additional term <u>or terms</u> of up to 15 years <u>each</u> if the PHA determines an extension is appropriate to continue providing affordable housing for low-income families.

  (2) Delete the second and third sentences.

- **Subsidy layering review not required for existing housing (983.55(a)).** We think this rule could be clearer. To eliminate any possible misunderstanding, the last sentence should be revised, by inserting a period after "existing housing" and making the "nor" clause into a separate sentence.

- **Environmental review for existing structures (983.58).** The Housing and Economic Recovery Act of 2008 relieves a PHA from undertaking an environmental review for an existing structure, "except to the extent that such a review is otherwise required by law or regulation". HUD, however, rendered this provision meaningless, by concluding that because all federal environmental reviews are "otherwise required by law or regulation", the

statute has no effect. This conclusion violates a basic principle of statutory construction that every statute is to be construed "so as to avoid rendering superfluous" any statutory language.[1] The result of HUD's failure to implement the statutory provision to date has been administratively burdensome, particularly for PHAs using Project-Based Vouchers for substantial numbers of existing units on different sites. HUD instead should have construed "otherwise required" to mean as required by a law or regulation related to other funding for the units.

Recommendation: Replace the current Section 983.58(c), which HUD has not proposed to change, with the following:

> "(c) *Existing housing.* Existing housing under this part 983 is exempt from environmental review, unless required by law or regulation related to funding for the units other than PBV assistance. If an environmental review is required, the RE [responsible entity] that is responsible for the environmental review under 24 CFR part 58 must determine whether or not PBV assistance is categorically excluded from review under the National Environmental Policy Act and whether or not the assistance is subject to review under the laws and authorities listed in 24 CFR 58.5."

- **Limitation of rent reductions below initial rent to calculation errors, provision of additional subsidy, and change in responsibility for utility payments (983.302(c)(2)).** HUD's proposal is at odds with the explicit HERA language, which allows but does not require that the initial rent serve as an ongoing rent floor, and explicitly delegates to PHAs the authority to make the decision about whether the PBV contract should include a rent floor. (See HERA sec. 2835(a)(1)(E), amending 8(o)(13)(I)(i).) PHA discretion over making the initial rent a firm floor also makes good policy sense. It may be important to have such rent security in locations where it could reasonably be expected that rents are volatile and the PBV contract will enable the owner to leverage additional funds for development or rehabilitation. But in other situations, such as where the PBV contract is for existing housing, such rent security could potentially come at the expense of a PHA's ability to assist additional families. PHAs are in the best position to assess whether a secure rent floor is more important, on balance, than other future uses of the funds.

  Recommendation: HUD should revise the rule to retain PHA discretion to make the decision about whether rent levels can ever be reduced below the initial rent. However, we agree that it should be clear that despite any commitment to an initial rent floor, PHAs should be able to reduce the rent for the reasons specified in HUD's proposed rule. In addition, it would be helpful if the final rule clarifies that whether or not the PHA has agreed contractually to not reduce rents below the initial rent, a PHA is not required to reduce PBV rents below the initial rent if the FMR declines by more than 5% or the rent would otherwise exceed 110% of FMR. PHAs should be able to make the decisions of whether to reduce PBV rents when the FMR declines on a case-by-case basis.

[1] See, for example, Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003); Bailey v. United States, 516 U.S. 137, 146 (1995) (cases cited for this proposition in a report of the Congressional Research Service updated in 2008 and entitled "Statutory Interpretation: General Principles and Recent Trends" (Order Code 97-589, Yule Kim, Legislative Attorney, American Law Division).

Recommended Changes in Other PBV Rules Proposed by HUD

We support many of the additional changes HUD proposes to make in the rules governing the use of project-based vouchers. In particular, we want to note our support for the clarification in 983.56 that the various exception categories for project-basing more than 25% of units in a property can be cumulated. This change will simplify compliance and monitoring. We recommend modifications of the proposed additional rule changes as follows:

- **Definition of "existing housing" (983.3 and 983.52(a)).** The proposed rule significantly narrows the range of properties that will be eligible to receive project-based voucher assistance (PBVs) as "existing housing." We are extremely concerned that this policy change will negatively impact HUD's goal of preserving existing affordable housing, including some of the specific preservation initiatives that HUD's Office of Multifamily Housing is currently undertaking. HUD's proposed change is directly contradictory to the changes made in HERA that are intended to make it easier to attach PBVs to existing housing by *reducing* regulatory requirements. For example, HERA allows a PHA to forego subsidy layering and environmental reviews for existing housing.

  Currently, PHAs have significant discretion to determine when to provide PBVs to existing housing. This flexibility has been critical to preserving existing affordable units in communities where rental housing has become increasingly scarce, including the stock of privately-owned, HUD-assisted housing with expiring use restrictions and subsidy contracts. This discretion also has assisted HUD-approved conversions of public housing to project-based vouchers.

  Under the proposed rule, PHAs will be permitted to provide PBVs to existing housing only where the anticipated cost of repairs is less than $1,000 per unit. Because the procedures for rehabilitated housing delay the initiation of rental assistance, this will create significant cash shortfalls for many preservation transactions which rely on the PBV income stream from Day One to support new financing (for rehabilitation and often acquisition). These projects meet HQS on Day One, but may require additional rehabilitation (e.g. for energy retrofits and modernization) to satisfy the requirements of lenders and tax credit investors, or to improve long-term sustainability.

  Since rehab in these properties is carried out with tenants in place, current rents are needed to cover ongoing operating expenses. In many cases, the financing is structured as a permanent loan with construction holdbacks, requiring full debt service payments starting on Day One. Because contract rents must meet a "rent reasonableness" standard from Day One, owners often forgo higher rents that may be charged after rehabilitation is complete, which may result in long-term cost savings for the Section 8 program.

  HUD has recently launched the Rental Assistance Demonstration (RAD) program, authorized by Congress in the FY2012 appropriations act. Part of RAD is intended to encourage owners of certain types of assisted multifamily housing with expiring subsidy contracts to convert to PBVs. While HUD has the authority to waive or modify all of Section 8(o)(13) for the conversion of public housing to PBVs, waiver authority is limited

when converting expiring Rent Supplement or Rental Assistance Payment properties. Many of these projects currently meet HQS but will require additional rehabilitation with tenants in place for the reasons discussed above. Without the flexibility for PHAs or owners of eligible privately-owned multifamily housing to treat these projects as existing housing if they are occupied and pass HQS on Day One, even if some rehabilitation is planned, many of these proposed preservation transactions will not be feasible. It is important that any new changes to the PBV program will not impede an owner's ability to rehabilitate a property after converting to PBVs through the RAD program.

Recommendation: To further the Department's preservation goals, HUD should retain the current definition of "existing housing." If the Department rejects this recommendation, it should revise the proposed definition to eliminate the proposed second element concerning no additional planned rehabilitation within the first year, and increase the dollar threshold to reflect the reasonable per-unit cost of updating units that meet HQS.

- **Prohibition on selecting a property to receive PBVs after rehab or construction has begun (983.152).** HUD includes what it claims is a "clarification" that prohibits a PHA from entering into an AHAP for a property where construction or rehab has commenced but is not sufficiently far along to meet the definition of existing housing. In the preamble HUD requests comment on whether this creates a problem for properties receiving LIHTCs or other federal funds. (See p. 28746.) But it seems the potential problems are broader. E.g., if a rehab/new construction project has stalled because of the economy or other reason, and under a new business plan or a new owner there is a new interest in having PBVs in the property, the rule would appear to prohibit a PHA from taking advantage of what could be an important opportunity. There is no apparent policy rationale for HUD's position. As long as a subsidy layering review is done and any other necessary determination is made before the AHAP, it does not appear there is any sound reason why the timing of the PHA decision should matter to HUD.

  Recommendation: HUD should revise 983.152(a) to allow an exception for extenuating circumstances in cases where an agreement to enter into a housing assistance payments contract for the property would expand housing opportunities.

- **Requirement to notify HUD about PBV program (983.5(c) and 983.6(d)).** HUD guidance has long required PHAs to include in their PHA Annual Plans their intent to initiate or expand a PBV program, with information on the projected number of units, their general location, and an explanation of how project-basing is consistent with the needs and goals of the plan. See, e.g., PIH 2011-54, September 20, 2011. These requirements should be included in the published regulations, as they affect the number and types of housing assistance available to the lowest income families. In addition, It is worthwhile to ensure that HUD can answer the question of how many PHAs operate PBV programs, and for how many units, but it is not clear why the proposed rules are needed if the guidance is being followed (or, stated differently, why HUD would be in a better position to aggregate local information through the proposed notice requirement than it is through the current PHA Plan reporting vehicles).

Recommendation: The PBV rule at 983.5 should be revised consistent with the current sub-regulatory requirement to state that a PHA must include in its PHA plan the projected number of PBV units, their general locations and how project basing would be consistent with the plan. If the required PHA plan information is set forth in the regulation and reported, the additional reporting requirements of 983.5 and 983.6(d) would add unnecessary, duplicative requirements and should be deleted.

- **Owner ability to terminate PBV contract if rent reduced below initial rent (983.205(d)).** The proposed rule continues the existing regulatory policy with a minor change (HUD approval required for the termination). In light of the modification we recommend in proposed 983.302(c)(2), discussed below, it would be necessary to retain some flexibility for owners if the rent is reduced below the initial rent. (If HUD does not agree to make the change we recommend, this rule would appear to contradict 983.302.)

  Recommendation: To avoid tenants being forced to move because the owner exercises this option, HUD should add to the final rule a requirement that the owner accept the regular, tenant-based voucher of a prior PBV tenant. The use of a voucher in the unit would be subject to regular HCV rules of rent reasonableness and HQS compliance. But if an owner opts out of a PBV contract rather than accept a rent reduction, the PHA finds the rent to be reasonable, and the tenant wants to remain and pay the likely additional rent above the PHA payment standard, HUD's rules should encourage such stability.

- **Requirement for owners to provide 1-year advance notice of intention not to renew PBV contract (983.206).** Proposed 983.206 would require owners to provide at least one year's notice, in a form prescribed by HUD, to the PHA and assisted tenants of any expiration of the HAP contract or decision not to renew. We support this requirement, which is statutorily required by 42 U.S.C. Sec. 1437f(c)(8). However, the regulatory language should be improved by requiring the notice to be written, and by clarifying the remedy for improper notice. To avoid involuntary displacement of tenants, we also recommend that HUD require owners who are terminating their participation in the PBV program to accept any replacement tenant-based assistance provided to tenants to help them pay the contract rent charged after the termination, without limiting the owner's ability to charge a reasonable market rent.

  Recommendations: Accordingly, we suggest the following revisions:

  (1) in 983.206(b), by replacing the word "notify" with "provide written notice";

  (2) by revising sec. 983.206(d)(1) to read:

  > "(d)(1) If an owner does not ~~give timely~~ provide required notice of termination, the owner must permit the tenants in assisted units to remain in their units ~~for the required notice period~~ until one year following provision of the legally required notice, with no increase in the tenant portion of their rent and with no eviction as a result of an owner's inability to collect an increased tenant portion of rent during that period."

(3) by adding a subsection 983.206(e), as follows:

> "(e) Following termination of the contract, an owner shall accept any replacement tenant-based assistance provided to assisted tenants in residence at the time of the termination, provided that this requirement shall not limit the reasonable market rent charged by the owner."

- **Stability for families whose income increases (983.211).** The proposed rule includes a new section, 983.211, which applies the 6-month suspension policy of the regular voucher program to the PBV program, and allows the PHA to substitute another unit in the project in the PBV contract after the expiration of the suspension period.[2] This is an important change, but HUD could improve on the proposed rule by allowing a PHA, where there is not another unit that can be substituted to maintain the number of PBV units in the property, to allow the unit to remain under the PBV contract despite the absence of housing assistance payments for the unit. Alternatively, HUD should allow the reduction in units under the PBV contract to be temporary, to enable the original number of PBV units to be restored if a unit becomes vacant and is rented to an eligible family. (A change in 983.258 also would be required to implement this recommended policy.)

- **Preference for people with disabilities qualifying for services offered (983.251(d)).** Proposed 983.251(d) modifies the existing rule to allow preferences for people who *qualify* for available services rather than people who "need" them. The term qualify is a more precise term and is a significant improvement in tenant selection preference policies for supportive housing units created through the PBV program. The use of this term will ensure that applicants for supportive housing can receive the supportive services offered.

  We also recommend one additional language change in 983.251(d). The proposed rule states that "PHAs may give preference to disabled families who qualify for services offered at a particular project or in conjunction with specific unit(s)". We believe that the distinction between "services offered at a particular project" and services offered "in conjunction with specific units" is unnecessary, as in either case the services may be provided by the housing provider or by an outside service provider and may be provided on or off site.

  Recommendation: We recommend the following text for the first sentence of 983.251(d):

  > "(d) *Preference for services offered.* In selecting families, PHAs may give preference to disabled families who qualify for services offered in conjunction with assisted units, in accordance with the limits under this paragraph."

- **Good cause eviction protection for PBV tenants (983.256(f)(3)(i)).** . The preamble (see p. 28747) indicates that the proposed rule is intended "to put in place, for the PBV program, a reliable long-term lease for a tenant unless the owner provides good cause for termination of the lease or nonrenewal of the lease." This is a very important change, which would

[2] Under current voucher program policy, a family whose income increases to the extent that 30 percent of its adjusted income equals or exceeds the contract rent plus utility allowance is in suspense status for 6 months, rather than terminated, allowing a time cushion for income to stabilize prior to termination. If the family's income declines sufficiently in the 6-month suspension period, voucher assistance is reinstated.

provide PBV tenants with the same security as other tenants in units with HUD project-based assistance *and* preserve the number of units with PBVs. Unfortunately, however, the proposed language in 983.256(f) does not accomplish the intent. Proposed 983.256(f)(2) does provide for automatic renewal or indefinite extension of the lease term, but 983.256(f)(3)(i) continues to allow the owner to terminate the lease, with no restriction that such a termination must be for cause. HUD proposes to delete current 983.257(b), which permits non-renewal of a lease without good cause but also requires in such a case that the PHA to reduce the number of assisted units under the PBV contract (i.e., the current policy undermines housing stability and is contrary to preservation goals). This is necessary but not sufficient to achieve the intended policy change.

Recommendation: To implement the stated intent, HUD must add to the final 983.256 an explicit statement that a tenancy may only be terminated for good cause.

- **Overcrowded, under-occupied, and accessible units (983.260).** The proposed change in this rule (currently at 983.259) is confusing, and the rule fails to provide protections for families equivalent to policy under HUD's other project-based rental assistance programs.

  HUD proposes a clarifying change in 983.260(c) to state that when the PHA provides the family with continued assistance in the form of a tenant-based voucher, it must terminate the "HAP contract" for a wrong-sized or accessible unit upon the earlier of expiration of the family's voucher or the date upon which the family vacates the unit. The current rule states that the PHA must terminate the "housing assistance payments" rather than "HAP contract" for a wrong-sized or accessible unit when a family receives a tenant-based voucher. Since other regulations distinguish between the HAP contract for the unit and the housing assistance payments made for an eligible family[3], this change could be interpreted to mean that the HAP contract for the unit will be completely terminated whereas the old language was clear that only the housing assistance payments for the vacating family would be terminated. HUD should continue to use the existing language concerning termination of the "housing assistance payments" to prevent confusion and ensure that units are not made unavailable for other families who would be eligible for project-based assistance when a vacating family receives a tenant-based voucher. In addition, the final rule should clarify that such termination should occur only when an available unit has been identified for a family receiving a tenant-based voucher. This change is consistent with the parallel rule in the regular tenant-based program, and is necessary to avoid causing the displaced family to become homeless.[4]

  The final rule also could be improved by clarifying the obligation of a PHA to provide continued assistance to families vacating overcrowded, under-occupied or accessible units in a manner consistent with similar policies in other HUD programs. Language should be added stating that if an appropriate-size unit is available in the same building or development, it must be offered to the family. If there is no such unit available, the PHA may offer another form of project-based assistance. However, if a family has resided in the

[3] *See e.g.*, 24 C.F.R. § 983.207(b)(2) (remedies for HQS violations include termination of housing assistance payments and termination of the HAP contract).

[4] 24 C.F.R. § 982.403 states that the PHA must terminate the current contract if an acceptable unit is available for rental by the family issued a voucher to move from an inappropriate unit.

unit for at least one year, the PHA must offer tenant-based voucher assistance (in addition to any available project-based option) and allow the family to choose the form of assistance it will receive. In addition, when a family has received a tenant-based voucher because its PBV assistance is terminated due to unit size or accessibility features, the rule should explicitly require the PHA to help the family find an appropriate unit, consistent with the requirement in 24 C.F.R. § 982.403.[5]

Recommended Additional Modifications of PBV Rules

As noted above, PHAs and property owners — and low-income families — should not have to wait many more years for further regulatory changes that are within HUD's authority and would improve program effectiveness. HUD should take the opportunity provided by this rulemaking to incorporate the following further changes in the PBV rules.

- **Termination of rental assistance for families in "excepted" properties failing without good cause to complete FSS or other supportive services program, and for remaining members of a family that no longer qualifies as elderly or disabled (983.56(b)(2)(ii)(B)&(C), 983.261(d), and 983.257(c)).** The proposed regulations leave unchanged provisions in three current sections pertaining to project-based voucher units that are "excepted" from the 25 percent per-property cap on voucher project-basing.[6] These rules have the effect of creating a work requirement for continued occupancy in a PBV property if the owner and PHA agreed to provide PBV assistance to more than 25 percent of the units available to households that are not elderly or disabled. There is no statutory language or legislative history justifying these rules. Therefore, these provisions should be deleted.

  Moreover, these regulations run counter to the principle that participation in services tied to housing should be voluntary. This principle is articulated in the Office of Public and Indian Housing's own policies pertaining to public housing occupancy. Notice PIH 2011-33, dated as recently as June 24, 2011, declares:

  > Under no circumstance may a PHA terminate assistance from the public housing program as a consequence of unemployment, underemployment, or otherwise failing to meet the work activity requirement for a particular public housing development.
  >
  > Where a development's house rules and lease include work activity as a condition of occupancy and a tenant becomes unemployed (or underemployed) the PHA may

[5] The regulations for tenant based assistance state that when a PHA issues a family a new voucher because the family is living in a wrong-size unit, "the family *and PHA* must try to find an acceptable unit as soon as possible." (24 C.F.R. § 982.403) (emphasis added).

[6] Section 983.257(c) provides as grounds for lease termination by owners, the lease of a family that fails without good cause to complete a Family Self-Sufficiency (FSS) contract or other supportive services requirement. Section 983.261(d) [to be renumbered as 983.262] provides that a family that does not successfully complete its FSS contract or supportive services requirement must vacate their unit. This section also requires PHAs to terminate the housing assistance payment. Section 983.56(b)(2)(ii)(B)&(C) define a "qualifying family" and reiterates the owner lease termination and PHA housing assistance payment termination language while citing 983.257(c) and 983.261(d).

choose to relocate affected households to another public housing unit within their jurisdiction.

While the emphasis in these provisions is on failure without good cause to successfully complete an FSS contract or supportive services requirement, section 983.261(d) also describes as no longer meeting the criteria of a "qualifying family" the "remaining" members of a family that no longer qualifies for elderly or disabled family status in connection with the 25 percent per-property cap. Requiring remaining members of a family that no longer qualifies for elderly or disabled family status to vacate their home is contrary to other provisions in the regulations that either allow a family to remain (sections 983.261(c) and 983.56 (b)(2)(ii)(B), both pertaining to successful completion of an FSS contract or supportive services requirement) or that require offering a family continued assistance in another unit (section 983.259 *Overcrowded, Under-Occupied, and Accessible Units*). It is also inconsistent with the general HUD policy based upon the statutory definition of family, which includes remaining members of a tenant family. See 42 U.S.C. 1437a(b)(3)(A); 24 C.F.R. 5.403 and 982.201(c). In addition, such a policy could run afoul of the Violence Against Women Act (VAWA) if a remaining member of the tenant family were a victim of domestic violence.[7]

Recommendation: The current PBV termination rules at Sections 983.56(b)(2)(ii)(B)&(C), 983.261(d), and 983.257(c) should be removed.

If they are not removed, alternatively, HUD should either:

(1) Predicate such terminations on the availability of tenant-based vouchers so that a family can move with continued assistance (similar to the policy that applies to over- or under-housed families at Section 983.259 and that applies to public housing families at Notice PIH 2011-33); or

(2) (a) If the property is partially assisted, allow the family to remain, substituting the housing assistance contract of their unit with another unit, if available, as is currently allowed at 24 C.F.R. 983.261(d);

(b) If the property is fully assisted, allow the family to remain but when the family vacates the new tenant would be subject to the requirements that apply to "excepted" units.

- **Restrictions on using project-based vouchers in "public housing" (983.51(e) and (983.54(a))**. The preamble to the proposed rule includes a "clarification" that reiterates HUD's policy position that the public housing and voucher programs are "separate and mutually exclusive subsidy systems" under the U.S. Housing Act and thus the use of project-based voucher assistance in a "public housing unit" is prohibited (p. 28744). There is no definition of a "public housing unit" in the existing regulation or the proposed rule. The

[7] In making any decision regarding the retention of the voucher subsidy, a victim of domestic violence should be preferred. See for example, the policy for allocation of VASH vouchers in the event of domestic violence, HUD-VASH Qs and As, No. D.4 available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/vash.

general definition section of the U.S. Housing Act, however, defines "public housing" to include units in a mixed finance project that receives "capital *or* operating" assistance. Section 3(b)(1) (emphasis added).

The effect of this so-called clarification is to interpret the existing regulation as barring the use of project-based vouchers to create housing that replaces public housing if the units receive public housing Capital Funds, Replacement Housing Factor funds, or HOPE VI funds. There is no apparent reason for this overbroad prohibition or for the clarification in the proposed rule. Indeed, the 2000 amendment of section 8(o)(13) deleted the previous restriction on using project-based vouchers in units that had received assistance under the U.S. Housing Act.

It makes sense not to allow vouchers to be project-based in units that receive other operating assistance, including public housing operating assistance. But if HUD applies a broader definition of "public housing" for purposes of the project-based voucher rule than for other purposes, PHAs would be prohibited from combining public housing capital funds (including HOPE VI funds and Replacement Housing Factor funds) with project-based vouchers. Such strategies are an important tool for development of permanently affordable replacement housing, and the clarification would seem to be at odds with HUD's expressed policy to minimize loss of hard units.

Recommendation: The existing regulations should be revised as follows to prohibit the use of PBV assistance with units that receiving public housing operating funds, but not with units that receive public housing capital funds only:

(1) Revise the final sentence of § 983.51(e) to read as follows:

"Under no circumstances may PBV assistance be used with *a unit receiving public housing operating funds."*

(2) Revise § 983.54(a) to read as follows:

"*Units receiving* public housing *operating funds*;"

- **Definition of "PHA-owned unit" (983.3(b)).** The purpose of distinguishing PHA-owned units in the regulation is to prevent self-dealing by PHAs where they both own the project and administer voucher assistance for a given unit. However, the existing definition is unnecessarily broad and in some cases has led HUD to consider units as PHA-owned where the PHA is merely a ground lessor or a mortgagee, but does not exercise control over the project itself. When a unit is deemed PHA-owned, then the regulations at 983.59 apply, requiring the engagement and compensation of an independent entity, rather than the PHA, for certain functions, including inspections and rent reasonableness determinations. We recommend tightening the definition so that the 983.59 requirements apply only in those situations where the PHA controls the project and there could actually be a conflict of interest in a PHA performing those functions itself.

  Recommendation: Revise the definition of "PHA-owned unit" at 983.3(b) to read: "PHA-owned unit means a unit in a project that is owned by the PHA, by a PHA instrumentality,

or by a limited liability company or limited partnership in which the PHA (or PHA instrumentality) holds a controlling interest in the managing member or general partner."

- **Applicability of owner proposal selection procedures to public housing revitalization and replacement efforts (983.51).** HUD should take the opportunity to change the current requirement for a local competitive process in instances where a PHA will attach project-based vouchers to units in which it has an ownership interest as part of an initiative to improve, develop or replace a public housing property or site, provided that the PHA includes the initiative in its PHA Plan. In this narrow circumstance where a PHA desires to control the revitalization or replacement of its public housing through the use of PBVs for its own units, the requirement to conduct a competitive process is unlikely to be cost-effective and will add delay and uncertainty to critical public housing revitalization efforts.

  Recommendation: In Section 983.51(b), change "the following two methods" to "the following three methods" in the second sentence and add the following new paragraph:

  "(3) Selection of a proposal without a competitive process for PHA-owned housing as part of an initiative to improve, develop, or replace a public housing property or site."

- **Prohibit rescreening.** Under a variety of recently enacted policies, tenants receiving PBVs often reside in the project and are being converted from another form of federal housing assistance, such as public housing, project-based rental assistance, or tenant protection vouchers, rather than being newly selected to receive assistance. Tenants experiencing such a conversion should not be at risk of losing their homes, and possibly losing housing assistance, simply because the conversion event presents a new opportunity for the PHA or project owner to screen them under different tenant selection criteria. In this rule, HUD should clarify that such tenants in residence at the time of the conversion from one form of assistance to PBVs are not to be considered as applicants and are exempt from elective re-screening by PHAs or owners. Such a clarification would fulfill HUD's duty to minimize displacement in administration of its programs, 42 U.S.C. Sec. 5313 note.

  Recommendation: HUD should adopt the following language as the second to last sentence in 983.251(b):

  > "In addition, such families who were recipients of another form of HUD rental assistance at the time of project selection will not be subject to additional elective screening requirements and may be evicted from the property only for good cause in accordance with the lease."

- **HAP contract amendments to add contract units** (**(proposed 983.207(b)).**The current regulation, 983.206(b), limits adding units in a building (or in a project under the Proposed Rule) to the number of units under PBV contract to the three-year period immediately following the execution date of the HAP contract. Where units in a project selected for Project-Based Vouchers were not included in the original HAP contract because they were occupied by ineligible households for those units at the HAP execution date (e.g., over-housed or over-income families), a PHA should be able to add the units to the HAP contract at any time that the ineligible families move.

Recommendation: In proposed 983.207(b), after "during the three-year period immediately following the execution date of the HAP contract" add the following: "or at any time when a unit that has been occupied by an ineligible family since that execution date becomes occupied by an eligible family".

- **Exclusion of project units from rent reasonableness comparability analysis where the owner continues below-market rents (983.303).** HUD should take the opportunity to clarify that where an owner is continuing below-market rents on some project units to families who do not receive Project-Based Vouchers at the commencement of the HAP contract, such units will be considered to be assisted units on the premises and will not have to be taken into consideration for rent reasonableness determinations. This clarification would be consistent with HUD's anti-displacement policy and HUD's policy announced by notice with respect to Housing Conversion Actions.

  Recommendation: Add a new section 983.303(c)(4) as follows:

  "(4) Units in the premises or project for which the owner is continuing below-market rents to families who were in occupancy but did not receive PBV assistance at the beginning of the HAP contract are not to be taken into consideration for rent reasonableness determinations."

Bazelon Center for Mental Health Law

California Housing Partnership Corporation

Cambridge Housing Authority

Center on Budget and Policy Priorities

Citizens Housing and Planning Association

Colorado Cross Disability Coalition

Consortium for Citizens with Disabilities Housing Task Force

Corporation for Supportive Housing

Council of Large Public Housing Agencies

Enterprise Community Partners

Legal Aid Society of Southwest Ohio

Local Initiatives Support Corporation

Mac McCreight, Greater Boston Legal Services

Mercy Housing, Inc.

National Alliance on Mental Illness

National Housing Law Project

National Housing Trust

National Low Income Housing Coalition

Rod Solomon, Hawkins Delafield & Wood, LLP

Technical Assistance Collaborative

The Arc of the United States