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# Housing Law Bulletin

Volume 43 • September 2013

Published by the National Housing Law Project

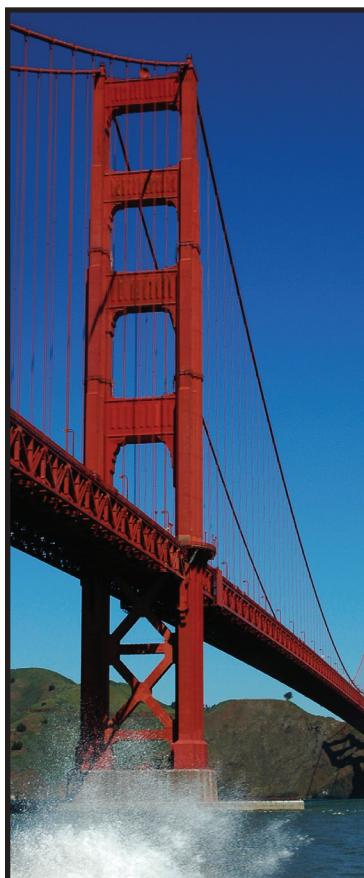


***RHS Publishes Proposed Voucher Rules***

—see page 181

***HUD Issues Notice on VAWA 2013***

—see page 185



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Volume 43 • September 2013

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## Table of Contents

	Page
RHS Publishes Proposed Voucher Program Rules .....	181
HUD Issues Notice on Applying VAWA 2013 to HUD Programs .....	185
NHLP's Analysis of the Proposed Affirmatively Furthering Fair Housing Rule.....	187
Questions Corner .....	192
Recent Cases .....	194
Recent Housing-Related Regulations and Notices ..	198

**Cover:** This photo was taken by Sandy Perry during a rally at San Jose (Cal.) City Hall organized by the Affordable Housing Network on Thursday, August 29. Attendees protested the devastating rent increases caused by the federal government sequester. Over 17,000 tenants in Santa Clara County alone saw rent increases as a result of cuts to the Section 8 Housing Choice Voucher Program.

The *Housing Law Bulletin* is published 10 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the *Bulletin* is \$175.

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## RHS Publishes Proposed Voucher Program Rules

by Gideon Anders, NHLP Senior Staff Attorney

The Rural Housing Service (RHS) has been operating a rural voucher program for the past seven years. The program, which is intended to protect residents living in RHS Section 515 rental housing when owners prepay their loans or have their loans foreclosed, is authorized by Section 542 of the Housing Act of 1949.<sup>1</sup> Congress, however, has never funded the program as authorized. Instead, Congress funds the program through annual appropriations that require the agency to operate the program consistently with Section 542, but then restricts eligibility to persons who live in the development as of the day of prepayment or foreclosure. Congress also limits the assistance provided to the difference between the residents' shelter payment and the market rent of the pre-paid or foreclosed unit as of the date of prepayment or foreclosure.<sup>2</sup> Since its enactment, RHS has been operating the program under a series of internal memoranda and handbooks and, most recently, under a Notice published in the Federal Register.<sup>3</sup> On August 14, the agency, for the first time, proposed formal regulations for the program and invited public comments by October 15, 2013.<sup>4</sup> This article reviews those regulations and comments on their many shortcomings.

### Voucher Eligibility

Residents of developments whose loans have been prepaid or that have been foreclosed upon may use a voucher to stay in the development if the owner agrees to accept vouchers. They are not, however, guaranteed the right to remain. If residents are forced or choose to relocate, the voucher regulations would allow them to move to any locality in the United States.<sup>5</sup> Unfortunately, the statutory subsidy restriction may limit their capacity to move unless they are willing and able to pay more than 30% of household income for shelter.

Voucher eligibility is limited to low-income households who reside in a 515 development as of the day of prepayment or foreclosure provided that all household members are: citizens or have been legally admitted to the United States, are not in breach of any unauthorized repayment agreement with RHS, and have not been

<sup>1</sup>42 U.S.C. § 1490r (West 2013).

<sup>2</sup>See, e.g. Pub. L. No. 112-55, 125 Stat. 167 (Nov. 18, 2011).

<sup>3</sup>Rural Development Voucher Program, Notice, 78 Fed. Reg. 36,520 (June 18, 2013).

<sup>4</sup>Rural Development Voucher Program, Proposed Rule, 78 Fed. Reg. 49,374 (Aug. 14, 2013).

<sup>5</sup>78 Fed. Reg. at 49,377 (Proposed 7 C.F.R. § 3560.806).

evicted from federally assisted housing in the past five years.<sup>6</sup> Voucher holders who are denied assistance are provided the right to appeal the adverse decision through the United States Department of Agriculture's National Appeals Division (NAD).<sup>7</sup>

### **Citizenship Eligibility**

RHS, like HUD, is restricted by Section 214 of the Housing Act of 1980 from providing housing assistance to undocumented persons.<sup>8</sup> Unlike HUD, however, RHS has never adopted regulations implementing those restrictions across all of its programs, choosing instead to incorporate the restrictions in its various individual program regulations.<sup>9</sup> Unfortunately, RHS has violated the letter and intent of Section 214 every time it has sought to implement these restrictions and it has done so again in the proposed voucher regulations. Contrary to Section 214, which makes a household eligible for assistance if any member of the household, including a minor, is legally admitted to the United States, the proposed regulations require *all* voucher household members to be citizens or to have legal residency status. The proposed regulations do not: provide for proration of assistance, require that status be verified through the Immigration and Customs Enforcement division of the Department of Homeland Security (ICE), or provide a mechanism for appealing ICE determinations. Moreover, the regulations fail to authorize self-certification of status for persons who are 62 years of age or older as set out in Section 214.

### **Prior Eviction from Federally Assisted Housing**

The authority to deny vouchers to households that have been evicted from federally assisted housing in the past five years is arbitrary and makes little sense. The voucher program is specifically designed to assist households who are already living in assisted housing. There is no statutory basis for denying that assistance to any eligible household based on a prior eviction particularly in instances when the household remains in the previously subsidized unit. Unless the household has misrepresented its prior rental history, the current landlord has already admitted the household to the development, and there is no reason to deny that household the right to continued occupancy on the basis of a prior eviction.

### **Appeals**

The voucher program is administered by RHS and a contractor operating as its agent. Thus, all voucher eligibility and termination decisions are made by a federal

agency that is bound, by statute<sup>10</sup> and the Constitution, to provide persons whose assistance is denied, reduced, or terminated the right to appeal adverse decisions. Nevertheless, RHS only allows persons whose eligibility for assistance is *denied* to appeal that decision to an impartial official in accordance with the rules governing the NAD. No appeal rights are granted to anyone whose assistance is reduced or terminated. Clearly, the proposed regulations violate voucher holders' due process rights.

### **Voucher Holder Responsibilities**

The proposed regulations place various responsibilities on voucher holders and authorize RHS to terminate participation for failure to comply, including failure to promptly notify the agency of any violations of those responsibilities.<sup>11</sup> Among the listed responsibilities, voucher holders are required to return all eligibility documentation to RHS within the time frames specified by the agency. However, none of these time frames are set out in the regulations. RHS apparently intends to publish them in a separate handbook that can be altered without compliance with RHS' statutory framework or the rule-making process set out in the Administrative Procedure Act (APA).<sup>12</sup> RHS' plan may be convenient for the agency, but it violates voucher holders' right to know what deadlines are applicable to the program and to participate in the process of changing those deadlines through public rulemaking.

Critical deadlines that must be published include the amount of time in which:

- RHS must notify residents of the availability of vouchers;
- the resident has to apply for a voucher;
- RHS has to determine the voucher holder's eligibility;
- the voucher holder has to locate and lease an acceptable unit;
- RHS has to inspect the unit;
- the voucher holder has to request extensions of time; and
- the landlord and RHS have to notify the voucher holder of intent to extend the lease and voucher.

Other voucher holder obligations include: finding a unit; providing RHS with a copy of the executed lease; not committing a substantial violation of the lease; not being absent from the unit for more than 90 consecutive days; notifying the agency if the holder moves from the unit

<sup>6</sup>78 Fed. Reg. at 49,377 (Proposed 7 C.F.R. § 3560.803).

<sup>7</sup>*Id.*

<sup>8</sup>42 U.S.C. § 1471(h) (West 2013).

<sup>9</sup>*See, e.g.* 7 C.F.R. § 3560.55(a)(1). RHS postponed implementation of this restriction indefinitely because it did not conform to Section 214. *See* Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs, Interim Final Rule, 70 Fed. Reg. 8503 (Feb. 22, 2005).

<sup>10</sup>42 U.S.C. § 1480(g) (West 2013).

<sup>11</sup>78 Fed. Reg. at 49,377 (Proposed 7 C.F.R. § 3560.804).

<sup>12</sup>Email from Janet Stouder, RHS Deputy Director Multi-family Housing to Gideon Anders (Sept. 11, 2013).

on a voluntary or involuntary basis (e.g. eviction); allowing the agency to inspect the unit; notifying the agency of changes in household composition; paying for utility bills; and providing appliances that the landlord is not required to provide under the lease.<sup>13</sup> Moreover, voucher holder household members may not engage in: (1) the abuse of drugs or alcohol, or (2) drug-related or other criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents or persons residing in the immediate vicinity of the premises.<sup>14</sup>

Most of these obligations mirror the HUD voucher program tenant obligations.<sup>15</sup> Some should not, however, be extended to the RHS voucher program because there are differences between the programs. Unlike HUD, RHS does not adjust household subsidy at any time during the term or the end of the lease because the amount of subsidy extended to voucher holders is set when the voucher is issued. There is, therefore, no reason to report changes in household size to the agency.

The requirement that the voucher holder not be absent from the unit for more than 90 days is unclear. Presumably, it means that the unit cannot be vacant for 90 days as opposed to the voucher holder simply being absent while the remaining household members continue to occupy the residence.

Interestingly, while the proposed regulations specify detailed resident responsibilities, the landlord responsibilities are not set out in similar fashion. Thus, provisions that preclude rent increases during the term, side payments, and payment for mandatory extra services, and that require good cause for eviction and a 90-day notice of any proposed rent increase at the end of the term, are not set out in the RHS proposed regulations. While RHS will, hopefully, include these requirements in the Rural Development Assistance Payment (RDAP) contract, there is no reason why landlord obligations are not detailed in the same manner that voucher holders' obligations are enumerated.

### **Voucher Eligible Units**

The proposed regulations authorize the use of vouchers in any rental housing unit that meets the agency's health and safety standards and for which the landlord is willing to accept vouchers.<sup>16</sup> Unlike the HUD Enhanced Voucher Program, in which HUD obligates owners of developments that were financed by the agency to accept vouchers, RHS has not extended that requirement to owners of RHS developments. This is inconsistent with RHS' statutory obligation to operate its program as consistently as possible with the HUD Section 8 program.<sup>17</sup>

<sup>13</sup>78 Fed. Reg. at 49,377 (Proposed 7 C.F.R. § 3560.804).

<sup>14</sup>*Id.*

<sup>15</sup>24 C.F.R. § 982.551.

<sup>16</sup>78 Fed. Reg. at 49,377 (Proposed 7 C.F.R. § 3560.806).

<sup>17</sup>Pub. L. No. 112-55, 125 Stat. 167 (Nov. 18, 2011).

## **Lease and RDAP Contract**

The proposed regulations contain provisions that must be included in the unit lease (entered into by and between the voucher holder and the landlord) and the RDAP contract between the landlord and RHS.<sup>18</sup>

### **Lease**

There are no unique lease provisions set out in the regulations other than that a Tenant Lease Addendum must be attached to the lease. A draft of the addendum is not included in the regulations and no provisions that must be included in that addendum are prescribed. Again, this is a significant omission.

### **RDAP Contract**

The only time limit that is set out in the proposed regulations is a 60-day restriction on paying retroactive assistance to landlords when the lease is entered into prior to the execution of the RDAP contract.<sup>19</sup> The problem with this time limit is that a voucher holder has no control over whether the deadline is met. Once a voucher holder leases a unit and informs RHS of the lease, the agency inspects the unit and, if the unit meets its standards, it forwards the RDAP contract to the landlord who is obligated to execute and return it to RHS. If the deadline is missed, only the voucher holder is penalized by having to pay the full rent for some period of time. This is most likely to happen when the voucher holder intends to move from the development previously financed by RHS. This is because the new landlord is likely to insist that the voucher holder sign a lease as early as possible and RHS will have to conduct a more thorough inspection of the dwelling because it is not part of a development with which it is familiar. Thus, the process is likely to take more than 60 days. Given that voucher holders are typically very low income households, the payment of full rent for any period of time, particularly when the voucher holder also has to pay rent and utility deposits, is likely to create an undue hardship for the voucher holder.

RHS can easily remedy this process by extending the time for which it will pay retroactive assistance to 120 days. It can also create an exception to the 60-day time limit when the deadline is not met for reasons outside the voucher holder's control.

The proposed regulations list the items that must be included in the RDAP contract, such as lease requirements and what actions will cause a breach of the contract and associated remedies, but they set out no specific requirements. Thus, advocates are provided no opportunity to comment on what will be included in the RDAP contract and are unable to assure that voucher holders' interests will be protected.

<sup>18</sup>78 Fed. Reg. at 49,377-49,378 (Proposed 7 C.F.R. § 3560.807).

<sup>19</sup>78 Fed. Reg. at 49,378 (Proposed 7 C.F.R. § 3560.807(c)(2)).



## Landlord Responsibilities

The proposed rules mostly set out landlord responsibilities in very general terms, such as the landlord's obligations to maintain the units, enforce the leases, and pay utility costs not paid by the voucher holder.<sup>20</sup> They require the landlord to inform the agency of the voucher resident's absence for more than 90 days and of the landlord's termination of the voucher holder's residency.

## Voucher Value

In a surprising addition, the proposed rules authorize, but do not require, RHS to adjust the voucher subsidy by the value of inflation. If the agency exercises that authority, it should substantially assist voucher households since it is currently the only way in which the agency can increase the subsidy received by the voucher holders. Potentially, the agency can increase the value of the voucher annually if the value of the prior 515 unit increases, but so far the agency has not chosen this option.

## Issuance of Voucher and Transfers

The rules propose that a voucher be issued to a "primary tenant," who controls it during the entire time that the agency extends assistance to the household. They also limit transfers to any other household member except in the case of the voucher holder's death, involuntary household separation, transfer to an assisted living or nursing facility, or divorce.<sup>21</sup> This designation and the transfer restrictions make no sense because all household members were eligible for a voucher as of the day of prepayment or foreclosure, and household members are never advised of the consequences of designating a primary tenant or subsequent transfer limitations. Indeed, the limitation can be inconsistent with the Section 214 citizenship eligibility requirement when an undocumented adult is designated as the primary tenant and he or she decides to live apart from the documented household member who qualified the household in the first place. The provision is also irrational when the primary tenant has engaged in domestic violence. It allows the perpetrator to relocate while leaving the survivor without voucher assistance.

## Voucher Term, Termination, and Renewal

### Voucher Term

The proposed rules extend a voucher for a term of 12 months.<sup>22</sup> While not explicit, renewals are for the same term. To have a voucher renewed, the voucher holder needs to certify that the household continues to be low-income. Actual income certification is unnecessary since

the voucher subsidy is not adjusted and is not income based.

### Termination

The proposed regulations do not require landlords to have good cause to evict voucher holders during either the lease term or at its end. Instead, they authorize landlords to evict for any cause specified in the lease between the landlord and the voucher holder. This omission is a critical deprivation of RHS voucher holders' most fundamental housing right.

Resident termination of the lease during the term is prohibited under the proposed regulations except with the landlord's consent.<sup>23</sup> The provision fails to take into account situations where the landlord is violating the lease or state or local law. It also fails to consider situations where the resident needs a reasonable accommodation or where the resident's termination is due to an act of domestic violence. Obviously, the landlord's consent should not be required in any of these cases.

### Intent to Renew Lease or Increase Rent

The proposed regulations are silent on the landlord's obligation to notify voucher-assisted households of the intent to renew the lease or increase rent charges at the time of renewal. Under the HUD voucher program, landlords are required to provide such a notice at least 60 days before the expiration of the lease. Such a notice is particularly critical under the rural voucher program because the number of decent and affordable housing units in rural areas is limited, and because the subsidy that the voucher holder receives is not geared to reasonable rents in the community. Thus, the failure to provide voucher holders with reasonable notice of the landlord's intent to renew the lease or raise rents can cause a severe hardship to RHS voucher holders.

## VAWA

Earlier this year, Congress extended the Violence Against Women Act (VAWA) to the RHS housing programs.<sup>24</sup> Unfortunately, in an apparent oversight, it failed to include the RHS voucher program among the programs to which VAWA applies. The RHS regulations also do not extend VAWA to the voucher program even though the agency has effectively applied VAWA to the program for the past six years by using the HUD HAP contract, which extends VAWA to Section 8 Voucher holders. There is no reason, therefore, why RHS should not continue to extend VAWA to the voucher program.

<sup>20</sup>78 Fed. Reg. at 49,378 (Proposed 7 C.F.R. § 3560.808).

<sup>21</sup>78 Fed. Reg. at 49,378 (Proposed 7 C.F.R. § 3560.811).

<sup>22</sup>78 Fed. Reg. at 49,378 (Proposed 7 C.F.R. § 3560.812).

<sup>23</sup>78 Fed. Reg. at 49,378-49,379 (Proposed 7 C.F.R. § 3560.814(a)(1)).

<sup>24</sup>Pub. L. No. 113-4, § 41411, 127 Stat. 103 (Mar. 7, 2013).

## Conclusion

RHS' plan to adopt formal regulations for the voucher program is to be commended. However, before finalizing the regulations, the agency must make substantial changes to what it has proposed. The National Housing Law Project (NHLP) plans to submit extensive comments to the regulations by the deadline. A draft of those comments should be posted on the NHLP website, [www.nhlp.org](http://www.nhlp.org), before the end of September. Advocates are urged to review the NHLP comments and either sign on to them, or submit their own comments to the agency. ■

## HUD Issues Notice on Applying VAWA 2013 to HUD Programs

by Karlo Ng, NHLP Staff Attorney

On August 6, 2013, the Department of Housing and Urban Development (HUD) published a Federal Register notice providing an overview of the applicability of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013)<sup>1</sup> housing provisions to HUD programs.<sup>2</sup> The notice summarizes key housing protections under VAWA 2013 and highlights how the new law amends continuing safeguards established by prior versions of VAWA. Advocates should be aware of several new issues raised by the notice. Public comments are due October 7, 2013.<sup>3</sup>

Importantly, the HUD notice indicated that while VAWA 2013's housing protections were effective upon enactment on March 7, 2013, the agency did not interpret this to mean that the provisions were self-executing.<sup>4</sup> Therefore, HUD guidance or rulemaking would be necessary for owners and managers to comply with the new provisions.<sup>5</sup> This assertion was unexpected news to many housing and survivor advocates. The advocacy community assumed that public housing authorities (PHAs), owners, and managers of the covered housing programs were immediately bound by the statute's basic requirements once VAWA 2013 was signed into law, except for a few significant safeguards requiring federal agencies to act before the protections could be implemented.<sup>6</sup> HUD's position on this issue was even more confounding in light of HUD's Office of Special Needs Assistance Programs' (SNAPS) mass email via HUD's Office of Community Planning and Development (CPD) listserv on August 30, 2013. This email explicitly stated that housing providers in HUD-covered programs should *not* wait on HUD guidance or regulations to extend the basic VAWA protections

<sup>1</sup>Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, § 601, 127 Stat. 54, 101 (2013), (to be codified at 42 U.S.C. §§ 14043e-11, 1437d note), available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ4/pdf/PLAW-113publ4.pdf>. For a summary of VAWA 2013's housing provisions, please see NHLP, *VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards* (July 2013) [hereinafter *NHLP Article on VAWA 2013*], available at <http://nhlp.org/files/VAWA%202013%20Bulletin%20Article%20Updated.pdf>.

<sup>2</sup>The Violence Against Women Reauthorization Act of 2013: Overview of Applicability to HUD Programs, 78 Fed. Reg. 47,717 (Aug. 6, 2013) [hereinafter *HUD VAWA 2013 Notice*], available at <http://www.gpo.gov/fdsys/pkg/FR-2013-08-06/pdf/2013-18920.pdf>.

<sup>3</sup>*Id.* at 47,717.

<sup>4</sup>*Id.* at 47,718.

<sup>5</sup>*Id.*

<sup>6</sup>For example, VAWA 2013 requires that each federal agency adopt an emergency transfer plan to be used by PHAs, owners, and managers of housing assisted under the covered housing programs. In addition, HUD must develop a notice of VAWA housing rights that PHAs, owners, and managers must provide to applicants and tenants. See NHLP *Article on VAWA 2013*, *supra* note 1.

to tenants in HUD-assisted housing.<sup>7</sup> It further reminded stakeholders that housing providers who refused to rent to, evicted, or otherwise treated someone differently because of that person's status as a survivor of domestic violence could be violating the Fair Housing Act.<sup>8</sup> In addition, jurisdictions or entities that encouraged or caused differential treatment toward survivors could be liable under fair housing laws.<sup>9</sup>

Advocates working with survivors to access and maintain affordable housing that is newly covered by VAWA 2013 should use this HUD email for advocacy purposes. In addition, advocates should know that HUD's regulations implementing VAWA 2005 are still in effect.<sup>10</sup> Therefore, owners and managers of public housing, project-based Section 8 properties, Section 202 (for the elderly) and Section 811 (for the disabled) supportive housing programs, as well as landlords accepting Section 8 vouchers, are still bound by these rules, which provide additional protections for survivors.

The August 6 HUD notice further included the following:

- PHAs, owners, and managers must immediately include survivors of sexual assault in 24 C.F.R. § 5.2005(d)(1). This regulatory provision allows a PHA, owner, or manager to evict a tenant or terminate assistance for a lease violation unrelated to the violence so long as the survivor is not subjected to a more demanding standard than other tenants.<sup>11</sup>
- HUD did not view VAWA 2013 to cover: Section 202 Direct Loan projects without Section 8 project-based assistance; Section 202 when the assistance is coupled with Section 162 Assistance; or the new Senior Preservation Rental Assistance Contracts.<sup>12</sup>
- Until HUD develops a model emergency transfer plan, PHAs, owners, and managers can continue to implement any existing transfer plan described in an agency's admissions and occupancy plan or administrative plan.<sup>13</sup>

<sup>7</sup>Email from HUD CPD to OneCPD Mailing List, Reauthorization of the Violence Against Women Act (VAWA) (Aug. 30, 2013), available at <http://us5.campaign-archive2.com/?u=87d7c8afc03ba69ee70d865b9&id=5c84a52df8&e=fb488621b>.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>See HUD VAWA 2013 Notice, *supra* note 2, at 47,722; see also HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66,246 (Oct. 27, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-10-27/pdf/2010-26914.pdf>.

<sup>11</sup>HUD VAWA 2013 Notice, *supra* note 2, at 47,720.

<sup>12</sup>*Id.* at 47,718 n.2.

<sup>13</sup>*Id.* at 47,722.

In addition, HUD highlighted four specific topics on which it would particularly like feedback.

- **Rights of Remaining Tenants and "Reasonable Time."** VAWA 2013 provides that if a lease bifurcation occurs because of domestic violence and the removed abuser was the tenant eligible to receive the housing subsidy, then any remaining tenant must have the opportunity to establish eligibility for the covered housing program. If that person cannot establish eligibility, then the housing provider must provide reasonable time for the tenant to find new housing or to establish eligibility under another covered housing program. VAWA 2013 requires that the federal agencies administering the covered programs determine what constitutes "reasonable time." HUD would like comments concerning what would be a "reasonable time" to find new housing or establish eligibility under another HUD-covered housing program.<sup>14</sup>
- **Self-certification Forms.** VAWA 2013 extended the documentation and confidentiality requirements found in VAWA 2005 to all programs covered by the new law. HUD will develop forms that are similar to forms HUD-50066 and HUD-91066 for the other programs. The agency requests comments on how these forms may be adapted for the newly covered programs.<sup>15</sup>
- **HUD's Notice of VAWA Rights.** The new law requires HUD to develop a notice of VAWA housing rights (HUD notice), which includes the right of confidentiality, for applicants and tenants. Specifically, PHAs, owners, and managers must provide the HUD notice accompanied by the agency-approved, self-certification form to applicants and tenants: (1) at the time an applicant is denied residency; (2) at the time the individual is admitted; and (3) with any notification of eviction or termination of assistance. In addition, the HUD notice must be available in multiple languages and be consistent with HUD guidance concerning language access for individuals with limited English proficiency. HUD solicits comments on the content of the notice of tenant's rights.<sup>16</sup>
- **Model Emergency Transfer Plan and Tenant Protection Vouchers.** VAWA mandates that each federal agency adopt a model emergency transfer plan to be used by PHAs and owners or managers of housing assisted under the covered housing programs. This transfer plan must allow survivor tenants to transfer to another available and safe dwelling unit assisted under a covered housing program if: (1) the tenant expressly requests the transfer and (2) either the

<sup>14</sup>*Id.* at 47,720.

<sup>15</sup>*Id.* at 47,721.

<sup>16</sup>*Id.* at 47,721-47,722.



tenant reasonably believes that he or she is threatened with imminent harm from further violence if he or she remains within the same assisted dwelling unit or where the tenant is a victim of sexual assault and the sexual assault occurred on the premises within 90 days before the transfer request. In addition, the transfer plan must incorporate reasonable confidentiality measures to ensure that the PHA, owner, or manager does not disclose the location of the new unit to the abuser. VAWA 2013 further mandates that HUD establish policies and procedures under which a victim requesting an emergency transfer may receive a tenant protection voucher. HUD requests comments on the content of the model emergency transfer plan and the implementation of the tenant protection vouchers provision.<sup>17</sup>

In conclusion, survivor advocates should familiarize themselves with the provisions in HUD's recent VAWA notice, and should also consider submitting comments to HUD by the October 7th deadline. The *Housing Law Bulletin* will provide future updates about VAWA 2013 implementation. ■

## NHLP's Analysis of the Proposed Affirmatively Furthering Fair Housing Rule

by Renee Williams, University of Chicago Public Interest Law Fellow, and Deborah Thrope, NHLP Staff Attorney

*The August issue of the Housing Law Bulletin featured a brief overview of the provisions contained in HUD's proposed Affirmatively Furthering Fair Housing (AFFH) rule. In this piece, we provide a more detailed analysis of the proposed rule. This article is largely adapted from NHLP's own AFFH comments<sup>1</sup> submitted to HUD via regulations.gov. This analysis assumes the reader has some existing familiarity with the proposed rule's contents.*

On July 19, 2013, the Department of Housing and Urban Development (HUD) issued its proposed Affirmatively Furthering Fair Housing rule (proposed rule).<sup>2</sup> The following article provides analysis of the proposed rule, with an emphasis on those features that could be improved upon in the text of the final rule.

### General Thoughts on the Proposed Rule

Overall, the proposed rule is a positive step forward towards the creation of more inclusive neighborhoods, communities, and regions. As the summary introducing the proposed rule acknowledges, the current use of the Analysis of Impediments to Fair Housing Choice (AI) has not been particularly effective in ensuring compliance with the Fair Housing Act's mandate to affirmatively further fair housing.<sup>3</sup> Thus, the proposed rule's creation of a new fair housing analysis framework—the Assessment of Fair Housing (AFH)—provides a welcome change.

Additionally, the proposed rule requires program participants subject to the AFFH mandate to examine their compliance through a wider lens by engaging in an analysis of factors such as an area's access to transportation, education, healthcare, social supports, and economic opportunities. To facilitate such an analysis, HUD intends to provide data to program participants, along with a geo-spatial mapping tool to offer users context. Again, these are also positive developments.

That said, certain areas of the proposed rule could be significantly strengthened. In its comments submitted

<sup>17</sup>*Id.* at 47,722.

<sup>1</sup>See NHLP Comments (Sept. 17, 2013), [http://nhlp.org/files/NHLP%20AFFH%20Comments%20FINAL\\_0.pdf](http://nhlp.org/files/NHLP%20AFFH%20Comments%20FINAL_0.pdf).

<sup>2</sup>For an overview of the Proposed AFFH Rule, see, NHLP, *HUD Proposes Affirmatively Furthering Fair Housing Rule*, 43 HOUS. L. BULL. 155, 155 (Aug. 2013). See also *Affirmatively Furthering Fair Housing, Proposed Rule*, 78 Fed. Reg. 43,710 (July 19, 2013) [hereinafter *Proposed AFFH Rule*].

<sup>3</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,710.

to HUD, NHLP identified three such major areas needing improvement. First and foremost, the final rule should include language that would focus on a balanced approach to implementing the AFFH mandate in a manner that incorporates both revitalization and desegregation of areas of concentrated racial and ethnic poverty. Second, the final rule must reflect the need to preserve affordable housing, even in areas that are economically depressed and have racial and ethnic concentrations of poverty. Third, the final rule must include strengthened language regarding enforceability of the AFFH mandate. In addition to these three main areas, there are more specific portions of the proposed rule that need to be strengthened to ensure the final rule's effective implementation.

### **Specific Comments on Topics in the Proposed Rule**

#### **A Balanced Approach Includes the Preservation of Affordable Housing**

The opening section of the AFFH regulations describes the purpose of the rule and states, "A program participant's strategies and actions may include strategically enhancing neighborhood assets (e.g., through targeted investment in neighborhood revitalization or stabilization) *or* promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals" (emphasis added).<sup>4</sup> Nearly identical language appears in the preamble to the rule.<sup>5</sup> This either/or language creates a false choice for program participants by suggesting that one approach may be sacrificed at the expense of the other. The final rule should substitute "and" for "or" so that program participants know that they must engage in a balanced approach to community development within the larger context of affirmatively furthering fair housing.

In Proposed Section 5.152,<sup>6</sup> HUD defines terms used throughout the remainder of the proposed rule. Definitions of concepts such as "affirmatively furthering fair housing," "fair housing issue," and "fair housing choice," should include language acknowledging that the ability of protected classes to find affordable housing plays a crucial role in the successful implementation of the AFFH mandate. These definitions, in the final rule, should reflect an approach that balances the complementary goals of

preserving and rehabilitating existing affordable housing stock and eliminating concentrations of poverty and segregation.

Similarly, the proposed rule requires that development-related policies in public housing agency (PHA) plans "reduce disparities in access to community assets, and address disproportionate housing needs" for members of protected groups.<sup>7</sup> Such language should be clarified so as not to preclude development-related activities that revitalize impoverished areas. The AFFH mandate should not result in the involuntary displacement of individuals and families who currently reside within racially and ethnically concentrated areas of poverty or in the loss of affordable housing units in these areas.

The proposed rule requires each Consolidated Plan (ConPlan) jurisdiction to certify that it will affirmatively further fair housing, and that "it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."<sup>8</sup> However, it is not clear from the text of the proposed rule that actions taken to preserve affordable housing in racially and ethnically concentrated areas of poverty would not be viewed by HUD as violating the AFFH mandate. In order to ensure continued investment in existing economically distressed areas, the final rule should include language that such actions are not necessarily materially inconsistent with the AFFH obligation.

The ultimate goal of the final AFFH rule should be making every community nationwide a community of opportunity while promoting resident choice. This goal can only be accomplished by taking a regional approach to assessing fair housing needs because considering low-income housing only in one specific jurisdiction could have the effect of perpetuating or increasing segregation in the larger region.<sup>9</sup>

#### **Enforcement**

The proposed rule places great emphasis on procedure without providing similar weight to program participants' substantive obligations. For the AFFH rule to be effective, HUD must designate tools for meaningful enforcement. Components of meaningful enforcement include:

- requiring participants to set benchmarks in the AFH that include specific goals and a timetable in which to achieve the goals;
- mandating participants to report annually on progress towards meeting these benchmarks;

<sup>4</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,729 (Proposed 24 C.F.R., Subpart A § 5.150).

<sup>5</sup>This preamble language reads, "A program participant's strategies and actions may include strategically enhancing neighborhood assets (for example, through targeted investment in neighborhood revitalization or stabilization) *or* promoting greater mobility and access to communities offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals" (emphasis added). Proposed AFFH Rule, 78 Fed. Reg. at 43,716.

<sup>6</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,729-30 (24 C.F.R., Subpart A § 5.152).

<sup>7</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,742 (Proposed 24 C.F.R. § 903.2(a)(3)).

<sup>8</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,738 (Proposed 24 C.F.R. § 91.225(a)(1)).

<sup>9</sup>See generally *United States ex. Rel. Anti-Discrimination Ctr v. Westchester Co.*, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

- requiring a transparent process where reports and other documents are available to the public and submitted to HUD; and
- instituting a formal complaint procedure that includes at minimum: (1) instructions for community members to challenge the acceptability of an AFH, the subsequent actions of a jurisdiction to meet its AFH goals, and/or the failure to engage in the citizen participation process to develop the AFH; (2) meaningful and timely review of meritorious complaints by HUD; and (3) options for sanctions in the event the program participant is taking steps in violation of its AFH or other AFFH obligations.

Additionally, as NHLP and numerous other advocacy groups observed in their comments, the proposed rule only obligates participants to prioritize as few as one goal for addressing or mitigating factors for addressing “fair housing determinants.”<sup>10</sup> Allowing program participants to prioritize as few as one goal would not allow for the in-depth analysis required to assess a community’s housing needs. In fact, such language signals to program participants that additional existing fair housing issues can be ignored or somehow de-prioritized, undermining much of what HUD sets out to accomplish with this rule. Thus, HUD should re-examine this language and make clear that prioritizing a single goal would likely fall short of compliance with the AFFH mandate.

### PHA Programs and the AFH Process<sup>11</sup>

PHA programs, and particularly the use of Housing Choice Vouchers (HCV), are integral to combating segregation by providing a path to communities with assets such as good schools and access to employment. However, equally important is the preservation of existing federally subsidized housing units—even those units currently situated in racially or ethnically concentrated areas of poverty. Thus, as the proposed rule’s language indicates, PHAs should be required to submit an AFH.

Under the proposed rule, PHAs are given three options for submitting an AFH.<sup>12</sup> The following list highlights some of the observations included in NHLP’s comments to HUD:

- **Hard Units.** Option 1 allows a PHA to calculate its hard units to determine with which ConPlan juris-

diction it will collaborate. The rule for determining the applicable ConPlan jurisdiction with respect to a PHA’s hard units seems arbitrary, however, and is too narrow of an assessment. Thus, HUD should define “hard units” to include all federally assisted owned and managed units subject to a PHA’s control including, but not limited to, Section 202, Section 8 Moderate Rehab, project-based vouchers, and Rental Assistance Demonstration (RAD) conversions. Many PHAs are currently converting their public housing stock to RAD project-based Section 8 or project-based vouchers. If HUD does not broaden the definition in the final rule, then these formerly public housing units will not be considered in PHAs’ AFH processes. In some cases, particularly in metropolitan areas, a PHA’s vouchers may be utilized primarily or substantially in an adjacent jurisdiction, which should also be considered a basis for determining an applicable jurisdiction.

- **Collaboration Among PHAs.** Option 1 does not accurately reflect HUD’s intent to implement a full range of regionalization options as stated in the summary to the proposed rule: “New § 5.156 addresses and encourages regional assessments and fair housing planning, providing that two or more program participants may join together to submit a single AFH to evaluate fair housing challenges, issues, and determinants from a regional perspective.”<sup>13</sup> The rule needs to be clarified not only to allow, but to encourage, two or more PHAs to work together on an AFH, within a regional boundary. Presumably, Option 1 is meant to cover PHAs that wish to file an AFH with another PHA in the region, although the language is unclear. Option 1 must be modified to explicitly allow for PHAs that wish to submit an AFH with other PHAs in its region.
- **Individual Obligation to Affirmatively Further Fair Housing.** Regionalization must not relieve program participants of their individual AFFH obligations. The final rule must reflect that each collaborating PHA has an obligation to AFFH, to set local PHA-specific goals, and to report on the PHA’s progress in meeting these goals. Conversely, a PHA that chooses to submit its own AFH under Option 2 needs to be required by the final rule to demonstrate and certify that it has reviewed and taken into consideration any existing regional or state-wide AFHs for the area.
- **Impact of Loss of Affordable Units.** The final rule should include language requiring PHAs to discuss the impact of the loss of affordable units related to PHA development-related activities in their AFHs.

<sup>10</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,731 (Proposed 24 C.F.R. 5, subpart A § 5.154(d)(4)(ii)). A “fair housing determinant” is a “factor that creates, contributes to, or perpetuates one or more fair housing issues.” Proposed AFFH Rule, 78 Fed. Reg. at 43,730 (Proposed 24 C.F.R. 5, subpart A § 5.152).

<sup>11</sup>Comments submitted to HUD on behalf of the Center for Budget and Policy Priorities (CBPP) are also instructive regarding PHAs. See CBPP Comments (Sept. 17, 2013), <http://www.regulations.gov/#!documentDetail;D=HUD-2013-0066-0775>.

<sup>12</sup>See generally Proposed AFFH Rule, 78 Fed. Reg. at 43,743 (Proposed 24 C.F.R. § 903.15(a)(1)-(3)).

<sup>13</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,718.



- **Demolition.** The proposed rule identifies demolition as a development-related activity that should be designed to “address disproportionate housing needs by protected class.”<sup>14</sup> Ordinarily, demolition is not an activity that will further this goal, unless it is replaced with higher-quality affordable or mixed-income housing without the loss of units. Where demolition and/or disposition are used as a tool to further other fair housing goals, the final rule should require that a PHA consider existing community assets in a neighborhood as a result of the housing, such as a community center, social services, or local businesses.
- **Housing Choice Voucher Program.** Housing Choice Vouchers represent a key component to any jurisdiction’s goals to AFFH. As such, any discussion of development-related activities in the final rule must be modified to more accurately reflect what a PHA must do with respect to the voucher program in the context of the AFFH mandate.
- **Possible Elimination of the PHA Plan Process.** In the FY 2014 Budget, the Administration proposed to eliminate the PHA plan process. In the future, HUD may successfully seek and obtain legislative changes to the PHA plan or annual plan process. The final rule must address the possible elimination of the PHA plan process.
- **Inclusion of Moving to Work (MTW) PHAs.** All PHAs should be required to submit an AFH. There are currently 35 PHAs that are MTW PHAs.<sup>15</sup> These MTW PHAs currently submit plans annually to HUD but may not be subject to the Section 903 PHA plan process rules. The AFFH final rule should state that any current and future MTW PHAs are subject to the AFFH rules and must conduct an AFH under the available options.

### Community Participation

The proposed rule greatly emphasizes public participation, which is, overall, a positive feature that should be retained in the final rule. However, public participation is only effective if the community has a real and meaningful opportunity to influence the outcome of the AFH process, such that the final AFH submitted to HUD is an accurate reflection of the state of fair housing in a given area. Again, the following list includes some of the comments NHLP included in its submission to HUD:

- **Capacity.** The final AFFH rule should include language about the importance of financial support for capacity building with respect to community par-

ticipation. Without additional support, most residents and other stakeholders will have little means to organize and participate in their local or regional AFH.

- **Public Tracking.** To better inform community participants and other stakeholders, the final rule should mandate that upon receipt by HUD, the agency will provide each AFH submission with a publicly available tracking number. Such tracking would allow residents, advocates, and stakeholders to know the status of an AFH submission. HUD should include status information on its website for ease of access. Ideally, such public tracking would work in conjunction with a formalized complaint process and with an objection mechanism in the AFH.
- **HUD Guidance for Increasing Resident and Public Participation.** HUD should provide guidance to program participants on how to encourage residents and the wider community to participate in this process. Such guidance is particularly important in this context, as implementation of the AFFH mandate may appear abstract and not immediately related to the everyday problems of residents. Any guidance should also include strategies for promoting community involvement in times of limited funding.
- **Participation by Limited English Proficient (LEP) persons.** Proposed ConPlan Sections 91.105(a)(4) (Local governments) and 91.115(a)(4) (States) require jurisdictions, as part of their citizen participation plans, to take reasonable steps to “provide language assistance to ensure meaningful access to citizen participation”<sup>16</sup> by non-English speaking persons. These sections also require that the citizen participation plan describe the jurisdiction’s procedures “for assessing its language needs and identify any need for translation of notices and other vital documents.”<sup>17</sup> The final rule must define what is meant by “vital documents” in this instance. While the term appears throughout HUD’s 2007 LEP Guidance,<sup>18</sup> the term should be defined specifically in the context of the citizen participation process with respect to an AFH. The final rule should also provide guidance on what sorts of documents constitute “vital documents” for the purposes of the AFH public participation process. Additionally, any citizen participation plan should list the languages for which the program participant will provide translation or interpretation during the AFH process.

<sup>16</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,735; 43,737 (Proposed 24 C.F.R. §§ 91.105(a)(4), 91.115(a)(4)).

<sup>17</sup>*Id.*

<sup>18</sup>*See generally* Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Notice, 72 Fed. Reg. 2732 (Jan. 22, 2007).

<sup>14</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,742 (Proposed 24 C.F.R. § 903.2(a)(3)).

<sup>15</sup>HUD, *Moving to Work FAQ*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/mtw/faq](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/faq).

**Additional Areas of the Proposed Rule**

The remaining points describe a variety of other important areas in which HUD should consider modifying the language of the proposed rule.

- **The AFFH Mandate and Persons with Disabilities.** PHAs should be required to provide updated information about the accessibility of PHA-owned units and the identity of landlords with accessible units in the jurisdiction who cannot discriminate against Section 8 tenants, such as owners of LIHTC properties. Additionally, a description of how a program participant is implementing its state *Olmstead* plan<sup>19</sup> should be a mandatory part of an AFH.
- **Additional Affordable Housing Mechanisms.** It is imperative that other affordable housing programs, particularly housing operating under the Low-Income Housing Tax Credit (LIHTC) program, be included in the AFH analysis as a subset of “activities relating to housing and urban development.”<sup>20</sup> Jurisdictions should be required to consider how LIHTC properties factor into the availability of affordable housing both within and outside of racially and ethnically concentrated areas of poverty. Furthermore, HUD should require that program participants coordinate with the Department of Treasury and the states’ tax credit allocation committees, which administer the LIHTC program, to ensure that plans for construction and conversion of LIHTC properties are incorporated into the jurisdiction’s AFH. HUD should also require that participants consider a state Qualified Allocation Plan when setting its goals to AFFH. Additionally, affordable housing programs administered by the U.S. Department of Agriculture should be included as a subset of housing and development-related activities. Units from these programs should be factored into a program participant’s AFH accordingly.
- **HUD Data.** The proposed rule summary only states that HUD data will be updated “periodically.”<sup>21</sup> The final rule should include language stating that the data be updated annually or biannually. If HUD determines that there has not been any substantial change in the available data, it should publish a notice to that effect for the respective year.
- **HUD FHEO Review.** The proposed rule does not identify which entity within HUD will be charged

with reviewing AFH submissions. The final rule should state that HUD’s Office of Fair Housing and Equal Opportunity (FHEO) should process AFH submissions; this change will ensure consistent review of AFHs across administrations.

**Conclusion**

HUD’s proposed AFFH rule provides an encouraging starting point for furthering the cause of equal access for all families to safe, affordable, and decent housing. However, as reflected by NHLP’s observations and comments submitted to HUD, there are many areas where the proposed rule must be improved. The *Bulletin* will continue to follow the progress of the proposed rule as it becomes finalized. ■

<sup>19</sup>The Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), recognized the rights of people with disabilities to live in the most integrated setting appropriate. Pursuant to 24 C.F.R. § 8.4(d), HUD promotes housing choice and the deinstitutionalization of people with disabilities. The *Olmstead* mandate requires that each state have and implement a plan with measurable objectives to meet this goal of housing choice and opportunity.

<sup>20</sup>See 42 U.S.C. § 3608(e)(5).

<sup>21</sup>Proposed AFFH Rule, 78 Fed. Reg. at 43,716.

## Questions Corner

**Q: My client was terminated from the Section 8 Housing Choice Voucher Program based solely on hearsay evidence presented at her informal hearing. Is this permissible?**

**A:** HUD regulations permit hearsay evidence to be considered in informal hearings without regard to the judicial rules of evidence.<sup>1</sup> However, courts lack a uniform position on how this evidence can be used to support a decision. Despite the lack of a universal standard, the following cases suggest that hearing officers should consider the reliability and probative value of the hearsay evidence when deciding its weight at an informal hearing.

The basis for challenging the use of hearsay evidence in a voucher termination hearing lies in a Housing Choice Voucher Program participant's right to due process. Absent a funding shortfall, a participant generally is entitled to continued participation in the voucher program until she is no longer income-eligible or until she violates program rules.<sup>2</sup> The Due Process Clause prevents a PHA from terminating the participant's voucher without a prior hearing regarding the grounds for termination.<sup>3</sup>

In *Goldberg v. Kelly*, the Supreme Court addressed due process in administrative hearings and held that procedural safeguards are required for public benefit terminations, including the right to confront witnesses.<sup>4</sup> In *Richardson v. Perales*, the Court held that Social Security disability decisions that did not involve a termination of benefits could be based on hearsay medical records.<sup>5</sup> The Court allowed the admission of written medical records because of the overall reliability and probative value of the evidence, especially when the claimant failed to exercise the right to subpoena the reporting physician.

While courts allow hearsay to be presented at informal hearings, the degree to which PHAs may rely on it varies greatly as a result of these due process protections. In considering PHA hearing decisions,

most courts only depend on the evidence if it is trustworthy. In *Robinson v. D.C. Housing Authority*, the PHA terminated a participant's Section 8 voucher because an additional person was allegedly living in the unit without PHA knowledge or approval.<sup>6</sup> In deciding that hearsay evidence of the unapproved occupancy was reliable and could affect the PHA's decision, the court weighed several factors, including whether the declarants were disinterested, the consistency of the statements, and if the voucher participant's counsel had access to the statements prior to the hearing.<sup>7</sup> The evidence admitted included an arrest warrant for the alleged additional occupant, the occupant's statement at the time of his arrest, and the plaintiff's statement that the alleged occupant received mail at her home and occasionally spent the night.<sup>8</sup>

In two separate decisions, the Eleventh Circuit addressed the due process dimensions of using hearsay in voucher termination hearings.<sup>9</sup> Both involved the question of whether an individual had been living in the unit unauthorized for a specific number of consecutive days. In each case, the court found that the PHA had not met its burden of proof. While agreeing that due process limits the extent to which an adverse determination may be based solely on hearsay, the decisions recognize that hearsay evidence alone may be sufficient if it is reliable and has probative value. In one of these cases, *Basco v. Machin*, the court did not rule on the hearsay issue, although it set forth, in dicta, four factors used to determine the reliability of hearsay evidence.<sup>10</sup> The factors included whether: (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been

<sup>1</sup>24 C.F.R. § 982.555(e)(5) (2012).

<sup>2</sup>24 C.F.R. §§ 982.314, 982.552 (2012). One exception worthy of mention (although beyond the scope of this article) is if a participant's voucher expires because the participant does not use it. In this case, the participant may have no right to a termination hearing.

<sup>3</sup>*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>4</sup>397 U.S. 254 (1970).

<sup>5</sup>402 U.S. 389 (1971).

<sup>6</sup>660 F. Supp. 2d 6 (D.D.C. 2009).

<sup>7</sup>*Id.* at 13-16.

<sup>8</sup>*Id.*

<sup>9</sup>*Basco v. Machin*, 514 F. 3d 1177 (11th Cir. 2008); *Lane v. Fort Walton Beach Hous. Auth.*, 2013 WL 2150922 (11th Cir. May 20, 2013).

<sup>10</sup>*Basco*, 514 F. 3d at 1182.



## QUESTIONS CORNER continued

recognized by courts as inherently reliable.<sup>11</sup> Several courts have applied the *Basco* factors when determining the reliability and probative value of hearsay evidence and whether a decision to terminate Section 8 assistance may be based solely on hearsay evidence.<sup>12</sup>

Also considering the hearsay issue, Massachusetts' highest court stated that "reliability, not cross-examination, is the 'due process touchstone.'" <sup>13</sup> The court evaluated the hearsay in the context of the *Mathews v. Eldridge* three-part balancing test for procedural due process rights.<sup>14</sup> In applying that test, the Massachusetts court found one document—a police report—reliable because it offered a detailed factual account based on the personal observations of the detective.<sup>15</sup> The court also noted that it is a crime for a police officer to file a false report.<sup>16</sup> However, the court held that a newspaper report was unreliable because some of the key statements were unattributed, multi-leveled, and conclusory hearsay.<sup>17</sup>

At least one court has concluded that sole dependence on unreliable hearsay evidence in a voucher termination hearing is a violation of due process.<sup>18</sup> In *Edgecomb v. Housing Authority of the Town of Vernon*, the court found that the PHA had violated a participant's due process rights on several grounds, including sole

reliance upon uncorroborated and unreliable hearsay evidence.<sup>19</sup> The court rejected the use of a police report containing no firsthand observations and the use of newspaper articles describing an arrest.<sup>20</sup>

Advocates should always assess the due process implications whenever a PHA relies upon hearsay in termination hearings. Furthermore, advocates should consider challenging the use of hearsay where it is unreliable or has little probative value. This is particularly true in the case of double-hearsay, and where the evidence is contradictory, biased, insufficiently detailed, not based on personal observation, or not supported by other evidence. When a PHA relies on witness statements, advocates should request that the hearing officer not consider the evidence because there was no opportunity for cross-examination. These strategies will help protect the due process rights of Housing Choice Voucher participants. ■

<sup>11</sup>*Id.*

<sup>12</sup>*See Woods v. Willis*, 2013 WL 611141 at \*10-11 (6th Cir. Feb. 19, 2013) (discussing the *Basco* factors and concluding that, to the extent that the hearing officer could rely upon hearsay evidence, the evidence presented—a handwritten, un-notarized letter, received in the mail—was unreliable and not probative); *Jones v. Upland Housing Auth.*, 2013 WL 708540 (C.D. Cal. Feb. 21, 2013) (quoting the *Basco* factors, reviewing two letters and determining one letter reliable because it was a statement against interest, but the other unreliable because of the declarant's possible bias); *Henley v. Hous. Auth. of New Orleans*, 2013 WL 1856061 (E.D. La. May 1, 2013) (citing the *Basco* factors and finding a sex offender registry report reliable because of statutory registration requirements).

<sup>13</sup>*Costa v. Fall River Hous. Auth.*, 903 N.E.2d 1098, 1109 (Mass. 2009).

<sup>14</sup>*Mathews*, 424 U.S. at 335 (1976) (broadly addressed procedural due process rights in administrative hearings through a three-part balancing test including: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail).

<sup>15</sup>*Costa*, 903 N.E.2d at 1111.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Edgecomb v. Housing Authority of the Town of Vernon*, 824 F. Supp. 312, 315-16 (D. Conn. 1993).

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

## Recent Cases

The following are brief summaries of recently reported federal and state cases that should be of interest to housing advocates. Copies of these opinions may be obtained from sources such as the cited reporter, Westlaw, Lexis, Google Scholar,<sup>1</sup> FindLaw,<sup>2</sup> or, in some instances, the court's website. NHLP does not archive copies of these cases.

### FEDERAL CASES

#### **Housing Choice Voucher Program: Reversal of Termination for Missed Recertification Appointment**

*Cooley v. Hous. Auth. of Slidell*, 2013 WL 3776488 (E.D. La. July 16, 2013). A Section 8 voucher participant challenged her termination from the program for unreported income as violating due process. At her initial certification, the tenant reported income from child support and Social Security, but nothing from employment from which she was on leave. When she returned to work, she failed to report her resumption of employment and the resulting income until her next annual recertification, in violation of the PHA's 10-day reporting requirement. The tenant also made a minor error in reporting the amount of her unemployment benefits when she later lost her job. She also spent about two weeks away due to a family death. During the tenant's absence, the PHA sent a recertification notice providing a limited window for rescheduling the appointment. The notice was not received until the tenant's return, and thus, she missed the recertification. Despite the tenant's efforts to reschedule, the PHA sent her a termination notice based upon her missed recertification appointment and other unspecified violations. The PHA hearing officer upheld the termination, finding violations of obligations to comply with interim and annual reporting requirements, and to report changes in sources of income or household composition within 10 days. The tenant filed suit under 42 U.S.C. § 1983, alleging that: (1) the notice of the recertification appointment violated due process, and (2) the termination decision was arbitrary and capricious. On cross-motions for summary judgment, the court first found that the § 1983 claim was proper, as the claim alleged that the PHA acted under color of state law pursuant to an official policy in the constitutional deprivation. The court found that the failure to receive

actual notice of the recertification appointment did not violate her due process rights, as she received an informal hearing on that issue before her benefits were terminated. However, the court found the agency's decision arbitrary and capricious because it failed to consider that the participant promptly contacted the PHA upon receiving the letter upon her return home. Since the termination decision failed to make any factual findings regarding other alleged program violations, the court precluded the PHA from relying on them.

#### **Public Housing: Lease Clause Requiring Tenants to Designate Payments as "Rent"**

*Sager v. Housing Comm'n of Anne Arundel Co.*, \_\_\_ F.Supp.2d \_\_\_, 2013 WL 3943497 (D. Md. July 30, 2013). After a housing authority's successful state court summary eviction action against a public housing tenant for nonpayment, the tenant sued in federal court to challenge the rent payment allocation provision of the lease under both state and federal laws. The offending provision, commonly used by many PHAs and landlords, provided that if a tenant made a payment that was not designated as "rent," the PHA could apply the payment to maintenance charges, late fees, or legal fees before applying it to rent. Under this clause, a tenant with other charges owing who tenders the "rent" due but fails to designate it as "rent" may be evicted through a summary process reserved solely for failure to pay rent. Conversely, a tenant's designation would require a PHA to collect any outstanding fees and charges through other procedures. Here, the PHA had initially moved to terminate for material lease violations, which the tenant disputed through the grievance process while continuing to make timely payments. After allocating the funds to non-rent fees and charges, the PHA filed a successful eviction for nonpayment based upon the rent balance due, although nothing indicates that judgment was executed. In the federal action, upon cross motions for partial summary judgment, the court held that the lease clause violated two provisions of state law: (1) the prohibition of clauses waving tenants' rights, specifically the right to contest the charges in a judicial proceeding and the federal right to be evicted only for serious lease violations, and (2) the state's unfair and deceptive trade practices law. The court also found violations of the federal Brooke Amendment statutory rent limitation, 42 U.S.C. § 1437a(a), as well as the federal prohibition on unreasonable lease clauses, 42 U.S.C. § 1437(d)(1)(2). Characterizing the clause as a "gotcha" and "predatory" provision authorizing summary ejectment of unknowing tenants, the court's analysis demonstrates a searching review of the purposes of the public housing program and its protections, as well as the applicable state requirements, which should prove useful in related contexts.

<sup>1</sup>scholar.google.com.

<sup>2</sup>www.findlaw.com.

## **Project-Based Section 8: Annual Contributions Contract Claims Provide Subject Matter Jurisdiction**

*Gloucester Townsp. Hous. Auth. v. Franklin Sq. Assocs.*, 2013 WL 3990820 (D.N.J. Aug. 2, 2013). Congress' 1994 amendments to Section 8 required project-based Section 8 owners seeking rent adjustments to provide rent comparability studies in certain circumstances. In the wake of HUD's implementation of these amendments, numerous owners filed suit for breach of contract. Pursuing such a claim in 2008, the defendant owner had sued the plaintiff housing authority (GTHA) in state court in a pending action that includes an unresolved motion to dismiss for failure to join HUD as an indispensable party. Several years later, plaintiff GTHA filed the instant action in federal court against both HUD and the owner, based upon the Annual Contributions Contract (ACC) with HUD and the Housing Assistance Payments (HAP) Contract with the owner, seeking a declaration of its rights and obligations. The owner then filed counterclaims against GTHA and a cross-claim against HUD. After HUD filed motions to dismiss, the court then sua sponte questioned its own subject matter jurisdiction. The court found a statutory waiver of sovereign immunity in 42 U.S.C. § 1404a, rejecting the reasoning of older cases finding exclusive U.S. Court of Federal Claims jurisdiction under the Tucker Act, and emphasizing that even HUD now recognizes the scope of the waiver. The court then found jurisdiction over the claims against HUD pursuant to the federal question statute, 28 U.S.C. § 1331. The court reasoned that at least the ACC claims involved federal common law, and the intertwined HAP claims provided the basis for supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The court denied HUD's pending motions to dismiss without prejudice as premature until a determination on whether a breach of the HAP had occurred.

## **Home Affordable Modification Program: Performance Under Trial Payment Plans**

*Corvello v. Wells Fargo Bank*, \_\_\_ F.3d \_\_\_, 2013 WL 4017279 (9th Cir. Aug. 8, 2013). Defendant Wells Fargo Bank did not offer plaintiffs, two homeowners seeking mortgage relief, permanent mortgage modifications despite the homeowners' compliance with their respective trial period plans (TPP). Plaintiffs filed suit in federal court, invoking diversity jurisdiction, alleging that their performance under the TPPs created enforceable contracts. Plaintiffs also alleged promissory estoppel and other state law claims. The district court had concluded that the TPP language did not create a contractual obligation requiring defendant to offer a permanent modification, and dismissed the suit under Rule 12(b)(6). The Ninth Circuit, reversing and remanding to the lower court, held that

any bank that enters into a TPP with a borrower under the Home Affordable Modification Program (HAMP) is contractually obligated to offer the borrower a permanent modification if that borrower fulfills his or her obligations under the TPP. Those obligations include (1) making all required TPP payments and (2) providing accurate financial representations. The Ninth Circuit adopted the Seventh Circuit's analysis in *Wigod v. Wells Fargo Bank*, 673 F.3d 547 (7th Cir. 2012) on this issue. The court rejected defendant's argument that a TPP clause requires the borrowers to actually receive a permanent modification offer for a contract to form.

## **Fair Housing Act: Race Discrimination**

*Martin v. Brondum*, \_\_\_ F. App'x \_\_\_, 2013 WL 3814949 (4th Cir. July 24, 2013). Plaintiffs brought suit under the Fair Housing Act (FHA), alleging that defendants refused to negotiate the purchase of a home due to racial and national origin discrimination. Plaintiffs also alleged that defendants misrepresented whether the home was actually on the market, also a result of discriminatory motives. On appeal, plaintiffs challenged the lower court's grant of summary judgment to defendants on the FHA claim, and the dismissal of pendent state law claims. The appeals court found that plaintiffs had not demonstrated direct evidence of discrimination by merely alleging that certain race-neutral statements nonetheless showed a discriminatory intent. Next, the court applied the *McDonnell-Douglas* framework. The court disagreed with the lower court's finding that in order to establish a prima facie case, the plaintiffs must have made an offer on the home; instead, the appellate court found that "[b]ecause the nature of the discrimination alleged was to misrepresent that the townhome was available for sale" plaintiffs were not required to have made an offer in order to allege discrimination. However, the Fourth Circuit ultimately affirmed the lower court, because, assuming that plaintiffs had established a prima facie case, they were still unable to refute the defendants' legitimate, non-discriminatory reasons for not negotiating with plaintiffs. The court of appeals also affirmed the dismissal of the state law claims.

## **Fair Housing Act: Gender Discrimination**

*Miami Valley Fair Housing Center, Inc. v. Connor Group*, \_\_\_ F.3d \_\_\_, 2013 WL 3968768 (6th Cir. Aug. 5, 2013). A fair housing group sued a landlord under the FHA and a similar Ohio fair housing statute for discrimination on the basis of race and familial status. Defendant landlord posted ads on Craigslist for one-bedroom units that are "a great bachelor pad for any single man looking to hook up." Plaintiff argued that the ads were discriminatory on their face. A jury ruled in favor of the defendant landlord.



The fair housing group filed a motion for directed verdict and new trial; the landlord filed a motion for attorney's fees. The district court denied both motions. The Sixth Circuit upheld the district court's decision to deny attorney's fees because it found no abuse of discretion. The appellate court also denied the motion for a directed verdict. Applying the ordinary person standard to determine whether the advertisement indicated a preference for a particular group, the Sixth Circuit found that the ad could be interpreted in different ways. The court further clarified that the ordinary person standard invokes an inquiry into "preference" for a particular group and not a "discouragement," as some courts have confused the two in the past. The Court of Appeals applied the same analysis to the Ohio statute. Next, the appeals court agreed with plaintiff that the jury instructions were misleading and ordered a new trial. When instructing the jury as to the ordinary person standard, the trial court judge applied the wrong analysis, one that was taken from a case from a different circuit and one that was interpreting a state fair housing statute that refers to suitability of the property, instead of preference for a particular group. Additionally, defendant had emphasized the suitability analysis in closing arguments, further misleading the jury such that the jury instruction was erroneous and prejudicial enough to warrant a new trial.

### **Fair Housing Act: Familial Status Discrimination**

*Smith v. Moss Gardens Apartments*, 2013 WL 4026814 (S.D. Cal. Aug. 6, 2013). Plaintiffs alleged discrimination on the basis of familial status, grounding their complaint in a series of events that took place over several years. The court dismissed the case sua sponte with leave to amend. The court only considered the two acts of alleged discrimination occurring within the statute of limitations. The first alleged act was that the manager became angry that the plaintiffs' minor children were playing in a common area; the second allegation involved defendant's notice to terminate plaintiff's tenancy. The court reasoned that the first was too minor to warrant the court's jurisdiction. Regarding the second act, the court found that the plaintiffs' complaint failed to describe the alleged discrimination in non-conclusory terms. Furthermore, the plaintiffs did not provide the notice's stated reason for termination. The court opined that, without more facts, issuance of the termination notice did not constitute a discriminatory act. The court added that a common area no-play rule applied equally to residents of all ages would "not create a justifiable controversy under the Fair Housing Act" because "generally-applicable rules of housing behavior fashioned to achieve non-discriminatory ends" are not unlawful. In addition, the plaintiffs did not plead that they bought or rented their home from the defendant, as required for protection under the Fair Housing Act. Based on the above analysis, the court dismissed the case without prejudice.

### **Fair Housing Act: Failure to Comply with Consent Decree; Contempt Proceedings**

*Hawecker v. Sorenson*, 2013 WL 3805146 (E.D. Cal. July 22, 2013). The federal government sought civil contempt proceedings due to the defendant's failure to comply with the terms of a fair housing consent decree. Plaintiffs originally filed suit alleging FHA violations, as well as violations of state law, arising out of the defendant's alleged pattern of sexual harassment directed at female tenants and prospective tenants. The federal government filed its own action against the defendant, alleging FHA violations for the harassing conduct. The cases were consolidated by the court. All parties entered into a consent decree in September 2012, under which the defendant was required to retain independent management for his rental properties. No independent manager was identified, and thus, the federal government initiated contempt proceedings. The court granted the government's motion for civil contempt proceedings, but did not issue civil sanctions pursuant to the instant proceedings.

### **Fair Housing Act: Attorney's Fees**

*United States v. Hylton*, 2013 WL 3927858 (D.Conn. July 26, 2013). The government sued defendants to enforce the FHA, and a fair housing organization intervened on behalf of three individuals. After a bench trial, the court awarded the intervenors compensatory and punitive damages for intentional acts of discrimination. The government and intervenors then sought attorney's fees for the fair housing organization and injunctive relief. The court employed the lodestar formula of multiplying the reasonable rate times a reasonable amount of hours and adjusting as appropriate, to determine the final fee award. The court concluded that a rate of \$225 for a senior staff attorney who had five to six years of housing law experience was reasonable. To determine a reasonable amount of hours, the attorney submitted vague records that did not provide sufficient detail for the court to determine exactly what work was completed or how much time was spent on each activity. The court noted that time records must meet specificity requirements and reduced the number of hours by 20%. The court then considered the defendants' financial incapacity and reduced one of the defendant's fees due to her sworn statement of financial hardship as well as her lesser level of culpability compared to the other individual defendant. Lastly, the court decided to grant the requested injunctive relief in that defendants must advertise as an "equal opportunity employer," attend annual fair housing trainings, post non-discrimination signs at all rental properties, and report complaints of discrimination directly to the government's attorney. The court noted that in a discrimination case where the harmful acts were intentional, injunctive relief is appropriate to prohibit the offending party from engaging in future acts of discrimination.

## **Fair Housing Amendments Act: Disability Discrimination**

*Tamayo v. Washington State Hous. Fin. Comm'n*, 2013 WL 3873278 (W.D. Wash. July 24, 2013). Plaintiffs (an employed person with disabilities, and his sister and brother-in-law with whom he shared a residence) sued to challenge the agency's denial of eligibility for a homeownership program. Plaintiffs alleged disability discrimination under federal civil rights, fair housing, and disability laws, including a failure to provide a reasonable accommodation. Their complaint sought declaratory and injunctive relief, including a temporary restraining order and mandatory preliminary injunction requiring the agency to approve their participation in a state program providing a below-market interest rate and downpayment assistance. The program's specific requirements included a credit history, which the disabled plaintiff lacked, or guardianship, which he neither had nor needed. After the agency denied him a requested exception to the requirement, plaintiffs filed suit and sought temporary relief. The court noted that this request was essentially for a mandatory injunction ordering agency action, which is disfavored and requires a showing of extreme or very serious damages in its absence. The court denied relief, finding no likelihood of success of the merits of plaintiffs' claims. There was no showing of disparate treatment or disparate impact. The court also could not find support for a reasonable accommodation claim, because the disabled plaintiff had not alleged that he was otherwise qualified for all of the program's requirements, such that an accommodation would permit him to obtain a home under the program.

## **Immigration-Based Rental Ordinances: Preemption**

*Villas at Parkside Partners v. City of Farmers Branch, Tex.*, \_\_\_ F.3d \_\_\_, 2013 WL 3791664 (5th Cir. July 22, 2013). Plaintiffs brought suit to challenge an ordinance adopted by defendant city which: (1) requires renters in the city to obtain a license in order to rent in the city; and (2) makes occupying a rental dwelling in the city without such a license, and/or misstating one's immigration status to obtain such a license, criminal acts. In order to obtain the rental license, a tenant must verify that he or she has legal immigration status. Landlords knowingly renting to persons without an occupancy license can lose their rental licenses. The district court granted summary judgment to the plaintiffs, and enjoined enforcement of the ordinance on preemption grounds. After the Fifth Circuit affirmed, the U.S. Supreme Court decided *Arizona v. United States*, 576 U.S. \_\_\_ (2012). However, on a rehearing en banc, the Fifth Circuit again reaffirmed the district court holding, and rejected the city's argument that the ordinance establishes "concurrent enforcement" of federal immigration

law. Instead, the Fifth Circuit concluded that such an ordinance conflicts with federal law and is thus preempted.

## **Immigration-Based Rental Ordinances: Preemption**

*Lozano v. City of Hazelton*, 724 F.3d 297 (3d Cir. 2013). This litigation concerns immigration-based ordinances enacted by the City of Hazelton, which aimed to prevent persons without legal immigration status from working or obtaining rental housing in the city. Among the rental provisions in the so-called "Illegal Immigration Relief Act Ordinance" (IIRAO), the city mandated that legal immigration status was required to enter into a lease, and that renting to persons without such status was unlawful. A separate rental registration ordinance required all rental applicants in the city to obtain an occupancy permit that could only be obtained with demonstration of legal immigration status. The district court previously permanently enjoined enforcement of these ordinances. Subsequently, the U.S. Supreme Court granted Hazelton certiorari, remanding the case in the wake of *Chamber of Commerce v. Whiting*, 563 U.S. \_\_\_ (2011). The Supreme Court also issued an opinion in *Arizona v. United States*, 576 U.S. \_\_\_ (2012) in the interim. Taking these decisions into account, the Third Circuit again held that both the employment and housing provisions of these ordinances were preempted by federal law. The Third Circuit reasoned that the housing provisions in both ordinances are field preempted, echoing its earlier finding that states and localities "have no power to regulate residency based on immigration status." Additionally, the appeals court held that the housing provisions in both ordinances were conflict preempted because such provisions interfere with federal immigration enforcement, such as the removal process, "with no regard for the federal scheme, federal enforcement priorities, or the discretion Congress vested in the Attorney General." Furthermore, the court held that the rental registration requirement was field preempted, even considered independently of the IIRAO, because such a requirement intrudes upon "the field occupied by federal alien registration law."

## **STATE CASES**

### **Holdover Proceedings: State Law Requires Landlord to Demonstrate Chronic Delinquency**

*Union Senior Plaza, LLP v. Mavins*, 2013 WL 3958245 (N.Y. Dist. Ct. Aug. 2, 2013). In a holdover eviction proceeding against a Section 8 voucher tenant for nonpayment of rent, the tenant moved to dismiss, contending that holdover proceedings cannot be used to evict tenants whose rent

payments have not been chronically delinquent. Under New York law, a holdover proceeding produces an irrevocable forfeiture that public policy disfavors in instances of isolated nonpayments. Although the landlord alleged that the tenant failed to make payments for four months, no other nonpayment proceedings were filed. The court found this single nonpayment to be insufficient proof of the chronic delinquency required for utilizing the holdover proceeding; therefore, the court dismissed the claim without prejudice.

### **Fair Housing: Reasonable Accommodation**

*East River Housing Corp. v. Aaron*, 40 Misc.3d 1213(A), 2013 WL 3762654 (N.Y. Civ. Ct. July 17, 2013). A landlord issued a notice to cure because a tenant had a dog in her apartment in violation of the no-pets policy. The tenant immediately sent the landlord a letter from her psychiatrist stating that the tenant experiences depression and anxiety, and that the assistance animal had alleviated these conditions. The tenant also requested non-enforcement of the no-pets policy as a reasonable accommodation of her disability. The tenant then filed a HUD complaint and moved for a stay pending the outcome of the discrimination complaint. One week before the hearing on the stay, HUD issued a determination that there was no probable cause to believe that the landlord engaged in discrimination. The stay was denied. However, one month later, HUD issued a "reopening" stating that the decision was being remanded to the Regional Director for reconsideration. HUD also issued a written request for a stay of the eviction proceedings pending the resolution of the HUD complaint. The court granted the tenant's motion for renewal of the stay, pending HUD's updated findings. ■

## **Recent Housing-Related Regulations and Notices**

The following are significant affordable housing-related regulations and notices recently issued by the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency (FHFA), Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs. 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 cited documents may be secured from various sources, including the Government Printing Office's website,<sup>1</sup> bound volumes of the Federal Register, HUD Clips,<sup>2</sup> HUD,<sup>3</sup> and USDA's Rural Development website.<sup>4</sup>

### **HUD Federal Register Notices**

**78 Fed. Reg. 49,680-49,681 (Aug. 15, 2013)**

#### **Streamlining Requirements Governing the Use of Funding for Supportive Housing for the Elderly and Persons With Disabilities Programs; Correction**

**Summary:** On June 20, 2013, HUD published a final rule that amended regulations for the purpose of streamlining the requirements applicable to mixed finance developments in the Section 202 Supportive Housing for the Elderly (Section 202) and the Section 811 Supportive Housing for Persons with Disabilities (Section 811) programs and amending certain regulations governing all Section 202 and Section 811 developments. This publication corrects an error in the final rule regarding the duration of the fund reservations for capital advances.

**Dates:** July 22, 2013 (applicable); August 15, 2013 (effective).

**78 Fed. Reg. 52,008-52,009 (Aug. 21, 2013)**

#### **30-Day Notice of Proposed Information Collection: Multifamily Housing Service Coordinator Program**

**Summary:** HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review.

This Collection concerns SF-424, HUD-91186, and other related documents used to assess the need and proposed use of grant funds and owners' abilities to administer those funds. HUD staff will use requests for extensions (HUD-91186-A) to evaluate anticipated program costs and the continued need for the program. The LOCCS Payment

<sup>1</sup><http://www.gpoaccess.gov/index.html>.

<sup>2</sup><http://www.hud.gov/hudclips>.

<sup>3</sup>To order notices and handbooks from HUD, call (800) 767-7468.

<sup>4</sup><http://www.rurdev.usda.gov/Home.html>.



Voucher (HUD-50080-SCMF) is used to monitor release of grant funds to reimburse eligible program costs over the term of the grant. Grant recipients will similarly use this voucher to track and record their requests for payment reimbursement for grant-funded expenses. The department is revising the Semi-Annual Performance Report, HUD-92456. The Semi-Annual Performance Report will be used to gauge program performance and the effective use of federal funds to meet stated program goals. The department proposes the new changes to obtain more specific, accurate, and relevant data. To complete the form, housing owners and Service Coordinators will develop and maintain meaningful data that reflect the efficacy of the Service Coordinator program.

*Comments Due:* September 20, 2013.

**78 Fed. Reg. 52,009 (Aug. 21, 2013)**

**30-Day Notice of Proposed Information Collection: Utility Allowance Adjustments**

*Summary:* HUD has submitted the proposed information collection requirement described to the Office of Management and Budget for review. Multifamily project owners are required to advise the Secretary of the need for and request approval of a new utility allowance for tenants.

*Comments Due:* September 20, 2013.

**78 Fed. Reg. 52,557-52,558 (Aug. 23, 2013)**

**30-Day Notice of Proposed Information Collection: Section 811 Project Rental Assistance (PRA) for Persons With Disabilities**

*Summary:* HUD has submitted the proposed information collection requirement described to the Office of Management and Budget for review. The collection of this information is necessary to the department to assist HUD in determining applicant eligibility and ability to develop housing for persons with disabilities within statutory and program criteria.

*Comments Due:* September 23, 2013.

**78 Fed. Reg. 52,964 (Aug. 27, 2013)**

**30-Day Notice of Proposed Information Collection: Section 8 Management Assessment Program (SEMAP) Certification**

*Summary:* HUD has submitted the proposed information collection requirement described for review. Program regulations at 24 C.F.R. Part 985 set forth the requirements of the SEMAP that include a certification of Indicators reflecting performance. Through this assessment, HUD can improve oversight of the Housing Choice Voucher Program and target monitoring and assistance to public housing agencies (PHA) that need the most improvement and pose the greatest risk. PHAs designated as troubled must implement corrective action plans for improvements.

*Comments Due:* September 26, 2013.

**78 Fed. Reg. 54,267-54,268 (Sept. 3, 2013)**

**30-Day Notice of Proposed Information Collection: Disaster Recovery Grant Reporting System**

*Summary:* HUD has submitted the proposed information collection requirement described to the Office of Management and Budget (OMB) for review. The Disaster Recovery Grant Reporting System is a grants management system used by the Office of Community Planning and Development to monitor special appropriation grants under the Community Development Block Grant program. This collection pertains to Community Development Block Grant Disaster Recovery and Neighborhood Stabilization Program grant appropriations.

*Comments Due:* October 3, 2013.

**78 Fed. Reg. 54,416-54,417 (Sept. 4, 2013)**

**Native American Housing Assistance and Self-Determination Act of 1996: Announcement of Negotiated Rulemaking Committee Meeting**

*Summary:* This notice announces the second meeting of the negotiated rulemaking committee.

*Dates:* September 17, 2013 through September 19, 2013.

**78 Fed. Reg. 55,281-55,282 (Sept. 10, 2013)**

**60-Day Notice of Proposed Information Collection: Quality Control for Rental Assistance Subsidy Determinations**

*Summary:* The proposed information collection requirement described will be submitted to the Office of Management and Budget (OMB) for review. The department is conducting under contract a study to update its estimates of the extent and type of errors associated with income, rent, and subsidy determinations for the 4.3 million households covered by the Public Housing and Section 8 housing subsidies. The Quality Control process involves selecting a nationally representative sample of assisted households to measure the extent and types of errors in rent and income determinations, which in turn cause subsidy errors. On-site tenant interviews, file reviews, third-party income verifications, and income matching with other federal data are conducted. Future studies are planned on an annual basis, as required by legislation. This proposed data collection approval request is for studies to be conducted in 2011, 2012, 2013, and 2014 of prior year certification and recertification actions.

*Comments Due:* November 12, 2013.

## **HUD Notices**

**Notice CPD 2013-06 (Aug. 22, 2013)**

**Guidance for Submitting the Portions of the Consolidated Annual Performance and Evaluation Report (CAPER) Related to Homelessness and the Emergency Solutions Grants (ESG) Program**

*Summary:* This Notice provides guidance for completing the Emergency Solutions Grants (ESG) portions

of the Consolidated Annual Performance and Evaluation Report (CAPER) using the Integrated Disbursement and Information System. This Notice also provides information on completing homelessness-related portions of the CAPER, which is relevant for all states, local governments, and territories that receive ESG, Community Development Block Grants, HOME Investment Partnerships, and/or Housing Opportunities for Persons With AIDS formula funding.

**Notice H 2013-24 (Aug. 23, 2013)**  
**Section 811 Project Rental Assistance (PRA)**  
**Occupancy Interim Notice**

*Summary:* The purpose of this Notice is to provide program occupancy guidance for the Section 811 Project Rental Assistance (PRA) program, as authorized under Section 811 of the Cranston-Gonzalez National Affordable Housing Act of 1990, as amended by the Frank Melville Supportive Housing Investment Act of 2010. PRA funds are provided to Grantees which have a partnership with their state health and human services/Medicaid agency as evidenced in an Inter-Agency Partnership Agreement. The Grantees select projects that will receive rental operating assistance through PRA, subject to a restriction whereby no more than 25% of the total number of dwelling units in the multifamily housing project receive either PRA funds, are used for supportive housing for persons with disabilities, or to which any occupancy preference for persons with disabilities applies. The Section 811 PRA program guidelines are applicable only to the assisted units, as defined in this Notice. Grantee and Owners must comply with these guidelines without modification, unless approved by HUD.

**Notice H 2013-25 (Aug. 23, 2013)**  
**Updated Guidelines for Continuation of Interest**  
**Reduction Payments after Refinancing: “Decoupling,”**  
**as Allowed by the National Housing Act, Under Section**  
**236(e)(2)**

*Summary:* This Notice establishes updated procedures for the optional continuation of Interest Reduction Payment (IRP) assistance when projects assisted under Section 236 are refinanced. Under Section 236(e)(2) the IRP subsidy may continue provided the owner enters into a new Agreement for IRP and Use Agreement to maintain the project as a low-income housing resource. For implementation of Section 236(e)(2), the department has chosen to use the word “decoupling” to refer to continued IRP that may be paid after a project is refinanced because the IRP assistance is severed or “decoupled” from the original Section 236 mortgage. This Notice supersedes Notice H 2000-08 except with regard to Section 236(b) transactions.

The owner and property must be and remain in compliance with all current requirements, including fair housing, accessibility, marketing, occupancy, waiting list, physical, and financial requirements.

**Notice H 2013-26 (Sept. 6, 2013)**  
**Rider to HUD-92323-ORCF, Operator Security Agreement**

*Summary:* This Notice announces the availability of a Rider to Operator Security Agreement. The Rider, attached to the HUD notice, pertains to HUD-92323-ORCF (Operator Security Agreement), the publication of which was announced in the Federal Register on March 14, 2013 (Volume 78, No. 50, pp. 16,279-16,286).

**Notice H 2013-27 (Sept. 9, 2013)**  
**Annual Base City High Cost Percentage and High Cost**  
**Area Revisions for 2013**

*Summary:* In accordance with Chapter 5, paragraph 5-6 of HUD Handbook 4445.1 REV-2, Underwriting Technical Direction for Project Mortgage Insurance, HUD has reviewed the High Cost Percentages (HCP) for each Base City. Each Base City HCP has been recalculated based on Marshall & Swift construction data. The results are reflected in a list of authorized Base City HCPs attached to the HUD notice effective January 1, 2013.

**Notice PIH 2013-21 (HA) (Aug. 23, 2013)**  
**Guidance on the Use of Tenant Participation Funds**

*Summary:* This Notice serves to clarify previous guidance on the use of tenant participation (TP) funds as established by 24 C.F.R. § 964.150 and supersedes PIH Notice 2001-3. The regulations on tenant participation funding allow for a more active resident role in determining TP funding use and a broader range of eligible activities than was previously outlined in PIH Notice 2001-3, including allowing self-sufficiency activities as eligible uses. The regulations at § 964.150(a)(2) require PHAs to provide TP funds to duly elected resident councils. The regulation also states that TP funds must be used for activities outlined in § 964 subpart B and this Notice clarifies that subpart C is also applicable in providing guidance on the use of TP funds, specifically § 964.205(b)(1)-(6). A list of eligible uses is provided in Section 7 of this Notice. This Notice applies to all public housing agencies operating public housing programs.

**Notice PIH 2013-22 (Aug. 23, 2013)**  
**Micro-Purchase Process for Purchases of Less Than**  
**\$5,000 by Indian Housing Block Grant (IHBG) Recipients**

*Summary:* The purpose of this Notice is to provide guidance to tribes and Tribally Designated Housing Entities (TDHEs) on Section 203(g) of the Native American Housing Assistance and Self-Determination Act, which provides a De Minimis Exemption from competitive rules when IHBG recipients procure goods and services under \$5,000. The exemption is implemented through the regulations at 24 C.F.R. § 1000.26(a)(11)(iii) and § 1000.52(d), which took effect on January 3, 2013. This notice supersedes Notice PIH 2009-14 (TDHE), which expired on May 31, 2010, and was extended first by Notice PIH 2010-17, and then by Notice PIH 2011-26.

**Notice PIH 2013-23 (HA) (Aug. 30, 2013)**  
**Extension: Administrative Guidance for Effective and Mandated Use of the Enterprise Income Verification (EIV) System**

*Summary:* This Notice extends Notice PIH-2010-19(HA). This Notice provides public housing agencies (PHAs) with administrative guidance related to the mandated use of HUD's EIV system, as required in accordance with the new HUD regulation, 24 C.F.R. § 5.233, as issued in the Final Rule: *Refinement of Income and Rent Determinations in Public and Assisted Housing Programs: Implementation of the Enterprise Income Verification System-Amendments*, effective January 31, 2010, as published in the Federal Register at 74 Fed. Reg. 68,924, on December 29, 2009.

**Notice PIH 2013-24 (Sept. 19, 2013)**  
**Revised Eligibility Requirements for Housing Choice Voucher (HCV) Contract Renewal Set-Aside Funding for Category 1, Shortfall Funds - Notice PIH 2013-12 - Implementation of the Federal Fiscal Year 2013 Funding Provisions for the Housing Choice Voucher Program**

*Summary:* The purpose of this Notice is to revise the eligibility criteria outlined in Paragraph 13 of Notice PIH 2013-12, for Category 1 (Shortfall Funds) for the \$103 Million Set-Aside. Category 1 "Shortfall Funds" provides funding for PHAs, that despite taking reasonable cost savings measures as determined by the Secretary, would otherwise be required to terminate participating families from the program due to insufficient funds.

## **USDA Proposed Rules**

**78 Fed. Reg. 52,460-52,464 (Aug. 23, 2013)**  
**Single Family Housing Direct Loan Program**

*Summary:* Through this action, the Rural Housing Service is proposing to amend its regulations for the Section 502 direct single family housing loan program to create a certified loan application packaging process for eligible loan application packagers. Loan application packagers, who are separate and independent from the agency, provide an optional service to parties seeking mortgage loans by helping them navigate the loan application process. Currently, packagers assisting parties applying for Section 502 direct loans do so under an informal arrangement, which is free from agency oversight or minimum competency standards. This proposed rule will impose experience, training, proficiency, and structure requirements on eligible service providers. This proposed rule also regulates the packaging fee that will be allowed under this process.

*Comments Due:* October 22, 2013.

## **USDA Federal Register Notices**

**78 Fed. Reg. 53,423-53,424 (Aug. 29, 2013)**  
**Section 538 Guaranteed Rural Rental Housing Program for Fiscal Year 2013**

*Summary:* The Rural Housing Service is amending a Notice published May 23, 2013 (78 Fed. Reg. 30,854-30,860). This action is taken to extend the eligible properties to include Rural Development-financed Farm Labor Housing properties. This amendment is to ensure that all eligible properties are included.

*Dated:* August 20, 2013.

**78 Fed. Reg. 54,621 (Sept. 5, 2013)**  
**Notice of Funds Availability for Section 514 Farm Labor Housing Loans and Section 516; Farm Labor Housing Grants for Off-farm Housing for Fiscal Year (FY) 2013**

*Summary:* The Rural Housing Service is correcting a notice published on August 14, 2013, (78 Fed. Reg. 49,460-49,467). This action is taken to correct two submission deadline dates.

*Dated:* August 23, 2013. ■