

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 990

[Docket No. FR-3760-F-01]

RIN 2577-AB50

Office of the Assistant Secretary for Public and Indian Housing; Low-Income Public Housing Performance Funding System—Streamlining

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule eliminates obsolete provisions from part 990 that had been retained solely for historical purposes. Additionally, revisions have been made to part 990 to reflect recent policy actions relating to the submission of operating budgets and the elimination of the maximum operating reserve.

EFFECTIVE DATE: May 20, 1996.

FOR FURTHER INFORMATION CONTACT: MaryAnn Russ, Deputy Assistant Secretary, Office of Public and Assisted Housing Operations, Public and Indian Housing, Room 4204, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708-0614. For hearing or speech-impaired persons, this number may be accessed via TDD by contacting the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On March 4, 1995, President Clinton issued a memorandum on regulatory reform wherein he directed all Federal departments and agencies to, among other things, delete obsolete and unnecessary regulations, and revise necessary regulations. The memorandum built on the regulatory philosophy set forth in the President's Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, which is premised on the recognition of the legitimate role of government to govern, but to do so in a focused and sensible way.

This final rule accomplishes the President's goal by eliminating obsolete sections in 24 CFR part 990, and revising several other sections.

In addition to the removal of obsolete provisions which had been retained in the regulation for historical purposes, the rule has been changed to reflect the following policy changes:

(1) In 1994, as part of HUD's reinvention efforts and

recommendations made as a result of the Public and Indian Housing Statutory and Regulatory Review Program on financial management, a streamlined operating budget submission procedure was adopted. HUD waived the requirement in Section 407 of the Annual Contributions Contract for the submission of annual operating budgets and revisions for certain housing authorities (HAs) which have successfully passed performance measures found in the Public Housing Management Assessment Program.

(2) In 1995, HUD administratively removed the maximum allowable operating reserve for the Low Rent Public Housing and Turnkey III programs. As a result of this step, the requirement (for applicable programs) to remit to HUD residual receipts generated out of operations of HAs is inoperative because such residual receipts were created by a maximum allowable operating reserve.

II. Summary of Amendments

Section 990.101 has been revised to remove a general discussion of the background leading to the development of the Performance Funding System (PFS) in 1975. It also removes an overview of the PFS which summarized in a general way the basic elements of the PFS.

The following changes have been made to the definitions found in § 990.102. The statement that the Formula is subject to annual update has been removed because the Formula published in this regulation in 1992 is not updated annually. The definition of Interim Formula has been removed because it is a historical reference to the formula used before PFS. The definition of Local Inflation Factor has been simplified to remove language describing the adoption of a revised factor in 1982. The definition of Operating Budget has been revised to reflect the fact that some HAs are no longer required to submit operating budgets for HUD approval. Top of Range, which has changed over time, is now defined here and will no longer have to be defined each time it is referenced in § 990.105.

Section 990.103 has been revised to eliminate a reference to the starting dates for commencement of the PFS in 1975.

The following changes have been made to § 990.105. Section 990.105(a) has been revised to drop two references to budgets being "approved" because some HAs are no longer required to obtain HUD approval of their operating budgets. The detailed description of the current PFS formula has been moved to

§ 990.105 from § 990.110(f), the FY 1992 Formal Review Process section. The Top of Range is now defined in § 990.102, and its definition has been removed from § 990.105. Sections describing the Allowable Expense Level calculations before 1992 have been removed.

Section 990.107 has been revised to eliminate a general discussion of the reasons behind the PFS treatment of utilities. It has also been revised to reflect that there is no longer a heating degree day adjustment and to remove reference to the 1983 starting date for the current provisions.

References to Residual Receipts have been eliminated from § 990.108 to reflect the fact that the requirement to remit residual receipts is no longer operative. A sentence on the proration of audit costs has been removed because it only discussed proration of development costs and proration to other programs is also often appropriate. The limitation on approval of costs attributable to changes in Federal law or regulation has been revised to remove the requirement for a determination that sufficient other funds are not available. The Section on Costs beyond Control has been removed because this provision is statutory and does not need to be repeated in regulation.

The revisions to § 990.109 have been made to simplify the reference to the Tenant Rent Roll and to reflect the fact that some HAs are no longer required to submit an operating budget.

Section 990.110 has also been changed to reflect elimination of a universal requirement to submit operating budgets. The phrase "independent audit" has been substituted for "IPA audit." The section on utility adjustments has been simplified so that separate discussions of upward and downward adjustments are combined into one paragraph. This section has also been revised to reflect the fact that the requirement to remit residual receipts is no longer operative. The discussion of rental income adjustments has been shortened by removing examples of two of the reasons for these adjustments. The paragraph covering the Formal Review Process which took place in 1992 has been removed.

Section 990.111, Operating Reserves, has been removed to reflect the elimination of a maximum operating reserve.

The entire description of operating budget submission and approval has been rewritten to reflect the fact that some HAs are no longer required to submit an operating budget.

Section 990.113 has been revised to eliminate specific regulatory citations for occupancy regulations.

A one-time 1982 Energy Conservation procedure has been removed by deleting § 990.116.

A change in a regulatory reference has been made in § 990.401(a) to reflect the revision to § 990.105.

III. Justification for Final Rulemaking

The Department has determined that it is unnecessary to subject this rule to public comment. Since this rule is limited to removing obsolete provisions and updating provisions in part 990 to reflect current practices, prior public comment was determined to be unnecessary. Section 10.1 of 24 CFR part 10 states that notice and public procedure can be omitted if the Department determines in a particular case or class of cases that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

IV. Findings and Certifications

Executive Order 12866

The Office of Management and Budget reviewed this final rule under Executive Order 12866, Regulatory Planning and Review. Any changes made to the rule as a result of that review are clearly identified in the docket file, which is available for public inspection at the Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

Environmental Impact

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(o) of the HUD regulations, the policies and procedures contained in this final rule relate only to operating costs that do not affect a physical structure or property and, therefore, are categorically excluded from the requirements of the National Environmental Policy Act.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. This rule eliminates obsolete provisions which had been retained solely for historical purposes.

Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of

Executive Order 12612, Federalism, has determined that the policies contained in this rule do not have federalism implications and, thus, are not subject to review under the Order.

Impact on the Family

The General Counsel of HUD, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on formation, maintenance, and general well-being of families, and thus, is not subject to review under the Order. No significant change in existing HUD policies or programs will result from promulgation of this rule, as those policies and programs relate to family concerns.

List of Subjects in 24 CFR Part 990

Grant programs—housing and community development; Public housing. Reporting and record keeping requirements.

Accordingly, 24 CFR part 990 is amended as follows:

PART 990—ANNUAL CONTRIBUTIONS FOR OPERATING SUBSIDY

1. The authority citation for part 990 continues to read as follows:

Authority: 42 U.S.C. 11437(g) and 3535(d).

2–3. Section 990.101 is revised to read as follows:

§ 990.101 Purpose.

Implementation of Section 9(a). The purpose of this subpart is to establish standards and policies for the determination of operating subsidy eligibility in accordance with section 9(a) of the U.S. Housing Act of 1937, 42 U.S.C. 1437g. Section 9(a) authorizes the Secretary of Housing and Urban Development (HUD) to make annual contributions for the operation of PHA-owned rental housing (operating subsidy).

4. In § 990.102, the following definitions are amended:

(a) The last sentence of the definition of *Formula* is removed;

(b) The definition of “*Interim Formula*” is removed;

(c) The definition for *Local Inflation Factor* is revised:

* * * * *

Local Inflation Factor. The HUD-supplied weighted average percentage increase in local government wages and salaries for the area in which the PHA is located and non-wage expenses;

* * * * *

(d) The definition for “*Operating budget*” is revised:

* * * * *

Operating budget. The PHA's operating budget and all related documents, as required by HUD, approved by the PHA Board of Commissioners;

* * * * *

and

(e) The definition of “*Top of Range*” is added:

* * * * *

Top of Range. Formula Expense Level multiplied by 1.15.

* * * * *

5. In § 990.103, paragraph (a) is revised; paragraph (b) is removed; and paragraph (c) is redesignated as paragraph (b), to read as follows:

§ 990.103 Applicability of PFS.

(a) PFS has been and will be utilized in determining the amounts of operating subsidy payable to PHAs. PFS is applicable to all PHA-owned rental units under Annual Contributions Contracts. PFS applies to PHAs that have not received operating subsidy payments previously, but are eligible for such payments under PFS. PFS, as described in this part, is not applicable to Indian Housing, the Section 23 Leased Housing Program, the Section 23 Housing Assistance Payments Program, the Section 8 Housing Assistance Payments Program, or the Turnkey III or Turnkey IV Homeownership Opportunity Programs. PFS is not applicable to housing owned by the PHAs of the Virgin Islands, Puerto Rico, Guam, and Alaska. Operating subsidy payments to these PHAs are made in accordance with subpart B of this part. PFS for Indian Housing is described in 24 CFR part 950.

* * * * *

6. Section 990.105 is amended by revising the introductory text, paragraph (a), introductory text, paragraph (c), paragraph (d), introductory text, paragraphs (d)(1) and (d)(2), introductory text, paragraph (d)(4), and (d)(5), to read as follows:

§ 990.105 Computation of allowable expense level.

The PHA shall compute its Allowable Expense Level using forms prescribed by HUD, as follows:

(a) *Computation of Base Year Expense Level.* The Base Year Expense Level includes Payments in Lieu of Taxes (PILOT) required by a Cooperation Agreement even if PILOT is not included in the Operating Budget for the Base Year because of a waiver of the requirements by the local taxing jurisdiction(s). The Base Year Expense Level includes all other operating expenditures as reflected in the PHA's

Operating Budget for the Base Year except the following:

* * * * *

(c) *Computation of Formula Expense Level.* The PHA shall compute its Formula Expense Level in accordance with a HUD-prescribed formula that estimates the cost of operating an average unit in a particular PHA's inventory. It uses weights and a Local Inflation Factor assigned each year to derive a Formula Expense Level for the current year and the requested budget year. The formula is the sum of the following six numbers and the weights of the formula and the formula are subject to updating by HUD:

(1) The number of pre-1940 rental units occupied by poor households in 1980 as a percentage of the 1980 population of the community multiplied by a weight of 7.954. This Census-based statistic applies to the county of the PHA, except that, if the PHA has 80 percent or more of its units in an incorporated city of more than 10,000 persons, it uses city-specific data. County data will exclude data for any incorporated cities of more than 10,000 persons within its boundaries.

(2) The Local Government Wage Rate multiplied by a weight of 116.496. The wage rate used is a figure determined by the Bureau of Labor Statistics. It is a county-based statistic, calibrated to a unit-weighted PHA standard of 1.0. For multi-county PHAs, the local government wage is unit-weighted. For this formula, the local government wage index for a specific county cannot be less than 85 percent or more than 115 percent of the average local government wage for counties of comparable population and metro/non-metro status, on a state-by-state basis. In addition, for counties of more than 150,000 population in 1980, the local government wage cannot be less than 85 percent or more than 115 percent of the wage index of private employment determined by the Bureau of Labor Statistics and the rehabilitation cost index of labor and materials determined by the R.S. Means Company.

(3) The lesser of the current number of the PHA's two or more bedroom units available for occupancy, or 15,000 units, multiplied by a weight of .002896.

(4) The current ratio of the number of the PHA's two or more bedroom units available for occupancy in high-rise family projects to the number of all the PHA's units available for occupancy multiplied by a weight of 37.294. For this indicator, a high-rise family project is defined as averaging 1.5 or more bedrooms per unit available for occupancy and averaging 35 or more

units available for occupancy per building and containing at least one building with units available for occupancy that is 5 or more stories high.

(5) The current ratio of the number of the PHA's three or more bedroom units available for occupancy to the number of all the PHA's units available for occupancy multiplied by a weight of 22.303.

(6) An equation calibration constant of -.2344.

(d) *Computation of Allowable Expense Level.* The PHA shall compute its Allowable Expense Level as follows:

(1) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level does not exceed the top of the range.* Every PHA whose Base Year Expense Level is less than the top of the range shall compute its Allowable Expense Level for the first budget year under the PFS by adding the following to its Base Year Expense Level (before adjustments under § 990.110):

* * * * *

(2) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level exceeds the top of the range.* Every PHA whose Base Year Expense Level exceeds the top of the range shall compute its Allowable Expense Level for the first budget year under PFS by adding the following to the top of the range (not to its Base Year Expense Level, as in paragraph (d)(1) of this section):

* * * * *

(4) *Allowable Expense Level for budget years after the first budget year under PFS.* For each budget year after the first budget year under PFS, the AEL shall be computed as follows:

(i) The Allowable Expense Level shall be increased by any increase to the AEL approved by HUD under § 990.108(c);

(ii) The AEL for the Current Budget Year also shall be adjusted as follows:

(A) Increased by one-half of one percent (.5 percent); and

(B) If the PHA has experienced a change in the number of units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on this paragraph, it shall use the increase (decrease) between the Formula Expense Level calculated using the PHA's characteristics that applied to the Requested Year when the last adjustment to the AEL was made based on this paragraph and the Formula Expense Level calculated using the PHA's characteristics for the Requested Budget Year.

(iii) The amount computed in accordance with paragraphs (d)(4) (i) and (ii) of this section shall be multiplied by the Local Inflation Factor.

(5) *Adjustment of Allowable Expense Level for budget years after the first budget year under PFS.* HUD may adjust the Allowable Expense Level of budget years after the first year under PFS under the provisions of § 990.105(b) or § 990.108(c).

7. Section 990.107 is amended by revising paragraphs (a) and (c)(1), introductory text, to read as follows:

§ 990.107 Computation of utilities expense level.

(a) The PHA's Utilities Expense Level for the requested Budget Year shall be computed by multiplying the AUCL per unit per month for each utility, determined as provided in paragraph (c) of this section, by the projected utility rate determined as provided in paragraph (b) of this section.

(c) * * *

(1) *Rolling Base Period System.* For project utilities with consumption data for the entire Rolling Base Period, the AUCL is the average amount consumed per unit per month during the Rolling Base Period adjusted in accordance with paragraph (d) of this section. The PHA shall determine the average amount of each of the utilities consumed during the Rolling Base period (i.e., the 36-month period ending 12 months prior to the first day of the Requested Budget Year). An example of a rolling base is as follows:

* * * * *

8. In § 990.108, paragraphs (a) (1) and (2) and (c) are revised, paragraph (d) is removed, paragraph (e) is redesignated as paragraph (d), paragraph (f) is redesignated as paragraph (e), and paragraph (g) is redesignated as paragraph (f).

§ 990.108 Other costs.

(a) *Cost of independent audits.* (1) Eligibility to receive operating subsidy for independent audits is considered separately from the PFS. However, the PHA shall not request, nor will HUD approve, an operating subsidy for the cost of an independent audit if the audit has already been funded by subsidy in a prior year. The PHA's estimate of cost of the independent audit is subject to adjustment by HUD. If the PHA requires assistance in determining the amount of cost to be estimated, the HUD Field Office should be contacted.

(2) A PHA that is required by the Single Audit Act (see 24 CFR part 44) to conduct a regular independent audit may receive operating subsidy to cover the cost of the audit. The estimated cost of an independent audit, applicable to the operations of PHA-owned rental housing, is not included in the Allowable Expense Level, but it is

allowed in full in computing the amount of operating subsidy under § 990.104, above.

* * * *

(c) *Costs attributable to changes in Federal law or regulation.* In the event that HUD determines that enactment of a Federal law or revision in HUD or other Federal regulation has caused or will cause a significant increase in expenditures of a continuing nature above the Allowable Expense Level and Utilities Expense Level, HUD may in HUD's sole discretion decide to prescribe a procedure under which the PHA may apply for or may receive an increase in operating subsidy.

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9. In § 990.109, paragraphs (b), introductory text, (b)(1), and (d) are revised to read as follows:

§ 990.109 Projected operating income level.

* * * *

(b) *Computation of projected average monthly dwelling rental income.* The projected average monthly dwelling rental income per unit for the PHA is computed as follows:

(1) *Average monthly dwelling rental charge per unit.* The dollar amount of the average monthly dwelling rental charge per unit shall be computed on the basis of the total dwelling rental charges (total of the adjusted rent roll amounts) for all Project Units, as shown on the Tenant Rent Rolls which the PHA is required to maintain, for the first day of the month which is six months prior to the first day of the Requested Budget Year, except that if a change in the total of the Rent Rolls has occurred in a subsequent month which is prior to the beginning of the Requested Budget Year and prior to the submission of the Requested Budget Year calculation of operating subsidy eligibility, the PHA shall use the latest changed Rent Roll for the purpose of the computation. This aggregate dollar amount shall be divided by the number of occupied dwelling units as of the same date.

* * * *

(d) *Estimate of additional dwelling rental income.* After implementation of the provisions of any legislation enacted or any HUD administrative action taken subsequent to the effective date of these regulations, which affects rents paid by tenants of Projects, each PHA shall submit a revision of its calculation of operating subsidy eligibility showing an estimate of any change in rental income which it anticipates as the result of the implementation of said provisions. HUD shall have complete discretion to adjust the projected average monthly dwelling

rental charge per unit to reflect such change or in the absence of this submission, if HUD has knowledge of such change. HUD also shall have complete discretion to reduce or increase the operating subsidy approved for the PHA current fiscal year in an amount equivalent to the change in the rental income.

* * * *

§ 990.110 [Amended]

10. Section 990.110 is amended as follows:

(a) The first sentence of the introductory text is amended by removing the phrase "operating budget" and adding the phrase "calculation of operating subsidy eligibility";

(b) Paragraph (a)(1) is amended by removing the phrase "IPA" and adding the word "independent" in its place; paragraph (a)(2) is amended by removing the phrase "operating budget" and adding the phrase "calculation of operating subsidy eligibility" in its place;

(c) Paragraph (c) is amended by removing the phrase "IPA" in two places and adding the word "independent" in its place;

(d) Paragraph (c)(1)(i) is amended by removing the "(i)" and the first sentence and adding the sentence "A change in the Utilities Expense Level because of changes in utility rates-to the extent funded by the operating subsidy-will result in an adjustment of future operating subsidy payments." in its place;

(e) Paragraph (c)(1)(ii) is removed; (f) Paragraph (c)(2)(ii) is amended by removing the sentence "The decreased consumption is to be determined by adjusting for any utility rate changes." and adding "The decreased consumption is to be determined by adjusting for any utility rate changes and may be adjusted, subject to HUD approval, using a heating degree day adjustment for space heating utilities." in its place;

(g) Paragraph (c)(2)(iii) is amended by removing the phrase, "then 50 percent of the amount will be funded by increased operating subsidy payment, subject to the availability of funds." and the following phrase is added in its place "fifty percent of an increase in the Utilities Expense Level attributable to increased consumption, after adjustment for any utility rate change, will be funded by HUD by adjusting future operating subsidy payments.";

(h) The first sentence of paragraph (d)(1) is amended by removing the phrase "such as a substantial increase in general unemployment in the locality, or because of a revision of the

PHA's rent schedule which has been approved by HUD";

(i) Paragraph (e) is amended by removing the phrase "990.107(g)(2)" and adding "990.107(f)(2)" in its place;

(j) Paragraph (e)(1)(i) is revised:

* * * *

(e) * * *

(1) * * *

(i) The consumption level that would have been expected if the energy conservation measure had not been undertaken would be adjusted for any change in utility rate and may be adjusted, subject to HUD approval, using a heating degree day adjustment for space heating utilities;

* * * *

(k) Paragraph (f) is removed; and

(l) Paragraph (g) is redesignated as paragraph (f).

11. Section 990.111 is revised to read as follows:

§ 990.111 Submission and Approval of Operating Subsidy Calculations and Budgets.

(a) *Required Documentation.* (1) Prior to the beginning of its fiscal year, the PHA shall prepare an operating budget in a manner prescribed by HUD. The Board of Commissioners shall review and approve the budget by resolution. Each fiscal year, the PHA shall submit to the HUD Field Office, in a time and manner prescribed by HUD, the approved board resolution and the required operating subsidy eligibility calculation forms. The PHA shall submit revised calculations in support of mandatory or other adjustments based on procedures prescribed by HUD.

(2) HUD may direct the PHA to submit its complete operating budget if the PHA has failed to achieve certain specified operating standards, or for other reasons which in HUD's determination threaten the PHA's future serviceability, efficiency, economy, or stability.

(b) *HUD operating budget review.* (1) The HUD Field Office will perform a detailed review on operating budgets that are subject to HUD review and approval. If the HUD Field Office finds that an operating budget is incomplete, includes illegal or ineligible expenditures, mathematical errors, errors in the application of accounting procedures, or is otherwise unacceptable, the HUD Field Office may at any time require the submission by the PHA of further information regarding an operating budget or operating budget revision.

(2) When the PHA no longer is operating in a manner that threatens the future serviceability, efficiency,

economy, or stability of the housing it operates, HUD will notify the PHA that it no longer is required to submit an operating budget to HUD for review and approval.

12. Section 990.112 is removed and the present § 990.113 is redesignated as § 990.112.

13. Section 990.115 is redesignated as § 990.113 and paragraphs (a) and (b) are revised to read as follows:

§ 990.113 Payments of operating subsidy conditioned upon reexamination of income of families in occupancy.

(a) *Policy.* The income of each family must be reexamined at least annually.

PHAs must be in compliance with this reexamination requirement to be eligible to receive full operating subsidy payments.

(b) *PHAs in compliance with requirements.* Each submission of the original calculation of operating subsidy eligibility for a fiscal year shall be accompanied by a certification by the PHA that it is in compliance with the annual income reexamination requirements and that rents have been or will be adjusted in accordance with current HUD requirements.

* * * * *

§ 990.116 [Removed]

14. Section 990.116 is removed.

§ 990.401 [Amended]

15. Section 990.401(a) is amended by removing from the last sentence the phrase § 990.105(e)(5) and adding the phrase § 990.105(e)(4) in its place.

Dated: March 14, 1996.

Michael B. Janis,

General Deputy Assistant Secretary for Public and Indian Housing.

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