

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**Office of the Assistant Secretary for Public and Indian Housing****24 CFR Parts 950 and 990**

[Docket No. FR-3647-F-01]

RIN 2577-AB44

Low-Income Public and Indian Housing—Vacancy Rule

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

ACTION: Final rule.

SUMMARY: This final rule establishes new conditions under which a Public Housing Agency (PHA), an Indian Housing Authority (IHA), or Resident Management Corporation may include vacant units in its computation of eligibility under the Performance Funding System (PFS). (The term housing authority (HA) is used throughout this final rule when referring to both PHAs and IHAs.) The final rule gives greater recognition to units that are vacant for reasons beyond the HA's control, makes changes in the current treatment of vacant units that are part of a modernization program, and, under certain circumstances, has HAs exclude long-term vacant units from their inventory of units available for occupancy.

DATES: April 1, 1996. Applicability date: Operating subsidy eligibility will first be determined under the new provisions of this rule by PHAs and IHAs having fiscal years beginning July 1, 1996.

FOR FURTHER INFORMATION CONTACT:

MaryAnn Russ, General Deputy Assistant Secretary, Public and Assisted Housing Operations, Room 4210, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708-1380 [this telephone number is not toll-free]. For hearing- and speech-impaired persons, this number may be accessed via TDD by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**Paperwork Reduction Act Statement**

The information collection requirements contained in §§ 950.725, 950.760, 990.109, and 990.117 of this rule have been approved by the Office of Management and Budget, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), and assigned OMB control number 2577-0066. An agency may not

conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Background

On July 19, 1995, the Department published a proposed rule (60 FR 37294) that would establish new conditions under which an HA may use a Projected Occupancy Percentage of less than 97 percent in computing its Dwelling Rental Income under the Performance Funding System (PFS). The proposed rule incorporated the recommendations of a regulatory negotiation advisory committee composed of persons who represent the interests affected by the current vacancy rule.

Discussion of Public Comments

The Department received eight public comments in response to the proposed rule, including comments from five PHAs, two national HA associations, and one IHA. One of the PHA commenters was a member of the advisory committee.

The Department received very favorable comments for using a negotiated rulemaking process to develop the proposed rule. This was the first use of negotiated rulemaking by the Department and consideration is being and will be given to using this model for other rulemaking efforts in the future. The IHA commenter expressed regrets that there was no IHA representative on the advisory committee. The Department notes that the National American Indian Housing Council was invited to join the committee, but declined membership.

The IHA commenter recommended that the definition of "Units vacant due to circumstances and actions beyond the IHA's control" (§ 950.102) be expanded to include cultural, social, or religious circumstances. The commenter notes that "[i]n many Indian communities * * * unexpected death, suicide, or violent act" in a unit may "affect the re-occupancy of [that] unit." The Department appreciates the comment, but does not believe that this type of circumstance seriously affects the ability of a significant number of IHAs to maintain an overall acceptable occupancy level. The Department has found that IHAs generally have high levels of occupancy and, thus, would not be adversely affected by the provisions of the vacancy rule. If such a circumstance did arise that caused the IHA to project an occupancy percentage of less than 97 percent and to have more than 5 vacant units, a waiver request

could be made and considered on the merits of the case.

One commenter requested that reduced Comprehensive Grant Program (CGP) funds be added to the list of acceptable "beyond control" circumstances. This rule does address the situation of a reduction in CGP funding which occurs as a result of a rescission of appropriated funds, although not as a "beyond control" circumstance. If such an action results in an HA not being able to complete all the vacant unit rehabilitation in its approved Annual Statement, the HA may seek a waiver to permit full PFS eligibility for those units approved but not funded. While the advisory committee discussed the need to mitigate the consequences of a rescission, the only procedural process mentioned to obtain relief was through a waiver. The specific waiver provision in the proposed rule is omitted in the final rule, because waiver authority already exists (see 24 CFR 990.101). Since the objective of the commenter is being met, the Department does not feel it necessary to overturn the decision of the committee.

One commenter noted that insufficient funding for otherwise approvable applications for Comprehensive Improvement Assistance Program (CIAP) funds was an acceptable "beyond control" circumstance and asked why insufficient CGP funding could not also be an acceptable reason. This rule does provide that the failure of an HA to fund an otherwise approvable Resident Management Corporation (RMC) request for CGP funds from its HA would be treated as an acceptable "beyond control" circumstance that the RMC could use to justify using a projected occupancy percentage of less than 97 percent. The advisory committee agreed on this relief because both the HA application to the Department for CIAP funds and a RMC request for CGP funds from its HA could be denied because of insufficient funds. The CGP, however, is not a competition program and the concept of insufficient funds as described above does not apply. Funds are provided to eligible HAs on a formula basis, and the HA knows what its resources are at the time it develops its Annual Statement.

Two commenters addressed that portion of the proposed rule dealing with vacant units undergoing modernization. One commenter stated that the requirement that an HA place its vacant units under construction within two Federal Fiscal Years (FFY) after the FFY in which the funds are approved was very stringent. Another

commenter believed that the 2-year requirement should be extended if HUD approves extensions to the modernization implementation schedule. The committee had addressed this issue and reached a consensus that the 2-year provision would not be extended.

It should be noted that the 2-year time period does not include the FFY in which the funds were received. Depending on when the HA received its modernization funding, it could actually have up to 3 years to place the vacant units under a construction contract. Also, if an HA initially fails to place its vacant units under a construction contract within the 2-year period, the HA would still be able to regain special treatment at the time it did place the units under a construction contract, although not retroactively.

The Department was part of the consensus on this issue and continues to support the committee decision.

The Department received three comments regarding the process for requesting a waiver. One commenter stated that if there were a rescission of appropriated funds for the CGP, the HA should not have to bear the burden of requesting a waiver. The Department appreciates the comment, but because the impact of a rescission will vary widely, the Department needs to know on a case-by-case basis what that impact will be in order to provide relief; that information can only come from the HA. The same commenter asked that procedures for requesting a waiver be provided to HAs before the rule becomes final, and another commenter requested that the rule include the conditions under which a waiver will be approved. The proposed rule provided general guidance in § 990.121 (the PHA would have had to document that it has made best efforts to correct the underlying problems and that it could not correct the problems in a cost-effective manner), but the specific documentation that the HA will have to submit cannot be determined in advance because a waiver by its nature involves a special circumstance. The final rule has omitted the separate waiver language from this part, because of the waiver authority already provided in § 999.101; repetition of this authority is contrary to the Department's ongoing efforts to streamline its regulations.

One commenter requested that the Department provide a 2-year extension to any HA, instead of 1 year, if a rescission of appropriated funds for the CGP occurs that prevents the HA from completing the modernization of all of the vacant units that were in the HA's approved Annual Statement. The

committee did recognize that relief should be given to an HA that had to change its approved Annual Statement in order to reflect a rescission of funds. Because the relief provided should relate back to the severity of the rescission and that severity is not known in advance, it was difficult to develop an appropriate measure of relief. The Department was part of the consensus to provide this relief and believes that, until there has been some experience with this type of unusual situation, the 1-year extension is appropriate.

The Department received one comment on the transition provisions of the proposed rule. The commenter believed that the rule would eliminate Comprehensive Occupancy Plans (COPs), even for those HAs that are still under a HUD-approved COP. This is not the case. An HA with a HUD-approved COP at the time the final rule becomes effective may continue to determine its PFS eligibility using the provisions of § 990.118, as that section exists before this final rule becomes effective. The Department will not approve new COPs, however, after the effective date of this rule, and after the time period of the COP has expired, the HA will determine its projected occupancy percentage using the provisions of this rule.

One commenter proposed that a lower standard of occupancy—of between 93 percent to 95 percent, rather than 97 percent—would be more reasonable for HAs. The appropriateness of the 97 percent occupancy standard was discussed at length by the committee, and the members concluded that, given current budget constraints, it was not feasible to redefine the standard. The provisions of the proposed rule developed by the committee, therefore, were based on an assumption that the 97 percent standard would remain in place; this final rule also continues the 97 percent standard.

Other Matters

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 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.

Regulatory Flexibility Act

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 will not have a significant economic impact on a substantial number of small entities. The rule sets out eligibility criteria for low-income public and Indian housing operating subsidies that may impact those HAs with large numbers of long-term vacant units. However, HUD's data incident to establishing the Vacancy Reduction Program indicates that high-vacancy PHAs are relatively few in number (and high-vacancy IHAs virtually nonexistent), and that a preponderance of the program's vacancies are in a very limited number of the larger PHAs. Most HAs will be unaffected by this rule.

Executive Order 12612, Federalism

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 will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order. The rule refines the criteria under which operating subsidies are paid on HUD-assisted housing owned and operated by HAs, but will not interfere with State or local government functions.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. No significant change in existing HUD policies or programs results from promulgation of this rule, as those policies and programs relate to family concerns. The rule merely involves the amount of funding that an HA should receive under a refinement of an existing procedure.

The Catalog of Federal Domestic Assistance Program numbers for this rule are 14.145, 14.146, and 14.147.

List of Subjects

24 CFR Part 950

Aged, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 990

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, parts 950 and 990 of title 24 of the Code of Federal Regulations are amended as follows.

PART 950—INDIAN HOUSING PROGRAMS

1. The authority citation for part 950 continues to read as follows:

Authority: 25 U.S.C. 450e(b); 42 U.S.C. 1437aa–1437ee and 3535(d).

2. Section 950.102 is amended by adding in alphabetical order definitions for “Long-term vacancy”, “Units vacant due to circumstances and actions beyond the IHA’s control”, and “Vacant unit undergoing modernization”, and by revising the definition for “Unit months available”, to read as follows:

§ 950.102 Definitions

* * * * *

Long-term Vacancy. This term means the same as it is used in the definition of “Unit Months Available” in this section.

* * * * *

Unit Months Available. Project Units multiplied by the number of months the Project Units are available for occupancy during a given IHA fiscal year. For purposes of this subpart, a unit is considered available for occupancy from the date established as the End of the Initial Operating Period for the Project until the time the unit is approved by HUD for deprogramming and is vacated or is approved for nondwelling use. In the case of an IHA development involving the acquisition of scattered site housing, see also § 950.705(b). A unit will be considered a long-term vacancy and will not be considered available for occupancy in any given IHA Requested Budget Year if the IHA determines that:

(1) The unit has been vacant for more than 12 months at the time the IHA determines its Actual Occupancy Percentage;

(2) The unit is not either: (i) a vacant unit undergoing modernization; or (ii) a unit vacant for circumstances and actions beyond the IHA’s control, as these terms are defined in this section; and

(3) The IHA determines that it will have a vacancy percentage of more than 3 percent and will have more than five vacant units, for its Requested Budget Year, even after adjusting for vacant units undergoing modernization and

units that are vacant for circumstances and actions beyond the IHA’s control, as defined in this section. (Reference in this subpart to “more than five units” or “fewer than five units” shall refer to a circumstance in which 5 units equals or exceeds 3 percent of the number of units to which the 3 percent threshold is applicable.)

Units Vacant Due to Circumstances and Actions Beyond the IHA’s Control. Dwelling units that are vacant due to circumstances and actions that prohibit the IHA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating or modernizing vacant units and are beyond the IHA’s control. For purposes of this definition, circumstances and actions beyond the IHA’s control are limited to:

(1) *Litigation.* The effect of court litigation such as a court order or settlement agreement that is legally enforceable. An example would be units that are being held vacant as part of a court-ordered or HUD-approved desegregation plan.

(2) *Laws.* Federal, Tribal, or State laws of general applicability, or their implementing regulations. Units vacant only because they do not meet minimum standards pertaining to construction or habitability under Federal, State, or local laws or regulations will not be considered vacant due to circumstances and actions beyond the IHA’s control.

(3) *Changing market conditions.* For example, small IHAs that are located in areas experiencing population loss or economic dislocations may face a lack of demand in the foreseeable future, even after the IHA has taken aggressive marketing and outreach measures.

(4) *Natural disasters.*

(5) *Insufficient funding* for otherwise approvable applications made for Comprehensive Improvement Assistance Program (CIAP) funds.

(6) *Resident Management Corporation funding.* The failure of an IHA to fund an otherwise approvable RMC request for Federal modernization funding;

(7) *Casualty Losses.* Delays in repairing damage to vacant units due to the time needed for settlement of insurance claims.

* * * * *

Vacant Unit Undergoing Modernization. Except as provided in § 950.775(a), a vacant unit in a project not considered to be obsolete (as determined using the indicia in § 970.6 of this chapter), when the project is undergoing modernization that includes work that is necessary to reoccupy the vacant unit, and in which one of the following conditions is met:

(1) The unit is under construction (i.e., the construction contract has been awarded or force account work has started); or

(2) The treatment of the vacant unit is included in a HUD-approved modernization budget (e.g., the Annual Statement for the Comprehensive Grant Program (CGP) (Form HUD–52837 or its successor), or the Comprehensive Improvement Assistance Program (CIAP) Budget (Form HUD–52825 or its successor)), but the time period for placing the vacant unit under construction has not yet expired. The IHA must place the vacant unit under construction within two Federal Fiscal Years (FFYs) after the FFY in which the modernization funds are approved.

* * * * *

§ 950.705 [Amended]

3. Section 950.705(b) is amended by removing the first sentence.

4. Section 950.720 is amended by revising paragraph (b), to read as follows:

§ 950.720 Other costs.

* * * * *

(b) (1) *Costs attributable to units approved for deprogramming and vacant* may be eligible for inclusion, but must be limited to the minimum services and protection necessary to protect and preserve the units until the units are deprogrammed. Costs attributable to units temporarily unavailable for occupancy because the units are utilized for IHA-related activities are not eligible for inclusion. In determining the PFS operating subsidy, these units shall not be included in the calculation of Unit Months Available. Units approved for deprogramming shall be listed by the IHA, and supporting documentation regarding direct costs attributable to such units shall be included as a part of the Performance Funding System calculation in which the IHA requests operating subsidy for these units. If the IHA requires assistance in this matter, the IHA should contact the HUD Field Office.

(2) Units approved for nondwelling use to promote economic self-sufficiency services and anti-drug activities are eligible for operating subsidy under the conditions provided in this paragraph (b)(2), and the costs attributable to these units are to be included in the operating budget. If a unit satisfies the conditions stated below, it will be eligible for subsidy at the rate of the AEL for the number of months the unit is devoted to such use. Approval will be given for a period of no more than 3 years. HUD may renew

the approval to allow payments after that period only if the IHA can demonstrate that no other sources for paying the non-utility operating costs of the unit are available. The conditions the unit must satisfy are:

(i) The unit must be used for either economic self-sufficiency activities directly related to maximizing the number of employed residents or for anti-drug programs directly related to ridding the development of illegal drugs and drug-related crime. The activities must be directed toward and for the benefit of residents of the development.

(ii) The IHA must demonstrate that space for the service or program is not available elsewhere in the locality and that the space used is safe and suitable for its intended use or that the resources are committed to make the space safe and suitable.

(iii) The IHA must demonstrate satisfactorily that other funding is not available to pay for the non-utility operating costs. All rental income generated as a result of the activity must be reported as income in the operating subsidy calculation.

(iv) Operating subsidy may be approved for only one site (involving one or more contiguous units) per public housing development for economic self-sufficiency services or anti-drug programs, and the number of units involved should be the minimum necessary to support the service or program. Operating subsidy for any additional sites per development can only be approved by HUD Headquarters.

(v) The IHA must submit a certification with its Performance Funding System Calculation that the units are being used for the purpose for which they were approved and that any rental income generated as a result of the activity is reported as income in the operating subsidy calculation. The IHA must maintain specific documentation of the units covered. Such documentation should include a listing of the units, the street addresses, and project/management control numbers.

(3) Long-term vacant units that are not included in the calculation of Unit Months Available are eligible for operating subsidy in the Requested Budget Year at the rate of 20 percent of the AEL. Allowable utility costs for long term vacant units will continue to be funded in accordance with § 950.715.

* * * * *

5. In § 950.725, paragraph (b)(3) is revised and the OMB approval number is added at the end of the section, to read as follows:

§ 950.725 Projected operating income level.

(b) * * *

(3) Projected Occupancy Percentage. The IHA shall determine its projected percentage of occupancy for all Project Units (Projected Occupancy Percentage), as follows:

(i) *General.* Using actual occupancy data collected before the start of the budget year as a beginning point, the IHA will develop estimates for its Requested Budget Year (RBY) of: how many units the IHA will have available for occupancy; how many of the available units will be occupied and how many will be vacant, and what the average occupancy percentage will be for the RBY. The conditions under which the RBY occupancy percentage will be used as the projected occupancy percentage for purposes of determining operating subsidy eligibility are described below.

(ii) *High Occupancy IHA—No Adjustments Necessary.* If the IHA's RBY Occupancy Percentage, calculated in accordance with § 950.760, is equal to or greater than 97%, the IHA's Projected Occupancy Percentage is 97%. If the IHA's RBY Occupancy Percentage is less than 97%, but the IHA demonstrates that it will have an average of five or fewer vacant units in the requested budget year, the IHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(iii) *Adjustments in Determining Occupancy.* If the IHA's RBY Occupancy Percentage is less than 97% and the IHA has more than 5 vacant units, the IHA will adjust its estimate of vacant units to exclude vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control. After making this adjustment, the IHA will recalculate its estimated vacancy percentage for the RBY.

(A) *High Occupancy IHA after adjustment.* If the recalculated vacancy percentage is 3% or less (or the IHA would have five or fewer vacant units), the IHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(B) *Low Occupancy IHA—adjustment for long-term vacancies.* If the recalculated vacancy percentage is greater than 3% (or more than 5 vacant units), the IHA will then further adjust its RBY Occupancy Percentage by excluding from its calculation of Unit Months Available (UMAs), all units that have been vacant for longer than 12 months that are not vacant units undergoing modernization or are not units vacant due to circumstances and actions beyond the IHA's control.

(iv) *Low Occupancy IHA after all adjustments.* An IHA that has determined its RBY Occupancy Percentage in accordance with paragraph (b)(iii)(B) of this section will be eligible for operating subsidy as follows:

(A) Long-term vacancies removed from the calculation of UMAs will be eligible to receive a reduced operating subsidy calculated at 20% of the IHA's AEL.

(B) If the recalculated RBY Occupancy Percentage is 97% or higher, the IHA will use 97%.

(C) If the recalculated RBY Occupancy Percentage is less than 97%, but the vacancy rate after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control is 3% or less (or the IHA has five or fewer vacant units), the IHA may use its recalculated RBY Occupancy Percentage as its projected occupancy percentage.

(D) If the recalculated RBY Occupancy Percentage is less than 97% and the vacancy percentage is greater than 3% (or the IHA has more than five vacant units) after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control, the IHA will use 97% as its projected occupancy percentage, but will be allowed to adjust the 97% by the number of vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control. For a small IHA using five vacant units as its occupancy objective for the RBY, the IHA will determine what percentage five units represents as a portion of its units available for occupancy and subtract that percentage from 100%. The result will be used as the IHA's projected occupancy percentage, but the IHA will be allowed to adjust the projected occupancy percentage by vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the IHA's control.

* * * * *

(Approved by the Office of Management and Budget under control number 2577-0066.)

6. Section 950.760 is revised to read as follows:

§ 950.760 Determining Actual and Requested Budget Year Occupancy Percentages.

(a) *Actual Occupancy Percentage.* When submitting Performance Funding System Calculations for Requested Budget Years beginning on or after July 1, 1996, the IHA shall determine an

Actual Occupancy Percentage for all Project Units included in the Unit Months Available. The IHA shall have the option of basing this option on either:

(1) The number of units occupied on the last day of the month that ends 6 months before the beginning of the Requested Budget Year; or

(2) The average occupancy during the month ending 6 months before the beginning of the Requested Budget Year. If the IHA elects to use an average occupancy under this paragraph (a)(2), the IHA shall maintain a record of its computation of its Actual Occupancy Percentage.

(b) *Requested Budget Year Occupancy Percentage.* The IHA will develop a Requested Budget Year Occupancy Percentage by taking the Actual Occupancy Percentage and adjusting it to reflect changes up or down in occupancy during the Requested Budget Year due to HUD-approved activities such as units undergoing modernization, new development, demolition, or disposition. If after the submission and approval of the Performance Funding System Calculations for the Requested Budget Year, there are changes up or down in occupancy because of modernization, new development, demolition or disposition that are not reflected in the Requested Budget Year Occupancy Percentage, the IHA may submit a revision to reflect the actual change in occupancy due to these activities.

(c) *Documentation Required to be Maintained.* The IHA must maintain, and upon HUD's request, make available to HUD specific documentation of the occupancy status of all units, including long-term vacancies, vacant units undergoing modernization, and units vacant due to circumstances and actions beyond the IHA's control. This documentation shall include a listing of the units, street addresses, and project/management control numbers.

(Approved by the Office of Management and Budget under control number 2577-0066.)

§ 950.770 [Removed and Reserved]

7. Section 950.770, Comprehensive Occupancy Plan (COP) Requirements, is removed and reserved.

8. A new § 950.775 is added, to read as follows:

§ 950.775 Transition Provisions.

(a) *Treatment of units already under an approved modernization budget* Vacant units to be rehabilitated under modernization budgets approved in FFY 1995 or prior are subject to the modernization implementation schedule, without extension, previously

approved by HUD. It is the intent of HUD not to penalize IHAs that have longer construction schedules in an approved modernization budget.

(b) *Treatment of Existing COPs.* (1) An IHA operating under a Comprehensive Occupancy Plan (COP) approved by HUD under § 950.770, as that section existed immediately before April 1, 1996, may, until the expiration of its COP, continue to determine its PFS eligibility under the provisions of part 950 as that part existed immediately before April 1, 1996. If the IHA does not elect to continue to determine its PFS eligibility using its COP, the IHA's PFS eligibility will be calculated in accordance with this part.

(2) HUD will not approve any extensions of COPs.

9. A new § 950.777 is added, to read as follows:

§ 950.777 Effect of rescission.

If there is a rescission of appropriated funds that reduces the level of Comprehensive Grant Program funding in an approved Annual Statement under the CGP, to the extent that the IHA can document that it is not possible to complete all the vacant unit rehabilitation in the IHA's approved Annual Statement, the IHA may seek and HUD may grant a waiver for 1 fiscal year to permit full PFS eligibility for those units approved but not funded.

PART 990—ANNUAL CONTRIBUTIONS FOR OPERATING SUBSIDY

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

Authority: 42 U.S.C. 1437g and 3535(d).

11. Section 990.102 is amended by adding in alphabetical order definitions for "Long-term vacancy", "Units vacant due to circumstances and actions beyond the PHA's control", and "Vacant unit undergoing modernization"; by revising the definition for "Unit months available"; and by removing the definition for "Vacant, On-Schedule Modernization Units", to read as follows:

§ 990.102 Definitions

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Long-term vacancy. This term means the same as it is used in the definition of "Unit Months Available" in this section.

* * * * *

Unit months available. Project Units multiplied by the number of months the Project Units are available for occupancy during a given PHA fiscal year. For purposes of this part, a unit is considered available for occupancy from the date established as the End of the

Initial Operating Period for the Project until the time the unit is approved by HUD for deprogramming and is vacated or is approved for nondwelling use. In the case of a PHA development involving the acquisition of scattered site housing, see also § 990.104(b). A unit will be considered a long-term vacancy and will not be considered available for occupancy in any given PHA Requested Budget Year if the PHA determines that:

(1) The unit has been vacant for more than 12 months at the time the PHA determines its Actual Occupancy Percentage;

(2) The unit is not either: (i) A vacant unit undergoing modernization; or (ii) A unit vacant for circumstances and actions beyond the PHA's control, as these terms are defined in this section; and

(3) The PHA determines that it will have a vacancy percentage of more than 3 percent and will have more than five vacant units, for its Requested Budget Year, even after adjusting for vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the PHA's control, as defined in this section. (Reference in this part to "more than five units" or "fewer than five units" shall refer to a circumstance in which five units equals or exceeds 3 percent of the number of units to which the 3 percent threshold is applicable.)

Units vacant due to circumstances and actions beyond the PHA's control. Dwelling units that are vacant due to circumstances and actions that prohibit the PHA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating or modernizing vacant units and are beyond the PHA's control. For purposes of this definition, circumstances and actions beyond the PHA's control are limited to:

(1) *Litigation.* The effect of court litigation such as a court order or settlement agreement that is legally enforceable. An example would be units that are being held vacant as part of a court-ordered or HUD-approved desegregation plan.

(2) *Laws.* Federal or State laws of general applicability, or their implementing regulations. Units vacant only because they do not meet minimum standards pertaining to construction or habitability under Federal, State, or local laws or regulations will not be considered vacant due to circumstances and actions beyond the PHA's control.

(3) *Changing market conditions.* For example, small PHAs that are located in areas experiencing population loss or

economic dislocations may face a lack of demand in the foreseeable future, even after the PHA has taken aggressive marketing and outreach measures.

(4) *Natural disasters.*

(5) *Insufficient funding* for otherwise approvable applications made for Comprehensive Improvement Assistance Program (CIAP) funds.

(6) *RMC Funding.* The failure of a PHA to fund an otherwise approvable RMC request for Federal modernization funding;

(7) *Casualty Losses.* Delays in repairing damage to vacant units due to the time needed for settlement of insurance claims.

* * * * *

Vacant unit undergoing modernization. Except as provided in § 990.119(a), a vacant unit in a project not considered to be obsolete (as determined using the indicia in § 970.6 of this chapter), when the project is undergoing modernization that includes work that is necessary to reoccupy the vacant unit, and in which one of the following conditions is met:

(1) The unit is under construction (i.e., the construction contract has been awarded or force account work has started); or

(2) The treatment of the vacant unit is included in a HUD-approved modernization budget (e.g., the Annual Statement for the Comprehensive Grant Program (CGP) (Form HUD-52837 or its successor), or the Comprehensive Improvement Assistance Program (CIAP) Budget (Form HUD-52825 or its successor)), but the time period for placing the vacant unit under construction has not yet expired. The PHA must place the vacant unit under construction within two Federal Fiscal Years (FFYs) after the FFY in which the modernization funds are approved.

§ 990.104 [Amended]

12. Section 990.104(b) is amended by removing the first sentence.

13. Section 990.108 is amended by revising paragraph (b), to read as follows:

§ 990.108 Other costs.

* * * * *

(b)(1) Costs attributable to units approved for deprogramming and vacant may be eligible for inclusion, but must be limited to the minimum services and protection necessary to protect and preserve the units until the units are deprogrammed. Costs attributable to units temporarily unavailable for occupancy because the units are utilized for PHA-related activities are not eligible for inclusion. In determining the PFS operating

subsidy, these units shall not be included in the calculation of Unit Months Available. Units approved for deprogramming shall be listed by the PHA, and supporting documentation regarding direct costs attributable to such units shall be included as a part of the Performance Funding System calculation in which the PHA requests operating subsidy for these units. If the PHA requires assistance in this matter, the PHA should contact the HUD Field Office.

(2) Units approved for nondwelling use to promote economic self-sufficiency services and anti-drug activities are eligible for operating subsidy under the conditions provided in this paragraph (b)(2), and the costs attributable to these units are to be included in the operating budget. If a unit satisfies the conditions stated below, it will be eligible for subsidy at the rate of the AEL for the number of months the unit is devoted to such use. Approval will be given for a period of no more than 3 years. HUD may renew the approval to allow payments after that period only if the PHA can demonstrate that no other sources for paying the non-utility operating costs of the unit are available. The conditions the unit must satisfy are:

(i) The unit must be used for either economic self-sufficiency activities directly related to maximizing the number of employed residents or for anti-drug programs directly related to ridding the development of illegal drugs and drug-related crime. The activities must be directed toward and for the benefit of residents of the development.

(ii) The PHA must demonstrate that space for the service or program is not available elsewhere in the locality and that the space used is safe and suitable for its intended use or that the resources are committed to make the space safe and suitable.

(iii) The PHA must demonstrate satisfactorily that other funding is not available to pay for the non-utility operating costs. All rental income generated as a result of the activity must be reported as income in the operating subsidy calculation.

(iv) Operating subsidy may be approved for only one site (involving one or more contiguous units) per public housing development for economic self-sufficiency services or anti-drug programs, and the number of units involved should be the minimum necessary to support the service or program. Operating subsidy for any additional sites per development can only be approved by HUD Headquarters.

(v) The PHA must submit a certification with its Performance

Funding System Calculation that the units are being used for the purpose for which they were approved and that any rental income generated as a result of the activity is reported as income in the operating subsidy calculation. The PHA must maintain specific documentation of the units covered. Such documentation should include a listing of the units, the street addresses, and project/management control numbers.

(3) Long-term vacant units that are not included in the calculation of Unit Months Available are eligible for operating subsidy in the Requested Budget Year at the rate of 20 percent of the AEL. Allowable utility costs for long term vacant units will continue to be funded in accordance with § 990.107.

* * * * *

14. In § 990.109, paragraph (b)(3) and the parenthetical statement containing the OMB approval number at the end of the section are revised to read as follows:

§ 990.109 Projected operating income level.

(b) * * *

(3) *Projected Occupancy Percentage.* The PHA shall determine its projected percentage of occupancy for all Project Units (Projected Occupancy Percentage), as follows:

(i) *General.* Using actual occupancy data collected before the start of the budget year as a beginning point, the PHA will develop estimates for its Requested Budget Year (RBY) of: how many units the PHA will have available for occupancy; how many of the available units will be occupied and how many will be vacant, and what the average occupancy percentage will be for the RBY. The conditions under which the RBY occupancy percentage will be used as the projected occupancy percentage for purposes of determining operating subsidy eligibility are described below.

(ii) *High Occupancy PHA—No Adjustments Necessary.* If the PHA's RBY Occupancy Percentage, calculated in accordance with § 990.117, is equal to or greater than 97%, the PHA's Projected Occupancy Percentage is 97%. If the PHA's RBY Occupancy Percentage is less than 97%, but the PHA demonstrates that it will have an average of five or fewer vacant units in the requested budget year, the PHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(iii) *Adjustments in Determining Occupancy.* If the PHA's RBY Occupancy Percentage is less than 97% and the PHA has more than 5 vacant units, the PHA will adjust its estimate of vacant units to exclude vacant units

undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control. After making this adjustment, the PHA will recalculate its estimated vacancy percentage for the RBY.

(A) *High Occupancy PHA after adjustment.* If the recalculated vacancy percentage is 3% or less (or the PHA would have five or fewer vacant units), the PHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(B) *Low Occupancy PHA—adjustment for long-term vacancies.* If the recalculated vacancy percentage is greater than 3% (or more than 5 vacant units), the PHA will then further adjust its RBY Occupancy Percentage by excluding from its calculation of Unit Months Available (UMAs), all units that have been vacant for longer than 12 months that are not vacant units undergoing modernization or are not units vacant due to circumstances and actions beyond the PHA's control.

(iv) *Low Occupancy PHA after all adjustments.* A PHA that has determined its RBY Occupancy Percentage in accordance with paragraph (b)(iii)(B) of this section will be eligible for operating subsidy as follows:

(A) Long-term vacancies removed from the calculation of UMAs will be eligible to receive a reduced operating subsidy calculated at 20% of the PHA's AEL.

(B) If the recalculated RBY Occupancy Percentage is 97% or higher, the PHA will use 97%.

(C) If the recalculated RBY Occupancy Percentage is less than 97%, but the vacancy rate after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control is 3% or less (or the PHA has five or fewer vacant units), the PHA may use its recalculated RBY Occupancy Percentage as its projected occupancy percentage.

(D) If the recalculated RBY Occupancy Percentage is less than 97% and the vacancy percentage is greater than 3% (or the PHA has more than five vacant units) after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control, the PHA will use 97% as its projected occupancy percentage, but will be allowed to adjust the 97% by the number of vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control. For a small PHA using five vacant units as its occupancy objective for the RBY, the

PHA will determine what percentage five units represents as a portion of its units available for occupancy and subtract that percentage from 100%. The result will be used as the PHA's projected occupancy percentage, but the PHA will be allowed to adjust the projected occupancy percentage by vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the PHA's control.

* * * * *

(Approved by the Office of Management and Budget under control number 2577-0066. Paragraphs (e) and (f) have been approved by the Office of Management and Budget under control number 2577-007.)

15. Section 990.117 is revised to read as follows:

§ 990.117 Determining Actual and Requested Budget Year Occupancy Percentages.

(a) *Actual Occupancy Percentage.* When submitting Performance Funding System Calculations for Requested Budget Years beginning on or after July 1, 1996, the PHA shall determine an Actual Occupancy Percentage for all Project Units included in the Unit Months Available. The PHA shall have the option of basing this option on either:

(1) The number of units occupied on the last day of the month that ends 6 months before the beginning of the Requested Budget Year; or

(2) The average occupancy during the month ending 6 months before the beginning of the Requested Budget Year. If the PHA elects to use an average occupancy under this paragraph (a)(2), the PHA shall maintain a record of its computation of its Actual Occupancy Percentage.

(b) *Requested Budget Year Occupancy Percentage.* The PHA will develop a Requested Budget Year Occupancy Percentage by taking the Actual Occupancy Percentage and adjusting it to reflect changes up or down in occupancy during the Requested Budget Year due to HUD-approved activities such as units undergoing modernization, new development, demolition, or disposition. If after the submission and approval of the Performance Funding System Calculations for the Requested Budget Year, there are changes up or down in occupancy because of modernization, new development, demolition or disposition that are not reflected in the Requested Budget Year Occupancy Percentage, the PHA may submit a revision to reflect the actual change in occupancy due to these activities.

(c) *Documentation Required to be Maintained.* The PHA must maintain, and upon HUD's request, make available to HUD specific documentation of the occupancy status of all units, including long-term vacancies, vacant units undergoing modernization, and units vacant due to circumstances and actions beyond the PHA's control. This documentation shall include a listing of the units, street addresses, and project/management control numbers.

(Approved by the Office of Management and Budget under control number 2577-0066.)

§ 990.118 [Removed and Reserved]

16. Section 990.118, Comprehensive Occupancy Plan Requirements, is removed and reserved.

17. Section 990.119 is revised, to read as follows:

§ 990.119 Transition Provisions.

(a) *Treatment of units already under an approved modernization budget.* Vacant units to be rehabilitated under modernization budgets approved in FY 1995 or prior are subject to the modernization implementation schedule, without extension, previously approved by HUD. It is the intent of HUD not to penalize PHAs that have longer construction schedules in an approved modernization budget.

(b) *Treatment of Existing COPs.* (1) A PHA that is operating under a Comprehensive Occupancy Plan (COP) approved by HUD under § 990.118, as that section existed immediately before April 1, 1996, may, until the expiration of its COP, continue to determine its PFS eligibility under the provisions of part 990 as that part existed immediately before April 1, 1996. If the PHA does not elect to continue to determine its PFS eligibility using its COP, the PHA's PFS eligibility will be calculated in accordance with this part.

(2) HUD will not approve any extensions of COPs.

18. A new § 990.121 is added, to read as follows:

§ 990.121 Effect of rescission.

If there is a rescission of appropriated funds that reduces the level of Comprehensive Grant Program funding in an approved Annual Statement under the CGP, to the extent that the PHA can document that it is not possible to complete all the vacant unit rehabilitation in the PHA's approved Annual Statement, the PHA may seek and HUD may grant a waiver for 1 fiscal year to permit full PFS eligibility for those units approved but not funded.

Dated: February 14, 1996.

Kevin E. Marchman,

*Deputy Assistant Secretary for Distressed and
Troubled Housing Recovery.*

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