

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Parts 5, 8, 882, 982, and 983

[Docket No. FR-4054-F-02]

RIN 2577-AB63

### Section 8 Certificate and Voucher Programs Conforming Rule

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

**SUMMARY:** This final rule completes the process of combining and conforming the regulations for tenant-based rental assistance under the Section 8 certificate and voucher programs, by adding two subparts that had been reserved in the previous final rule establishing the single part governing tenant-based assistance. This rule also amends requirements for project-based assistance under the certificate program. In addition, this rule continues the Department's regulation streamlining efforts by revising various sections in the part previously created to cover the combined Section 8 certificate and voucher programs and by consolidating definitions now found in individual program regulations into the part that covers definitions that have broader applicability.

**EFFECTIVE DATES:** This rule shall be effective June 1, 1998, except §§ 983.254(a)(1) and (2)(i); and 983.256(c)(2)(v) shall be effective November 27, 1998.

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#### SUPPLEMENTARY INFORMATION:

#### Paperwork Reduction Act

The information collection requirements contained in §§ 982.516, 982.517, 983.254, 983.255, and 983.256 of this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The OMB approval number is 2577-0169, which expires on April 30, 2001. *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.*

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## I. History and Scope of Rule

On February 24, 1993 (58 FR 11292), HUD published a comprehensive proposed rule to combine and conform the rules for tenant-based Section 8 rental assistance under the certificate and voucher programs. The proposed rule also would have amended requirements for project-based assistance under the Section 8 certificate program. HUD received approximately 400 comments on the proposed rule, which generally approve the broad purpose of the rule. Comments recommend revision of particular features of the rule.

On July 18, 1994, HUD published the first portion of the comprehensive final rule for the tenant-based program at 24 CFR part 982. This publication contained the final rule on unified admission procedures for the program (59 FR 36662) (part 982, subpart E). On July 3, 1995 (60 FR 34660), HUD published the second portion of the comprehensive final rule for the tenant-based programs at 24 CFR part 982, as well as regulations for the project-based certificate program at 24 CFR part 983. This publication did not include provisions concerning:

- Calculation of the rent and housing assistance payment for the tenant or project-based programs.
- “Special housing types”: program variants to meet special housing needs, such as congregate housing, shared housing, single room occupancy housing and group homes.

Today’s publication covers the subjects omitted in the July 1995 final rule. In addition, the rule includes some streamlining and clarifying changes to parts 982 and 983.

## II. Types of Tenancy

The rule (§ 982.501) specifies that there are three types of tenancy in the Section 8 tenant-based programs:

- A “regular” tenancy under the certificate program;
- An “over-FMR” tenancy under the certificate program; and
- A tenancy under the voucher program.

In a regular certificate tenancy, the share of rent paid by an assisted family is defined by a statutory formula. Section 8 subsidy covers the balance of rent for the unit. The family may not agree to pay a bigger share of the rent. In an over-FMR tenancy, the family may agree to pay more. This rule adds

authority for over-FMR tenancies. The term “regular” tenancy is added to designate and distinguish the original form of certificate tenancy.

Comments propose that HUD should combine the certificate and voucher programs. Subsidy should be calculated by the same method. The programs should not use different FMRs and voucher payment standards. The certificate and voucher programs should use the same rent formula. The HA should assume responsibility to administer the program and stretch the dollars.

In this rulemaking, HUD has fully unified the tenant-based certificate and voucher programs so far as allowed by current Federal law. Except for limited differences in calculation of subsidy and family contribution, the same regulations apply to the tenant-based certificate and voucher programs, and to a regular or over-FMR tenancy under the certificate program. For example, both programs are subject to the same requirements concerning finding and leasing a unit, housing quality standards and subsidy standards (maximum unit size), landlord responsibility and family obligations.

The three forms of tenancy conform to specific statutory requirements affecting subsidy and family contribution. Within this framework, however, the rule is designed to minimize or eliminate unnecessary differences.

For each tenancy, the same fair market rent or HUD approved exception rent (called the “FMR/exception rent limit”) determines the maximum subsidy for a program family. Actual subsidy generally equals maximum subsidy minus 30 percent of a family’s adjusted income. For a regular tenancy in the certificate program, the FMR/exception rent limit is the maximum initial rent. For a voucher or over-FMR tenancy, the FMR/exception rent limit is the maximum payment standard. The same area exception rents apply for a regular, voucher or over-FMR tenancy. For each type of tenancy, the rent to owner may not exceed comparable rent.

## III. Rent to Owner

### A. Rent Reasonableness (Comparability)

#### 1. Comparability Requirement

During a Section 8 tenancy, an owner’s rent must be “reasonable.” The HA must determine whether the initial or adjusted rent for a Section 8 unit is reasonable in comparison with rent for units in the private unassisted market (§ 982.503(b) and § 983.256(b)).

The final rule (§ 982.503(b)) refines requirements on how the HA determines comparable rent. To

determine comparability, the HA must consider:

- Location, quality, size, unit type and age of the contract unit, and
- Any amenities, housing services, maintenance and utilities to be provided by the owner in accordance with the lease.

#### 2. Comparability: Comments

a. *Against comparability.* Comments assert that HUD should not require that rents must be reasonable. Some comments suggest that HUD should eliminate rent reasonableness in both the certificate and voucher programs. In the certificate program, rents are controlled by the FMRs. In the voucher program, tenants choose to pay the rent.

Other comments urge that the rent reasonableness requirement should be limited to the certificate program and should not apply to the voucher program. Rent reasonableness negates the designed purpose of the voucher program—allowing a participant to freely select a higher priced unit, reducing concentrations of low-income housing. Rent reasonableness curbs the ability to disperse low-income families.

Comments state that participants in the voucher program like the flexibility to negotiate rent, and to choose a higher rent unit. Owners prefer the voucher program because they do not want to negotiate rents with the HA. If voucher rents are limited by comparability, owners may refuse to participate.

Comments claim that comparability subjects a landlord to de facto rent control. Ongoing HA inspection of reasonableness reduces a landlord’s incentive to offer assisted housing. Application of rent reasonableness creates undue owner uncertainty and confusion. Requiring initial and annual examination of rent is a burden on a landlord’s property and privacy.

b. *For Comparability.* Some comments support rent reasonableness requirements and extension of comparability to the voucher program. A cap on family rent payment in the voucher program is overdue. Rent reasonableness prevents owners charging excessive rents for marginal units. Owners charge different rents for different programs. In tight markets, a voucher tenant is forced to pay higher rent out-of-pocket. Under the new rule, an HA can establish a systematic method for establishing reasonable rent for the unit size.

c. *Comparability During Term.* The rule (§ 982.503(a)(4)) provides that rent must be reasonable during the whole course of an assisted tenancy. This principle applies both to the certificate program and to the voucher program.

The rent must be reasonable at the beginning of the lease, and during the lease term.

Comments state that rent reasonableness should only apply to new HAP contracts, not annually. Comparability should not be required unless rent increases. According to the comments, requiring reasonableness when rent does not increase during the lease term is an unnecessary administrative burden.

Comments ask HUD to clarify what happens if the HA determines that a proposed rent increase is not reasonable.

*d. How HA Determines Comparability.* Comments state that HUD should clarify how to determine the relevant "market", and should define "private unassisted market". Does the unassisted market include types of assisted housing other than Section 8? Does assisted refer to all types of Federal, State or local subsidies, or only to housing assisted under Section 8?

Comments state that reasonableness should not be applied on a building by building basis. Comparability should recognize market differences between units. An HA should not set single rents for a class of units in a particular property. Comparability should only assure that rent and rent increases for Section 8 and non-Section 8 units are substantially the same. Rent reasonableness should take into account unit to unit value differences ordinarily recognized in the market. Comparability should not override an owner's rental determination in response to actual market dynamics.

Comments recommend that HAS should emphasize quality, age and location of a Section 8 unit as compared with the other units. The comments claim that HAS consider any unit that passes HQS as comparable to an unassisted private market unit with an equal number of bedrooms. Substandard housing and apartments are rented for the same amount as standard and above standard rentals in the same neighborhood. Comments state that families should not pay equal or higher rent for "substandard" units as for standard units rented on the unassisted private market.

Comments assert that HUD has not given adequate guidance for determining rent reasonableness. By contrast, there are "extensive regulations" on setting and review of Fair Market Rents. Comments recommend that HUD should require:

- Determination by a qualified person;
- Information on procedures used by an HA;

—Opportunity for negotiation and correction, and a procedure for resolution of disputes;

—Review and correction of the HA determination of reasonable rent.

Comments ask HUD to clarify whether rent for an over-FMR tenancy must meet rent reasonableness.

*e. Rents Charged by Section 8 Owner.* The proposed rule would have provided that "reasonable rent" may not exceed rent charged by a Section 8 owner for a comparable "assisted or unassisted" unit in the same building. (This definition was issued as a final rule in the second phase of this rulemaking, published July 3, 1995.) The proposed rule also provided that an owner who accepts an assistance payment from the HA certifies that rent does not exceed rents charged by the owner for any comparable "assisted or unassisted" unit in the building.

Comments argue that owner rents for assisted units should not be used to show market rent.

*f. Administration of Comparability.* Comments remark that determination of comparability is an additional administrative burden for the HA, and wastes program administrative resources.

Comments note that the comparability requirement is no longer limited to the certificate program. The new rule will require HAS to determine rent reasonableness in both the certificate and voucher programs. In the past, HUD justified lower fees for administration of the voucher program on the ground that an HA does not have to perform rent reasonableness. Under the new rule, HAS will now incur additional costs to perform comparability for the voucher program. Comments recommend that HUD should not reduce the administrative fee, or should increase the fee.

Comments note that Section 8 rent setting is more complicated than in private transactions, because Section 8 rent is subject to HUD and HA regulation.

Comments state that HUD should increase monitoring of rent reasonableness if there is more than one HA operating in a jurisdiction. HUD should prevent landlords from playing HAS against each other to increase the rent.

Some comments state that an owner should certify that rent is no more than rent the owner charges for a comparable unit in the building or complex.

Comments state that an HA should presume that the rent for a Section 8 unit is reasonable unless rent is higher than rent for a comparable non-Section 8 unit in the building.

Comments state that non-profit owners charge a lower rent for families who do not receive Section 8 subsidies. These owners want to charge a neighborhood comparable rent to Section 8 participants. The comment recommends that an owner should be allowed to charge a higher rent for Section 8 tenants than for market rate tenants if comparable rents are charged in the neighborhood.

*g. Comparability: Other Issues.*

Comments express concern on how implementation of rent reasonableness may affect existing tenancies. Comments ask HUD to clarify how rent reasonableness applies to existing voucher tenancies. Comments ask HUD to clarify when and how voucher landlords can raise the rent.

By law, an HA may serve as contract administrator of units owned by the HA. Because of the evident conflict between the HA's proprietary interest and the responsibility for determining if the landlord's rent is reasonable, HUD determines whether rent of HA-owned units is reasonable. Comments state that comparability should be determined by the HUD field office economist rather than the Secretary.

The proposed rule provides that an HA must "assist" the family in negotiating reasonable rent. Comments ask what assistance must be provided.

### 3. Comparability: HUD Response

*a. Use of Comparability.* By law, rents for voucher units must be "reasonable in comparison with rents charged for comparable units in the private unassisted market" (or for units assisted under the Section 8 certificate program) (42 U.S.C. 1437f(o)(10)(A)). The HA must review all initial rents or rent increases, and must determine whether the rent requested by an owner is reasonable.

A public housing agency shall review all rents for [voucher] units \* \* \* (and all rent increases for [voucher] units \* \* \*) to determine whether the rent (or rent increase) requested by an owner is reasonable. If the public housing agency determines that the rent (or rent increase) for a unit is not reasonable, the agency may disapprove a lease for such unit. (42 U.S.C. 1437f(o)(10)(A))

Under this law, the rent reasonableness requirement must be applied in the voucher program. Rent reasonableness may not be restricted to the certificate program as suggested by some public comment.

In the certificate program, by law rent adjustment is subject to comparability. "Adjustments" may not result in "material differences" between rent for a Section 8 assisted unit and rent for

comparable unassisted units (42 U.S.C. 1437f(c)(2)(C)). The adjusted rent may not exceed "the rent for a comparable unassisted unit of similar quality, type and age in the market area" (42 U.S.C. 1437f(c)(2)(A)). By this HUD regulation, comparability applies both to initial rent to owner and rent to owner as adjusted during the life of the assisted tenancy (§ 982.503(a)).

Under this rule, comparability for a voucher or certificate tenancy limits the maximum "rent to owner"—the amount of rent payable to the owner in accordance with the lease (§ 982.4). Rent to owner does not include any allowance for tenant-paid utilities. By contrast, the fair market rent limit (for a regular tenancy under the Section 8 certificate program) is a limit on the initial "gross rent"—the total amount of the rent to owner plus any allowance for tenant-paid utilities.

In the regular certificate program, the initial rent is subject to both limits: initial rent to owner must be reasonable, and the total of the rent to owner plus any utility allowance may not exceed the fair market rent. In a voucher or over-FMR tenancy, the initial rent to owner must be reasonable. However, the fair market rent is not used as a restriction on the rent. Instead, the fair market rent is used as a limit on the "payment standard"—the maximum subsidy for a family.

Comparability review by the HA prevents owners from charging Section 8 families more than market rents charged for private market tenants. Experience in operation of the Section 8 programs shows that without this control, the availability of the Section 8 subsidy encourages and enables owners to charge more than a normal market rent.

A Section 8 family may lack the motive, knowledge or leverage to negotiate a market rent. For a regular certificate tenancy, the participant has no economic motive to limit the amount of rent paid to an owner, since the amount of the rent paid to the owner does not affect the family's share of rent. A higher rent is covered by a higher Federal subsidy. In a voucher or over-FMR tenancy a higher rent increases the family's out of pocket payment. Nevertheless, without comparability, families may agree to excess rents since part of the rent—often the greatest part of the rent—is paid by the Section 8 subsidy.

The Section 8 program is designed to enable poor families to pay a fair rent for decent housing, not to subsidize excessive rents or profits. High rents waste Federal subsidy. By requiring reasonable rents for Section 8 families,

this rule attempts to gain the maximum benefits from use of available program funds.

Comments state that HUD should not require the HA to redetermine comparability unless the rent increases, and express concern with the administrative burden of the annual determination. In response to these concerns, the final rule (§ 982.503(a)(2)) only requires that the HA conduct a redetermination of reasonable rent in two cases:

- Before any *increase of rent to owner*, or
- If there is a five percent *decrease in the published FMR* (in effect 60 days before the contract anniversary) as compared with the FMR in effect one year before the contract anniversary.

In a regular certificate tenancy, rent may increase by application of the published factor at the annual anniversary, or by a HUD-approved special adjustment. In an over-FMR or voucher tenancy, rent may increase by terms of the lease between the owner and the tenant. For each type of tenancy, the HA must conduct a comparability analysis before an owner may increase the rent. An increased rent may not exceed the reasonable rent for unassisted units in the local market.

Market rents may decline. Even absent a rent increase, the current rent to owner for a program unit—though reasonable at the time of the last HA comparability determination—may now exceed reasonable rent for comparable unassisted units rented in the local market. This excess is a windfall to the owner and results in excess subsidy payment by HUD or an excess payment by the family. To prevent excess rent in such cases, the rule will now require that the HA must conduct a comparability analysis if there is a five percent or greater decrease in the published FMR in effect 60 days before the contract anniversary as compared with the FMR rent in effect one year before the contract anniversary.

The FMR is HUD's estimate of the fortieth percentile rent for standard units in the local market. A five percent decrease in the FMR indicates a substantial decrease in market rents, and justifies requiring the HA to undertake a comparability determination. Conversely, however, the rule does not require that the HA automatically and routinely conduct a comparability determination if the unit rent does not rise, and if there is no fall in the published FMR for the market. Even if there is substantial decline in local market rents, signalled by a fall in the FMR, rent for the particular assisted

unit is not reduced unless the comparability analysis shows that current unit rent exceeds rent for comparable unassisted units.

At any time, HUD may direct the HA to determine comparability for its program generally or for particular units, though there is no proposed increase in unit rent or decrease in market rents (§ 982.503(a)(2)(iii)). For example, HUD may exercise this authority because of concern that program rents are excessive because an HA has failed to carry out rent comparability in accordance with program requirements.

The rule also provides that the HA may redetermine reasonable rent at any time (§ 982.503(a)(3)). The HA has discretion to conduct rent reasonableness analysis for any or all units, though not mandated in accordance with the rule.

Comparability applies to existing program tenancies, as well as new tenancies. Application of reasonableness during the lease term is required by law, and is consistent with provisions of assistance contracts for existing certificate and voucher tenancies. In the certificate program, HAP contracts provide that rent adjustments must be reasonable. In the voucher program, current HAP contracts also provide that rent paid to the owner must be reasonable.

The HA must keep records to document the basis for each HA determination, as required under the rule, that the initial and adjusted rent to owner is reasonable during the assisted tenancy (§ 982.158(f)(7) (for tenant-based programs) and § 983.12(b)(2) (for PBC program)). In the tenant-based programs, a comparability determination must be kept for at least three years. In the PBC program, a comparability determination must be kept during the HAP contract term and for at least three years thereafter.

*b. How HA Determines Comparability.* HUD has not adopted comments recommending that HUD issue extensive and detailed Federally-prescribed procedures for rental valuation and for resolution of valuation issues. Instead, the final rule (§ 982.503(b)) contains a brief and simple statement of the basic standards to be applied by an HA in determining reasonable rent of a unit with Section 8 tenant-based assistance.

Each HA should use appropriate and practical procedures for determining rental values in the local market. The HA is responsible for designating qualified HA staff or outside analysts. HAs have extensive experience in determining rent reasonableness for the

Section 8 tenant-based programs, and can utilize available techniques and expertise. An HA is well able to gather and maintain data on rent values in its local market, or to retain qualified analysts for this purpose.

An HA's day-to-day operation of a tenant-based program is a prime source of up-to-date information on private market rentals in the HA community. In the process of examining and approving rentals for program participants, the HA receives on-the-ground information on rents demanded and accepted by local landlords. HA's can maintain current rental data, and can designate staff or outside specialists with training and experience in rental valuation.

The determination of rent reasonableness for Section 8 tenant-based assistance does not call for a special or unusual valuation in accordance with detailed procedures prescribed by HUD. The central purpose of comparability is merely to assure that federally subsidized rents do not exceed rental values in the private market. Each individual HA should value units so that the HA's determination of reasonable rent faithfully reflects the characteristics of the Section 8 unit, and the valuation of comparable units in the private unassisted market.

*c. Factors Considered in Valuing Unit.* To determine if rent is reasonable, the HA must compare characteristics of the contract unit with characteristics of comparable unassisted units. The rule provides (§ 982.503(b) and § 983.256(b)) that an HA must consider:

- Location, quality, size, unit type and age of the contract unit.
- Amenities, housing services, maintenance and utilities to be provided by the owner of the contract unit in accordance with the assisted lease.

The proposed rule would have provided that the HA must consider "any" owner services. The final rule specifies that the HA may only consider "housing" services (§ 982.503(b)(2) and § 983.256(b)(2)). Comparable rent does not include the value of any non-housing services provided by the owner to the assisted tenant (for example, the value of any food or medical services). In determining comparable rent, rent of any comparable with non-housing services must be adjusted down to indicate rent of an assisted unit without such services.

Comments state that an HA should consider local regulations that affect rent of comparable units. HUD agrees that local laws or regulations may affect rent of a comparable or subject unit. However, such effects would be

reflected in the comparable rents, and in the comparison between the comparable and subject. There is no need to add any special regulatory treatment concerning the effect of local laws or regulations.

*d. Rent Charged by Owner.* The proposed rule would have provided that rent to owner may not exceed rent that the owner is charging for a comparable assisted or unassisted unit. Public comments state that comparability should not be based on owner rent for assisted units. On reconsideration, HUD agrees that the rent for assisted units is not a persuasive indicator of private market unassisted rents. In renting to certificate or voucher families, the owner may not be able to match reduced rents for subsidized units in the same building.

Under the final rule (§ 982.503(b)), reasonable rent for a contract unit is determined by comparison with rents for other comparable "unassisted" units in the local market and the owner's premises. In the final rule (§ 982.4), the term "reasonable rent" means a rent that is not more than rent for comparable units in the private unassisted market, including rent charged by the owner for comparable *unassisted* units in the premises.

The final rule does not provide, as proposed, that rent for a contract unit may not exceed rent charged by the owner for a comparable "assisted" unit in the premises. The rule therefore deletes the requirement for owner certification of this fact. By accepting the HA's monthly Section 8 payment, an owner certifies that rent for a Section 8 unit does not exceed rent charged by the owner for comparable unassisted units in the premises (§ 982.503(c); § 983.256(d)).

If requested, the owner must give the HA information on rents charged by the owner for other units in the premises or elsewhere (§ 982.503(c); § 983.256(d)). Comments agree with HUD that the owner should be required to give the HA information on rents charged by owner.

## *B. Other Limits on Rent to Owner*

### *1. New Provisions*

The final rule adds new provisions to confirm that owner rents for some units may be subject to limits in addition to rent reasonableness. These limits apply:

- To units subject to rent control under local law;
- To units subject to rent restrictions under rules for the HUD HOME program (HOME Investment Partnerships Program; see 24 CFR part 92);

- To project-based certificate (PBC) units, to ensure that an owner does not receive excessive subsidy by combining Section 8 assistance with tax credits or other subsidies.
- At the discretion of the HA, because of other governmental subsidies in addition to Section 8 assistance.

### *2. Rent Control*

Local rent control may force an owner to reduce the rent to owner below the HA-determined reasonable rent (or below the fair market rent for a regular tenancy in the Section 8 certificate program). The rule provides that the amount of rent to owner may be subject to rent control limits under State or local law (§ 982.511 and § 983.258).

The new rule confirms that the Section 8 program rule establishes the maximum rent to owner, but does not establish the minimum rent to owner. Therefore the rule does not pre-empt local rent control laws which may prohibit an owner from charging the full comparable rent otherwise allowed in accordance with requirements of the Federal program regulation.

### *3. HOME Rents*

Section 8 families may rent units in projects assisted under the HUD HOME program. Requirements of the HOME program determine the maximum rents for units in a HOME-assisted project. The Section 8 rule provides that rent for HOME-assisted units is subject to requirements of the HOME program (§ 982.512(b) and § 983.257(a)).

This rule thus confirms that participation in the Section 8 program does not relieve or replace rent limits required by the HOME program. The converse is also true. Participation in the HOME program does not relieve or replace rent limits required by the Section 8 program. Rather, for a unit that is assisted both under the HOME program and under the Section 8 program, the owner is subject both to the HOME and Section 8 limits on unit rents. As for other Section 8 units, rent for a HOME-assisted unit must not exceed rents charged by the owner for comparable unassisted units.

### *4. Other Subsidies*

The new rule provides that an HA may adopt policies requiring a reduction of the initial rent to owner because of other governmental subsidies (§ 982.512(c) and § 983.257(c)). In some cases the owner or property may benefit from Governmental subsidies in addition to Section 8. Such subsidies may flow from the Federal government, or from a State or local government. The subsidy may take various forms: such as

tax concessions or credits, subsidized loans or grants to an owner.

The HA may judge that the combination of Section 8 subsidy with other subsidies is an excess concentration of public resources, is more than necessary to induce the owner to provide the housing, or provides a windfall or excessive profit to the owner. The final rule explicitly grants the HA discretion to refuse Section 8 initial rents that the HA deems excessive after considering other available subsidies for the project, and to require an initial rent below the reasonable rent otherwise allowed under the program.

Section 8 housing may benefit from federal tax credits allocated by State housing credit agencies. Section 102(d) of the HUD Reform Act of 1979 (42 U.S.C. 3545 and 3545 note) requires HUD to take into account other government assistance in determining the amount of Section 8 or other HUD assistance for "any housing project." Before the HA commits assistance under the project-based certificate program, HUD or a State housing credit agency must certify that the combination of Section 8 and other governmental assistance for a project is not "more than is necessary to provide affordable housing."

Departmental regulations provide that in making a certification under Section 102(d), HUD will consider the aggregate amount of assistance from the Department and other sources that is "necessary to ensure the feasibility of the assisted activity" (24 CFR 4.13(a)). If HUD determines that the aggregate amount of assistance is more than necessary for this purpose "the Department will consider all options available to enable it to make the required certification, including reductions in the amount of Section 8 subsidies" (24 CFR 4.13(b)). To implement the limitation of Federal assistance for a project, HUD has issued administrative guidelines on the "layering" of governmental subsidies (59 FR 9332, February 25, 1994).

The proposed PBC rule would have provided that the initial rents to owner (contract rent) may not exceed the rents necessary to make the assisted activity feasible, after taking into account assistance from other government sources, and that the HA and owner must so certify. Comments object to the requirement for certification that this standard is met. The final PBC rule does not include this certification requirement.

The final PBC rule provides, at § 983.257(b), that:

\* \* \* the HA may only approve or assist a project in accordance with HUD regulations and guidelines designed to ensure that participants do not receive excessive compensation by combining HUD program assistance with assistance from other Federal, State or local agencies, or with low income housing tax credits.

An owner may receive excessive benefit by combining Section 8 benefits with tax credit or other governmental subsidies. Excess aggregate subsidy may be eliminated by reducing Section 8 rents or by reducing tax credits or other governmental subsidies. On the one hand, a State housing credit agency may reduce the allocation of Federal tax credits. Alternatively, the HA may exercise its regulatory discretion to reduce initial Section 8 rents because of tax credits or other subsidies for the project.

#### IV. Maximum Subsidy

##### A. Purpose and Proposed Changes

HUD publishes the fair market rent (FMR) for each market area. The FMRs are estimates of the cost to rent standard existing housing. In the Section 8 certificate and voucher programs, the published FMR is generally the maximum subsidy for a family. However, HUD may approve an "exception rent" to allow a higher subsidy. The "FMR/exception rent limit" is the fair market rent or any HUD-approved exception rent. (§ 982.504, and definition of FMR/exception rent limit in § 982.4.) (In addition to the tenant-based programs, the exception rent requirements in § 982.504 also apply to PBC (§ 983.252(b)).)

For a regular tenancy in the certificate program, the FMR/exception rent limit is the maximum initial rent (§ 982.508(a); see also § 982.504(a)(2)). The initial rent may not exceed the FMR/exception rent limit either for the actual size of the unit rented, or for the "family unit size"—the appropriate unit size for the family (§ 982.508(a)(2); § 982.402(c)(1)). Family unit size is determined under the HA subsidy standards (§ 982.402).

For a voucher or over-FMR tenancy, the FMR/exception rent limit determines the HA payment standard (maximum subsidy amount) (§ 982.505; see also § 982.504(a)(2)). For the voucher program, the payment standard may not exceed the FMR/exception rent limit (§ 982.505(b)(1)). For an over-FMR tenancy, the payment standard is the FMR/exception rent limit (§ 982.505(c)(1)).

Under the old certificate rule, an HA was permitted to approve exception rents up to 110 percent of published

FMR for up to 20 percent of units in the HA certificate program. The HA did not need to ask HUD permission to approve such exception rents. In addition, HUD could approve certificate program exception rents for neighborhoods or special cases. In the voucher program, the HA could set a payment standard up to a HUD-approved exception rent for the whole HA jurisdiction. In this rulemaking, HUD proposed to eliminate the existing exception rent authorities, and to substitute a new uniform exception rent standard for the tenant-based programs.

Under the proposed and final rule HUD may approve an exception rent limit for part of the area covered by a published FMR. In all cases, the approved exception rent limit may not exceed 120 percent of the published FMR (§ 982.504(b)(1)(ii) of final rule)—the statutory exception rent limit. Within this limit, the final rule allows two alternative procedures for determining the maximum exception rent.

First, in accordance with prior practice and as provided in the proposed rule, the final rule provides that HUD may approve an exception rent that does not exceed the 40th percentile of rents to lease standard units in the exception rent area. Under this method, the 40th percentile rent is determined by the same method as is used to establish the published FMR for the whole FMR area.

Second, the final rule adds a new method for determining the maximum approvable exception rent. The final rule provides that HUD may approve an exception rent if the exception rent does not exceed the FMR times a fraction comprised of the median rent of the exception rent area divided by the median rent of the entire FMR area. For this purpose, HUD will use decennial census data and other available statistically valid information to determine the median rent for the exception rent area and FMR area (§ 982.504(b)(1)(ii)(B)).

The final rule also provides that HUD will not approve an area exception rent unless HUD determines that an exception rent is needed for either of two specific program reasons (§ 982.504(b)(1)(iii)):

- To help families find housing outside area of high poverty, or
- Because a high percentage of certificate or voucher holders have trouble finding housing for lease under the tenant-based program within the term of the certificate or voucher.

The total population of exception rent areas in an FMR area may not include more than 50 percent of the population of the fair market rent area (§ 982.504(b)(1)(iv)).

A HUD-approved area exception rent applies to any family that rents a unit with tenant-based assistance in a HUD-approved exception rent area (§ 982.504(b)(1)(i)). The rule does not limit the number of exception rent tenancies in these areas.

In addition, the final rule provides that for a regular certificate tenancy, the HA may approve an exception rent up to 120 percent of the published FMR, as a reasonable accommodation for a disabled family member (§ 982.504(b)(2)).

#### *B. FMR/Exception Rent Limit: Comments*

##### *1. Certificate Program: Elimination of HA Exception Authority*

Some comments argue that HUD should not change the old exception rent regulation. Other comments state that the new exception rent system is flexible and offers more choice for clients.

Comments object to losing the HA's 20 percent exception authority in the certificate program. Comments recommend increasing the percentage of exception units.

Comments complain that the new rule restricts HA flexibility. They state that an HA should retain discretion to allow FMR exceptions on a community-wide or unit-by-unit basis. The comments state that the old certificate system allows the HA to consider local market conditions and circumstances of participating families. The HA needs discretion to meet special needs or unusual circumstances. Sometimes the HA needs to grant an exception rent for a specific unit because of special family needs.

Comments suggest that an HA may reduce arbitrary variation in HA exception rent approval by adopting objective criteria for determining when to grant exception rents. The HA administrative plan should include provisions on HA approval of exception rents. Inclusion of HA exception rent policy in the administrative plan prevents arbitrary or abusive action by the HA.

Comments note that removal of HA exception rent authority hampers ability of certificate-holders to lease units. The HA loses landlords when the FMR is low and rents are high. A tight market forces tenants into poor neighborhoods. Under the old rule, an HA can use the 20 percent exception authority so

program families can lease in new areas. However, an HA comment states that the HA does not allow exception rents since there are many units available under the FMR.

##### *2. Over-FMR Tenancy*

Some public comments concern the relation between exception rent limits on maximum subsidy, and the new rules that allow some certificate families to pay a higher rent. In this type of tenancy, the maximum subsidy is capped at the FMR limit, but the family can pay the owner rent that exceeds the FMR limit. (In the proposed rule, this is called an "excess rent" tenancy. In the final rule this is called an "over-FMR" tenancy.) By law, the HA may not approve such tenancies for more than 10 percent of "incremental" units in the HA program.

Comments state that the over-FMR tenancy is not an adequate substitute for the 20 percent exception rent authority. Over-FMR tenancies are limited to 10 percent of the HA program and families who can afford to pay more than the FMR. Poor welfare families will not qualify for excess rent tenancy. According to the comments, the over-FMR tenancy substitutes for the individual exception rent authority under old rule. An HA needs authority to approve higher rents for more than 10 percent of incremental units.

##### *3. Exception Rent: HUD Approval*

Comments note that the new rule requires HUD approval for all exception rents. The law does not require HUD approval for exception rents up to 10 percent over FMR. Comments claim that elimination of HA exception rent authority is contrary to law.

Comments state that communities should not be required to submit an unusual amount of data in requesting approval of an exception rent. An HA cannot afford to hire consultants for each FMR change.

Comments recommend a 30 day deadline for HUD to review an HA exception rent request. If HUD misses the deadline, the HA request should be automatically approved.

Comments ask HUD to clarify some aspects of the new exception rent system. HUD should specify that the new exception rent authority replaces the former HA authority to approve exception rents without HUD approval. HUD should explain how deletion of 20 per cent authority is phased-in, and whether prior approved exceptions are grandparented.

Comments note that the new system only allows an exception rent for a unit located in an approved exception rent

area. The new system may eliminate incentive for an owner to improve property over the HQS.

##### *4. Exception Rent: New Procedure*

Comments state that the new exception rent procedure is too complex. The authority to approve an exception rent is not based on individual family circumstances. HUD should not require the HA to document the rent level representing a given percentile of the local market.

#### *C. FMR/Exception Rent Limit: New Rule*

##### *1. Approval of Exception Rent*

*a. New rule.* Fair market rents (FMRs) are published annually by HUD. An "exception rent" is a maximum rent subsidy in excess of the published FMR. Under the old rule, an HA was authorized to approve exception rents up to 110 percent of the FMR for up to 20 percent of units under the ACC (annual contributions contract between HUD and an HA).

The new rule (§ 982.504(b)) permits two types of exception rent:

- An exception rent for part of the FMR area. Such exception rents must be approved by HUD. Area exception rents apply to all three types of program tenancy: a regular certificate tenancy, a voucher tenancy and an over-FMR tenancy.
- For a regular certificate tenancy only, an exception rent granted by the HA as a reasonable accommodation for a person with disabilities.

*b. Area Exception Rent.* The final rule provides that an HA may request exception rent approval for a part of the fair market rent area designated as an "exception rent area" (§ 982.504(b)(1)). HUD may approve an exception rent for all units, or for all units of a given size (number of bedrooms), leased by program families in a HUD-approved exception rent area. However, the total population of exception rent areas in a fair market rent area may not include more than 50 percent of the population of the fair market rent area (§ 982.504(b)(1)(iv)).

The amount of the HUD-approved exception rent is subject to two restrictions. First, the exception rent may not exceed 120 percent of the published fair market rent (§ 982.504(b)(1)(ii)(A)). For a regular tenancy in the Section 8 certificate program, the maximum monthly rent is 120 percent of the published FMR (42 U.S.C. 1437f(c)(1)). In the voucher program, the payment standard must be "based on" the published fair market rent (42 U.S.C. 1437f(o)(1)). Under the rule (§ 982.505), the 120 percent of FMR



limit is the maximum payment standard for a voucher or over-FMR tenancy.

Second, in addition to the 120 percent limit, the exception rent may not exceed a second limit, designed to test whether there is a need for higher rental subsidy in a proposed exception rent area.

Under the proposed rule, HUD would have applied the same methodology that is used to determine the FMR for the whole FMR area. FMRs are currently set at the 40th percentile rent—the rent level that includes rents for 40 percent of standard quality units renting in the local housing market (§ 888.113(a)). When the proposed rule was published in February 1993, FMRs were set at the 45th percentile rent. The proposed rule would have provided that the exception rent may not exceed the 45th percentile rent as determined by the methodology used to determine the published FMR.

Under the final rule, the HUD field office may approve an area exception rent for a high-rent portion of the FMR area. HUD may use one of two alternative methods for determining the maximum area exception rent. The area exception rent may be based either: (1) on the 40th percentile rent for the exception rent area, or (2) on the relationship between the median rent of the exception rent area as compared with the median rent for the whole FMR area (§ 982.504(b)(1)).

Using the first method, the exception rent may not exceed the lower of:

- 120 percent of the published FMR, or
- The 40th percentile rent for the exception rent area.

Using the second method, the exception rent may not exceed the lower of:

- 120 percent of the FMR, or
- The published FMR times a fraction comprised of the median rent of the exception rent area divided by the median rent of the entire FMR area.

When the second method is used, HUD compares exception area median rent to median rent for the entire FMR area. The information needed for this comparison can be obtained easily from the decennial United States census. By contrast, information on the 40th percentile rent level relationships for the FMR and exception rent areas is not available in census publications or tabulations in the same detail used by HUD to compute the FMR.

Under the proposed rule and existing practice, an HA would have been required to submit survey data which justifies the HA's request for HUD approval of an exception rent. To secure exception rent approval, the HA would have been forced to gather and submit survey data showing the 40th percentile

rent for the proposed exception rent area. The new rule relieves the HA of the obligation and burden of supplying rental survey data to support its request for exception rent approval.

The new rule provides instead that HUD may use decennial census data and other available statistically valid information to determine the median rent for the exception rent area and FMR area. HAs usually lack the resources and statistical know-how to conduct adequate rental surveys for determination of percentile rent. Moreover, the random digit dialing technique that is used to determine the FMR does not work well for parts of FMR areas because of the large number of calls, and therefore the associated high cost, that is required to obtain an adequate sample size for the exception rent area.

The determination that exception area rents are more expensive than rents for the FMR area as a whole (either by median rent comparison or by determination of the 40th percentile rent) does not itself show that there is a programmatic justification for a higher subsidy. The final rule (§ 982.504(b)(1)(iii)) provides that HUD will not approve an exception rent unless HUD determines that an exception rent is needed either:

- To help families find housing outside areas of high poverty, or
- Because a high percentage of certificate or voucher holders have trouble finding housing for lease under the program within the term of the certificate or voucher.

An area exception rent only applies if a family selects and rents a unit within a HUD-approved exception rent area (§ 982.504(b)(1)(i)). There is no limit on the number or percentage of area exception rent units in the HA program. However, the total population of exception rent areas in an FMR area may not include more than 50 percent of the population of the fair market rent area (§ 982.504(b)(1)(iv)).

*c. Regular Tenancy: Accommodation for Person With Disabilities.* The final rule (§ 982.504(b)(2)) provides that on request from a family that includes a person with disabilities, the HA must approve an exception rent of up to 120 percent of the fair market rent if appropriate as a reasonable accommodation for the needs of a such person arising from such person's disability. This authority to approve a higher rent only applies to a regular certificate tenancy, and does not apply to a voucher tenancy or over-FMR certificate tenancy.

## 2. Exception Rent: New Rule—HUD Response

HUD has not adopted the recommendation to retain the HA 20 percent exception authority in the old certificate rule, or to retain a broad authority for HAs to grant exception rents for neighborhoods or special cases. Instead, the rule is designed to apply a uniform and equitable exception standard for all areas and all cases (with a limited exception to accommodate the special needs of a person with disabilities). This standard is applied across the whole universe of the HA tenant-based programs—to establish the maximum initial rent to owner in a regular certificate tenancy, or the payment standard for a voucher or over-FMR tenancy.

Under the old voucher rule, HUD only allowed the use of "community-wide" exception rents to determine the voucher payment standard: certificate exception rents that apply to the whole HA jurisdiction. Under the new rule, the same exception rent limit applies for certificates and vouchers. For both tenant-based programs, and for any form of tenancy, HUD may approve an exception rent for a portion of the HA jurisdiction. Some comments support this change, noting that exception rents are critical to success of the certificate and voucher programs.

As noted above, some comments claim that elimination of the HA's 20 percent exception authority limits family opportunity to search for units in better areas—nearer to schools or jobs, and outside impacted areas with a high concentration of poor or minority families. However, under the new rule HUD may approve area exception rents so families can rent more expensive units in better areas. The granting of an area exception rent allows families to access decent units in the exception rent area. There is no percentage limit on the number of assisted families that may rent in exception rent areas.

In a regular certificate tenancy, the family may rent a unit up to the exception rent limit. Such rentals do not count against the statutory limit on the percent of certificate families paying in excess of the FMR/exception rent limit under an over-FMR tenancy.

HUD has not accepted a comment urging HUD to phase in elimination of an HA's 20 percent exception rent authority. There is no need for a phase-in since the new procedure does not reduce the subsidy for existing program tenancies. The new provision only applies to lease approvals after the regulation effective date. In the regular certificate program, the FMR/exception



rent limit only operates as a constraint on rent at the beginning of the lease term, but does not affect rent adjustments during the lease term. In a voucher or over-FMR tenancy, the family is protected against a drop of the payment standard during the lease term.

Under the new rule, HUD may approve an exception rent for a "designated" part of the FMR area. Comments state HUD should define what this means. HUD believes there is no need for further definition. Under the rule, HUD may designate any part of the FMR area.

The rule specifies that a designated exception rent area may not include more than 50 percent of the FMR area population. If there is a need for higher rents and subsidy in a larger portion of the FMR area, HUD will consider whether the available data indicate that HUD should adopt a higher published FMR, instead of adopting a higher "exception rent" for more than half of the FMR area.

#### **V. Minimum Rent: Family Share of Rent**

In the certificate and voucher programs the family must contribute at least 10 percent of gross income as rent for the unit (for certificates: 42 U.S.C. 1437a(a)(1) and 1437f(c)(3)(A); see also 24 CFR 5.613 (61 FR 54502, October 18, 1996); for vouchers: 42 U.S.C. 1437f(o)(2); see also § 982.507 (regular certificate tenancy); § 982.505(b)(2)(ii) (vouchers); § 982.505(c)(2) (over-FMR tenancy)). Comments state that HUD should raise the "minimum rent" from 10 percent of gross income to 14 percent.

HUD has not raised the minimum rent. The minimum rent percentage is determined by the statute.

For several years, temporary laws have provided that a Section 8 assisted family must pay a "minimum monthly rent": the minimum share of rent that is not covered by Section 8 subsidy (110 Stat. 40, sec. 402(a) of P.L. 104-99, 1/26/96, as amended by 110 Stat. 2892-2893, sec. 201(c) of P.L. 104-204, 9/26/96). The temporary minimum rent requirement applies in addition to standing statutory requirements that specify the amount of the rent a Section 8 (non-voucher) family is "required to pay" (42 U.S.C. 1437f(c)(3)(A)), and the amount of subsidy for a voucher family (42 U.S.C. 1437f(o)(2)). The Congress may extend temporary minimum rent requirements to future years. The rule is revised to provide for enforcement of minimum rents as enacted by the Congress.

In an *over-FMR tenancy*, the initial gross rent (rent paid to owner plus

allowance for tenant-paid utilities) exceeds the FMR limit (§ 982.4). The final rule provides that the subsidy payment for an over-FMR tenancy may not exceed gross rent minus the minimum rent as required by law (§ 982.505(c)(2)(ii)). For a *regular tenancy*, the final rule provides that the subsidy payment equals the gross rent minus the higher of the total tenant payment or the minimum rent as required by law (§ 982.507(b)).

In a *voucher tenancy*, the subsidy payment may not exceed gross rent minus the minimum rent (minimum family share) (§ 982.505(b)(2)). In the voucher program, the minimum rent is the higher of (1) 10 percent of gross income (42 U.S.C. 1437f(o)(2)) or (2) a higher minimum rent as required by law. For each type of tenancy, the minimum rent requirement assures that the family must pay out-of-pocket at least a minimum share of actual rent during the course of the tenancy.

In the regulatory formula for determining the amount of subsidy in an over-FMR tenancy (§ 982.505(c)(2)), total tenant payment is deducted from the payment standard to calculate the maximum subsidy (payment standard minus total tenant payment). Minimum rent is deducted from the actual unit rent (gross rent) to determine the minimum family share. The actual subsidy for a family is the lesser of the amounts derived from these two calculations.

For a voucher or over-FMR tenancy, the assistance formulas also assure that the subsidy does not exceed the amount needed to support the actual reasonable rent for the unit. Subsidy may not exceed the difference between the "gross rent" and the minimum rent (§ 982.505(b)(2)(i) (voucher tenancy) and § 982.505(c)(2) (over-FMR tenancy)). "Gross rent" is the sum of the actual rent to owner and the HA allowance for tenant-paid utilities (definition at § 982.4). Rent to owner must be reasonable (§ 982.503(a)).

#### **VI. Certificate Program: Over-FMR Tenancy**

##### *A. New Type of Tenancy*

For the first time under this rule, some families in the certificate program may choose to rent units that rent for more than the fair market rent (FMR)/exception rent limit. In the proposed rule this type of tenancy was called an "excess rent tenancy." In the final rule this type of tenancy is called an "over-FMR tenancy" (§ 982.4).

The name used in the proposed rule may be misleading, since the phrase "excess rent tenancy" suggests that the

rent is excessive. By law and HUD regulation, rent paid to the owner must be reasonable—both in relation to comparable market rents and to family financial resources. Thus the rent may not be "excessive." The phrase "over-FMR tenancy" better indicates that the family pays a rent that exceeds the FMR limit—the cap on gross rent in the regular certificate program.

By allowing a family to rent above the FMR/exception rent limit, this regulatory change enlarges the pool of available housing that can be rented by a family under the certificate program, and may enable the family to pick a unit that better fits the family needs. A family that enters an over-FMR tenancy pays more than the statutory formula rent ("total tenant payment") that otherwise defines the family share of unit rent. However, as for all housing assisted in the certificate and voucher programs, the total rent to owner may not exceed the reasonable market rent. Moreover, as for all housing assisted in the certificate program, the fair market rent limit is the maximum initial subsidy. (The initial subsidy payment is the difference between the fair market rent limit and the formula rent paid by the family.)

In the final rule, the term "regular tenancy" is used to distinguish the basic form of certificate program tenancy used since the beginning of the certificate program from an "over-FMR" tenancy, newly authorized by this rule. A regular tenancy is defined as a certificate program tenancy "*other than an over-FMR tenancy*" (§ 982.4).

In a regular tenancy, the initial rent (the rent at the beginning of the lease term, including the HA allowance for tenant-paid utilities) may not exceed the FMR/exception rent limit. The family pays the portion of rent determined by the statutory formula (42 U.S.C. 1437f(c)(3)(A) and 1437a(a)(1)), generally 30 percent of adjusted income. The family is prohibited from paying a higher share of the rent. The subsidy covers the difference between the actual unit rent and the formula rent paid by the family.

Both in the voucher program and in an over-FMR tenancy in the certificate program, the family may rent a unit for more than FMR/exception rent limit. The family pays the portion of rent not covered by the HUD subsidy.

For a tenancy in the voucher program, the HA sets the maximum subsidy level, called the "payment standard". The payment standard may not exceed the FMR/exception rent limit. Unless HUD approves a lower percent, the payment standard may not be less than 80 percent of the FMR/exception rent limit.

For an over-FMR tenancy in the certificate program, the maximum subsidy equals the FMR/exception rent limit. (For any tenancy in the certificate and voucher programs, the actual subsidy payment generally equals the maximum subsidy minus 30 percent of the family's adjusted income.)

#### *B. Over-FMR Tenancy: Comments*

##### **1. General Effect of Rule**

Some comments welcome regulatory change to allow over-FMR tenancies in the certificate program. By permitting use of an over-FMR tenancy, the certificate program operates more like the voucher program. The over-FMR tenancy opens housing opportunities for program participants. The over-FMR tenancy helps families, including large families, that cannot find suitable units at rents under the FMR.

Comments state that the over-FMR tenancy removes the need for "side payments" by a family. ("Side payments" are illegal family rental payments to a Section 8 landlord that exceed the tenant rent share ("tenant rent") defined by federal law.) Comparability assures that rent paid to the owner is not excessive. Comments assert that the tenant-based programs need flexibility for higher rental payments.

##### **2. Objections to Over-FMR Tenancy**

Other comments object to the over-FMR tenancy. Comments state that HUD should not allow an assisted family to pay a higher share of family income. Authorization for the over-FMR tenancy casts the HA as a financial manager for the tenant. An over-FMR tenancy is not consistent with the low-income program. A tenant may overextend financially in agreeing to a higher rent. Family income may decrease after rental of the unit. The tenant may be forced to move. The HA will have a financial burden if a family is forced to move.

HA comment indicates that there may be little need to allow the over-FMR tenancy. An HA states that there are many units available within the FMR in the HA's local housing market. Because of deflation, Section 8 tenants have a wider choice of housing.

Comments state that the over-FMR tenancy encourages fraud, and non-reporting of family income by participants. Owners will try to collect extra money. The over-FMR tenancy will make owners greedy, and cause price escalation in tight markets. The over-FMR tenancy may be "discriminatory." Landlords will favor over-FMR tenants. The permission to allow an over-FMR tenancy limits the

ability of other families to find housing in the open market.

Comments state that the over-FMR tenancy will be an administrative burden. The HA must determine residual income, and track over-FMR tenancies. HA's cannot explain the over-FMR tenancy to families, and the families will not understand how such a tenancy works. The new rule will create a new certificate sub-program rather than simplifying administration by combining and conforming the certificate and voucher programs, the stated objective of the conforming rule.

#### *C. Over-FMR Tenancy: 10 Percent Limit*

##### **1. Law**

The law provides that an HA may not approve over-FMR tenancies ("excess rentals") for more than 10 percent of "incremental rental assistance" (42 U.S.C. 1437f(c)(3)(B)(ii)). To implement this statutory restriction, the proposed rule would have provided that the number of over-FMR tenancies may not exceed 10 percent of "incremental units" in the HA certificate program. Incremental refers to additional program units not provided for families previously receiving Section 8 assistance.

##### **2. Comments**

Comments state that the HUD rule should not restrict the number of over-FMR tenancies in an HA program. HUD should not limit HA authority to approve over-FMR tenancies to 10 percent of the HA's incremental units. The 10 percent limit is arbitrary and too low.

Comments also state that the same requirements should apply to certificates and vouchers. The certificate rule should follow the voucher program. In the voucher program, there is no limit on the number or percentage of units that rent above the voucher payment standard. The voucher program should be the model for a future combined tenant-based program. Different certificate and voucher limits on family share of rent confuse families and landlords.

Comments state that the rule should allow over-FMR tenancy for all families. The HA should not have to approve over-FMR tenancies on a unit by unit basis. Tenants and owners will not know if HA exception authority is available. Comments ask how an HA determines whether to approve a family's request within the 10 percent limit.

Comments note that the opportunity for an over-FMR tenancy opens up a tight housing market. Availability of over-FMR tenancy for all units would

increase family opportunities. The 10 percent maximum restricts family choice. All families should have the same choice. An over-FMR tenancy permits a family to rent a single family dwelling instead of an apartment.

Comments state that there is no need for a 10 percent cap. Rent paid by a family must be reasonable and affordable. Allowing Section 8 assistance for an over-FMR tenancy does not increase the amount of HUD subsidy. The family pays the excess over FMR.

The meaning of "incremental" units is not clear, and should be stated in plain language.

Under the old rule, an HA could approve exception rents for up to 20 percent of units under ACC. However, over-FMR tenancies are only permitted for 10 percent of ACC units. Comments claim that the proposed rule reduces authority to grant exceptions from 20 percent to 10 percent of ACC. Comment asks if pre-rule exception rents count against the 10 percent limit.

##### **3. HUD Response**

HUD agrees with commenters that the 10 percent limit is an arbitrary restriction on the HA's authority to approve over-FMR rentals in the certificate program. As remarked in the comments, the opportunity for an over-FMR tenancy opens up new housing choices for an assisted family, but does not increase the maximum federal subsidy. HUD is, however, constrained by current law, under which such rentals may not exceed 10 percent of "incremental" units in the HA certificate program (see 42 U.S.C. 1437f(c)(3)(B)(ii)).

In HUD appropriations practice, incremental assistance generally refers to appropriated funding for units which increase the aggregate supply of federally assisted housing, as contrasted with continued funding for previously assisted units or families. The 10 percent limit is applied to the base of incremental units in the HA program. Under the proposed rule, the number of incremental units under the ACC (consolidated ACC) would be calculated by subtracting ACC units for families previously assisted under other Section 8 or *federal housing programs*. Under the final rule (§ 982.506(a)(2)), all certificate units are counted as incremental except units provided to replace units for which HUD provided tenant-based program funding designated for families residing in section 8 project-based housing.

*D. Over-FMR Tenancy: Affordability of Rent (Maximum Family Share)*

1. Law and Regulation

In a regular Section 8 certificate tenancy, a family must rent a unit below the FMR limit, and a statutory formula specifies the family share of the rent (called "total tenant payment") as a percentage of family income (42 U.S.C. 1437f(c)(3)(A) and 1437a(a)(1)). The family usually pays 30 percent of adjusted income toward the total unit rent.

In an over-FMR tenancy, a family may rent a unit over the FMR limit. The family pays a higher percentage of income towards the total unit rent than otherwise allowed by the statutory Section 8 rent formula. The law provides that a family may not enter an over-FMR tenancy (agree to pay more than 30 percent of income) unless the HA has determined that:

\* \* \* the rent for the unit and the rental payments of the family are reasonable, after taking into account other family expenses (including child care, unreimbursed medical expenses, and other appropriate family expenses). (42 U.S.C. 1437f(c)(3)(B)(i)(II))

The proposed rule would have provided, both for vouchers and for an excess rent (over-FMR) tenancy, that the initial family share of rent may not exceed half of a family's adjusted income. Under the proposed rule, the other half of family income must not be needed for rent, and remains available (as "residual income") for family expenses other than housing—including costs of food, child care, unreimbursed medical expenses and other appropriate family expense.

The final rule does not prescribe the percent or amount of residual family income that must be left over for non-housing expenses in an over-FMR tenancy. The HA decides how to implement the statutory test. The final rule grants the HA maximum authority to determine whether the family share of rent at the beginning of the lease term is reasonable. In making this determination, the HA must consider amounts remaining for other family expenses, such as child care, unreimbursed medical expenses, and other appropriate family expenses as determined by the HA (§ 982.506(b)(2)).

In the proposed rule, the residual income requirement would have applied to rentals under the voucher program, as well as over-FMR tenancies (called "excess rent" tenancies in the proposed rule) under the certificate program. In the final rule, the revised residual income requirement only applies for an over-FMR tenancy in the certificate program. There is no such

statutory or regulatory requirement for rentals under the voucher program.

2. Comments

*a. Objections to Affordability.* Some comments object to the affordability (residual income requirement) for an over-FMR tenancy under the statute and proposed rule. These comments assert that the family should be allowed to pay a higher rent.

Comments object that the affordability test limits use of the over-FMR tenancy to families that can afford to pay the rent. The residual income requirement excludes families that are too poor to locate an affordable unit. HUD should not deny assistance for rental of a unit because a family would have to pay more than half of income for rent, if the family would have to pay even more on the private market.

The family should choose how much to pay for rent, and whether a unit is affordable. The HA should not be responsible for determining if the rent is affordable for the family. The family should have freedom of choice. The family should not be prevented from renting above the payment standard because the rent does not leave enough residual income for non-rental purposes. The family should decide its own priorities. The program should not decide maximum housing cost in relation to family income, and should not require rent reasonableness.

Comments state that the proposed 50 percent residual income requirement is arbitrary. The rule should not require that participant has 50 percent for other costs. If an HA believes the family cannot afford the unit, the HA should counsel the family.

Comments also indicate that the HA cannot enforce the residual income requirement. Residents will choose units beyond their means. A residual income requirement is not needed since the HA performs rent reasonableness. Other comments urge that HUD should not require either affordability or rent reasonableness.

*b. Defining Affordability.* Comments argue that the HA should limit the rent paid by a family. The HA should not approve a unit unless the family can afford the rent.

Some comments favor a residual income test that prevents a family from renting a unit if the family will not have income to cover other everyday living expenses. A family needs residual income for other non-rent family necessities. A residual income test avoids problems between the tenant and owner. A tenant who cannot afford the rent may break the lease.

Comments express different views on the appropriate test of residual income. Some comments indicate that an HA should have discretion whether to approve an over-FMR tenancy if a family is paying more than half of income for rent. Other comments state that the rule should not allow rent over 50 percent of income. Comments welcome the proposed change requiring that a voucher family must have 50 percent residual income after payment of its rent.

Comments state that a family should not be permitted to pay as much as 50 percent of income (adjusted income) for rent. A family paying 50 percent (of gross income) would qualify for statutory federal preference in admission to assisted housing. (Note: federal preference requirements have been suspended.) Comments state that it is disturbing and absurd to provide federal preference for admission of a family with a 50 percent rent burden, but allow a program rent burden exceeding 50 percent. Comments note that a family that qualifies for rent burden preference (because rent is more than 50 percent of income) cannot meet the residual income test unless the family moves or rent is reduced.

Comments recommend that HUD should allow an HA to:

—Limit maximum rents: Rent cannot exceed 10 or 20 percent over the FMR/exception rent.

—Require affordability: Rent cannot exceed 50 percent or 40 percent of adjusted income.

*c. Affordability: Other Comments.* Comments state that the regulatory affordability test should consider family payments for taxes and social security. HUD adjusted income does not reflect tax payments. Families pay a higher percent of "real" (after tax) income for rent. On the other hand, comments note that adjusted income does not count all family resources, such as student loans.

Comments state that there should be a uniform affordability policy for certificates and vouchers. The same limit should apply for both tenant-based programs. Comments object to HUD's proposal to apply a residual income test in the voucher program, as well as an over-FMR tenancy in the certificate program.

The rule should clarify what happens if family does not maintain required residual income.

Comments note that the affordability test is an administrative burden for the HA. The affordability (residual income) requirement is confusing.

### 3. How HA Determines Affordability

Program subsidy pays a part of the rent. The balance is paid by the family. To decide, as required by law, whether the family can afford the housing, the HA must examine whether the family share of the rent ("rental payments of the family") is reasonable in relation to family resources and other family expenses. By contrast, the rent reasonableness test examines whether the rent paid to an owner is reasonable in relation to market rents for comparable units, not whether the rent is reasonable for an individual assisted family.

The final rule (§ 982.4) adds the defined term "family share": "the portion of rent and utilities paid by the family". Family share is calculated by subtracting the housing assistance payment from the gross rent (rent to owner plus any utility allowance) (§ 982.515(a)).

The term "family share" replaces the equivalent term "tenant contribution" in the proposed rule. Gross rent is the total of rent to owner plus any allowance for tenant paid utilities. Family share is the family-paid portion of gross rent. The definition of family share as including tenant-paid utilities is consistent with the traditional use of gross rent to determine the family rent contribution (total tenant payment) for Section 8 or public housing.

The rule provides that the HA may not use housing assistance payments or other program funds (including any administrative fee reserve) to pay any part of the family share (§ 982.515(b)). Payment of the family share is the responsibility of the family.

The proposed rule prescribed a specific formula for an HA determination that family rental payments are "reasonable." The proposed rule would have provided that the family share of rent (tenant contribution) must leave at least 50 percent of adjusted income to meet other family expenses ("residual income"). In the proposed rule, this requirement would have applied both to an over-FMR tenancy, and to a voucher tenancy.

The final rule (§ 982.506(b)(2)) essentially tracks the statutory requirement. The HA may not approve an over-FMR tenancy unless the HA determines that the initial family share is reasonable.

In making this determination, the HA must take into account other family expenses, such as child care, unreimbursed medical expenses, and other appropriate family expenses as determined by the HA.

The final rule does not dictate any specific formula or procedure for determining that the family will have enough money left over for non-rent expenses. The HA has discretion to develop an appropriate procedure.

Under the proposed and final rule, the requirement to determine that the family share of rent does not absorb an unreasonable share of family income only applies at initial HA approval of an over-FMR tenancy. The HA does not repeat this determination during the course of the assisted tenancy. By contrast, the rent reasonableness requirement (to determine that rent paid to owner does not exceed comparable market rents) applies both at initial lease approval and during the course of the assisted tenancy.

In the proposed rule, the requirement to assure that the family rent burden is reasonable would have been applied to the voucher program, as well as to an over-FMR tenancy in the certificate program. Under the final rule, the requirement is only applied to approval of an over-FMR tenancy, as required by law.

#### *E. Over-FMR Tenancy: Amount of Subsidy*

##### 1. Comments

In a voucher or over-FMR tenancy, the "payment standard" is the maximum subsidy for a family. In an over-FMR tenancy, the payment standard is the FMR limit ("FMR/exception rent limit"). In a voucher tenancy, the HA sets the payment standard. Generally, the voucher payment standard must be in the band from 80 percent to 100 percent of the FMR limit.

Comments note that the voucher payment standard may be less than the FMR limit. Consequently the maximum subsidy in the voucher program may be less than the maximum subsidy for an over-FMR tenancy. Comments state that the same payment standard should be used for an over-FMR tenancy and a voucher tenancy. An HA should not allow over-FMR tenancies in its certificate program unless the voucher payment standard equals the FMR. Otherwise over-FMR tenancy families will get a bigger subsidy in the same kind of program.

In the regular certificate program, owner rents are adjusted annually by applying the annual adjustment factor (AAF) that is published by HUD. In the proposed rule, HUD proposed to adjust the subsidized rent for an over-FMR tenancy in the same way, by applying the published AAF. However, comments state that the proposed calculation of adjustment for an over-

FMR tenancy is too complicated. Comments ask HUD to streamline the method of calculating subsidy adjustments.

##### 2. HUD Response

For an over-FMR tenancy, the new rule provides that the payment standard is always set at the FMR/exception rent limit during the lease term (§ 982.505(c)(1)). For an over-FMR tenancy, unlike a voucher tenancy, the HA may not set a payment standard below the FMR/exception rent limit.

In a regular certificate tenancy, the FMR/exception rent limit only restricts rent at the beginning of the lease term. In such a tenancy, the FMR does not limit or affect subsequent adjustments of the rent to owner (by application of the published annual adjustment factor at the annual anniversary). Under the proposed rule for an over-FMR tenancy, the FMR/exception rent limit would have been applied in the same fashion—solely as a limit on subsidized rent at the beginning of the lease term. The FMR/exception rent limit would not have affected later adjustments by application of the AAF during the term of the lease.

Under the final rule, the FMR/exception rent limit determines the amount of the payment standard for an over-FMR tenancy, both at initial leasing and over the course of the assisted tenancy. HUD believes that this is a simpler and more readily understandable way to adjust the amount of assistance. For an over-FMR tenancy, the amount of subsidy is always set at the program limit. As in the voucher program, the maximum subsidy is treated as a "payment standard," and the same rules apply to determination of payment standards for a voucher or over-FMR subsidy (§ 982.505(d)). In this way, the rule gives parallel treatment of subsidies for over-FMR and voucher tenancies. In both forms of tenancy, a family may choose a unit renting for more than the maximum subsidy, and the family's share of rent is not fixed.

##### 3. How Subsidy Is Adjusted

Under the Section 8 statute, HUD has discretion to determine a system for adjusting the subsidized rent over the life of an assistance contract. The system for adjustment of rents may provide for annual adjustments:

\* \* \* to reflect changes in the fair market rentals established in the housing area \* \* \* or, if the Secretary [of HUD] determines, on the basis of a reasonable formula. (42 U.S.C. 1437f(c)(2)(A))

In a regular certificate tenancy, the rent to owner (formerly called "contract

rent") is adjusted each year of the lease. Under the HUD-determined "reasonable formula," the old rent to owner (contract rent) is multiplied by a HUD-published factor. (See 24 CFR, part 888, subpart B.) The adjusted rent may not exceed the reasonable rent for a comparable unassisted unit (42 U.S.C. 1437f(c)(2)(C)).

In this rulemaking, HUD proposed to adjust the subsidized rent (maximum subsidy) for an over-FMR tenancy in the same fashion as for a regular tenancy—by applying the published annual adjustment factor (AAF) to the subsidized rent for the prior year. As for a regular tenancy, the adjusted subsidized rent for an over-FMR tenancy would not exceed the reasonable rent. Thus under this proposed system, the amount of the rental subsidy would be identical for a regular tenancy and for an over-FMR tenancy, both at initial leasing and over the course of the tenancy. However, in the case of an over-FMR tenancy, the family may pay the amount by which the actual rent to the owner exceeds the FMR/exception rent limit (42 U.S.C. 1437f(c)(3)(B)).

In the final rule, HUD has adopted a different formula to adjust the subsidy for an over-FMR tenancy in the Section 8 certificate program (§ 982.505(c)(2)). For an over-FMR tenancy, the housing assistance payment equals the lesser of:

(1) The applicable over-FMR payment standard (i.e., the FMR/exception rent limit) minus the total tenant payment (the statutory formula rent), or

(2) The monthly gross rent (rent to owner plus utility allowance for any tenant-paid utilities) minus any minimum rent required by law.

This new HUD adjustment formula meets both of the alternate statutory standards for adjustment of Section 8 subsidized rents (42 U.S.C. 1437f(c)(2)(A)). Subsidy is adjusted in accordance with a HUD-determined "reasonable formula." Under the formula, changes in the over-FMR payment standard are based on "changes in the fair market rentals" for the area.

#### *F. Over-FMR Tenancy: Other Comments*

##### *1. HA Discretion*

The proposed rule would have provided that an HA is not required to approve an over-FMR tenancy. Comments argue that an HA may not refuse if a family asks the HA to approve an over-FMR tenancy that satisfies statutory conditions (rent is reasonable, rent payments are reasonable for the family, and the number of such

tenancies does not exceed 10 percent limit of the HA's incremental units).

In HUD's view, the choice to approve an over-FMR tenancy in the HA program generally, or in a particular case, rests with the HA. The language of the law explicitly allows the HA to "approve" family requests that meet the statutory conditions, and therefore vests in the HA the discretion whether or not to approve such requests in any or all cases (42 U.S.C. 1437f(c)(3)(B)). The law provides that the family "may pay" a higher rental contribution if the HA has granted approval of an over-FMR tenancy. In this way, the statute merely grants permission for the HA to approve an over-FMR tenancy in which the assisted family will "pay a higher percentage of income" than specified in the statutory Section 8 rental formula.

The final rule (§ 982.506(a)(1)) provides that the HA "may approve" an over-FMR tenancy at the request of a family. Generally, the HA is not required to approve any over-FMR tenancy (§ 982.506(a)(2)). However, the HA must approve an over-FMR tenancy in accordance with program requirements if needed as a reasonable accommodation for a person with disabilities.

##### *2. Administrative Fee*

Comments state that HUD should consider the HA's burden of administering over-FMR tenancies in setting the administrative fee.

This rule does not establish procedures for determining the HA administrative fee. Currently, administrative fees are calculated in accordance with permanent requirements enacted in the fiscal year 1997 HUD appropriation act (section 202, Pub.L. 104-204, 110 Stat. 2893-2894). (See also 62 FR 9488, March 3, 1997.)

Comments state that HAs need to educate families and the public about the over-FMR tenancy. Otherwise people will believe that the program is illegal. HUD agrees that HAs should provide information on over-FMR tenancies and other aspects of the program.

#### **VII. Voucher Tenancy: Payment Standard**

##### *A. Voucher Payment Standard*

##### *1. Setting Payment Standard*

In a voucher tenancy, as in a certificate over-FMR tenancy, the maximum monthly subsidy is based on the HA's "payment standard" (§ 982.505). In both cases, the assistance payment generally equals the difference

between the payment standard and 30 percent of adjusted income.

In the voucher program, the HA establishes the amount of the payment standard. Under the old rule, the HA was required to set a payment standard within the band from 80 percent to 100 percent of either: (1) the published fair market rent (for each FMR area and unit size) or (2) the "community-wide" exception rent (i.e., a HUD-approved exception rent for the whole HA jurisdiction).

The proposed rule would have removed the 80 percent minimum. The proposed rule would have permitted the HA to establish a payment standard at any level below the FMR/exception rent limit (including HUD-approved exception rents) in effect when the payment standard is adopted. The final rule provides that an HA must ask HUD approval to establish a payment standard below 80 percent of the FMR limit (§ 982.505(b)(1)(ii)).

##### *2. Minimum and Maximum Payment Standard: Comments*

Some comments state that an HA should have discretion, as provided in HUD's proposed rule, to set the HA's voucher payment standard at any level below the FMR. HUD should not set a minimum payment standard.

However, other comments argue that HUD should require a minimum payment standard. The HA should not be allowed to set its voucher payment standard below 80 percent of the FMR. According to the comments, removing a federal minimum reduces subsidy, and harms families with the lowest income. If rent exceeds the FMR, the family pays more than 30 percent of income for rent. Reducing subsidy below the FMR increases the gap between the HA payment standard and the actual rent. The lowest income poor may not be able to cover the gap and obtain decent housing.

Comments state that if an HA lowers its voucher payment standard, an assisted family will not be able to afford the rent in spite of the housing subsidy. A low payment standard limits housing choices of assisted families. Elimination of a minimum voucher payment standard deprives participant families of the opportunity to rent decent, safe and affordable housing.

Comments also note that if HUD removes the Federally required minimum payment standard, HAs may try to stretch voucher dollars too far. Rent burdens could rise closer to 50 percent of family income, than to 30 percent of income.

Comments state that HUD should either set the minimum percent of FMR

that can be used as the voucher payment standard, or prohibit an HA setting the payment standard at a level that makes housing unaffordable to the poorest families. HUD should not allow a payment standard below the amount needed to afford decent housing in a local market.

Comments argue that the HA should be required to set the voucher payment standard at the FMR. A lower voucher payment standard has a segregative effect. The voucher program should use the same payment standard as for an over-FMR tenancy in the certificate program. For both types of tenancy, the same standard should determine the point at which a family pays more than 30 percent of income as the family share of rent.

Comments state that setting the voucher payment standard to conform with the FMR would permit more efficient and consistent program administration.

Comments state that HUD should clarify if an HA may automatically adjust payment standards when FMRs increase or decrease, or must perform a "convoluted analysis." The HA should be allowed to set its payment standard up to the current FMR without the need to obtain HUD approval or to submit rent studies or documentation. Increases in the FMR have already been studied and approved by HUD.

### 3. Minimum and Maximum Payment Standard: HUD Response

After consideration of public comments, HUD has decided to retain the restriction, absent special HUD approval, against setting the voucher payment standard below 80 percent of the FMR/exception rent limit. An HA's voucher payment standards must be "based on" the fair market rent (42 U.S.C. 1437f(o)(1)), which represents HUD estimate of the amount needed to rent decent housing in the local market. The level of the voucher payment standard may not be wholly disconnected from the fair market rent limit.

Under current procedures, FMRs are set at the "40th percentile rent" (§ 888.113). Forty percent of units in the local market rent below the FMR. By setting a payment standard below the FMR, an HA reduces the percentage of units that can be rented below the payment standard. At a given rent, a reduction of the payment standard reduces the assistance payment, and therefore increases the share of rent that must be paid by an assisted family. A reduction of the payment standard therefore either limits family choice of

rental housing in the local market, or increases family rent burden.

To assure that the voucher standard is "based on" the FMR, and does not unduly limit family housing choice, HUD has decided to retain the 80 percent minimum. The HA may, however, request approval of a payment standard below this amount. HUD may then consider whether the proposed payment standard level allows a reasonable housing choice in the local market, and bears a reasonable relation to the published FMR.

### B. Shopping Incentive

#### 1. Comments

In the regular certificate program, a participant family does not have an economic incentive to shop for a lower rent unit. The subsidy covers the actual rent paid to the owner (up to the FMR), and any reduction in rent reduces the amount of the subsidy. In the voucher program, however, the payment standard, not the actual unit rent, determines the amount of subsidy (except in cases when the so-called minimum rent limits the amount of subsidy). A lower rent to the owner generally does not reduce the amount of the subsidy. In the voucher program, the family has an incentive to shop for a cheaper unit.

Comments express different views on the value of a shopping incentive in the tenant-based programs. Some comments approve use of a shopping incentive, and recommend a shopping incentive for both the certificate and voucher programs. A participant should be rewarded for renting a less expensive unit. Other comments criticize the voucher shopping incentive, and assert shopping incentive should be eliminated or restricted. Comments suggest that shopping incentive should be treated the same way in the certificate and voucher programs. HUD should include or exclude shopping incentive in both programs.

Comments claim that the shopping incentive does not work. Comments state that voucher families do not shop for lower rents. Voucher families seek higher-priced housing in safer neighborhoods with better schools. The shopping incentive is paid largely to in-place families who do not shop for new apartments. The shopping incentive is inequitable, costly, and wastes subsidy resources. The voucher shopping incentive should be either eliminated or granted only to families that actually move to housing renting below the payment standard.

Under the voucher formula, the maximum assistance payment for a

family is determined by an HA-established payment standard, rather than actual rent of the assisted unit (42 U.S.C. 1437f(o) (1) and (3)). For this reason, a lower rent generally does not reduce the amount of subsidy. (In some cases, a family that rents a unit substantially below the payment standard must pay a minimum share of the rent.)

Comments note that in the certificate program, subsidy is limited according to the size of unit actually rented by family. Comments recommend that this principle should also apply in the voucher program.

A comment acknowledges that a form of voucher shopping incentive is required by federal law. The comment proposes, however, that HUD delete the regulatory shopping incentive not required by the law. Under the old voucher rule, the amount of subsidy is based on size of the assisted family, not the size of the unit actually rented by the family. The comment contends that the old regulatory system in the voucher program is wasteful and inequitable. In the certificate program, a family pays the same contribution even if it rents a smaller unit. The landlord only receives rent for the size of unit actually rented by family. In the voucher program also, a family should receive subsidy for the unit size actually rented by the family.

#### 2. HUD Response

Since the beginning of the certificate program, the Section 8 subsidy has been based on rent for the unit finally selected by a family, even if the family could have elected to rent a bigger unit within the appropriate FMR for the family size. The certificate assistance covered the actual rent for the unit selected, within the FMR for the actual size of the unit selected. In the second phase of the conforming rule, published on July 3, 1995, this principle was extended to the voucher program. In describing principles governing use of the HA "subsidy standards" (HA policies governing the appropriate subsidy for the family size and composition), the 1995 rule provides that the voucher payment standard may not exceed the payment standard for the unit rented by the family (§ 982.402(c)(2)).

This final stage of the conforming rule states the formulas for determining the amount of assistance in a regular certificate tenancy, and for a voucher, or an over-FMR tenancy. For all three types of assistance, the subsidy may not exceed the maximum subsidy "for the unit size rented by the family" (§ 982.508(a)(2)(ii) (regular tenancy);

(§ 982.505(d)(2)(ii)) (voucher or over-FMR tenancy).

In the final rule, a common provision describes how to determine the payment standard for either a voucher tenancy or an over-FMR tenancy (§ 982.505(d)(2)). The payment standard for a family is the lower of:

- the payment standard for the family unit size, or
- the payment standard for the unit size rented by the family.

## **VIII. Family Size: Effect on Amount of Subsidy**

### **A. General**

An HA adopts standards ("subsidy standards") to determine the number of bedrooms for a family. "Family unit size" is the appropriate number of bedrooms for a family under the HA subsidy standards. The family unit size is used to determine the maximum rent subsidy for a family.

The HUD rule describes how family unit size determines the maximum rent subsidy for a family in the certificate or voucher program (§ 982.402(c); definitions of "family unit size" and "subsidy standards" in § 982.4). (These rules were contained in the second phase of this conforming rule, published 60 FR 34660, July 3, 1995). Under these existing rules, the subsidy for a family in the certificate or voucher program is the lower of the appropriate subsidy (1) for the size and composition of a particular family (family unit size); or (2) for the particular unit size rented by the family (§ 982.402(c)). The same principle is applied and clarified in this rule, and is extended to calculation of subsidy for an over-FMR tenancy.

In calculating a family's subsidy for a voucher tenancy or over-FMR tenancy, the payment standard is the lower of: the payment standard for the family unit size, or the payment standard for the unit size rented by the family (§ 982.505(d)(2)). This rule applies to each determination and redetermination of the applicable payment standard during the course of a voucher or over-FMR tenancy.

In a regular tenancy under the certificate program, the FMR/exception rent limit is the lower of the FMR/exception rent limit for the family unit size, or the FMR/exception rent limit for the unit size rented by the family (§ 982.508(a)(2)). For a regular tenancy, the FMR/exception rent limit is the maximum gross rent (and therefore the maximum rent to owner) at the beginning of the lease term. The initial rent to owner is the base for subsequent rent adjustment at each annual anniversary. The FMR/exception rent

limit does not otherwise affect rent adjustments during the course of a regular tenancy.

### **B. Space for Live-in Aide**

With HA approval, a live-in aide may reside in the unit to provide necessary supportive services for a member of the assisted family who is a person with disabilities (see § 982.316). In previously published provisions, the conforming rule provides that a live-in aide must be counted in determining the family unit size under the HA subsidy standards (§ 982.402(b)(6)). Thus the maximum subsidy increases so that the family can rent a unit with additional space for the live-in aide. In this phase of the conforming rule, the rule specifies that this general principle also applies when a person with disabilities chooses to reside in certain special housing types: congregate housing (§ 982.608(b)); a group home (§ 982.613(c)(1)(ii)); shared housing (§ 982.617(c)(3)); or a cooperative (§ 982.619(d)(2)).

## **IX. Over-FMR or Voucher Tenancy—Payment Standard: Changes in Subsidy During Tenancy**

### **A. How Assistance is Adjusted**

In a regular certificate tenancy, rent to owner is adjusted *at each annual anniversary* during the lease term (§ 982.509). Under the proposed rule, HUD would have used the same system to adjust HUD subsidy for an over-FMR tenancy. On each contract anniversary, the amount of subsidy would have been adjusted by applying the most recent adjustment factor published by HUD.

Under the final rule, the amount of the monthly assistance payment for an over-FMR tenancy is adjusted by the same system used for a voucher tenancy.

For a voucher or over-FMR tenancy, the amount of the monthly subsidy (assistance payment) for a participant family is the amount by which the HA "payment standard" exceeds the family contribution (as determined by statute and rule for each program). The payment standard is the lower of the appropriate payment standard for the family size or for the unit size actually rented by the family (§ 982.505(d)(2); § 982.402(c)(2)).

The final rule provides (§ 982.505(d)(4)) that the payment standard used to compute the subsidy during the lease term is the *higher of*: (1) the *current* payment standard, or (2) the *initial* payment standard minus any drop in rent to owner. The current payment standard is the payment standard amount determined at the most recent regular HA reexamination. The

initial payment standard is the payment standard determined when the HA approves the lease (before the beginning of the lease term). If rent to owner drops during the term, the rent decrease is subtracted from the initial payment standard. Thus this amount equals the initial payment standard *minus* any amount by which the initial rent to owner exceeds the current rent to owner.

### **B. Protecting Family Against Drop in Subsidy**

Under existing requirements for the voucher program, a participant family is protected against a drop in the monthly subsidy during the lease. The payment standard may rise (for example, if there is an increase in the published FMR). However, if family composition does not change, the payment standard may not fall below the HA payment standard at the beginning of the lease term. When deciding whether to lease a unit at the rent demanded by an owner, a family can count on receiving a subsidy calculated from the same (or higher) payment standard during the term of the lease, though the subsidy may decrease if there is a change in family composition or the family decides to move to another unit.

In an over-FMR tenancy, the payment standard for each unit size is the FMR/exception rent limit. In the voucher program, the HA may set its payment standard for each unit size at 80 to 100 percent of the FMR/exception rent limit. For a voucher or over-FMR tenancy, the payment standard for the family is the higher of (1) the payment standard at the beginning of the lease term (minus the amount of any actual drop in the rent to owner during the course of the tenancy) or (2) the payment standard determined at the most recent regular reexamination (§ 982.505(d)(4)).

In an over-FMR or voucher tenancy, the family must pay out-of-pocket any rent in excess of the payment standard. In deciding whether to lease at a given rent, the family needs assurance that the HA assistance payment will not fall during the term of the tenant's lease because of reductions in the payment standard. Under this rule, the family is protected against a drop in the payment standard during the lease term. The payment standard that is used to calculate the family's assistance does not drop below the HA payment standard in effect *at the time the lease is approved*.

During the tenancy, a family is largely insulated against a decrease in voucher or over-FMR subsidy because of a decrease in the applicable HA payment standard. In the final rule, this



protection is modified by reducing the subsidy to the extent of any actual decrease in the rent to owner since the beginning of the tenancy.

Most often, rent to owner decreases if there is a general fall in market rents, and if rent to owner is reduced by enforcement of market comparability at the annual anniversary. This rule provides that the HA must redetermine comparability if there has been a five percent decrease in the FMR in effect 60 days before the contract anniversary as compared with the FMR in effect at the prior contract anniversary. Rent to owner may also decrease in accordance with the terms of the lease, or because rent is reduced by local rent control or some other binding requirement. Regardless of the cause of any reduction in the rent to owner, the actual amount of the rent reduction is deducted from the amount of the initial payment standard in calculating the current payment standard.

The family is protected against a fall of the payment standard during the term of the lease. On the other hand, however, the payment standard for the family rises if the HA payment standard at the time of regular reexamination is higher than the HA payment standard at the beginning of the lease/contract term. If the family enters a new assisted lease (for the same or a different unit), the payment standard for the family is then conformed to the current HA payment standard in effect when the new lease is approved. The family is only protected against a fall in the HA payment standard during the HAP contract term.

#### *C. When Payment Standard Changes*

Comments state that an HA should only change the payment standard at the annual recertification. The HA should not change the payment standard as soon as there is a change in the family size.

Under the payment standard formula in the final rule, the payment standard is adjusted if there is a change in the payment as determined at the most recent "regular" reexamination, the annual recertification of family income and composition.

### **X. Regular Tenancy—Rent to Owner: Annual Rent Adjustment During Tenancy**

#### *A. Comments*

Some comments approve allowing downward adjustment of certificate program contract rents—now called "rent to owner." An HA should adjust rent as market conditions change.

Other comments object to decrease of contract rent by annual adjustment.

Generally, a conventional landlord does not lower rent on an ongoing lease. Conventional rents increase or remain steady. The comments claim that negative rent adjustments are a disincentive to owner participation. The owner runs a risk of rent reduction. If area rents are falling, Section 8 rent to owner should not increase by application of the AAF. However, rents should not be reduced. Rent reasonableness should be used to control excess rents, rather than adjustment by a negative AAF.

The new rule deletes the old provision that prohibited annual adjustment below the initial rent (at the beginning of the lease term). Comments state that this change will discourage owner participation. The rule should not permit adjustment below the initial rent.

Comments recommend that so long as rent is reasonable, rent should be adjusted up to the FMR exception rent limit at time of adjustment. The increase in the FMR is greater than the AAF. Because of the AAF system, an HA cannot approve adjusted rent that is reasonable and within the FMR.

The rule provides that an owner must request an annual adjustment at least sixty days in advance (§ 982.509(b)(5)). Adjustments are not retroactive. The annual adjustment for a contract anniversary must be requested at least sixty days before the next anniversary (§ 982.509(b)(6)).

Comments ask HUD to clarify requirements concerning an owner request for adjustment. An HA points out that the requirement to submit a written request for rent adjustment is burdensome, and creates paperwork for administration of the program. The HA prefers to contact owners personally or by telephone. Other comments state that the rule should require an HA to give an owner advance notice of an available increase in rent, and that the increase must be requested in writing. Rules that deny owner rent increases because of their lack of sophistication contribute to growing owner hostility. Because of such hostility, families experience greater difficulty locating housing. Comment suggests that an owner should be permitted to terminate the tenancy if dissatisfied with the adjustment.

Some comments assert that annual adjustments should only be granted when the owner requests. HUD should require written notice of rent increases (both in the certificate and voucher programs). This requirement would reduce confusion for landlords with tenants in both programs. Requiring an owner to give notice of a rent increase may delay or reduce rent increase

requests. Another HA currently requires the owner and tenant to submit request for lease approval 60 days before the anniversary date. By this process, an HA can determine if a proposed rent increase is consistent with the annual adjustment factor and rent reasonableness.

Comments state that an adjustment should be effective a month after the HA receives the owner's written request. The owner should not receive a retroactive adjustment. Other comment says that owners will object if adjustment is not retroactive when the owner request is late. The current regulation causes incredible paperwork processing rent increases.

Comments recommend that the rule should state whether HA is allowed to supply forms for requesting adjustment.

#### *B. New Rule*

In a regular certificate tenancy, rent to owner is adjusted each year. The new rule provides (§ 982.509(b)) that the adjusted rent is the lower of:

- The pre-adjustment rent (minus any previously approved special adjustments) multiplied by the annual adjustment factor (AAF) published by HUD, or
- The reasonable rent.

Rent to owner may be increased or decreased by applying the two elements of the regulatory adjustment formula (§ 982.509(b)(3)).

An AAF may be positive or negative. The published AAF for the area is based on objective data concerning changes in residential rental costs for the area (see 60 FR 12594, March 7, 1995). In addition, the adjusted rent may not exceed the reasonable rent for comparable units rented on the private unassisted market.

HUD has not adopted recommendations to hold owner harmless against a rent decrease either because of a negative published factor (however rare), or because the market rent is less than rent adjusted by the formula factor. The regulatory adjustment formula for a regular certificate tenancy is a reasonable basis for determining changes in rent to owner during the assisted lease, and thereby determining the appropriate amount of Federal subsidy.

For a regular tenancy, the family does not negotiate the procedure for adjusting rent received by the owner. Changes in rent are not controlled by normal constraints of the private unassisted market. The family's share of the rent is determined by the amount of family income, and is not affected at all by the amount of the adjusted rent to owner.

The family therefore lacks any incentive to limit the rent paid to the owner from HA assistance payments.

For this reason, the program must supply another formula to determine rent adjustments during the assisted tenancy. The adjustment formula in this rule substantially restates the formula successfully used since the beginning of the Section 8 certificate program (with some technical modifications). Section 8 rents must provide an adequate incentive for participation by private owners at competitive private market rents. In general, massive participation by private landlords shows that existing certificate rent mechanisms, including procedures for adjustment of owner rent, have largely afforded adequate compensation for private landlords. In addition, HUD believes that the procedures for determining initial rent and rent adjustments reflect a reasonable balance between rents that open housing opportunities for program participants, and limitations to maximize the number of families assisted with available funds.

In the final rule, HUD has revised proposed language that states when an owner must request an annual adjustment. The proposed rule would have provided that the rent will only be increased prospectively, and that an increase for any anniversary date must be requested by the next anniversary. These provisions are modified to allow at least sixty days for HA action on the owner request.

The owner must give the HA written notice requesting an increase in the rent (§ 982.509(b)(4)). The rent is not increased unless the owner has complied with the HAP contract. To receive a rent increase, the request must be submitted at least sixty days before the increase is effective, and at least sixty days before the next annual anniversary (§ 982.509(b)(5) and (6)).

#### **XI. Regular Tenancy—Rent to Owner: Special Rent Adjustment During Tenancy**

##### **A. General**

In a regular certificate tenancy, rents are adjusted annually by a published factor. If formula adjustments are not sufficient, HUD may approve additional increases in the rent to owner. Such increases are called "special adjustments." By law (42 U.S.C. 1437f(c)(2)(B)), HUD has discretion to approve special adjustments:

\* \* \* necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs

which are not adequately compensated for by [formula adjustments] \* \* \*.

In accordance with the law, the rule provides that special adjustments may only be granted because of "substantial and general increases" of unit costs (§ 982.510(a)(1)). Comments approve these requirements. By law, special adjustments are subject to comparability. Adjusted rent, including any special adjustment, may not exceed reasonable rent for comparable unassisted units (42 U.S.C. 1437f(c)(2)(C); § 982.510(b)).

An owner does not have any right to receive a special adjustment of the rent to owner (previously called "contract" rent). A special adjustment must be approved by HUD (§ 982.510(a)(2)). HUD has "sole discretion" whether to approve or withhold a special adjustment requested by an owner (§ 982.510(a)(1)).

##### **B. Purpose**

The old rule allowed special adjustments only for the following specific cost categories: real property taxes and assessments, and regulated or non-regulated utility costs. The proposed rule would have enlarged the list of covered cost categories, by permitting HUD approval of special adjustments for "security costs" as well as a broad authorization for approval of costs "similar" to the enumerated cost categories. The proposed rule would also have provided that HUD must approve a special adjustment to cover increases in ownership and maintenance cost that results from expiration of a real property tax exemption.

The final rule does not expand the purpose of special adjustments allowed under the old rule. In this respect, the new rule substantially restates the grounds for special adjustment in the old rule. The final rule permits special adjustments to cover increases in utility costs or in real property taxes and special governmental assessments (§ 982.510(a)(1) and § 983.255(b)). The final rule does not include authority to approve special adjustments for "security costs" or "similar costs." Special adjustments may only be approved by HUD for the specific purposes enumerated in the rule.

At this time, HUD knows no persuasive justification for expansion of special adjustments. First, any increase in special adjustments would draw on limited program funds in a time of severe budgetary restrictions. Second, HUD knows of no persuasive showing or evidence that a loosening of policy on special adjustments is necessary to provide adequate housing choice for

assisted families. Third, while owners will always seek maximum rents, it is hard for HAs to determine when special adjustments are really necessary in a particular case, and for HUD to evaluate relative need for special adjustments in particular cases. Fourth, special adjustments significantly complicate HA administration and control of program rents. HUD believes that HAs should primarily rely on formula adjustments by published factors, as a universal process for adjusting program rents.

The law provides that HUD may approve rent adjustments HUD determines necessary to cover increases in ownership and maintenance expenses "... that have resulted from the expiration of a real property tax exemption" (42 U.S.C. 1437f(c)(2)(B)). Such adjustments may only be approved if appropriations are available.

The proposed rule would have provided that HUD must approve a special adjustment to cover increased expenses when a real property tax exemption expires. Although some comments endorse this provision, the final rule does not require or authorize special adjustments at expiration of a real property tax exemption. At this time, appropriated funds are not available for this purpose. The final rule therefore removes a proposed provision reciting the authority to grant a special adjustment for this purpose.

Comments state that the rule should allow special adjustments for security costs, and for increases in insurance cost because of crime. The final rule does not authorize HUD approval of special adjustments for "security costs." HUD believes that such costs should be met from market rents in accordance with program requirements. In the certificate and voucher programs, HAs do not review owner budgets. It would be difficult to determine if proposed increases are really required, or if crime-related costs can be met from assisted rental revenues. If increases were granted for security costs, there is no existing mechanism to assure that the owner would actually use the additional money for this purpose. For efficient administration of the tenant-based programs, the HA should not attempt to micro-manage owner expenditures for particular costs.

Comments state that HUD should allow special adjustments because of major property upgrades that benefit the tenant. This recommendation is not adopted. This proposal would evade the fair market rent (for the family size and for the size of the unit rented) as the central statutory and regulatory control on unit rent. Moreover, the law does not

permit special adjustments for improvement of the particular project. As noted above, special adjustments may only be granted because of "general increases" in real property costs—i.e., common increases that broadly affect landlord operating costs in the market area.

HA comments state that the special adjustment rules are confusing. HUD should give a better description of the cases when special adjustments are warranted. HUD believes that the final rule contains a clear and straightforward list of the types of expenses for which HUD may approve a special adjustment of the rent paid to owner.

Comments recommend eliminating special adjustments, and substituting adjustment to level of the current FMR. In the current system, HAs negotiate new HAP contracts to avoid the need for HUD approval of special adjustments. HUD has not adopted this recommendation.

### C. Comparability

In accordance with the law, the rule provides that adjusted rent must be reasonable in comparison with rent of unassisted units in the local market. This principle applies to both the tenant-based and the project-based certificate programs. The reasonableness limit applies to special adjustments, as well as regular annual adjustments of the rent.

HUD may not approve a special adjustment if the adjusted rent to owner would exceed the reasonable rent for comparable unassisted units (§ 982.510(b) and § 983.255(c)(2)). (For PBC, reasonable rent is determined by a comparability study in accordance with special PBC requirements.) HUD may not consider granting a special adjustment over the amount of rent as adjusted by applying the published formula factor (AAF), unless reasonable rent exceeds the formula adjusted rent.

Application of comparability for special adjustments satisfies two statutory requirements. First, the law provides that regular and special adjustments may not result in material difference between rents charged " \* \* \* for assisted units and unassisted units of similar quality, type and age in the same market area. \* \* \* " (42 U.S.C. 1437f(c)(2)(C)). Second, the law also provides that special adjustments may only be granted for costs "not adequately compensated" by regular annual formula adjustments (42 U.S.C. 1437f(c)(2)(B)).

In the project-based and tenant-based certificate programs, market rent for comparable unassisted units is used as a regulatory standard for determining

whether owner is "adequately compensated" by the unit rent. Under the law, special adjustments are not designed to meet special or unique needs of a particular landlord. Special adjustments may only be approved to cover "substantial general increases" in costs common to owners in the locality, such as a general increase in real property tax rates (42 U.S.C. 1437f(c)(2)(B)). Thus levels of comparable unassisted market rents are used to gauge rents generally needed to adequately compensate landlords for increased costs to maintain and operate rental housing in the market area.

### D. Required Documentation

The old rule provides that an owner who seeks a special adjustment must submit "financial statements" which "clearly support" the owner's request for a special adjustment. This requirement applied both to the tenant-based and project-based certificate programs. In this rulemaking, HUD proposed to continue this requirement for both programs.

In the final rule, the financial statement requirement is retained only for PBC (§ 983.255(d)), but is not included in the special adjustment requirements for a regular tenancy in the tenant-based certificate program (§ 982.510). The final PBC rule (§ 983.255(c)(1)) provides that an owner must demonstrate that rent to owner "is not sufficient for proper operation of the housing". The PBC rule (§ 983.255(d)) also states that:

The owner must submit financial information, as requested by the HA, that support the grant or continuance of a special adjustment. For HAP contracts of more than twenty units, such financial information must be audited.

In the tenant-based certificate program, the grant or denial of a special adjustment only affects rent during the present lease term of a particular assisted family. Conversely the special adjustment will not affect rent under a new lease for the same family or for any other family. In PBC, the grant or denial of a special adjustment may affect the level of rents during the remaining term of the project-based HAP contract, and may apply to all units covered by the project-based HAP contract.

For the tenant-based program, the owner will not be required to submit a "financial statement" showing that costs are not adequately compensated by regular annual adjustments. To receive a special adjustment, the owner must show that a requested adjustment meets the regulatory standard—that the adjustment is appropriate to cover increases in actual and necessary costs

for eligible cost items. However, the rule does not specify any particular format or procedure for documenting this fact.

For PBC, however, the rule provides owner must "demonstrate" that cost increases are not adequately compensated for by the annual factor adjustment (§ 983.255(c)(1)). The PBC owner must submit "financial information" that support grant or continuance of a special adjustment (§ 983.255(d)). For PBC HAP contracts covering more than 20 units, the financial information must be audited.

### E. HUD Approval

Comments state that HUD should allow an HA to approve special adjustments without HUD approval. HAs are qualified to approve special adjustments.

Under the law, HUD may not adopt this recommendation. HUD itself must approve all special adjustments. The HAP contract must provide "for the Secretary to make" special adjustments. The Secretary may make special adjustments to the extent " \* \* \* [the Secretary] determines such adjustments are necessary. \* \* \* " (42 U.S.C. 1437f(c)(2)(B)). By these provisions, HUD has statutory authority to determine that a special adjustment is necessary, and the authority to make a special adjustment in accordance with the Secretary's determination. This authority is clearly assigned to HUD, and may not be delegated to the HA.

Comments state that an HA should have opportunity to comment before HUD decides to grant or deny a special adjustment. HUD believes there is no need to modify the rule in this respect. Ordinarily, a special adjustment is not granted without the HA's support. The HA submits the owner's request for special adjustment to HUD. The HA has ample opportunity to present its views. The HA provides supporting documentation and justification. The HA may submit any comments or information in support of, or in opposition to, the owner's request for a special adjustment. There is no need or advantage to complicate the adjustment process with additional procedural requirements.

Comments state that HUD should be required to respond in 30 days when an HA asks HUD to approve a special adjustment. This recommendation is not adopted. HUD will try to respond promptly to special adjustment or other HA or owner concerns. However, HUD cannot undertake to comply with an arbitrary deadline that may not fit the facts of individual cases.

A special adjustment must be approved by HUD. The special

adjustment provisions are revised to emphasize that HUD has sole discretion whether to grant or deny a special adjustment. The final rule states that HUD may approve a special adjustment “\* \* \* at HUD’s sole discretion \* \* \*.” (§ 982.510(a)(1) and § 983.255(a)(1)). The rule also provides that the Section 8 owner “does not have any right to receive a special adjustment” (§ 982.510(a)(2) and § 983.255(a)(2)).

#### F. Term

Comments state that HUD should not require an HA to track rent increases for a one-time special adjustment. A special adjustment for ongoing costs should not be treated as a one-time adjustment. Comments note that it is burdensome and unnecessary to track special adjustments, and require re-justification of approved special adjustments. Comments assert that the cost of deducting approved special adjustments may not exceed the saving. The deduction of special adjustments must be calculated, tracked and explained to owners.

The final rule re-states and substantially simplifies proposed provisions on special adjustments for temporary or one-time costs (§ 982.510(c)(2) and § 983.255(e)(2)). The HA may withdraw or limit the term of a special adjustment. If HUD approves a special adjustment to cover temporary or one-time costs (e.g., a one-time special assessment for drainage improvements), the special adjustment is only a temporary or one-time increase of the rent to owner.

The rule also clarifies the relation between a special adjustment, and a subsequent regular annual adjustment by application of HUD’s published annual adjustment factor (AAF). In an annual adjustment, the owner’s pre-adjustment rent is multiplied by the AAF (§ 982.509(b)(1)(i) and § 983.254(b)(1)(i)). The rule now states that the pre-adjustment rent to owner—the base for the annual adjustment, does not include any previously approved special adjustment (§ 982.509(b)(2) and § 983.254(b)(3)).

#### XII. Fees and Charges to Family for Meals, Supportive Services or Other Items

The final rule contains new provisions that state restrictions on owner charges to the family. These provisions largely codify and clarify HUD’s construction of the existing program rules.

The rule (§ 982.513) provides that:—Rent to owner may not include the cost of meals or supportive services. Reasonable rent (comparable rent)

does not include the value of meals or supportive services.

- The lease may not require the tenant or family members to pay charges for meals or supportive services. Non-payment of such charges is not grounds for eviction.
- The owner may not charge the tenant extra amounts for items customarily included in rent in the locality, or provided at no additional cost to the unsubsidized tenants in the premises.

#### XIII. Utility Allowance

##### A. Objections to Utility Allowance

###### 1. Comments

Comments state that HUD should eliminate the utility allowance in the certificate and voucher programs. Comments claim that elimination of utility allowances would unify the certificate and voucher programs.

Comments assert that the utility allowance promotes dependence and reliance on federal subsidy. Because of the utility allowance, the HA must pay a tenant without countable income to live in an assisted unit. The utility allowance does not encourage conservation and reduce tenant consumption.

###### 2. HUD Response

The utility allowance is used when the family is responsible for paying the cost of utilities or other housing services that are not included in the rent to owner. The HA’s utility allowance is the HA’s estimate of the monthly cost for reasonable utility consumption (see definition of “utility allowance” at § 5.603). The utility allowance performs different roles in the certificate and voucher programs. In the certificate program, the utility allowance is used so that a family does not pay more than the maximum rent. In the voucher program, the utility allowance is used so that a family does not pay less than the minimum rent.

In the certificate program, the utility allowance is deducted from the family’s total rent (“total tenant payment”) to calculate the amount payable to the owner (“tenant rent”). The utility allowance is used so that all families pay the same rental contribution (“total tenant payment”), regardless of whether utilities for a particular unit are paid by the owner or the family. The utility allowance is necessary for equivalent and equitable treatment of families that rent units with or without tenant-paid utilities.

In the certificate program, the amount of “rent” paid by a family is specified by law. If the utility allowance is more than the total tenant payment, the

family receives a “utility reimbursement” from the HA. The utility reimbursement is paid so that the family’s out of pocket utility cost to live in the unit does not exceed rent payable under the statutory rent formula. The HA utility reimbursement provides money the family can use to pay for utilities not included in the rent to owner.

The amount of the utility allowance and utility reimbursement are not determined by the actual utility costs of a particular assisted family. Rather, the utility allowance is based on reasonable consumption by an “energy conservative household of modest circumstances” (§ 5.603) in the community. A family that wastes or over-uses utilities does not get a higher utility allowance or utility reimbursement. The family pays for any excess consumption of tenant-paid utilities and benefits from its own funds.

In the voucher program, the utility allowance only affects calculation of the statutory maximum subsidy (“minimum rent”). Under the voucher law, the family must pay a minimum share of the actual rent for the unit “including the amount allowed for utilities in the case of a unit with separate utility metering” (42 U.S.C. 1437f(o)(2)). Thus the voucher statute explicitly requires use of a utility allowance for separately metered utilities that are not included in rent to owner. The utility allowance increases the base for calculation of the minimum rent, and therefore increases the minimum rent paid by affected voucher families.

##### B. Administration of Utility Allowance

###### 1. Comments

Comments state that the utility allowance requirement forces an HA to review utility costs annually and submit cumbersome utility calculations for HUD approval. Comments state that the rule should require HUD to act on the HA utility allowance submission within 30 days. Comments ask if an HA should use the new utility allowance schedule if the HA is conducting a interim reexamination because of a change in family income. Comments state that an HA should maintain separate utility allowance schedules for areas with significant difference in utility costs.

###### 2. HUD Response

Under the rule, the HA is not required to seek HUD approval before adopting the utility allowance schedule. The HA must give HUD a copy of the utility allowance schedule, and—if requested by HUD—must provide any information

or procedures the HA used to prepare the schedule (§ 982.517(a)(2)). At HUD's direction, the HA must revise the schedule, to correct any errors, or as necessary to update the schedule (§ 982.517(c)(2)).

As in the past, the HA must review its utility allowance schedule each year (§ 982.517(c)(1)). Under the old rule, the HA was required to revise the schedule if there was a "substantial change" in utility rates. Some HAs have failed to keep their allowance schedules up to date. The new rule establishes a more objective and definite standard triggering the requirement for revision of the utility allowance schedule. The new rule now provides that the HA must revise the allowance for a particular utility category if there is a ten percent or more change in the utility rate since the last revision (§ 982.517(c)(1)).

An HA must maintain information that supports its annual utility allowance review and any revisions of the utility allowance schedule (§ 982.517(c)(1)).

Sometimes, there may be significant differences in utility cost levels in different parts of an HA jurisdiction. This difference may occur because the HA has a large operating area, such as a State with different climatic regions, or because there are different utility suppliers for portions of the HA jurisdiction. The rule does not seek to specify when an HA should or must issue separate schedules for different portions of the HA jurisdiction. In general, the HA retains discretion to decide when it is necessary to set up separate schedules. However, an HA's utility allowances must meet the regulatory standard—that the allowances must be based on utility costs for households "in the same locality" (§ 982.517(b)(1)).

At any regular or interim reexamination of family income, the HA must determine the appropriate utility allowance from the current utility allowance schedule (§ 982.517(d)(2)). At the effective date of the reexamination, the HA must make appropriate adjustments in the housing assistance payment, including adjustments reflecting revision of the utility allowance. In the certificate program, changes in the utility allowance may affect the amount of the assistance payment to owner, the rent remaining to be paid by the family ("tenant rent"), utility reimbursement, and maximum rent to owner for a new rental. In the voucher program, changes in the utility allowance only affect calculation of the minimum rent.

### *C. Services Included in Utility Allowance*

#### *1. Comments*

The utility allowance schedule covers tenant-paid utilities and other tenant-paid housing services. Comments state that HUD should carefully review what is included in the utility allowance. Comments ask what other "services" are covered.

Comments ask if the utility allowance must include garbage service and sewer service, though not mentioned in the rule. Comments state that the utility allowance should cover sewer and trash removal expenses.

The rule allows a utility allowance for air conditioning of the unit. Comments ask if air conditioning is mandatory. Comments ask if the HA must grant a utility allowance for air conditioning if air conditioning is not commonly used for residential rentals in the HA area. Comments recommend that HUD should clarify that the utility allowance does not include "non-essential utility mediums" such as cable and satellite television.

#### *2. HUD Response*

The HUD Office of Policy Development and Research has found that HAs throughout the United States use a wide variety of utility allowance schedules and formats. Many schedules are internally inconsistent, or at wide variance to the schedules of other jurisdictions using the same utility suppliers.

HUD believes that the use of a common format will help HAs improve the quality and consistency of HA-adopted utility allowance schedules, so that the schedules more accurately represent utility consumption and costs in different localities. The final rule provides that the utility allowance schedule must be prepared and submitted on the form prescribed by HUD (§ 982.517(b)(4)).

An HA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with the housing quality standards. However, the HA may not provide any allowance for non-essential utility costs, such as costs of cable or satellite television. (§ 982.517(b)(2)(i))

The HA utility schedule must classify covered utilities and other services according to specified categories (§ 982.517(b)(2)(ii)). The final rule refines and supplements the list of covered categories:

heating; air conditioning; cooking; water heating; water; sewer; trash collection

(disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services.

The utility allowance must cover tenant-paid fees or costs for trash collection and sewage.

The housing quality standards do not require air conditioning. The final rule provides that the HA must provide a utility allowance for tenant-paid air-conditioning costs if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air conditioners (§ 982.517(b)(2)(ii)).

### *D. Determining Utility Allowance: Unit Size and Size of Family*

#### *1. Comments*

The rule provides that a utility allowance is based on the unit actually leased by family, not on the family unit size (appropriate size unit for family under the HA "subsidy standards") (§ 982.517(d)(1)). According to comments, the utility allowance should be based on the family unit size.

Comments note that an elderly family that wants to stay in the same unit rent may rent a unit larger than necessary (larger than the family unit size). If the HA uses the utility allowance for the actual size unit, the rent exceeds FMR, and the family must move.

Comments state that an HA should have the option to give a utility allowance based either on the number of occupants or on the unit size. Other comments state that the family should receive a utility allowance for the larger of family unit size or actual unit leased.

Comments state that the utility allowance should be based on actual need for the particular utility by the actual family configuration. Comments claim that utility expenses reflect the size of family, not the size of the unit. Comments state that using the utility allowance for a smaller unit penalizes a family for renting a smaller unit to reduce family rent.

#### *2. HUD Response*

The final rule provides that the HA must use the utility allowance for the actual unit size rented. HUD has not accepted the recommendation to use the utility allowance for the family unit size under the HA subsidy standards, or the greater of the utility allowance for the family unit size or actual unit size.

In occupancy of a particular unit, the family needs to pay utilities for the actual unit rented. In general, utility costs will be higher if a family leases a unit with more bedrooms. Furthermore,

utility cost is primarily affected by the character of the unit rather than the character of the family.

For a regular tenancy in the certificate program, the initial gross rent may not exceed the FMR/exception rent limit. The maximum gross rent includes the appropriate utility allowance for the actual unit rented by the family.

#### *E. Reasonable Accommodation*

The final rule adds a new provision allowing the HA to establish a special higher utility allowance, on a case-by-case basis, as a reasonable accommodation for a disabled person. The rule provides that on request from a family that includes a person with disabilities, the HA must approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation in accordance with 24 CFR part 8 to make the program accessible to and usable by the family member with a disability (§ 982.517(e)).

#### *F. Direct HA Payment of Tenant Utility Cost*

##### *1. Comments*

Comments state that there is a risk of unit damage or harm to other residents if the tenant does not pay the utility bill. HUD should require the HA to pay utility reimbursement directly to the utility company, or should permit direct payment with family consent.

Comments recommend that HUD should eliminate utility reimbursement. Comments state that the term "utility reimbursement" should be used for the voucher program, and indicates that the family receives the same utility reimbursement in both programs.

##### *2. HUD Response*

The rule provides that if the housing assistance payment exceeds rent to owner, the HA may pay the balance of the payment either to the family or directly to the utility supplier to pay the utility bill (§ 982.514(b)). In the certificate program, this case occurs when there is a utility reimbursement (because the utility allowance exceeds the total tenant payment). In the voucher program, this case occurs when the amount of the voucher subsidy (as calculated by the statutory formula) exceeds the rent to owner; there is no utility reimbursement (i.e., no payment based on the difference between the utility allowance and the family contribution).

The rule does not, as suggested by comment, require the HA to pay certificate utility reimbursement

directly to the utility company. The rule also does not require that the HA must secure family assent for direct payment. The HA has the election whether to remit the payment to the family or the utility supplier.

#### **XIV. Reexamination of Family Income**

##### *A. Comments*

Comments state that HUD should set a uniform policy on interim reexamination. Comments state that the HA should be required to process any request for reexamination because of change in income or composition since the last determination. Income of low income families, particularly employment income, fluctuates. The HA must respond quickly to decrease in family income. If a family reports a decrease in income, HUD should require an HA to promptly increase the assistance payments.

Comments state that changes should be effective for the month after the action that results in the decrease. The HA should reduce the family contribution even if the family delays reporting a decrease in income, or cannot immediately verify loss of income, e.g., because a former employer will not verify unemployment.

Comments state that an increase in the family contribution should not be effective before the second month after family income increases, or after 30 days notice to the family. A family needs a delay to adjust and budget for an increase in family income.

An HA asks for authority to require interim re-examination when family income increases, not just when adding a new family member. Comment notes that HAs are currently required to process reductions no matter how small the change in tenant contribution. The HA should be permitted to limit the number of interim adjustments each year, or to set a minimum dollar limit.

For families that claim little or no income, a comment recommends reexamination more frequent than annually.

##### *B. HUD Response*

At any time, the HA may conduct an interim examination of family income and composition (§ 982.516(b)(1)). At any time, a family may ask the HA to conduct a recertification if there is a change in family income or composition since the last determination (§ 982.516(b)(2)).

Reexamination affects the amount of the subsidy and the family share of rent. The HA must conduct reexamination in accordance with policies in the HA administrative plan.

The proposed rule would have provided that the HA must determine "whether a change should be made" in response to a change of family income or composition between annual reexaminations. The final rule provides that the HA "must make" an interim determination effective "within a reasonable time" after the family request (§ 982.516(b)(2)). The rule has not adopted the proposal that HAs be allowed to limit the number of interim reexaminations at the family's request.

The final rule provides that an HA must adopt policies prescribing when and under what circumstances the family must report a change in family income or composition (§ 982.516(c)). The rule clarifies that HAs have authority to initiate an interim reexamination when family income increases (§ 982.516(b)(1)). However, HAs are not required to initiate an interim reexamination not requested by the family.

The rule also provides that the HA must adopt policies prescribing how to determine the effective date of a change in the housing assistance payment because of an interim determination (§ 982.516(d)(1)). At the effective date of a regular or interim reexamination, the HA must make appropriate adjustments in the housing assistance payment and family unit size (§ 982.516(d)(2)).

If a reexamination is requested by the family, the HA must make the interim reexamination effective within a "reasonable time" after the family request (§ 982.516(b)(2)). Within this broad standard, HAs have broad authority to set local policies on when to increase the assistance payment because of a reduction of family income. HUD does not wish to set a rigid national standard on timing of changes in the family contribution and assistance payment as a result of an interim reexamination.

The law provides that "reviews of family income shall be made no less frequently than annually" (42 U.S.C. 1437f(c)(3)(A)). The law does not prescribe requirements for interim reexaminations between the annual review. HUD believes that HA's should have broad discretion to determine policies on conducting interim reexaminations. Over the years, the interim reexamination policies adopted in HA administrative plans have seldom been a source of contention. HAs have almost always acted responsibly in adopting policies on when to hold an interim reexamination, and when to make effective a change in the family share and housing assistance payment as a result of the reexamination.

Common rules for the Section 8 and public housing programs provide that an HA must reexamine family income and composition at least annually (§ 5.617(a)). A family must submit information or documentation necessary to determine the family's adjusted income (§ 5.617(b)(2)). This rule confirms that the HA must obtain verification of factors affecting the family's adjusted income, or must document why verification was not available (§ 982.516(a)).

## **XV. Project-based Certificate (PBC) Program: Rent to Owner**

### **A. PBC: Comparability Procedures**

During the term of a HAP contract, PBC rents must be reasonable (§ 983.256(a)(2)). Comparability applies both to HA determination of initial rent to owner (§ 983.256(a)(1)), and to regular or special adjustments during the HAP contract term (§ 983.254(b)(1) (regular); § 983.255(c)(2) (special)). For PBC housing, the HA must redetermine that the current rent to owner is reasonable at least annually during the HAP contract term (§ 983.256(a)(3)). The final rule modifies procedures for analysis of comparability.

The existing and proposed rule did not specify the form of comparability analysis for tenant-based or project-based certificate assistance. For PBC, but not for the tenant-based program, the final rule provides that the HA must use a standard HUD form to document comparability of the initial rent (§ 983.256(c)(1)(ii)) and adjusted rent (§ 983.256(c)(2)(iii)). For both purposes, HA records must show the calculation of comparable rent ("correlated subject rent") on HUD Form 92273—"Estimates of Market Rent by Comparison." Form 92273 lists property "characteristics," and provides a format to enter the plus or minus dollar value of the differences (adjustments) between the subject and the comparable units for each characteristic. A separate Form 92273 must be prepared for each "unit type" in the PBC project: e.g., apartment, row-house, town house or single-family detached.

In determining initial rent, the comparability analysis must use at least three comparable units in the private unassisted market (§ 983.256(c)(1)(ii)). However, the rule does not specify the minimum number of comparables that must be used in determining comparability of the adjusted rent.

The existing and proposed rule do not specify minimum qualifications of the person who performs a comparability analysis for determination of initial or adjusted rent. For PBC only, the final

rule provides that the HA must use a qualified "State-certified appraiser" (§ 983.256(c)(1)(i)) for determination of initial rent. The term "State-certified appraiser" is defined at § 983.2 (added by rule published July 3, 1995), but was not previously used in the rule. A State-certified appraiser must meet minimum certification requirements established by the Appraisal Foundation. To assure objectivity, the rule provides that the appraiser may not have any direct or indirect interest in the property or otherwise (§ 983.256(c)(2)(iii)).

For determination of rent during the term of a PBC HAP contract, the HA is not required to use a State-certified appraiser. The comparability study may be prepared by HA staff or by another qualified person (§ 983.256(c)(2)(iii)).

### **B. PBC: Approval of Rent; HA Certification That Rent Is Reasonable**

Under the old rule, all PBC rents were approved by HUD. Under the new rule HUD must approve initial rent for HA-owned PBC units or PBC units financed with a HUD-insured multifamily mortgage (§ 983.253(b)). The HA approves the initial rent to owners for PBC units that are not financed with a HUD-insured multifamily mortgage, and are not owned by the HA (§ 983.253(a)).

In all cases, the HA must certify to HUD that the initial PBC rent to owner is reasonable (§ 983.256(c)(1)(iii)).

### **C. PBC: Rent to Owner: Annual Adjustments**

#### **1. Adjustment by Published Factor**

At each annual anniversary, rent to owner is adjusted upon a timely request by the owner. Adjusted rent is the lesser of:

- The pre-adjustment rent to owner multiplied by the applicable factor published by HUD,
- The reasonable rent as shown by an HA "comparability study"; or
- The rent requested by the owner. (§ 983.254(b)(1); § 983.256(c)(2)).

Previously, program rules provided that the rent is adjusted by applying the most recently published factor: the HUD factor that is in effect on the contract anniversary date (when the adjustment is effective). For future HAP contracts, the final rule provides that rent will be adjusted by the published AAF factor in effect 60 days before the HAP contract anniversary (§ 983.254(b)(2)). This new rule applies if the Agreement to enter housing assistance payments contract is entered on or after the effective date of this rule. For earlier contracts, the applicable factor remains the factor in effect at the contract anniversary date—

since this date is specified in the existing contract documents.

#### **2. Adjustment Comparability: Comparability Studies**

By law and contract, the adjusted rent of housing assisted under the certificate program may not exceed the reasonable rent for comparable unassisted units. This limitation is now separately and independently expressed both in 42 U.S.C. 1437f(c)(2) (A) and (C).

This final rule contains HUD's regulations for conducting comparability studies under § 1437f(c)(2)(C) in the Section 8 PBC program (§ 982.206(c)(2)). To apply the comparability limitation under § 1437f(c)(2)(C), the HA must conduct an adjustment comparability study if requested by the owner of a Section 8 PBC project. If the owner requests a comparability study under § 1437f(c)(2)(C), the comparability study must be submitted to the owner at least 60 days before the HAP contract anniversary. Unless the comparability study is submitted by this deadline, the rent to owner (formerly "contract rent") is adjusted by applying the annual adjustment factor.

The proposed rule would have provided that rent reasonableness only applies to PBC annual adjustments if the requested rent (gross rent, including the allowance for tenant-paid utility) is 110 percent or more of the FMR limit. Under the final PBC rule, as in the rule for the tenant-based certificate program, rent reasonableness always applies at the annual adjustment of rent to owner (see § 983.254(b)(1); § 983.256(c)(2)). Factor-adjusted rent may never exceed the comparable rent.

By law, adjusted rent for a unit assisted in the certificate program "shall not exceed" rent for a comparable unassisted unit in the market area (42 U.S.C. 1437f(c)(2)(A)). Moreover, rent adjustments may not result in "material differences" between rents for assisted and unassisted units (42 U.S.C. 1437f(c)(2)(C)). HUD has determined that any excess over the reasonable rent for comparable unassisted units is a material difference, and should not be permitted. Any excess rent is a waste of scarce funds.

Under the proposed rule, the adjustment system would have wholly ignored rent reasonableness if the factor-adjusted rent did not exceed 110 percent of the FMR. In such cases, the proposed rule afforded no means of limiting the discrepancy between the factor-adjusted rent and the reasonable rent for a unit. Under the final rule, the comparability analysis must be conducted without regard to the relation



between the adjusted rent and the published FMR. The FMR determines the general level of market rents in the area. By contrast, the comparability study determines the rental value of the particular unit, and is therefore a more precise way of determining the appropriate rent and subsidy for the particular unit.

The HA must conduct a comparability study to limit PBC rent increases over the initial rent. The adjusted rent for a contract unit may not exceed the reasonable rent as shown by a comparability study. A comparability study analyzes rents charged for comparable unassisted units (§ 982.206(c)(2)(ii)).

The final rule provides that an adjustment comparability study must be prepared on the standard HUD multifamily appraisal form (HUD Form 92273) (§ 982.206(c)(2)(iii)). The same form is also used to determine comparability of the initial rent at the beginning of the PBC HAP contract term. For determination of adjustment comparability, the rule also provides that a comparability study must show how the reasonable rent was determined. The appraisal must state major differences between the contract units and comparable unassisted units (§ 982.206(c)(2)(iv)).

### 3. When Owner Requests Rent Increase; HA Comparability Study

As indicated above, the proposed rule would have required the HA to conduct a comparability analysis only if the rent requested by an owner is 110 percent or more of the FMR limit. The proposed rule would have also provided that the HA must first notify the owner in writing of its intention to conduct a rent reasonableness study, and then also notify owner of the study result 30 days after owner requests an increase of the rent.

The old rule did not specify when the owner must submit a request for adjustment of the rent. The proposed rule would have provided:

- That rent will not be adjusted retroactively—for the period before owner's request.
- That rent will not be adjusted for the 60 days following the owner's request.
- That the adjustment for any anniversary is lost unless requested by the owner at least 60 days before the following anniversary.

Comments question the need to notify an owner that the HA intends to conduct a comparability study. Comments state that the notice requirement is an administrative burden, and will not improve the PBC

program. Under the final rule, HUD has eliminated the regulatory directive requiring HAs to provide notice of the annual comparability study. (Of course, HAs may elect to remind owners at appropriate points in the annual cycle.)

Under the new rule, an owner must request the adjustment (increase) for any contract anniversary at least 120 days before that contract anniversary (§ 983.254(a)(1)). The annual adjustment is wholly lost unless requested by this deadline.

The final rule establishes a fixed timetable both for owner's request for adjustment, and for the HA submission of a statutory comparability study in response to the owner request. The rule provides that:

- A PBC owner must request a rent increase at least 120 days before the HAP contract anniversary. The owner's request for increase must be submitted in writing, and "in the form and manner required by the HA" (§ 983.254(a)(1)).
- If the owner properly requests a rent increase by the 120 day deadline, the HA must submit a comparability study to the owner at least 60 days before the contract anniversary (§ 983.256(c)(2)(v)).

If the owner misses the 120 day deadline, the owner does not receive any increase in the rent at the annual adjustment (§ 983.254(a)(2)). If the HA misses the 60 day deadline, an increase in rent by application of the published factor is not subject to comparability (§ 983.256(c)(2)(v)). In this case, the owner receives the full annual adjustment by application of the published factor to the pre-adjustment rent.

The HA may not grant a rent increase unless the owner has complied with obligations under the HAP contract. The final rule (§ 983.254(a)(2)(ii)) prohibits an increase in the rent unless:

during the year before the contract anniversary, the owner complied with all requirements of the HAP contract, including compliance with the HQS for all contract units.

### 4. Rent Decrease at Annual Adjustment

Rent may increase or decrease by application of the published annual adjustment factor (AAF) and comparability at the contract anniversary (see § 983.254(b)). The old rent is multiplied by the published factor. Rent to owner increases if the factor is positive (a factor of more than one) and if the increased rent is reasonable. Rent decreases if the published factor is negative (a factor of less than one). The owner must submit

a written request for a "rent increase" (§ 983.254(a)(1)). The request must be submitted by the 120 day deadline. A rent decrease by application of the published factor or comparability occurs automatically, without any owner request.

Rent may decrease at annual adjustment: either by application of a negative factor, or by application of comparability. However, under the old rule, rent could not be adjusted below the initial rent—the contract rent (rent to owner) at the beginning of the PBC HAP contract term. The proposed rule would have removed this limitation for both tenant-based and PBC. For PBC alone, the final rule retains this limitation. The final rule provides that the amount of the initial rent—if correctly determined—is the limit on any downward adjustment of the rent. The PBC rule provides that, except as necessary to correct errors in establishing the initial rent in accordance with HUD requirements, the adjusted rent to owner must not be less than the initial rent (§ 983.254(d)).

Comments state that the rule should not allow an HA to decrease the rent by applying a negative adjustment factor. This recommendation is not adopted. The final rule provides that rent to the owner must be adjusted "up or down" by applying the published factor in accordance with regulatory requirements (§ 982.204(b)(4)). The amount of rent should not be insulated from rent reduction by application of the factor, which is designed to reflect the best currently available data on market changes in residential rent and utility cost levels. Furthermore, the rule clarifies that rents will be reduced, by application of a negative factor or by comparability, regardless of whether owner requests an adjustment of the rent. Obviously, owners who expect a reduction will not request a rent adjustment.

### D. PBC: Rent to Owner: Special Adjustments

HUD may approve a "special adjustment" of the rent paid to a PBC project owner (§ 983.255(a)). A special adjustment may only be granted if there are "substantial and general increases" in owner costs for any of four specified purposes: real property taxes, special government assessments, utility rates or costs of unregulated utilities (§ 983.255(b); see 42 U.S.C. 1437f(c)(2)(B)).

The owner does not have any right to receive a special adjustment (§ 983.255(a)(2)). HUD has discretion to grant or deny owner's request for a special adjustment (§ 983.255(a)(1)).

The owner must justify a special adjustment. Comments recommended that owners should be required to submit sworn or certified financial statements to justify requests for special rent adjustments. Comments recommended that special adjustment requests should be automatically approved if the HUD field office review is not completed within 30 days.

The rule provides that a PBC special adjustment may only be granted "if and to the extent the owner demonstrates that cost increases are not adequately compensated by application of the published annual adjustment factor at the contract anniversary" (§ 983.255(c)(1)). The owner must demonstrate that the rent to owner is not sufficient for proper operation of the housing. The owner must submit financial information, as required by the HA, that supports the grant or continuance of a special adjustment (§ 983.255(d)).

For PBC HAP contracts covering 20 or more units, the owner must submit audited financial information to support the request for a special adjustment. In establishing this 20 unit threshold, HUD has balanced the benefit of additional assurance provided by the audit against the cost and burden for the owner. The rule does not require submission of sworn or certified information as suggested by comment. However, any program submission by an owner or auditor is subject to Federal criminal penalties for misrepresentation or fraud in connection with Federal financial assistance.

HUD declines to grant AN automatic special adjustment rent increase if the HUD field office review is not completed within 30 days. HUD may need a longer period for review and determination on the owner's request and materials submitted by the HA and owner. The expiration of an arbitrary period does not show that owner needs an adjustment that meets the statutory and regulatory standard. Moreover, the owner is never entitled to a special adjustment. There is no contractual or moral commitment to provide a special adjustment under any circumstance.

If HUD finds that a special adjustment is justified, special adjustments may be made effective to cover past owner costs. In general, it has been HUD's practice that a special adjustment is made effective on the later of the first day of the month following the date of: (1) the owner's request or (2) the tax rate increase or other cost triggering the special adjustment. This practice avoids damage to the owner from necessary delay in processing a request for special adjustment.

#### *E. PBC: Rent to Owner: Correcting Mistakes*

The proposed rule would have provided that errors in establishing or adjusting the rent are subject to "post-audit changes." The final rule provides that the HA may, "at any time," correct any errors in establishing or adjusting rent in accordance with HUD requirements (§ 983.259). The HA may recover any excess payment from the owner.

#### *F. PBC: Rent to Owner: HA-Owned Units*

A 1990 law provides that an HA that administers the Section 8 program may enter into a HAP contract with itself to pay assistance for HA-owned units (42 U.S.C. 1437f(a)). The rule provides that HUD must approve initial rents (§ 983.253(b), and annual rent adjustments (§ 983.254(c))) for HA-owned PBC units.

### **XVI. Special Housing Types**

#### *A. General*

Subpart M of the rule gathers provisions on special housing types in the tenant-based programs. The special housing types are program variants designed to meet special housing needs within the structure of the Section 8 tenant-based programs. The special housing types are:

- Single room occupancy (SRO) housing;
- Congregate housing;
- Group home (replacing prior provisions on Individual Group Residences);
- Shared housing;
- Cooperative;
- Manufactured home.

A single individual or other family has the choice whether to use a special housing type offered in the HA program, or to rent other eligible housing (§ 982.601(c)). The HA may not restrict the family's freedom to choose among available units in the local housing market (§ 982.601(c)).

Except for program modifications explicitly stated in subpart M, all of the regulatory requirements for other tenant-based assistance also apply to the special housing types (§ 982.601(d)). The rule separately states the requirements for each special housing type.

In the proposed rule, provisions on special housing types were left largely unchanged, with some technical clarification and reorganization. In the final rule, HUD has restated the rules to follow a more consistent and parallel organization that addresses the basic questions about each special housing type:

- Who may reside in the housing,
- Whether there is a separate assistance contract and lease for each assisted individual,
- How to determine the maximum rent paid to an owner and the amount of the housing assistance payment, and
- Special housing quality standards (HQS).

For each special housing type, the rule states modifications of the standard program HQS.

#### *B. HA Choice*

##### **1. HA Discretion to Offer Special Housing Type**

In the past, HA's were generally required to offer each of the special housing types permitted under HUD program rules. HAs were only given the option whether to allow shared housing.

HUD has now decided to allow an HA maximum discretion in deciding whether to offer each of the special housing types permitted under program rules. With two exceptions as described below, the HA may now choose whether to offer any particular special housing type in its program (§ 982.601(b)). This decision rests wholly in the discretion of the individual HA, and HUD does not second-guess or review the HA decision. The HA administrative plan must state the HA policy choice whether to offer particular special housing types in the HA tenant-based program (§ 982.54(d)(17)). HUD does not approve the administrative plan.

##### **2. Person With Disabilities: Reasonable Accommodation**

An HA's Section 8 program must be readily accessible to persons with disabilities (Section 504 of the Rehabilitation Act of 1973, and HUD's implementing regulation (24 CFR part 8)). The rule provides that an HA must permit a family to use any special housing type if needed as a reasonable accommodation so that the program is readily accessible for persons with disabilities (in accordance with 24 CFR part 8 (§ 982.601(b)(3))).

##### **3. Manufactured Home**

The HA must also allow a family to rent a manufactured home (with the space on which the home is located) (§ 982.620(a)(2)).

The regulations also permit HAs to provide Section 8 assistance for a family that owns a manufactured home and leases only a manufactured home space (§ 982.620(a)(3) and §§ 982.622 to 982.624). For such families, the assistance only covers the cost of space rental. The HA may elect whether to provide such space rental assistance in

the tenant-based program (§ 982.620(a)(3)).

Both for rental of a manufactured home and space, or for manufactured home space rental, the HA must comply with special manufactured home housing quality standards (HQS) (§ 982.621). The basic Section 8 Housing Quality Standards (HQS) describe the physical characteristics of housing that can be rented under the program (see § 982.401). HAs must use these HQS standards, and must allow rental of housing that meet the HQS standards. The HQS for manufactured homes describe the physical characteristics of manufactured housing that can be rented under the program (§ 982.621). HAs must use these HQS standards, and must allow families to rent manufactured homes that meet the standards. If the HA elects to offer space rental assistance, the HA must also use the physical HQS for manufactured homes for such housing (§ 982.620(b)(1) and § 982.621).

### C. Family Choice

In an HA's tenant-based program, all families have freedom to shop for eligible housing that is available for rent in the local market (§ 982.353 (a) and (f)). An HA may not restrict family choice by requiring the family to rent housing that qualifies as a special housing type, or to rent any specific unit.

If an HA has decided to offer a special housing type in its program, a family has the choice whether to rent housing that qualifies as a special housing type or as any specific special housing type, or to rent other eligible housing in accordance with requirements of the program. The HA may not set aside program funding for special housing types in general, or for a specific special housing type. (§ 982.601(c).)

### D. Group Homes for Elderly or Disabled

The final rule substantially reforms and simplifies the old rules on "Independent Group Residences" (IGR) for persons who are elderly or disabled. The proposed rule would have largely codified and continued IGR requirements under the old certificate and voucher rules. Under the old rule, an elderly or disabled participant who cannot live independently may live in group housing with necessary supportive services. The IGR must be approved or licensed by the State. A State-recognized service agency determines the supportive service needs of IGR residents and coordinates services for the residents. The State approves the agreement between the

landlord and the agency that provides supportive services.

Under the old IGR program rules, the HA must determine that prospective IGR residents are unable to live independently. The HA must assure that IGR residents receive necessary services. In this respect, the treatment of IGRs differs from all other housing that may be selected by a certificate or voucher holder under the HQS. For non-IGR housing, the HA does not ask whether the family has the capacity for independent living.

In the final rule, HUD has reshaped and simplified the old IGR requirements. First, HUD eliminates the requirement that group housing is only available for individuals who *cannot* live independently. Second, HUD wholly eliminates the Federally-imposed supportive services requirements.

The new rule dramatically simplifies the role of the HA. The HA does not assess the nature and character of the occupant's disability in order to match the occupant with requirements for occupancy in a group home, or to assure that the occupant will benefit from appropriate supportive services.

As in the past, the new rules provide that a group home must be licensed by the State. The State may or may not require supportive services or other protections or benefits for group home residents.

An elderly or disabled Section 8 participant chooses whether to live in a group home or in other housing that satisfies the HUD housing quality standards. The HA may not bar access to group housing because the HA believes that the participant can live independently, and does not need supportive services. Conversely, the HA may not bar access to group housing because the HA believes that the participant needs supportive services that are not available at the housing.

If a family seeks admission to certain units, the owner—not the HA—determines whether the family qualifies to reside in the housing. In all Section 8 housing, the selection of tenants is the function of the owner (42 U.S.C. 1437f(d)(1)(A)). The owner may determine qualifications for occupancy.

For group housing, as for other housing that meets the Section 8 housing quality standards, the HA has no responsibility or authority to act as a gatekeeper who determines whether the assisted family has or lacks the capacity to live independently. A Section 8 family may choose to live in a group home or other eligible housing. The HA may not inquire into the nature or extent of disability.

The existing and proposed rule would have provided that IGR residents must be "ambulatory" and capable of taking appropriate actions for their own safety in an emergency. These provisions have been excised. Such safety concerns are critical, but are better handled by State and local authorities than by imposing a layer of Federal regulatory requirements enforced through local housing authorities. Further, safety should be a concern for residents of all housing or all assisted housing, not just for residents of Section 8 group homes.

In the final rule, HUD has retained provisions confirming that residents of a group home must not require continual medical or nursing care. Since the beginning of the Section 8 program, HUD has construed the Section 8 statute as precluding assistance in facilities that provide continual medical or nursing care. Section 8 was designed to provide rental assistance, rather than as a subsidy for nursing homes or other medical facilities.

In a Section 8 group home, up to twelve elderly or disabled individuals live together in a single unit (which may be an apartment or a home) (§ 982.610). Group homes serve a vulnerable population. The rule therefore provides, as in the past, that group homes must be licensed by the State (§ 982.612). The State may devise and enforce its own scheme of protections for elderly and disabled group home residents. However, such protections are not required by HUD, and are not enforced by the HA in administering Section 8 assistance for a group home resident.

In the proposed rule (as in the existing regulation), the HQS for Independent Group Residences would have provided that sanitary facilities must accommodate the needs of "physically handicapped occupants with wheelchairs or other special equipment." The final rule provides that sanitary facilities in a group home must be accessible to and usable by the residents, including residents with disabilities. (§ 982.614(c)(1)(iv)). The group home must contain sanitary facilities readily accessible to and usable by residents, including persons with disabilities.

This special housing type is now called a "group home," rather than "Independent Group Residence" (or IGR) (§ 982.4(b)).

### E. Other Changes

#### 1. Congregate Housing

The proposed rule would have provided across-the-board that subsidy for an elderly or disabled person in congregate housing is controlled by the

zero bedroom FMR/exception rent limit. The final rule provides that if there are two or more rooms (not including kitchen or sanitary facilities), the one bedroom FMR/exception rent limit determines the maximum subsidy (§ 982.608(a)(2)). (As indicated above, additional space is allowed if an HA-approved live-in aide also lives in the unit to care for an elderly or disabled member of the family.)

## 2. Shared Housing

In shared housing, an assisted family shares a home or apartment with other assisted or unassisted residents. The unit includes both common and private space. The assisted family has exclusive right to use its private space. The final rule amends the minimum private space requirement in the HQS for shared housing.

Under the HQS, all housing must meet so-called "performance" requirements, the minimum program requirements. In addition, housing must also meet "acceptability" standards unless HUD has approved acceptability variations because of local conditions. The final rule revises acceptability requirements defining the minimum private space for residents of shared housing.

The existing acceptability criteria would have provided that the private space for each assisted family must contain enough space "so that children of opposite sex, other than very young children are not required to occupy the same bedroom." This private space acceptability requirement is now deleted.

The amount of private space is now solely governed by the performance standard, requiring that the private space for an assisted family must contain at least one bedroom for each two persons (§ 982.618(d)). The final rule is revised to provide that the number of bedrooms in the family's private space may not be less than the "family unit size"—the appropriate number of bedrooms for the family under the HA subsidy standards (§ 982.618(d)(2)(ii)).

The old rule provided that two assisted individuals may share a one bedroom unit in shared housing. The new rule provides that a zero or one bedroom unit may not be used for shared housing (§ 982.618(2)(iii)). Such units are too small for sharing by several families—whether the families consist of individual persons or of multi-person families.

The rule is amended to clarify that the assisted family may reside in a shared housing unit with other assisted and unassisted persons (§ 982.615(b)(2)).

However, as noted above, the assisted family has the exclusive right to use of its private space.

## XVII. Live-in Aide for Disabled Resident

The 1937 Act provides that an assisted family may consist of one or more elderly or disabled persons living with one or more "persons . . . essential to their care or well being" (42 U.S.C. 1437a(b)(3)(B); see § 982.201(c)(3)). The final rule is revised (by adding a new § 982.316) to restate and clarify authority for HA-approved live-in aides in the certificate and voucher programs (including live-in aides for elderly or disabled persons assisted in special housing types under part 982, subpart M).

With approval of the HA, a live-in aide resides with the family to provide essential supportive services for an elderly person or person with disabilities (42 U.S.C. 1437a(b)(3)(B); definition of "live-in aide" at 24 CFR § 5.403). The live-in aide is not a member of the assisted family, but is counted in determining the appropriate unit size, and therefore the amount of subsidy for the family (§ 982.402(b)(6)).

The new rule provides that a family that consists of one or more elderly or disabled persons may request that the HA approve a live-in aide to reside in the unit and provide necessary supportive services for a family member who is a person with disabilities (§ 982.316(a)). The HA must approve a live-in aide if needed as a reasonable accommodation to make the program accessible to and usable by persons with disabilities in accordance with HUD regulations at 24 CFR part 8 (implementing Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)).

Under existing regulatory provisions, occupancy by a live-in aide is counted in determining the "family unit size"—the appropriate unit size for the family size and composition under the HA subsidy standards (§ 982.402(b)(6); see definition of "family unit size" and "subsidy standards" in § 982.4). For ordinary rental housing or for a special housing type, the family unit size is used to determine the maximum subsidy. This rule confirms that occupancy by an HA-approved live-in aide is also counted in determining family unit size for special housing types: § 982.608(b) (congregate housing); § 982.613(c)(1)(ii) (group home); § 982.617(c)(3) (shared housing); § 982.619(d)(2) (cooperative); § 982.620(c)(2) (manufactured housing).

The final rule specifies circumstances in which the HA may decline to

approve a particular person as a live-in aide for a person with disabilities (§ 982.316(b)). The rule provides that an HA may refuse to approve, or may withdraw such approval, if a proposed live-in aide:

- Commits fraud, bribery or any other corrupt or criminal act in connection with any federal housing program;
- Commits drug-related criminal activity or violent criminal activity, or
- Currently owes rent or other amounts to the HA or to another HA in connection with Section 8 or public housing assistance under the 1937 Act.

## XVIII. Streamlining of Part 982

As part of the Department's effort to reinvent its regulations, this rulemaking includes changes to 24 CFR parts 5 and 982.

Part 982 is amended to remove some provisions that are explanatory in nature but that neither impose obligations nor confer benefits on program participants. The information stated in such provisions either is available elsewhere or may be made available in HUD guidance documents.

In addition, part 982 is amended to delete some provisions which duplicate provisions in regulations for other programs administered pursuant to the United States Housing Act of 1937 (1937 Act). Cross-cutting provisions are consolidated in HUD regulations at 24 CFR part 5 and cross-referenced in part 982. Part 5 contains general provisions applicable to more than one of the Department's programs, and, specifically, contains definitions of terms used in HUD programs. It is the Department's intent to include in part 5 as many as possible of the definitions that are used in more than one program, removing the need to restate these definitions in numerous program regulations.

This rule moves some of the definitions in part 982 to part 5. An introductory paragraph is added to the definitions section at § 982.4, listing the definitions applicable to the certificate and voucher programs that are found in part 5. The remaining program definitions are stated in full in part 982.

## XIX. Other Changes

To reflect the consolidation of provisions of the former part 813, which had been referenced in § 982.4, into 24 CFR part 5 (which took place by a final rule published on October 18, 1996), this rule revises the cross references in § 982.4 to part 813 to correctly reference part 5.

The revised § 982.205(c)(3) makes clear that an HA has the authority, if the

HA states this policy in its administrative plan, to remove an applicant's name from a tenant-based assistance waiting list if the applicant has refused offers of the types of tenant-based assistance offered by the HA. (Section 982.204(c)(1) is revised to remove a duplicative "example" of the same principle.) (Even if an HA operates a waiting list that covers public housing, as well as Section 8, this rule only affects an applicant's selection for Section 8 assistance, but does not affect the applicant's selection for public housing.)

In general, an HA may remove from its waiting list the name of an applicant family that does not timely respond to HA requests for information or updates (e.g., information on current family income). However, the rule is now amended to specify that in communicating such HA requests to an applicant, the HA must provide reasonable accommodation, in accordance with 24 CFR part 8, for a family member who is a person with disabilities. The HA may not remove the applicant's name without providing such accommodation. The final rule provides that if an applicant does not respond to the HA request for information or updates because of the family member's disability, the HA must reinstate the applicant in the family's former position on the waiting list (§ 982.204(c)(2)).

The rule is amended to provide that an HA may give preference for admission of families that include a person with disabilities. However, the HA may not give preference for admission of persons with a specific disability (§ 982.207(c)).

Ordinarily, the HA may not extend the term of a certificate or voucher to more than 120 days (§ 982.303(b)(1)). The rule is amended to give the HUD field office authority to approve an additional term extension if needed as a reasonable accommodation to make the program accessible to and usable by a person with a disability (§ 982.303(b)(2)). This amendment removes the need to obtain a Headquarters regulation waiver for such extensions.

## **XX. Findings and Certifications**

### **A. Impact on the Environment**

A Finding of No Significant Impact (FONSI) with respect to the environment was made in connection with the proposed rule in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. Since the final

rule does not contain additional provisions or requirements affecting the environment, a new FONSI is not required, and the FONSI for the proposed rule is still valid. The FONSI is available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m.) in the Office of the Rules Docket Clerk, room 10276, 451 Seventh Street, SW, Washington, DC 20410-0500.

### **B. 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 significant impact 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 merely completes the process of combining and conforming the regulations for tenant-based rental assistance under the Section 8 certificate and voucher programs and continues the Department's efforts to streamline regulations.

### **C. Unfunded Mandates Reform Act**

The Secretary, in accordance with the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, has reviewed this rule before publication and by approving it certifies that this rule does not impose a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

### **D. 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 will not have a significant impact on a substantial number of small entities, because it does not place major burdens on housing authorities or housing owners. The rule just simplifies the operation of two similar programs by combining and conforming their provisions.

### **E. Regulatory Review**

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that this rule is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1)

of the Order). Any changes made as a result of that review are clearly identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, room 10276, 451 Seventh St. SW, Washington, DC 20410-0500.

### **Catalog**

The Catalog of Federal Domestic Assistance numbers for the programs affected by this rule are 14.855 and 14.857.

### **List of Subjects**

#### **24 CFR Part 5**

Administrative practice and procedure, Aged, Grant programs—housing and community development, Individuals with disabilities, Loan programs—housing and community development, Low- and moderate-income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

#### **24 CFR Part 8**

Administrative practice and procedure, Civil Rights, Equal employment opportunity, Grant programs—housing and community development, Housing, Individuals with disabilities, Loan programs—housing and community development, Reporting and recordkeeping requirements.

#### **24 CFR Part 882**

Grant programs—housing and community development, Housing, Homeless, Lead poisoning, Low- and moderate-income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

#### **24 CFR Part 982**

Grant programs—housing and community development, Housing, Low- and moderate-income housing, Rent subsidies, Reporting and recordkeeping requirements.

#### **24 CFR Part 983**

Grant programs—housing and community development, Housing, Low- and moderate-income housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, title 24 of the Code of Federal Regulations parts 5, 8, 882, 982, and 983 are amended as follows:

## **PART 5—GENERAL HUD REQUIREMENTS; WAIVERS**

1. The authority citation for part 5 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d), unless otherwise noted.

### Subpart A—Generally Applicable Definitions and Federal Requirements; Waivers

2. In § 5.100, definitions for “Indian” and “Indian Housing Authority (IHA)” are removed; and definitions for “Housing agency (HA)”, and “MSA”, are added in appropriate alphabetical order, to read as follows:

#### § 5.100 Definitions.

\* \* \* \* \*

*Housing agency (HA)* means a State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) authorized to engage in or assist in the development or operation of low-income housing. (“PHA” and “HA” mean the same thing.)

\* \* \* \* \*

*MSA* means a metropolitan statistical area.

\* \* \* \* \*

### Subpart B—Disclosure and Verification of Social Security Numbers and Employer Identification Numbers; Procedures for Obtaining Income Information

3. Section 5.214 is amended by:

- Revising paragraph (1) in the definition of “Assistance applicant”;
- Revising paragraph (1)(i) in the definition of “Entity applicant”;
- Removing the definition of “HA”;
- Revising paragraph (1)(i) in the definition of “Individual owner applicant”; and
- Revising paragraph (1) in the definition of “Participant”, to read as follows:

#### § 5.214 Definitions.

\* \* \* \* \*

*Assistance applicant.* \* \* \*

(1) For any program under 24 CFR parts 215, 221, 236, 290, or 891, or any program under Section 8 of the 1937 Act: A family or individual that seeks rental assistance under the program.

\* \* \* \* \*

*Entity applicant.* \* \* \*

(1) \* \* \*

- The project-based assistance programs under Section 8 of the 1937 Act;

\* \* \* \* \*

*Individual owner applicant.* \* \* \*

(1) \* \* \*

- The project-based assistance programs under Section 8 of the 1937 Act; or

\* \* \* \* \*

*Participant.* \* \* \*

(1) For any program under 24 CFR Part 891, or Section 8 of the 1937 Act: A family receiving rental assistance under the program;

\* \* \* \* \*

### Subpart D—Definitions and Other General Requirements for Assistance Under the United States Housing Act of 1937

4. In § 5.403, paragraph (a) is revised, and in paragraph (b), the definition for “Annual contributions contract” is added in appropriate alphabetical order, to read as follows:

#### § 5.403 Definitions.

(a) The terms *displaced person*, *elderly person*, *low income family*, *near-elderly person*, *person with disabilities*, and *very low income family* are defined in section 3(b) of the 1937 Act (42 U.S.C. 1437a(b)). For purposes of reasonable accommodation and program accessibility for persons with disabilities, the term “person with disabilities” means “individual with handicaps” as defined in 24 CFR 8.3.

(b) \* \* \*

*Annual contributions contract (ACC)* means the written contract between HUD and a PHA under which HUD agrees to provide funding for a program under the 1937 Act, and the PHA agrees to comply with HUD requirements for the program.

\* \* \* \* \*

### Subpart E—Restrictions on Assistance to Noncitizens

5. In § 5.520, paragraphs (c)(1)(ii) and (c)(2)(i) are revised, to read as follows:

#### § 5.520 Proration of assistance.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(ii) *Step 1.* Determine total tenant payment in accordance with § 5.613. (Annual income includes income of all family members, including any family member who has not established eligible immigration status.

\* \* \* \* \*

(2) \* \* \*

(i) *Step 1.* Determine the amount of the pre-proration voucher housing assistance payment in accordance with 24 CFR 982.505. (Annual income includes income of all family members, including any family member who has not established eligible immigration status.

\* \* \* \* \*

### PART 8—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

6. The authority citation for part 8 continues to read as follows:

**Authority:** 29 U.S.C. 794; 42 U.S.C. 3535(d) and 5309.

7. In § 8.28, paragraph (a)(5) is revised to read as follows:

#### § 8.28 Housing certificate and housing voucher programs.

(a) \* \* \*

(5) If necessary as a reasonable accommodation for a person with disabilities, approve a family request for an exception rent under § 982.504(b)(2) for a regular tenancy under the Section 8 certificate program so that the program is readily accessible to and usable by persons with disabilities.

\* \* \* \* \*

### PART 882—SECTION 8 MODERATE REHABILITATION PROGRAMS

8. The heading for part 882 is revised to read as set forth above.

9. The authority citation for part 882 is revised to read as follows:

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

10. Section 882.101 is revised to read as follows:

#### § 882.101 Applicability.

(a) The provisions of this part apply to the Section 8 Moderate Rehabilitation program.

(b) This part states the policies and procedures to be used by a PHA in administering a Section 8 Moderate Rehabilitation program. The purpose of this program is to upgrade substandard rental housing and to provide rental subsidies for low-income families.

(c) Subpart H of this part only applies to the Section 8 Moderate Rehabilitation Single Room Occupancy Program for Homeless Individuals.

11. Section 882.102 is revised to read as follows:

#### § 882.102 Definitions.

(a) The definitions in 24 CFR part 5 apply to this part.

(b) In addition, the following definitions apply to this part:

*ACC reserve account* (or “project account”). The account established and maintained in accordance with § 882.403(b).

*Agreement to enter into Housing Assistance Payments Contract (“Agreement”).* A written agreement between the Owner and the PHA that,

upon satisfactory completion of the rehabilitation in accordance with requirements specified in the Agreement, the PHA will enter into a Housing Assistance Payments Contract with the Owner.

**Annual Contributions Contract** ("ACC"). The written agreement between HUD and a PHA to provide annual contributions to the PHA to cover housing assistance payments and other expenses pursuant to the 1937 Act.

**Assisted lease** (or "lease"). A written agreement between an Owner and a Family for the leasing of a unit by the Owner to the Family with housing assistance payments under a Housing Assistance Payments Contract between the Owner and the PHA.

**Congregate housing.** Housing for elderly persons or persons with disabilities that meets the HQS for congregate housing.

**Contract.** See definition of Housing Assistance Payments Contract.

**Contract rent.** The total amount of rent specified in the Housing Assistance Payments Contract as payable to the Owner by the Family and by the PHA to the Owner on the Family's behalf.

**Decent, safe, and sanitary.** Housing is decent, safe, and sanitary if it satisfies the applicable housing quality standards.

**Drug-related criminal activity** means the illegal manufacture, sale, distribution, use, or the possession with intent to manufacture, sell, distribute or use, of a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)).

**Drug-trafficking.** The illegal manufacture, sale, or distribution, or the possession with intent to manufacture, sell or distribute, of a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)).

**Gross rent.** The total monthly cost of housing an eligible Family, which is the sum of the Contract Rent and any utility allowance.

**Group home.** A dwelling unit that is licensed by a State as a group home for the exclusive residential use of two to twelve persons who are elderly or persons with disabilities (including any live-in aide).

**Housing Assistance Payment.** The payment made by the PHA to the Owner of a unit under lease by an eligible Family, as provided under the Contract. The payment is the difference between the Contract Rent and the tenant rent. An additional payment (the "utility reimbursement") is made by the PHA when the utility allowance is greater than the total tenant payment.

**Housing Assistance Payments Contract** ("Contract"). A written contract between a PHA and an Owner for the purpose of providing housing assistance payments to the Owner on behalf of an eligible Family.

**Housing quality standards** (HQS). The HUD minimum quality standards for housing assisted under the Section 8 moderate rehabilitation program. See § 882.404 and 24 CFR 982.401. For SRO housing, see 24 CFR 982.605; and for the Section 8 moderate rehabilitation SRO program under subpart H of this part, see § 882.803(b). For congregate housing HQS, see 24 CFR 982.609; for group housing HQS, see 24 CFR 982.614.

**Moderate rehabilitation.**

Rehabilitation involving a minimum expenditure of \$1000 for a unit, including its prorated share of work to be accomplished on common areas or systems, to:

- (1) Upgrade to decent, safe and sanitary condition to comply with the Housing Quality Standards or other standards approved by HUD, from a condition below these standards (improvements being of a modest nature and other than routine maintenance); or
- (2) Repair or replace major building systems or components in danger of failure.

**Owner.** Any person or entity, including a cooperative, having the legal right to lease or sublease existing housing.

**Single room occupancy housing** (SRO). A unit that contains no sanitary facilities or food preparation facilities, or contains either, but not both, types of facilities.

**Statement of Family responsibility.** An agreement in the form prescribed by HUD, between the PHA and a Family to be assisted under the Program, stating the obligations and responsibilities of the Family.

**Violent criminal activity.** Any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force against the person or property of another.

**§§ 882.106, 882.108, 882.109, 882.110, 882.111, 882.118** [Removed and reserved]

12. In Subpart A, §§ 882.106, 882.108, 882.109, 882.110, 882.111 and 882.118 are removed and reserved.

**§ 882.112** [Redesignated as § 882.414]

13. Section 882.112 is redesignated as § 882.414 in subpart D.

**§ 882.217** [Redesignated as § 882.517]

14. Section 882.217 is redesignated as § 882.517 in subpart E.

## Subpart B—[Removed and Reserved]

14a. Subpart B is removed and reserved.

## Subparts C, F, and G—[Removed and Reserved]

15. Subparts C, F, and G are removed and reserved.

16. Section 882.401 is revised to read as follows:

### § 882.401 Eligible properties.

(a) **Eligible properties.** Except as provided in paragraph (b) of this section, housing suitable for moderate rehabilitation as defined in § 882.402 is eligible for inclusion under the Moderate Rehabilitation Program. Existing structures of various types may be appropriate for this program, including single-family houses, multi-family structures and group homes.

(b) **Ineligible properties.** (1) Nursing homes, units within the grounds of penal, reformatory, medical, mental and similar public or private institutions, and facilities providing continual psychiatric, medical or nursing services are not eligible for assistance under the Moderate Rehabilitation Program.

(2) Housing owned by a State or unit of general local government is not eligible for assistance under this program.

(3) High rise elevator projects for families with children may not be utilized unless HUD determines there is no practical alternative. (HUD may make this determination for a locality's Moderate Rehabilitation Program in whole or in part and need not review each building on a case-by-case basis.)

(4) Single room occupancy (SRO) housing may not be utilized unless:

(i) The property is located in an area in which there is a significant demand for such units as determined by the HUD Field Office; and

(ii) The PHA and the unit of general local government in which the property is located approve of such units being utilized for such purpose.

(5) No Section 8 assistance may be provided with respect to any unit occupied by an Owner; however, cooperatives will be considered as rental housing for purposes of the Moderate Rehabilitation Program.

### § 882.402 [Removed and reserved]

17. Section 882.402 is removed and reserved.

18. Section 882.404 is revised to read as follows:

### § 882.404 Housing quality standards.

(a) **Compliance with housing quality standards.** Housing used in the Section



8 moderate rehabilitation program must meet the housing quality standards in 24 CFR 982.401.

(b) *Energy performance requirement.* Caulking and weatherstripping are required as energy conserving improvements.

(c) *Special housing types.* In 24 CFR part 982, subpart M (Special Housing Types), the following provisions on HQS for special housing types apply to the Section 8 moderate rehabilitation program:

(1) 24 CFR 982.605 (HQS for SRO housing). (For the Section 8 moderate rehabilitation SRO program under subpart H of this part 982, see also § 982.803(b).)

(2) 24 CFR 982.609 (HQS for congregate housing).

(3) 24 CFR 982.614 (HQS for group home).

19. Section 882.407 is revised to read as follows:

**§ 882.407 Other Federal requirements.**

The moderate rehabilitation program is subject to applicable federal requirements in 24 CFR 5.105.

**§ 882.411 [Amended]**

20. In § 882.411, paragraph (c) is amended by removing the phrase “under § 882.112” and adding in its place “under § 882.414”.

**§ 882.413 [Amended]**

21. Section 882.413 is amended by removing paragraph (c).

**§§ 882.501, 882.502, 882.503, 882.504, 882.505, 882.506, 882.508 [Removed and reserved]**

22. In Subpart E, §§ 882.501, 882.502, 882.503, 882.504, 882.505, 882.506, and 882.508 are removed and reserved.

**§ 882.511 [Amended]**

23. In § 882.511, the section heading is revised, paragraphs (a) through (e) are redesignated as paragraphs (b) through (f) respectively, and a new paragraph (a) is added, to read as follows:

**§ 882.511 Lease and termination of tenancy.**

(a) *Lease.* The lease must include all provisions required by HUD, and must not include any provisions prohibited by HUD.

\* \* \* \* \*

24. Section 882.514 is amended by:

a. Amending paragraph (a)(1) to remove “parts 812 and 813 of this chapter, and”;

b. Amending paragraph (d)(1) introductory text to remove “(§ 882.504(e))”;

c. Amending paragraph (d)(1)(iv) to remove “and” at the end of the

paragraph and amending paragraph (d)(1)(v) to remove the period at the end of the paragraph and add “; and” in its place.

d. Redesignating paragraph (d)(2)(vi) as paragraph (d)(1)(vi); and

e. Revising paragraph (e), to read as follows:

**§ 882.514 Family participation.**

\* \* \* \* \*

(e) *Continued participation of Family when Contract is terminated.* If an Owner evicts an assisted family in violation of the Contract or otherwise breaches the Contract, and the Contract for the unit is terminated, and if the Family was not at fault and is eligible for continued assistance, the Family may continue to receive housing assistance through the conversion of the Moderate Rehabilitation assistance to tenant-based assistance under the Section 8 certificate or voucher program. The Family must then be issued a certificate or voucher, and treated as any participant in the tenant-based programs under 24 CFR part 982, and must be assisted by the PHA in finding a suitable unit. All requirements of 24 CFR part 982 will be applicable except that the term of any housing assistance payments contract may not extend beyond the term of the initial Moderate Rehabilitation Contract. If the Family is determined ineligible for continued assistance, the certificate or voucher may be offered to the next Family on the PHA's waiting list. The unit will remain under the Moderate Rehabilitation ACC which provides for such a conversion of the units; therefore no amendment to the ACC will be necessary to convert to the Section 8 tenant-based assistance programs.

\* \* \* \* \*

25. Section 882.515 is amended by:

a. Removing the first sentence from paragraph (b);

b. Redesignating paragraph (c) as paragraph (d); and

c. Adding a new paragraph (c), to read as follows:

**§ 882.515 Reexamination of family income and composition.**

\* \* \* \* \*

(c) *Obligation to supply information.*

The family must supply such certification, release, information or documentation as the PHA or HUD determine to be necessary, including submission of required evidence of citizenship or eligible immigration status, submission of social security numbers and verifying documentation, submission of signed consent forms for the obtaining of wage and claim information from State Wage

Information Collection Agencies, and submissions required for an annual or interim reexamination of family income and composition. See 24 CFR part 5.

\* \* \* \* \*

26. In § 882.802, the definition for “Eligible individual (“individual”)” is revised to read as follows:

**§ 882.802 Definitions.**

\* \* \* \* \*

*Eligible individual (“individual”).* An individual who is capable of independent living and is authorized for admission to assisted housing under 24 CFR part 5.

\* \* \* \* \*

27. In § 882.803, paragraph (b) is revised to read as follows:

**§ 882.803 Project eligibility and other requirements.**

\* \* \* \* \*

(b) *Housing quality standards.* (1) Section 882.404 (HQS for Moderate Rehabilitation) and 24 CFR 982.605 (HQS standards for SRO) are applicable to the Section 8 Moderate Rehabilitation SRO Program for Homeless Individuals (except that § 882.404(c)(2) (congregate housing) and (c)(3) (group home) are not applicable).

(2) In accordance with § 882.404(a), the SRO program must meet the HQS standards in 24 CFR 982.401. However, 24 CFR 982.401(j) (lead-based paint) and 982.401(l) (site and neighborhood) do not apply to this program.

(3)(i) The site must be adequate in size, exposure and contour to accommodate the number and type of units proposed; adequate utilities and streets must be available to service the site. (The existence of a private disposal system and private sanitary water supply for the site, approved in accordance with local law, may be considered adequate utilities.)

(ii) The site must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4), title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601–19), E.O. 11063 (as amended by E.O. 12259; 3 CFR, 1959–1963 Comp., p. 652 and 3 CFR, 1980 Comp., p. 307), and HUD regulations issued pursuant thereto.

(iii) The site must be accessible to social, recreational, educational, commercial and health facilities, and other appropriate municipal facilities and services.

\* \* \* \* \*

28. In § 882.805, paragraph (d)(1)(i)(B) is amended by removing reference to “§ 882.803(b)(2)” and adding in its place reference to “24 CFR 982.605(b)(4)”,

and paragraph (c) is revised, to read as follows:

**§ 882.805 HA application process, ACC execution, and pre-rehabilitation activities.**

\* \* \* \* \*

(c)(1) If an owner is proposing to accomplish at least \$3000 per unit of rehabilitation by including work to make the unit(s) accessible to a person with disabilities occupying the unit(s) or expected to occupy the unit(s), the PHA may approve such units not to exceed 5 percent of the units under its Program, provided that accessible units are necessary to meet the requirements of 24 CFR part 8, which implements section 504 of the Rehabilitation Act of 1973. The rehabilitation must make the unit(s), and access and egress to the unit(s), barrier-free with respect to the disability of the individual in residence or expected to be in residence.

(2) The PHA must take the applications and determine the eligibility of all tenants residing in the approved units who wish to apply for the Program. After eligibility of all the tenants has been determined, the Owner must be informed of any adjustment in the number of units to be assisted. In order to make the most efficient use of housing assistance funds, an Agreement may not be entered into covering any unit occupied by a family which is not eligible to receive housing assistance payments. Therefore, the number of units approved by the PHA for a particular proposal must be adjusted to exclude any unit(s) determined by the PHA to be occupied by a family not eligible to receive housing assistance payments. Eligible Families must also be briefed at this stage as to their rights and responsibilities under the Program.

(3) Should the Owner agree with the assessment of the PHA as to the work that must be accomplished, the preliminary feasibility of the proposal, and the number of units to be assisted, the Owner, with the assistance of the PHA where necessary, must prepare detailed work write-ups including specifications and plans (where necessary) so that a cost estimate may be prepared. The work write-up will describe how the deficiencies eligible for amortization through the Contract Rents are to be corrected including minimum acceptable levels of workmanship and materials. From this work write-up, the Owner, with the assistance of the PHA, must prepare a cost estimate for the accomplishment of all specified items.

(4) The owner is responsible for selecting a competent contractor to undertake the rehabilitation. The PHA must propose opportunities for minority

contractors to participate in the program.

(5) The PHA must discuss with the Owner the various financing options available. The terms of the financing must be approved by the PHA in accordance with standards prescribed by HUD.

(6) Before execution of the Agreement, the HA must:

(i)(A) Inspect the structure to determine the specific work items that need to be accomplished to bring the units to be assisted up to the Housing Quality Standards (see § 882.803(b)) or other standards approved by HUD;

(B) Conduct a feasibility analysis, and determine whether cost-effective energy conserving improvements can be added;

(C) Ensure that the owner prepares the work write-ups and cost estimates required by paragraph (c)(3) of this section;

(D) Determine initial base rents and contract rents;

(ii) Assure that the owner has selected a contractor in accordance with paragraph (c)(4) of this section;

(iii) After the financing and a contractor are obtained, determine whether the costs can be covered by initial contract rents, computed in accordance with paragraph (d) of this section; and, if a structure contains more than 50 units to be assisted, submit the base rent and contract rent calculations to the appropriate HUD field office for review and approval in sufficient time for execution of the Agreement in a timely manner;

(iv) Obtain firm commitments to provide necessary supportive services;

(v) Obtain firm commitments for other resources to be provided;

(vi) Determine that the \$3,000 minimum amount of work requirement and other requirements in paragraph (c)(1) of this section are met;

(vii) Determine eligibility of current tenants, and select the units to be assisted, in accordance with paragraph (c)(2) of this section;

(viii) Comply with the financing requirements in paragraph (c)(5) of this section;

(ix) Assure compliance with all other applicable requirements of this subpart; and

(x) If the HA determines that any structure proposed in its application is infeasible, or the HA proposes to select a different structure for any other reason, the HA must submit information for the proposed alternative structure to HUD for review and approval. HUD will rate the proposed structure in accordance with procedures in the applicable notice of funding availability. The HA may not proceed with

processing for the proposed structure or execute an Agreement until HUD notifies the HA that HUD has approved the proposed alternative structure and that all requirements have been met.

\* \* \* \* \*

29. Section 882.806 is amended by:

a. Revising the section heading;

b. Amending paragraph (a)(2) to remove the first sentence;

c. Amending paragraph (a)(2) to remove the phrase "In addition, the" and in place of this language add "The";

d. Designating the text of paragraph (a)(2) following the heading as paragraph (a)(2)(ii);

e. Adding a new paragraph (a)(2)(i); and

f. Revising paragraphs (a)(3) and (a)(4) to read as follows:

**§ 882.806 Agreement to enter into housing assistance payments contract.**

(a) \* \* \*

(2) *Timely performance of work.* (i) After execution of the Agreement, the Owner must promptly proceed with the rehabilitation work as provided in the Agreement. If the work is not so commenced, diligently continued, or completed, the PHA will have the right to rescind the Agreement, or take other appropriate action.

\* \* \* \* \*

(3) *Inspections.* The PHA must inspect, as appropriate, during rehabilitation to ensure that work is proceeding on schedule and is being accomplished in accordance with the terms of the Agreement, particularly that the work meets the acceptable levels of workmanship and materials specified in the work write-up.

(4) *Changes.* (i) The Owner must submit to the PHA for approval any changes from the work specified in the Agreement which would alter the design or the quality of the required rehabilitation. The PHA may condition its approval of such changes on a reduction of the Contract Rents. If changes are made without prior PHA approval, the PHA may determine that Contract Rents must be reduced or that the Owner must remedy any deficiency as a condition for acceptance of the unit(s).

(ii) Contract rents may not be increased except in accordance with §§ 882.408(d) and 882.805(d)(2).

\* \* \* \* \*

30. In § 882.807, paragraphs (a) and (d) are revised to read as follows:

**§ 882.807 Housing assistance payments contract.**

(a) *Time of execution.* Upon PHA acceptance of the unit(s) and certifications pursuant to § 882.507, the

Contract will be executed by the Owner and the PHA. The effective date must be no earlier than the PHA inspection which provides the basis for acceptance as specified in § 882.507(e).

\* \* \* \* \*

(d) *Unleased unit(s)*. At the time of execution of the Contract, the Owner will be required to submit a list of dwelling unit(s) leased and not leased as of the effective date of the Contract.

\* \* \* \* \*

31. Section 882.808 is amended by:

a. Amending paragraph (d) to remove reference to "882.112" and add in its place reference to "882.414";

b. Amending paragraph (i)(1) to remove reference to "part 813" and add in its place reference to "part 5, subpart F";

c. Amending paragraph (i)(3) to remove reference to "Section 882.515(c)" and add in its place reference to "Section 882.515(d)";

d. Amending paragraph (o) to remove reference to "Section 882.217" and add in its place reference to "Section 882.517"; and

e. Revising paragraphs (b)(4), (c), and (i)(2), to read as follows:

#### **§ 882.808 Management.**

\* \* \* \* \*

(b) \* \* \*

(4) *Continued participation of individual when contract is terminated*. Section 882.514(e) applies to this program.

\* \* \* \* \*

(c) *Lease*. Sections 882.403(d) and 882.511(a) apply to this program. In addition, the lease must limit occupancy to one eligible individual.

\* \* \* \* \*

(i) \* \* \*

(2) *Interim reexaminations*. The individual shall supply such certification, release, information, or documentation as the PHA or HUD determines to be necessary, including submissions required for interim reexaminations of individual income and determinations as to whether only one individual is occupying the unit. In addition § 882.515(b) shall apply.

\* \* \* \* \*

#### **§ 882.810 [Removed and reserved]**

32. Section 882.810 is removed and reserved.

#### **§ 882.406 [Redesignated as § 882.810]**

33. Section 882.406 is redesignated as § 882.810 in subpart H, and newly redesignated paragraph § 882.810(g)(1)(iii)(C) is further amended by removing reference to "24 CFR 813.107" and adding in its place reference to "24 CFR 5.613".

### **PART 982—SECTION 8 TENANT-BASED ASSISTANCE: UNIFIED RULE FOR TENANT-BASED ASSISTANCE UNDER THE SECTION 8 RENTAL CERTIFICATE PROGRAM AND THE SECTION 8 RENTAL VOUCHER PROGRAM**

34. The authority citation for part 982 is revised to read as follows:

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

35. In part 982, the table of contents is amended by adding an entry for § 982.316 under subpart G and adding entries for subparts K and M, to read as follows:

\* \* \* \* \*

#### **Subpart G—Leasing a Unit**

\* \* \* \* \*

##### **Sec.**

982.316 Live-in aide.

\* \* \* \* \*

#### **Subpart K—Rent and Housing Assistance Payment**

982.501 Overview.

982.502 Negotiating rent to owner.

982.503 Rent to owner: Reasonable rent.

982.504 Maximum subsidy: FMR/exception rent limit.

982.505 Voucher tenancy or over-FMR tenancy: How to calculate housing assistance payment.

982.506 Over-FMR tenancy: HA approval.

982.507 Regular tenancy: How to calculate housing assistance payment.

982.508 Regular tenancy: Limit on initial rent to owner.

982.509 Regular tenancy: Annual adjustment of rent to owner.

982.510 Regular tenancy: Special adjustment of rent to owner.

982.511 Rent to owner: Effect of rent control.

982.512 Rent to owner in subsidized projects.

982.513 Other fees and charges.

982.514 Distribution of housing assistance payment.

982.515 Family share: Family responsibility.

982.516 Family income and composition: Regular and interim examinations.

982.517 Utility allowance schedule.

\* \* \* \* \*

#### **Subpart M—Special Housing Types**

982.601 Overview.

##### **Single Room Occupancy (SRO)**

982.602 SRO: General.

982.603 SRO: Lease and HAP contract.

982.604 SRO: Rent and housing assistance payment.

982.605 SRO: Housing quality standards.

##### **Congregate Housing**

982.606 Congregate housing: Who may reside in congregated housing.

982.607 Congregate housing: Lease and HAP contract.

982.608 Congregate housing: Rent and housing assistance payment; FMR/exception rent limit.

982.609 Congregate housing: Housing quality standards.

##### **Group Home**

982.610 Group home: Who may reside in a group home.

982.611 Group home: Lease and HAP contract.

982.612 Group home: State approval of group home.

982.613 Group home: Rent and housing assistance payment.

982.614 Group home: Housing quality standards.

##### **Shared Housing**

982.615 Shared housing: Occupancy.

982.616 Shared housing: Lease and HAP contract.

982.617 Shared housing: Rent and housing assistance payment.

982.618 Shared housing: Housing quality standards.

##### **Cooperative**

982.619 Cooperative housing.

##### **Manufactured Home**

982.620 Manufactured home: Applicability of requirements.

982.621 Manufactured home: Housing quality standards.

##### **Manufactured Home Space Rental**

982.622 Manufactured home space rental: Rent to owner.

982.623 Manufactured home space rental: Housing assistance payment.

982.624 Manufactured home space rental: Utility allowance schedule.

36. Section 982.4 is revised to read as follows:

#### **§ 982.4 Definitions.**

(a) *Definitions found elsewhere:*

(1) Statutory definitions. The terms *displaced person*, *elderly person*, *low-income family*, *person with disabilities*, *public housing agency*, *State*, and *very low-income family* are defined in section 3(b) of the 1937 Act (42 U.S.C. 1437a(b)). For purposes of reasonable accommodation and program accessibility for persons with disabilities, the term *person with disabilities* means *individual with handicaps* as defined in 24 CFR 8.3.

(2) *General definitions*. The terms *1937 Act*, *Housing agency (HA)*, *HUD*, and *MSA*, are defined in 24 CFR part 5, subpart A.

(3) *Definitions under the 1937 Act*. The terms *annual contributions contract (ACC)*, and *live-in aide* are defined in 24 CFR part 5, subpart D.

(4) *Definitions concerning family income and rent*. The terms *adjusted income*, *annual income*, *tenant rent*, *total tenant payment*, *utility allowance*, and *utility reimbursement* are defined in 24 CFR part 5, subpart F.

(b) In addition to the terms listed in paragraph (a) of this section, the following definitions apply:

**Absorption.** In portability (under subpart H of this part 982): the point at which a receiving HA stops billing the initial HA for assistance on behalf of a portability family. The receiving HA uses funds available under the receiving HA consolidated ACC.

**Administrative fee.** Fee paid by HUD to the HA for administration of the program. See § 982.152.

**Administrative fee reserve** (formerly "operating reserve"). Account established by HA from excess administrative fee income. The administrative fee reserve must be used for housing purposes. See § 982.155.

**Administrative plan.** The plan that describes HA policies for administration of the tenant-based programs. See § 982.54.

**Admission.** The point when the family becomes a participant in the program. The date used for this purpose is the effective date of the first HAP contract for a family (first day of initial lease term) in a tenant-based program.

**Amortization payment.** In a manufactured home space rental: The monthly debt service payment by the family to amortize the purchase price of the manufactured home.

**Applicant** (applicant family). A family that has applied for admission to a program but is not yet a participant in the program.

**Budget authority.** An amount authorized and appropriated by the Congress for payment to HAs under the program. For each funding increment in an HA program, budget authority is the maximum amount that may be paid by HUD to the HA over the ACC term of the funding increment.

**Certificate.** A document issued by an HA to a family selected for admission to the certificate program. The certificate describes the program and the procedures for HA approval of a unit selected by the family. The certificate also states obligations of the family under the program.

**Certificate program.** The rental certificate program.

**Certificate or voucher holder.** A family holding a certificate or voucher with unexpired search time.

**Common space.** In shared housing: Space available for use by the assisted family and other occupants of the unit.

**Congregate housing.** Housing for elderly persons or persons with disabilities that meets the HQS for congregate housing. A special housing type: see § 982.606 to § 982.609.

**Contiguous MSA.** In portability (under subpart H of this part 982): An MSA that

shares a common boundary with the MSA in which the jurisdiction of the initial HA is located.

**Continuously assisted.** An applicant is continuously assisted under the 1937 Act if the family is already receiving assistance under any 1937 Act program when the family is admitted to the certificate or voucher program.

**Contract authority.** The maximum annual payment by HUD to an HA for a funding increment.

**Cooperative** (term includes mutual housing). Housing owned by a nonprofit corporation or association, and where a member of the corporation or association has the right to reside in a particular apartment, and to participate in management of the housing. A special housing type: see § 982.619.

**Domicile.** The legal residence of the household head or spouse as determined in accordance with State and local law.

**Drug-related criminal activity.** As defined in 42 U.S.C. 1437(f)(5).

**Drug-trafficking.** The illegal manufacture, sale, or distribution, or the possession with intent to manufacture, sell, or distribute, of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

**Exception rent.** An amount that exceeds the published FMR. See § 982.504(b). See also definition of FMR/exception rent limit.

**Fair market rent (FMR).** The rent, including the cost of utilities (except telephone), as established by HUD for units of varying sizes (by number of bedrooms), that must be paid in the housing market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities. See periodic publications in the **Federal Register** in accordance with 24 CFR part 888.

**Family self-sufficiency program** (FSS program). The program established by an HA in accordance with 24 CFR part 984 to promote self-sufficiency of assisted families, including the coordination of supportive services (42 U.S.C. 1437u).

**Family share.** The portion of rent and utilities paid by the family. For calculation of family share, see § 982.515(a).

**Family unit size.** The appropriate number of bedrooms for a family, as determined by the HA under the HA subsidy standards.

**FMR/exception rent limit.** The Section 8 existing housing fair market rent published by HUD Headquarters, or any exception rent. For a regular tenancy in the certificate program, the initial rent

to owner plus any utility allowance may not exceed the FMR/exception rent limit (for the selected dwelling unit or for the family unit size). For a tenancy in the voucher program, the HA may adopt a payment standard up to the FMR/exception rent limit. For an over-FMR tenancy in the certificate program, the payment standard is the FMR/exception rent limit.

**Funding increment.** Each commitment of budget authority by HUD to an HA under the consolidated annual contributions contract for the HA program.

**Gross rent.** The sum of the rent to owner plus any utility allowance.

**Group home.** A dwelling unit that is licensed by a State as a group home for the exclusive residential use of two to twelve persons who are elderly or persons with disabilities (including any live-in aide). A special housing type: see § 982.610 to § 982.614.

**HAP contract.** Housing assistance payments contract.

**Housing assistance payment.** The monthly assistance payment by an HA, which includes:

(1) A payment to the owner for rent to the owner under the family's lease; and

(2) An additional payment to the family if the total assistance payment exceeds the rent to owner.

**Initial HA.** In portability, the term refers to both:

(1) An HA that originally selected a family that later decides to move out of the jurisdiction of the selecting HA; and

(2) An HA that absorbed a family that later decides to move out of the jurisdiction of the absorbing HA.

**Initial payment standard.** The payment standard at the beginning of the HAP contract term.

**Initial rent to owner.** The rent to owner at the beginning of the HAP contract term.

**Jurisdiction.** The area in which the HA has authority under State and local law to administer the program.

**Lease.** (1) A written agreement between an owner and a tenant for the leasing of a dwelling unit to the tenant. The lease establishes the conditions for occupancy of the dwelling unit by a family with housing assistance payments under a HAP contract between the owner and the HA.

(2) In cooperative housing, a written agreement between a cooperative and a member of the cooperative. The agreement establishes the conditions for occupancy of the member's cooperative dwelling unit by the member's family with housing assistance payments to the cooperative under a HAP contract between the cooperative and the HA.

For purposes of this part 982, the cooperative is the Section 8 "owner" of the unit, and the cooperative member is the Section 8 "tenant."

**Lease addendum.** In the lease between the tenant and the owner, the lease language required by HUD.

**Manufactured home.** A manufactured structure that is built on a permanent chassis, is designed for use as a principal place of residence, and meets the HQS. A special housing type: see § 982.620 and § 982.621.

**Manufactured home space.** In manufactured home space rental: A space leased by an owner to a family. A manufactured home owned and occupied by the family is located on the space. See § 982.622 to § 982.624.

**Mutual housing.** Included in the definition of "cooperative."

**Notice of Funding Availability (NOFA).** For budget authority that HUD distributes by competitive process, the **Federal Register** document that invites applications for funding. This document explains how to apply for assistance and the criteria for awarding the funding.

**Over-FMR tenancy.** In the certificate program: A tenancy for which the initial gross rent exceeds the FMR/exception rent limit.

**Owner.** Any person or entity with the legal right to lease or sublease a unit to a participant.

**Participant (participant family).** A family that has been admitted to the HA program and is currently assisted in the program. The family becomes a participant on the effective date of the first HAP contract executed by the HA for the family (first day of initial lease term).

**Payment standard.** In a voucher or over-FMR tenancy, the maximum subsidy payment for a family (before deducting the family contribution). For a voucher tenancy, the HA sets a payment standard in the range from 80 percent to 100 percent of the current FMR/exception rent limit. For an over-FMR tenancy, the payment standard equals the current FMR/exception rent limit.

**Portability.** Renting a dwelling unit with Section 8 tenant-based assistance outside the jurisdiction of the initial HA.

**Premises.** The building or complex in which the dwelling unit is located, including common areas and grounds.

**Private space.** In shared housing: The portion of a contract unit that is for the exclusive use of an assisted family.

**Reasonable rent.** A rent to owner that is not more than rent charged:

(1) For comparable units in the private unassisted market; and

(2) For comparable unassisted units in the premises.

**Receiving HA.** In portability: An HA that receives a family selected for participation in the tenant-based program of another HA. The receiving HA issues a certificate or voucher and provides program assistance to the family.

**Regular tenancy.** In the certificate program: A tenancy other than an over-FMR tenancy.

**Rent to owner.** The total monthly rent payable to the owner under the lease for the unit. Rent to owner covers payment for any housing services, maintenance and utilities that the owner is required to provide and pay for.

**Set-up charges.** In a manufactured home space rental: Charges payable by the family for assembling, skirting and anchoring the manufactured home.

**Shared housing.** A unit occupied by two or more families. The unit consists of both common space for shared use by the occupants of the unit and separate private space for each assisted family. A special housing type: see § 982.615 to § 982.618.

**Single room occupancy housing (SRO).** A unit that contains no sanitary facilities or food preparation facilities, or contains either, but not both, types of facilities. A special housing type: see § 982.602 to § 982.605.

**Special admission.** Admission of an applicant that is not on the HA waiting list or without considering the applicant's waiting list position.

**Special housing types.** See subpart M of this part 982. Subpart M of this part states the special regulatory requirements for: SRO housing, congregate housing, group homes, shared housing, cooperatives (including mutual housing), and manufactured homes (including manufactured home space rental).

**Subsidy standards.** Standards established by an HA to determine the appropriate number of bedrooms and amount of subsidy for families of different sizes and compositions.

**Suspension.** Stopping the clock on the term of a family's certificate or voucher, for such period as determined by the HA, from the time when the family submits a request for HA approval to lease a unit, until the time when the HA approves or denies the request.

**Tenant.** The person or persons (other than a live-in aide) who executes the lease as lessee of the dwelling unit.

**Tenant rent.** In the certificate program: The total tenant payment minus any utility allowance. (This term applies both to a regular tenancy and an over-FMR tenancy.)

**Utility hook-up charge.** In a manufactured home space rental: Costs payable by a family for connecting the manufactured home to utilities such as water, gas, electrical and sewer lines.

**Violent criminal activity.** Any illegal criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force against the person or property of another.

**Voucher (rental voucher).** A document issued by an HA to a family selected for admission to the voucher program. This document describes the program and the procedures for HA approval of a unit selected by the family. The voucher also states obligations of the family under the program.

**Voucher program.** The rental voucher program.

**Waiting list admission.** An admission from the HA waiting list.

37. In Section 982.53, paragraph (a) is revised to read as follows:

#### § 982.53 Equal opportunity requirements.

(a) The tenant-based program requires compliance with all equal opportunity requirements imposed by contract or federal law, including the authorities cited at 24 CFR 5.105(a) and title II of the Americans with Disabilities Act, 42 U.S.C. 12101, *et seq.*

\* \* \* \* \*

38. Section 982.54 is amended by:

- a. Revising paragraph (d)(7);
- b. Redesignating paragraphs (d)(15) through (d)(19) as paragraphs (d)(18) through (d)(22) respectively; and
- c. Adding new paragraphs (d)(15) through (d)(17), to read as follows:

#### § 982.54 Administrative plan.

\* \* \* \* \*

(d) \* \* \*

(7) Providing information about a family to prospective owners;

\* \* \* \* \*

(15) For the certificate and voucher programs, the method for determining that rent to owner is a reasonable rent (initially and during the term of a HAP contract);

(16) Approval and administration of over-FMR tenancies in the HA certificate program;

(17) HA choice whether to offer particular special housing types (see § 982.601(b));

\* \* \* \* \*

#### § 982.102 [Amended]

39. Section 982.102 is amended by removing paragraph (d).

40. In § 982.152, a new paragraph (a)(3) is added and paragraph (c)(1) is revised to read as follows:

**§ 982.152 Administrative fee.**

(a) \* \* \*

(3) HA administrative fees may only be used to cover costs incurred to perform HA administrative responsibilities for the program in accordance with HUD regulations and requirements.

\* \* \* \* \*

(c) \* \* \*

(1) A one-time preliminary fee, in the amount of \$500, is paid by HUD in the first year an HA administers a tenant-based assistance program under the 1937 Housing Act. The fee is paid for each new unit added to the HA program by the initial funding increment.

\* \* \* \* \*

**§ 982.153 [Amended]**

41. Section 982.153 is amended by removing paragraph (b) and by removing the paragraph designation "(a)".

42. Section 982.158 is amended by removing "and" at the end of paragraph (f)(6), by redesignating paragraph (f)(7) as paragraph (f)(8), and by adding new paragraph (f)(7) to read as follows:

**§ 982.158 Program accounts and records.**

\* \* \* \* \*

(f) \* \* \*

(7) Records to document the basis for HA determination that rent to owner is a reasonable rent (initially and during the term of a HAP contract); and

\* \* \* \* \*

43. In § 982.204, paragraph (c) is revised to read as follows:

**§ 982.204 Waiting list: Administration of waiting list.**

\* \* \* \* \*

(c) *Removing applicant names from the waiting list.* (1) The HA administrative plan must state HA policy on when applicant names may be removed from the waiting list. The policy may provide that the HA will remove names of applicants who do not respond to HA requests for information or updates.

(2) An HA decision to withdraw from the waiting list the name of an applicant family that includes a person with disabilities is subject to reasonable accommodation in accordance with 24 CFR part 8. If the applicant did not respond to the HA request for information or updates because of the family member's disability, the HA must reinstate the applicant in the family's former position on the waiting list.

\* \* \* \* \*

44. In § 982.205, the section heading and paragraph (c) are revised to read as follows:

**§ 982.205 Waiting list: Different programs.**

\* \* \* \* \*

(c) *Other housing assistance: Effect of application for, receipt or refusal.* (1)

For purposes of this section, "other housing assistance" means a federal, State or local housing subsidy, as determined by HUD, including public or Indian housing.

(2) The HA may not take any of the following actions because an applicant has applied for, received, or refused other housing assistance:

(i) Refuse to list the applicant on the HA waiting list for tenant-based assistance;

(ii) Deny any admission preference for which the applicant is currently qualified;

(iii) Change the applicant's place on the waiting list based on preference, date and time of application, or other factors affecting selection under the HA selection policy; or

(iv) Remove the applicant from the waiting list.

(3) Notwithstanding paragraph (c)(2) of this section, the HA may remove the applicant from the waiting list for tenant-based assistance if the HA has offered the applicant assistance under both the certificate program and the voucher program.

45. Section 982.206 is amended by removing Example A and Example B from paragraph (b)(1) and by revising paragraph (a)(2) to read as follows:

**§ 982.206 Waiting list: Opening and closing; public notice.**

(a) \* \* \*

(2) The HA must give the public notice by publication in a local newspaper of general circulation, and also by minority media and other suitable means. The notice must comply with HUD fair housing requirements.

\* \* \* \* \*

46. In § 982.207, paragraph (c) is redesignated as paragraph (d), and a new paragraph (c) is added, to read as follows:

**§ 982.207 Waiting list: Use of preferences.**

\* \* \* \* \*

(c) The HA may give preference for admission of families that include a person with disabilities. However, the HA may not give preference for admission of persons with a specific disability.

\* \* \* \* \*

47. In § 982.302, paragraph (a) is revised to read as follows:

**§ 982.302 Issuance of certificate or voucher; Requesting HA approval to lease a unit.**

(a) When an applicant family is selected, or when a participant family

wants to move to a new unit with continued tenant-based assistance (see § 982.314), the HA issues a certificate or voucher to the family. The family may search for a unit.

\* \* \* \* \*

48. Section 982.303 is amended by:

a. Amending paragraph (b)(1) by removing from the second sentence the phrase "The initial term" and adding in its place "Except as provided in paragraph (b)(2)(ii) of this section, the initial term"; and

b. Revising paragraph (b)(2), to read as follows:

**§ 982.303 Term of certificate or voucher.**

\* \* \* \* \*

(b) *Extensions of term.* \* \* \*

(2) If the family needs and requests an extension of the initial certificate or voucher term as a reasonable accommodation, in accordance with 24 CFR part 8, to make the program accessible to and usable by a family member with a disability:

(i) The HA must extend the term of the certificate or voucher up to 120 days from the beginning of the initial term;

(ii) The HUD field office may approve an additional extension of the term.

\* \* \* \* \*

49. A new § 982.316 is added to subpart G to read as follows:

**§ 982.316 Live-in aide.**

(a) A family that consists of one or more elderly or disabled persons may request that the HA approve a live-in aide to reside in the unit and provide necessary supportive services for a family member who is a person with disabilities. The HA must approve a live-in aide if needed as a reasonable accommodation in accordance with 24 CFR part 8 to make the program accessible to and usable by the family member with a disability. (See § 982.402(b)(6) concerning effect of live-in aide on family unit size.)

(b) At any time, the HA may refuse to approve a particular person as a live-in aide, or may withdraw such approval, if:

(1) The person commits fraud, bribery or any other corrupt or criminal act in connection with any federal housing program;

(2) The person commits drug-related criminal activity or violent criminal activity; or

(3) The person currently owes rent or other amounts to the HA or to another HA in connection with Section 8 or public housing assistance under the 1937 Act.

50. Section 982.352 is amended by:

a. Revising paragraph (c)(7);

b. Redesignating paragraph (c)(9) as paragraph (c)(12);

- c. Removing “or” after paragraph (c)(8);
- d. Adding new paragraphs (c)(9), (c)(10), and (c)(11), to read as follows:

**§ 982.352 Eligible housing.**

\* \* \* \*

(c) \* \* \*

(7) Rental assistance payments under Section 521 of the Housing Act of 1949 (a program of the Rural Development Administration);

\* \* \* \*

(9) Section 202 supportive housing for the elderly;

(10) Section 811 supportive housing for persons with disabilities;

(11) Section 202 projects for non-elderly persons with disabilities (Section 162 assistance); or

\* \* \* \*

**§ 982.401 [Amended]**

51. Section 982.401 is amended by removing the last sentence from paragraph (a)(1).

52. In § 982.402, paragraph (c) is revised to read as follows:

**§ 982.402 Subsidy standards.**

\* \* \* \*

(c) *Effect of family unit size—maximum subsidy.* The family unit size, as determined for a family under the HA subsidy standards is used to determine the maximum rent subsidy for the family:

(1) *Certificate program: Regular tenancy.* HUD establishes fair market rents by number of bedrooms. For a regular tenancy, the initial gross rent (sum of the initial rent to owner plus any utility allowance) may not exceed either:

(i) The FMR/exception rent limit for the family unit size; or

(ii) The FMR/exception rent limit for the unit size rented by the family.

(2) *Certificate program: Over-FMR tenancy.* For an over-FMR tenancy, the HA establishes payment standards by number of bedrooms. The payment standard for the family must be the lower of:

(i) The payment standard for the family unit size; or

(ii) The payment standard for the unit size rented by the family.

(3) *Voucher program.* For a voucher tenancy, the HA establishes payment standards by number of bedrooms. The payment standards for the family must be the lower of:

(i) The payment standards for the family unit size; or

(ii) The payment standard for the unit size rented by the family.

\* \* \* \*

**§ 982.451 [Amended]**

53. Section 982.451 is amended by removing paragraph (a); by redesignating paragraphs (b) and (c) as paragraphs (a) and (b).

54. In § 982.452, paragraph (b)(2) is revised to read as follows:

**§ 982.452 Owner responsibilities.**

\* \* \* \*

(b) \* \* \*

(2) Maintaining the unit in accordance with HQS, including performance of ordinary and extraordinary maintenance. For provisions on family maintenance responsibilities, see § 982.404(a)(4).

55. A new subpart K is added, to read as follows:

**Subpart K—Rent and Housing Assistance Payment**

**§ 982.501 Overview.**

(a) There are three types of tenancy in the Section 8 tenant-based programs:

(1) A regular tenancy under the certificate program;

(2) An over-FMR tenancy under the certificate program; and

(3) A tenancy under the voucher program.

(b) Some requirements of this subpart are the same for all three types of tenancy. Some requirements only apply to a specific type of tenancy. Unless specifically stated, requirements of this subpart are the same for all tenancies in the tenant-based programs.

**§ 982.502 Negotiating rent to owner.**

The owner and the family negotiate the rent to owner. At the family's request, the HA must help the family negotiate the rent to owner.

**§ 982.503 Rent to owner: Reasonable rent.**

(a) *HA determination.* (1) The HA may not approve a lease until the HA determines that the initial rent to owner is a reasonable rent.

(2) The HA must redetermine the reasonable rent:

(i) Before any increase in the rent to owner;

(ii) If there is a five percent decrease in the published FMR in effect 60 days before the contract anniversary (for the unit size rented by the family) as compared with the FMR in effect one year before the contract anniversary; or

(iii) If directed by HUD.

(3) The HA may also redetermine the reasonable rent at any other time.

(4) At all times during the assisted tenancy, the rent to owner may not exceed the reasonable rent as most recently determined or redetermined by the HA.

(b) *Comparability.* The HA must determine whether the rent to owner is

a reasonable rent in comparison to rent for other comparable unassisted units. To make this determination, the HA must consider:

(1) The location, quality, size, unit type, and age of the contract unit; and

(2) Any amenities, housing services, maintenance and utilities to be provided by the owner in accordance with the lease.

(c) *Owner certification of rents charged for other units.* By accepting each monthly housing assistance payment from the HA, the owner certifies that the rent to owner is not more than rent charged by the owner for comparable unassisted units in the premises. The owner must give the HA information requested by the HA on rents charged by the owner for other units in the premises or elsewhere.

**§ 982.504 Maximum subsidy: FMR/exception rent limit.**

(a) *Purpose.* (1) Fair market rents (FMRs) are published by HUD. In the tenant-based programs, the FMR/exception rent limit is used to determine the maximum subsidy for a family.

(2) For a regular tenancy under the certificate program, the FMR/exception rent limit is the maximum initial gross rent under the assisted lease.

(3) For the voucher program, the FMR/exception rent limit is the maximum “payment standard” (maximum subsidy) for a family.

(4) For an over-FMR tenancy under the certificate program, the FMR/exception rent limit is the “payment standard” (maximum subsidy) for a family.

(b) *Determining exception rent.—(1) Area exception rent: HUD approval.* (i) At HUD's sole discretion, HUD may approve an area exception rent for all units, or all units of a given size (number of bedrooms), leased by program families in a part of the fair market rent area that is designated as an “exception rent area.” A HUD-approved area exception rent applies to all HAs with jurisdiction of the exception rent area.

(ii) An area exception rent may not exceed 120 percent of the FMR.

(iii) HUD will determine the area exception rent by either of the two following methods:

(A) *Median rent method.* In the median rent method, HUD determines the area exception rent by multiplying the FMR times a fraction of which the numerator is the median gross rent of the exception rent area and the denominator is the median gross rent of the entire FMR area. In this method, HUD uses median gross rent data from



the most recent decennial United States census, and the exception rent area may be any geographic entity within the FMR area (or any combination of such entities) for which median gross rent data is provided in decennial census data products.

(B) *40th percentile rent method.* In this method, HUD determines that the area exception rent equals the 40th percentile of rents to lease standard quality rental housing in the exception rent area. HUD determines the 40th percentile rent in accordance with the methodology described in 24 CFR 888.113 for determining fair market rents. An HA that asks HUD to approve an area exception rent determined by the 40th percentile rent method must present statistically representative rental housing survey data that justify exception rent approval by HUD.

(iv) An area exception rent will not be approved unless HUD determines that an exception rent is needed either:

(A) To help families find housing outside areas of high poverty; or

(B) Because certificate or voucher holders have trouble finding housing for lease under the program within the term of the certificate or voucher.

(v) The total populations of exception rent areas in an FMR area may not include more than 50 percent of the population of the fair market rent area.

(vi) At any time, HUD may withdraw or modify any approved area exception rent.

(2) *Regular certificate tenancy: Exception rent as reasonable accommodation for person with disabilities: HA approval.* For a regular tenancy in the certificate program, on request from a family that includes a person with disabilities, the HA must approve an exception rent of up to 120 percent of the fair market rent if the exception rent is needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8.

**§ 982.505 Voucher tenancy or over-FMR tenancy: How to calculate housing assistance payment.**

(a) *Use of payment standard.* For a voucher tenancy or for an over-FMR tenancy under the certificate program, a "payment standard" is used to calculate the monthly housing assistance payment for a family. The "payment standard" is the maximum monthly subsidy payment for a family.

(b) *Voucher program: Amount of assistance.—(1) Voucher payment standard: Maximum and minimum.* (i) The HA must adopt a payment standard schedule that establishes payment

standards for the HA voucher program. For each FMR area and for each exception rent area, the HA must establish voucher payment standard amounts by unit size (zero-bedroom, one-bedroom, and so on).

(ii) For a voucher tenancy, the payment standard for each unit size may not be:

(A) More than the current FMR/exception rent limit; or

(B) Less than 80 percent of the current FMR/exception rent limit, unless a lower percent is approved by HUD.

(2) *Voucher assistance formula.* (i) For a voucher tenancy, the housing assistance payment for a family equals the lesser of:

(A) The applicable payment standard minus 30 percent of monthly adjusted income; or

(B) The monthly gross rent minus the minimum rent.

(ii) The minimum rent is the higher of:

(A) 10 percent of monthly income (gross income); or

(B) A higher minimum rent as required by law.

(3) *Voucher payment standard schedule.* (i) A voucher payment standard schedule is a list of the payment standard amounts used to calculate the voucher housing assistance payment for each unit size in an FMR area. The payment standard schedule for an FMR area includes payment standard amounts for any HUD-approved exception rent area in the FMR area.

(ii) The voucher payment standard schedule establishes a single payment standard for each unit size in an FMR area and, if applicable, in a HUD-approved exception rent area within an FMR area.

(iii) Payment standard amounts on the payment standard schedule must be within the maximum and minimum limits stated in paragraph (b)(1)(ii) of this section. Within these limits, payment standard amounts on the schedule may be adjusted annually, at the discretion of the HA, if necessary to assure continued affordability of units in the HA jurisdiction.

(iv) To calculate the housing assistance payment for a family, the HA must use the applicable payment standard from the HA payment standard schedule for the fair market rent area (including the applicable payment standard for any HUD-approved exception rent area) where the unit rented by the family is located.

(4) *Payment standard for certain subsidized projects.* For a voucher tenancy in an insured or noninsured Section 236 project, a Section 515

project of the Rural Development Administration, or a Section 221(d)(3) below market interest rate project, the payment standard may not exceed the basic rental charge (as defined in 12 U.S.C. 1715z-1(f)(1)), including the cost for tenant-paid utilities.

(c) *Over-FMR tenancy: Determining amount of assistance.—(1) Payment standard.* For an over-FMR tenancy, the payment standard for the unit size is the FMR/exception rent limit.

(2) *Over-FMR tenancy assistance formula.* For an over-FMR tenancy, the housing assistance payment for a family equals the lesser of:

(i) The applicable payment standard minus the total tenant payment; or

(ii) The monthly gross rent minus the minimum rent as required by law.

(d) *Payment standard for family.* (1) This paragraph (d) applies to both a voucher tenancy and an over-FMR tenancy.

(2) The payment standard for a family is the lower of:

(i) The payment standard for the family unit size; or

(ii) The payment standard for the unit size rented by the family.

(3) If the unit rented by a family is located in an exception rent area, the HA must use the appropriate payment standard for the exception rent area.

(4) During the HAP contract term for a unit, the amount of the payment standard for a family is the higher of:

(i) The initial payment standard (at the beginning of the lease term) minus any amount by which the initial rent to owner exceeds the current rent to owner; or

(ii) The payment standard as determined at the most recent regular reexamination of family income and composition effective after the beginning of the HAP contract term.

(5) If there is a change in family size or composition during the HAP contract term, paragraph (d)(4)(i) of this section does not apply at the next regular reexamination following such change, or thereafter during the term.

**§ 982.506 Over-FMR tenancy: HA approval.**

(a) *HA discretion to approve.* (1) At the request of the family, the HA may approve an over-FMR tenancy in accordance with this section.

(2) Generally, the HA is not required to approve any over-FMR tenancy. However, the HA must approve an over-FMR tenancy in accordance with this section, if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8.

(b) *Requirements.—(1) Ten percent limit.* The HA may not approve

additional over-FMR tenancies if the number of such tenancies currently is ten percent or more of the number of incremental certificate units under the HUD-approved budget for the HA certificate program. "Incremental units" means the number of budgeted certificate units minus any units for which HUD provided tenant-based program funding designated for families previously residing in housing with Section 8 project-based assistance.

(2) *Affordability of family share.* The HA may not approve an over-FMR tenancy unless the HA determines that the initial family share is reasonable. In making this determination, the HA must take into account other family expenses, such as child care, unreimbursed medical expenses, and other appropriate family expenses as determined by the HA.

(c) *Amount of assistance.* During an over-FMR tenancy, the amount of the housing assistance payment is determined in accordance with § 982.505(c).

(d) *HA administrative plan.* (1) The administrative plan must cover HA policies on approval and administration of over-FMR tenancies.

(2) The plan must state how the HA decides whether to approve an over-FMR tenancy at the family's request (within the program limit stated in paragraph (b)(1) of this section). Such policy may be based on first-come, first-served; on an HA determined system of preferences; or on discretionary case-by-case consideration of individual requests.

**§ 982.507 Regular tenancy: How to calculate housing assistance payment.**

The monthly housing assistance payment equals the gross rent, minus the higher of:

- (a) The total tenant payment; or
- (b) The minimum rent as required by law.

**§ 982.508 Regular tenancy: Limit on initial rent to owner.**

(a) *FMR/exception rent limit.* (1) The initial gross rent for any unit may not exceed the FMR/exception rent limit on the date the HA approves the lease.

(2) The FMR/exception rent limit for a family is the lower of:

- (i) The FMR/exception rent limit for the family unit size; or
- (ii) The FMR/exception rent limit for the unit size rented by the family.

(b) *Reasonable rent.* The initial rent to owner may not exceed a reasonable rent as determined in accordance with § 982.503.

**§ 982.509 Regular tenancy: Annual adjustment of rent to owner.**

(a) *When rent is adjusted.* At each annual anniversary date of the HAP contract, the HA must adjust the rent to owner at the request of the owner in accordance with this section.

(b) *Amount of annual adjustment.* (1) The adjusted rent to owner equals the lesser of:

- (i) The pre-adjustment rent to owner multiplied by the applicable Section 8 annual adjustment factor, published by HUD in the **Federal Register**, that is in effect 60 days before the HAP contract anniversary;
- (ii) The reasonable rent (as most recently determined or redetermined by the HA in accordance with § 982.503); or

(iii) The amount requested by the owner.

(2) In making the annual adjustment, the pre-adjustment rent to owner does not include any previously approved special adjustments.

(3) The rent to owner may be adjusted up or down in accordance with this section.

(4) Notwithstanding paragraph (b)(1) of this section, the rent to owner for a unit must not be increased at the annual anniversary date unless:

- (i) The owner requests the adjustment by giving notice to the HA; and
- (ii) During the year before the annual anniversary date, the owner has complied with all requirements of the HAP contract, including compliance with the HQS.

(5) The rent to owner will only be increased for housing assistance payments covering months commencing on the later of:

- (i) The contract anniversary date; or
- (ii) At least sixty days after the HA receives the owner's request.

(6) To receive an increase resulting from the annual adjustment for an annual anniversary date, the owner must request the increase at least sixty days before the next annual anniversary date.

**§ 982.510 Regular tenancy: Special adjustment of rent to owner.**

(a) *Substantial and general cost increases.* (1) At HUD's sole discretion, HUD may approve a special adjustment of the rent to owner to reflect increases in the actual and necessary costs of owning and maintaining the unit because of substantial and general increases in:

- (i) Real property taxes;
- (ii) Special governmental assessments;
- (iii) Utility rates; or
- (iv) Costs of utilities not covered by regulated rates.

(2) An HA may make a special adjustment of the rent to owner only if the adjustment has been approved by HUD. The owner does not have any right to receive a special adjustment.

(b) *Reasonable rent.* The adjusted rent may not exceed the reasonable rent. The owner may not receive a special adjustment if the adjusted rent would exceed the reasonable rent.

(c) *Term of special adjustment.* (1) The HA may withdraw or limit the term of any special adjustment.

(2) If a special adjustment is approved to cover temporary or one-time costs, the special adjustment is only a temporary or one-time increase of the rent to owner.

**§ 982.511 Rent to owner: Effect of rent control.**

In addition to the rent reasonableness limit under this subpart, the amount of rent to owner also may be subject to rent control limits under State or local law.

**§ 982.512 Rent to owner in subsidized projects.**

(a) *Subsidized rent.* (1) The rent to owner in an insured or noninsured Section 236 project, a Section 515 project of the Rural Development Administration, a Section 202 project or a Section 221(d)(3) below market interest rate project is the subsidized rent.

(2) During the assisted tenancy, the rent to owner must be adjusted to follow the subsidized rent, and must not be adjusted by applying the published Section 8 annual adjustment factors. For such units, special adjustments may not be granted. The following sections do not apply to a tenancy in a subsidized project described in paragraph (a)(1) of this section: § 982.509 (annual adjustment) and § 982.510 (special adjustment).

(b) *HOME.* For units assisted under the HOME program, rents are subject to requirements of the HOME program (24 CFR 92.252).

(c) *Other subsidy: HA discretion to reduce rent.* In the case of a regular tenancy, the HA may require the owner to reduce the initial rent to owner because of other governmental subsidies, including tax credit or tax exemption, grants or other subsidized financing.

**§ 982.513 Other fees and charges.**

(a) The cost of meals or supportive services may not be included in the rent to owner, and the value of meals or supportive services may not be included in the calculation of reasonable rent.

(b) The lease may not require the tenant or family members to pay charges

for meals or supportive services. Non-payment of such charges is not grounds for termination of tenancy.

(c) The owner may not charge the tenant extra amounts for items customarily included in rent in the locality, or provided at no additional cost to unsubsidized tenants in the premises.

**§ 982.514 Distribution of housing assistance payment.**

The monthly housing assistance payment is distributed as follows:

(a) The HA pays the owner the lesser of the housing assistance payment or the rent to owner.

(b) If the housing assistance payment exceeds the rent to owner, the HA may pay the balance of the housing assistance payment either to the family or directly to the utility supplier to pay the utility bill on behalf of the family.

**§ 982.515 Family share: Family responsibility.**

(a) The family share is calculated by subtracting the amount of the housing assistance payment from the gross rent.

(b) The HA may not use housing assistance payments or other program funds (including any administrative fee reserve) to pay any part of the family share. Payment of the family share is the responsibility of the family.

**§ 982.516 Family income and composition: Regular and interim examinations.**

(a) *HA responsibility for reexamination and verification.* (1) The HA's responsibilities for reexamining family income and composition are specified in 24 CFR part 5, subpart F.

(2) The HA must obtain and document in the tenant file third party verification of the following factors, or must document in the tenant file why third party verification was not available:

- (i) Reported family annual income;
- (ii) The value of assets;
- (iii) Expenses related to deductions from annual income; and
- (iv) Other factors that affect the determination of adjusted income.

(b) *When HA conducts interim reexamination.* (1) At any time, the HA may conduct an interim reexamination of family income and composition.

(2) At any time, the family may request an interim determination of family income or composition because of any changes since the last determination. The HA must make the interim determination within a reasonable time after the family request.

(3) Interim examinations must be conducted in accordance with policies in the HA administrative plan.

(c) *Family reporting of change.* The HA must adopt policies prescribing when and under what conditions the family must report a change in family income or composition.

(d) *Effective date of reexamination.* (1) The HA must adopt policies prescribing how to determine the effective date of a change in the housing assistance payment resulting from an interim redetermination.

(2) At the effective date of a regular or interim reexamination, the HA must make appropriate adjustments in the housing assistance payment and family unit size.

(e) *Family member income.* Family income must include income of all family members, including family members not related by blood or marriage. If any new family member is added, family income must include any income of the additional family member. The HA must conduct a reexamination to determine such additional income, and must make appropriate adjustments in the housing assistance payment and family unit size.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2577-0169.)

**§ 982.517 Utility allowance schedule.**

(a) *Maintaining schedule.* (1) The HA must maintain a utility allowance schedule for all tenant-paid utilities (except telephone), for cost of tenant-supplied refrigerators and ranges, and for other tenant-paid housing services (e.g., trash collection (disposal of waste and refuse)).

(2) The HA must give HUD a copy of the utility allowance schedule. At HUD's request, the HA also must provide any information or procedures used in preparation of the schedule.

(b) *How allowances are determined.* (1) The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the HA must use normal patterns of consumption for the community as a whole and current utility rates.

(2)(i) An HA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with the housing quality standards. However, the HA may not provide any allowance for non-essential utility costs, such as costs of cable or satellite television.

(ii) In the utility allowance schedule, the HA must classify utilities and other housing services according to the following general categories: space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services. The HA must provide a utility allowance for tenant-paid air-conditioning costs if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air conditioners.

(3) The cost of each utility and housing service category must be stated separately. For each of these categories, the utility allowance schedule must take into consideration unit size (by number of bedrooms), and unit types (e.g., apartment, row-house, town house, single-family detached, and manufactured housing) that are typical in the community.

(4) The utility allowance schedule must be prepared and submitted in accordance with HUD requirements on the form prescribed by HUD.

(c) *Revisions of utility allowance schedule.* (1) An HA must review its schedule of utility allowances each year, and must revise its allowance for a utility category if there has been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised. The HA must maintain information supporting its annual review of utility allowances and any revisions made in its utility allowance schedule.

(2) At HUD's direction, the HA must revise the utility allowance schedule to correct any errors, or as necessary to update the schedule.

(d) *Use of utility allowance schedule.*

(1) The HA must use the appropriate utility allowance for the size of dwelling unit actually leased by the family (rather than the family unit size as determined under the HA subsidy standards).

(2) At reexamination, the HA must use the HA current utility allowance schedule.

(e) *Higher utility allowance as reasonable accommodation for a person with disabilities.* On request from a family that includes a person with disabilities, the HA must approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation in accordance with 24 CFR part 8 to make the program accessible to and usable by the family member with a disability.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2577-0169.)

56. In § 982.552, paragraph (a)(1) is revised to read as follows:

**§ 982.552 HA denial or termination of assistance for family.**

(a) \* \* \*

(1) An HA may deny assistance for an applicant or terminate assistance for a participant under the programs because of the family's action or failure to act as described in this section or § 982.553. The provisions of this section do not affect denial or termination of assistance for grounds other than action or failure to act by the family.

\* \* \* \* \*

57. A new subpart M is added, to read as follows:

**Subpart M—Special Housing Types**

**§ 982.601 Overview.**

(a) *Special housing types.* This subpart describes program requirements for special housing types. The following are the special housing types:

- (1) Single room occupancy (SRO) housing;
- (2) Congregate housing;
- (3) Group home;
- (4) Shared housing;
- (5) Cooperative (including mutual housing);
- (6) Manufactured home.

(b) *HA choice to offer special housing type.* (1) The HA may permit a family to use any of the following special housing types in accordance with requirements of the program: single room occupancy housing, congregate housing, group home, shared housing or cooperative housing.

(2) In general, the HA is not required to permit use of any of these special housing types in its program.

(3) The HA must permit use of any special housing type if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8.

(4) For occupancy of a manufactured home, see § 982.620(a).

(c) *Family choice of housing and housing type.* The HA may not set aside program funding for special housing types, or for a specific special housing type. The family chooses whether to rent housing that qualifies as a special housing type under this subpart, or as any specific special housing type, or to rent other eligible housing in accordance with requirements of the program. The HA may not restrict the family's freedom to choose among

available units in accordance with § 982.353.

(d) *Applicability of requirements.* Except as modified by this subpart, requirements in the other subparts of this part apply to the special housing types. Provisions in this subpart only apply to a specific special housing type. The housing type is noted in the title of each section.

**Single Room Occupancy (SRO)**

**§ 982.602 SRO: General.**

(a) *Who may reside in an SRO?* A single person may reside in an SRO housing unit.

(b) *When may a person rent an SRO housing unit?* A single person may rent a unit in SRO housing only if:

- (1) HUD determines there is significant demand for SRO units in the area;
- (2) The HA and the unit of general local government approve providing assistance for SRO housing under the program; and
- (3) The unit of general local government and the HA certify to HUD that the property meets applicable local health and safety standards for SRO housing.

**§ 982.603 SRO: Lease and HAP contract.**

For SRO housing, there is a separate lease and HAP contract for each assisted person.

**§ 982.604 SRO: Rent and housing assistance payment.**

(a) *SRO FMR/exception rent limit.* The FMR/exception rent limit for SRO housing is 75 percent of the zero-bedroom FMR/exception rent limit.

(b) *Regular tenancy: Limit on initial gross rent.* For a regular tenancy in the certificate program, the initial gross rent may not exceed the FMR/exception rent limit for SRO housing.

(c) *Voucher program: Payment standard.* The HA must adopt a payment standard for persons who occupy SRO housing with assistance under the voucher program. The SRO payment standard may not exceed the FMR/exception rent limit for SRO housing. While an assisted person resides in SRO housing, the SRO payment standard must be used to calculate the housing assistance payment.

(d) *Over-FMR tenancy: Payment standard.* While the assisted person resides in SRO housing with assistance under an over-FMR tenancy in the certificate program, the payment standard for the person is the SRO FMR/exception rent limit.

(e) *Utility allowance.* The utility allowance for an assisted person

residing in SRO housing is 75 percent of the zero bedroom utility allowance.

**§ 982.605 SRO: Housing quality standards.**

(a) *HQS standards for SRO.* The HQS in § 982.401 apply to SRO housing. However, the standards in this section apply in place of § 982.401(b) (sanitary facilities), § 982.401(c) (food preparation and refuse disposal), and § 982.401(d) (space and security). Since the SRO units will not house children, the housing quality standards in § 982.401(j), concerning lead-based paint, do not apply to SRO housing.

(b) *Performance requirements.* (1) SRO housing is subject to the additional performance requirements in this paragraph (b).

(2) Sanitary facilities, and space and security characteristics must meet local code standards for SRO housing. In the absence of applicable local code standards for SRO housing, the following standards apply:

(i) *Sanitary facilities.* (A) At least one flush toilet that can be used in privacy, lavatory basin, and bathtub or shower, in proper operating condition, must be supplied for each six persons or fewer residing in the SRO housing.

(B) If SRO units are leased only to males, flush urinals may be substituted for not more than one-half the required number of flush toilets. However, there must be at least one flush toilet in the building.

(C) Every lavatory basin and bathtub or shower must be supplied at all times with an adequate quantity of hot and cold running water.

(D) All of these facilities must be in proper operating condition, and must be adequate for personal cleanliness and the disposal of human waste. The facilities must utilize an approvable public or private disposal system.

(E) Sanitary facilities must be reasonably accessible from a common hall or passageway to all persons sharing them. These facilities may not be located more than one floor above or below the SRO unit. Sanitary facilities may not be located below grade unless the SRO units are located on that level.

(ii) *Space and security.* (A) No more than one person may reside in an SRO unit.

(B) An SRO unit must contain at least one hundred ten square feet of floor space.

(C) An SRO unit must contain at least four square feet of closet space for each resident (with an unobstructed height of at least five feet). If there is less closet space, space equal to the amount of the deficiency must be subtracted from the area of the habitable room space when determining the amount of floor space

in the SRO unit. The SRO unit must contain at least one hundred ten square feet of remaining floor space after subtracting the amount of the deficiency in minimum closet space.

(D) Exterior doors and windows accessible from outside an SRO unit must be lockable.

(3) Access. (i) Access doors to an SRO unit must have locks for privacy in proper operating condition.

(ii) An SRO unit must have immediate access to two or more approved means of exit, appropriately marked, leading to safe and open space at ground level, and any means of exit required by State and local law.

(iii) The resident must be able to access an SRO unit without passing through any other unit.

(4) *Sprinkler system.* A sprinkler system that protects all major spaces, hard wired smoke detectors, and such other fire and safety improvements as State or local law may require must be installed in each building. The term "major spaces" means hallways, large common areas, and other areas specified in local fire, building, or safety codes.

### **Congregate Housing**

#### **§ 982.606 Congregate housing: Who may reside in congregate housing.**

(a) An elderly person or a person with disabilities may reside in a congregate housing unit.

(b)(1) If approved by the HA, a family member or live-in aide may reside with the elderly person or person with disabilities.

(2) The HA must approve a live-in aide if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8. See § 982.316 concerning occupancy by a live-in aide.

#### **§ 982.607 Congregate housing: Lease and HAP contract.**

For congregate housing, there is a separate lease and HAP contract for each assisted family.

#### **§ 982.608 Congregate housing: Rent and housing assistance payment; FMR/exception rent limit.**

(a) Unless there is a live-in aide:

(1) The FMR/exception rent limit for a family that resides in a congregate housing unit is the zero-bedroom FMR/exception rent limit.

(2) However, if there are two or more rooms in the unit (not including kitchen or sanitary facilities), the FMR/exception rent limit for a family that resides in a congregate housing unit is the one-bedroom FMR/exception rent limit.

(b) If there is a live-in aide, the live-in aide must be counted in determining the family unit size.

#### **§ 982.609 Congregate housing: Housing quality standards.**

(a) *HQS standards for congregate housing.* The HQS in § 982.401 apply to congregate housing. However, the standards in this section apply in place of § 982.401(c) (food preparation and refuse disposal). Congregate housing is not subject to the HQS acceptability requirement in § 982.401(d)(2)(i) that the dwelling unit must have a kitchen area.

(b) *Food preparation and refuse disposal: Additional performance requirements.* The following additional performance requirements apply to congregate housing:

(1) The unit must contain a refrigerator of appropriate size.

(2) There must be central kitchen and dining facilities on the premises. These facilities:

(i) Must be located within the premises, and accessible to the residents;

(ii) Must contain suitable space and equipment to store, prepare, and serve food in a sanitary manner;

(iii) Must be used to provide a food service that is provided for the residents, and that is not provided by the residents; and

(iv) Must be for the primary use of residents of the congregate units and be sufficient in size to accommodate the residents.

(3) There must be adequate facilities and services for the sanitary disposal of food waste and refuse, including facilities for temporary storage where necessary.

### **Group Home**

#### **§ 982.610 Group home: Who may reside in a group home.**

(a) An elderly person or a person with disabilities may reside in a State-approved group home.

(b)(1) If approved by the HA, a live-in aide may reside with a person with disabilities.

(2) The HA must approve a live-in aide if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8. See § 982.316 concerning occupancy by a live-in aide.

(c) Except for a live-in aide, all residents of a group home, whether assisted or unassisted, must be elderly persons or persons with disabilities.

(d) Persons residing in a group home must not require continual medical or nursing care.

(e) Persons who are not assisted under the tenant-based program may reside in a group home.

(f) No more than 12 persons may reside in a group home. This limit covers all persons who reside in the unit, including assisted and unassisted residents and any live-in aide.

#### **§ 982.611 Group home: Lease and HAP contract.**

For assistance in a group home, there is a separate HAP contract and lease for each assisted person.

#### **§ 982.612 Group home: State approval of group home.**

A group home must be licensed, certified, or otherwise approved in writing by the State (e.g., Department of Human Resources, Mental Health, Retardation, or Social Services) as a group home for elderly persons or persons with disabilities.

#### **§ 982.613 Group home: Rent and housing assistance payment.**

(a) *Meaning of pro-rata portion.* For a group home, the term "pro-rata portion" means the ratio derived by dividing the number of persons in the assisted household by the total number of residents (assisted and unassisted) residing in the group home. The number of persons in the assisted household equals one assisted person plus any HA-approved live-in aide.

(b) *Rent to owner: Reasonable rent limit.* (1) The rent to owner for an assisted person may not exceed the pro-rata portion of the reasonable rent for the group home.

(2) The reasonable rent for a group home is determined in accordance with § 982.503. In determining reasonable rent for the group home, the HA must consider whether sanitary facilities, and facilities for food preparation and service, are common facilities or private facilities.

(c) *Maximum subsidy.*—(1) *Family unit size.* (i) Unless there is a live-in aide, the family unit size is zero or one bedroom.

(ii) If there is a live-in aide, the live-in aide must be counted in determining the family unit size.

(2) *Regular tenancy: Limit on initial gross rent.* For a person who resides in a group home under a regular tenancy in the certificate program, the initial gross rent may not exceed either:

(i) The FMR/exception rent limit for the family unit size; or

(ii) The pro-rata portion of the FMR/exception rent limit for the group home size.

(3) *Voucher tenancy: Payment standard.* For a voucher tenancy, the

payment standard for a person who resides in a group home is the lower of:

(i) The payment standard for the family unit size; or

(ii) The pro-rata portion of the payment standard for the group home size.

(4) *Over-FMR tenancy: Payment standard.* For an over-FMR tenancy, the payment standard for a person who resides in a group home is the lower of:

(i) The FMR/exception rent limit for the family unit size; or

(ii) The pro-rata portion of the FMR/exception rent limit for the group home size.

(d) *Utility allowance.* The utility allowance for each assisted person residing in a group home is the pro-rata portion of the utility allowance for the group home unit size.

**§ 982.614 Group home: Housing quality standards.**

(a) *Compliance with HQS.* The HA may not give approval to reside in a group home unless the unit, including the portion of the unit available for use by the assisted person under the lease, meets the housing quality standards.

(b) *Applicable HQS standards.* (1) The HQS in § 982.401 apply to assistance in a group home. However, the standards in this section apply in place of § 982.401(b) (sanitary facilities), § 982.401(c) (food preparation and refuse disposal), § 982.401(d) (space and security), § 982.401(g) (structure and materials) and § 982.401(l) (site and neighborhood).

(2) The entire unit must comply with the HQS.

(c) *Additional performance requirements.* The following additional performance requirements apply to a group home:

(1) *Sanitary facilities.* (i) There must be a bathroom in the unit. The unit must contain, and an assisted resident must have ready access to:

(A) A flush toilet that can be used in privacy;

(B) A fixed basin with hot and cold running water; and

(C) A shower or bathtub with hot and cold running water.

(ii) All of these facilities must be in proper operating condition, and must be adequate for personal cleanliness and the disposal of human waste. The facilities must utilize an approvable public or private disposal system.

(iii) The unit may contain private or common sanitary facilities. However, the facilities must be sufficient in number so that they need not be shared by more than four residents of the group home.

(iv) Sanitary facilities in the group home must be readily accessible to and

usable by residents, including persons with disabilities.

(2) *Food preparation and service.* (i) The unit must contain a kitchen and a dining area. There must be adequate space to store, prepare, and serve foods in a sanitary manner.

(ii) Food preparation and service equipment must be in proper operating condition. The equipment must be adequate for the number of residents in the group home. The unit must contain the following equipment:

(A) A stove or range, and oven;

(B) A refrigerator; and

(C) A kitchen sink with hot and cold running water. The sink must drain into an approvable public or private disposal system.

(iii) There must be adequate facilities and services for the sanitary disposal of food waste and refuse, including facilities for temporary storage where necessary.

(iv) The unit may contain private or common facilities for food preparation and service.

(3) *Space and security.* (i) The unit must provide adequate space and security for the assisted person.

(ii) The unit must contain a living room, kitchen, dining area, bathroom, and other appropriate social, recreational or community space. The unit must contain at least one bedroom of appropriate size for each two persons.

(iii) Doors and windows that are accessible from outside the unit must be lockable.

(4) *Structure and material.* (i) The unit must be structurally sound to avoid any threat to the health and safety of the residents, and to protect the residents from the environment.

(ii) Ceilings, walls, and floors must not have any serious defects such as severe bulging or leaning, loose surface materials, severe buckling or noticeable movement under walking stress, missing parts or other significant damage. The roof structure must be firm, and the roof must be weathertight. The exterior or wall structure and exterior wall surface may not have any serious defects such as serious leaning, buckling, sagging, cracks or large holes, loose siding, or other serious damage.

The condition and equipment of interior and exterior stairways, halls, porches, walkways, etc., must not present a danger of tripping or falling. Elevators must be maintained in safe operating condition.

(iii) The group home must be accessible to and usable by a resident with disabilities.

(5) *Site and neighborhood.* The site and neighborhood must be reasonably free from disturbing noises and

reverberations and other hazards to the health, safety, and general welfare of the residents. The site and neighborhood may not be subject to serious adverse environmental conditions, natural or manmade, such as dangerous walks or steps, instability, flooding, poor drainage, septic tank back-ups, sewage hazards or mud slides, abnormal air pollution, smoke or dust, excessive noise, vibrations or vehicular traffic, excessive accumulations of trash, vermin or rodent infestation, or fire hazards. The unit must be located in a residential setting.

**Shared Housing**

**§ 982.615 Shared housing: Occupancy.**

(a) *Sharing a unit.* An assisted family may reside in shared housing. In shared housing, an assisted family shares a unit with the other resident or residents of the unit. The unit may be a house or an apartment.

(b) *Who may share a dwelling unit with assisted family?* (1) If approved by the HA, a live-in aide may reside with the family to care for a person with disabilities. The HA must approve a live-in aide if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8. See § 982.316 concerning occupancy by a live-in aide.

(2) Other persons who are assisted under the tenant-based program, or other persons who are not assisted under the tenant-based program, may reside in a shared housing unit.

(3) The owner of a shared housing unit may reside in the unit. A resident owner may enter into a HAP contract with the HA. However, housing assistance may not be paid on behalf of an owner. An assisted person may not be related by blood or marriage to a resident owner.

**§ 982.616 Shared housing: Lease and HAP contract.**

For assistance in a shared housing unit, there is a separate HAP contract and lease for each assisted family.

**§ 982.617 Shared housing: Rent and housing assistance payment.**

(a) *Meaning of pro-rata portion.* For shared housing, the term "pro-rata portion" means the ratio derived by dividing the number of bedrooms in the private space available for occupancy by a family by the total number of bedrooms in the unit. For example, for a family entitled to occupy three bedrooms in a five bedroom unit, the ratio would be 3/5.

(b) *Rent to owner: Reasonable rent.* (1) The rent to owner for the family may

not exceed the pro-rata portion of the reasonable rent for the shared housing dwelling unit.

(2) The reasonable rent is determined in accordance with § 982.503.

(c) *Maximum subsidy.*—(1) *Regular tenancy: Limit on initial gross rent.* For a regular tenancy under the certificate program, the initial gross rent may not exceed either:

(i) The FMR/exception rent limit for the family unit size; or

(ii) The pro-rata portion of the FMR/exception rent limit for the shared housing unit size.

(2) *Voucher or over-FMR tenancy: Payment standard.* For a voucher tenancy or an over-FMR tenancy, the payment standard is the lower of:

(i) The payment standard for the family unit size; or

(ii) The pro-rata portion of the payment standard for the shared housing unit size.

(3) *Live-in aide.* If there is a live-in aide, the live-in aide must be counted in determining the family unit size.

(d) *Utility allowance.* The utility allowance for an assisted family residing in shared housing is the pro-rata portion of the utility allowance for the shared housing unit.

#### **§ 982.618 Shared housing: Housing quality standards.**

(a) *Compliance with HQS.* The HA may not give approval to reside in shared housing unless the entire unit, including the portion of the unit available for use by the assisted family under its lease, meets the housing quality standards.

(b) *Applicable HQS standards.* The HQS in § 982.401 apply to assistance in shared housing. However, the HQS standards in this section apply in place of § 982.401(d) (space and security).

(c) *Facilities available for family.* The facilities available for the use of an assisted family in shared housing under the family's lease must include (whether in the family's private space or in the common space) a living room, sanitary facilities in accordance with § 982.401(b), and food preparation and refuse disposal facilities in accordance with § 982.401(c).

(d) *Space and security: Performance requirements.* (1) The entire unit must provide adequate space and security for all its residents (whether assisted or unassisted).

(2)(i) Each unit must contain private space for each assisted family, plus common space for shared use by the residents of the unit. Common space must be appropriate for shared use by the residents.

(ii) The private space for each assisted family must contain at least one

bedroom for each two persons in the family. The number of bedrooms in the private space of an assisted family may not be less than the family unit size.

(iii) A zero or one bedroom unit may not be used for shared housing.

#### **Cooperative**

##### **§ 982.619 Cooperative housing.**

(a) *When cooperative housing may be used.* A family may reside in cooperative housing if the HA determines that:

(1) Assistance under the program will help maintain affordability of the cooperative unit for low-income families; and

(2) The cooperative has adopted requirements to maintain continued affordability for low-income families after transfer of a cooperative member's interest in a cooperative unit (such as a sale of the resident's share in a cooperative corporation).

(b) *Rent to owner.* (1) The reasonable rent for a cooperative unit is determined in accordance with § 982.503. For cooperative housing, the rent to owner is the monthly carrying charge under the occupancy agreement/lease between the member and the cooperative.

(2) The carrying charge consists of the amount assessed to the member by the cooperative for occupancy of the housing. The carrying charge includes the member's share of the cooperative debt service, operating expenses, and necessary payments to cooperative reserve funds. However, the carrying charge does not include down-payments or other payments to purchase the cooperative unit, or to amortize a loan to the family for this purpose.

(3) Gross rent is the carrying charge plus any utility allowance.

(4) For a regular tenancy under the certificate program, rent to owner is adjusted in accordance with § 982.509 (annual adjustment) and § 982.510 (special adjustments). For a cooperative, adjustments are applied to the carrying charge as determined in accordance with this section.

(5) The occupancy agreement/lease and other appropriate documents must provide that the monthly carrying charge is subject to Section 8 limitations on rent to owner.

(c) *Housing assistance payment.* The amount of the housing assistance payment is determined in accordance with subpart K of this part.

(d) *Live-in aide.* (1) If approved by the HA, a live-in aide may reside with the family to care for a person with disabilities. The HA must approve a live-in aide if needed as a reasonable accommodation so that the program is

readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8. See § 982.316 concerning occupancy by a live-in aide.

(2) If there is a live-in aide, the live-in aide must be counted in determining the family unit size.

#### **Manufactured Home**

##### **§ 982.620 Manufactured home: Applicability of requirements.**

(a) *Assistance for resident of manufactured home.* (1) A family may reside in a manufactured home with assistance under the program.

(2) The HA must permit a family to lease a manufactured home and space with assistance under the program.

(3) The HA may provide assistance for a family that owns the manufactured home and leases only the space. The HA is not required to provide such assistance under the program.

(b) *Applicability.* (1) The HQS in § 982.621 always apply when assistance is provided to a family occupying a manufactured home (under paragraph (a)(2) or (a)(3) of this section).

(2) Sections 982.622 to 982.624 only apply when assistance is provided to a manufactured home owner to lease a manufactured home space.

(c) *Live-in aide.* (1) If approved by the HA, a live-in aide may reside with the family to care for a person with disabilities. The HA must approve a live-in aide if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8. See § 982.316 concerning occupancy by a live-in aide.

(2) If there is a live-in aide, the live-in aide must be counted in determining the family unit size.

##### **§ 982.621 Manufactured home: Housing quality standards.**

A manufactured home must meet all the HQS performance requirements and acceptability criteria in § 982.401. A manufactured home also must meet the following requirements:

(a) *Performance requirement.* A manufactured home must be placed on the site in a stable manner, and must be free from hazards such as sliding or wind damage.

(b) *Acceptability criteria.* A manufactured home must be securely anchored by a tie-down device that distributes and transfers the loads imposed by the unit to appropriate ground anchors to resist wind overturning and sliding.



**Manufactured Home Space Rental****§ 982.622 Manufactured home space rental: Rent to owner.**

(a) *What is included.* (1) Rent to owner for rental of a manufactured home space includes payment for maintenance and services that the owner must provide to the tenant under the lease for the space.

(2) Rent to owner does not include the costs of utilities and trash collection for the manufactured home. However, the owner may charge the family a separate fee for the cost of utilities or trash collection provided by the owner.

(b) *Reasonable rent.* (1) During the assisted tenancy, the rent to owner for the manufactured home space may not exceed a reasonable rent as determined in accordance with this section. Section 982.503 is not applicable.

(2) The HA may not approve a lease for a manufactured home space until the HA determines that the initial rent to owner for the space is a reasonable rent. At least annually during the assisted tenancy, the HA must redetermine that the current rent to owner is a reasonable rent.

(3) The HA must determine whether the rent to owner for the manufactured home space is a reasonable rent in comparison to rent for other comparable manufactured home spaces. To make this determination, the HA must consider the location and size of the space, and any services and maintenance to be provided by the owner in accordance with the lease (without a fee in addition to the rent).

(4) By accepting each monthly housing assistance payment from the HA, the owner of the manufactured home space certifies that the rent to owner for the space is not more than rent charged by the owner for unassisted rental of comparable spaces in the same manufactured home park or elsewhere. The owner must give the HA information, as requested by the HA, on rents charged by the owner for other manufactured home spaces.

**§ 982.623 Manufactured home space rental: Housing assistance payment.**

(a) *Fair market rent.* The FMR for a manufactured home space is determined in accordance with 24 CFR 888.113(e). Exception rents do not apply to rental of a manufactured home space.

(b) *Housing assistance payment: For regular certificate tenancy.* (1) *Limit on initial rent.* For a regular tenancy, the initial rent to owner for leasing a manufactured home space may not exceed the published FMR for a manufactured home space.

(2) *Formula.* (i) During the term of a regular tenancy, the amount of the

monthly housing assistance payment equals the lesser of paragraphs (b)(2)(i)(A) or (b)(2)(ii)(B) of this section:

(A) Manufactured home space cost minus the higher of:

- (1) The total tenant payment; or
- (2) The minimum rent as required by law.

(B) The rent to owner for the manufactured home space.

(ii) "Manufactured home space cost" means the sum of:

- (A) The amortization cost;
- (B) The utility allowance; and
- (C) The rent to owner for the manufactured home space.

(c) *Housing assistance payment: For voucher tenancy or over-FMR tenancy.*

(1) *Payment standard.* For a voucher tenancy or an over-FMR tenancy, the payment standard is used to calculate the monthly housing assistance payment for a family. The payment standard for a family renting a manufactured home space is the published FMR for rental of a manufactured home space. The amount of the payment standard is determined in accordance with § 982.505(d)(4) and (d)(5).

(2) *Subsidy calculation for voucher tenancy.* During the term of a voucher tenancy, the amount of the monthly housing assistance payment for a family equals the lesser of paragraphs (c)(2)(i) or (c)(2)(ii) of this section:

(i) An amount obtained by subtracting 30 percent of the family's monthly adjusted gross income from the sum of:

- (A) The amortization cost;
- (B) The utility allowance; and
- (C) The payment standard.

(ii) The monthly gross rent for the manufactured home space minus the minimum rent. For a voucher tenancy, the minimum rent is the higher of:

- (A) 10 percent of monthly income (gross income); or
- (B) A higher minimum rent as required by law.

(3) *Subsidy calculation for over-FMR tenancy.* During the term of an over-FMR tenancy, the amount of the monthly housing assistance payment for a family equals the lesser of paragraphs (c)(3)(i) or (c)(3)(ii) of this section:

(i) An amount obtained by subtracting the family's total tenant payment from the sum of:

- (A) The amortization cost;
- (B) The utility allowance; and
- (C) The payment standard.

(ii) The monthly gross rent for the manufactured home space minus the minimum rent as required by law.

(d) *Amortization cost.* (1) In calculating the subsidy payment for a voucher tenancy, an over-FMR tenancy, or a regular tenancy under the certificate

program, the amortization cost may include debt service to amortize costs (other than furniture costs) included in the purchase price of the manufactured home. The debt service includes the payment for principal and interest on the loan. The debt service amount must be reduced by 15 percent to exclude debt service to amortize the cost of furniture, unless the HA determines that furniture was not included in the purchase price.

(2) The amount of the amortization cost is the debt service established at time of application to a lender for financing purchase of the manufactured home if monthly payments are still being made. Any increase in debt service due to refinancing after purchase of the home is not included in the amortization cost.

(3) Debt service for set-up charges incurred by a family that relocates its home may be included in the monthly amortization payment made by the family. In addition, set-up charges incurred before the family became an assisted family may be included in the amortization cost if monthly payments are still being made to amortize such charges.

(e) *Annual income.* In determining a family's annual income, the value of equity in the manufactured home owned by the assisted family, and in which the family resides, is not counted as a family asset.

**§ 982.624 Manufactured home space rental: Utility allowance schedule.**

The HA must establish utility allowances for manufactured home space rental. For the first twelve months of the initial lease term only, the allowances must include a reasonable amount for utility hook-up charges payable by the family if the family actually incurs the expenses because of a move. Allowances for utility hook-up charges do not apply to a family that leases a manufactured home space in place. Utility allowances for manufactured home space must not cover costs payable by a family to cover the digging of a well or installation of a septic system.

**PART 983—SECTION 8 PROJECT-BASED CERTIFICATE PROGRAM**

58. The authority citation for part 983 continues to read as follows:

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

59. In part 983, the table of contents entries for subparts A and E are revised, and the table of contents entries for subpart F are added to read as follows:

## PART 983—SECTION 8 PROJECT-BASED CERTIFICATE PROGRAM

### SUBPART A—GENERAL INFORMATION

- 983.1 Purpose and applicability.
- 983.2 Additional definitions.
- 983.3 Information to be submitted to HUD by the HA concerning its plan to attach assistance to units.
- 983.4 HUD review of HA plans to attach assistance to units.
- 983.5 Housing quality standards.
- 983.6 Site and neighborhood standards.
- 983.7 Eligible and ineligible properties and HA-owned units.
- 983.8 Rehabilitation: Minimum expenditure requirement.
- 983.9 Prohibition against new construction or rehabilitation with U.S. Housing Act of 1937 assistance and use of flexible subsidy; pledge of Agreement or HAP contract.
- 983.10 Displacement, relocation, and acquisition.
- 983.11 Other Federal requirements.
- 983.12 Program accounts and records.
- 983.13 Special housing types.

\* \* \* \* \*

### SUBPART E—MANAGEMENT

- 983.201 Responsibilities of the HA.
- 983.202 Responsibilities of the owner.
- 983.203 Family participation.
- 983.204 Maintenance, operation and inspections.
- 983.205 Overcrowded and underoccupied units.
- 983.206 Assisted tenancy and termination of tenancy.
- 983.207 Informal review or hearing

### SUBPART F—RENT AND HOUSING ASSISTANCE PAYMENT

- 983.251 Applicability.
- 983.252 Limits on initial rent to owner.
- 983.253 Initial rent: Who approves.
- 983.254 Annual adjustment of rent to owner.
- 983.255 Special adjustment of rent to owner.
- 983.256 Reasonable rent.
- 983.257 Other subsidy: Effect on rent to owner.
- 983.258 Rent to owner: Effect of rent control
- 983.259 Correction of rent.
- 983.260 Housing assistance payment: Amount and distribution.
- 983.261 Family share: Family responsibility to pay.
- 983.262 Other fees and charges.

60. Section 983.1 is revised to read as follows:

#### § 983.1 Purpose and applicability.

(a) This part 983 applies to the Section 8 Project-based Certificate (PBC) program, authorized under section 8(d)(2) of the 1937 Act (42 U.S.C. 1437f(d)(2)).

(b)(1) Except as otherwise expressly modified or excluded by this part 983, provisions of 24 CFR part 982 apply to the PBC program.

(2) The following provisions of 24 CFR part 982 do not apply to the PBC program:

- (i) Provisions on tenant-based assistance, on issuance or use of a voucher or certificate; and on portability;
  - (ii) Provisions on voucher tenancy or over-FMR tenancy;
  - (iii) In subpart D, § 982.158(e) (retention of lease, HAP contract and family application);
  - (iv) In subpart E, § 982.202(b)(3) (where family will live); § 982.204(d) (family size); § 982.205(a) (waiting lists);
  - (v) Subpart G, except that the following provisions of subpart G are applicable to the PBC Program: § 982.308 (lease); § 982.311(a), (b), (c) and (d)(1) (when assistance is paid); § 982.312 (absence from unit); and § 982.313 (security deposit);
  - (vi) Subpart H (where family can live and move);
  - (vii) In subpart I, § 982.402(a)(3), § 982.402(c) and (d) (effect of family unit size—subsidy and size of unit); and § 982.403 (termination of HAP contract when unit is too big or too small);
  - (viii) In subpart J, § 982.451(a), § 982.451(b)(2) (term of HAP contract same as lease); § 982.454 (termination of HAP contract because of insufficient funding); § 982.455 (termination of HAP contract; termination notice);
  - (ix) Subpart K, except that the following provisions of Subpart K are applicable to the PBC Program: § 982.504 (for determination of the FMR/exception rent limit); § 982.516 (family income and composition; regular and interim examinations); § 982.517 (utility allowance schedule);
  - (x) In subpart M, all provisions authorizing assistance for shared housing (including § 982.615 through § 982.618); or assistance for a family occupying a manufactured home (including § 982.620 through § 982.624).
- (3) This part does not apply to the voucher program, or to an over-FMR tenancy under the certificate program. Every tenancy assisted in the PBC program is a regular tenancy under the certificate program.

#### § 983.2 [Amended]

61. In § 983.2, the introductory text is amended by removing the reference to “§ 982.3 of this chapter” and adding in its place “24 CFR 982.4”.

62. Section 983.3 is amended by adding new paragraph (d), to read as follows:

#### § 983.3 Information to be submitted to HUD by the HA concerning its plan to attach assistance to units.

\* \* \* \* \*

(d) *Amount of assistance.* The HA must ensure that the amount of assistance that is attached to units is within the amounts available under the ACC.

63. Section 983.5 is revised to read as follows:

#### § 983.5 Housing quality standards.

24 CFR 982.401 (*housing quality standards*) applies to the PBC program. For special housing types, housing quality standards in 24 CFR part 982, subpart M, apply to the PBC program.

64. Section 983.7 is amended as follows:

- a. By revising the introductory text of paragraph (b);
- b. By removing “or” at the end of paragraph (b)(5) and by the removing the period at the end of paragraph (b)(6) and adding a semicolon in its place.
- c. By removing paragraph (b)(7), and by adding new paragraphs (b)(7) and (b)(8);
- d. By removing paragraph (d);
- e. By redesignating paragraph (c) as paragraph (d);
- f. By removing paragraph (f);
- g. By redesignating paragraph (g) as paragraph (f); and
- h. By adding paragraph (c), to read as follows:

#### § 983.7 Eligible and ineligible properties and HA-owned units.

\* \* \* \* \*

(b) An HA may not attach or pay PBC assistance to units in the following types of housing:

\* \* \* \* \*

(7) College or other school dormitories; or

(8) A manufactured home.

\* \* \* \* \*

(c) An HA may not attach or pay PBC assistance to units in any of the following types of subsidized housing:

- (1) Public housing;
- (2) A unit subsidized by any other form of Section 8 assistance (tenant-based or project-based);
- (3) A unit subsidized with any local or State rent subsidy;
- (4) A Section 236 project (insured or noninsured); or a unit subsidized with Section 236 rental assistance payments;
- (5) A Rural Development Administration Section 515 project;
- (6) A unit subsidized with rental assistance payments under Section 521 of the Housing Act of 1949 (a Rural Development Administration Program);
- (7) Housing assisted under former Section 23 of the United States Housing Act of 1937 (before amendment by the Housing and Community Development Act of 1974);
- (8) A Section 221(d)(3) project;

(9) A project with a Section 202 loan;  
 (10) A Section 202 project for non-elderly persons with disabilities (Section 162 assistance);

(11) Section 202 supportive housing for the elderly;

(12) Section 811 supportive housing for persons with disabilities;

(13) A Section 101 rent supplement project;

(14) A unit subsidized with tenant-based assistance under the HOME program; or

(15) Any unit with any other duplicative Federal State, or local housing subsidy, as determined by HUD. For this purpose, "housing subsidy" does not include the housing component of a welfare payment, a social security payment received by the family, or a rent reduction because of a tax credit.

\* \* \* \* \*

#### **§ 983.10 [Amended]**

65. In § 983.10, paragraph (g)(1)(iii)(B) is amended by removing the reference to "24 CFR 813.107" and adding in its place "24 CFR 5.613".

66. Section 983.12 is revised to read as follows:

#### **§ 983.12 Program accounts and records.**

(a) During the term of each assisted lease, and for at least three years thereafter, the HA must keep:

- (1) A copy of the executed lease; and
- (2) The application from the family.

(b) During the HAP contract term, and for at least three years thereafter, the HA must keep a copy of:

- (1) The HAP contract; and
- (2) Records to document the basis for determination of the initial rent to owner, and for the HA determination that rent to owner is a reasonable rent (initially and during the term of the HAP contract).

67. Section 983.13 is revised to read as follows:

#### **§ 983.13 Special housing types.**

(a) *Applicability.* For applicability of rules on special housing types at 24 CFR part 982, subpart M, see § 983.1(b)(2)(x). In the PBC program, the HA may not provide assistance for shared housing or for manufactured homes.

(b) *Group homes.* A group home may include one or more group home units. There must be a single PBC HAP contract for units in the group home. A separate lease is executed for each elderly person or person with disabilities who resides in a group home.

#### **§ 983.14 [Removed]**

68. Section 983.14 is removed.

69. In § 983.51, the introductory text of paragraph (d) is revised to read as follows:

#### **§ 983.51 HA unit selection policy, advertising, and owner application requirements.**

\* \* \* \* \*

(d) *Owner application.* The owner's application submitted to the HA must contain the following:

\* \* \* \* \*

#### **§ 983.52 [Amended]**

70. Section 983.52 is amended by:

- a. Removing the second and third sentences from paragraph (a);
- b. Removing the reference to "§ 982.8 of this chapter" from paragraph (a) and adding in its place "§ 983.8"; and
- c. Removing the reference to "§ 983.12" from paragraph (c) and adding in its place reference to "§ 983.202".

#### **§ 983.55 [Amended]**

71. Section 983.55 is amended by removing from paragraphs (a) and (b) the reference to "§ 983.12" and by adding in its place a reference to "§ 983.202".

#### **§ 983.101 [Amended]**

72. Section 983.101 is amended by removing from paragraph (b)(3) the reference to "§ 983.12" each place it appears and by adding in its place a reference to "§ 983.202".

#### **§ 983.103 [Amended]**

73. Section 983.103 is amended by removing from paragraph (d) the reference to "§ 983.203" and by adding in its place a reference to "§ 983.253".

#### **§ 983.151 [Amended]**

74. Section 983.151 is amended by removing the last sentence from paragraph (b)(3).

75. Section 983.201 is revised to read as follows:

#### **§ 983.201 Responsibilities of the HA.**

The HA must:

- (a) Inspect the project before, during and upon completion of new construction or rehabilitation; and
- (b) Ensure that the amount of assistance that is attached to units is within the amounts available under the ACC.

#### **§ 983.202 [Amended]**

76. Section 983.202 is amended by removing from the second sentence the phrase "disclosing information and submitting certifications as required by 24 CFR part 12 and implementing instructions," and by removing the additional phrase "that accessibility"

and adding in place of this latter phrase the term "accessibility".

#### **§ 983.203 [Amended]**

77. Section 983.203 is amended by:

a. Removing from paragraph (a)(1) the phrase "and 24 CFR 5.410 through 5.430";

b. Removing from paragraph (b) the next to the last sentence, which is in parentheses;

c. Removing from paragraph (d)(6) the parenthetical phrase "(under § 983.208)" and adding in its place "(under § 983.207)"; and

d. Removing from paragraph (g)(1) reference to "§ 983.207" and adding in its place "§ 983.206".

78. In § 983.204, a new paragraph (e) is added to read as follows:

#### **§ 983.204 Maintenance, operation and inspections.**

\* \* \* \* \*

(e) *Enforcement of HQS.* 24 CFR part 982 and this part 983 do not create any right of the family, or any party other than HUD or the HA, to require enforcement of the HQS requirement by HUD or the HA, or to assert any claim against HUD or the HA, for damages, injunction or other relief, for alleged failure to enforce the HQS.

#### **§ 983.205 [Removed]**

#### **§§ 983.206 through 983.208 [Redesignated as §§ 983.205 through 983.207]**

79. In subpart E, § 983.205 is removed and §§ 983.206 through 983.208 are redesignated as §§ 983.205 through 983.207, respectively.

80. In newly redesignated § 983.205, paragraph (a) is revised to read as follows:

#### **§ 983.205 Overcrowded and underoccupied units.**

(a) 24 CFR 982.403, *Terminating HAP contract: When unit is too big or too small*, does not apply.

\* \* \* \* \*

81. Newly redesignated § 983.207 is revised to read as follows:

#### **§ 983.207 Informal review or hearing.**

24 CFR 982.554 (Informal review for applicants) and 24 CFR 982.555 (Informal hearing for participants) are applicable.

82. In part 983, a new subpart F is added, to read as follows:

### **SUBPART F—RENT AND HOUSING ASSISTANCE PAYMENT**

#### **§ 983.251 Applicability.**

(a) This subpart describes how to determine the amount of the rent to owner and the housing assistance payment in the PBC program.

(b) In subpart K of 24 CFR part 982 (rent and housing assistance payment for tenant-based program), the following are the only sections that apply to the PBC program under this Part: § 982.504 (for determination of the FMR/exception rent limit); § 982.516 (regular and interim examinations of family income and composition); and § 982.517 (utility allowance schedule).

**§ 983.252 Limits on initial rent to owner.**

(a) *Reasonable rent.* The initial rent to owner for a unit may not exceed the reasonable rent as determined by the HA in accordance with § 983.256.

(b) *FMR/exception rent limit.* The initial gross rent for a unit (rent to owner plus utility allowance) may not exceed the FMR/exception rent limit on the date the Agreement is executed. The FMR/exception rent limit is determined by the HA in accordance with 24 CFR 982.504.

**§ 983.253 Initial rent: Who approves.**

(a) *For units that are not HUD-insured or HA-owned.* The HA approves the initial rent to owners for PBC units that are not financed with a HUD-insured multifamily mortgage, and are not owned by the HA.

(b) *For units that are insured or HA-owned.* For HA-owned PBC units or PBC units financed with a HUD insured multifamily mortgage, the initial rents must be approved by HUD.

**§ 983.254 Annual adjustment of rent to owner.**

(a) *Owner request for adjustment and compliance with contract.* At each annual anniversary date of the HAP contract, the HA must adjust the rent to owner in accordance with the following requirements:

(1) The owner must request a rent increase (including a comparability study to determine the amount of such increase) by written notice to the HA at least 120 days before the HAP contract anniversary. The request must be submitted in the form and manner required by the HA.

(2) The HA may not increase the rent at the annual anniversary unless:

(i) The owner requested the increase by the 120 day deadline; and  
(ii) During the year before the contract anniversary, the owner complied with all requirements of the HAP contract, including compliance with the HQS for all contract units.

(b) *Amount of annual adjustment.* (1) The adjusted rent to owner equals the lesser of:

(i) The pre-adjustment rent to owner multiplied by the applicable Section 8 annual adjustment factor published by HUD in the **Federal Register**;

(ii) The reasonable rent as determined by the HA in accordance with § 983.256; or

(iii) The rent requested by owner.

(2) For a HAP contract under an Agreement executed on or after June 1, 1998, the applicable factor is the published annual adjustment factor in effect 60 days before the HAP contract anniversary. For a HAP contract under an Agreement executed before June 1, 1998, the applicable factor is the published annual adjustment factor in effect on the contract anniversary date.

(3) In making the annual adjustment, the pre-adjustment rent to owner does not include any previously approved special adjustments.

(4) The rent to owner may be adjusted up or down in accordance with this section.

(c) *Rent adjustments for HA-owned units.* For HA-owned PBC units, the HA must request HUD approval of the annual adjustment. The HA may not increase the rent at the annual anniversary until and unless HUD has reviewed the HA comparability study, and has approved the adjustment.

(d) *Initial rent.* Except as necessary to correct errors in establishing the initial rent in accordance with HUD requirements, the adjusted rent to owner must not be less than the initial rent.

(Information collection requirements in this section have been approved by the Office of Management and Budget under control number 2577-0169.)

**§ 983.255 Special adjustment of rent to owner.**

(a) *HUD discretion.* (1) At HUD's sole discretion, HUD may approve a special adjustment of the rent to owner. An HA may only make a special adjustment of the rent to owner if the adjustment has been approved by HUD.

(2) The owner does not have any right to receive a special adjustment.

(b) *Purpose of special adjustment.* A special adjustment may only be approved to reflect increases in the actual and necessary costs of owning and maintaining the contract units because of substantial and general increases in:

(1) Real property taxes;  
(2) Special governmental assessments;  
(3) Utility rates; or  
(4) Costs of utilities not covered by regulated rates.

(c) *Limits on special adjustment.* (1) A special adjustment may only be approved if and to the extent the owner demonstrates that cost increases are not adequately compensated by application of the published annual adjustment factor at the contract anniversary (see § 983.254). The owner must demonstrate

that the rent to owner is not sufficient for proper operation of the housing.

(2) The adjusted rent may not exceed the reasonable rent as determined by a comparability study in accordance with § 983.256.

(d) *Financial information.* The owner must submit financial information, as requested by the HA, that supports the grant or continuance of a special adjustment. For HAP contracts of more than twenty units, such financial information must be audited.

(e) *Term of special adjustment.* (1) The HA may withdraw or limit the term of any special adjustment.

(2) If a special adjustment is approved to cover temporary or one-time costs, the special adjustment is only a temporary or one-time increase of the rent to owner.

(Information collection requirements in this section have been approved by the Office of Management and Budget under control number 2577-0169.)

**§ 983.256 Reasonable rent.**

(a) *Requirement.* (1) The HA may not enter an agreement to enter into housing assistance payments contract until the HA determines that the initial rent to owner under the HAP contract is a reasonable rent.

(2) During the term of a HAP contract, the rent to owner may not exceed the reasonable rent as determined by the HA.

(3) At least annually during the HAP contract term, the HA must redetermine that the current rent to owner does not exceed a reasonable rent.

(b) *Comparability.* The HA must determine whether the rent to owner is a reasonable rent in comparison to rent for other comparable unassisted units. To make this determination, the HA must consider:

(1) The location, quality, size, unit type, and age of the contract unit; and  
(2) Any amenities, housing services, maintenance and utilities to be provided by the owner in accordance with the lease.

(c) *Appraisal.* (1) *Determining initial rent.* (i) To determine that the initial rent to owner is reasonable, the HA must use a qualified State-certified appraiser who has no direct or indirect interest in the property or otherwise.

(ii) For each unit type, the appraiser must submit a completed comparability analysis on Form HUD-92273 (Estimates of Market Rent by Comparison—the form is available at the Department of Housing and Urban Development, HUD Custom Service Center, 451 7th Street, SW, Room B-100, Washington, DC 20410) for HA review and approval. The appraisal

must use at least three comparable units in the private unassisted market.

(iii) The HA must certify to HUD that the initial rent to owner for a unit does not exceed the reasonable rent.

(2) *Annual Adjustment:*

*Comparability study.* (i) In determining the annual adjustment of rent to owner (in accordance with § 983.254), the adjusted rent to owner must not exceed a reasonable rent as determined by an HA "comparability study."

(ii) The comparability study is an analysis of rents charged for comparable units. The HA comparability study must determine the reasonable rent for the contract units as compared with rents for comparable unassisted units. The adjusted rent for a contract unit may not exceed the reasonable rent as shown by the comparability study.

(iii) The comparability study must include a completed comparability analysis for each unit type on Form HUD-92273 (Estimates of Market Rent by Comparison). The comparability study may be prepared by HA staff or by another qualified appraiser. The appraiser may not have any direct or indirect interest in the property or otherwise.

(iv) The comparability study must show how the reasonable rent was determined, including major differences between the contract units and comparable unassisted units.

(v) If the owner requests a rent increase by the 120 day deadline (in accordance with § 983.254(a)), the HA must submit a comparability study to the owner at least 60 days before the HAP contract anniversary. If the HA does not submit the comparability study to the owner by this deadline, an increase of rent by application of the annual adjustment factor (in accordance with § 983.254(b)) is not subject to the reasonable rent limit.

(d) *Owner certification of rents charged for other units.* By accepting each monthly housing assistance payment from the HA, the owner certifies that the rent to owner is not more than rent charged by the owner for comparable unassisted units in the premises. The owner must give the HA

information requested by the HA on rents charged by the owner for other units in the premises or elsewhere.

(Information collection requirements in this section have been approved by the Office of Management and Budget under control number 2577-0169.)

**§ 983.257 Other subsidy: Effect on rent to owner.**

(a) *HOME.* For units assisted under the HOME program, rents are subject to requirements of the HOME program (24 CFR 92.252).

(b) *Combining subsidy.* The HA may only approve or assist a project in accordance with HUD regulations and guidelines designed to ensure that participants do not receive excessive compensation by combining HUD program assistance with assistance from other Federal, State or local agencies, or with low income housing tax credits. (See 42 U.S.C. 3545(d) and section 3545 note.)

(c) *Other subsidy: HA discretion to reduce rent.* The HA may reduce the initial rent to owner because of other governmental subsidies, including tax credit or tax exemption, grants or other subsidized financing.

(d) *Prohibition of other subsidy.* For provisions prohibiting PBC assistance to units in certain types of subsidized housing, see § 983.7(c).

**§ 983.258 Rent to owner: Effect of rent control.**

In addition to the rent reasonableness limit, and other rent limits under this rule, the amount of rent to owner also may be subject to rent control limits under State or local law.

**§ 983.259 Correction of rent.**

At any time during the life of the HAP contract, the HA may revise the rent to owner to correct any errors in establishing or adjusting rent to owner in accordance with HUD requirements. The HA may recover any excess payment from the owner.

**§ 983.260 Housing assistance payment: Amount and distribution.**

(a) *Amount.* The monthly housing assistance payment equals the gross rent, minus the higher of:

- (1) The total tenant payment; or
- (2) The minimum rent as required by law.

(b) *Distribution.* The monthly housing assistance payment is distributed as follows:

(1) The HA pays the owner the lesser of the housing assistance payment or the rent to owner.

(2) If the housing assistance payment exceeds the rent to owner, the HA may pay the balance of the housing assistance payment either to the family or directly to the utility supplier to pay the utility bill.

**§ 983.261 Family share: Family responsibility to pay.**

(a) The family share is calculated by subtracting the amount of the housing assistance payment from the gross rent.

(b) The HA may not use housing assistance payments or other program funds (including any administrative fee reserve) to pay any part of the family share. Payment of the family share is the responsibility of the family.

**§ 983.262 Other fees and charges.**

(a) The cost of meals or supportive services may not be included in the rent to owner, and the value of meals or supportive services may not be included in the calculation of reasonable rent.

(b) The lease may not require the tenant or family members to pay charges for meals or supportive services. Non-payment of such charges is not grounds for termination of tenancy.

(c) The owner may not charge the tenant extra amounts for items customarily included in rent in the locality or provided at no additional cost to the unsubsidized tenants in the premises.

Dated: April 13, 1998.

**Andrew M. Cuomo,**  
Secretary.

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