NAHMAnalysis
NATIONAL AFFORDABLE HOUSING MANAGEMENT ASSOCIATION

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National Affordable Housing Management Association – 400 N. Columbus Street, Suite 203 - Alexandria, VA 22314
Phone 703-683-8630 - Fax 703-683-8634 - www.nahma.org

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Final Rule: Streamlining HUD Administrative Regulations

Background

The 2014 Appropriations Act authorized HUD to implement certain statutory changes to some of its housing programs administered through the Office of Public and Indian Housing and the Office of Housing, such as allowing for inspection requirements for units assisted through Housing Choice Vouchers (HCVs) or Project-Based Rental Assistance (PBRA) to be satisfied through use of "alternative inspection methods." In response to the statutory changes, on January 6, 2015, HUD issued the proposed rule "Streamlining Administrative Regulations for Public Housing, Housing Choice Voucher, Multifamily Housing, and Community Planning and Development Programs" [Docket No. FR 5743–P–01] to formally begin the process of implementing regulatory changes. In addition to the changes mandated by Congress, the January 2015 rule also proposed changes to streamline regulatory requirements pertaining to certain elements of various rental assistance programs. The January 2015 proposed rule requested public comment, and after gathering input from members, NAHMA submitted comments on March 4, 2015.

The Department reviewed hundreds of public comment documents on the proposed rule and on March 4, 2016, it issued the final rule "Streamlining Administrative Regulations for Public Housing, Housing Choice Voucher, Multifamily Housing, and Community Planning and Development Programs" [Docket No. FR 5743–F–03]. This final rule went into effect on April 7, 2016, and makes changes to the proposed rule, including changes in response to public comment from NAHMA and other industry associations. This NAHMAnalysis reviews the text of the final rule, comparing the final provisions to our March 2015 comments.

1) Use of Actual Past Income

The proposed rule permitted public housing agencies (PHAs) and multifamily housing owners to define annual income as *either* actual past income *or* projected income. Under this proposal, actual past income would be based on amounts received prior to admission or the annual reexamination effective date, and would simply exclude the additional step (required under current rules) of projecting income based on this information. The proposal would also require PHAs to apply the same definition to all families in their HCV or public housing programs. Multifamily owners would be required to use the same definition for all families in a single property.

NAHMA and Other Industry Comments

In comments to the proposed rule, NAHMA was intrigued in the use of actual past income but we found that the language, as drafted, would be difficult to implement. First, requiring the owner to project income as a condition of using streamlined annual reexaminations severely limits owners' ability to use actual past income. More than half of the families assisted through the PBRA Program include an elderly or disabled head or co-head of household. Presumably, these are the very families who would most benefit from the streamlined recertification process. If we assume the streamlined recertification process were widely employed in the Section 202 and Section 811 programs, the past actual income definition would be of little use in these properties.

NAHMA also found that the proposed rule may inadvertently set owners up for non-compliance by requiring use of projected income if the tenant requests that definition of annual income.

The preamble stated,

> "…the PHA or owner must use projected income if the family makes a request (for example the family may have experienced a decrease in income that would result in a lower family payment than would be calculated if income is defined as actual past income)."

Under this scenario, NAHMA argued an owner who was using past actual income would be in noncompliance by using the projected income. Rather than using past income, NAHMA recommended that HUD pursue policy changes to allow multifamily owners and managers to rely on tax returns filed by residents and applicants for income verifications. Income reported to the IRS could be incorporated into the Enterprise Income Verification (EIV) system as well. This would lessen the burden placed on properties since the responsibility for certifying income would be placed on the government rather than the owner/agent.

Other comments on the proposed rule highlighted that the requested provision did nothing to alleviate the burden associated with performing interim income reexaminations. Since many families experience fluctuations in income over the course of a year, with each occurrence, a housing provider must calculate income based on projected income, rather than past income. The commenters stated that furthermore, the proposal required housing providers that adopted a definition based on actual past income to calculate expenses for such things as childcare and medical care during the same 12-month period. It is difficult to have the same timeframes for all sources of income.

Final Rule

In the final rule, HUD agreed that the proposal to use actual past income provided minimal, if any, streamlining benefit, and required impractical actions on the part of housing providers in using the same time frames for income and deductions. Given the concerns raised about the proposal, HUD has decided not to adopt the use of actual past income in the final rule.

2) **Streamlined Annual Reexamination for Families on Fixed Incomes**

Currently, PHAs and owners are statutorily required to verify income and calculate rent annually, including for families on fixed incomes. The requirement to undertake the complete process for income verification and rent determination for families on fixed incomes is not

necessary given the infrequency of changes to their incomes. Further, this requirement consumes considerable staff time and resources.

In the proposed rule, HUD aimed to simplify the requirements associated with determining the annual income of families on fixed incomes by allowing PHAs and owners to opt to conduct a streamlined annual reexamination of income for families when 100 percent of the family's income consists of fixed income sources. In a streamlined annual reexamination, PHAs and owners will recalculate family incomes by applying a published cost-of-living adjustment (COLA) for the source of income to the previously verified income amount.

If COLA information is not publicly available and cannot be provided by the tenant through a document generated by a third party, then the PHA or owner would have to follow the standard verification process to determine the appropriate adjustment for the fixed-income source. Calculating adjustments to annual income (such as medical deductions or child care deductions) would still be required as part of the streamlined annual reexamination of income.

NAHMA and Other Industry Comments

In comments to the proposed rule, NAHMA applauded HUD for proposing to move towards a more risk-based approach to income verification for households with fixed incomes. NAHMA strongly agreed with their rationale that the full income verification process was unnecessary for families living on fixed incomes. Still, NAHMA recommended that a threshold of 90 percent fixed income is preferable to the proposed 100 percent threshold. The 90 percent threshold is consistent with legislation previously introduced in Congress, the Tenant Income Verification Relief Act of 2015 (H.R. 233), as well as HUD's own budget request for fiscal year 2016.

Other public comments also asked that HUD allow for streamlined reexaminations even when the family does not have all of its income from fixed-income sources or when some family members have a variable income and others have a fixed income. Some commenters also asked that either the regulatory definition of "fixed" income be made more flexible or HUD grant PHAs flexibility to establish their own definition. Others stated that the proposal did not provide any streamlining benefit, and, to fully streamline, HUD should eliminate or modify the medical expense through methods like a standard deduction or self-certification of medical expenses. Furthermore, some commenters expressed concern that allowing streamlined recertification for fixed income families would allow such families to overlook sources of income. Some suggested that HUD should still require annual income verifications, because some families would have some members with fixed income and others with variable income.

Final Rule

In response to comments, HUD has revised the streamlined annual reexamination measure to provide PHAs and owners with the option of conducting a streamlined income redetermination for *any fixed-income source*, irrespective of whether an individual or a family also has a non-fixed source of income. This means that the regulation no longer requires a family to have 100 percent of its income from fixed sources. If a family member receives income from annuities or other retirement benefit programs, insurance policies, disability or death benefits, or other similar types of periodic receipts, and the income consists solely of periodic payments at reasonably predictable levels, then the income source may be considered to be "fixed."

HUD has decided that it will not eliminate the requirement to verify medical expenses and otherwise calculate adjustments to annual income for fixed-income families.
For ongoing medical expenses, PHAs and owners already have the option to determine anticipated expenses by calculating expenses paid by the family in the 12 months preceding recertification. For past one-time, nonrecurring medical expenses that have been paid in full, PHAs and owners already have the option of including these expenses at an initial, interim, or annual recertification. Furthermore, HUD will not adopt the use of self-certification of medical expenses and other deductions, citing the risk of improper payment. The final rule makes clear that a full examination of family income must be conducted upon admission to a program.

3) Start of Assisted Tenancy

In the proposed rule, HUD sought to allow PHAs to limit move-ins for HCV holders to certain days of the month in order to streamline administration, reduce the need for pro-rated payments and eliminate overlapping HAP payments.

HUD acknowledged “this proposed change may have the unintended consequence of limiting tenant choice”, and there was sharp opposition from commenters.

NAHMA and Other Industry Comments

In comments to the proposed rule, NAHMA opposed this provision since the apartment industry relies on seamless turnover to meet its overhead costs. The financial implications of delayed move-ins could deter many owners from participating in the voucher program. Furthermore, restricting move-ins would place HCV holders at a disadvantage to unsubsidized applicants.

Opposition was seen in many other public comments as well. It was noted that in high-demand areas, the proposed change could reduce the number of landlords willing to participate in the voucher program, which would ultimately limit choice to voucher holders. Many commenters also expressed concern that this would have negative consequences for families that need to move immediately or alternatively would cause tenants to have to move out of a unit before being able to move into a new one. Other commenters stated that this would concentrate administrative tasks into a single time of the month for PHAs, actually increasing their burden.

Final Rule

HUD has decided not to move forward with the proposal to limit move-ins for HCV holders and it was not included in the final rule.

Other Policy Items Included in Final Rule

In addition to the items which NAHMA highlighted in its comments delivered to HUD, there are several other provisions included in the final rule that owners and managers should note. NAHMA did not directly comment on these provisions, but other industry groups did provide feedback, which received a response from HUD.

4) Verification of Social Security Numbers

In the January proposed rule, HUD sought to admit a family in to a rental assistance program in cases where a child under the age of six, who does not have a social security number, was added to the household within six months prior to the date of admission. There is a 90-day

period after admission in which a family must provide documentation of the child's social security number. An additional 90-day period is allowed under certain circumstance.

Industry Response

Some commenters stated that, in the HCV program, the "date of admission" is typically the date of lease-up (i.e., the effective date of the Housing Assistance Payment (HAP) contract). Prior to lease-up, however, a PHA may have expended considerable time and resources pulling a family from the waiting list, obtaining the necessary verifications, procuring a Housing Quality Standards (HQS) inspection, and performing a rent reasonableness determination. Lease-up could ultimately occur more than six months from the date the child was added to the household, which would result in the household being ineligible for admission to the program.

Final Rule

HUD has addressed this scenario in the final rule by adopting two separate dates of admission in the voucher program. First, the endpoint of the six-month period during which a family member under the age of six years may be added to the household is the date of voucher issuance. Second, the 90-day period for the family providing evidence of the social security number starts on the date of lease-up, and a 90-day extension is allowed under certain circumstances.

5) Biennial Inspections

As mentioned, the 2014 Appropriations Act authorized PHAs to inspect HCV units biennially rather than annually. It also allowed PHAs to use an inspection performed through another housing program, such as HOME or LIHTC. The January 2015 proposed rule then began the implementation of this policy change and provided details on how PHAs may use the new flexibilities.

As part of the biennial/alternative inspection change, HUD proposed to allow PHAs the option of charging a reasonable fee to an owner if the owner indicates that a housing quality standards (HQS) violation is fixed, but a re-inspection proves that the violation has not yet been fixed. This fee would not be permitted if the re-inspection confirms that previous violations have been fixed but at the same time reveals new HQS violations.

Industry Comments

In the comments sent to HUD, some suggested that the Department's electronic systems be updated for biennial inspections, and others asked for a centralized database for inspection reports and data, which could then be accessed by PHAs in order to obtain the results of alternative inspection methods. Others stated that HUD should review inspection protocols with input from PHAs and implement "best practices" across the board. Commenters also asked for consolidating inspection standards between HUD programs and LIHTC.

For the re-inspection fees, some commenters suggested that this fee could deter owners of multifamily properties from participating in the Section 8 program, and others requested that HUD clearly define what constitutes a "reasonable" fee.

Final Rule

In response to the comments, HUD provided additional clarification on the biennial inspection policy and the re-inspections fee proposal. First, HUD clarified that the re-inspection fee is optional; a PHA should consider any concerns it has that a fee may deter landlords from participating in the program when determining whether to impose a re-inspection fee. The final rule also noted that fees will be included in a PHA's administrative fee reserve and may be used only for activities related to the administration of HCVs.

The final rule also made clear that the biennial inspection policy is optional; PHAs will retain the discretion to inspect properties annually if they warrant more frequent attention. The same is true of alternative inspection methods—their use is entirely at the discretion of the PHA, per the statute and this rulemaking. Nothing in this final rule requires a PHA to adopt biennial inspections or alternative inspection methods. HUD also clarified that a PHA may adopt an alternative inspection method that is specifically authorized by Congress, such as sampling as conducted under the requirements of the LIHTC program. The final rule also included a provision that the Real Estate Assessment Center (REAC) will approve or disapprove a PHA's certification that an alternative inspection method meets HUD standards prior to allowing the PHA to employ the alternative inspection method.

HUD was unable to adopt the policy to update Department electronic systems to accommodate for biennial inspections as requested by commenters. HUD's information technology investment decisions are based on available resources as appropriated by Congress. However, the final rule notes that HUD will explore ways to move to electronic reporting systems with available resources such as the creation of a national-level affordable housing database.

6) Exclusion of Mandatory Education Fees from Income

Current regulations provide that education assistance in excess of amounts needed for tuition is to be counted as income when determining eligibility to receive housing assistance. However, in recent years, Congress has excluded the required fees charged to students as part of a growing trend among universities to have a structure of tuition and fees (such as student activity fees or lab fees).

Final Rule

HUD did not cite any opposition to this change and it was adopted as part of the final rule.

7) Earned Income Disregard

The earned income disregard (EID) permits certain tenants of public housing and persons with disabilities participating in the HCV and certain CPD programs to accept a job without having their rent increase immediately due to the increase in earned income. The EID is available for a total of 24 months, but those months can be spread across 48 months to account for intermittent job losses. In addition, PHAs are required to fully exclude income for the first 12 months of EID, and to exclude only 50 percent for the last 12 months.

In the proposed rule, HUD noted that tracking employment for a 48-month period and determining how much to exclude depending on the month can be burdensome to PHAs. To address this burden, HUD proposed to limit the EID to 24 consecutive months from the date that a participant qualifies for the EID. The full exclusion for the first 12-month period, provided the

eligible family member remains continually employed for such period, would still be maintained. For the second 12-month period, the rule would provide PHAs with the discretion to phase in a rent increase, disregarding not less than 50 percent of the excluded amount in determining a family's rent, but again only if the eligible family member remains continually employed. After the expiration of the consecutive 24-month period during which a family has remained continually employed, the EID would terminate.

Industry Comments

Several commenters of the proposed rule had requested that HUD modify the proposal by clarifying the requirement that the family remain continually employed. In contrast, other commenters suggested that this change should not be made because residents eligible for EID would not be able to be continually employed for 24 months.

There were also concerns expressed for allowing residents to re-qualify for EID, either because it would create an additional burden on PHAs or because it could create an incentive for individuals to leave jobs when the EID expires. Other commenters expressed concern that a family losing the EID during the 24-month period would be able to qualify for a new EID period immediately, essentially allowing for an infinite time frame to receive the EID.

Final Rule

Considering the comments, HUD decided to drop the continuous employment requirement from the final rule. HUD did retain the ability of these residents to start and stop employment and still retain the benefit of the EID. However, these residents may only receive the benefit for up to 24 consecutive months from the date of initial increase in annual income. If an individual becomes eligible to receive the EID, the 24-month period will not stop if the circumstance that triggered the EID ceases; however, if the individual experiences an event that would again provide an EID benefit during the 24-month period, then the individual will be provided the rent incentive.

HUD believes that this change eliminates the burdensome process of PHAs tracking EID starts and stops over a 48-month time period, but still provides some flexibility to tenants to receive the EID if they again obtain employment.

8) Family Declaration of Assets under $5,000

In the proposed rule, HUD altered policies so a family that has net assets equal to or less than $5,000 may declare that it has net assets equal to or less than $5,000 without the PHA taking additional steps to verify the accuracy of the declaration. The declaration must state the amount of income the family expects to receive from such assets; this amount will be included in the family's income.

Industry Comments

HUD noted that many commenters of the proposed rule asked that the maximum amount of assets that can be self-certified be increased to $10,000. Others asked that HUD eliminate the consideration of assets when determining income, claiming that income from assets usually has little, if any, effect on the amount of rent paid by a family. Other commenters stated that self-certification does not actually reduce burden on PHAs and may actually increase work for PHA staff. There were also industry comments asking that HUD allow this provision to apply to multifamily housing as well.

Final Rule

In response to the comments, HUD has clarified in the final rule that the verification provision applies to families at reexamination. At admission, all assets of a family will be verified, as is the current practice. However, the final rule now requires a PHA to obtain third-party documentation of all family assets every three years. Additionally, HUD indicated in the final rule that it will be issuing an interim rule to allow this provision to apply to multifamily housing.

Conclusion

Overall, NAHMA is encouraged to see the Department has listened to public comments and that many of our concerns with the proposed rule have been addressed in the final rule. The streamlined regulations as included in the final rule will provide modest benefits to owners and agents, and to tenants and PHAs. Although many of the changes are considered low-hanging fruit, HUD has demonstrated it is willing to engage industry groups to identify beneficial program alterations. NAHMA will continue to work with the Department in streamlining other administrative areas that may be improved and will generally support efforts that seek to strengthen affordable housing management.