

NAHMA Analysis

News and Analysis of Breaking Issues in Affordable Housing



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Screening and Eviction for Drug Abuse and other Criminal Activity

Final Rule

Federal Register May 24, 2001

Effective June 25, 2001

Applies to Section 8 housing [Private, Public and Voucher Programs], Section 236, 221-d-3, 202 and 811 as well as Public Housing. The provisions here also apply to Rural Development [Farmers Home] Section 514 and 515 housing programs.

When the Quality Housing and Work Responsibility Act was drafted in 1998 among the provisions dropped into the law were provisions mandating better screening and denial of housing to individuals and families with specific types of criminal activity in their history. Additionally provisions were added requiring eviction from assisted housing for the same sorts of activities if engaged in after admission. HUD has now, nearly two and a half years later, finally issued a final rule on these requirements. When QHWRA was adopted Congress specifically mandated that three classes of applicants or residents in assisted housing that would be refused admission or evicted.

- Current Illegal Drug users
- Persons who have criminal records related to drugs or violence
- Sex Offenders

George's Spin - This rule while not unexpected is substantially broader than the underlying legislation. As Public Law 105-276 - QHWRA was written many of the standards set out were titled and aimed at Public Housing. Congress wanted to extend the same protections to the private sector, and the end result we see here covers all forms of assisted housing both public and private. That is not to suggest that any of us want dopers and pedophiles in our properties, but the statute and this rule will add a whole layer of complexity to admissions and evictions.

The PHA's and State Housing Finance agencies have been elected by HUD to provide us with background checks, and information. Our conversations the last few days with friends in some of the agencies that are now required to process requests for us suggest that they were caught off guard on this, and won't be able on June 25 to process requests for background information. One PHA we've talked with has their lawyers trying to figure out how to avoid doing this work altogether using the theory that they could be sued, and it will cause them harm. While this reaction is pretty

extreme, it shows the lengths some agencies will go to not get involved in doing background checks for us.

A whole category of agencies not previously included in the background check business were included here. The State Housing Finance agencies which have not directly operated Section 8 housing were swept into this rule as information providers. For us that is a benefit in that we will have the option of channeling all our requests through a state agency rather than a number of PHA's. The state agencies objected pretty strongly to this part of the rule, and were included over their objections. The FBI has held off processing background check clearances for HFA's until publication of this rule. It is unlikely many will be ready by June 25.

Fees are another matter that is presently unsettled. In the final rule HUD allows all the information providers to charge reasonable fees for their services, including billing for the time and overhead of PHA/HFA staff who will process the paperwork and run the State and FBI checks. Depending on how much these fees turn out to be it could add substantial administrative costs to a property.

As you read the rule you will see that in several areas HUD purposely left provisions vague or unsettled. One example of that is in the area of tenant control over visitors and invitees. They acknowledge the fact that the 9th Circuit in Rucker vs Davis has struck down major elements of the policy they advocate here, but they leave it up to us to determine how far we should go in enforcement. This very significant issue is glossed over with "Some courts have disagreed with HUD's concept of legal control and have read into 42USC 1437 d (6)(1) a requirement that the tenant have some degree of knowledge or ability to control the unlawful behavior."

The places where HUD did not define things clearly will be a problem particularly in eviction actions. As you read the comments to this rule you will see that some of the Resident Advocates and Legal Aid have major issues with parts of this, and we will hear those arguments again in court. The most stunning assertion in this regard appears on page 28785 where HUD says "In the final rule, HUD has adopted the first recommended approach with respect to most programs. Section 5.861 specifies that with respect to eviction for criminal activity, neither an arrest nor a conviction is necessary, and the responsible entity need not satisfy the standard of proof used for a criminal conviction." A friend we've known for years who was chief of the Landlord Tenant Division of the Cook County Courts had a saying about that sort of assertion - "That ain't gonna fly in this courtroom Mr. Caruso, I find for the defendant, you lose and pay costs, next case..."

The full rule is 32 pages long, and you will want to download it from our web page at http://www.nahma.org/members/secure_adv.html so that you can review it in detail and begin to revise your policies.

The most significant changes you will find in reviewing the rule is that in a number of instances “you can” has been changed to “you must”.

In very summary fashion here are the major changes that you will find in the rule:

1. PHA/HFA's are now required to do criminal background checks for us for both applicant and eviction situations.
2. Specified criminal activity on the part of an applicant or resident now mandates denial of an application, and in many cases will result in an eviction. There is now a prohibition on admission of sex offenders (§ 5.856). It appears that with new applicants when the background is run, all states where the applicant has lived that have sex offender statutes will have to be contacted and confirmed by the PHA/HFA doing your background check. There is a similar permanent ban on people involved with the production of methamphetamines.
3. In order to get your background checks done, your admission policies may have to be updated and revised to include the new exclusions, and you will have to have a revised applicant sign off form acceptable to the PHA/HFA doing your background work.
4. The lease you use will likely have to be updated to reflect the revised categories of exclusions and enforcement language. At present HUD has not revised the Model Section 8 lease and a rewrite of it is not on the current work list. This means that you will need either to rewrite your current lease and get it approved, or add another addendum. *Spin Cont'd - You will want to have both your lawyer who will be taking this to court and your fair housing expert review the new documents to make sure they will work.*
5. You are going to need to revisit your records confidentiality, destruction and retention policies, since now for the first time you will have NCIC records and HHS regulated health records your confidentiality and destruction on decision policies need to comply with the relevant statutes. The fine for violations by staff in this area is a maximum of \$5,000 per violation so care is indicated.
6. On page 28795 it is noted that you can use criminal information records in support of eviction actions, you will want to consult with your eviction attorney on how that aspect will be handled, and coordinate with the PHA/HFA that will be supplying materials.
7. You will want to change your applications to capture at least one address where any adult household member has resided in another state or states. It appears that to do the Sex Offender search you will need at least one residence address in every state someone has lived in so those states can be contacted.

The final spin - We have been assured that no one in HUD will be visiting sites on June 26 to check on implementation of this rule. With so many elements yet to be settled you will probably want to get things in work, review and change policies as needed and begin contacting the PHA/HFA that will be processing background checks for you. Because of the sensitivity of a lot of parts of this rule you will want to proceed carefully, this will take more than three weeks to get in place, particularly if HUD has to review and approve your modified lease.