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Guidance Concerning the Final Rule on Screening and Eviction for Drug Abuse and Other Criminal Activity (Notice H 2002-22 HUD)

Effective Date

The notice was issued October 29, 2002. It is currently effective.

Background

HUD published the Screening and Eviction for Drug Abuse and other Criminal Activity, Final Rule in the Federal Register on May 24, 2001. The rule took effect on June 25, 2001, and its requirements are already a part of your management review. (Please see NAHMA analysis 2001-155 for a summary of NAHMA's history on the final rule.) Notice H 2002-22 is intended to provide "clarification and guidance" on the requirements of the existing final rule.

Summary

Notice H 2002-22 specifies offenses for which applicants must be denied admission to federally assisted properties, grounds for termination of tenancy which must be included in your leases and actions you are required to take to comply with the requirements of the final rule.

All of your screening and eviction policies must comply with the Fair Housing and Equal Opportunity regulations.

Consistent with the final rule, this notice specifies certain households that are not permitted to receive housing assistance due to criminal or dangerous behavior. You are **required** to deny admission if any member of the household is "subject to a lifetime registration requirement under a state sex offender registration program," or is currently using illegal drugs. You are also required to deny admission if there is "reasonable cause" to believe a household member's use or pattern of use of illegal drugs or alcohol abuse interferes with the health, safety, or right to peaceful enjoyment of the premises by other tenants. Finally, if a household member was evicted from federally assisted housing for drug-related criminal activity, they are banned from assisted housing for three years from the date of eviction; you may, but are not required to, admit them if they have completed rehabilitation.

Notice H 2002-22 specifies that you **must** perform a criminal background check for prospective tenants to comply with these requirements. (See section IX of the attachment.) With respect to the sex offender screening, the notice directs owners to contact national and state sex offender registry agencies. Background checks are not required for households applying for unassisted units. Similarly, owners are not required to conduct background checks on current tenants during recertification.

You may perform the background checks yourself, hire a private contractor, or request the service from your local public housing authority (PHA). The PHA must perform the background check if requested by the owner; however, the PHA is entitled to charge you a “reasonable” fee for the service. The fee is considered a project expense. Owners are specifically prohibited from charging applicants fees to cover the cost of background checks.

You have the **option** of denying admission based on a household member’s past or present drug-related criminal activity, violent criminal activity, or other criminal activity that threatens the health and safety of other residents, the owner, the employees, or agents.

Your leases are **required** to include the following as grounds for termination:

1. “Drug related criminal activity engaged in on or near the premises, by any tenant, household member, or guest, and any such activity engaged in on the premise by any other person under the tenant’s control”
2. Illegal drug use
3. A pattern of illegal drug use or alcohol abuse by a household member which interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents
4. “Criminal activity by a tenant, any member of the tenant’s household, a guest or another person under the tenant’s control” which threatens other residents—including property management staff residing on the premises—or persons who live “in the immediate vicinity of the premises”
5. Fugitive felon status
6. Parole or probation violations

Landlords have the discretion to terminate the lease based on these violations. Additionally, under regulation 24 CFR 5.861, you have the right to evict, “if the Landlord determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested, or convicted for such activity and without satisfying a criminal standard of proof of the activity.”

Issues of Concern to NAHMA

NAHMA's biggest concern is that Notice H 2002-22 reiterates the prohibition on recovering the costs of required background checks. The cost of doing business has been increased, and no means of recovering that cost has been offered.

Other concerns pertain to HUD's missed opportunity to specify minimum standards as to what constitutes "reasonable time" for admission exclusions and "on or near the premises" for drug activities. The vagueness of such terminology creates confusion in judicial cases.

Finally, the notice reiterates that owners may, but are not required, to perform criminal background checks on current tenants during recertification. However, the tenant must consent to the background check. NAHMA is concerned that this policy is ineffective. A current tenant who is knowingly involved in criminal activity is not likely to consent to a background check.

Positive Aspects of This Notice

No **major** policy changes were included in this notice. Aside from specifying that threats to property management staff *residing on the premises*, rather than all staff, constitutes grounds for eviction, Notice H 2002-22 generally concurs with NAHMA's understanding of the Screening and Eviction Final Rule.

NAHMA's position

NAHMA considers the inability to recover the cost of required criminal background checks an "unfunded mandate." The background checks are a required cost of doing business, but no means to offset the cost is provided. There is no additional money from HUD to offset the additional cost to owners, and recovering the cost from the applicants is expressly prohibited.

NAHMA believes a fair compromise would allow properties to charge an application fee to cover the cost of the background check, and then credit a tenant's rent or security deposit if they are approved.

Attachments

Notice H 2002-22 (HUD) is attached for review.

Special Attention of:

NOTICE H 2002- 22 (HUD)

All Regional Directors
All Multifamily Hub Directors
All Multifamily Program Center Directors
All Project Managers
All Owners and Management Agents of
Multifamily Properties
All Section 8 Contract Administrators
All State Housing Finance Agencies
Regional Counsel, Chief Counsel, and
Chief Attorneys

Issued: October 29, 2002
Expires: October 31, 2003

Cross References:

Subject: Screening and Eviction for Drug Abuse and Other Criminal Activity -
Final Rule

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I. THIS NOTICE

This Notice provides clarification and guidance for Multifamily Housing Programs on the requirements mandated by the Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule, published at Federal Register, Vol. No. 66, No. 101 on May 24, 2001. The Rule became effective on June 25, 2001.

II. APPLICABILITY

Multifamily Housing assisted with Section 8 project-based assistance under Section 8 of the U.S. Housing Act of 1937, as amended (42 USC 1437f) Section 221(d)(3) BMIR

Section 202 Direct Loan Program

Section 202 Supportive Housing for the Elderly Program

Section 811 Supportive Housing for Persons with Disabilities Program

Section 236 of the National Housing Act

Section 101 Rent Supplement Program

This Notice does not apply to units assisted under Section 8 Moderate Rehabilitation, Section 8 project-based certificate, and Section 8 project-based voucher programs.

III. BACKGROUND

The Quality Housing and Work Responsibility Act (QHWRA), among other statutes, provided authority for better screening and denial of Federally-assisted housing to individuals and families with specific types of criminal activities in their history.

IV. SCREENING AND EVICTION FOR DRUG ABUSE AND OTHER CRIMINAL ACTIVITY – FINAL RULE

The Final Rule requires Owners (which includes management agents and Landlords) to adopt and implement comprehensive policies for screening out applicants who engage in illegal drug use or other criminal activity and for evicting or terminating tenancy of persons who engage in certain criminal activity. Such policies must be adopted and implemented in a manner that is consistent with Fair Housing and Equal Opportunity regulations as well as any other applicable legal requirements.

Under the Final Rule, Owners are required to incorporate new provisions into their admissions screening criteria and lease provisions that will be used for screening and admission or termination of tenancy or eviction. The Final Rule also provides

guidance regarding specific actions that Owners and Public Housing Agencies (PHAs) (including State Housing Finance Agencies (HFAs) that administer Section 8 contracts) are mandated or authorized to take in the screening of applicants or termination of tenancy of residents of Federally-assisted housing.

Tenants of Federally-assisted housing sign leases that require them to accept responsibility for the actions of individual household members, their guests, or other persons under their control on the premises with their consent. At minimum, (1) any criminal drug activity or (2) other criminal activity or drug and alcohol abuse that threatens the health and safety of the residents or staff or hinders the peaceful enjoyment of the housing premises, is intolerable. The Final Rule sets forth certain mandatory provisions that Owners must use to screen applicants and to determine whether applicants are eligible for admission to Federally-assisted housing. The Final Rule also sets forth other, discretionary provisions that Owners are expressly authorized by statute, but not required, to use to screen applicants and to determine whether applicants are to be admitted to Federally-assisted housing. In setting forth these mandatory and discretionary provisions, the Final Rule makes clear that the Rule does not intend to preclude Owners from establishing additional - and more restrictive - policies than those set forth in the Rule. However, all policies and procedures established by Owners consistent with the Final Rule are to be applied in a manner that is consistent with applicable fair housing and equal opportunity laws.

V. AMENDING THE TENANT SELECTION PLAN AND SCREENING CRITERIA

Owners must amend their existing tenant selection plan and screening criteria to comply with the provisions of the Final Rule and this Notice. Owners must indicate under what conditions they will accept or reject an applicant.

VI. DENYING ADMISSIONS - MANDATORY PROVISIONS

Owners are required to adopt and incorporate into their screening and admissions policies the following *mandatory* provisions that prohibit admission to applicants who fit into the following categories. Owners are required to deny admission to Federally-assisted housing if:

- Any household member has been evicted from Federally-assisted housing for drug-related criminal activity, for three years from the date of eviction. If the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program or circumstances leading to the eviction no longer exist, the Owner may, but is not required to, admit the household.

- Any household member is currently engaging in illegal drug use.
- The Owner determines that there is reasonable cause to believe that a household member's illegal use or a pattern of illegal use of a drug may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. (Examples of evidence of illegal activities may include a conviction record, former landlord references, etc.)
- Any member of the household is subject to a lifetime registration requirement under a state sex offender registration program. In accordance with Federal law, Owners shall establish standards that prohibit admission to any Federally-assisted property to sex offenders subject to a lifetime registration requirement under a state sex offender registration program. During the admissions screening process, the Owner must perform the necessary criminal history background checks in the state where the housing is located and in other states where the household members are known to have resided.
- The Owner determines that there is reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

VII. DENYING ADMISSIONS – DISCRETIONARY PROVISIONS

In addition to the above mandatory screening standards and guidance in HUD Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Programs, Owners of Federally-assisted housing have the discretion to prohibit the admission of a household with a household member who is currently engaging in, or has engaged in during a reasonable time before the admission decision in:

- Drug-related criminal activity;
- Violent criminal activity;
- Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or
- Other criminal activity that would threaten the health or safety of the PHA or Owner or any employee, contractor, subcontractor or agent of the PHA or Owner who is involved in the housing operations.

To the extent that an Owner's admissions policy includes any item above or any similar restriction that employs a standard regarding a household member's current or recent actions, the Owner may delineate the length of time prior to the admission

decision during which the applicant must not have engaged in the criminal activity that the Owner will consider when making his/her determination.

Moreover, the Owner has the discretion to reconsider an applicant who was previously denied admission to Federally-assisted housing because of a determination concerning a member of the household who has been engaged in criminal activity. The Owner may admit the household if the household member is not currently engaged in, and has not engaged in, the criminal activity described above during a reasonable period, determined by the Owner, before the admission decision. However, to the extent that an Owner chooses to adopt this admission provision or a similar admissions authority that is based upon a household member's current or recent actions, the Owner must have sufficient evidence submitted by the household member which includes (1) a certification that states that she or he is not currently engaged in such criminal activity and has not engaged in such criminal activity during the specified period and (2) supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers or criminal records that were verified by the Owner.

VIII. TERMINATING TENANCY - LEASE PROVISIONS

The regulations at 24 CFR 5.858, 5.859 and 5.860 set forth required provisions that Owners must incorporate into their leases that provide for termination of tenancy. Owners have the discretion to terminate the tenancy and the lease must provide grounds for terminating the lease for the following:

- Drug-related criminal activity engaged in on or near the premises, by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control. (See the definitions of premises, guest and other person under the tenant's control.) The definitions below are in accordance with the regulations at 24 CFR 5.100.
 - 1) Premises – means the building or complex or development in which the public or assisted housing dwelling unit is located, including common areas and grounds.
 - 2) Guest – means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant.
 - 3) Other person under the tenant's control – means a person who, although not staying as a guest in the unit, is, or was at the time of the activity in question, on the premises because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. (Examples of other persons under the tenant's control include party attendees, regular visitors, and people who

provide a commercial service to a household member on a regular and frequent basis, such as an in-home nursing care provider.) Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control -- for example, the pizza delivery man.

- A determination made by the Landlord that a household member is illegally using a drug.
- A determination made by the Landlord that a pattern of illegal use of a drug by a household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- Criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control:
 - a) that threatens the health, safety, or right to peaceful enjoyment of the premises of other residents (including property management staff residing on the premises); or
 - b) that threatens the health, safety, or right to peaceful enjoyment of their residences of persons residing in the immediate vicinity of the premises.
- If the tenant is fleeing to avoid prosecution, custody or confinement after conviction for a crime or an attempt to commit a crime that is a felony under the laws of the place from which the individual flees or that, in the case of the State of New Jersey, is a high misdemeanor.
- If the tenant is violating a condition of probation or parole imposed under Federal or state law.
- A determination made by the Landlord that a household member's abuse or pattern of abuse of alcohol threatens the health, safety, or right to peaceful enjoyment of the premises of other residents.

In accordance with the regulation at 24 CFR 5.861, the Landlord may terminate tenancy and evict the tenant through judicial action for criminal activity by a covered person if the Landlord determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested, or convicted for such activity and without satisfying a criminal standard of proof of the activity. HUD encourages, but does not require, Landlords to take into account individual circumstances when making a determination to terminate tenancy; such circumstances might include, among other things, the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, and whether the leaseholder, if not the wrongdoer, took all feasible steps

to prevent the offending action from occurring and has removed the offending person from the lease or otherwise banned the offending person from the premises in the future.

IX. INFORMATION REGARDING SEX OFFENDERS

In the screening of applicants, Owners must perform the necessary criminal history background checks to determine the applicants' suitability for Federally-assisted housing. Therefore, Owners should contact national and state sex offender registry agencies. Owners are required to prohibit admission of all sex offenders who are subject to a lifetime registration requirement under a state sex offender program. In accordance with Federal law, any individual who is a sex offender subject to a lifetime registration requirement under state law shall not be admitted to Federally-assisted housing. Owners have the discretion to "screen out" applicants who the Owner determines to be unsuitable under the Owner's established standards for admission (for example, sex offenders who are not subject to a registration requirement under state law).

In accordance with the regulation at 24 CFR 5.905(b), an Owner of Federally-assisted housing that is located in the jurisdiction of a PHA that administers a Section 8 or public housing program under an Annual Contributions Contract with HUD may request that the PHA obtain information necessary to determine whether a household member is subject to a lifetime registration requirement under a state sex offender registration requirement.

Households already living in Federally-assisted housing units are not subject to the provisions in the regulations at 24 CFR 5.856. Neither the statutory nor regulatory requirements specifically address sex offenders currently living in Federally-assisted housing.

X. CONDUCTING BACKGROUND CHECKS

Owners of Federally-assisted housing may request the PHA in the area where the project is located to obtain criminal background information concerning a "household member" for applicant screening, lease enforcement, or eviction. Prior to performing or requesting a PHA to conduct a background check, Owners must obtain signed written consent forms from the applicant or household member. Additionally, before a background check is conducted the Owner must provide the PHA with its selection criteria. The PHA will screen for admission based on the Owner's selection criteria. All criminal background checks conducted must be done consistently for every applicant and/or resident.

Upon request of the Owner, the PHA must request the criminal conviction records in the states where the applicant resides and has resided. The regulation at 24 CFR 5.903(a) authorizes PHAs administering Section 8 (including State Housing

Finance Agencies that administer a Section 8 contract under an Annual Contributions Contract (ACC)) to obtain criminal conviction records from a law enforcement agency. Owners and PHAs may rely on the applicants' declarations regarding their residences and any other information. The PHA's determination with regard to the screening and admission of applicants is based upon the criminal conviction record and the Owner's standards for prohibiting admission. All findings of criminal background or sex offender status used to make determinations must be documented. If the Owner's selection criteria are not clear, the PHA should contact the Owner for clarity. The PHA will make a determination based on the information provided by the Owner. Any decisions based on "reasonable belief" or other "determination" of the owner, the reason for the belief or determination should be documented. This documentation should not be only of specific behavior but that the behavior would (or does) interfere with the health, safety, or peaceful enjoyment of other residents.

If, after a criminal background check has been conducted, it is discovered that the applicant or tenant provided false information, the Owner may deny admissions to the applicant or may evict the tenant in accordance with its standards for admissions screening or for termination of tenancy. However, the household must be notified by the PHA/Owner of the proposed action to be based on the information and must provide the subject of the record, and the applicant or tenant, with a copy of such information, and an opportunity to dispute the accuracy and relevance of the information obtained from any law enforcement agency.

Owners may use sources other than the PHA for the purpose of conducting background checks of criminal conviction records. The Owner may conduct his/her own background search of criminal records, or may secure a contractor. The Owner may not charge the applicant/tenant a fee for these background searches. In those cases where the Owner conducts his/her own criminal background searches or uses sources other than a PHA, the Owner will make the determination, in accordance with the Owner's standards for admission, if the applicant/tenant meets the screening criteria.

If there is any information discovered, and the applicant or tenant has not revealed the information, the applicant or tenant may be subject to violation. Information withheld during the application process could be grounds for denying admission. Tenants who provide false information or withhold information may be in violation of the lease agreement.

Owners and PHAs have the discretion to contract out their screening activities, but will be responsible for the action and decisions made by their contractors. HUD does not prescribe the manner in which the PHA determines its source for obtaining this information. The criminal records must be requested from the appropriate law enforcement agency, National Crime Information Center (NCIC), police departments, or other law enforcement agencies that hold criminal conviction records.

Police officers and other security or management personnel that apply to rent subsidized units are subjected to the same screening criteria as other applicants.

PHAs that obtain criminal records are not responsible for updating the criminal history of an applicant or tenant. Criminal records are to be managed in accordance with the requirements in the regulations at 24 CFR 5.903(g) requiring the PHA to insure that, "...any criminal record received by the PHA from a law enforcement agency is maintained confidentially; not misused or improperly disseminated; and destroyed, once the purpose for which the record was requested has been accomplished." When destroying records of criminal background checks in accordance with 24 CFR 5.903(g), notation should be made in the tenant file of the date the records were destroyed and that the reason was for purposes of confidentiality.

In addition, PHAs and Owners must handle any information obtained from other records in accordance with applicable state and Federal privacy laws and with the provisions of the consent forms signed by the applicant.

XI. STATE HOUSING FINANCE AGENCIES (HFAs)

Under the Final Rule, HFAs as well as PHAs are required to comply with its provisions. In accordance with the ACC between HUD and the HFA, the HFA (referred to as a PHA in the ACC) is required to perform all the responsibilities in accordance with applicable provisions of "The United States Housing Act of 1937 and other Federal laws, including any amendments or changes in the law and HUD regulations and other requirements including any amendments or changes in HUD requirements."

XII. TENANTS LIVING IN AN UNASSISTED UNIT

Owners are not required to have background checks conducted on applicants applying for an unassisted unit or tenants living in an unassisted unit in a project-based property. Owners may conduct background checks on applicants for unassisted units if they wish. The Final Rule does not require that the PHA conduct criminal background checks on applicants for units that are not Federally-assisted. For purposes of screening and eviction, Federally-assisted housing is defined as a "...dwelling unit in housing that is provided project-based assistance under multifamily housing programs." The "project" means only the part of the development that is HUD-assisted when a development is only partially HUD assisted.

XIII. FEES

The PHA may charge the Owner reasonable fees for performing background checks on behalf of the Owner for criminal conviction records and for taking other action on behalf of the Owner. The fee is a project expense. The PHA may require the Owner to reimburse costs incurred by the PHA, including reimbursement of any fees charged to the PHA by a law enforcement agency, the PHA's own related staff and administrative costs. The fee that a PHA may charge for these requirements is separate from the administrative fee paid by HUD.

Note: Owners cannot charge the applicant/tenant any fees for criminal background checks.

XIV. LEASE RECERTIFICATION

Owners are not required to have criminal background checks conducted of current tenants at lease recertification. However, Owners have the authority to require criminal background checks at recertification. If, after a criminal background check has been conducted, it is discovered that the tenant is in violation of the provisions of the lease, the Owner may evict the tenant in accordance with the lease and the Owner's standards for termination of tenancy. However, the household must (1) be notified by the PHA/Owner of the proposed action to be based on the information and (2) must provide the subject of the record, and the tenant, with a copy of such information and an opportunity to dispute the accuracy and relevance of the information obtained from any law enforcement agency.

XV. FIELD OFFICE REPORTING REQUIREMENTS

Field Offices must review the Owners' tenant selection criteria when performing management reviews to ensure that the Owners' criteria are in compliance with Fair Housing requirements and the provisions of the Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule.

If you have any questions regarding this Notice, please contact Cynthia Thomas at (202) 708-2866, extension 3686.

John C. Weicher
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Federal Housing Commissioner