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Update on HUD Notice H 2012-05: “Guidelines on Addressing Infestations in HUD-insured and Assisted Multifamily Housing”

DISCLAIMER: This NAHMAanalysis is intended to provide a general policy overview of HUD’s infestation guidance; it does not constitute legal advice nor is it intended as compliance assistance.

Background

On August 16, 2011, HUD released Notice H 2011-20 “Guidelines on Bed Bug Control and Prevention in HUD Insured and Assisted Multifamily Housing.” It applied to “all Multifamily properties with active HUD Insured, HUD-Held or Direct Loans, Section 202 or 811 Capital Advances, Project-Based Rental Assistance contracts, and/or HUD Use Agreements.”¹

The notice provided information and references to best practices regarding the prevention and control of bed bug infestations. It also provided guidance on the rights and responsibilities of HUD, property owners and management agents (O/A) and tenants with regard to bed bug infestations.

However, Notice H 2011-20 was extremely controversial for several reasons. First, the Notice placed sole financial responsibility for infestation prevention and treatment on the properties. Likewise, the guidance contradicted effective methods of infestation control and eradication that require O/As and tenants to assume particular responsibilities for successful pest elimination. The notice also lacked enforcement tools for O/As to ensure tenant compliance with property treatment and control efforts. Notice H 2011-20 triggered serious unintended consequences which effectively jeopardized the financial health of HUD’s portfolio, unnecessarily complicated management of affordable housing, and interfered with the eviction of tenants who failed to abide by the HUD model lease terms. As a result, NAHMA and many of our industry colleagues strongly opposed Notice H 2011-20.

¹ Notice H 2011-20 Guidelines on Bed Bug Control and Prevention in HUD Insured and Assisted Multifamily Housing. Washington, DC: Department of Housing and Urban Development, August 16, 2011, 2. <http://portal.hud.gov/hudportal/documents/huddoc?id=11-20hsgn.pdf> (accessed August 2, 2012).

In late December 2011, HUD's Office of Multifamily Housing convened a meeting to solicit industry feedback on the real-world implications of Notice H 2011-20. After taking feedback from industry stakeholders into consideration, HUD developed new guidance—Notice H 2012-05, "Guidelines on Addressing Infestations in HUD-insured and Assisted Multifamily Housing." This guidance was released on April 23, 2012, and it superseded Notice H 2011-20. The 2012 notice applies to projects with:

- Section 8 Project Based Rental Assistance, Rent Supplement or Rental Assistance Payment (RAP) contracts;
- Active Section 202 Direct Loans, Section 202/162, Section 202 and 811 Capital Advances, and Section 202 Senior Preservation Rental Assistance Contracts or Section 811 Project Rental Assistance demonstration funding; and
- Active FHA insured first mortgages under Sections 207 pursuant to 223(f), 221(d)(3), 221(d)(4), 221(d)(5), 231, 213 or 236.²

Notice H 2012-05 addresses many of the affordable housing providers' concerns with Notice H 2011-20, and ensures that the responsibilities of controlling and treating infestations are more fairly shared among tenants and O/As. Notice H 2012-05 reaffirms the property lease and house rules as the guiding documents on property owners' and residents' rights and responsibilities regarding infestations and housing physical condition standards.

For a copy of Notice H 2012-05, please visit: <http://portal.hud.gov/huddoc/12-05hsgn.pdf>

Summary

Notice H 2012-5 superseded the previous guidance, Notice H 2011-20. The more recent notice replaces HUD's previous bed bug guidance for the Office of Housing's multifamily programs, but it also applies more broadly to insect and vermin infestations.

The following policies from the previous notice were carried over into the current guidance:

- HUD's recommendation that O/As implement integrated pest management (IPM) plans to prevent and eradicate bedbugs;
- Clarification that O/As may request the use of project funds for treatment and eradication of infestations;
- Certain restrictions on reimbursing tenants for additional costs to the household such as new furniture, clothing or cleaning services; and
- Procedures for HUD multifamily staff to follow-up with owners after receiving a report from a REAC inspection which notes bedbugs are present on the property; however, the new guidance includes some slight modifications to this policy.

² Notice H 2012-5 Guidelines on Addressing Infestations in HUD-insured and Assisted Multifamily Housing. Washington, DC: Department of Housing and Urban Development, April 23, 2012, 2. <http://portal.hud.gov/huddoc/12-05hsgn.pdf> (accessed August 3, 2012).

There are a number of substantial differences between the guidance in effect, Notice H 2012-05, and the previous guidance, Notice H 2011-20. Major differences include:

- The current guidance addresses infestations more broadly than the previous guidance, which focused exclusively on bed bugs.
- The current guidance removes the blanket prohibition against charging tenants for treatment of infestations. For assisted project owners, however, “requests for tenants to pay the costs of infestation treatment must be in accordance with the provision for tenant payment of damages or noncompliance as required in the Family Model Lease.”³
- Subject to certain conditions, Notice H 2012-05 also lifts the blanket prohibitions on denying tenancy or evicting residents based on their experience with infestations. It states, “Assisted Owners must follow additional guidelines including occupancy requirements for assisted housing, and must adhere to all HUD and state and local landlord/tenant laws before taking action to deny tenancy or remove residents for causes related to infestations.”⁴
- The detailed timetable for responding to residents’ reports of bed bugs was removed. Instead, the guidance instructs O/As to respond to reports of infestations with urgency and take appropriate action within a reasonable time period.⁵
- Finally, the previous guidance limited O/As’ ability to protect the property and its residents from infested furniture. The old guidance said O/As could only require non-chemical treatment at move-in. They could also offer, but not require, non-chemical treatment of used furniture or luggage. The current guidance gives owners more leeway to require treatment of residents’ furniture. Under Notice H 2012-5:

“O/As may voluntarily offer to inspect tenants’ furniture before move-in. Where there is an approved (for Assisted Owners) lease provision that complies with state and/or local landlord/tenant law, O/As may require appropriate treatment of furniture upon tenant move-in, or when a tenant moves furniture into the apartment. These services or products are to be offered at the Owner’s expense, or may be paid from project operating funds if available.”⁶

Positive Changes

The guidance of Notice H 2012-05 is a much more balanced, workable approach to controlling and eradicating infestations than Notice H 2011-20. Notice H 2012-05 reaffirms the enforcement tools to ensure tenant compliance with pest control efforts available to O/As under the property lease and house rules, subject to state and local landlord/tenant laws. The notice appropriately

³ Ibid, 5.

⁴ Ibid, 5.

⁵ Ibid, 4.

⁶ Ibid, 5.

cites the property lease and house rules as the guiding documents for details on O/As' and tenants' rights and responsibilities regarding infestations and the physical condition standards for the project. It also continues the policy of allowing O/As to use project funds for treatment and eradication of infestations. We are also pleased that the revised guidance provides more leeway for owners to require appropriate treatment of residents' furniture in order to reduce the risk of infestations. Therefore, NAHMA supports the guidance provided by Notice H 2012-05.

Issues of Concern to NAHMA

NAHMA is aware that a number of tenant advocacy groups called on HUD to repeal Notice H 2012-05 and reinstate Notice H 2011-20.⁷ NAHMA would strongly oppose any action by HUD to reinstate the previous flawed bed bug guidance. Infestations—particularly bed bug infestations—are a serious problem. HUD's revised guidance represents a more appropriate and balanced approach to controlling infestations by recognizing that:

- Prohibiting O/As from sanctioning tenants who have not complied with treatment protocol unfairly places other tenants and the property at risk of infestation;
- The financial resources for properties to address infestations are extremely limited, and must be used efficiently;
- Under HUD's model leases, O/As are guaranteed the right to pursue certain remedies when tenants:
 - Cause damages to the property, through deliberate action or neglect;
 - Are in "material noncompliance" with the lease; or
 - Fail to carry out their obligations under state and/or local landlord/tenant laws; and
- Under some state and local landlord/tenant laws, O/As may pursue certain remedies when tenants fail to meet their responsibilities for controlling and addressing infestations.

On August 21, 2012, HUD officials informed NAHMA and other industry partners that the Department is not going to withdraw Notice H 2012-05 or reinstate Notice H 2011-20. NAHMA welcomed this news.

Nevertheless, we believe it is important to address misinformation and/or misunderstandings about the current infestation policies explained in Notice H 2012-05. This section uses a question and answer format to refute the criticisms levied against the revised infestation guidance.

Q: Does Notice H 2012-05 permit O/As of HUD-assisted properties to shift the burden of treatment costs away from properties and onto tenants?

A: *No.*

⁷ Housing Justice Network. *Housing Justice Network to Department of Housing and Urban Development Multifamily Deputy Assistant Secretary Carol Galante Re: Notice H 2012-5, Guidelines on Addressing Infestations in Multifamily Housing*. Letter. From the National Low Income Housing Coalition May 31, 2012. http://nihc.org/sites/default/files/HJN_Bed_Bug_Ltr_5-31-12.pdf (accessed August 1 2012). This letter lays out the most common criticisms of the revised guidance from the tenants' advocacy groups, which are the basis for our Q&As.

For owners of assisted properties, the Notice limits remedies available to owners of covered properties to those permitted in the property lease and under state and local law. Removing the blanket prohibition against charging tenants for treatment expenses in all circumstances was necessary in order to address concerns about the small minority of tenants who are not cooperative with treatment protocols. In these cases, the lack of cooperation by a few tenants quickly escalates into expensive damages to the property and inconvenience to their neighbors.

The revised guidance only allows owners to charge tenants to the extent permitted under the property lease, consistent with state and local landlord/tenant laws. In fact, O/As are allowed the right to charge tenants for “damages” under the terms of HUD’s four multifamily Model Lease agreements.⁸

When a household plans to move into a HUD-assisted multifamily property, they typically sign one of HUD’s four model leases. These contracts contain provisions that require tenants to pay the costs of any damages to the property and allow the O/A to evict a tenant for “material noncompliance” with the agreement. By signing one of these HUD model leases, a tenant agrees to pay the costs associated with any “damages” they caused. For example, HUD’s Lease for Subsidized Properties (a.k.a the Family Model Lease) guarantees O/As the rights to request repayment as a result of tenant-caused damages to the property through “carelessness, misuse, and neglect.”⁹ Notice H 2012-05 recognizes that residents who do not comply with the bed bug treatment protocols and cause reinfestations damage the property.

Likewise, the Notice also affirms that owners may request project funds to treat and control infestations. The fact that HUD continued allowing owners to request property funds for eradication refutes the idea that the Agency is permitting owners to shift the financial burdens to tenants.

Q: Are O/As required to treat infestations?

A: Yes.

In the background section on page one of Notice H 2012-05, HUD writes:

“Pursuant to 24 CFR Part 5, Subpart G, HUD housing must be decent, safe, sanitary and in good repair. Owners of HUD-insured or assisted housing must maintain such housing in a manner that meets physical condition standards. In accordance with project Regulatory Agreements and Section 8 HAP Contracts, the housing must have no evidence of infestation. HUD monitors Owners and Agents (O/As) to ensure that housing meets physical condition standards enumerated in 24 CFR 5.703.”

Likewise, assisted O/As are required to provide extermination services and make “necessarily repairs with reasonable promptness” under the terms of the Family Model Lease.¹⁰

⁸ Subsidized Programs, Section 202/8 or Section 202 Project Assistance Contract (PAC), Section 202 Project Rental Assistance Contract (PRAC), or Section 811 PRAC.

⁹ HUD Form HUD 90105-a Model Lease for Subsidized Properties. OMB Approval No. 2502-0204, Expires 03/31/2014. Washington, DC: Department of Housing and Urban Development, December 2007, 5. <http://portal.hud.gov/hudportal/documents/huddoc?id=90105a.pdf> (accessed July 11, 2012).

¹⁰ HUD Form HUD 90105-a Model Lease for Subsidized Properties, 5.

Furthermore, Notice H 2012-05 informs O/As that HUD is taking additional steps to monitor and track reports of bed bug infestations and subsequent treatments.¹¹ REAC must notify the Hub/Program Center Director if the O/A reported an infestation or the REAC inspector notes the presence of bed bugs. After receiving a notification¹² of a bed bug infestation, HUD multifamily housing staff must:

- Record the infestation in the Integrated Real Estate Management System (iREMS);
- If bed bugs were identified by REAC, send a letter to the owner notifying them of the infestation and requesting that the owner inform their project manager of the actions they will take to treat the infestations;
- Advise owners to inform HUD of the actions they will take to eradicate the infestation;
- Advise owners to inform HUD of the actual action taken to treat the infestation and if and when the bed bugs have been eradicated;
- Release funds from a property's Reserve for Replacement or Residual Receipts accounts if requested and if such funds are available and authorized;
- Continue to enter all infestation related information into iREMS; and
- Report any significant developments or problems regarding a bed bug infestation to the Office of Asset Management.¹³

For these reasons, we believe HUD expects O/As to treat infestations.

Q: If HUD allows owners to use project funds for bed bug treatment and control, why does the new guidance allow owners to charge tenants?

A: Notice H 2012-05 states that infestations are an “eligible project expense”¹⁴ and permits owners to use certain project funds¹⁵ to eradicate infestations. Generally speaking, the guidance limits an owner's remedies to those available under the lease and state and local laws. It does not envision pushing the entire cost of treatments onto the tenants. For assisted properties, the notice only allows charges to be pursued in certain situations where O/As can demonstrate tenant-caused damages or noncompliance, in accordance with the Family Model Lease.

Forcing properties to assume sole financial responsibility for infestations caused by tenants' **noncompliance** results in costly, unfunded mandates. In fact, several NAHMA members have reported that annual pest control expenses exceeded \$100,000 for properties which experienced bed bug infestations. Limited resources must not be wasted.

Moreover, NAHMA believes that properties' financial resources will be limited in the future. Although Notice H 2012-05 permits O/As to request budget-based rent increases (BBRIs) if their Section 8 contract allows them,¹⁶ only a small minority of assisted properties have BBRI eligible contracts. Therefore, the majority of HUD's assisted properties would not be able to take

¹¹ Notice H 2012-5 Guidelines on Addressing Infestations in HUD-insured and Assisted Multifamily Housing, 6.

¹² From REAC, the O/A, the performance based contract administrator (PBCA), the tenants, or within the Office of Inspector General (OIG) audit.

¹³ Notice H 2012-5 Guidelines on Addressing Infestations in HUD-insured and Assisted Multifamily Housing, 6-7.

¹⁴ Ibid, 5.

¹⁵ These include operating funds (when available), reserve for replacements, residual receipts, advances, and budget based rent increases (where applicable).

¹⁶ Notice H 2012-5 Guidelines on Addressing Infestations in HUD-insured and Assisted Multifamily Housing, 5.

advantage of this option. Likewise, the recent page changes to the Section 8 renewal guide cap BBRI for Option 4 contract renewals at market levels.¹⁷ As a result, relief through BBRI will be minimal at best.

Properties that were restructured under Mark-to-Market (M2M) and whose rent increases are limited to OCAFs are in an even worse predicament. Average OCAFs nation-wide have been held below 2% for the last two federal fiscal years (1.7% in 2011¹⁸ and 1.8% in 2012¹⁹). Based on current economic trends, NAHMA does not expect OCAFs to significantly change in the near future. Rents are being held to comparable market levels; however, the comparable market properties have more options to recover the cost of bed bug treatments, including rent increases or directly billing the renters. The OCAF properties are simply not receiving adequate rent increases or other substantial increases in cash flow to continue absorbing pest control costs that result from **noncompliance** with treatment protocol.

Furthermore, replacement reserves are limited. M2M underwriting did not account for the explosion in pest control costs caused by bed bugs and other vermin. Likewise, HUD's Notice H 2011-30 "Use of Reserve for Replacement Accounts in Restructured Mark-to-Market (M2M) Properties," places additional demands on the reserves. It states "...owners of M2M restructured properties are required to utilize the Reserve for Replacements account as the primary source for capitalized expenses."²⁰ By requiring properties to use reserve for replacement accounts for M2M capital expenses, the accounts could be depleted, which would significantly limit the resources available to pay the cost of treating infestations.

HUD also issued Notice H 2012-14 on August 3, 2012, which requires new regulations project-based Section 8 properties to use residual receipts to offset housing assistance payment (HAP) contracts.²¹ Owners must use residual receipts to offset HAP contracts until their accounts are reduced to \$250 per unit.²² This policy significantly limits the funding available to pay for emergency property operations, including the treatment of vermin infestations.

Q: Won't the policies in Notice H 2012-05 just discourage tenants from reporting infestations and impede control efforts?

A: Most tenants do comply with inspection and treatment protocols. Unfortunately, there are some residents who do not. Remedies available to O/As are limited to those described in the property leases, which must comply with state and local landlord/tenant laws. For HUD-assisted properties, Notice H 2012-05 allows O/As to target individual households that are not complying with infestation control and eradication guidance. Noncompliant tenants increase the risk of infestation to other residents' apartments and to the properties' common areas.

¹⁷ Office of Housing. *Section 8 Renewal Policy Guide Book*. Transmittal. Washington, DC: Department of Housing and Urban Development, May 18, 2012, 7.

¹⁸ Department of Housing and Urban Development. *Notice of Certain Operating Cost Adjustment Factors for 2011*. Federal Register, Docket No. FR-5569-N-01. Washington, DC: Government Printing Office, November 8, 2010.

¹⁹ Department of Housing and Urban Development. *Notice of Certain Operating Cost Adjustment Factors for 2012*. Federal Register, Docket No. FR-5569-N-01. Washington, DC: Government Printing Office, October 26, 2011.

²⁰ *Notice H 2011-30 Use of Reserve for Replacement Accounts in Restructured Mark-to-Market (M2M) Properties*. Washington, DC: Department of Housing and Urban Development, October 19, 2011, 1. <http://portal.hud.gov/hudportal/documents/huddoc?id=11-30hsgn.pdf> (accessed August 4, 2012).

²¹ *Notice H 2012-14 Use of "New Regulation" Section 8 Housing Assistance Payments (HAP) Contracts Residual Receipts to Offset Project-Based Section 8 Housing Assistance Payments*. Washington, DC: Department of Housing and Urban Development, August 3, 2012. <http://portal.hud.gov/huddoc/12-14hsgn.pdf> (accessed August 10, 2012).

²² *Ibid.*, 3.

While implementing an integrated pest management plan (IPM)²³ may help encourage tenants to cooperate with control and eradication efforts, it does not ensure 100 percent tenant compliance.

In a 2009 study on IPM programs published in the *Journal of Medical Entomology*, researchers noted that:

“Some residents placed clothes or bed linens against the wall, forming bridges for bed bugs to access the bed or sofa from the floor to the furniture. These conditions impaired the full effect of the interceptors²⁴ and may have contributed to the reappearance of bed bugs on furniture.”²⁵

The researchers also wrote that one resident “brought in a bed-bug infested chair during our study,” which contributed to the eradication failure in this particular building.²⁶

The study demonstrates that, despite the implementation of an IPM, some tenants may continue to behave in a manner that places themselves, their neighbors, and the property at risk. Therefore, the ability to take action against such tenants is essential for O/As in order to impress upon tenants the seriousness of noncompliance and reduce behaviors that contribute to infestations in the future.

Furthermore, NAHMA strongly believes that tenants who fail to comply with treatment protocols—including, but not limited to, guidance from O/As and professional pest control experts—should be held accountable. These tenants are wasting limited property resources, damaging the property, and placing other residents’ apartments at risk of infestation. In these cases, O/As should have the right to seek recourses under the lease and/or state and local landlord-tenant laws, which may include eviction or entering into repayment agreements with the noncompliant tenant.

Q: Why should O/As have the right to deny tenancy to applicants with prior experience with infestations?

A: To ensure an applicant is not a financial risk to the property nor a physical risk to their neighbors before offering residency.

NAHMA believes that O/As must have the right to deny tenancy if they reasonably determine that the potential resident failed to cooperate with any prior O/A regarding bed bug prevention and eradication efforts. This measure is akin to other screening criteria that O/As are authorized to implement, such as credit checks that permit O/As to screen out applicants who are deemed unsuitable for tenancy.

²³ Which can include infestation best practices, interceptors, bed covers, and/or educational sessions for management and tenants.

²⁴ Used in bed bug identification and control efforts.

²⁵ Changlu Wang, Timothy Gibb, and Gary W. Bennett, “Evaluation of the Two Least Toxic Integrated Pest Management Programs for Managing Bed Bugs (Heteroptera: Cimicidae) With Discussion of a Bed Bug Intercepting Device,” *Journal of Medical Entomology* 46 (2009): 570.

²⁶ *Ibid.*, 571.

Q: Why should tenants comply with O/A guidance and pest control treatment protocol when eradicating infestations?

A: Because “tenants are the first line of defense against bed bug infestations” and resident cooperation is a key factor in the successful control and eradication of vermin infestations.^{27, 28}

Notice H 2012-05 maintained several positive recommendations from the older notice, including a provision that encouraged O/As to implement IPM plans. HUD suggested that these plans include best practices and educational components.

A successful infestation eradication effort also includes resident cooperation:

“..with the O/A’s efforts to identify and address infestations. This tenant cooperation is shown to expedite the control of infestations. Cooperation includes allowing the O/A to enter the unit to perform inspections and treatments, allowing pest treatments to occur, following the pest treatment protocol, and removing infested furniture or other items from common areas such as hallways or community rooms.”²⁹

Q: Does Notice H 2012-05 undermine state and local law and lease requirements?

A: No.

The background section of Notice H 2012-05 clearly states:

“The Notice does not supersede existing lease provisions that comply with state and/or local landlord/tenant laws and that have been approved by HUD (where such approval is required).”³⁰

Furthermore, Section VII “Recurring Infestations” affirms that:

“All Owners (of assisted and unassisted properties) may pursue remedies provided in the lease agreement and **in accordance with state and local rental law [emphasis NAHMA’s]**. Assisted Owners must follow additional guidelines including occupancy requirements for assisted housing, and **must adhere to all HUD and state and local landlord/tenant laws before taking action to deny tenancy or remove residents [emphasis NAHMA’s]** for causes related to infestations.”³¹

²⁷Ibid.

²⁸ Notice H 2012-5 Guidelines on Addressing Infestations in HUD-insured and Assisted Multifamily Housing, 3.

²⁹Ibid, 4.

³⁰Ibid, 2.

³¹Ibid, 5.

Q: Does Notice H 2012-05 create a new basis for evicting tenants that is not currently permitted under existing leases or state and local laws?

A: No. The Notice repeatedly affirms that owners may pursue remedies provided in the property lease in accordance with state and local landlord/tenant laws. Owners of assisted housing must satisfy additional HUD policy requirements before evicting a resident.

HUD's Family Model Lease allows O/As to terminate tenancy for a number of reasons, which include:

- "Material noncompliance" with the lease;³² and/or
- Failure "to carry out obligations under any State Landlord and Tenant Act."³³

"Material noncompliance" includes but is not limited to:

- Repeated minor violations of the lease that:
 - Disrupt the livability of the project;
 - Adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment to the leased premises and related project facilities;
 - Interfere with the management of the project; or
 - Have an adverse financial effect on the project ; and
- Non-payment of rent or any other financial obligation due under the lease.³⁴

NAHMA has strongly argued that HUD should treat the failure of tenants to comply with bed bug treatment protocols and controls as material noncompliance with the lease. Infestations result in damages that can disrupt the livability of the project and have an adverse financial effect on the project. Tenants that do not comply with infestation treatment protocol are interfering with the management of the project. Because the tenants have signed these contracts prior to move-in, they are legally obligated to fulfill the terms of the agreement or face possible eviction.

NAHMA's Position

Notice H 2012-05 provides sound guidance that fairly balances tenant and O/A responsibilities for preventing and controlling vermin infestations. It guarantees that O/As can pursue reasonable remedies to address noncompliant tenants and does not conflict with existing HUD policies, regulations, and statute. It corrects policies from the previous Notice H 2011-20, which allowed the actions of noncompliant tenants to negatively affect other residents who comply with O/A instructions to prevent and control vermin infestations. NAHMA is pleased that HUD is retaining the current guidance in Notice H 2012-05.

³² HUD Form HUD 90105-a Model Lease for Subsidized Properties, 11.

³³ Ibid.

³⁴ Ibid, 12.