July 16, 2012

Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW., Room 10276
Washington, DC 20410–0500

Re: The Housing and Economic Recovery Act of 2008 (HERA): Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs [Docket No. FR–5242–P–01]

To Whom It May Concern:

We welcome the opportunity to comment on HUD’s proposed rule regarding Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher programs rule, largely stemming from the enactment of the “Housing and Economic Recovery Act of 2008” (HERA). Except where noted in our comments, NAHRO concurs with HUD’s regulatory implementation of Section 8 project-based and tenant-based program provisions enacted in HERA.

NAHRO represents more than 3,100 agencies and over 20,000 individual members and associates, and is the oldest and largest association serving housing and community development agencies for the provision of adequate and affordable housing and strong, viable communities for all Americans—particularly those with low- and moderate-incomes. Our members administer HUD programs such as Public Housing, Section 8 Housing Choice Vouchers, CDBG and HOME.

Reasonable Rents for LIHTC-Assisted Units Without Section 8 Assistance
[§982.507(c)(2)]

HUD’s proposed rule, 24 CFR §982.507(c) states that if a rent requested by a property owner exceeds the Low-Income Housing Tax Credit (LIHTC) rent for households not receiving Section 8 tenant-based or project-based voucher assistance, than a PHA is required to conduct a rent reasonableness determination in accordance with HUD’s existing program regulations governing rent reasonableness, and the rent cannot exceed the lesser of the: (1) reasonable rent as determined pursuant to a rent comparability study, and (2) the payment standard established by the PHA for the unit size involved. This provision pertains to two main topics, one concerning whether or not a rent reasonableness determination is required, and another concerning the allowable rent level.

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Whether or Not a Rent Reasonableness Determination by the PHA is Required

Under HERA, PHAs are not required to conduct a rent reasonableness determination (in accordance with the existing regulations for Section 8 tenant-based and voucher-based programs) if the initial rent or rent requested at subsequent intervals, is equal to or less than the rent for other comparable units receiving tax credits or assistance in the project for units that are not occupied by Section 8 tenant-based or project-based assisted households. It would be helpful if this point was clarified in HUD’s final rule.

To substantiate our comment, please refer to subparagraph (a)(2) regarding Voucher Program Rent Reasonableness in HERA, Sec. 2835 - Other HUD Programs Section 8 Assistance – which states:

“Section 8(o)(10) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(10)) is amended by adding at the end the following new subparagraph;

“(F) TAX CREDIT PROJECTS.—In the case of a dwelling unit receiving tax credits pursuant to section 42 of the Internal Revenue Code of 1986 or for which assistance is provided under subtitle A of title II of the Cranston Gonzalez National Affordable Housing Act of 1990, for which a housing assistance contract not subject to paragraph (13) of this subsection is established, rent reasonableness shall be determined as otherwise provided by this paragraph, except that—

“(i) comparison with rent for units in the private, unassisted local market shall not be required if the rent is equal to or less than the rent for other comparable units receiving such tax credits or assistance in the project that are not occupied by families assisted with tenant-based assistance under this subsection;…”

Allowable Rent Level

The section titled, “Rent to owner: Reasonable rent” under HUD’s proposed rule [§ 982.507“(c)(2)”] states, “[i]f the rent requested by the owner exceeds the LIHTC rents for non-voucher families, the PHA must perform a rent comparability study in accordance with program regulations and the rent shall not exceed the lesser of the: (i) Reasonable rent as determined pursuant to a rent comparability study and (ii) the payment standard established by the PHA for the unit size involved.”

With the exception of the intersection of reductions in annual FMR values by five percent or more in lease terms subsequent to the initial voucher-assisted lease, under HERA, the initial rent requested or the rent at intervals during subsequent lease terms, would not be “rent reasonable” if it exceeds the greater of: 1) the rent for other comparable units receiving such tax credits or assistance in the project for units that are not occupied by Section 8 tenant-based or project-based assisted households; or 2) a PHA’s payment standard for an applicable unit size. Under HERA, there could be a scenario where the initial rent requested or the rent at intervals during subsequent lease
terms would be “rent reasonable” if it is equal to the greater of 1) the rent for other comparable units receiving such tax credits or assistance in the project for units that are not occupied by Section 8 tenant-based or project-based assisted households; or 2) a PHA’s payment standard for an applicable unit size. It would be helpful if this point was clarified in HUD’s final rule.

To substantiate our comment, please refer to subparagraph (a)(2) regarding Voucher Program Rent Reasonableness in HERA, Sec. 2835 - Other HUD Programs Section 8 Assistance – states:

“Section 8(o)(10) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(10)) is amended by adding at the end the following new subparagraph;

(F) TAX CREDIT PROJECTS.—In the case of a dwelling unit receiving tax credits pursuant to section 42 of the Internal Revenue Code of 1986 or for which assistance is provided under subtitle A of title II of the Cranston Gonzalez National Affordable Housing Act of 1990, for which a housing assistance contract not subject to paragraph (13) of this subsection is established, rent reasonableness shall be determined as otherwise provided by this paragraph, except that—…”

“(ii) the rent shall not be considered reasonable for purposes of this paragraph if it exceeds the greater of—

‘‘(I) the rents charged for other comparable units receiving such tax credits or assistance in the project that are not occupied by families assisted with tenant-based assistance under this subsection; and

‘‘(II) the payment standard established by the public housing agency for a unit of the size involved.’’.

Extension Terms of HAP Contract [§982.507(c)(2)]

HUD’s proposed rule is inconsistent with the statutory language in HERA regarding cumulative terms on extending PBV HAP contracts, as well as with the intent of the statutory language.

Regarding the term of HAP contract extensions for the PBV program[§ 983.205(b)], HUD’s proposed rule states, “[a] PHA may agree to enter into an extension at the time of the initial HAP contract term or any time before expiration of the contract, for an additional term of up to 15 years if the PHA determines an extension is appropriate to continue providing affordable housing for low-income families. A HAP contract extension may not exceed 15 years. A PHA may provide for multiple extensions; however, in no circumstance may such extensions exceed 15 years, cumulatively…”

HUD’s interpretation of HERA also overlooks a number of important aspects of PBV program statutory language that were in place before HERA was enacted and that remain in place after its enactment. Section (a)(1) of HERA under section 2835 titled, “Other HUD
Programs – PHA Project-Based Assistance” amends 8(o)(13)(G) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(13)). As amended under HERA, section 8(o)(13)(G) under existing law states:

A public housing agency may enter into a contract with the owner of a structure assisted under a housing assistance payment contract pursuant to this paragraph to extend the term of the underlying housing assistance payment contract for such period as the agency determines to be appropriate to achieve long-term affordability of the housing or to expand housing opportunities. Such contract may, at the election of the public housing agency and the owner of the structure, specify that such contract shall be extended for renewal terms of up to 15 years each, if the agency makes the determination required by this subparagraph and the owner is in compliance with the terms of the contract. Such a contract shall provide that the extension of such term shall be contingent upon the future availability of appropriated funds for the purpose of renewing expiring contracts for assistance payments, as provided in appropriations Acts, and may obligate the owner to have such extensions of the underlying housing assistance payment contract accepted by the owner and the successors in interest of the owner. A public housing agency may agree to enter into such a contract at the time it enters into the initial agreement for a housing assistance payment contract or at any time thereafter that is before the expiration of the housing assistance payment contract.

The overriding public policy objective of the existing PBV statutory language as well as amended by HERA, is that the cumulative number of years by which a PHA has the discretionary authority to extend an existing PBV HAP contract with the consent of the owner, depends upon a PHA’s informed judgment about what is reasonably appropriate in order to achieve long-term affordability of the housing or to expand housing opportunities. In all cases, a PHA’s judgment on this topic is governed by their assessment of whether or not under the terms contemplated for a PBV HAP extension, the dwelling units are of sufficient quality to comply with HUD’s Housing Quality Standards (HQS) through the duration of any extended period of the PBV HAP contract. The statutory language in HERA also states that “…such contract shall be extended for renewal terms of up to 15 years each…” Congress’ use of the word “terms,” and use of the word “each” to modify 15 years in the sentence above, demonstrates that Congress’ statutory language in HERA was not intended to limit a PHA to extend PBV HAP contracts to a “term” of up to 15 years exclusively.

Determining the Rent to Owner (§ 983.301)

The reasonable rent provision under HUD’s proposed PBV rule [§ 983.301(e)] states, “[t]he PHA shall determine the reasonable rent in accordance with § 983.303. The rent to the owner for each contract unit may at no time exceed the reasonable rent, except in cases where, upon redetermination of the rent to owner, the reasonable rent would result in a rent below the initial rent.”

Section 2835(a)(1)(E) of HERA which amended Section 8(o)(13)(I)(i) regarding rent adjustments states, “except that the contract may provide that the maximum rent permitted for
a dwelling unit shall not be less than the initial rent for the dwelling unit under the initial housing assistance payments contract covering the unit;…” The statutory language under HERA allows but does not require that the following stipulation be in the PBV HAP contract. However, if a PHA chooses to include this stipulation in the PBV HAP contract with the consent of the owner, the language in HERA requires that the provision stipulate the maximum rent permitted for a dwelling unit shall not be less than the initial rent for the dwelling unit under the initial housing assistance payments contract covering the PBV-assisted unit.

**Reasonable Rent to Owner (§ 982.507)**

The subsection regarding reasonable rent to owner [24 CFR § 982.507 (a)(2)] states, “the PHA 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 1 year before the contract anniversary; or (iii) If directed by HUD. (3) The PHA 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 PHA.”

It is worth noting that HUD’s above regulations do not require change by the statutory language from HERA. The existing regulations which should remain in place under HUD’s current PBV rulemaking, only require that for purposes of property owner’s annual rent increase requests, PHAs must undertake rent reasonableness determinations if/when applicable FMRs decrease by five percent or more. This existing regulation, which should remain in place under HUD’s HERA-related rulemaking, does not require PHAs to lower PBV owners’ rents if/when applicable FMRs decrease by five percent or more, as has been directed by some HUD Field Offices in some instances over the years. The intent of this regulation [§ 982.507(a)(2)(iii)] is to allow PHAs to conduct rent reasonableness if warranted, but not for PHAs to necessarily lower the existing PBV rent in these circumstances.

Except in the circumstances described in our comments above regarding determining the rent to an owner (§ 983.301) concerning initial rents, if under the circumstances described above regarding decreases in FMR values of five percent or more a PHA receives a property owners’ annual rent increase request for a given unit but a PHA’s rent reasonableness determination justifies the existing PBV rent, than a PHA can maintain the existing PBV rent.

Except in the circumstances described in our comments above regarding determining the rent to an owner (§ 983.301) concerning initial rents, if under the circumstances described above regarding decreases in FMR values of five percent or more a PHA receives a property owners’ annual rent increase request for a given unit but a PHA’s rent reasonableness determination justifies a lower PBV rent, than a PHA can lower the PBV rent to the rent reasonable level but not lower than the initial rent.

Some HUD Field Office personnel have misinterpreted and/or misapplied the PBV regulations governing reasonable rents in the PBV program, which is why we believe that clarification of the proper implementation of this regulation is welcomed.
Removal of Unit from HAP Contract (24 CFR 983.211) and Continuation of Housing Assistance Payments (24 CFR 983.258)

HUD’s proposed PBV rule describes when units are to be removed from the Housing Assistance Payment contract if a tenant’s rent equals the total rent owed to owner under the assisted lease. HUD’s proposed policy states the unit is to be removed from the PBV contract after 180 days has passed with no subsidy payment. Both of these proposed policies do not provide a logical option to return units to the PBV HAP contract if the unit becomes available and qualified again, if three years have lapsed since the beginning term of the PBV HAP contract. It would be beneficial to program participants if the units could be available to be re-added to the contract “anytime” the contract is still active.

Description of the PBV Program (§ 983.5) & Maximum Amount of PBV Assistance (§ 983.6)

HUD’s proposed PBV rule includes information collection from PHA’s in the following areas:

(1) The total amount of annual budget authority;
(2) The percentage of annual budget authority available to be project-based; and
(3) The total amount of annual budget authority the PHA is planning to project-base under this part and the number of units that such budget authority will support.

If HUD is going to collect the following information from agencies, in an effort to minimize administrative burdens on PHAs we recommend including a request for this information in the PHA Plan so that PHAs that are utilizing the PBV section of the PHA Plan can answer these questions at that time.

Thank you for your consideration of our recommendations. Please do not hesitate to contact us if you require additional information.

Sincerely,

Jonathan B. Zimmerman  
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