



24 CFR Parts 5, 245, 882, 960, 966, and 982

[Docket No. FR-6362-P-01]

RIN 2501-AE08

Reducing Barriers to HUD-Assisted Housing

AGENCY: Office of the Secretary, U.S. Department of Housing and Urban Development (HUD).

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the regulations for certain HUD Public and Indian Housing and Housing Programs. The proposed amendments would revise existing regulations that govern admission for applicants with criminal records or a history of involvement with the criminal justice system and eviction or termination of assistance of persons on the basis of illegal drug use, drug-related criminal activity, or other criminal activity. The proposed revisions would require that prior to any discretionary denial or termination for criminal activity, PHAs and assisted housing owners take into consideration multiple sources of information, including but not limited to the recency and relevance of prior criminal activity. They are intended to minimize unnecessary exclusions from these programs while allowing providers to maintain the health, safety, and peaceful enjoyment of their residents, their staffs, and their communities. The proposed rule is intended to both clarify existing PHA and owner obligations and reduce the risk of violation of nondiscrimination laws.

DATES: Comments are due no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested persons are invited to submit comments regarding this rule.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street S.W., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that website to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All comments and communications properly submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as from individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

In accordance with 5 U.S.C. 553(b)(4), a summary of this proposed rule may be found at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Danielle Bastarache, Deputy Assistant Secretary for Public Housing and Voucher Programs, Room 4204, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC, 20410; telephone (202) 402-1380 (this is not a toll-free number) for the Public Housing and Section 8 programs. Ethan Handelman, Deputy Assistant Secretary for Multifamily Housing, Room 6106, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC, 20410; telephone (202) 402-2495 (this is not a toll-free number) for Multifamily Housing programs. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

SUPPLEMENTARY INFORMATION

I. Executive Summary

Everyone deserves to be considered as the individual they are, and everyone needs a safe and affordable place to live. For people with criminal records, having a stable place to live is critical to rebuilding a productive life. Yet too many people who apply for housing opportunities are not given full consideration as individuals, but instead are denied opportunities simply because they have a criminal record. Criminal records are often incomplete or inaccurate, and criminal conduct that occurred years ago may not be indicative of a person's current fitness as a tenant. These unnecessary exclusions disproportionately harm Black and Brown people, Native Americans, other people of color, people with disabilities, and other historically marginalized and underserved communities. In April 2016, HUD issued guidance to all housing providers cautioning that unnecessary and unwarranted exclusions based on criminal records may create a risk of Fair Housing Act liability because they can have an unjustified disparate impact based on

race.¹ That guidance advised housing providers that individualized assessments that take into account relevant mitigating information are likely to have a less discriminatory effect than categorical exclusions based on criminal record.

Yet too often, people still are being excluded from HUD-assisted housing for convictions that do not reflect at all on current fitness for tenancy, such as stale convictions that date back more than a quarter century, or those for low-level nonviolent offenses, such as riding a subway without paying a fare. Such exclusions do little to further legitimate interests such as safety, as mounting evidence shows and an increasing number of housing providers and public housing agencies (PHAs) now recognize.

This proposed rule would help standardize practices within HUD programs with respect to prospective tenants. It would provide clearer, common-sense rules and standards to help HUD-subsidized housing providers and PHAs carry out the legitimate and important ends of maintaining the safety of their properties and the surrounding communities and following federal law (which requires exclusion from HUD-assisted housing of people who are engaged in certain conduct or have certain criminal history), but without engaging in overbroad or discriminatory denials of housing. This proposed rule would establish in HUD program regulations a set of practices that already are required of housing providers under state and local law in much of the country; that are consistent with guidance HUD has provided to all housing providers to comply with the Fair Housing Act and to HUD-subsidized providers and PHAs to comply with program rules; and that, as HUD has heard from its industry partners, are already being used and work in practice to effectively balance various equities. In doing so, the proposed rule would clarify a legal landscape that many HUD-subsidized housing providers and PHAs find confusing, leading to divergent practices within HUD programs. While existing HUD regulations generally *permit* a

¹ *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (April 4, 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

fact-specific, individualized assessment approach, they have not been updated to clearly *require* it.

This proposed rule would cover various HUD programs, including public housing and Section 8 assisted housing programs, as well as the Section 221(d)(3) below market interest rate (BMIR) program, the Section 202 program for the elderly, the Section 811 program for persons with disabilities, and the Section 236 interest reduction payment program, and in doing so would amend existing programmatic regulations. A summary of some of the ways in which these changes would impact different program rules are explained below:

Clarifying what counts as relevant criminal activity and how recently it must have occurred: Existing regulations permit an assisted owner or PHA (for voucher applicants) to prohibit admission when the household has engaged in, “in a reasonable time prior to admission,” (1) drug-related criminal activity; (2) violent criminal activity; (3) other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises of other residents; or (4) 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. While public housing regulations do not have a similar “reasonable time prior to admission” qualifier, there is a “relevancy” qualifier preceding these same four substantive categories of criminal activity. Under the proposed rule, PHAs and assisted owners would still be able to deny admission for these four categories of criminal activity; however, the proposed rule would clarify that assisted owners and PHAs may not deny admission for categories of criminal activity beyond those which are specified in the regulations. The proposed rule would require the establishment of a “lookback period” limiting the reliance on old convictions and would provide, for all programs, that prohibiting admission for a period of time longer than three years following any particular criminal activity is “presumptively unreasonable.” The general rule would be that PHAs and assisted owners cannot make decisions based on criminal history that research indicates is not predictive of future criminal activity; that is irrelevant to safety, health, or fitness for tenancy; or

that is based on incomplete or unreliable evidence of criminal activity (e.g., a record for an arrest that has not resulted in a conviction).

Specifying procedural requirements before denying admission: At present, program regulations require PHAs and assisted owners to follow various procedural steps before denying admission based on a criminal record but do not provide important specifics. For example, PHAs and assisted owners must notify the household of the proposed denial, supply a copy of a criminal record, and provide an opportunity to dispute the accuracy and relevancy of the record before denial of admission. However, the current regulations do not specify how much notice a household must receive or the meaning of the opportunity to dispute the accuracy and relevancy of the record prior to a denial of admission. The proposed rule would clarify that tenants shall be given at least 15 days to challenge the accuracy and relevance of the information and to provide any relevant mitigating information prior to an admissions decision.

Requiring a fact-specific and individualized assessment before making a discretionary decision to deny tenancy or admission based on criminal history: Current program regulations note that PHAs and assisted owners “may consider” certain circumstances prior to making a discretionary denial of admission or termination decision, and the different program regulations provide incomplete and inconsistent lists of appropriate considerations.² HUD is proposing amended language that would make clear that for all discretionary admission and termination determinations, PHAs and assisted owners must consider relevant mitigating circumstances. With respect to admissions decisions, the proposed rule would require a fact-specific and individualized assessment of the applicant, adopting a term and concept that is familiar in the industry but has not previously been required in HUD programs. The proposed rule would harmonize the non-exhaustive list of relevant considerations across programs, setting out some specific factors that will frequently be considered relevant, such as how long ago the offense or

² See 24 CFR 5.852(a), 966.4(l)(5)(vii)(B), and 982.552(c)(2)(i) and (iii).

incident occurred, mitigating conduct that has taken place since (e.g., evidence of rehabilitation and successful reentry, including employment and tenancy), and completion of drug or alcohol treatment programs. So long as housing providers consider the circumstances relevant to the decision, the ultimate decision as to whether to deny tenancy or admission would remain within their discretion.

Revising and making available tenant selection plans and PHA administrative plans: Under existing rules, owners participating in certain assisted housing programs must have a written tenant selection plan. The proposed rule would require these owners to update their tenant selection plans to reflect the relevant policies they employ within six months following this rule's effective date. The proposed rule would also require PHAs and owners to make PHA administrative plans and tenant selection policies more widely available.

Providing additional guidance for PHAs and owners conducting screenings: When PHAs access criminal records from law enforcement agencies, existing regulations require PHAs to obtain consent from families before accessing their criminal records, require them to be kept confidential, and permit disclosure under limited circumstances. The proposed rule would broaden these protections to be applicable to all criminal record searches conducted by PHAs, as well as to assisted owners where appropriate. The proposed rule also would specify that, except in circumstances where housing providers and PHAs rely exclusively on an applicant's self-disclosure of a criminal record, they may not bar admission for failure to disclose a criminal record unless that criminal record would have been material to the decision.

Clarifying mandatory admission denial standards: Language concerning mandatory admission denials based on criminal activity and alcohol abuse which are required by federal statute is largely left unchanged by the proposed rule. For example, the requirement that an assisted owner or PHA prohibit admission of individuals "if any household member has been evicted from federally assisted housing for drug-related criminal activity" in the last three years

unless the “the circumstances leading to the eviction no longer exist” has not been modified.³ Nor have any modifications been made to the prohibition on admission to HUD-assisted housing to those who are “subject to a lifetime registration requirement under a State sex offender registration program.” The requirement that assisted owners or PHAs must establish standards to prohibit admission of individuals “currently engaged in” illegal use of a drug and in situations where individuals’ pattern of illegal drug use or alcohol abuse may interfere “with the health, safety, or right to peaceful enjoyment of the premises by other resident[s]” would remain substantively unchanged.

However, HUD proposes adding greater clarification to the definition of “currently engaging in,” which as described above triggers a mandatory exclusion with respect to the use of illegal drugs and triggers discretionary exclusion authority with respect to certain criminal activity. The existing regulations provide only that currently engaging in “means that the individual has engaged in the behavior recently enough to justify a reasonable belief that the individual's behavior is current.” The proposed rule would provide that a PHA or assisted owner may not rely solely on criminal activity that occurred 12 months ago or longer to establish that behavior is “current.” The proposed rule would also require that any such determination be based on a preponderance of the evidence standard and that such a determination take into account mitigating evidence, for example that the individual has successfully completed substance use treatment services.

Specifying standards of proof in admissions and terminations decisions based on criminal activity: Existing regulations are largely silent on the standards of proof that must be met for admissions and terminations decisions based on criminal activity. Where they speak to the subject at all, they state broadly that an assisted owner or PHA may terminate a tenancy when

³ HUD is proposing an amendment to these provisions which would clarify that current participation in a substance use treatment program may constitute a changed circumstance allowing for waiver of this 3-year-bar. This amendment and other proposed changes are explained in more detail later in this proposed rule.

a household member engaged in certain criminal activity, regardless of whether they have been arrested or convicted for such activity, and without satisfying the heightened standard of proof necessary to support a criminal conviction. There is no similar provision in existing regulations regarding admission decisions; nor do existing rules specifically discuss how PHAs and assisted owners may or may not consider arrest records in making either admissions or termination determinations. The proposed rule would (1) prohibit the consideration of arrest records standing alone (in the absence of other reliable evidence of criminal conduct) for any exclusion from housing; and (2) provide that criminal conduct or any other finding on which such an exclusionary decision is made must be based on a preponderance of the evidence. This would establish and clarify certain evidentiary standards and requirements for making key determinations in a manner that is largely consistent with what HUD already recommends in guidance for its housing providers and PHAs.

Implementing limited changes affecting owners accepting Housing Choice Vouchers (HCVs) and Project Based Vouchers (PBVs): Most of the changes in the proposed rule would not apply to owners who participate in the HCV or PBV programs. The proposed rule would not apply most of the changes to owners who participate in the HCV or PBV programs, in order to avoid discouraging owner participation. Those owners who participate in the HCV or PBV programs would still be able to screen for drug-related criminal activity and other criminal activity that is a threat to the health, safety or property of others. The proposed rule would add language to clarify that this includes “violent” criminal activity and that owners in the HCV and PBV program must also conduct any screening consistent with the Fair Housing Act, which was not previously spelled out in program regulations. Additionally, for terminations of tenancy, HUD proposes the same standards regarding preponderance of evidence and arrest records as would apply for PHAs and assisted owners. Finally, existing regulations note that owners “may consider” certain mitigating circumstances when terminating a tenancy. HUD proposes that, where a termination is based on criminal activity, illegal drug use, or alcohol abuse, an owner

may consider an updated set of circumstances—the same circumstances, including mitigating and contextualizing evidence, that PHAs and assisted owners would be required to consider in the context of admissions and termination decisions.

Collectively, the principles embodied by this proposed rule are meant to ensure that people are considered as individuals in HUD-assisted housing. Requiring housing providers and PHAs to make fact-specific determinations based on the totality of the circumstances, rather than denying opportunities based solely on criminal history, would help ensure that stale, inaccurate, and/or incomplete evidence and stigma surrounding people with criminal justice system involvement do not create unnecessary and counterproductive barriers to safe and affordable housing. Research shows that expanding access to such housing reduces the risk of future criminal justice system involvement and, in doing so, strengthens public safety. To be sure, that does not mean that everyone with a criminal history will satisfy legitimate tenant screening criteria that apply to all applicants equally. Housing providers would retain the authority to screen out individuals who they determine, based on consideration of relevant information, pose a threat to the health and safety of other tenants. What the proposed rule would bar is the categorical, blanket exclusion of people with criminal records without regard to all relevant and contextualizing evidence and consideration of the full life someone has lived.

II. BACKGROUND

A. Statutory Authority for This Rulemaking

1. HUD's General Statutory Authority to Promulgate Regulations

Federal agencies derive their authority to regulate from Congress. Such authority may be provided through a specific law or from an agency's organic statute. HUD's authority to issue regulations, section 7(d) of HUD's organic statute, the Department of Housing and Urban Development Act, provides: The Secretary may delegate any of his or her functions, powers, and duties to such officers and employees of the Department as he or she may designate, may authorize such successive redelegations of such functions, powers, and duties as he or she may

deem desirable, and may make such rules and regulations as may be necessary to carry out his or her functions, powers, and duties.⁴

2. HUD's Specific Statutory Authority Relevant to this Rulemaking

a. HUD's Authority to Establish Criteria for Selection of Tenants, Occupancy, and Lease Provisions

In 1992, Congress enacted section 13603 of the Housing and Community Development Act (HCDA). (Oct. 28, 1992, P. L. 102-550, Title VI, Subtitle C, 643, 106 Stat. 3821). Section 13603 sets forth the authority and standards by which HUD may enact rules to establish criteria for occupancy and provides that the Secretary shall promulgate regulations that establish criteria for selection of tenants and lease provisions in federally assisted housing. The Act requires that “the criteria provide sufficient guidance to owners and managers of federally assisted housing to enable them to (A) select tenants capable of complying with reasonable lease terms, (B) utilize leases prohibiting behavior which endangers the health or safety of others or violates the right of other tenants to peaceful enjoyment of the premises, (C) comply with legal requirements to make reasonable accommodations for persons with disabilities, and (D) comply with civil rights laws.”⁵

b. HUD's Authority to Mandate Lease Terms and Conditions

The United States Housing Act of 1937 (42 U.S.C. 1437a, *et seq.*) (“USHA” or “the 1937 Act”) provides HUD with authority to include language in contracts with PHAs that require PHAs (and owners) to add specific requirements in lease agreements for federally assisted housing (e.g., 42 U.S.C. 1437d(l), 42 U.S.C. 1437f(d)(o)(6)).

c. HUD's Authority to Establish Evidentiary Standards for Applicants Previously Denied Admission Based on Criminal Activity

⁴ 42 U.S.C. 3535(d). HUD relied, *inter alia*, on this authority in promulgating the 2001 rulemaking that implemented QHWA. See 66 FR 28792.

⁵ 42 U.S.C. 13603(b).

The Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105-276, approved Oct. 21, 1998, 112 Stat. 2634-2643) (“QHWRA”) provides that for applicants who have been previously denied admission for criminal activity, PHAs or owners may impose a requirement that such applicants provide “evidence sufficient” to show that they have not engaged in that criminal activity within a “reasonable period” of time. The statute explicitly outlines that “the [HUD] Secretary shall by regulation provide” to PHAs what “evidence is sufficient.” 42 U.S.C. 13661(c)(2).

d. HUD’s Authority to Make Rules to Carry Out the Fair Housing Act and other Civil Rights Laws

As noted above, the proposed rule is also an effort to advance compliance with nondiscrimination statutes directed at housing and programs and activities receiving federal financial assistance. The Fair Housing Act of 1968 (42 U.S.C. 3601, *et seq.*) provides that “the Secretary [of HUD] may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter [Fair Housing Act]. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.” 42 U.S.C. 3614(a).

3. *Statutory History With Regard To Criminal History*

a. U.S. Housing Act of 1937⁶

Section 1437d(1)(6) of title 42, United States Code, applicable to public housing, requires that PHA leases include a provision stating that any member of a tenant’s household may be evicted for drug-related or certain other criminal activity.⁷ This section was originally enacted in the Anti-Drug Abuse Act of 1988 (102 Stat. 4181), and was retained in the 1990 National

⁶ As discussed more fully below, the USHA (or the 1937 Act) has been amended on several occasions with respect to criminal history, including by the Anti-Drug Abuse Act of 1988; the 1990 National Affordable Housing Act amendments; the Housing Opportunity Program Extension Act of 1996; and the Quality Housing and Work Responsibility Act of 1998.

⁷ “Each public housing agency shall utilize leases which . . . (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy..”.

Affordable Housing Act amendments, which redefined the classes of criminal activity to which this prohibition applies (Pub. L. 101-625, section 504, amending section 6(1)(5) of the U.S. Housing Act).

With respect to Section 8 housing leases, the USHA contains language similar to 1437d(1)(6). *See, e.g.*, 42 U.S.C. 1437f(d)(1)(B)(iii), which applies to both project-based and tenant-based section 8.⁸ *See also* section 1437f(o)(7)(D), which applies to tenant-based and project-based voucher assistance specifically and mandates virtually identical language in all housing assistance payments contracts between a PHA and an owner.⁹ Additionally, section 1437f(o)(6)(C) allows a PHA to elect not to enter into a Housing Assistance Payments contract with an owner who, among other things, “[R]efuses, or has a history of refusing, to take action to terminate tenancy for activity engaged in by the tenant, any member of the tenant’s household, any guest, or any other person under the control of any member of the household that (i) threatens the health or safety of, or right to peaceful enjoyment of the premises by, other tenants or employees of the public housing agency, owner, or other manager of the housing; (ii) threatens the health or safety of, or right to peaceful enjoyment of the residences by, persons residing in the immediate vicinity of the premises; or (iii) is drug-related or violent criminal activity.”

b. Housing Opportunity Program Extension Act

In 1996, the Housing Opportunity Program Extension Act (Pub. L. 104-120, 110 Stat. 834-846, approved March 28, 1996) (“the Extension Act”) amended the United States Housing

⁸ “[D]uring the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy...”

⁹ “[D]uring the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any violent or drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy...”

Act. The Extension Act made an individual who has been evicted from public housing or any Section 8 program for drug-related criminal activity ineligible for admission to public housing and the Section 8 programs for a three-year period, beginning from the date of eviction, unless the individual who engaged in the activity has successfully completed a rehabilitation program approved by the PHA or if the PHA determines that the circumstances leading to the eviction no longer exist.

The Extension Act also required PHAs to establish standards that prohibit occupancy in any public housing unit or participation in a Section 8 tenant-based program by any person the PHA determines to be using a controlled substance, or whose pattern of illegal use of a controlled substance or pattern of alcohol abuse would interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents of the development. The Extension Act states that in determining whether a person's use of a controlled substance or pattern of alcohol abuse may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents of the development, the PHA administering the program may consider whether an applicant has been rehabilitated from drug or alcohol abuse. In addition, the Extension Act provides PHAs the opportunity to access criminal conviction records from law enforcement agencies for public housing applicants and residents. It also requires that the public housing agency provide the tenant or applicant with a copy of the criminal record and an opportunity to dispute the accuracy and relevance of that record before an adverse action is taken on the basis of that criminal record.

c. Quality Housing and Work Responsibility Act of 1998.

In 1998, Sections 575-579 of the Quality Housing and Work Responsibility Act (Pub. L. 105-276, approved Oct. 21, 1998, 112 Stat. 2634-2643) (QHWRA) revised sections 6 and 16 of the 1937 Act and created statutory authority to expand the drug abuse and criminal activity requirements already applicable to public housing to most federally assisted housing. Sections 42 U.S.C. 13661-63 apply to all federally assisted housing; they contain provisions applicable to

illegal drug use, alcohol abuse, individuals who are subject to a lifetime registration requirement under a State sex offender registration program, and other criminal activity.

QHWRA expanded the prohibition on admitting families for three years because of eviction from public housing or Section 8 units for drug-related criminal activity to cover admissions to (and evictions from) Section 202, Section 811, Section 221(d)(3) BMIR, Section 236, and Section 514/515 rural housing projects. In addition, QHWRA (section 578(a)) added the obligation for project owners – including PHAs that administer public housing – to deny admission to sex offenders who are subject to a lifetime registration requirement under a State sex offender registration program.

d. Related Rulemaking

HUD issued a variety of guidance on implementing the Extension Act (PIH Notice 96-16, issued April 12, 1996, and PIH Notice 96-27, issued May 15, 1996) and published proposed rules for the Section 8 tenant-based and moderate rehabilitation programs on March 31, 1997 (62 FR 15346) and for the public housing program on May 9, 1997 (62 FR 25728).

Because of the timing of the 1998 Act and the related nature of its drug abuse and criminal activity requirements, HUD published a proposed rule (64 FR 40262; July 23, 1999) on the provisions as they existed after the revision to the drug abuse and criminal activity requirements made by QHWRA, rather than issuing a final rule on the admission and eviction provisions of the earlier Extension Act.¹⁰ HUD published its Final Rule implementing the relevant provisions of both the Extension Act and QHWRA on May 24, 2001.¹¹

¹⁰ The FY 1999 appropriations act (section 428 of Pub. L. 105-276, 112 Stat. 2511) added a new paragraph (f) to section 16 of the 1937 Act to bar persons convicted of manufacturing or producing methamphetamine on the premises of federally-assisted housing from public housing and Section 8- assisted housing where the PHA determines who is admitted.

¹¹ *Screening and Eviction for Drug Abuse and Other Criminal Activity* (66 FR 28775; May 24, 2001). An additional relevant provision was added to the 1937 Act by the Personal Responsibility and Work Opportunity Act of 1996 (Pub. L. 104-193, approved August 22, 1996; 110 Stat. 2105, 2348). Section 903 of that Act amended the 1937 Act (42 U.S.C. 1437f(d)(1) and 1437d(l)) to add as grounds for termination of tenancy in the public housing and Section 8 assistance programs fleeing to avoid prosecution, or custody or confinement after conviction, for a felony (or a high misdemeanor in New Jersey). Violating a condition of probation or parole imposed under Federal or State law is also grounds for termination of tenancy under that provision. That provision also created the obligation (in a new section 27 of the 1937 Act) for PHAs to provide Federal, State or local law enforcement officials with information

B. HUD's Post-rulemaking Efforts with respect to Criminal Histories

In the 20-plus years since the publication of the final rule implementing statutory drug abuse and criminal activity provisions, HUD's experience has been that some PHAs and HUD-assisted housing owners are unnecessarily restrictive in their use of criminal records background screening in their tenant selection practices. This may be partly due to mistaken beliefs that HUD still advocates use of "One Strike" admissions policies, as it did in the 1990s.¹² Rather than viewing criminal records as just one part of what should be an individualized determination of whether prospective tenants are likely to engage in future criminal activity that may endanger the health and safety of others, many have used "blanket bans" to turn away prospective tenants with any criminal records, no matter how far in the past that criminal justice system involvement was and its relation, if any, to the applicant's current fitness as a tenant based upon public safety, public health, and right to peaceful enjoyment concerns.¹³ Some owners and PHAs, especially in recent years, have begun taking an individualized approach to tenant screening. Others, however, consider the mere presence of certain convictions or criminal records automatic grounds for denial, without regard to how far in the past that criminal justice system involvement may have occurred, the type of criminal history involvement and the circumstances surrounding it, including any mitigating factors, such as a subsequent record of rehabilitation. As a result,

concerning assisted recipients whom the officials are pursuing for violating parole or fleeing to avoid prosecution. These provisions are not affected by this proposed rule.

¹² On March 28, 1996, President Clinton announced a "One Strike and You're Out" policy for public housing residents and signed into law the "Housing Opportunity Program Extension Act of 1996," providing additional authority to PHAs in the areas of screening, lease enforcement, and eviction with the aim of reducing crime in public housing. In Notice PIH 96-16, HUD recommended that PHAs adopt "One Strike" policies with stricter screening at admissions and lease provisions that offered "zero tolerance" for public housing residents who engage in criminal activity. Available at https://www.hud.gov/program_offices/administration/hudclips/notices/pih/96pihnotices

¹³ Blanket ban policies are presumptively inconsistent with current HUD regulations, and HUD's proposed changes should not be construed to indicate otherwise. For example, when making a discretionary (or "permissive") admission denial to the voucher program, a PHA must show that the criminal activity falls within specific categories listed in HUD's regulations. Specifically, the criminal activity must be current or have happened a reasonable time before the admission decision, and must be either drug-related, violent, or criminal activity that may threaten the health, safety, or right to peaceful enjoyment of others (i.e., other residents, persons residing in the immediate vicinity, the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA. 24 CFR 982.553(a)(2)(ii)(A)(1)-(4). See *Hartman v. Hous. Auth. of Cnty. of Lawrence*, No. 164 C.D. 2021, 2023 WL 7218096, at *4 (Pa. Commw. Ct. Nov. 2, 2023)(unpublished)(upholding trial court's opinion that the PHA exceeded its authority under HUD regulations and abused its discretion when it denied admission to the Section 8 voucher program based on a charge of welfare fraud, with no evidence that such activity threatened the health, safety, or right to peaceful enjoyment of others).

subsidized housing opportunities are denied to a group of people that need them the most and whom research demonstrates can most benefit from them to reduce the risk of homelessness and recidivism. In this regard, the Department notes that there are only two statutorily required exclusions for federally assisted housing: persons who are subject to a lifetime registration requirement under a State sex offender registration program and persons convicted of producing methamphetamines on federally assisted property.¹⁴ Other than these two statutorily required exclusions, PHAs and HUD-assisted housing owners are not statutorily required to deny housing assistance to people with prior criminal convictions.

In addition to admissions, similar patterns exist in the eviction and termination context notwithstanding regulatory provisions and judicial precedent that should restrain PHAs and assisted housing providers. For example, in situations where PHAs and assisted owners are granted discretion to evict or terminate for criminal activity, some have failed to exercise such discretion in a thoughtful, analytical manner and have instead engaged in automatic eviction and termination of tenants and participants simply because some criminal activity occurred or was alleged to have occurred, with no consideration of relevant mitigating circumstances outlined in the current regulations. This has led to unnecessary evictions and homelessness, including of vulnerable individuals and families who pose no danger to others. HUD notes that engaging in automatic evictions and terminations where regulations grant PHAs or owners discretion is contrary to the regulations currently in place. Courts have adopted the view that HUD's eviction and termination regulations already require PHAs and owners to consider relevant mitigating

¹⁴ There are two "qualified" (*i.e.*, not absolute) exclusions: 1) a PHA must prohibit admission for three years from date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity (the PHA may admit if the PHA determines the member successfully completed a supervised drug rehabilitation program approved by the PHA, or the circumstances leading to the eviction no longer exist) and 2) a PHA must prohibit admission of households with a member who: a) the PHA determines is currently engaging in illegal use of a drug, or b) the PHA determines that it has reasonable cause to believe that a household member's illegal drug use, pattern of illegal drug use, abuse of alcohol, or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

circumstances prior to an eviction or termination, and HUD agrees with this view.¹⁵ This proposed rule is intended to be consistent with existing law and does not intend to suggest that a lesser degree of consideration for mitigating circumstances should be given in evictions or terminations than in admissions. HUD specifically seeks comment on whether the language of the proposed rule makes clear and effective the necessity to consider relevant mitigating circumstances prior to eviction or termination (*see* “Questions for public comment,” *infra*, Section VII, #4).

HUD is committed to ensuring that PHAs and owners retain the ability to make admission and termination decisions to protect the peaceful enjoyment of all residents and employees at their properties. At the same time, HUD seeks to ensure that its grantees make those decisions consistent with a growing body of case law, evidence, and best practices. PHAs and assisted housing owners should have clarity about their obligations so they can have clear,

¹⁵ *See, e.g., E. Carolina Reg'l Housing Authority v. Lofton*, 789 S.E.2d 449, 451 (N.C. 2016) (PHAs attempt to evict tenant and her family for her babysitter committing marijuana offenses in her unit “failed to exercise its discretion” under 24 CFR 966.4(l)(5)(vii)); *City of Charleston Hous. Auth. v. Brown*, 878 S.E.2d 913, 920 (S.C. Ct. App. 2022) (reversing an eviction because there was no evidence that the PHA properly exercised its discretion by considering mitigating factors as required by § 966.4(l)(5)(vii)); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778, 785 (Mass. 2008) (reversing termination of voucher where hearing officer failed to consider mitigating circumstances required by 24 CFR 982.552(c)(2), noting that “failure to exercise discretion is itself an abuse of discretion”); *Oakwood Plaza Apts. v. Smith*, 800 A.2d 265, 270 (N.J. Super. Ct. App. Div. 2002) (holding that 24 CFR 982.310(h), “involve[s] [t]he same degree of discretion” as in public housing evictions, and “the federal statutory framework therefore does not permit a Section 8 landlord to act in an arbitrary or capricious fashion.”). HUD is unaware of any judicial precedent interpreting HUD regulations as making the consideration of relevant mitigating circumstances optional in the eviction context; indeed at least one circuit court decision interprets the statutory language underlying these regulations as requiring a consideration of relevant circumstances. *Campbell v. Minneapolis Pub. Hous. Auth. ex rel. City of Minneapolis*, 168 F.3d 1069, 1076 (8th Cir. 1999). However, HUD is aware of a split in court decisions on this issue in the voucher termination context. HUD agrees with those decisions which read the voucher termination regulations as requiring the consideration of mitigating circumstances, in line with the majority of case law on these issues. *See, e.g. Lynn Hous. Auth.*, 880 N.E.2d at 785; *Lipscomb v. Hous. Auth. of Cnty. of Cook*, 45 N.E.3d 1138, 1147 (Ill. Ct. App. 2015) (a discretionary termination of benefits under 24 CFR 982.552(c) requires the agency to consider the “relevant circumstances” before making its determination); *Matter of Gist v. Mulligan*, 886 N.Y.S.2d 172, 173 (App. Div. 2009) (finding the PHA’s decision to terminate a tenant’s voucher was an abuse of discretion based on the circumstances in the case, even though the participant violated the program rules); *Blitzman v. Mich. State Hous. Dev. Auth.*, Nos. 330184; 334484, 2017 WL 3044129, at *5-7 (Mich. Ct. App. Jul. 18, 2017) (unpublished) (holding that, although “may consider” is usually permissive language, in the context here, it becomes a command to consider mitigating circumstances); *Hicks v. Dakota Cnty. Comm. Dev. Agency*, No. A06–1302, 2007 WL 2416872, at *4 (Minn. Ct. App. Aug. 28, 2007) (unpublished) (the PHA must consider the mitigating circumstance in the case at hand, even though the regulation used the permissive term “may”) *compare to Peterson v. Washington Cnty. Hous. & Redevelopment Auth.*, 805 N.W.2d 558, 563-64 (Minn. Ct. App. 2011) (a hearing officer is not required to consider mitigating factors when deciding whether a participant’s violation of a reporting rule is a terminable offense); *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 799 (Iowa 2011) (the words “may consider” in § 982.552(c)(2)(i) give the hearing officer discretion about whether to consider mitigating factors).

predictable processes for screening prospective residents. Effective applicant screening entails more than simply reviewing an applicant's criminal record, since having a criminal record in and of itself is not a reliable indicator that an individual is unsuitable for tenancy in HUD-assisted housing. For the same reason, PHAs and owners must consider all relevant mitigating circumstances when making termination and eviction decisions, rather than basing such decisions solely on a tenant's criminal record.

HUD-assisted properties benefit from having long-term residents who pay their portion of the rent and do not interfere with the peaceful and quiet enjoyment of other residents. HUD believes that the type of screening being proposed in this rule, which aims to determine whether people are able to comply with lease terms, would ensure that selected residents meet those resident criteria. It would further ensure fewer inappropriate denials are made, avoiding the time and expense of re-reviews or defending challenges.

1. HUD Guidance and Secretarial Letters

For two decades, HUD has issued letters and guidance in an attempt to encourage PHAs and owners of HUD-assisted housing to reconsider and revise unnecessarily restrictive criminal record screening and eviction policies. In April 2002, former HUD Secretary Mel Martinez urged PHAs to use the public housing lease provision that allows for eviction based on certain criminal activity (often referred to as the "one strike" lease provision) only as "the last option explored, after all others have been exhausted," and a "tool of last resort" in cases involving the use of illegal drugs.¹⁶ In June 2011, former HUD Secretary Shaun Donovan issued a letter to PHAs across the country, emphasizing the importance of providing "second chances" for formerly incarcerated individuals.¹⁷ Secretary Donovan urged PHAs to adopt admission policies that achieve a sensible and effective balance between allowing individuals with a criminal record

¹⁶ Letter from Mel Martinez to Public Housing Authority Executive Directors (April 16, 2002), available at <https://www.nhlp.org/wp-content/uploads/Ltr-from-Mel-Martinez-HUD-Secy-to-Pub-Hous-Dirs-Apr.-16-2002-1.pdf>

¹⁷ Letter from Shaun Donovan to Public Housing Authority Executive Directors (June 17, 2011), available at <https://perma.cc/L5QM-MSMX>.

to access HUD-subsidized housing and ensuring the safety of all residents of such housing. A year later, Secretary Donovan encouraged owners of HUD-assisted multifamily properties (“owners”) to do the same,¹⁸ noting that “people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future.” He also reiterated HUD’s goal of “helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live.”

In 2013, HUD again noted the troubling relationship between housing barriers for individuals with criminal records and homelessness. In PIH Notice 2013-15,¹⁹ which focused on housing individuals and families experiencing homelessness, HUD stated “the difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness in turn increases the risk of subsequent re-incarceration.” The notice reminded PHAs of the very limited circumstances under which exclusion related to criminal activity is mandated by statute and exhorted PHAs to consider amending their discretionary admissions and occupancy policies to be more inclusive of vulnerable populations who may have criminal backgrounds or histories of incarceration.

In November 2015, HUD went on to issue more comprehensive guidance to both PHAs and assisted housing owners on the proper use of criminal records in housing decisions.²⁰ The guidance made clear, among other things, that arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants; that HUD does not require the adoption of “One Strike” policies; and that PHAs and assisted housing owners must be cognizant of their obligation to safeguard the due process rights of both applicants and tenants. The Notice also

¹⁸ Letter from Shaun Donovan to Assisted Housing Owners (March 14, 2012).
<https://nhlp.org/files/HUD%20Letter%203.14.12.pdf>

¹⁹ *Guidance on housing individuals and families experiencing homelessness through the Public Housing and Housing Choice Voucher programs*, HUD PIH Notice 2013-15 (HA), (June 10, 2013), available at
<https://www.hud.gov/sites/documents/PIH2013-15.PDF>.

²⁰ *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*, PIH Notice 2015-19 (November 2, 2015), available at
<https://www.hud.gov/sites/documents/PIH2015-19.PDF> (Identical guidance was issued at the same time by HUD’s Office of Housing as Housing Notice 2015-10).

explicitly reminds PHAs and owners of their obligation to ensure that all admissions and occupancy requirements comply with applicable civil rights requirements contained in the Fair Housing Act, Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, Titles II and III of the Americans with Disabilities Act of 1990, and all other equal opportunity provisions listed in 24 CFR 5.105.

With respect particularly to “One Strike” policies, HUD stated that PHAs and owners are not required to adopt or enforce rules that deny admission to anyone with a criminal record or that require automatic eviction any time a household member engages in criminal activity in violation of their lease. Rather, in most cases, PHAs and owners may exercise discretion in these situations, and in exercising such discretion they may consider all of the circumstances relevant to the particular admission or eviction decision. Additionally, when specifically considering whether to deny admission or terminate assistance or tenancy because of illegal drug use by a household member who is no longer engaged in such activity, a PHA or owner may consider whether the household member is participating in or has successfully completed a substance use rehabilitation program or has otherwise been rehabilitated successfully.

HUD followed this up with guidance from the Office of General Counsel (OGC) in 2016 that clarified that housing providers who use overbroad criminal record exclusions risk violating the Fair Housing Act.²¹ HUD’s Office of General Counsel advised that in order to avoid such risk, screening policies based on criminal records should be narrowly tailored to exclude only to the extent necessary to achieve a substantial interest. To meet this standard, housing providers should make an individualized assessment that takes into account relevant mitigating information beyond that contained in an individual’s criminal record before making any adverse decision based on criminal activity. HUD’s Office of General Counsel instructed that this individualized assessment should consider factors such as the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has

²¹ See fn.1 *supra*.

maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation.

The guidance also clarified that housing providers must be able to prove through reliable evidence that their policies actually assist in protecting resident safety and peaceful enjoyment; therefore, they should not exclude individuals because of one or more prior arrests (without any conviction), impose “blanket bans” that exclude anyone with a conviction record or even certain types of convictions, or utilize policies that fail to distinguish between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not. While this OGC guidance was not directed specifically to PHAs or HUD-assisted housing providers, it applies to them as it does to all other entities who engage in actions covered by the Fair Housing Act.²²

On June 23, 2021, HUD Secretary Marcia Fudge issued a letter to PHAs, Continuums of Care, Multifamily Owners, and HUD Grantees,²³ reiterating the theme of HUD’s earlier secretarial-issued letters and clarifying that people exiting prisons and jails who are at-risk of homelessness due to their low incomes and lack of sufficient resources or social supports are among the eligible populations for Emergency Housing Vouchers under the American Rescue Plan. Secretary Fudge’s letter also emphasizes HUD’s commitment to taking a comprehensive approach to addressing reentry housing needs, including developing tools and guidance to ensure that applicant screening and tenant selection practices avoid unnecessarily overbroad denial of housing to applicants on the basis of criminal records; reviewing existing HUD policies and regulations that limit access to housing and HUD assistance among those with criminal histories;

²² *Id.* at 3 (clarifying that the 2016 Guidance “applies to a wide-range of entities covered by the Act, including private landlords, management companies, condominium associations or cooperatives, third-party screening companies, HUD-subsidized housing providers, and public entities that operate, administer or fund housing or that enact ordinances that restrict access to housing based on criminal involvement”), <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>.

²³ Letter from Marcia L. Fudge to Public Housing Authorities, Continuums of Care, Multifamily Owners, and HUD Grantees (June 23, 2021), https://www.hud.gov/sites/dfiles/PA/documents/SOHUD_reentry_housing_letter.pdf.

and publishing findings regarding the best practices on reentry housing programs.²⁴ Following the June letter, HUD held a series of listening sessions with stakeholders, housing residents, and people with lived experience of criminal justice system involvement and learned that there continue to be numerous instances of people being denied HUD program access for years-old criminal convictions or convictions that do not pose a current risk or threat.

Partially as a result of those listening sessions, in April 2022, Secretary Fudge issued an internal directive to principal staff to conduct an agency-wide review of all existing regulations, guidance, and subregulatory policy documents and to propose amendments that will reduce barriers to housing for persons with criminal histories and their families and make HUD programs as inclusive as possible. This review identified opportunities to apply to HUD programs' core principles informed by evidence-based research, *e.g.*, that criminal records should not be taken as indicating that the person is engaged in or at-risk of engaging in current or future criminal activity or used in an overbroad manner to deny access to HUD-assisted housing; that stable housing reduces recidivism and increases public safety; and that overly broad exclusions of people with criminal records do not increase public safety.²⁵ This proposed rule would implement many of the changes that were proposed as part of that review effort.

2. Interagency Coordination Efforts

HUD has been involved since 2011 in various coordinated intergovernmental efforts to address larger issues of reentry of formerly incarcerated individuals, as part of both the Federal Interagency Reentry Council (FIRC) and the more recently convened Reentry Coordination Council (RCC).

In January 2011, then U.S. Attorney General Eric Holder established the Cabinet-level FIRC, representing a significant executive branch commitment to coordinating reentry efforts and advancing effective reentry policies. From 2011 to 2016, HUD worked with more than 20

²⁴ *Id.*

²⁵ U.S. Dept. of Housing and Urban Development, *Why Housing Matters for Successful Reentry and Public Safety*, THE EDGE, (Apr. 19, 2022), <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-041922.html>.

other federal agencies to reduce recidivism and improve housing, employment, education, health, and child welfare outcomes. Following up on the work of the FIRC, in October 2021 U.S. Attorney General Merrick Garland convened the federal Reentry Coordination Council (RCC). The creation of the RCC – which largely mirrors the work of its FIRC predecessor, but with an added focus on the impacts of COVID – stems from the First Step Act of 2018 (section 505 of Pub. L. No. 115-391), which reauthorized the Second Chance Act and requires the Attorney General to “coordinate on Federal programs, policies, and activities relating to the reentry of individuals returning from incarceration to the community, with an emphasis on evidence-based practices” and to “submit to Congress a report summarizing the achievements” of the agency collaboration, including “recommendations for Congress that would further reduce barriers to successful reentry.” The RCC is composed of representatives from six federal agencies in addition to the Department of Justice; it issued its first report in April 2022.²⁶

In May 2022, President Biden issued Executive Order 14074,²⁷ which, among other things, mandated the establishment of an interagency Alternatives and Reentry Committee, with HUD as an enumerated member, to develop a comprehensive evidence-based federal strategic plan to improve public safety while safely reducing federal strategy to reduce unnecessary criminal justice interactions, to support and improve rehabilitation while people are incarcerated, and to facilitate and support successful reentry. One of the specific charges of that committee is to identify ways to reduce barriers to federal programs, including housing programs, for individuals with criminal records.²⁸ The White House Alternatives, Rehabilitation, and Reentry Strategic Plan mandated by the Executive Order was published on April 28, 2023.²⁹

²⁶ *Coordination to Reduce Barriers to Reentry: lessons learned from COVID-19 and beyond* (April 2022), available at <https://www.justice.gov/opa/press-release/file/1497911/download>.

²⁷ E.O. 14074 *Advancing Effective, Accountable Policing and Criminal Justice Practices To Enhance Public Trust and Public Safety* (May 25, 2022).

²⁸ *Id.*

²⁹ <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/28/fact-sheet-biden-harris-administration-takes-action-during-second-chance-month-to-strengthen-public-safety-improve-rehabilitation-in-jails-and-prisons-and-support-successful-reentry/>.

3. HUD's Engagement of Stakeholders and People with Lived Experience of Criminal Justice System Involvement.

Prior to and after the Secretary's internal directive to conduct a comprehensive internal review of HUD policy and guidance regarding the use of criminal records in housing decisions, HUD staff engaged in extensive conversations with a variety of stakeholders on these issues. In particular, HUD staff has held multiple listening sessions that included representatives of public housing agencies, HUD-assisted housing providers, community organizers, legal services organizations, providers of reentry services and other services for formerly incarcerated people, as well as formerly incarcerated individuals and other people with criminal records. HUD held three such sessions in early April 2022 that were attended by over 100 people. Although they were invited to all three sessions, HUD held one of these three sessions exclusively for formerly incarcerated people and others who have been involved in the criminal justice system. The listening sessions revealed several independent insights, including:

- There is wide variation among HUD-assisted housing providers in their use of criminal records in screening, admission, and tenancy policies.
- Following HUD's issuance of fair housing guidance from the Office of the General Counsel, some public housing agencies and HUD-assisted housing providers proactively made changes in their use of criminal records, such as limiting "lookback" periods, limiting their review to only a certain set of convictions, and also reviewing mitigating factors as part of an individualized assessment.
- Many other HUD-assisted housing providers appear to be unaware of the 2016 guidance from HUD's Office of General Counsel or expressed uncertainty regarding how to apply fair housing principles. Some expressed concern that the fair housing guidance applicable to all housing providers was difficult to reconcile with HUD program regulations and sub-regulatory guidance materials.

- Many people continue to be denied access to HUD housing assistance programs for criminal records that appeared to indicate little risk to the health, safety, welfare, and peaceful enjoyment of housing by other residents.
- Owners and PHAs who provide HUD-assisted housing would like clear guidance on how to screen applicants appropriately.

The information gathered from these listening sessions helped inform the Secretary’s decision to mandate a comprehensive review, as well as this proposed rulemaking.

III. Need for the Regulation

In addition to creating clarity and standardizing variegated admission and termination practices regarding individuals with criminal records across the country, the proposed rule is needed to address several discrete issues.

A. Prevalence of criminal justice system involvement in general population.

In a typical year, approximately 600,000 people in the United States enter prisons; at the same time, people are sent to jails across our country over 10 million times.³⁰ Individuals returning to their communities after a term of imprisonment face a number of barriers to success, including housing insecurity, inability to access health care, food insecurity, and barriers to education and employment. These longstanding barriers were exacerbated during the COVID-19 pandemic and compounded by additional hurdles, including limited access to government and community-based services and support.³¹

The criminal justice system affects a large segment of the U.S. population. The U.S. population has less than 5% of the world’s population but represents over 20% of the world’s

³⁰ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>. During the pandemic the American correctional system experienced a 20 percent reduction in the prison population and a 25 percent reduction in the jail population. This is largely due to the “pandemic-related slowdowns in the criminal justice system.”

³¹ See Ripper, B. (2023). Flyers, fighters, and freezers: how formerly incarcerated women coped with reentry and the job search during the COVID-19 pandemic. *Journal of Offender Rehabilitation*, 62(3), 137-156 and Kramer, C., Song, M., Sufrin, C. B., Eber, G. B., Rubenstein, L. S., & Saloner, B. (2023). Release, Reentry, and Reintegration During COVID-19: Perspectives of Individuals Recently Released from the Federal Bureau of Prisons. *Health Equity*, 7(1), 384-394.

prisoners. Between 70 million and 100 million—or as many as one in three Americans—have a criminal record.³² Approximately 5.5 million people in the United States – 1 in 48 adult U.S. residents – were under the supervision of adult correctional systems at the end of 2021,³³ and as many as one in three adult Americans has been arrested at least once.³⁴ In 2021, nearly 445,000 people were released from prison.³⁵ Individuals in prison and jail are disproportionately poor compared to the overall U.S. population.³⁶ The impact of this mass incarceration is disproportionate, with historically marginalized groups being most impacted. Moreover, people of color are overrepresented in the nation’s prisons and jails: for instance, Black Americans make up thirty-eight percent of the incarcerated population despite representing only twelve percent of the U.S. population. Black men are incarcerated at nearly six times the rate of White men. Black men with disabilities account for less than 2% of the overall U.S. population but more than 18% of the state prison population. Hispanic men are incarcerated at nearly two-and-a-half times the rate of White men. Native Americans overall are incarcerated at more than twice the rate of White Americans.³⁷

The nation as a whole faces a severe shortage of affordable housing and rental assistance relative to need; federal housing assistance is not an entitlement and serves only one in five eligible renter households.³⁸ However, certain populations, including those with criminal justice

³² Sent’g Proj., *Americans with Criminal Records* (Aug. 2022), <https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-RecordsPoverty-and-Opportunity-Profile.pdf>.

³³ Carson, E. Ann and Kluckow, Rich. (February 2023). *Correctional Population in the United States, 2021 – Statistical Tables*. Bureau of Justice Statistics. In 2019, an estimated 6.3 million people in the United States (1 in 40) were under the supervision of the adult correctional system. During the first year of the pandemic in 2020, the number dropped by 11 percent to 5.5 million – a level not observed in nearly 25 years. (Minton, Beatty, and Zeng, 2021; Kluckow and Zeng, 2022). The decrease between year 1 and 2 of the pandemic was only 1 percent. (Carson and Kluckow, 2023)

³⁴ See Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, PRISON POLICY INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>; Shawn Bushway et. al., *Barred from employment: More than half of unemployed men in their 30s had a criminal history of arrest*, 8 *Science Advances* No. 7 (Feb. 18, 2022), <https://www.science.org/doi/10.1126/sciadv.abj6992>.

³⁵ Carson, E. Ann (December 2022). *Prisoners in 2021 – Statistical Tables*. Bureau of Justice Statistics.

³⁶ Sawyer & Wagner, *supra* fn.30.

³⁷ *Id.* Since the writing of the article, the U.S. Census Bureau reported the percent Americans reporting race as “Black or African American alone” increased to 13.6 percent.

³⁸ Corianne Payton Scally, et al., *The Case for More, Not Less: Shortfalls in Federal Housing Assistance and Gaps in Evidence for Proposed Policy Changes*, URBAN INST., at 1, (Jan. 2018),

system involvement, face even greater challenges with obtaining and maintaining housing and housing assistance. The shortage of affordable housing during the COVID-19 pandemic placed persons with criminal histories and with limited or no credit histories (which is often a byproduct of incarceration) at a particular disadvantage. In some jurisdictions, the lack of safe, stable housing also delayed approval for discretionary early or compassionate release from prison, leading those without housing to serve more time behind bars than those with stable housing available to them.³⁹ Even fewer housing options are affordable and accessible for individuals with disabilities, making it more difficult for these individuals to successfully transition back home from jail or prison.

Even prior to the pandemic, formerly incarcerated people were almost ten times more likely to experience homelessness than the general public. The rates are significantly higher among those released from incarceration within the prior two years. Using HUD Point-in-Time estimates and the National Former Prisoner Survey, academic Lucius Couloute⁴⁰ estimates that the sheltered homeless rate is 98 per 10,000 for formerly incarcerated individuals compared to 13 per 10,000 for the general public. The unsheltered homeless rate is 105 per 10,000 for formerly incarcerated individuals compared to 8 per 10,000 in the general public. An additional 367 per 10,000 formerly incarcerated individuals have marginal housing insecurities, living in rooming

https://www.urban.org/sites/default/files/publication/95616/case_for_more_not_less.pdf; G. Thomas Kingsley, *Trends in Housing Problems and Federal Housing Assistance*, URBAN INST., (Oct. 2017), <https://www.urban.org/sites/default/files/publication/94146/trends-in-housing-problems-and-federal-housing-assistance.pdf>

³⁹ Letter from Marcia L. Fudge, Secretary, U.S. Dept. of Housing and Urban Development, *supra* at fn 23.

⁴⁰ See U.S. Dept. of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States, 2020 – Statistical Tables* (Mar. 2022), <https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf>; Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, Prison Policy Initiative (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>; Shawn Bushway et. al., *Barred from employment: More than half of unemployed men in their 30s had a criminal history of arrest*, 8 *Science Advances* No. 7 (Feb. 18, 2022), <https://www.science.org/doi/10.1126/sciadv.abj6992>; see also Saneta deVuono-powell, et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design (Sept. 2015), at 26-27, <https://www.whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf> (stating that in one study, 79 percent of survey respondents reported being ineligible for or denied housing due to their criminal conviction history or that of a family member).

houses, hotels, or motels. Moreover, studies have calculated that a person experiencing chronic homelessness can cost taxpayers between \$30,000 and \$100,000 per year.⁴¹

The nexus between criminal justice system involvement and homelessness is clear. Those who have been incarcerated once are seven times more likely to experience homelessness than the general population; this rises to thirteen times more likely for those arrested more than once.⁴² Moreover, research shows that the lack of stable housing following incarceration leads to a higher likelihood of rearrest and reincarceration.⁴³ Additionally, there is a growing body of evidence that shows that the provision of housing assistance, particularly when accompanied with supportive services, can help reduce the risk of recidivism and homelessness and decrease the risk of future involvement in the criminal justice system.⁴⁴ Blanket bans and other restrictive criminal records policies and practices affect more than just the individual with a history of criminal activity, but rather they can affect an entire family, e.g., when the criminal history of one member leads to the denial or termination of housing for all members. Studies show that housing instability can have harmful and long-lasting consequences for children,⁴⁵ potentially

⁴¹ See National Alliance to End Homelessness, *Ending Chronic Homelessness Saves Taxpayers Money* (June 2017), <http://endhomelessness.org/wp-content/uploads/2017/06/Cost-Savings-from-PSH.pdf> (“A chronically homeless person costs the tax payer an average of \$35,578 per year”); United States Interagency Council on Homelessness, *Ending Chronic Homelessness in 2017* (2017), https://www.usich.gov/resources/uploads/asset_library/Ending_Chronic_Homelessness_in_2017.pdf (“Some studies have found that leaving a person to remain chronically homeless costs taxpayers as much as \$30,000 to \$50,000 per year); *What is the Cost of Homelessness?*, Father Joe’s Villages (Mar. 8, 2022), <https://my.neighbor.org/what-is-the-cost-of-homelessness/> (describing how top homeless users of public services in San Diego cost tax payers nearly an average of \$111,000 per year); Malcolm Gladwell, *Million Dollar Murray*, *New Yorker* (February 5, 2006), <https://www.newyorker.com/magazine/2006/02/13/million-dollar-murray> (describing how one man experiencing homelessness and alcohol use disorder used about \$1 million dollars in public services over his 10 years of homelessness); Kathleen Miles, *Housing the Homeless Not Only Saves Lives—It’s Actually Cheaper Than Doing Nothing*, *HuffPost* (Mar. 25, 2014), https://www.huffpost.com/entry/housing-first-homeless-charlotte_n_5022628 (describing study finding that program that housed 85 chronically homeless adults saved \$1.8 million in health care costs and reduced emergency room visits and days in the hospital by nearly 80 percent).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See, e.g., Kimberly Burrowes, *Can Housing Interventions Reduce Incarceration and Recidivism?* HOUSING MATTERS (Feb. 27, 2019), <https://housingmatters.urban.org/articles/can-housing-interventions-reduce-incarceration-and-recidivism>; Leah A. Jacobs & Aarton Gottlieb, *The Effect of Housing Circumstances on Recidivism: Evidence from a Sample of People on Probation in San Francisco*, 47 CRIM. JUST. BEHAV. 1097-1115 (Sept. 2020), [ncbi.nlm.nih.gov/pmc/articles/PMC8496894/pdf/nihms-17434785](https://pubmed.ncbi.nlm.nih.gov/pmc/articles/PMC8496894/pdf/nihms-17434785).

⁴⁵ Rebecca Vallas et al., *Removing Barriers to Opportunity for Parents with Criminal Records and their Children*, Center for American Progress (Dec. 2015) at 10, https://americanprogress.org/wp-content/uploads/2015/12/CriminalRecords-report2.pdf?_ga=2.8340081.214011696.1657129695-2105602745.1657129694.

affecting a child's educational outcomes, access to medical care, food security, and health outcomes.⁴⁶

B. Inaccuracy of arrest record as an indicator of criminal activity.

Subject to limitations imposed by program rules, the Fair Housing Act, and other civil rights requirements, PHAs and owners generally retain discretion in setting admission, termination of assistance, and eviction policies for their programs and properties. Even so, such policies must ensure that adverse housing decisions based upon criminal activity are supported by sufficient evidence that the individual engaged in such activity.

This proposed rule would establish by regulation existing HUD guidance that an arrest cannot be the sole basis for a determination that an individual engaged in criminal activity. The mere fact that an individual has been arrested does not, in and of itself, constitute evidence that he or she has engaged in criminal activity. Accordingly, the fact that there has been an arrest for a crime may not be used as the sole basis for the requisite determination that the relevant individual engaged in criminal activity warranting denial of admission, termination of assistance, or eviction.

An arrest shows nothing more than that someone had reason to suspect that the person apprehended committed an offense.⁴⁷ In many cases, arrests do not result in criminal charges, and even where they do, such charges can be and often are dismissed or the person is not convicted of the crime alleged. Even where an arrest leads to a charge, one study found that only 53 percent of charges resulted in conviction (43.8 percent among felony counts), whereas 38.7 percent of all charges resulted in non-conviction.⁴⁸

⁴⁶ *Id.*

⁴⁷ See *Schwartz v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957); see also *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (“[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57,60 (1st Cir. 2006) (“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”).

⁴⁸ Chien, Colleen. (2020). America's Paper Prisons: The Second Chance Gap. Michigan Law Review, Volume 119, Issue 3. (computed from charge count and conviction tables in the appendix). According to the paper, the remaining 8.3 percent of charges were disposed of through diversions, deferrals, pending transfers, or the disposition of the case was unknown. *Id.*

Moreover, arrest records are often inaccurate or incomplete (*e.g.*, by failing to indicate or update the outcome of the arrest or charge records or the dispositions of cases presented to the court),⁴⁹ such that reliance on arrests not resulting in conviction as the basis for denying applicants or terminating the assistance or tenancy of a household or household member may result in unwarranted denials of admission to or eviction from federally assisted housing.

For these reasons, HUD has explained, and the Supreme Court has recognized, that “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”⁵⁰ Because arrest records do not constitute proof of past unlawful conduct and are often incomplete, the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual.⁵¹

Although a record of arrest itself is insufficient to show that an individual engaged in the conduct at question, the conduct underlying an arrest – where reliable records of that conduct exist – may indicate that the individual is not suitable for tenancy. The conduct, not the arrest, is what is relevant for admissions and tenancy decisions. A housing provider still must have reliable evidence that the alleged conduct reflected in the arrest actually occurred in order to deny housing on that basis.⁵² HUD recognizes that housing providers often lack resources to

⁴⁹ Wells, M., Cornwell, E.Y., Barrington, L., Bigler, E., Enayati, H. & Vilhuber, Y. (2020). Criminal Record Inaccuracies and the Impact of Record Education Intervention on Employment-Related Outcomes. U.S. Department of Labor; Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, National Consumer Law Center (Dec. 2019), at 17, <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>.

⁵⁰ *Schware*, at 241.

⁵¹ *See, e.g., Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 300 (D. Conn. 2020); U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal History Background Checks* at 3, 17 (June 2006), available at http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (reporting that the FBI’s Interstate Identification Index system, which is the national system designed to provide automated criminal record information and “the most comprehensive single source of criminal history information in the United States,” is “still missing final disposition information for approximately 50 percent of its records.” The DOJ has noted that the disposition rates are slightly higher today, and this statement doesn’t encompass National Fingerprint File states that maintain their own criminal history nor differentiate between states and federal agencies.).

⁵² Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred. *See* U.S. Equal Emp’t Opportunity Comm’n, *EEOC Enforcement Guidance, Number 915.002*, 12 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; *see also Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that defendant employer’s policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII

investigate and adjudicate whether criminal conduct occurred in the absence of a conviction,⁵³ and that a number of PHAs have faced legal costs and liability for terminating tenants based on their use of unreliable hearsay.⁵⁴ HUD seeks comment on whether it should provide further clarification of what evidence may or may not be used to determine that criminal activity occurred for admission, denials, terminations, and evictions, whether in this rule or in subsequent guidance (*see* “Questions for public comment,” *infra*, Section VII, #7).

1. Absence of empirical evidence that having a criminal record negatively affects success in tenancy.

Although existence of a criminal record is one of the pieces of information used to assess the probability of future criminal reoffending, it has not been routinely studied as a predictor of

because there “was no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees,” such that “information concerning a . . . record of arrests without conviction, is irrelevant to [an applicant’s] suitability or qualification for employment”), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

⁵³ While a record of conviction will generally serve as sufficient evidence to show that an individual engaged in criminal conduct, even a guilty plea does not conclusively establish the underlying crime. There may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged or pardoned or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. *See generally* SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>. *See also* *Costa v. Fall River Hous. Auth.*, 903 N.E.2d 1098 (Mass. 2009) (noting that “guilty pleas are not conclusive of the underlying facts, but evidence of them.”)

⁵⁴*See, e.g.* *Woods v. Willis*, 825 F. Supp. 2d 893, 901-02 (N.D. Ohio 2011) (finding that a PHA hearing officer erred for terminating Section 8 benefits based solely on hearsay evidence to substantiate fraud allegations); *Costa v. Fall River Hous. Auth.*, 903 N.E.2d 1098, 1108-12 (Mass. 2009) (holding that a housing authority grievance panel could not properly base its decision to terminate Section 8 benefits on “unattributed, multi-level, and conclusory hearsay evidence” from a newspaper); *Diaz v. Donovan*, 404959/07, 2008 N.Y. Misc. LEXIS 4570, at *7-8 (Sup. Ct. June 25, 2008); *Basco v. Machin*, 514 F.3d 1177, 1182-83 (11th Cir. 2008) (hearsay evidence in the form of police reports insufficient to create prima facie case for termination) *overruled on other grounds by* *Yarbrogh v. Decatur Hous. Auth.*, 931, 1322, 1323 (11th Cir. 2019); *Escalera v. N.Y.C. Hous. Auth.*, 425 F.2d 853, 862-63 (2d Cir. 1970); *Edgecomb v. Hous. Auth. of Town of Vernon*, 824 F. Supp. 312, 315-16 (D. Conn. 1993); *Loving v. Brainerd Hous. & Redev. Auth.*, No. 08-1349 (JRT/RLE), 2009 WL 294289, at *6-7 (D. Minn. Feb. 5, 2009); *Chase v. Binghamton Hous. Auth.*, 458 N.Y.S.2d 960, 962-63 (App. Div. 1983) (holding that unreliable hearsay statements were not admissible in an administrative hearing to show that the tenant violated her housing agreement); *Knox v. Christina*, 465 N.Y.S.2d 203 (App. Div. 1983); *Brown v. Winnebago Cty Hous. Auth.*, 10 C 50027, 2010 U.S. Dist. LEXIS 144669, at *3-5 (N.D. Ill. Apr. 1, 2010); *Williams v. Hous. Auth. of City of Milwaukee*, 779 N.W.2d 185, 188-90 (Wis. Ct. App. 2009); *Mortle v. Milwaukee County*, No. 2007AP166, 2007 WL 4233007 (Wis. Ct. App. Dec. 4, 2007) (unpublished); *Badri v. Mobile Hous. Bd.*, No. 11–0328–WS–M, 2011 WL 3665340, at *5 (S.D. Ala. Aug. 22, 2011) (reversing termination based on double hearsay contained in letters); *Sanders v. Sellers-Earnest*, 768 F. Supp. 2d 1180, 1185-88 (M.D. Fla. 2010) (reversing termination based on hearsay statement of ex-boyfriend on police report); *Young v. Maryville Hous. Auth.*, No. 3:09–CV–37, 2009 WL 2043891, at *7-*8 (E.D. Tenn. July 2, 2009) (reversing termination based on double hearsay in police report); *Willis v. Rice Cty. Hous. & Redev. Auth.*, No. A08-1637, 2009 WL 2225983, at *3-*5 (Minn. Ct. App. July 28, 2009) (unpublished).

housing retention.⁵⁵ One study of a supportive housing program for individuals with behavioral health conditions experiencing homelessness found that, on average, having criminal history made no difference in the ability to successfully stay housed.⁵⁶ Research also shows that over time the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until, by six to seven years after the prior offense, it approximates the likelihood that a person with no criminal history will commit an offense.⁵⁷

A study of housing outcomes among tenants participating in an Intervention based on the Housing First model found that successful tenancy by those with a criminal history was similar to that of participants without a criminal history.⁵⁸ A national study following nearly 15,000 veterans who were transitioned from homelessness to housing through the HUD-VA Supportive Housing (HUD-VASH) program found that prior incarceration did not impede connection to services or success in obtaining or maintaining housing.⁵⁹ A Minnesota study examining the relationship between criminal conviction history and housing outcomes among over 10,000 households found that 11 out of 15 conviction types in resident criminal histories show no evidence of impact on negative housing outcomes.⁶⁰ The remaining four conviction types (property offenses, major drug offenses, fraud, and assault) did show an impact on negative

⁵⁵ Daniel K. Malone, 2009. "Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders," *Psychiatric Services* 60:2, 224–30.

⁵⁶ See Malone, D. K. (2009). Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders. *Psychiatric Services*, 60(2), 224-230. The overall housing success rate for continuous residency of at least two years was 72 percent among the 332 individuals in the sample.

⁵⁷ See, e.g., *id.* (citing Title VII cases and Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 *Criminology and Pub. Pol'y* 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

⁵⁸ *Id.*

⁵⁹ Tejani N, Rosenheck R, Tsai J, KasproW W, McGuire JF. Incarceration histories of homeless veterans and progression through a national supported housing program. *Community Ment Health J.* 2014 Jul;50(5):514-9. doi: 10.1007/s10597-013-9611-9. Epub 2013 Jun 1. PMID: 23728839.

⁶⁰ Cael Warren, *Success in Housing: How much Does a Criminal Background Matter?* WILDER RESEARCH, at 15 (Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

housing outcomes, but even they increased the probability of negative housing outcomes by only three to nine percentage points, which decreased over time.⁶¹

HUD is not aware of any empirical evidence that would justify a blanket exclusion from housing of people with criminal histories or by treating criminal records as *per se* disqualifying without reference to other evidence bearing on fitness for tenancy. Despite this lack of empirical basis, many landlords and housing providers continue to deny housing or housing assistance to people solely or largely based upon their criminal histories. Several studies using paired testers of prospective tenants, some with criminal histories and others without, found significant differences in success in housing admission.⁶² One study found that prospective tenants without criminal records were more than twice as likely to have calls returned (96 percent) than those with criminal records (43 percent).⁶³

Many public housing agencies and HUD-assisted housing providers recognize that people with criminal records face unnecessary exclusions to housing assistance and barriers to housing. A HUD study of public housing agency efforts to address homelessness found that PHAs commonly identified criminal records as a barrier to assisting people experiencing homelessness, and, as a result, many modified their screening and admission policies.⁶⁴ Through an initiative supported by the U.S. Department of Justice's Bureau of Justice Assistance, twenty-two public housing agencies in twelve states voluntarily amended their screening and admissions policies to limit the scope of the criminal records considered and/or developed programs to increase access for people with criminal records.⁶⁵ There is no evidence that indicates that the more tailored

⁶¹ *Id.* Even with this modest impact, the author of this study noted that the data limitations--namely the fact that the author could not control for residents' employment status, education background, disability status, mental health or substance abuse diagnoses, or housing history--led him to question the size and significance of the impact observed. *Id.* at 15, 21.

⁶² Douglas N. Evans, Kwan-Lamar Blount-Hill & Michelle A. Cubellis (2019) Examining housing discrimination across race, gender and felony history, *Housing Studies*, 34:5, 761-778, DOI: 10.1080/02673037.2018.1478069

⁶³ Evans, Douglas & Porter, Jeremy. (2014). Criminal history and landlord rental decisions: a New York quasi-experimental study. *Journal of Experimental Criminology*. 11. 21-42. 10.1007/s11292-014-9217-4.

⁶⁴ Abt Associates (2014). Study of PHAs' Efforts to Serve People Experiencing Homelessness. U.S. Department of Housing and Urban Development: Washington DC.

⁶⁵ U.S. Department of Justice Bureau of Justice Assistance. (2022). "Opening Doors, Returning Home: How Public Housing Authorities Across the Country Are Expanding Access for People with Conviction Histories." <https://bja.ojp.gov/doc/opening-doors-returning-home.pdf>

consideration of criminal records in screening and admissions by these public housing agencies negatively affected housing outcomes or public safety.

2. Research demonstrates that risk of recidivism and future criminal activity decreases significantly over time and with age.

Research indicates that a person's prior criminal justice system involvement taken at face value is not a reliable or accurate predictor of their risk to public safety. Moreover, the relationship between a past conviction and the risk of future criminal justice system involvement declines over time and with age. Most people who are released from incarceration never return to prison.⁶⁶ Studies have shown that a person with a prior criminal conviction that has not committed subsequent offense within four to seven years is no more likely to be arrested for a crime than a person in the general population.⁶⁷ As time passes, a person's criminal history becomes less likely to determine their risk of future criminal justice system involvement. After a period of time, a person with a criminal history is no more likely to commit another offense than a person of the same age without a criminal history. Specifically, there is little difference in offending likelihood after an individual reaches their mid-20's.

Although 71 percent of state prisoners released from prison were arrested within five years following release, half of these arrests were for public disorder offenses or associated probation/parole violation, failure to appear, obstruction of justice, contempt of court, commercialized vice, and disorderly conduct. Nearly all these offenses would fall into the category of non-criminal technical violations. Research has shown that post-incarceration interventions such as housing, social supports, and community-based programs have repeatedly shown benefit to enrolled individuals, regardless of the severity of their original criminal

⁶⁶ *Following Incarceration, Most Released Offenders Never Return to Prison.* Rhodes, W., Gaes, G., Luallen, J., King, R., Rich, T., & Shively, M. (2014). <https://doi.org/10.1177/0011128714549655>

⁶⁷ *Kurlychek, Megan, et al., Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement, 53 Crime & Delinq. 64, 70 (2007)*

conduct.⁶⁸ Research indicates that recidivism rates drop significantly after three years for all types of offenses.⁶⁹

Of the small percentage of people who do reoffend, the average time from release to the subsequent offense is 18 months. However, it is important to keep in mind whether a person receives supportive services that address their core needs and their environment affects their risk of recidivism.⁷⁰ When a person is released to a higher-risk environment, the risk of reoffending increases. Higher-risk environments are characterized by instability, such as a shortage of affordable, accessible, and quality housing; lack of positive social supports; unemployment; and other factors. The risk of recidivism is not the same for every person; assessing the likelihood of reoffending requires consideration of multiple factors and is highly individual and circumstance dependent.

Another factor to consider is age. Researchers have studied the prevalence of offending over the life course. Their studies have shown that crime commission typically peaks in the mid-20s and then drops sharply as a person ages. Most people will no longer commit crimes by their 40s, and desistance from crime overall is the typical outcome.⁷¹ There are a number of reasons why offending decreases with age. Studies on brain development suggest that adolescents are more likely to take more risks, be more influenced by their peers, and act on instant gratification. Human brains do not develop completely until approximately age 26, and the rational decision-making centers are the last to develop. As people age, they tend to become more future-oriented, better able to manage their emotions, and more able to assess the consequences of their actions.⁷²

⁶⁸ See *Recidivism Rates: What You Need to Know*. Council on Criminal Justice (2021). <https://counciloncj.org/recidivism-report/> and *Reforms without Results: Why states should stop excluding violent offenses from criminal justice reforms*. Prison Policy Initiative (2020). <https://www.prisonpolicy.org/reports/violence.html>

⁶⁹ Bureau of Justice Statistics. “*Recidivism and Reentry*” available at <https://bjs.ojp.gov/topics/recidivism-and-reentry>. Accessed on February 22, 2024.

⁷⁰ *The Limits of Recidivism: Measuring Success After Prison* (2022). <https://nap.nationalacademies.org/read/26459/chapter/1>

⁷¹ *A New Lease on Life*. The Sentencing Project (2021). <https://www.sentencingproject.org/app/uploads/2022/08/A-New-Lease-on-Life.pdf>

⁷² *Adolescent Development and the Regulation of Youth Crime*. Scott, E. & Steinberg, L. (2008). <https://ccoso.org/sites/default/files/import/Adol-dev-and-reg-of-crime.pdf>

Of individuals who were incarcerated, older individuals are substantially less likely to recidivate. If they do recidivate, it is more likely to involve a non-violent offense or technical violation.⁷³ Aging out of criminal justice system altogether, however, is the typical outcome.

Criminal records alone are not reliable, accurate, or sufficient to determine a person's risk to public safety or risk of engaging in future criminal activity as most people who commit crimes do not engage in further criminal activity, recidivism risk is highly individual and circumstance dependent, and the risk of reoffending decreases with time and age. Additionally, research shows that positive environmental factors and supportive services, such as access to housing, decrease the risk that a person will reoffend.

C. Primacy of stable housing as it affects recidivism rate and public safety.

There is compelling evidence that excluding or denying housing or housing assistance to people with criminal records can have detrimental and counterproductive impacts on the people with criminal records, and, by increasing the risk of recidivism, undermine the public safety of communities as a whole. Denying housing assistance to people with prior criminal justice system involvement can increase the risk of housing instability and homelessness, which can, in turn, increase their risk of recidivism. As noted earlier, formerly incarcerated individuals are nearly ten times more likely to be homeless than the general public, and the rates are significantly higher among those released from jail or prison within the past two years.⁷⁴ Homelessness and housing instability among people returning to the community from prisons and jails can increase their recidivism, particularly in the first few months and years following release from prison or jails, when the need for stabilizing supports is most acute. One study estimated that people with unstable housing were up to seven times more likely to reoffend.⁷⁵ Housing insecurity also

⁷³ *The Effects of Aging on Recidivism Among Federal Offenders*. United States Sentencing Commission (2017). https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf

⁷⁴ See fn.40, *supra*, and the accompanying text.

⁷⁵ Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Records Checks, Race, and Disparate Impact*, 93 Ind. L. J. 421, 432–33 (2018).

increases the risk of recidivism for people on probation.⁷⁶ The type of housing a person is released to also affects the risk of recidivism, and release to emergency shelters after release from jail or prison increases the odds of rearrest.⁷⁷ Research also has found that moving residences increases the risk of recidivism by at least 70 percent every time someone who is formerly incarcerated changes their residence due to the destabilizing impact.⁷⁸

By contrast, there is compelling evidence that stable housing and the provision of housing assistance programs can reduce the risk of recidivism, which includes arrests, convictions, and incarceration for new offenses. A study by the Urban Institute found that people who secured housing within a few months after release from jail or prison had better mid-term outcomes than those who had less stable access to housing.⁷⁹ Stable housing also increases the ability of formerly incarcerated people to find and maintain employment and reestablish family ties, both of which have also been shown to reduce recidivism.⁸⁰ Numerous studies have found that the provision of affordable housing with other supportive services, including permanent supportive housing programs, reduced police interactions, arrest rates, and admission rates to jail and prison, days spent in jail or prison, and increased successful completion of parole.⁸¹

IV. State and local legislative and policy changes to reduce barriers to housing for people with criminal histories.

Recognizing that people with criminal records face barriers and exclusions from rental housing and housing assistance programs, several states and localities have enacted legislation or adopted policies that regulate the use of criminal records in admissions decisions. Many of these

⁷⁶ Jacobs, L. A., & Gottlieb, A. (2020). The Effect of Housing Circumstances on Recidivism: Evidence From a Sample of People on Probation in San Francisco. *Criminal Justice and Behavior*, 47(9), 1097–1115. <https://doi.org/10.1177/0093854820942285>

⁷⁷ Clark, V. (2015). The Effect of Community Context and Post-Release Housing Placements on Recidivism Evidence from Minnesota. Minnesota Department of Corrections.

⁷⁸ Tesfai, A. & Gilhuly, K. (2016). The Long Road Home: Decreasing Barriers to Public Housing for People with Criminal Records. Human Impact Partners.

⁷⁹ Yahner, J. & Visher, C. (2008). Illinois Prisoners' Reentry Success Three Years after Release. Urban Institute.

⁸⁰ Baer, D., Bhati, A., Brooks, L., Castro, J., La Vigne, N., Mallik-Kane, K., Naser, R., Osborne, J., Roman, C., Roman, J., Rossman, S., Solomon, A., Visher, C., & Winterfield, L. (2006). Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute's Prisoner Reentry Portfolio. Urban Institute.

⁸¹ See studies identified at <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-041922.html>

laws, including the examples below, apply to providers of government- and HUD-assisted housing programs as well as private-market rental housing.

In 2018, the District of Columbia amended its local code to adopt a *Fair Criminal Record Screening for Housing* policy that prohibits any landlord or provider of rental housing from accessing applicants' arrest records, limits landlords' consideration to 48 specified criminal convictions that must have occurred in the past seven years and requires landlords to consider mitigating factors prior to denying admission to rental housing.

In 2019, Colorado passed the *Rental Application Fairness Act*.⁸² Under this law, landlords may not consider arrest records or criminal conviction records more than five years before the date of housing application. There are several exceptions, including for crimes related to methamphetamine, crimes requiring registration to the sex offender registry, and homicides.

Also in 2019, the Cook County, Illinois, Board of Commissioners passed an amendment to its county human rights ordinance that prohibits housing discrimination on the basis of a criminal record. Specifically, this law prohibits denying admission to rental housing based on a criminal history unless there is a conviction within the past three years, or the person is subject to a sex offender registry bar. It also requires landlords to perform an individualized assessment and to show that any denial based on a criminal conviction in the past three years is necessary to protect against a demonstrable risk to personal safety and/or property.⁸³

In 2021, Illinois passed the *Public Housing Access Bill*, under which PHAs are required to limit their lookback period for criminal activity to six months prior to the application date (the two federal mandates remain in place).⁸⁴

New Jersey's *Fair Chance in Housing Act*, passed in 2021, places limits on housing providers' ability to inquire about arrests, expunged criminal records, and records from the

⁸² Colorado HB 19-1106(2020), https://leg.colorado.gov/sites/default/files/2019a_1106_signed.pdf

⁸³ Cook County Board of Commissioners, <https://www.cookcountyil.gov/content/just-housing-amendment-human-rights-ordinance>.

⁸⁴ Illinois Public Act 101-0659 (2021), <https://ilga.gov/legislation/publicacts/101/PDF/101-0659.pdf>.

juvenile justice system. Only after a conditional offer of housing is made may a housing provider run a criminal background check and an individualized assessment is required prior to any denial based on a criminal record. The law includes a tiered system for denial under which certain types of conviction records require a longer lookback period than others. For example, a six-year lookback period is in place for a first-degree indictable offense; that decreases to four years for a second- or third-degree indictable offense.⁸⁵

New York State's housing agency, Homes and Community Renewal (HCR), has adopted a policy that regulates what criminal history information may be considered and used in connection with admissions decisions by housing providers receiving state funding. HCR's policy limits the review of criminal records by applicants to state-funded housing providers to misdemeanors within the last year or felonies within the last five years and also requires that state-funded housing providers conduct an individualized assessment that must take into account multiple factors to assess the relevance of the criminal conviction to housing suitability.⁸⁶ HCR provides state-funded housing agencies with a worksheet to guide this individualized assessment.⁸⁷

In 2017, Seattle, Washington, enacted the *Fair Chance Housing Ordinance*, which prohibits landlords from inquiring about criminal history or taking adverse action based upon criminal history.⁸⁸ Its goal is to prevent unfair bias against individuals with prior criminal justice system involvement. The ordinance also prohibits advertising language that would automatically exclude individuals with arrest records, conviction records, or criminal histories.⁸⁹

⁸⁵ New Jersey Office of the Attorney General, *Fair Chance in Housing Act What You Need to Know*, <https://www.njoag.gov/wp-content/uploads/2022/01/FCHA-Flowchart-12.30.21.pdf>

⁸⁶ New York State Homes and Community Renewal, https://hcr.ny.gov/system/files/documents/2022/10/doc-y-guidance-for-assessing-justice-involved-applicants_-10.7.2022.pdf

⁸⁷ New York State Homes and Community Renewal, https://hcr.ny.gov/system/files/documents/2022/12/doc-x-justice-involved-worksheet_-10.7.2022.pdf

⁸⁸ Seattle, Wash., Municipal Code sec. 14.09, *et seq.*

⁸⁹ *See Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023) (ruling that the provision preventing landlords from asking about a tenant's criminal record violates the First Amendment, but upholding the portion of the ordinance that bars a landlord from taking adverse action based on a tenant's criminal history).

In 2020, both Oakland and Berkeley, California, enacted *Fair Chance Housing Ordinances*.⁹⁰ The laws prohibit most types of landlords from asking about or taking adverse action based on criminal history. There are narrow exceptions including one that allows housing providers to comply with federal or state laws that require automatic exclusion based on specific types of criminal histories.

Ann Arbor, Michigan, enacted its *Fair Chance Access to Housing* law in 2021.⁹¹ Similar to Oakland and Berkeley, Ann Arbor's law also prohibits landlords from asking about or taking adverse action due to criminal history with certain narrow exceptions. As with the California laws discussed above, even where exceptions do exist, emphasis is placed on providing applicants with notice and an opportunity to withdraw their applications for tenancy.

This proposed rule is informed by some of these state and local laws, but HUD does not propose to go so far as to bar any consideration of criminal history.

Lookback periods.

As noted above, several of these state and local legislative and policy initiatives have involved not only *Fair Chance* statutes and ordinances, but efforts aimed directly at defining and limiting lookback periods for criminal activity when such activity may be relevant to a potential adverse housing action.

The issue of limiting lookback periods was specifically raised by HUD as an industry best practice in its 2015 notice to PHAs and owners of federally assisted housing.⁹² Likewise, many reentry advocates point to overly lengthy lookback periods as one of the major impediments to successful reentry.⁹³ While declining to provide a one-size-fits-all solution, HUD itself has suggested in 2001⁹⁴ that five years *may be* a reasonable period for serious offenses, depending on the offense. HUD notes, however, the more recent efforts by states and localities

⁹⁰ Berkeley, Cal., Mun. Code sec. 13.106.040, *et seq.*; Oakland, Cal., Mun. Code sec. 8.25.010, *et seq.*

⁹¹ Ann Arbor, Mich., Mun. Code, Title IX, Chapter 122, sec. 9:600, *et seq.*

⁹² See fn.20, *supra*.

⁹³ See, e.g., *When Discretion Means Denial: A National Perspective on Criminal Barriers to Federally Subsidized Housing* (Chicago: Sargent Shriver National Center on Poverty Law, 2015), p.12.

⁹⁴ See, *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 FR 28776, 28779 (May 24, 2001).

across the country and social science research conducted since 2001 support further reducing these lookback periods.⁹⁵

Recognizing the discretion currently afforded to PHAs and owners to establish their own lookback periods and the absence of standard practice in this area (with many PHAs or owners operating under policies that allow lookback periods of ten years or more), HUD proposes that in making admissions decisions a lookback period that considers convictions that occurred more than three years prior to an application is presumptively unreasonable. The proposed rule would permit, however, a PHA or owner to determine a longer lookback period for certain crimes if they are able to provide empirical evidence justifying such longer period.

HUD seeks specific comment from the public on the issue of lookback periods for criminal activity (*see* “Questions for public comment,” *infra*, Section VII, #2).

V. NEED TO BRING REGULATIONS INTO ALIGNMENT WITH CIVIL RIGHTS LAWS AND OTHER LEGAL REQUIREMENTS

HUD has a duty to both administer its programs in a manner that affirmatively furthers fair housing (AFFH)⁹⁶ and to ensure that PHAs, owners, and grantees do not discriminate in HUD’s housing programs.⁹⁷ Additionally, even when statutes and regulations grant HUD-assisted housing providers discretion to deny admission, terminate, or evict, based on certain criminal records, criminal activity, or for other reasons, this discretion is necessarily limited by requirements for housing providers under civil rights statutes, including the Fair Housing Act’s mandate to not discriminate.⁹⁸

⁹⁵ *See* studies cited in section III, B-C, *supra*.

⁹⁶ *See* 42 U.S.C. 3608(d), (e)(5).

⁹⁷ *See, e.g., San Francisco Housing Auth. v. United States*, No. C 03-2619 CW, Slip Op. at 14-15 (N.D. Cal. July 29, 2003) (noting that “[t]his affirmative fair housing duty was imposed by Congress to correct the longstanding ‘bureaucratic myopia’ of HUD and its predecessor agencies regarding civil rights and housing discrimination,” and that “[t]he public has a vital interest in ensuring that the HOPE VI program is administered in accordance with the Fair Housing Act.”).

⁹⁸ *See, e.g., Alexander v. Edgewood Mgmt. Corp.*, Civ. No. 15-01140 (RCL), 2016 U.S. Dist. LEXIS 145787, at *7 (D.D.C. July 22, 2016) (noting that although defendant was allowed to deny admission to applicants for engaging in certain criminal activity under 42 U.S.C. 13661(c) (pertinently, for drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents which was engaged in in a reasonable time prior to admission), this “is still subject to claims of

Criminal record policies that are otherwise lawful are still subject to the Fair Housing Act's requirement to provide reasonable accommodations for people with disabilities and similar requirements under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.⁹⁹ HUD's regulations must provide sufficient guidance to owners and managers of federally assisted housing to enable them to, among other things, comply with civil rights laws. *See* 42 U.S.C. 13603(b)(2)(D).

This proposed rule would incorporate changes to program regulations that, in addition to furthering the policy aims discussed above, help HUD-assisted housing providers ensure they are complying with these obligations. Much of the conduct this rule proposes to require has been

disparate impact"); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 67-69 (D. Mass. 2002) (explaining how program statutes and the Fair Housing Act must be read in harmony, and that the permission the Quality Housing and Work Responsibility Act of 1998 grants to PHAs to enact local preferences is limited by the Fair Housing Act, including its prohibition against policies having an unjustified disparate impact); *Comer v. Cisneros*, 37 F.3d 775, 795 (2d Cir. 1994) ("Although the U.S. Housing Act, by its terms, does permit a local preference, such preference is subject to various limitations including that its administration must be consistent with the Constitution and civil rights laws."); *Altman v. Eco Vill., Ltd.*, No. C 79-202, 1984 U.S. Dist. LEXIS 24962, at *21 (N.D. Ohio 1984) (citing the Fair Housing Act and finding in favor of tenants of a Section 8 new construction building and against the owner for discriminatory eviction actions taken against the tenants, while also finding that the relevant programmatic statute granted the owner broad discretion to evict tenants, even without citing any cause). *See e.g.*, Operations Notice for the Expansion of the Moving to Work Demonstration Program, 85 FR 53458-9 ("Notwithstanding the flexibilities described in this notice, the public housing and voucher funding provided to MTW agencies remain federal funds and are subject to any and all other federal requirements outside of the 1937 Act... As with the administration of all HUD programs and all HUD-assisted activities, fair housing, and civil rights issues apply to the administration of MTW demonstration. This includes actions and policies that may have a discriminatory effect on the basis of race, color, sex, national origin, religion, disability, or familial status (see 24 CFR part 1 and part 100 subpart G) or that may impede, obstruct, prevent, or undermine efforts to affirmatively further fair housing."); 85 FR 53449-50 ("HUD and the MTW agencies may not waive or otherwise deviate from compliance with Fair Housing and Civil Rights laws"); cases cited in fn.99 (courts consistently finding that eviction actions that are not mandatory but are allowed by program statutes (i.e. for criminal activity that threatens the health, safety, and welfare of other tenants) are subject to reasonable accommodation requirements of the Fair Housing Act.)

⁹⁹ *See Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1226 (11th Cir. 2016) (finding in favor of tenant and against landlord where landlord terminated tenant's lease based on tenant's son threatening to "sacrifice [the landlord's staff members] then trap all the residents in their apartments and set the property on fire", where the landlord refused to modify its policies to accommodate the tenant's son's disabilities); *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 341-343 (ED NY May 23, 2012) (PHA's attempt to evict a tenant for assaulting his neighbor where the tenant's behavior was caused by his disability and where the PHA made no attempt to consider reasonable accommodations which would eliminate or acceptably minimize the risk the tenant posed violated the Fair Housing Act); *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636 (D.N.H 1993) (finding that HUD-funded housing provider would violate Act by evicting tenant with a conviction for disorderly conduct for threatening elderly neighbor without first demonstrating that no reasonable accommodation would eliminate or acceptably minimize the risk he posed to other residents at the complex); *Roe v. Housing Authority of City of Boulder*, 909 F. Supp. 814 (D. Colo 1995) (finding PHA violated the Fair Housing Act by attempting to evict tenant without considering accommodating the tenant's disabilities where tenant had struck and injured another tenant, threatened apartment manager, and created noise disturbing neighbor); PIH Public Housing Occupancy Guidebook 2.2 ("A PHA must engage in an individualized analysis to determine if it must provide a reasonable accommodation to an individual with a disability who allegedly is in violation of the PHA's criminal record policies, rules, or lease.") available at <https://www.hud.gov/sites/dfiles/PIH/documents/PHOGLeaseRequirements.pdf>

found to be required by courts under the Fair Housing Act and other laws. For example, various courts have held that statutory and regulatory program rules require an independent assessment—as this rule would require—or have held that it is an abuse of discretion for a housing provider to fail to consider individual circumstances.¹⁰⁰ HUD believes this proposed rule would help PHAs and HUD-subsidized housing providers comply with such case law by providing necessary clarity.

Policies or practices that bar persons from housing based on their criminal history may have a disparate impact on certain groups of persons¹⁰¹ and thus implicate the Fair Housing Act and other civil rights laws. In particular, given data showing that persons of color and persons with disabilities are disproportionately impacted by criminal justice system involvement, courts in recent years have recognized that criminal records–based policies may discriminate because of characteristics protected under the Fair Housing Act.¹⁰² People of color are “arrested, convicted

¹⁰⁰ See, e.g. *Carter v. Lynn Hous. Auth.*, 450 Mass. 626, 635, 880 N.E.2d 778, 785 (2008) (considering 42 U.S.C 1437 et seq. and 24 CFR 982.552(c)(2)(i) as requiring the consideration of mitigating circumstances) (quoting *Commonwealth v. Fredette*, 56 Mass. App. Ct. 253, 259 n.10, 776 N.E.2d 464 (2002) (“Failure to exercise discretion is itself an abuse of discretion”)); *Singleton v. Bos. Hous. Auth.*, 98 Mass. App. Ct. 1105, 150 N.E.3d 1163 (2020) (due process regulations at 24 CFR 982.552(c)(2)(i) require the decision maker to weigh the evidence, find facts relating to “all relevant circumstances,” and to balance them in the decision whether to impose a sanction less severe than termination); *Matter of Gist v. Mulligan*, 2009 NY Slip Op 6688, ¶ 1, 65 A.D.3d 1231, 1232, 886 N.Y.S.2d 172, 173 (App. Div. 2nd Dept.) (finding the decision to terminate a tenant’s voucher by the PHA to be an abuse of discretion based on the circumstances where the penalty of termination was shocking to one’s sense of fairness, even though evidence supported that the participant engaged in program violations which constituted valid bases of termination) (citing *Matter of Sicardo v Smith*, 49 AD3d 761, 762, 853 NYS2d 639 [2008]; *Matter of Riggins v Lannert*, 18 AD3d 560, 562, 796 NYS2d 93 [2005]; *Matter of Brown v Lannert*, 272 AD2d 323, 714 NYS2d 677 [2000]).

¹⁰¹ See fn.20, *supra*. See also “Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” at 2 (June 10, 2022).

¹⁰² See, e.g., *Sams v. GA W. Gate, LLC*, No. CV415-282, 2017 U.S. Dist. LEXIS 13168, at *13-14 (S.D. Ga. Jan. 30, 2017) (finding that plaintiffs had successfully plead that a policy banning those with certain convictions in the last 99 years would disparately impact African Americans based on statistics showing that “African Americans are twice as likely to have criminal convictions as caucasians [and that] . . . in 2014, African Americans represented 36% of the prison population in the United States but only 12% of the country's total population”); *Jackson v. Tryon Park Apartments, Inc.*, No. 6:18-CV-06238 EAW, 2019 U.S. Dist. LEXIS 12473, at *8-9 (W.D.N.Y. Jan. 25, 2019) (finding that plaintiff had successfully plead that policies excluding people for having a felony conviction have a disparate impact on applicants for housing on the basis of race and color because “[e]mpirical evidence shows that nationally, and in New York State, blanket bans on eligibility, based on criminal history, result in the denial of housing opportunities at a disproportionate rate for African Americans and minorities”); *La. Fair Hous. Action Ctr. v. Azalea Garden Props., LLC*, No. 22-74, 2022 U.S. Dist. LEXIS 77083, at *14 (E.D. La. Apr. 27, 2022) (finding that plaintiff’s statistical data showing that “a disproportionate number of African Americans are arrested and incarcerated in the United States compared to white persons, [which] is particularly true at the local level in Jefferson Parish where the apartment building was located”, made plausible the allegation that a blanket ban (or something short of a blanket ban) excluding all applicants with any criminal history disproportionately affects

and incarcerated at rates [that are] disproportionate to their share of the general population.”¹⁰³ In 2019, the incarceration rate of Black males was 5.7 times that of White non-Hispanic males.¹⁰⁴ Consistent with longstanding jurisprudence, even if a housing provider has no intent to discriminate, a criminal records policy can violate the Fair Housing Act if it has an unjustified discriminatory effect on a protected class.¹⁰⁵ To adequately justify a criminal records policy with a disparate impact on a protected class (such as race or disability), a housing provider must be able to demonstrate that it is necessary to serve the housing provider’s substantial, legitimate, nondiscriminatory interest, and that such interest could not be served by another practice that has a less discriminatory effect.¹⁰⁶ While ensuring resident safety and protecting property are substantial and legitimate interests, they must be the actual reasons for a criminal records policy and a housing provider must be able to prove through reliable evidence that its policy actually

certain applicants because of race), *rev'd on other grounds*, 82 F.4th 345 (5th Cir. 2023); *Jones v. City of Faribault*, No. 18-1643 (JRT/HB), 2021 U.S. Dist. LEXIS 36531, at *55 (D. Minn. Feb. 18, 2021) (recognizing that while it is “of course true that the [defendant] did not create the pervasive and well-known racial disparities in the criminal justice system . . . if the [defendant’s] criminal screening policy intersects with a pre-existing, known racial disparity in a way that creates a similar racial disparity in housing, then it is possible that the [defendant’s] policy creates a housing disparity and violates the [Fair Housing Act.]”); *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 291-93 (D. Conn. 2020) (finding plaintiffs’ evidence that nationally, African Americans and Latinos are more likely to be arrested for federal drug crimes than whites, and, in Connecticut, African Americans are more likely to be arrested than white, created a sufficient issue for trial regarding whether defendants’ policy created a disparate impact on African Americans and Latinos); *Alexander v. Edgewood Mgmt. Corp.*, No. 15-01140 (RCL), 2016 U.S. Dist. LEXIS 145787, 2016 WL 5957673, at *2-3 (D.D.C. July 25, 2016) (finding plaintiff properly plead that the defendant violated the Fair Housing Act where the applicant was rejected based on a seven year old misdemeanor conviction and an over 15 year old conviction that was later overturned and which the plaintiff alleged created a discriminatory effect on African Americans because a disproportionate number of individuals arrested, convicted, and incarcerated in the District of Columbia are African American); *Fortune Soc’y v. Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145, 173 (E.D.N.Y. 2019) (finding plaintiffs presented sufficient evidence that defendants had blanket ban on anyone with a criminal record and allowing plaintiffs expert witness to testify at trial about how disparities in the criminal justice system support that defendant’s criminal record policy has a disparate impact on African American and Latino individuals).

¹⁰³ See fn.1, *supra*. See also Report Highlights ‘Staggering’ Racial Disparities in U.S. Incarceration Rates (usnews.com) (reporting that nationally “Black Americans are incarcerated at nearly 5 times the rate of white Americans, though in some states the disparity is far greater.”).

¹⁰⁴ Robey, J., Massoglia, M., & Light, M. (2023). A generational shift: Race and the declining lifetime risk of imprisonment. *Demography*, p. 1.

¹⁰⁵ See 24 CFR 100.500; see also *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. at 519, 527-28, 535-36, 541 (upholding disparate impact liability, overruling HUD’s regulation which provides this framework to analyze disparate impact claims and citing this framework with approval).

¹⁰⁶ *Id.*

assists in protecting resident safety and/or property and that interest could not be served by another policy that has a less discriminatory effect.¹⁰⁷

As described above, this proposed rule is intended to address certain common practices that HUD believes may sweep too broadly in their attempts to serve legitimate interests such as tenant safety and so may expose PHAs and HUD-assisted housing providers to risk of violating the Fair Housing Act or other civil rights statutes. Non-discrimination requirements are extensive, and compliance with these proposed regulations does not mean that compliance is achieved under civil rights laws. However, these regulations should make it clearer and easier for program participants such as owners and PHAs to develop narrowly tailored policies that fulfill the housing mission of providing safe, affordable homes with improved compliance with fair housing and nondiscrimination obligations.

VI. SUMMARY OF PROPOSED RULE

Consistent with HUD's authority and to address the need for the regulation discussed above, HUD is proposing changes to 24 CFR parts 5, 245, 882, 960, 966, and 982. Part 5 applies generally to HUD programs; however, subpart I, Preventing Crimes for Federally Assisted Housing—Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse, does not apply to the Public Housing or HCV programs. Program-specific provisions related to denial of admissions and termination of tenancy similar to those in part 5, subpart I, are included in the Moderate Rehabilitation Program, public housing, and HCV regulations (Section 8 Moderate Rehabilitation Program (24 CFR part 882), Public Housing Program (24 CFR parts 960 and 966), and Section 8 Tenant-Based Assistance: Housing Choice Voucher Program (24 CFR part 982)). Part 5, subpart J applies to PHAs that administer public housing and Section 8 programs.

¹⁰⁷ See fn.1, *supra*; see also *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 300 (D. Conn. 2020) (applying this same principle to its partial grant of summary judgment to plaintiff on issue of whether a particular criminal records screening policy was necessary to protect health and safety and concluding that excluding people from housing based on arrests alone cannot serve a legitimate business justification.)

Throughout the proposed changes, HUD, where possible and where not contradicted by statute, uses person-centered language that describes an individual's behavior rather than labeling that individual. To that end, this proposed rule would amend language that references "alcohol abusers" and "drug criminals" and instead use the language "alcohol abuse" and "drug-related criminal activity." HUD also proposes consistent language and cross-references throughout the regulations.

With respect specifically to the term "alcohol abuse", HUD recognizes that some agencies, advocates, and members of the disability and medical communities have moved away from the term "alcohol abuse" towards alternatives such as "alcohol use disorder," "excessive alcohol use," or "alcohol use" due to stigma associated with the term "alcohol abuse."¹⁰⁸ HUD considered these alternatives while drafting this proposed rule but has elected not to adopt any of them at this time. The term "alcohol abuse" is taken directly from statutory language in QHWRA, which permits denial of admission or eviction from federally assisted housing in a situation where "abuse (or pattern of abuse) of alcohol . . . interfere[s] with the health, safety, or right to peaceful enjoyment of the premises by other residents."¹⁰⁹ In other words, "alcohol abuse" is a term of art used to describe a category of conduct that can justify exclusion from housing. It has been construed in case law and carried forward in numerous regulatory provisions, subregulatory guidance, and leases. Any replacement term, unless substantively identical, would alter the scope of the conduct that permits exclusion and create questions about how to reconcile the rule with the governing statutes.

HUD has considered using different terms, for example, "excessive alcohol use" and "alcohol use" in this proposed rule but has declined to do so because they are broader than "alcohol abuse." Consequently, substituting these terms would expand the category of conduct

¹⁰⁸ Nat'l Inst. on Drug Abuse, *Words Matter – Terms to Use and Avoid Using When Talking About Addiction* (Nov. 29, 2021), <https://nida.nih.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction> (suggesting that the term "abuse" should be avoided because it has a high association with negative judgments and punishment).

¹⁰⁹ 42 U.S.C. 13661(b)(1)(B), 13662(a)(2).

that permits exclusion, contrary to the purposes of this proposed rule, and may lead to more admission denials and evictions than were intended by QHWRA's statutory language.

HUD has also contemplated using the term "alcohol use disorder" as an alternative to "alcohol abuse," as some federal agencies have begun using because of its clinical definition.¹¹⁰ However, not only is this term inconsistent with the statutory language in QHWRA, but it also creates confusion in the fair housing context, because individuals with alcohol use disorder are people with a disability under the Fair Housing Act, Americans with Disabilities Act, and the Rehabilitation Act of 1973. Using a term as the standard for permitting exclusion that is also a recognized disability could create problems harmonizing this standard with the analysis required under the civil rights laws. HUD seeks public comment specifically on the issue of the continued use of the term "alcohol abuse" (*see* "Questions for public comment," *infra*, Section VII, #11).

HUD also proposes at various places to include "PHA employees" or "property employees" among those meant to be protected from threatening activity. The Housing Act of 1937 and QHWRA both evince a desire to include these employees among those intended to be protected from threatening activity, but they are not uniformly included in the existing regulations.

HUD also proposes to add the following definitions to § 5.100: "*Criminal history*", "*Criminal record*", "*Currently engaging in or engaged in*", "*Individualized assessment*", and "*Preponderance of the evidence*." These terms are discussed throughout this section where appropriate. With respect to the term "*Currently engaging in or engaged in*", HUD seeks specific comment on certain aspects of the proposed definition (*see* "Questions for public comment," *infra*, section VII, #1).

A. Part 5: Individualized Assessment

¹¹⁰ Nat'l Inst. on Alcohol Abuse & Alcoholism, *Understanding Alcohol Use* (Apr. 2023), https://www.niaaa.nih.gov/sites/default/files/publications/Alcohol_Use_Disorder_0.pdf (highlighting that "alcohol use disorder" is a medical condition listed in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, that encompasses "alcohol abuse," among other conditions).

To increase access to covered housing programs, this proposed rule would require that housing providers conduct an individualized assessment of each individual whose suitability is under question based on the existence of a criminal history. Though the individualized assessment requirement would apply slightly differently to different programs and circumstances due to statutory and programmatic differences, HUD intends to increase access to HUD's programs by applying the new individualized assessment process.

This rule proposes to amend 24 CFR part 5 by adding a definition of "individualized assessment" to § 5.100. The definition would provide that the purpose of the "individualized assessment is to determine the risk that an applicant will engage in conduct that would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees." As proposed, HUD's definition of "individualized assessment" would require holistic consideration of "multiple points of information" that may include a criminal history but also relevant mitigating factors, including but not limited to those set forth in § 5.852(a)(1) and (2), and repeated in the public housing and voucher regulations as appropriate. In conjunction with the individualized assessment, HUD also proposes to define "criminal history" in § 5.100 to mean an individual's past involvement with criminal activity or the criminal justice system, including but not limited to that reflected in a criminal conviction. Criminal history may include information that appears in an individual's criminal record but may also include information that is not part of that individual's criminal record. "Criminal record" is proposed to be defined as a history of an individual's contacts with law enforcement agencies or the criminal justice system. A criminal record may include details of warrants, arrests, convictions, sentences, dismissals or deferrals of prosecution; acquittals or mistrials pertaining to an individual; probation, parole, and supervised release terms and violations; sex offender registry status; and fines and fees.

This proposed rule retains existing requirements in § 5.851 regarding authority to screen applicants for admissions and terminate tenants. HUD is proposing, however, to add a

requirement that, where discretion exists to deny admission or terminate, a housing provider must consider certain circumstances listed in § 5.852 before doing so based on the following circumstances: a criminal record, a finding of criminal activity, illegal drug use, or alcohol abuse. In the admissions context, the considerations listed in § 5.852 must be considered as part of an individualized assessment.

This proposed rule is not intended to affect existing discretion with respect to admissions, evictions, and terminations on other bases. Section 5.851(a)(1) provides that a criminal record may be considered only in the manner and for the purpose described in this regulation. Paragraph (a)(2) would require an individualized assessment in every instance a housing provider considers criminal activity in an admissions decision except in circumstances where a statute requires denial of admission based on criminal history. Paragraph (a)(2)(i) would provide that such criminal activity, if determined relevant, may be considered only alongside the relevant mitigating factors, including the factors listed at § 5.852(a). HUD seeks public comment specifically on whether it should provide additional specificity in the final rule or in subsequent guidance on this requirement (*see* “Questions for public comment,” *infra*, Section VII, #5).

Section 5.851(a)(2)(ii) would provide that an arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial of admission; however, the underlying conduct leading to an arrest may be relevant to determine the applicant’s risk to engage in such conduct provided there is sufficient evidence independent of the arrest itself that the conduct occurred.

Section 5.851(b) would require that any termination based on criminal activity, illegal drug use, or alcohol abuse must be in accordance with the procedures and requirements of subpart I. Several of the specific protections discussed above are proposed to be expressly incorporated into relevant provisions in the regulations in the public housing and voucher provisions as discussed in more detail below.

HUD's intent is to provide practical guidance to assist housing providers with decisions regarding admissions and terminations that involve criminal history considerations. To that end, § 5.852(a)(1) outlines factors for a housing provider to consider in the admission context and the termination or eviction context. The factors listed in § 5.852(a)(1) are meant to provide housing providers with a holistic view of the individual seeking housing or seeking to maintain housing. The factors are not all inclusive, and housing providers may consider other relevant mitigating circumstances.

For an individualized assessment conducted for admissions purposes, § 5.852(a)(1), the relevant factors that should be considered include, but are not limited to, the nature and circumstances of the conduct in question, including seriousness, impact on suitability for tenancy, and length of time that has passed since the conduct; the extent to which the applicant or relevant household member has attempted to mitigate the risk that admission would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees; whether the applicant would like the owner to consider mitigating circumstances related to a medical condition of a household member; whether, considering relevant evidence, there is reason to believe the conduct will recur and rise to the level that it will interfere with the health, safety, or right to peaceful enjoyment of the premises by others; and whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities.

For terminations or evictions, relevant factors that housing providers should consider under § 5.852(a)(2) include the nature and circumstances of the conduct in question, including seriousness and impact on fitness for continued tenancy; the effect on the community and on other household members not involved in the conduct of termination or eviction or of inaction; whether the leaseholder or relevant household member was involved in the conduct and whether they have taken reasonable steps to prevent or mitigate the conduct; whether, considering relevant evidence, there is reason to believe the conduct will recur and rise to the level that it will

interfere with the health, safety, or right to peaceful enjoyment of the premises by others; whether the applicant would like the owner to consider mitigating circumstances related to a medical condition of a household member; and whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities.

The proposed rule provides at § 5.851(a)(2)(ii) that the existence of an arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity; however, actions that resulted in the arrest could be relevant as long as there is sufficient evidence, independent of the arrest, that the actions occurred, and other mitigating factors are considered.

HUD also recognizes that there are statutory limits that dictate how housing providers treat criminal histories in certain circumstances.¹¹¹ Where an individual is statutorily barred from admission or continued tenancy in a covered program, a housing provider is not required to conduct an individualized assessment or consider the above factors before denying them admission or terminating their tenancy.

In § 5.852(b), the proposed rule continues to give the housing provider the discretion to exclude a household member that the housing provider determined participated in or was culpable for an action or failure to act that warrants denial or termination. However, this rule would provide clarity that this determination must be based on a preponderance of the evidence. HUD proposes to add a definition for “preponderance of the evidence” at § 5.100, which would define the standard as more likely than not that a claim is true when all evidence is taken together and its reliability or unreliability is considered. This definition responds to the need for housing providers to have a clear, uniform standard with which to evaluate evidence underlying

¹¹¹ 42 U.S.C. 13663 bars admission to federally assisted housing for individuals who are subject to a lifetime registration requirement under a State sex offender registration program; 42 U.S.C. 1437n(f) bars admission to and requires termination of individuals convicted of manufacturing or producing methamphetamine from public housing and Section 8- assisted housing.

important decisions that have significant consequences on the future housing opportunities of tenants and prospective tenants.

Section 5.852(b) also proposes that the duration of any such exclusion must not exceed the time period an individual could be denied admission based on the same action or failure to act. In addition, this section would provide that such an exclusion may not be based solely on the fact of an arrest. The conduct underlying an arrest may provide the basis for an exclusion, provided the housing provider can meet a preponderance of the evidence standard that the conduct occurred independent of the fact of the arrest.

HUD proposes to remove current § 5.852(c) regarding consideration of rehabilitation because it would be redundant with paragraphs (a)(1)(iv) and (a)(2)(vi).

HUD also proposes to remove the language from § 5.852(d) that allows an owner to prohibit admission for a period of time longer than that authorized by statute. HUD proposes parallel deletions of equivalent language in the public housing regulations at § 960.203(c)(3)(ii) of the current regulation and § 966.4(1)(5)(vii)(E), as HUD proposes to replace this with the creation of a three-year presumptive lookback period for criminal history (see discussion of lookback periods under A.2 of this section).

The proposed paragraph (c) would revise current paragraph (e) and clarify that admission and eviction actions be consistent with 24 CFR part 5, subpart L, as well as the fair housing and equal opportunity provisions of § 5.105 and would clarify that the Fair Housing Act's prohibitions against discrimination extend to third-party screening services or companies contracted by housing providers.

Finally, HUD proposes to add a new paragraph (d) to address situations where an applicant fails to disclose criminal record information. The provision would provide that except in those circumstances where a PHA or owner solely relies on self-disclosure in reviewing an applicant's criminal record, the PHA or owner may deny admission for failure to disclose a criminal record only if that criminal record would be material to an admissions decision pursuant

to this rule and the PHA's or owner's admissions standards. For criminal history information that is material to an admissions decision, the PHA may take the failure to disclose into account, along with other factors set out in this rule, in determining whether that criminal record warrants denial of admission. Parallel provisions are proposed to be added at §§ 960.203(d) and 982.552(f).

1. *Drug-Related Criminal Activity and Illegal Drug Use* §§ 5.854, 5.858

Section 5.854 addresses the admission of individuals who have engaged in drug-related criminal activity or illegal drug use. However, the currently codified title of the section does not include reference to "illegal drug use." To provide clarity as to the scope of the application of this section, HUD proposes to revise the title of this section to add "illegal drug use." Paragraph (a) of this section provides that housing providers must prohibit the admission of an applicant for three years following an eviction from federally assisted housing for drug-related criminal activity as required by 42 U.S.C. 13661(a). This proposed rule would clarify § 5.854(a)(1), by providing that a housing provider may admit a household member who engaged in drug-related criminal activity if the person is participating in or has successfully completed a substance use treatment service. The proposed rule would remove reference to "an approved supervised drug rehabilitation program" as the only basis for admittance so that the language is more closely aligned with the statute. HUD also proposes a minor change to paragraph (b) of this section to clarify that "illegal use of a drug" that threatens the health, safety, or right to peaceful enjoyment of the premises by "property employees," and not only other residents or property employees, may be a basis for denying admission.

HUD proposes to revise Section 5.858, which addresses the eviction of tenants who have engaged in drug-related criminal activity or illegal drug use, in a number of ways. Because the title of the section does not include reference to "illegal drug use," HUD proposes to revise the title of this section to add "illegal drug use" to clarify the scope of the application. HUD proposes to further clarify this section by revising § 5.858 into paragraphs (a) and (b) to more

clearly make the distinction between the relevant lease provisions applicable to drug-related criminal activity versus illegal drug use. HUD also proposes to insert the word “potential” before “grounds for you to terminate tenancy” to make clear that the stated actions need not automatically result in evictions. Finally, HUD proposes to clarify that a housing provider may consider the health and safety of “property employees” when determining whether to evict a family based on a household member’s illegal use of a drug or a pattern of illegal use.

2. Other Criminal Activity § 5.855

Section 5.855 addresses when a housing provider is allowed to prohibit admission to a housing program based on criminal activity other than that covered in § 5.854. This proposed rule would revise § 5.855(a) to clarify that the list of situations in which a housing provider has discretion to prohibit admission of a household member on the basis of criminal activity is an exclusive list. HUD would keep § 5.855(a)(1) and (2) unchanged (drug-related criminal activity and violent criminal activity) but would limit the remaining activities to situations where the health, safety, and right to peaceful enjoyment of residents or the health or safety of the PHA, owner, employee, contractor, subcontractor, or agent of the PHA or owner who is involved in the housing operations is actually threatened.

Section 5.855(b) provides that a housing provider may establish a reasonable period of time (a so-called “lookback period”) before an admission decision during which an applicant must not have engaged in the activities enumerated in paragraph (a). While housing providers would continue to exercise discretion in setting lookback periods, this rule proposes to place a limit on what would be a reasonable period of time for lookbacks. Specifically, HUD proposes that “prohibiting admission for a period of time longer than three years following any particular criminal activity is presumptively unreasonable.” This section would also permit a housing provider to impose a longer period of time for a lookback, but only after a determination, based on empirical evidence, that a longer period of time is necessary to ensure the health, safety, and peaceful enjoyment of other tenants or property employees. An example of empirical evidence in

this context may include data gathered through qualitative and/or quantitative research that is made the subject of a published, peer-reviewed study. HUD would provide other potential examples through subregulatory guidance. The proposed rule does not provide that three years will always be a reasonable period of time, only that a time longer than three years is presumptively unreasonable. Parallel provisions are proposed at §§ 882.518(b)(2), 882.519(e)(2), 960.204(c)(2), and 982.553(a)(4)(ii)(B). HUD intends that, under the proposed rule, a housing provider may determine that a time less than three years is the reasonable lookback period for some or all activity. Any discretionary decision to deny admission based on activity occurring within the lookback period also would have to occur in accordance with the individualized assessment described elsewhere in this proposed rule.

In § 5.855(c), HUD proposes requiring PHAs and HUD-assisted housing providers to provide notice of the proposed action and a copy of any relevant criminal record to the subject of the criminal record and the applicant (except where otherwise prohibited by law) no less than 15 days prior to a notification of denial. The notification must inform the household that it has the opportunity to dispute the accuracy and relevance of the criminal record as well as the opportunity to present any relevant mitigating information, which the housing provider must consider. HUD specifically seeks comment on the proposed 15-day timeframe and whether the proposed process would adequately balance the needs of applicants and PHAs and HUD-assisted housing providers (*see* “Questions for public comment,” *infra*, Section VII, #3).

In § 5.855(d), HUD proposes that all determinations to deny admission under § 5.855 must be supported by a preponderance of the evidence, as defined by § 5.100. This section would also provide that the fact of an arrest could not be the basis for determining that an individual engaged in criminal activity but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence independent of the arrest that the conduct occurred, subject to the lookback period. Section 5.855(e) would be revised to make it clear that no applicant that was previously denied admission based on criminal activity shall be prohibited from applying for

assistance, and that a HUD-assisted housing provider must not deny the application based solely on the prior denial.

3. Alcohol Abuse § 5.857

In § 5.857, HUD proposes to remove “you have reasonable cause to believe” from the description of the standard that a housing provider must meet to show 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. HUD is proposing this deletion because it believes it to be consistent with the preponderance of the evidence standard used throughout these regulations. The proposed deletion would avoid confusion that these standards are different. Parallel deletions are proposed at §§ 882.518(a)(1)(iii) and (b)(4), 960.204(a)(2)(ii) and (b), and 982.553(a)(2)(ii)(B) and (a)(4)(C)(3). HUD also clarifies that the health and safety provision applies to a property employee.

4. Evictions on the basis of criminal activity § 5.861

Currently, § 5.861 provides that in order to evict an existing tenant based on criminal activity, a housing provider may do so regardless of whether the person has been arrested or convicted of such activity and without satisfying a criminal conviction standard of proof. This proposed rule would change the focus of this provision to the evidentiary standard that the housing provider does have to meet in order to evict, namely the preponderance of the evidence standard, which HUD believes is a more helpful articulation of the applicable rule. HUD continues to believe this standard can be met regardless of whether a person has been arrested or convicted, and by definition it can be met without satisfying a criminal conviction standard of proof. While this proposed rule does not change the substance of this pronouncement, in HUD’s experience, clarifying specific limits is more helpful to ensure compliance with applicable laws than what this regulation currently does. Therefore, and also in keeping with the principles discussed in the preamble, this proposed rule would change the focus of this provision. HUD would eliminate the above-referenced language and provide that the housing provider may

terminate tenancy and evict based on criminal activity if the housing provider determines that the covered person has engaged in the criminal activity described in subsections 5.858 and 5.859.

B. Part 5: Criminal Records

As specified in 24 CFR 5.901, part 5, subpart J, of HUD's regulations addresses access to and use of criminal conviction records and sex offender registry information obtained from law enforcement agencies. However, these regulations do not apply to access to and use of other criminal records, such as records obtained from third party screening companies and records of arrest or other criminal history information from law enforcement agencies. HUD is aware that increasingly, PHAs and owners are considering records other than conviction and sex offender registry records obtained directly from law enforcement agencies. Although this information has the potential to be less accurate, reliable, and instructive, this information is currently the least regulated by HUD's program regulations.

This proposed rule would therefore amend certain sections of subpart J in order to cover all criminal records, emphasize the limited circumstances in which HUD believes criminal records should be relevant in an admission or termination decision and to strengthen an individual's right to dispute their accuracy and relevance in such a decision. HUD proposes adding a new definition for "criminal record" to § 5.100, which would include a variety of interactions with the criminal justice system including arrests, warrants, conviction, sentencing, dismissals or deferrals of prosecution, not-guilty verdicts, and probation, parole, and supervised release violations.

Section 5.901(a) would be amended to clarify that subpart J applies when criminal records are obtained from a law enforcement agency or any other source for consideration in admission, lease enforcement, or eviction. Language would also be added to emphasize that PHAs and owners are not required to review an individual's criminal records beyond the extent necessary to satisfy statutory requirements.

Section 5.903(f) governs an individual's opportunity to dispute the accuracy and relevance of a criminal record of conviction obtained by a PHA from a law enforcement agency that may be used to deny their admission or evict them from federally assisted housing. The proposed rule would revise § 5.903 to provide that when a PHA obtains any criminal record, either under § 5.901(a) or by request of an owner under § 5.903(d), the PHA must notify the subject of the record and the applicant or tenant (except where otherwise prohibited by law) of the proposed action to be taken based on the record and give them an opportunity to dispute the accuracy and relevance of the record. The PHA would be required to provide this opportunity at least 15 days before a denial of admission, eviction or lease enforcement action based on such information. This proposed rule would also add a new paragraph (f)(2) to this section that would outline an individual's rights when an owner of federally assisted housing obtains criminal record information from anywhere other than a PHA. Specifically, the owner must notify the subject of the record and the applicant or tenant if the owner obtains a criminal record relevant to admissions or continued tenancy and provide an opportunity to dispute the accuracy and relevance of the criminal conviction record before a denial of admission, lease enforcement action, or eviction. Such opportunity must be provided at least 15 days before any of the three foregoing decisions. Consistent with these changes in § 5.903, HUD proposes similar revisions to § 5.905(d) concerning notice and opportunity to dispute sex offender registration information. Finally, HUD proposes to revise § 5.903(g), which deals with records management, by deleting the phrase "from a law enforcement agency," since all records should be afforded the safeguards set out in paragraph (g), regardless of their source.

This proposed rule would also add a new § 5.906 to ensure consistency of tenant selection plans and the regulations proposed in this rule and with any non-conflicting state or local law providing protections for people with criminal records. Proposed paragraph (a) would require owners of federally assisted housing – except owners of properties receiving tenant-based assistance and project-based voucher and moderate rehabilitation owners – to amend their tenant

selection plan within six months of the effective date of the final rule to make such plan consistent with amended 24 CFR part 5. Under proposed paragraph (b), owners would be prohibited from considering the existence of a criminal record in the admissions process or in the termination of tenancy process except as specified in this proposed rule. HUD is proposing this paragraph to make it clear that overall compliance is required as of the effective date of the regulation, even if the requirement to amend Tenant Selection Plans under paragraph (a) is subject to the 6-month delay in effective date. HUD seeks public comment specifically on whether the six months proposed for amendment of the tenant selection plan is reasonable (*see* “Questions for public comment,” *infra*, Section VII, #6).

C. Part 245: Tenant Organizations

This proposed rule would amend part 245, subpart B – Tenant Organizations. Specifically, the proposed rule would revise existing paragraph (b) and redesignate existing paragraphs (b) and (c) of § 245.115. Paragraph (b)(1) would provide that owners covered under § 245.10 must make their tenant selection plans available to the public and specifies the acceptable manner in which this may be done, including by posting on its website or social media account(s), in a conspicuous location and accessible format, where applicable. Parallel provisions have been proposed at §§ 882.514(a)(2), 960.202(c)(2), and 982.54(b).

Proposed paragraph § 245.115(b)(2) would require that tenants be notified of proposed substantive changes to the tenant selection plan and be provided the right to inspect and copy such changes for 30 days following notification. This opportunity would extend to any legal or other representatives acting for tenants individually or as a group. During the 30-day inspection period, the owner would be required, during normal business hours, to provide a place reasonably convenient to the tenants where they may inspect and copy the materials in question.

Paragraph (b)(3) of this section would give tenants the right to draft written comments on the proposed changes to the tenant selection plan, with or without the help of tenant representatives, and submit them to the owner and to the local HUD office. This proposed

change is consistent with HUD's recognition of the importance of ensuring tenants have a voice in how their homes are managed and would increase incentives to owners to update their tenant selection plans as needed to reflect program requirements and best practices. Additionally, by providing tenants with visibility into tenant selection policies, HUD believes that tenants will play a role in holding owners accountable for policies such as the proposed requirement to perform an individualized assessment prior to making a determination based on criminal records. HUD seeks public comment on whether owners should be required to respond to comments received from tenants (*see*, "Questions for public comment", *infra*, Section VII, #9).

D. Part 882: Moderate Rehabilitation

This proposed rule would revise the regulations governing the Moderate Rehabilitation Program, located in part 882, subpart E, to reflect the changes in part 5 above as they apply to the Moderate Rehabilitation program. As noted above, § 882.514(a)(2) would be revised to provide for transparency with respect to tenant selection policies.

1. Individualized Assessment

The proposed rule would make several changes to § 882.518. Paragraph (a)(1) would be redesignated as paragraph (2) and new paragraph (a)(1) would clarify that an arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial of admission; however, the underlying conduct leading to an arrest may be relevant to determine the applicant's risk to engage in such conduct provided there is sufficient evidence independent of the arrest itself that the conduct occurred, and would require that where a criminal activity is determined to be relevant it must be considered alongside the factors in § 882.518(a)(1)(ii) and other relevant mitigating factors. Paragraph (a)(1)(ii) of this section would also provide the list of mitigating factors related to admissions from § 5.852(a)(1), which must be considered as part of an individualized assessment.

2. Admissions

The proposed rule would amend redesignated § 882.518(a)(2) by revising its title to cover drug-related criminal activity rather than “drug criminals.” To align with the revisions proposed to § 5.854, the language of § 882.518(a)(2)(A) and (B) would be revised to substitute “substance use treatment service” for “approved supervised drug rehabilitation program” (in (A)) and “household member who engaged in the criminal activity” for “criminal household member” (in (B)). This proposed revision is an expansion of the existing statutory provision that allows a PHA to nonetheless admit the household if, among other things, the household member who engaged in drug-related criminal activity and whose tenancy was terminated has successfully *completed* substance use treatment services.

HUD is also proposing changes to § 882.518(a)(2)(iii), which currently requires that a PHA establish standards that prohibit admission of a household to a PHA’s program if the PHA determines that any household member is currently engaging in illegal use of a drug, or if the PHA determines that it has “reasonable cause to believe” that a household member’s illegal use or pattern of illegal use of a drug “may” threaten the health, safety, or right to peaceful enjoyment of the premises by other residents. First, HUD proposes to delete the phrase “that it has reasonable cause to believe” to be consistent with the preponderance of the evidence standard used throughout these regulations. The proposed deletion would avoid confusion that these standards are different. Second, HUD proposes replacing the word “may” in this paragraph with “would,” to prevent an overly broad reading of “may” in this context, which could lead to speculative admissions determinations HUD does not believe were intended by this language. Third, HUD is incorporating a cross-reference to the newly proposed definition of “currently engaging in or engaged” in § 5.100 to clarify when the applicant is currently engaging in the use of an illegal drug. Lastly, in this paragraph, HUD would add that any determination must take into account any relevant information submitted by the household, such as whether the household member is currently receiving or has successfully completed substance use treatment services.

Section 882.518(b)(1) addresses the authority a PHA has to deny admission on the basis of other criminal activity. The revisions proposed by this rule mirror those in § 5.585 and provide that a PHA may only deny admission based on criminal activity if it determines by a preponderance of the evidence that the individual is currently engaging in criminal activity or engaged in criminal activity during a reasonable time before the admission decision as those terms would be defined in § 5.100. Other criminal activity must be criminal activity that would actually threaten residents, owner, employee, contractor, subcontractor or agent of the owner who is involved in the owner's housing operations. Paragraph (b)(2) of this section, which provides that the PHA may prohibit admission based on criminal activity only for a reasonable time, would be revised to include the three-year presumptively reasonable lookback period previously discussed.

HUD proposes to revise § 882.518(b)(3) which would provide that except in those circumstances where a PHA solely relies on self-disclosure in reviewing an applicant's criminal record, the PHA may deny admission for failure to disclose a criminal record only if that criminal record would be material to an admissions decision pursuant to this rule and the PHA's or owner's admissions standards. HUD also proposes in § 882.518 to redesignate paragraph (b)(4) as paragraph (b)(5). New paragraph (b)(4) would explain that no applicant that was previously denied admission shall be prohibited from applying for assistance, and that PHAs may not deny applications based solely on prior denials. This section would be revised, in line with part 5, to provide that the fact that there has been an arrest is not a sufficient basis for the determination that the relevant individual engaged in criminal activity, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

Redesignated paragraph (b)(5) currently requires a PHA to establish standards that prohibit admission on the basis of alcohol abuse. Like the changes in part 5, the proposed rule provides that the PHA must determine the applicant's abuse of alcohol would threaten the health,

safety, or right to peaceful enjoyment of the premises of residents or PHA employees. Similarly, HUD proposes to make changes to paragraph (b)(1)(iv) which currently states that PHAs may prohibit admission of a household to a PHA's program if the PHA determines that any household member is currently engaging in, or has engaged in during reasonable time before the admission, other criminal activity which "may" threaten the health or safety of the owner or any employee, contractor, subcontractor or agent of the owner who is involved in the owner's housing operations. HUD proposes replacing the word "may" in this paragraph with "would" to prevent an overly broad reading of "may" in this context, which could lead to speculative admissions determinations HUD does not believe were intended by this language.

Redesignated paragraph (b)(6), consistent with part 5, subpart J, would provide that before a PHA denies admission based on criminal activity, it must notify the household of the proposed action and provide a copy of any relevant criminal record (except where otherwise prohibited by law) no less than 15 days prior to the denial, and expressly provides an equivalent protection to that proposed in § 5.851, that a criminal record may be considered only if it is accurate and relevant to determining the risk that an applicant would threaten the health, safety, or right to peaceful enjoyment of residents or PHA employees. The provision would provide an opportunity to dispute the accuracy and relevance of the criminal record and to present any mitigating evidence. In addition, paragraph (b)(6) would provide the list of mitigating factors related to admissions from § 5.852(a)(1), which must be considered as part of an individualized assessment, and this section would also provide that if the PHA decides to deny admission following the individualized assessment, the PHA must notify the family of its decision and that the family may request an informal hearing in accordance with § 882.514(f).

3. Denial and Terminations

New paragraph (c)(1) of § 882.518 proposes that for terminations or evictions, relevant factors that PHAs should consider under § 5.852(a)(2) include the nature and circumstances of the conduct in question, including seriousness and impact on fitness for continued tenancy; the

effect on the community and on other household members not involved in the conduct of termination or eviction or of inaction; whether the leaseholder was involved in the conduct and whether they have taken reasonable steps to prevent or mitigate the conduct; whether, considering relevant evidence, there is reason to believe the conduct will recur and rise to the level that it will interfere with the health, safety, or right to peaceful enjoyment of the premises of other residents or property employees; whether the applicant would like the owner to consider mitigating circumstances related to a medical condition of a household member; and whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities.

The proposed rule would amend redesignated paragraph (c)(2) consistent with the changes in Part 5. Specifically, the proposed rule would revise the term “drug criminals” to “drug-related criminal activity,” change “interferes with” to “threatens,” specify when the text is discussing illegal drug use, add “property employees” to the list of individual whom a tenant’s illegal drug use may threaten and give rise to cause to evict, allow the PHA to admit a household member who engaged in drug-related criminal activity if the person is participating in or has successfully completed a substance use treatment service, and reference the definition of “currently engaging in or engaged in” at § 5.100. Similar to the proposed revisions in § 882.518(a)(1), paragraph (d) would be revised in line with part 5, to provide that the fact that there has been an arrest is not a sufficient basis for the determination that the individual engaged in criminal activity, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

The proposed rule would also revise §§ 882.511 and 882.514 to require that the owner follow § 882.519 for actions or potential actions to terminate tenancy, or deny tenancy on the basis of criminal activity, illegal drug use, of alcohol abuse. HUD proposes to remove in § 882.514(c) the provision that an owner may refuse any family, provided that the owner does not unlawfully discriminate. In addition, HUD would revise § 882.514(a)(2) by clarifying that

the PHA's tenant selection policies should be publicized by posting copies in each office where applications are received and by making available copies to applicants or tenants for free upon request. Paragraph (a)(2) would also clarify that these policies can be posted on the PHA's website and/or its social media account(s), in a conspicuous location and an accessible format, where applicable. Lastly, HUD proposes to revise § 882.514(f) by removing the outdated reference to the informal review provisions for the denial of a Federal selection preference under § 882.517(k).

The proposed rule would also add a new section, § 882.519. Proposed § 882.519(a) would reflect changes in part 5 by adding the requirement that where discretion exists to deny admission or terminate, an owner must consider certain circumstances listed in § 882.519 before doing so based on the following circumstances: a criminal record, a finding of criminal activity, illegal drug use, or alcohol abuse. In the admissions context, the considerations listed in § 882.519 must be considered as part of an individualized assessment. Section 882.519(a)(2) would require an individualized assessment in every instance an owner considers criminal activity in an admissions decision. Paragraph (a)(2)(i) of this section would provide that such criminal activity may be considered only if it is relevant to determining the risk that an applicant will interfere with or adversely affect the health, safety, or right to peaceful enjoyment of residents or property employees. Paragraphs (a)(2)(ii) and (iii) of this section would require that where a criminal activity is determined to be relevant, it must be considered alongside the factors in § 882.519(b) and other relevant mitigating factors, and that an arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial of admission; however, the underlying conduct leading to an arrest may be relevant to determine the applicant's risk to engage in such conduct provided there is sufficient evidence independent of the arrest itself that the conduct occurred.

Like part 5, § 882.519(b)(1) would provide the list of mitigating factors related to admissions from § 5.852(a)(1), which must be considered as part of an individualized

assessment. Paragraph (b)(2) of this section would list the circumstances relevant to a particular termination or eviction that an owner must take into account before exercising discretion to terminate or evict based on a criminal record, illegal drug use, or alcohol abuse. Proposed § 882.519(c) would give the owner discretion to exclude a household member that the owner determined, based on a preponderance of the evidence, participated in or was culpable for an action or failure to act that warrants denial or termination. In addition, HUD proposes to add § 882.519(d) which would provide that except in those circumstances where a PHA solely relies on self-disclosure in reviewing an applicant's criminal record, the PHA may deny admission for failure to disclose a criminal record only if that criminal record would be material to an admissions decision pursuant to this rule and the PHA's or owner's admissions standards.

Parallel to provisions proposed at §§ 5.855(B), 882.518(b)(2), 960.204(c)(2), and 982.553(a)(4)(ii)(B), HUD also proposes to add § 882.519(e) which would provide that an owner may establish a reasonable period of time (lookback period) before an admission decision during which an applicant must not have engaged in the activities enumerated in this paragraph. An owner would continue to exercise discretion in setting lookback periods; however, this rule proposes to place a limit on what HUD believes is a reasonable period of time, which is a period of time no longer than three years following any particular criminal activity. The proposed rule does not provide that three years will always be a reasonable period of time, only that a time longer than three years is presumptively unreasonable. A housing provider can, however, overcome this presumption and impose a longer period of time but only after a determination, based on empirical evidence, that a longer period of time is necessary to ensure the health, safety, and peaceful enjoyment of other tenants or property employees.

Section 882.519(e)(3) would be added to require that an owner provide notice of the proposed action and a copy of any relevant criminal record to the subject of the criminal record and the applicant (except where otherwise prohibited by law) no less than 15 days prior to a notification of denial. The notification must inform the household that it has the opportunity to

dispute the accuracy and relevance of the criminal record as well as the opportunity to present any relevant mitigating information, which the housing provider must consider.

Lastly, § 882.518(e)(4) and (5) would be added to explain that no applicant that was previously denied admission shall be prohibited from applying for assistance, and that PHAs may not deny applications based solely on prior denials. This section would be added to align with part 5, to provide that the fact that there has been an arrest is not a basis for the requisite determination that the relevant individual engaged in criminal activity, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

E. Part 960: Public Housing Program

This proposed rule would revise the regulations governing admission to the Public Housing Program, codified in part 960, to reflect the revisions in part 5.

The proposed rule would clarify, by adding a new § 960.103(e), that nothing in part 960 is intended to pre-empt operation of State and local laws that provide additional protections to those with criminal records, but that State and local laws shall not change or affect any HUD requirement for administration or operation of the program. The proposed rule would also redesignate § 960.202(c)(3) as (c)(4) and add language to new paragraph (c)(3) that would mirror the tenant selection policy transparency provision already discussed (see discussion of § 245.118(b)(1)).

The proposed rule would make several changes to § 960.203. Paragraph (b) of this section would remove an obsolete provision that PHAs that successfully screen out applicants with criminal histories would receive points under Public Housing Assessment System (PHAS). In addition to being obsolete, the former provision was fundamentally at odds with the purpose of this proposed rule. Paragraph (c) of this section would be redesignated as paragraph (b) and revised in several ways. Redesignated paragraph (b)(3)(i) currently provides that a PHA may require an applicant to exclude a household member from residing in the unit in order to be

admitted to the housing program where that household member has participated in or been culpable for actions described in § 960.204 that warrant denial. HUD proposes to temper this provision by adding language limiting the duration of such exclusion to the time period an individual could be denied admission for that action or failure to act and requiring that the time period shall be reasonable in light of all relevant circumstances.

Existing paragraph (c)(3)(ii), which allows a PHA to prohibit admission for a period of time longer than that authorized by statute, is proposed for deletion for the reasons discussed earlier (see discussion of § 5.852(d)). HUD proposes to replace it with a new paragraph (b)(3)(ii), which would be added to provide equivalent protections to those proposed in part 5 in the public housing regulations.

Existing paragraph (d) would be redesignated as paragraph (c) and would mirror the requirements of § 5.852(a)(1) with respect to admissions decisions on the basis of a criminal record. Finally, proposed new paragraph (d) would mirror the provision previously discussed at § 5.852(d) regarding an applicant's failure to disclose a criminal history.

The rule proposes several changes to § 960.204. HUD proposes to revise paragraph (a)(1)(i) of this section to clarify that a PHA may admit a household member evicted from federally assisted housing within three years of the date of the eviction if the PHA determines that the evicted household member is participating or has successfully completed substance use treatment services. HUD is proposing this revision in accordance with the waiver provision of 42 U.S.C. 13661(a), which does not require the bar when circumstances leading to the eviction no longer exist (which could include situations where the person who committed the drug offense leading to the eviction is in treatment). In addition, the Americans with Disabilities Act, prohibits public entities, such as PHAs, from discriminating against applicants with substance abuse disabilities who are not currently using illegal drugs and are currently participating in a supervised rehabilitation program, have successfully completed a supervised drug rehabilitation

program, or have otherwise been rehabilitated successfully. 28 CFR 35.131; *see* 42 U.S.C.

12210.

HUD is also proposing changes to § 960.204(a)(2)(i) and (ii). These provisions currently require that a PHA establish standards that prohibit admission of a household to a PHA's program if the PHA determines that any household member is currently engaging in illegal use of a drug, or if the PHA determines that it has "reasonable cause to believe" that a household member's illegal use or pattern of illegal use of a drug "may" threaten the health, safety, or right to peaceful enjoyment of the premises by other residents. First, HUD is incorporating a cross-reference to the newly proposed definition of "currently engaging in or engaged" in § 5.100 to clarify when the applicant is currently engaging in the use of an illegal drug. HUD also proposes to delete the phrase "that it has reasonable cause to believe." HUD is proposing this deletion because it believes it to be consistent with the preponderance of the evidence standard used throughout these regulations. The proposed deletion would avoid confusion that these standards are different. HUD also proposes replacing the word "may" in this paragraph with "would," to prevent an overly broad reading of "may" in this context, which could lead to speculative admissions determinations HUD does not believe was intended by this language.

Similarly, HUD is proposing to revise § 960.204(b) by deleting the reasonable cause to believe standard and requiring a determination that a household member's abuse of alcohol would threaten others for the reasons already discussed (see discussion of § 5.857).

HUD proposes to insert a new § 960.204(c) in order to import a structure for permissive prohibition of admissions for criminal activities that is present in parts 882 and 982, but not currently in part 960. This proposed insertion also would provide a three-year presumptively reasonable lookback provision (see discussion of lookback periods under A.2 of this section).

Mirroring the revisions in subpart J, HUD is proposing to revise redesignated § 960.204(d) first, to expressly include a protection from part 5 (specifically, that a criminal record may be considered outside of the context of mandatory denials only if it is relevant to

determining the risk that an applicant would threaten the health, safety, or right to peaceful enjoyment of residents or PHA employees) and second, to add additional detail to the notification requirements and to make clear that including a brief explanation regarding why the record may be relevant to the PHA's admission decision is part of what it means to provide an opportunity to dispute the accuracy and relevance of that record.

The proposed rule would make a minor revision to § 960.205; specifically, HUD proposes to include a cross reference to the definition of "currently engaging in or engaged in" at § 5.100.

F. Part 966: Lease Requirements

Part 966, subpart A, "Public Housing Lease and Grievance Procedure," provides the requirements PHAs must include in their public housing leases and procedures governing the grievance process. This proposed rule would make several changes to this subpart to ensure that public housing lease terms and the hearing procedures are consistent with the principles and regulatory changes in parts 5, 960 and 982. HUD also proposes an edit to § 966.4(1)(2)(iv)(A) to correct an erroneous cross-reference.

HUD proposes a number of changes to § 966.4(1), which addresses termination of tenancy and eviction. In § 966.4(1)(3), which governs lease termination notices, HUD is proposing only slight non-substantive wording changes. These changes would clarify that the timeframes in these regulations specify the outer time limits for such notice to be provided and emphasize that the notice that must be provided within these timeframes must be "adequate." At (1)(3)(ii), the regulation currently requires PHAs to "state specific grounds for termination" in the lease termination notice. While PHAs should already be including the specific lease provision at issue as part of stating the specific grounds for termination, the proposed language at 966.4(1)(3)(ii) would add language "and the specific lease provision at issue" to make explicit this requirement.

HUD also proposes to revise paragraph (l)(5)(iii) of this section, which deals with termination of tenancy on the basis of criminal activity, to incorporate the preponderance of the evidence standard discussed earlier to make clear that the fact of an arrest is not a basis for termination.

This proposed rule would remove existing paragraph (l)(5)(vii)(A), which provides that PHAs that successfully screen out applicants with criminal histories would receive points under PHAS, for the reasons previously discussed (see discussion of § 960.203(b) with respect to the removal of this language). HUD would revise paragraphs (l)(5)(vii)(A) and (B) to provide that a PHA may consider all circumstances relevant to a particular case. Again, mirroring part 5, the proposed rule would revise this paragraph to provide that an exclusion must be based on a preponderance of the evidence and that the duration of any exclusion must not exceed the time period an individual could be denied admission based on the same action or failure to act. The duration shall also be reasonable in light of all relevant circumstances, including but not limited to the excluded household member's age and relationship to other household members. In addition, the amendments would provide that such an exclusion may not be based solely on the fact of an arrest, though the conduct underlying an arrest may provide the basis for an exclusion. Likewise, the proposed rule would remove paragraph (l)(5)(vii)(D), which lists mitigating factors already discussed and paragraph (E), which allows extension of a statutory period of exclusion, for the same reasons discussed earlier regarding § 5.852(d). Redesignated paragraph (l)(5)(vii)(C) would be revised to clarify that admission and eviction actions must also be consistent with 24 CFR part 5, subpart L.

Finally, the proposed rule would revise paragraph (m) to provide that the cost of copying any document in the PHA's possession that is directly relevant to a termination or eviction is on the PHA, and not the tenant. Additionally, HUD proposes to require the PHA to provide such copy at the PHA's expense. HUD proposes to make a similar revision to § 966.56(b)(1).

G. Part 982: Housing Choice Voucher Program

This proposed rule would revise the regulations governing admission to and continued occupancy in the Housing Choice Voucher Program, located in part 982, to incorporate and reflect the changes in part 5 above.

The proposed rule would make a slight revision to § 982.53(d), to make it clear that State or local laws that provide additional protections to those with criminal records are among the laws that are not preempted by part 982. The proposed rule would revise § 982.54(b) to add language regarding transparency of tenant selection plans.

The proposed rule would amend § 982.301(b)(4), which governs the information required to be supplied to a family selected for tenancy, to require that the family be informed of the fact that a receiving PHA may not rescreen a family that moves under the portability procedures. The proposed revision includes a cross-reference to § 982.355(c)(9), where this requirement is proposed to be codified.

The proposed rule would amend § 982.306(c)(3), which currently provides that a PHA may disapprove an owner if the owner has engaged in any drug related or violent criminal activity but does not specify when that activity must have taken place. HUD proposes to add the requirement that a PHA may disapprove an owner only if the owner is currently engaging in the activity or has engaged in the activity during a reasonable time before the decision regarding approval. The rule would also make clear that a PHA may disapprove an owner for other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of residents or PHA employees occurring during a reasonable time before the decision regarding approval.

The proposed rule would also amend § 982.306(c)(5), which currently allows a PHA to deny an owner based on the owner's history or practice of failing to terminate tenancies based on certain criminal activity of that tenant. The proposed language provides that a PHA may deny approval of an owner if the owner has a history or practice of refusing after an appropriate request from the PHA to take action to terminate certain tenancies. HUD believes this more

limited authority better comports with the underlying statutory language, which authorizes the disapproval of an owner “who refuses, or has a history of refusing,” to take such action, 42 U.S.C. 1437f(o)(6)(C), as well as HUD’s concern that owners not feel obligated to evict where they do not believe eviction is warranted and no one has asked them to do so.

1. PHA Admissions and Terminations Generally (§ 982.552)

This proposed rule would make several targeted changes to § 982.552, which deals with PHAs’ denial of admission or termination of assistance for a family generally. These proposed changes affect denials of admission or termination of assistance on grounds of criminal activity, illegal use of drugs, or alcohol abuse, and do not affect preexisting PHA discretion to deny admission or terminate assistance for other reasons.

Section 982.552(c)(1) allows PHAs to deny admission or terminate assistance on various grounds. HUD would revise paragraph (c)(1) to remove the words “at any time”, which are superfluous to the section. HUD would also revise paragraph (c)(1)(v) to clarify that money owed that is subject to a payment agreement in good standing is not grounds for denial or termination of assistance.

Paragraph (c)(2)(i) of this section would be revised to require that with respect to those grounds that involve criminal activity, illegal drug use, and alcohol abuse, the requirements at § 982.553(a) and (b), which explicitly require the consideration of various mitigating circumstances, apply. Paragraph (c)(2)(ii) of this section would also be revised to clarify that a PHA’s authority to exclude an adult family member who participated in the criminal activity may not extend beyond a longer time than they would otherwise be denied admission for the same conduct. HUD proposes to remove paragraph (c)(2)(iii), because this paragraph is incorporated into the considerations of mitigating circumstances. Finally, HUD proposes to add § 982.552(c)(2)(v) to make explicit that a PHA may temporarily stay a termination hearing while criminal case proceedings for the underlying activity are pending.

2. Admissions (§§ 982.307 and 982.553)

The proposed rule would make several targeted revisions to § 982.307, which deals with tenant screening for the Housing Choice Voucher program. Section 982.307(a)(1) would be updated to provide that any PHA screenings of tenants must be conducted in accordance with §§ 982.552 and 982.553, which will be discussed in more detail below. Paragraph (a)(3) would be updated to provide that any owner screenings of tenants must be conducted in accordance with the Fair Housing Act. Paragraph (a)(3)(iv) would be revised to clarify that “violent criminal activity” is a type of criminal activity that must be screened for. In terms of the information a PHA may offer an owner about a family, paragraph (b)(2) would be revised to limit such information to information about the tenancy history of family members.

The proposed rule would also make several changes to § 982.553, which deals with when a PHA may deny admission on the basis of criminal activity, illegal drug use, or alcohol abuse. HUD proposes to insert a new paragraph (a)(1), which would expressly provide an equivalent protection to that proposed in part 5 with respect to the use of criminal records.

HUD also proposes to insert a new paragraph (a)(2) requiring individualized assessment of relevant circumstances before denying admissions based on a criminal record, criminal activity, illegal drug use, or alcohol abuse, as discussed further in the above discussion on part 5.

HUD’s proposed revisions to § 982.553 build on § 982.552, as discussed above. HUD would amend § 982.553(a)(2) (paragraph (a)(3) in this proposed rule) which addresses prohibiting admission on the basis of being evicted from federally assisted housing for drug related criminal activity. Specifically, HUD proposes new language at paragraph (a)(2)(i)(A) (paragraph (a)(3)(i)(A) in this proposed rule) that would clarify that the PHA is not required to prohibit admission for those who are currently enrolled in substance use treatment services, consistent with parallel changes to other program regulations explained above.

§ 982.553(a)(3)(ii)(A) of this proposed rule would be revised to point to the definition of “currently engaging in or engaged in” in § 5.100 for determining if an individual is currently engaging in the illegal use of a drug. Paragraph (a)(2)(ii)(B) of this section (paragraph

(a)(3)(ii)(B) in this proposed rule) currently allows a PHA to admit a household member that has been evicted from federally assisted housing for drug-related criminal activity, if the PHA determines that it has “reasonable cause to believe” that a household member’s illegal drug use or pattern of illegal use of a drug “may” threaten the health, safety, or right to peaceful enjoyment of the premises by other residents. HUD proposes to add “or PHA employees” and to delete the phrase “that it has reasonable cause to believe” to be consistent with the preponderance of the evidence standard used throughout these regulations. The proposed deletion would avoid confusion that these standards are different.

Additionally, consistent with changes in other parts, HUD proposes removing the word “may” in proposed § 982.553(a)(3)(ii)(B) and (a)(4)(ii)(A)(3) and (4) to remove the speculative nature of the standard.

Proposed § 982.553(a)(4)(ii)(B) would be revised to provide, as discussed earlier, that a period of time longer than three years for a PHA to prohibit admission based on criminal activity is presumptively unreasonable and that a PHA may impose a longer prohibition period only after a PHA determination based on empirical evidence that a longer period it is necessary for the health, safety, and right to peaceful enjoyment of the premises of other residents or PHA employees.

The language of redesignated § 982.553(a)(4)(ii)(C) would be revised to make it clear that no applicant that was previously denied admission based on criminal activity shall be prohibited from applying for assistance, and that a PHA must not deny the application based solely on the prior denial. HUD proposes to remove § 982.553(a)(2)(ii)(C)(1) and (2) of the current regulation. These paragraphs are unnecessary with the addition of new paragraphs (a)(1) and (2). Finally, § 982.553(a)(4)(ii)(C)(1) of this proposed rule would be revised to remove the “reasonable cause” standard, consistent with changes discussed above.

HUD is also proposing changes to § 982.553(d)(1), which provides procedural requirements for admissions denials in reliance on a criminal record. In such cases, the PHA

must notify the family of the initial denial determination in accordance with the procedures in § 982.554. The notice must include a copy of the criminal record at issue (except where otherwise prohibited by law) and an explanation of why the record is relevant, and it must provide the family at least 15 days to request an informal hearing. The proposed revisions would further provide that before a PHA denies admission on the basis of criminal activity, the PHA must provide the household an opportunity to present any relevant mitigating information and expressly sets out the same factors discussed earlier for admissions in § 5.852(a). Finally, proposed paragraph (d)(1)(ii) would allow that while a PHA is determining whether there are grounds for denial of assistance based on criminal activity, the PHA cannot issue a voucher to the family, enter into a HAP contract or approve a lease, or process or provide assistance under the portability procedures.

3. Terminations/Evictions (§§ 982.310, 982.553, 982.555)

PHAs

Section 982.553(b) lists requirements for when a PHA may terminate tenancy on the basis of criminal activity, illegal drug use, or alcohol abuse. Amendments to this paragraph build on § 982.552, as discussed in this preamble. HUD proposes several revisions to § 982.553(b) to refer to “drug related criminal activity” rather than “drug criminals” and “alcohol abuse” rather than “alcohol abusers.”

Section 982.553(c) addresses evidence of criminal activity that can be considered when determining admission and terminations for criminal activity, illegal drugs use or alcohol abuse. HUD proposes to revise paragraph (c) to expressly provide protections equivalent to those proposed for part 5.

The proposed rule would also revise § 982.555, which addresses the informal hearing process for terminations. HUD proposes to retain the requirement in paragraph (e)(2)(i) that the family must be allowed to copy or receive a copy of any documents directly relevant to the hearing but would clarify that this includes the information that the PHA relied upon to make its

initial termination. Paragraph (e)(2)(i) would also be further revised, consistent with earlier discussions, to require that the copying of such documents must be done at the PHA's expense.

Owners

The proposed rule would make several targeted revisions to § 982.310, which governs the circumstances under which an owner may terminate a tenancy. These revisions apply only to circumstances in which the termination is for criminal activity, illegal drug use, or alcohol abuse, as authorized by the HAP lease addendum. The purpose of these proposed revisions is not to unduly regulate HCV landlords' eviction procedures generally; rather, they are targeted to apply only when they evict pursuant to these specialized HUD rules for criminal activity.

Consistent with other proposed revisions made in order to provide express protections equivalent to those proposed for part 5, § 982.310(c)(3) would be revised to require an owner's determination that a tenant engaged in criminal activity to be made on a preponderance of the evidence and would also provide that the fact of an arrest is not a basis to determine that the individual engaged in criminal activity warranting termination of tenancy or eviction. The proposed rule would also add a sentence to § 982.310(c)(3) that would provide that an owner may terminate tenancy and evict by judicial action based on the conduct underlying an arrest if the conduct indicates that the individual is not suitable for tenancy and the owner has sufficient evidence other than the fact of arrest that the individual engaged in the conduct.

Section 982.310(h)(1), which addresses owner termination of tenancy decisions, is proposed to be revised to amend certain mitigating factors that an owner may require. As proposed to be modified, owners may consider the nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on fitness for continued tenancy; the effect on the community of eviction or of the failure of the owner to take such action; the extent of participation by the leaseholder in the conduct; the effect of eviction on household members not involved in the conduct; and the extent to which the leaseholder has taken reasonable steps to prevent or mitigate the offending action.

HUD would insert a new paragraph (h)(2) to apply to circumstances where termination is based on criminal activity, illegal drug use or alcohol abuse, and would provide that in these cases an owner may consider any relevant circumstances described in proposed paragraph (h)(1) and may also consider whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others and whether the leaseholder would like the owner to consider mitigating circumstances related to a medical condition of a household member.

HUD would revise redesignated paragraph (h)(3) to add the preponderance of the evidence standard discussed elsewhere, and to note that the fact that there has been an arrest alone is not a basis for a determination of culpability in the absence of other independent evidence.

HUD would remove current paragraph (h)(3), which is incorporated into proposed paragraph (h)(2).

3. *Portability (§§ 982.301 and 982.355)*

The proposed rule would make changes to §§ 982.301(b)(4) and 982.355(c)(9) to provide that a family that moves under the portability procedures may not be rescreened by the receiving PHA. HUD specifically seeks comment on these provisions and if there should be limited exceptions for statutorily mandated denials in cases where the incoming family has not yet been admitted to the program (i.e., the family was issued a voucher and chose to move under portability immediately without first leasing a unit in the jurisdiction of the initial PHA), as well as on the broader question of under what circumstances, if any, rescreening of tenants for criminal activity is appropriate (*see* “Questions for public comment”, *infra*, Section VII, #8).

H. Treatment of HCV / PBV Owners.

Under the HCV program, the PHA is responsible for determining the family’s eligibility for admission to the program. Where eligibility is established, the PHA issues a voucher to the family, which commences the family’s housing search; if the family finds a unit and the owner is

willing to lease the unit to the family under the program, the family may request PHA approval of the tenancy.

The screening and selection of the family for the unit, as distinct from program eligibility, is the function of the owner. If the owner is unwilling to lease the unit to the family, the family may continue their housing search during the term of the voucher. The program regulations at § 982.307(a)(2) and (3) provide the owner is responsible for the screening of families based on their tenant histories and that an owner may consider a family's background with respect to factors such as respecting the rights of other residents to the peaceful enjoyment of their housing and drug-related criminal activity or other criminal activity that is a threat to the health, safety or property of others. In the PBV program, the PHA refers an eligible family to the owner for an available PBV unit, but as with HCV the owner remains responsible for screening and selection of the family to occupy the owner's unit.

HUD strongly encourages owners participating in or considering participation in the HCV or the PBV programs to conduct an individualized assessment or otherwise take mitigating circumstances into consideration with respect to their screening procedures related to criminal records for all the reasons previously discussed in this preamble. The proposed rule would not impose additional requirements with respect to owner screening for criminal activity. This is because, except in limited specific circumstances, there is no federal statutory requirement that owners must accept a voucher and participate in the HCV program or make their units available for PBV assistance. Such a requirement may have the unintended consequence of discouraging owners from considering any HCV family for their unit because consideration would trigger screening requirements and restrictions that would not be required of the owner with respect to unassisted prospective tenants. Likewise, owners may be discouraged from considering the PBV program if, as a condition of making their housing available, the owner's right to screen prospective tenants would be limited by, or subject to, additional requirements. HUD notes owners in the HCV and PBV programs are subject to the Fair Housing Act, which prohibits

screening that has an unjustified discriminatory effect on any protected class, as well as all applicable state or local laws related to the consideration of criminal records and the use of criminal records, including limitations on inquiries, restrictions on lookback periods, and requirements to consider mitigating factors prior to denying a rental application on such basis.

HUD is seeking specific comment on the issue of owner screening requirements for the HCV and PBV programs with respect to criminal records and criminal activity (*see*, “Questions for public comment”, *infra*, section VII, #10).

I. Severability.

It is HUD’s intention that the provisions of the proposed rule shall operate independently of each other. In the event that this rule or any portion of this rule is ultimately declared invalid or stayed as to a particular program, it is HUD’s intent that the rule nonetheless be severable and remain valid with respect to those programs not at issue. Additionally, it is HUD’s intention that any provision(s) of the rule not affected by a declaration of invalidity or stayed shall be severable and remain valid. HUD concludes it would separately adopt all of the provisions contained in this proposed rule.

VII. QUESTIONS FOR PUBLIC COMMENT

HUD welcomes comments on all aspects of this proposed rule. In addition, HUD specifically requests comments on the following topics:

Question for comment #1: “Currently engaging in or engaged in.” The proposed rule would provide that, for purposes of determining whether criminal activity that may be the basis for termination or eviction is “current,” a PHA or owner may not rely solely on criminal activity that occurred 12 months ago or longer to establish that behavior is “current.” Should HUD establish such a rule and, if so, is less than 12 months an appropriate timeframe?

Question for comment #2: Lookback period for criminal activity. The proposed rule would provide that it is presumptively unreasonable for PHAs and owners to consider convictions that occurred more than three years ago in making admissions decisions. This is

based in part on research on recidivism that indicates that people's risk of committing a crime drops precipitously after the person has not reoffended for a period of three years. The proposed rule would provide, however, that this presumption can be overcome based on evidence that, with respect to specific crimes, older convictions are relevant to individualized assessments of current suitability for tenancy.

2a. Is three years the appropriate time period for this presumption? Are there specific crimes for which a longer lookback period should be considered? If so, what are those crimes, how long of a lookback period would be recommended, and what is the supporting rationale? In general, what should HUD consider to be adequate "empirical evidence" that, for a specified crime of conviction, would overcome the presumption that a lookback period of longer than three years is unreasonable?

2b. By the same token, are there certain offenses for which a lookback period that exceeds three years may be presumptively unreasonable? HUD seeks specific comment on all aspects of the proposal to presumptively but not conclusively cap the lookback period for any given offense at three years.

Question for comment #3: Opportunity to dispute criminal records relied upon by PHA or owner (Denials). The proposed rule would provide that PHAs and owners provide applicants with relevant criminal records no fewer than 15 days prior to notification of a denial of admission, as well as an opportunity to dispute the accuracy and relevance of the records relied upon. Is 15 days prior to notification of a denial of admission an appropriate timeframe? Do the processes described in §§ 5.855(c), 882.518, 960.204, and 982.553 adequately balance the needs of applicants and housing providers? If not, what additional processes or measures would be helpful?

Question for comment #4: Mitigating factors. The proposed rule would provide that PHAs and owners consider the following set of mitigating factors when a decision to deny or terminate assistance or to evict is predicated on consideration of a criminal record: the facts or

circumstances surrounding the criminal conduct, the age of the individual at the time of the conduct, evidence that the individual has maintained a good tenant history before and/or after the criminal conviction or the criminal conduct, and evidence of rehabilitation efforts. Are there other mitigating factors that should be considered? Should HUD define these mitigating factors in greater detail in regulation or guidance? Please provide suggested definitions or standards.

Question for comment #5: Justifying denial of admissions. The proposed rule would provide that criminal activity in the past can be the basis for denying admission only if it would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA/property employees. Should HUD provide additional specificity in the rule or in subsequent guidance on this requirement, and if so, on what aspects?

Question for comment #6: Ensuring consistency of tenant selection plan. The proposed rule would amend 24 CFR part 5 to add a new section, § 5.906. Proposed § 5.906(a) would require an owner of federally assisted housing as defined at § 5.100, other than an owner of a property receiving tenant-based assistance and project-based voucher and moderate rehabilitation owners, to amend the tenant selection plan required by § 5.655 within six months after the effective date of the final rule to ensure its consistency with §§ 5.851 through 5.905. HUD seeks comment on whether the six months proposed for amendment of the tenant selection plan is reasonable.

Question for comment #7: Evidence relating to exclusions. The proposed rule would require housing providers who exclude a household member to apply a “preponderance of the evidence” standard when determining whether the household member participated in or was culpable for an action or failure to act that warrants denial or termination. This proposal would address the need for housing providers to have a uniform standard with which to evaluate evidence underlying decisions that affect a tenant’s or prospective tenant’s future housing opportunities. What makes evidence generally reliable in this context? Should HUD provide further guidance as to the use of evidence in this regulation or in subregulatory guidance?

Question for comment #8: Rescreening of tenants for criminal activity. At §§ 982.301 and 982.355, HUD proposes to prohibit the receiving PHA from rescreening a family that moves under the portability procedures of the HCV program (including for criminal activity). HUD is aware that there are other circumstances under which a PHA or an owner might rescreen a tenant for criminal activity, and HUD would like to consider the issue of rescreening for criminal activity in a comprehensive manner. As such, HUD specifically seeks comment from PHAs and owners on whether there are circumstances under which rescreening a tenant for criminal activity is appropriate, and if so, an explanation of the precise circumstances and reasons therefore. Specifically, for those PHAs and owners who rescreen, under what circumstances do you rescreen after an initial screening, how often do you conduct such rescreening, how long have you been conducting such rescreening, on approximately how many tenants/participants, and what has been the results of your rescreening? Specifically, has your rescreening then led to any evictions or terminations? If so, how many, what were the specific offenses for which they were evicted, what was the case outcome for those offenses, and when did the offense occur in relation to the eviction or termination? Other than the offense in question, were there other concerning factors raised by the tenant/participant? Do you believe your rescreening serves a legitimate purpose? For all members of the public, how, if at all, should HUD address comments about rescreening in the final rule?

Question for comment #9: Owner responses to tenant comments on tenant selection plans. Proposed revisions to 24 CFR 245.115(b)(3) would give tenants the right to comment on proposed changes to the tenant selection plan, with or without the help of tenant representatives, and submit them to the owner and to the local HUD office. Should owners be required to respond to comments received from tenants on proposed changes to the tenant selection plan prior to finalizing those changes? If so, what is a reasonable time frame for an owner to respond?

Question for Comment #10: Screening Requirements for HCV and PBV Owners. As noted earlier, HUD is requesting comments on owner screening requirements for the HCV and

PBV programs with respect to criminal records and criminal activity. Specifically, should HUD establish the same or similar requirements for HCV and/or PBV owners as proposed for owners under part 5? If not, what, if any, requirements should be established for denials on the basis of criminal records, current or recent criminal activity, illegal drug use, or alcohol abuse?

HCV Owners: Should an owner participating in or considering participating in the HCV program be required, as opposed to encouraged, to conduct an individualized assessment before refusing to rent their unit to an HCV family based on criminal activity? Likewise, should there be restrictions on an owner's screening in terms of a lookback period for criminal activity? How would such restrictions apply, and what would be the mechanism and the enforcement action, if any, that a PHA would be responsible for taking in such instances? Would any additional requirements adversely impact owner participation in the HCV program and to what extent? Are there other approaches short of regulatory requirements that would encourage HCV owners or potential HCV owners to adopt such practices voluntarily?

PBV Owners: Should the criminal activity screening requirements be more extensive for or exclusively applied to PBV owners as opposed to HCV owners? For example, what aspects of the PBV program, which are generally similar to other HUD project-based assistance, should HUD consider to either continue to treat it more like HCV or rather, apply the requirements proposed in this rule.

Question for public comment #11: Continued use of the term "alcohol abuse". As discussed in the preamble, this proposed rule continues the use of the statutory term "alcohol abuse" when describing the relevant potential disqualifying circumstances related to alcohol. HUD seeks public comment on the continued use of the term and whether there are alternative, less pejorative, and/or more current terms that could replace "alcohol abuse".

VIII. FINDINGS AND CERTIFICATIONS

Regulatory Review (Executive Orders 12866, 13563, and 14094)

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 entitled “Modernizing Regulatory Review” (hereinafter referred to as the “Modernizing E.O.”) amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

The proposed rule would revise 24 CFR parts 5, 245, 882, 960, 966, and 982 to amend existing regulations that govern admission for applicants with criminal history, and for evicting or terminating assistance of persons on the basis of illegal drug use, drug-related criminal activity, or other criminal activity. HUD believes, consistent with Executive Order 13563, that this proposed rule would reduce unnecessary exclusions from HUD programs while allowing providers to maintain the safety of their residents, staff, and communities. The proposed rule is also intended to reduce the risk of PHAs and owners violating nondiscrimination laws. This rule was determined to be a “significant regulatory action” as defined in Section 3(f) of Executive Order 12866. HUD has prepared an initial regulatory impact analysis and has assessed the potential costs and benefits, both quantitative and qualitative, of this proposed regulatory action and has determined that the benefits would justify the costs. The analysis is available at www.regulations.gov and is part of the docket file for this rule.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule does not impose any federal mandates on any State, local, or Tribal governments, or on the private sector, within the meaning of UMRA.

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available through the Federal eRulemaking Portal at <http://www.regulations.gov>.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would impact Public Housing and Multifamily housing by increasing access for individuals with criminal records in need of affordable housing. Under current regulations, PHAs and owners already are authorized to, and often do, conduct a review of criminal histories in connection with admissions and eviction decisions. This proposed rule would provide clear guidance and requirements on how to do that to ensure that providers are relying only on relevant information that indicates an actual threat to health, safety or quiet enjoyment of the premises; and not relying on irrelevant information, e.g., arrest records, outdated criminal records, or inaccurate or insufficient information.

The proposed rule would ensure that individual assessments consider relevant information and that housing providers make decisions based on the preponderance of the evidence of criminal activity; that individuals that are denied admission or evicted because of

criminal history are provided with notice and access to the records, as well as the opportunity to dispute inaccurate information; and that these changes be adopted in tenant selection plans, tenant lease documents, and PHA policies.

HUD estimates the number of small entities for PHAs as 2,102. At this time, HUD is unable to provide an accurate estimate of small PBRA owners because we do not always know whether there is a corporate structure behind an individual owner. There are 158 PBRA owners at a minimum that are sole proprietorships or tenancies in common, which are likely small entities. Since the costs of the rule are expected to be minimal (average upfront costs of \$120 per PHA and \$184 per PBRA owner, and average annual costs of \$185 per PHA and \$69 per private owner), the proposed rule is not expected to have a significant impact on small entities. Additionally, HUD believes that this proposed rule would benefit small entities equal to or even more than larger entities by providing clarification on how these individual assessments should be applied.

HUD recognizes that there is one aspect of the proposed rule that has the potential to impose some costs on some providers of federally-assisted housing – the proposed new requirement that the PHA furnish copies of relevant documents to applicants or tenants wishing to challenge an admission or termination decision based on a criminal history at the PHA's expense. HUD does not consider that this would amount to a substantial economic impact. HUD expects that, even where furnishing copies of documents would be required, the incremental material costs (paper, copier machine wear and tear, etc.) and costs attributable to personnel time would not rise to the level of a substantial economic impact.

Accordingly, it is HUD's determination that this proposed rule would not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this proposed rule would not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this proposed rule that would meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has Federalism implications if the rule either imposes substantial direct compliance costs on State and local governments or is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule would not have Federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt state law within the meaning of the Executive Order.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number. The information collection requirements contained in this proposed rule are still being finalized for HUD to submit to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and the proposed rule would either update or create a new information collection with an assigned an OMB control number.

The proposed rule would clarify that PHAs must include in their lease termination notices the specific lease provisions and specific criminal activity at issue, a copy of the criminal record at issue, and a description of why the criminal record may be relevant to the PHA's admission decision. HUD estimates that this would require a one-time revision to lease termination notices ("program termination notices" for HCV). Additionally, PHAs would be required to provide a copy of all relevant PHA documents when providing a notification of denial. Currently, this information in part is available by request, so this proposed rule would extend the amount of information PHAs would need to make available. However, HUD is seeking comment on how this could be balanced against confidentiality of records and burden on PHAs to provide information that may not be needed.

PHAs and owners would also be required to revise leases one time in order to include provisions on what grounds a PHA or owner has to terminate tenancy on the basis of drug-related criminal activity or illegal drug use. The proposed rule would also require owners to revise their tenant selection plans to ensure consistency with the amended 24 CFR part 5 and notify tenants of the proposed substantive changes. HUD is still finalizing the overall reporting and recordkeeping burden, but the estimates are as follows:

Description of Information Collection	Number of Responses	Responses Per Year	Total Annual Responses	Hours per Response	Total Hours
PBRA and PIH Leases	26,242	1	26,242	.5	13,121
PBRA and PIH Notices	26,242	1	26,242	2	52,484
Tenant Selection Plans	26,242	1	26,242	1.5	39,363
Copy of Records	4,000	1	4,000	.5	2,000

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the information collection requirements in the proposed rule regarding:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Whether the proposed collection of information enhances the quality, utility, and clarity of the information to be collected; and

(4) Whether the proposed information collection minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Interested persons are invited to submit comments regarding the information collection requirements in this rule. The proposed information collection requirements in this rule have been submitted to OMB for review under section 3507(d) of the Paperwork Reduction Act. Under the provisions of 5 CFR part 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after the publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of the publication. This time frame does not affect the deadline for comments to the agency on the proposed rule. Comments must refer to the proposed rule by name and docket number (FR-6085) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building,
Washington, DC 20503, Fax number: 202-395-6947

and

Colette Pollard, HUD Reports Liaison Officer, U.S. Department of Housing and Urban
Development, 451 7th Street SW, Room 2204, Washington, DC 20410

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low- and moderate-income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 245

Condominiums, Cooperatives, Grant programs-housing and community development, Loan programs-housing and community development, Low- and moderate-income housing, Rent subsidies, Reporting and recordkeeping requirements, Utilities.

24 CFR Part 882

Grant programs-housing and community development, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 960

Aged, Grant programs-housing and community development, Individuals with disabilities, Pets, Public housing.

24 CFR Part 966

Grant programs-housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 982

Grant programs-housing and community development, Grant programs-Indians, Indians, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR parts 5, 245, 882, 960, 966, and 982 as follows:

PART 5 – GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

1. The authority citation for part 5 continues to read as follows:

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d); Sec. 327, Pub. L. 109-115, 119 Stat. 2396; Sec. 607, Pub. L. 109-162, 119 Stat. 3051 (42 U.S.C. 14043e *et seq.*); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

Subpart A—Generally Applicable Definitions and Requirements; Waivers

2. Amend § 5.100 by adding in alphabetical order definitions for “Criminal history”, “Criminal record”, “Currently engaging in or engaged in”, “Individualized assessment”, and “Preponderance of the evidence” to read as follows:

§ 5.100 Definitions.

* * * * *

Criminal history means an individual’s past involvement with the criminal justice system, including but not limited to that reflected in a criminal conviction. Criminal history may include information that appears in an individual’s criminal record (as defined in this section) but may also include information that is not part of that individual’s criminal record.

Criminal record means a history of an individual’s contacts with law enforcement agencies or the criminal justice system. A criminal record may include details of warrants, arrests, convictions, sentences, dismissals or deferrals of prosecution, acquittals or mistrials pertaining to an individual, probation, parole, and supervised release terms and violations, sex offender registry status and fines and fees.

Currently engaging in or engaged in means, with respect to behavior such as illegal use of a drug, other drug-related criminal activity, or other criminal activity, that the individual has engaged in the behavior recently enough to justify a reasonable belief that the individual's behavior is current. Any finding that an individual is currently engaging or engaged in behavior must satisfy the preponderance of the evidence standard and must take into account any relevant contrary evidence, such as evidence that the individual has successfully completed substance use

treatment services with no evidence of recurrence. In the absence of evidence to the contrary, conduct that occurred 12 months or longer before the determination date does not support a determination that an individual is currently engaging in or engaged in the conduct at issue.

* * * * *

Individualized Assessment, where required by these regulations, is a process by which an applicant is evaluated for admission to a federally assisted housing program. The point of an individualized assessment is to determine the risk that an applicant will engage in conduct that would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees. An individualized assessment requires consideration of multiple points of information that may include general tenancy history, criminal record, criminal activity, including drug-related criminal activity, alcohol abuse, or other specified activity together with consideration of relevant mitigating factors, including but not limited to those set forth at § 5.852(a)(1) and (2).

* * * * *

Preponderance of the evidence means, when taking all the evidence together and considering its reliability or unreliability, it is more likely than not that a claim is true.

* * * * *

Subpart I—Preventing Crime in Federally Assisted Housing—Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse

3. Revise § 5.851 to read as follows:

§ 5.851 What authority do I have to screen applicants and to terminate tenancy?

(a) *Screening applicants.* (1) You are authorized to screen applicants for the programs covered by this part and in general may deny admission to applicants you determine are unsuitable under your standards for admission. However, any finding of unsuitability that is based on a criminal record, a finding of criminal activity, illegal drug use, or alcohol abuse must be in accord with the procedures and standards set out in this subpart. Criminal histories of

applicants and their household members may be considered only in the manner and for the purposes described in this regulation.

(2) Except in those circumstances where a statute requires you to deny admission based on criminal history, any reliance on criminal activity in admissions decisions is not permitted without an individualized assessment.

(i) If a criminal activity is determined relevant, it must be considered alongside the factors set forth at § 5.852(a) and other relevant mitigating factors.

(ii) An arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial of admission. The actions that resulted in the arrest could be relevant to determine the applicant's risk to engage in such conduct provided there is sufficient evidence independent of the arrest that the actions occurred.

(b) *Terminating tenancy.* You are authorized to terminate tenancy of tenants, in accordance with your leases and State landlord-tenant law for the programs covered by this part. The provisions of this subpart implement statutory directives that either require or permit you to terminate tenancy under certain circumstances on the basis of criminal activity, illegal drug use, or alcohol abuse, as provided in 42 U.S.C. 1437f, 1437n, and 13662. Any termination based on criminal activity, illegal drug use, or alcohol abuse must be in accordance with the procedures and requirements of this subpart. You retain authority to terminate tenancy on any basis that is otherwise authorized.

4. Revise § 5.852 to read as follows:

§ 5.852 What factors should I consider in determining the relevance of criminal records, criminal activity, drug use, or alcohol abuse in screening, termination, and eviction actions?

(a) *General*—(1) *Admissions.* If the law and regulation permit you to deny admission but do not require denial of admission based on a criminal record, criminal history, a finding of criminal activity, illegal drug use, or alcohol abuse, you may take or not take the action in

accordance with your standards for admission. Before denying admission on the basis of a criminal record, criminal activity, illegal drug use, or alcohol abuse, you must conduct an individualized assessment that takes into account circumstances relevant to a particular admission decision. The circumstances relevant to a particular admission decision include but are not limited to:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense, the extent to which it bears on suitability for tenancy, and the length of time that has passed since the conduct;

(ii) The extent to which the applicant or relevant household member has taken actions to mitigate the risk that admission of the individual would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees (e.g., evidence of post-conviction rehabilitation, treatment/recovery, employment, housing history);

(iii) Whether the applicant would like the owner to consider mitigating circumstances related to a medical condition of a household member (which then must be considered);

(iv) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination, you must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, you may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse; and

(v) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable

accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(2) *Terminations and evictions.* If the law and regulation permit you to terminate assistance or evict but do not require you to do so based on criminal record, or a finding of criminal activity, illegal drug use, or alcohol abuse, you may take or not take the action in accordance with your standards for termination or eviction. Before exercising your discretion to terminate assistance or evict based on criminal record, or a finding of criminal activity, illegal drug use, or alcohol abuse, you must take into account all the circumstances relevant to a particular termination or eviction. The circumstances relevant to a particular termination or eviction may include but are not limited to:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on fitness for continued tenancy;

(ii) The effect on the community of termination or eviction; or of the failure of the responsible entity to take such action;

(iii) The extent of participation by the leaseholder in the conduct;

(iv) The effect of termination of assistance or eviction on household members not involved in the conduct;

(v) The extent to which the leaseholder or relevant household member has taken reasonable steps to prevent or mitigate the offending action;

(vi) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination you must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, you may require the applicant to submit evidence

of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse;

(vii) Whether the leaseholder would like the owner to consider mitigating circumstances related to a medical condition of a household member (which then must be considered); and

(viii) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(b) *Exclusion of culpable household member.* You may require an applicant (or tenant) to exclude a household member from residing in the unit in order to be admitted to the housing program (or continue to reside in the assisted unit), if you determine that household member has participated in or been culpable for, based on a preponderance of the evidence, action or failure to act that warrants denial (or termination). The fact that there has been an arrest is not a basis for the requisite determination that the relevant individual participated in or was culpable for the action or failure to act, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest. The duration of any such exclusion shall not extend beyond the time period an individual could be denied admission for that action or failure to act and shall be reasonable in light of all relevant circumstances, including but not limited to the excluded household member's age and relationship to other household members.

(c) *Nondiscrimination limitation.* Your admission, termination, and eviction actions must be consistent with the fair housing and equal opportunity provisions of § 5.105 and subpart L of this part. HUD standards for nondiscrimination requirements extend to third-party screening services or companies contracted by you.

(d) *Effect of failure to disclose criminal record.* Except where an owner solely relies on self-disclosure in reviewing an applicant’s criminal record, the owner may deny admission for failure to disclose criminal record only if that criminal record would be material to an admissions decision pursuant to this rule and the owner’s admissions standards.

5. Amend § 5.853 by:

- a. Revising paragraph (a); and
- b. Removing from paragraph (b) the definition of “Currently engaging in”.

The revision reads as follows:

§ 5.853 Definitions

(a) *Terms found elsewhere.* The following terms are defined in subpart A of this part: 1937 Act, covered person, currently engaging in or engaged in, drug, drug-related criminal activity, federally assisted housing, guest, household, HUD, other person under the tenant’s control, premises, preponderance of the evidence, public housing, public housing agency (PHA), Section 8, violent criminal activity.

* * * * *

6. Amend § 5.854 by revising the section heading and paragraphs (a)(1) and (2) and (b)(2) to read as follows:

§ 5.854 When must I prohibit admission of individuals who have engaged in drug-related criminal activity and illegal drug use?

(a) * * *

(1) The evicted household member who engaged in drug-related criminal activity is participating in or has successfully completed substance use treatment services; or

(2) The circumstances leading to the eviction no longer exist (for example, the household member who engaged in the drug-related criminal activity has died or is imprisoned).

(b) * * *

(2) You determine that you have reasonable cause to believe that a household member's illegal use or a pattern of illegal use of a drug threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or property employees.

7. Revise and republish § 5.855 to read as follows:

§ 5.855 When may I prohibit admission of individuals who have engaged in criminal activity?

(a) You may prohibit admission of a household or household member to federally assisted housing on the basis of criminal activity only if you determine that the household member is currently engaging in, or has engaged in during a reasonable time before the admission decision:

(1) Drug-related criminal activity;

(2) Violent criminal activity;

(3) Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(4) 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.

(b) You may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (a) of this section (reasonable time). However, prohibiting admission for a period of time longer than three years following any particular criminal activity, including prior terminations from HUD-assisted housing for drug-related criminal activity, is presumptively unreasonable. An owner may impose a longer prohibition based on particular criminal activity only after a determination, based on empirical evidence, that such longer prohibition is necessary to ensuring the health, safety, and peaceful enjoyment of other tenants or property employees.

(c) Before you prohibit admission on the basis of criminal activity you must notify the household of the proposed action and provide a copy of any relevant criminal record to the subject of the record and the applicant (except where otherwise prohibited by law) no less than 15 days prior to notification of the denial. During the 15-day period, you must provide the household and the subject of any record an opportunity to dispute the accuracy and relevance of that record. You must provide the household the opportunity to present, and you must take into consideration, any relevant mitigating information, which may include but is not limited to the factors set forth at § 5.852(a)(1)(i) through (v).

(d) All determinations to deny admission on the basis of criminal activity must be supported by a preponderance of the evidence. The fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

(e) No applicant that was previously denied admission because of a determination concerning a member of the household under paragraph (a) of this section shall be prohibited from applying for assistance. An owner must not deny the application based solely on the prior denial.

8. Revise § 5.857 to read as follows:

§ 5.857 When must I prohibit admission on the basis of alcohol abuse?

You must establish standards that prohibit admission to federally assisted housing if you determine that a household member's abuse or pattern of abuse of alcohol would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or property employees.

9. Revise § 5.858 to read as follows:

§ 5.858 What authority do I have to evict tenants on the basis of drug-related criminal activity and illegal drug use?

(a) *Drug-related criminal activity.* The lease must provide that 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, is potential grounds for you to terminate tenancy.

(b) *Illegal drug use.* In addition, the lease must allow you to evict a family when you determine that a household member is illegally using a drug or when you determine that a pattern of illegal use of a drug threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or property employees.

10. Amend § 5.859 by revising the section heading to read as follows:

§ 5.859 When am I specifically authorized to evict tenants on the basis of other criminal activity?

* * * * *

11. Amend § 5.860 by revising the section heading to read as follows:

§ 5.860 When am I specifically authorized to evict on the basis of alcohol abuse?

* * * * *

12. Revise § 5.861 to read as follows:

§ 5.861 What evidence of criminal activity must I have to evict?

You may terminate tenancy and evict the tenant through judicial action for criminal activity by a covered person in accordance with this subpart if you determine that the covered person has engaged in the criminal activity described in §§ 5.858 and 5.859.

Subpart J – Access to and Use of Criminal Records and Information

13. Revise the heading for subpart J to read as set forth above.

14. Amend § 5.901 by revising paragraph (a) to read as follows:

§ 5.901 To what criminal records and searches does this subpart apply?

(a) *General criminal records searches.* This subpart applies when criminal records are obtained from a law enforcement agency under the authority of section 6(q) of the 1937 Act (42

U.S.C. 1437d(q)) or from another source for consideration in admission, lease enforcement, termination, or eviction decisions. PHAs and owners are not required to review criminal records beyond the extent necessary to satisfy statutory requirements.

* * * * *

15. Amend § 5.903 by:

a. Revising paragraph (f); and

b. Removing the words “from a law enforcement agency” in paragraph (g) introductory text.

The revision reads as follows:

§ 5.903 What special authority is there to obtain access to criminal records?

* * * * *

(f) *Opportunity to dispute*—(1) *Action by PHA*. If a PHA obtains criminal record information from a State or local agency under either paragraph (a) of this section or pursuant to a request by an owner under paragraph (d) of this section showing that a household member has been involved in a crime relevant to applicant screening, lease enforcement or eviction, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the applicant or tenant (except where otherwise prohibited by law) a copy of the criminal record, and an opportunity to dispute the accuracy and relevance of the information. This opportunity must be provided at least 15 days before a denial of admission, eviction or lease enforcement action on the basis of such information.

(2) *Action by owner*. If an owner of federally assisted housing as defined at §5.100, other than an owner of a property receiving tenant-based assistance, obtains criminal record information from any source other than a PHA, such as a third-party screening company relevant to applicant screening, lease enforcement, or eviction, the owner must notify the household of the proposed action to be based on the information and must provide the subject of the record and the applicant or tenant a copy of such information, and an opportunity to dispute the

accuracy and relevance of the information prior to any denial of admission, lease enforcement action, or eviction. This opportunity must be provided at least 15 days before a denial of admission, eviction, or lease enforcement action on the basis of such information.

* * * * *

16. Amend § 5.905 by revising paragraph (d) to read as follows:

§ 5.905 What special authority is there to obtain access to sex offender registration information?

* * * * *

(d) *Opportunity to dispute*—(1) *Action by PHA*. If a PHA obtains sex offender registration information under paragraph (a) of this section or pursuant to a request by an owner under paragraph (b) of this section showing that a household member is subject to a lifetime sex offender registration requirement, the PHA must notify the household 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 of the information. This opportunity must be provided at least 15 days before a denial of admission, eviction or lease enforcement action on the basis of such information.

(2) *Action by owner*. If an owner of federally assisted housing as defined at §5.100, other than an owner of a property receiving tenant-based assistance, obtains sex offender registration information from any source other than a PHA showing that a household member is subject to a lifetime sex offender registration requirement, the owner must notify the household 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 of the information. This opportunity must be provided at least 15 days before a denial of admission, eviction or lease enforcement action on the basis of such information.

17. Add § 5.906 to subpart J to read as follows:

§ 5.906 Ensuring consistency of tenant selection plans.

(a) An owner of federally assisted housing as defined at § 5.100 that is required to have a written tenant selection plan shall amend such plan to ensure its consistency with §§ 5.851 through 5.905 and with any non-conflicting state or local law providing protections for people with criminal records. The tenant selection plan must include any changes to policies and procedures related to termination of tenancy as well as admissions, and any changes related to criminal background checks conducted by the owner to ensure compliance with these regulations.

(b) An owner may not consider the existence of a criminal record in the admission process or in the termination of tenancy process except as specified in these regulations.

PART 245 – TENANT PARTICIPATION IN MULTIFAMILY HOUSING PROJECTS

18. The authority citation for part 245 continues to read as follows:

Authority: 12 U.S.C. 1715z-1b; 42 U.S.C. 3535(d).

19. Amend § 245.115 by:

- a. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively;
- b. Adding new paragraph (b);
- c. Removing in newly redesignated paragraph (c) the text “paragraph (a)” and adding in its place the text “paragraphs (a) and (b)”; and
- d. Removing in newly redesignated paragraph (d) the text “paragraphs (a) and (b)” and adding in its place the text “paragraphs (a) through (c)”.

The addition reads as follows:

§ 245.115 Protected Activities

* * * * *

(b)(1) Owners of multifamily housing projects covered under § 245.10 must publicize their tenant selection policies by posting copies thereof in each office where applications are received and by making available copies to applicants or tenants for free upon request. An owner may satisfy this requirement by posting its selection policies or its documents containing these

policies on its website and/or its social media account(s), in a conspicuous location and an accessible format, where applicable.

(2) The tenants (including any legal or other representatives acting for tenants individually or as a group) must be notified of proposed substantive changes to the tenant selection plan, which shall include any substantive changes to termination of tenancy or criminal background check policies and procedures for applicants and existing tenants, and must have the right to inspect and copy such changes for a period of 30 days after notification of the proposed change(s). During this period, the owner must provide a place (as specified in the notice) reasonably convenient to tenants in the project where tenants and their representatives can inspect and copy these materials during normal business hours.

(3) The tenants have the right during this period to submit written comments on the proposed-tenant selection plan change(s) to the owner and to the local HUD office. Tenant representatives may assist tenants in preparing these comments.

* * * * *

PART 882 – SECTION 8 MODERATE REHABILITATION PROGRAMS

20. The authority citation for part 882 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

21. Amend § 882.511 by:

a. Removing in paragraph (e) the misspelled word “judical” and adding in its place the word “judicial”; and

b. Adding paragraph (h).

The addition reads as follows:

§ 882.511 Lease and termination of tenancy.

* * * * *

(h) In actions or potential actions to terminate tenancy on the basis of criminal activity, illegal drug use, or alcohol abuse, the owner shall follow § 882.519.

22. Amend § 882.514 by:

- a. Redesignating paragraph (a)(2) as (a)(3) and adding a new paragraph (a)(2); and
- b. Revising and republishing paragraphs (c) and (f).

The addition and revisions read as follows:

§ 882.514 Family participation.

* * * * *

(a) * * *

(2) The PHA’s tenant selection policies shall be publicized by posting copies thereof in each office where applications are received and by making available copies to applicants or tenants for free upon request. The PHA may satisfy this requirement by posting its selection policies or its documents containing these policies on its website and/or its social media account(s), in a conspicuous location and an accessible format, where applicable.

* * * * *

(c) *Owner selection of families.* All vacant units under Contract must be rented to Eligible Families referred by the PHA from its waiting list. However, if the PHA is unable to refer a sufficient number of interested applicants on the waiting list to the Owner within 30 days of the Owner's notification to the PHA of a vacancy, the Owner may advertise or solicit applications from Low-Income Families and refer such Families to the PHA to determine eligibility. The Owner is responsible for tenant selection; however, the owner must not deny program assistance or admission to an applicant based on the fact that the applicant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant otherwise qualifies for assistance or admission. The Owner must follow the procedures outlined in § 882.519 if the reason for the Owner’s denial is based on criminal activity, illegal drug use, or alcohol abuse. Should the Owner reject a Family, and should the Family believe that the Owner's rejection was the result of unlawful discrimination, the Family may request the assistance of the PHA in

resolving the issue. If the issue cannot be resolved promptly, the Family may file a complaint with HUD, and the PHA may refer the Family to the next available Moderate Rehabilitation unit.

* * * * *

(f) *Families determined by the PHA to be ineligible.* If a Family is determined to be ineligible in accordance with the PHA's HUD-approved application, either at the application stage or after assistance has been provided on behalf of the Family, the PHA shall promptly notify the Family by letter of the determination and the reasons for it and the letter shall state that the Family has the right within a reasonable time (specified in the letter) to request an informal hearing. If, after conducting such an informal hearing, the PHA determines, based on a preponderance of the evidence, that the Family is ineligible, it shall notify the Family in writing. The procedures of this paragraph do not preclude the Family from exercising its other rights if it believes it is being discriminated against on the basis of race, color, religion, sex, age, handicap, familial status, or national origin. The informal hearing requirements for denial and termination of assistance on the basis of ineligible immigration status are contained in 24 CFR part 5.

23. Revise § 882.518 to read as follows:

§ 882.518 Denial of admission and termination of assistance on the basis of criminal record, criminal activity, illegal drug use, and alcohol abuse.

(a) *Requirement to deny admission—(1) Relevant circumstances and individualized assessment.* (i) If the law and regulation permit the PHA to deny admission but do not require denial of admission based on a criminal record, criminal history, a finding of criminal activity, illegal drug use, or alcohol abuse, the PHA may take or not take the action in accordance with the PHA standards for admission. All determinations to deny admission on the basis of criminal activity must be supported by a preponderance of the evidence. An arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial of admission. The actions that resulted in the arrest could be relevant to determine the applicant's risk to engage in such conduct provided there is sufficient evidence independent of

the arrest that the actions occurred and must be considered alongside the factors set forth at paragraph (a)(1)(ii) of this section and other relevant mitigating factors.

(ii) Before denying admission on the basis of a criminal record, criminal activity, illegal drug use, or alcohol abuse, the PHA must conduct an individualized assessment that takes into account circumstances relevant to a particular admission decision. A criminal record may be considered in the individualized assessment only if it is relevant to determining the risk that an applicant would threaten the health, safety, or right to peaceful enjoyment of residents or PHA employees. The circumstances relevant to a particular admission decision include but are not limited to:

(A) The nature and circumstances of the conduct in question, including the seriousness of the offense, the extent to which it bears on suitability for tenancy, and the length of time that has passed since the conduct;

(B) The extent to which the applicant or relevant household member has taken actions to mitigate the risk that admission of the individual would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees (e.g., evidence of post-conviction rehabilitation, treatment/recovery, employment, housing history; treatment of a medical condition of a household member);

(C) Whether the applicant would like the PHA to consider mitigating circumstances related to a medical condition of a household member (which then must be considered);

(D) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination, the PHA must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the PHA may require the applicant to submit

evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse; and

(E) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(2) *Prohibiting admission on the basis of drug-related criminal activity.* (i) The PHA must prohibit admission to the program of an applicant for three years from the date of termination of tenancy if any household member's federally assisted housing tenancy has been terminated for drug-related criminal activity. However, the PHA may admit the household if the PHA determines:

(A) The household member who engaged in drug-related criminal activity and whose tenancy was terminated is participating in or has successfully completed substance use treatment services; or

(B) The circumstances leading to the termination of tenancy no longer exist (for example, the household member who engaged in the criminal activity has died or is imprisoned).

(ii) The PHA must establish standards that permanently prohibit admission to the program if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(iii) The PHA must establish standards that prohibit admission of a household to the program if the PHA determines that any household member is currently engaging in illegal use of a drug or that a household member's pattern of illegal use of a drug, as defined in 24 CFR 5.100, would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or property employees (*see* definition of “*Currently engaging in or engaged in*” at 24 CFR 5.100). Any determination whether a pattern of illegal use meets this standard must take

into account any relevant information submitted by the household, such as whether the household member is currently receiving or has successfully completed substance use treatment services.

(3) *Prohibiting admission of sex offenders.* The PHA must establish standards that prohibit admission to the program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In this screening of applicants, the PHA must perform criminal history background checks necessary to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where household members are known to have resided.

(b) *Authority to deny admission—(1) Prohibiting admission on the basis of other criminal activity.* The PHA may prohibit admission of a household to the program on the basis of criminal activity only if the PHA determines, based on a preponderance of the evidence, that any household member is currently engaged in or has engaged in during a reasonable time before the admission decision (see definition of “*Currently engaging in or engaged in*” at 24 CFR 5.100):

(i) Drug-related criminal activity;

(ii) Violent criminal activity;

(iii) Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(iv) Other criminal activity that would threaten the health or safety of the owner or any employee, contractor, subcontractor or agent of the owner who is involved in the owner's housing operations.

(2) *Reasonable time.* The PHA may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (b)(1) of this section (“reasonable time”). However, prohibiting admission for a period of time longer than three years following any particular criminal activity, including prior terminations from

HUD-assisted housing for drug-related criminal activity, is presumptively unreasonable. A PHA or owner may impose a longer prohibition based on particular criminal activity only after a PHA determination, based on empirical evidence, that such longer prohibition is necessary to ensuring the health, safety, and right to peaceful enjoyment of the premises by other tenants or property employees.

(3) *Effect of failure to disclose criminal record.* Except where a PHA solely relies on self-disclosure in reviewing an applicant's criminal record, the PHA may deny admission for failure to disclose criminal record only if that criminal record would be material to an admissions decision pursuant to this rule and the PHA's or owner's admissions standards.

(4) *Previous denial.* No applicant that was previously denied admission based on criminal activity shall be prohibited from applying for assistance. A PHA must not deny the application based solely on the prior denial.

(5) *Prohibiting admission on the basis of alcohol abuse.* The PHA must establish standards that prohibit admission to the program if the PHA determines that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees.

(6) *Notification requirements.* Before a PHA denies admission on the basis of criminal activity, the PHA must notify the household of the proposed action and provide a copy of any relevant criminal record to the subject of the record and the applicant (except where otherwise prohibited by law) no less than 15 days prior to notification of the denial. During the 15-day period, the PHA must provide the subject of any record an opportunity to dispute the accuracy and relevance of that record. The PHA must provide the household an opportunity to present, and must consider as part of an individualized assessment, any relevant mitigating information which may include but is not limited to the circumstances listed in paragraph (a)(1)(ii) of this section. If the PHA decides to deny admission following the individualized assessment, the PHA

must notify the family of its decision and that the family may request an informal hearing in accordance with § 882.514(f).

(c) *Terminating assistance*—(1) *General*. If the law and regulation permit the PHA to terminate assistance or evict but does not require the PHA to do so based on criminal record, criminal activity, illegal drug use, or alcohol abuse, the PHA may take or not take the action to terminate assistance in accordance with the PHA standards for termination. Before exercising the PHA's discretion to terminate assistance based on criminal record, a finding of criminal activity, illegal drug use, or alcohol abuse, the PHA must take into account all the circumstances relevant to a particular termination. The circumstances relevant to a particular termination may include but are not limited to:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on fitness for continued tenancy;

(ii) The effect on the community of termination or eviction; or of the failure of the responsible entity to take such action;

(iii) The extent of participation by the leaseholder in the conduct;

(iv) The effect of termination of assistance or eviction on household members not involved in the conduct;

(v) The extent to which the leaseholder or relevant household member has taken reasonable steps to prevent or mitigate the offending action;

(vi) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination the PHA must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the PHA may require the applicant to submit

evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse;

(vii) Whether the leaseholder would like the PHA to consider mitigating circumstances related to a medical condition of a household member (which then must be considered); and

(viii) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(2) *Terminating assistance*—(i) *Terminating assistance on the basis of drug-related criminal activity or illegal drug use.* (A) The PHA may terminate assistance for 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. The PHA may terminate assistance if the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees.

(B) The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(ii) *Terminating assistance for other criminal activity.* (A) The PHA must establish standards that allow the PHA to terminate assistance for a family if the PHA determines that any household member is engaged in criminal activity that threatens the health, safety, or right of peaceful enjoyment of the premises by other residents or by persons residing in the immediate vicinity of the premises.

(B) The PHA may terminate assistance for a family if the PHA determines that a member of the household is:

(1) Fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or 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; or

(2) Violating a condition of probation or parole imposed under Federal or State law.

(3) *Evidence of criminal activity.* (i) The PHA may terminate assistance for criminal activity in accordance with this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the criminal activity. The fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting termination but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

(ii) See 24 CFR part 5, subpart J, for provisions concerning access to criminal records.

(4) *Terminating assistance on the basis of alcohol abuse.* The PHA must establish standards that allow termination of assistance for a family if the PHA determines that a household member's abuse or pattern of abuse of alcohol threatens the health, safety, or right to peaceful enjoyment of the premises by other residents.

(d) The fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

24. Add § 882.519 to subpart E to read as follows:

§ 882.519 Owner denial or termination of tenancy on the basis of criminal activity, illegal drug use, or alcohol abuse.

(a) *Owner screening and terminations.* (1) The owner may screen applicants for suitability in accordance with § 882.514(c). However, any finding of unsuitability that is based on a criminal record, a finding of criminal activity, illegal drug use, or alcohol abuse must be in accord with the procedures and standards set out in this section. Criminal histories of applicants and their household members may be considered only in the manner and for the purposes described in this this section.

(2) Any reliance on criminal activity in screening decisions is not permitted without an individualized assessment.

(i) Criminal activity may be considered in the individualized assessment only if it is relevant to determining the risk that an applicant would threaten the health, safety, or right to peaceful enjoyment of residents or property employees.

(ii) If a criminal activity is determined relevant, it must be considered alongside the factors set forth at paragraph (b) of this section and other relevant mitigating factors.

(iii) An arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial. The actions that resulted in the arrest could be relevant to determine the applicant's risk to engage in such conduct provided there is sufficient evidence independent of the arrest that the actions occurred and must be considered alongside the factors set forth at paragraph (b) of this section and other relevant mitigating factors.

(3) Any owner termination of tenancy based on criminal activity, illegal drug use, or alcohol abuse must be in accordance with the procedures and requirements of this section.

(b) *Mitigating circumstances and individualized assessment—(1) Relevant circumstances and individualized assessment.* Before denying admission on the basis of a criminal record, criminal activity, illegal drug use, or alcohol abuse, the owner must conduct an individualized assessment that takes into account circumstances relevant to a particular admission decision. The circumstances relevant to a particular admission decision include but are not limited to:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense, the extent to which it bears on suitability for tenancy, and the length of time that has passed since the conduct;

(ii) The extent to which the applicant or relevant household member has taken actions to mitigate the risk that admission of the individual would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees (e.g., evidence of post-conviction rehabilitation, treatment/recovery, employment, housing history; treatment of a medical condition of a household member);

(iii) Whether the applicant would like the owner to consider mitigating circumstances related to a medical condition of a household member (which then must be considered);

(iv) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination, the owner must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the owner may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse; and

(v) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(2) *Terminations of tenancy.* Before the owner exercises discretion to terminate the tenancy or evict based on criminal record, illegal drug use, or alcohol abuse, the owner must take

into account all the circumstances relevant to a particular termination or eviction. The circumstances relevant to a particular termination or eviction may include but are not limited to:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on fitness for continued tenancy;

(ii) The effect on the community of termination or eviction; or of the failure of the responsible entity to take such action;

(iii) The extent of participation by the leaseholder in the conduct;

(iv) The effect of termination of assistance or eviction on household members not involved in the conduct;

(v) The extent to which the leaseholder or relevant household member has taken reasonable steps to prevent or mitigate the offending action;

(vi) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination the owner must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the owner may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse;

(vii) Whether the leaseholder would like the owner to consider mitigating circumstances related to a medical condition of a household member (which then must be considered); and

(viii) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable

accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(c) *Exclusion of culpable household member.* The owner may require an applicant (or tenant) to exclude a household member from residing in the unit if the owner determine that household member has participated in or been culpable for, based on a preponderance of the evidence, action or failure to act that warrants denial (or termination). The fact that there has been an arrest is not a basis for the requisite determination that the relevant individual participated in or was culpable for the action or failure to act, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest. The duration of any such exclusion shall not extend beyond the time period an individual could be denied admission for that action or failure to act and shall be reasonable in light of all relevant circumstances, including but not limited to the excluded household member's age and relationship to other household members.

(d) *Effect of failure to disclose criminal history.* Except where an owner solely relies on self-disclosure in reviewing an applicant's criminal record, the owner may deny for failure to disclose criminal record only if that criminal record would be material to a denial decision under this regulations and the owner's selection standards.

(e) *Criminal activity.* (1) The owner may screen and deny a household on the basis of criminal activity only if the owner determines that the household member is currently engaging in, or has engaged in during a reasonable time before the owner's denial decision:

(i) Drug-related criminal activity;

(ii) Violent criminal activity;

(iii) Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(iv) Other criminal activity that would threaten the health or safety of the owner or any employee, contractor, subcontractor or agent of the owner who is involved in the housing operations.

(2) The owner may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (e)(1) of this section (*reasonable time*). However, prohibiting admission for a period of time longer than three years following any particular criminal activity, including prior terminations from HUD-assisted housing for drug-related criminal activity, is presumptively unreasonable. An owner may impose a longer prohibition based on particular criminal activity only after a determination, based on empirical evidence, that such longer prohibition is necessary to ensuring the health, safety, and peaceful enjoyment of other tenants or property employees.

(3) Before the owner makes a denial determination on the basis of criminal activity, the owner must notify the household of the proposed action and provide a copy of any relevant criminal record to the subject of the record and the applicant (except where otherwise prohibited by law) no less than 15 days prior to notification of the denial. During the 15-day period, the owner must provide the household and the subject of any record an opportunity to dispute the accuracy and relevance of that record. The owner must provide the household the opportunity to present, and the owner must take into consideration, any relevant mitigating information, which may include but is not limited to the factors set forth in paragraphs (b)(1)(i) through (v) of this section.

(4) All determinations to deny the household on the basis of criminal activity must be supported by a preponderance of the evidence. The fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

(5) No applicant that was previously denied by the owner because of a determination concerning a member of the household under paragraph (e)(1) of this section may be denied based solely on the prior denial.

PART 960 – ADMISSION TO, AND OCCUPANCY OF, PUBLIC HOUSING

25. The authority citation for part 960 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437n, 1437z-3, and 3535(d).

26. Amend § 960.103 by adding paragraph (e) to read as follows:

§ 960.103 Equal opportunity requirements and protection for victims of domestic violence, dating violence, sexual assault, or stalking.

* * * * *

(e) *State or local law.* Nothing in this part is intended to pre-empt operation of State and local laws that provide additional protections to those with criminal records. However, State and local laws shall not change or affect any requirement of this part, or any other HUD requirements for administration or operation of the program.

27. Amend § 960.202 by revising paragraph (c)(2), redesignating paragraphs (c)(3) and (4) as paragraphs (c)(4) and (5) respectively, and adding new paragraph (c)(3) to read as follows:

§ 960.202 Tenant selection policies.

* * * * *

(c) * * *

(2) Be publicized by posting copies thereof in each office where applications are received;

(3) Be made available to applicants or tenants for free upon request. The PHA may satisfy this requirement by posting its selection policies or its documents containing these policies on its website and/or its social media account(s), in a conspicuous location and an accessible format, where applicable;

* * * * *

28. Amend § 960.203 by:

a. Removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively;

b. Revising newly redesignated paragraphs (b)(3) and (c); and

c. Adding a new paragraph (d).

The revisions and addition read as follows:

§ 960.203 Standards for PHA tenant selection criteria.

* * * * *

(b) * * *

(3) A record of criminal activity involving crimes of physical violence to persons or property and other criminal activity which would adversely affect the health, safety, or welfare of other tenants or PHA employees. (See § 960.204.) With respect to criminal activity described in § 960.204:

(i) The PHA may require an applicant to exclude a household member from residing in the unit in order to be admitted to the housing program where that household member has participated in or been culpable for actions described in § 960.204 that warrants denial. The duration of any such exclusion shall not extend beyond the time period an individual could be denied admission for that action or failure to act and shall be reasonable in light of all relevant circumstances, including but not limited to the excluded household member's age and relationship to other household members.

(ii) Except in those circumstances where a statute requires a PHA to deny admission based on criminal activity, any reliance on criminal activity in admissions decisions is not permitted without an individualized assessment. All determinations to deny admission on the basis of criminal activity must be supported by a preponderance of the evidence. The fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity, but the conduct that resulted in the arrest can be such a

basis provided there is sufficient evidence that it occurred independent of the fact of the arrest. A criminal record may be considered in the individualized assessment only if it is relevant to determining the risk that an applicant would threaten the health, safety, or right to peaceful enjoyment of residents or PHA employees.

* * * * *

(c) In the event of the receipt of unfavorable information with respect to an applicant, consideration shall be given to the nature of the applicant's conduct. Before denying admission on the basis of a criminal record, criminal activity, illegal drug use, or alcohol abuse, the PHA must conduct an individualized assessment that takes into account circumstances relevant to a particular admission decision. The circumstances relevant to a particular admission decision include but are not limited to:

(1) The nature and circumstances of the conduct in question, including the seriousness of the offense, the extent to which it bears on suitability for tenancy, and the length of time that has passed since the conduct;

(2) The extent to which the applicant has taken actions to mitigate risk that admission of the individual would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents or PHA employees (e.g., evidence of post-conviction rehabilitation, treatment/recovery, employment, housing history);

(3) Whether the applicant would like the PHA to consider mitigating circumstances related to a medical condition of a household member (which then must be considered);

(4) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination, the PHA must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol

(as applicable) has not recurred. For this purpose, the PHA may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse; and

(5) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(d) Except where a PHA solely relies on self-disclosure in reviewing an applicant's criminal record, the PHA may deny admission for failure to disclose criminal record only if that criminal record would be material to an admissions decision pursuant to this rule and the PHA's admissions standards.

29. Amend § 960.204 by:

- a. Revising the section heading and paragraphs (a)(1)(i) and (ii), (a)(2)(i) and (ii), and (b);
- b. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively;
- c. Adding a new paragraph (c); and
- d. Revising newly redesignated paragraph (d).

The revisions and addition read as follows:

§ 960.204 Denial of admission for criminal activity or drug use by household members.

(a) * * *

(1) * * *

(i) The evicted household member who engaged in drug-related criminal activity is participating in or has successfully completed substance use treatment services approved by the PHA; or

(ii) The circumstances leading to the eviction no longer exist (for example, the household member who engaged in the criminal activity has died or is imprisoned).

(2) * * *

(i) The PHA determines that any household member is currently engaging in illegal use of a drug (*see* definition of “*Currently engaging in or engaged in*” at 24 CFR 5.100); or

(ii) The PHA determines that a household member’s illegal use or pattern of illegal use of a drug would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees.

* * * * *

(b) *Persons that abuse or show a pattern of abuse of alcohol.* The PHA must establish standards that prohibit admission to the PHA's public housing program if the PHA determines that a household member's abuse or pattern of abuse of alcohol would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees.

(c) *Permissive prohibitions—(1) Prohibiting admission of other criminals.* The PHA may prohibit admission of a household to the program only if the PHA determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission:

(i) Drug-related criminal activity;

(ii) Violent criminal activity;

(iii) Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or

(iv) Other criminal activity which may threaten the health or safety of property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA (including a PHA employee or a PHA contractor, subcontractor or agent).

(2) *Reasonable time.* The PHA may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (c)(1) of this section (“reasonable time”). However, prohibiting admission for a period of time longer than three years following any particular criminal activity, including prior terminations from HUD-

assisted housing for drug-related criminal activity, is presumptively unreasonable. A PHA may impose a longer prohibition based on particular criminal activity only after a PHA determination, based on empirical evidence, that such longer prohibition is necessary to ensuring the health, safety, and peaceful enjoyment of other tenants or property employees.

(3) *Previous denial.* No applicant that was previously denied admission based on criminal activity shall be prohibited from applying for assistance. A PHA must not deny the application based solely on the prior denial.

(d) *Notification.* Before a PHA denies admission on the basis of criminal activity, the PHA must notify the household of the proposed action and provide a copy of any relevant criminal record to the subject of the record and the applicant (except where otherwise prohibited by law) no less than 15 days prior to notification of the denial. During the 15-day period, the PHA must provide the subject of any record an opportunity to dispute the accuracy and relevance of that record. The PHA must provide the household an opportunity to present any relevant mitigating information which may include but is not limited to the relevant mitigating factors set forth at § 960.203(c)(1) through (5).

* * * * *

30. Amend § 960.205 by revising paragraph (b)(1) to read as follows:

§ 960.205 Drug use by applicants: Obtaining information from substance use treatment provider.

* * * * *

(b) * * *

(1) *Currently engaging in illegal use of a drug.* See definition of “Currently engaging in or engaged in” at 24 CFR 5.100.

* * * * *

PART 966 – PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE

31. The authority citation for part 966 continues to read as follows:

Authority: 42 U.S.C. 1437d and 3535(d).

32. Amend § 966.4 by:

a. Removing the cross-reference to “(1)(5)” and adding in its place a reference to “(1)(5)” in paragraph (1)(2)(iv)(A);

b. Revising paragraph (1)(3)(i) introductory text and the first sentence of paragraph (1)(3)(ii);

c. Revising and republishing paragraph (1)(5); and

d. Removing from the second sentence of paragraph (m) the word “tenant’s” and adding in its place the word “PHA’s”.

The revisions read as follows:

§ 966.4 Lease requirements.

* * * * *

(1) * * *

(3) * * *

(i) The PHA must give adequate written notice of lease termination, which shall not provide less notice than:

* * * * *

(ii) The notice of lease termination to the tenant shall state specific grounds for termination and the specific lease provision at issue and shall inform the tenant of the tenant's right to make such reply as the tenant may wish. * * *

* * * * *

(5) *PHA termination of tenancy for criminal activity or alcohol abuse.—(i) Evicting tenants on the basis of drug-related criminal activity—(A) Methamphetamine conviction.* The PHA must immediately terminate the tenancy if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(B) *Drug crime on or off the premises.* The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) *Evicting tenants on the basis of other criminal activity—(A) Threat to other residents.* The lease must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.

(B) *Fugitive felon or parole violator.* The PHA may terminate the tenancy if a tenant is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or 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; or violating a condition of probation or parole imposed under Federal or State law.

(iii) *Eviction for criminal activity—(A) Evidence.* The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines, based on a preponderance of the evidence, that the covered person has engaged in the criminal activity. The fact that there has been an arrest for a crime is not a basis for a determination that the relevant individual engaged in criminal activity warranting termination.

(B) *Notice to post office.* When a PHA evicts an individual or family for criminal activity, the PHA must notify the local post office serving the dwelling unit that the individual or family is no longer residing in the unit.

(iv) *Use of criminal record.* If the PHA seeks to terminate the tenancy for criminal activity as shown by a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant (except where otherwise prohibited by law) with a copy of the criminal record before a PHA grievance hearing or court trial concerning the termination of tenancy or eviction. The tenant must be given an opportunity to dispute the accuracy and relevance of that record in the grievance hearing or court trial.

(v) *Cost of obtaining criminal record.* The PHA may not pass along to the tenant the costs of a criminal records check.

(vi) *Evicting tenants on the basis of alcohol abuse.* The PHA must establish standards that allow termination of tenancy if the PHA determines that a household member has:

(A) Engaged in abuse or pattern of abuse of alcohol that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(B) Furnished false or misleading information concerning illegal drug use, alcohol abuse, or rehabilitation with respect to illegal drug use or alcohol abuse.

(vii) *PHA action, generally—(A) Consideration of circumstances.* In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case. Before exercising discretion to terminate assistance or evict based on criminal activity, illegal drug use, or alcohol abuse, the PHA must take into account all the circumstances relevant to a particular termination or eviction. The circumstances relevant to a particular termination or eviction may include but are not limited to:

(1) The nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on fitness for continued tenancy,

(2) The effect on the community of termination or eviction; or of the failure of the responsible entity to take such action;

(3) The extent of participation by the leaseholder in the conduct;

(4) The effect of termination of assistance or eviction on household members not involved in the conduct;

(5) The extent to which the leaseholder or relevant household member has taken reasonable steps to prevent or mitigate the offending action;

(6) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination the PHA must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the PHA may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse;

(7) Whether the leaseholder would like the owner to consider mitigating circumstances related to a medical condition of a household member; and

(8) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(B) *Exclusion of culpable household member.* The PHA may require a tenant to exclude a household member from residing in the unit in order to continue to reside in the assisted unit if the PHA determines that household member has participated in or been culpable for, based on a preponderance of the evidence, action or failure to act that warrants termination. The fact that there has been an arrest is not a basis for the requisite determination that the relevant individual participated in or was culpable for the action or failure to act, but the conduct that resulted in the

arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest. The duration of any such exclusion shall not extend beyond the time period an individual could be denied admission per admission criteria and shall be reasonable in light of all relevant circumstances, including but not limited to the excluded household member's age and relationship to other household members.

(C) *Nondiscrimination limitation.* The PHA's eviction actions must be consistent with the fair housing and equal opportunity provisions of 24 CFR 5.105 and 24 CFR part 5, subpart L.

* * * * *

33. Amend § 966.56 by revising paragraph (b)(1) to read as follows:

§ 966.56 Procedures governing the hearing.

* * * * *

(b) * * *

(1) The opportunity to examine before the grievance hearing any PHA documents, including records and regulations, that are directly relevant to the hearing. (For a grievance hearing concerning a termination of tenancy or eviction, see also § 966.4(m).) The tenant shall be allowed to copy or receive a copy of any such document at the PHA's expense. If the PHA does not make the document available for examination upon request by the complainant, the PHA may not rely on such document at the grievance hearing.

* * * * *

PART 982 – SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE

VOUCHER PROGRAM

34. The authority citation for part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

35. Amend § 982.53 by revising paragraph (d) to read as follows:

§ 982.53 Equal opportunity requirements and protection for victims of domestic violence, dating violence, sexual assault, or stalking.

* * * * *

(d) *State and local law.* Nothing in this part is intended to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder, or State and local laws that provide additional protections to those with criminal records. However, such State and local laws shall not change or affect any requirement of this part, or any other HUD requirements for administration or operation of the program.

* * * * *

36. Amend § 982.54 by revising paragraph (b) to read as follows:

§ 982.54 Administrative Plan.

* * * * *

(b) The administrative plan must be in accordance with HUD regulations and requirements. The administrative plan is a supporting document to the PHA plan (24 CFR part 903) and must be available for public review. The PHA may satisfy this requirement by posting its administrative plan on its website and/or its social media account(s), in a conspicuous location and an accessible format, where applicable. The PHA must revise the administrative plan if needed to comply with HUD requirements.

* * * * *

37. Amend § 982.301 by revising paragraph (b)(4) to read as follows:

§ 982.301 Information when family is selected.

* * * * *

(b) * * *

(4) Where the family may lease a unit and an explanation of how portability works, including information on how portability may affect the family’s assistance through screening, subsidy standards, payment standards, and any other elements of the portability process which

may affect the family's assistance, including that the receiving PHA may not rescreen a family that moves under the portability procedures (see § 982.355(c)(9)).

* * * * *

38. Amend § 982.306 by revising paragraphs (c)(3) and (5) to read as follows:

§ 982.306 PHA disapproval of owner.

* * * * *

(c) * * *

(3) The owner is currently engaging in or has engaged in, during a reasonable time before the decision regarding approval, any drug-related criminal activity, violent criminal activity, or other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by residents or PHA employees;

* * * * *

(5) The owner has a history or practice of refusing an appropriate request by a PHA to take action to terminate tenancy of tenants of units assisted under Section 8 or any other federally assisted housing program for activity engaged in by the tenant, any member of the household, a guest or another person under the control of any member of the household that:

* * * * *

39. Amend § 982.307 by:

a. Adding “and with §§ 982.552 and 982.553” to the end of the last sentence in paragraph (a)(1); and

b. Revising paragraphs (a)(3) introductory text, (a)(3)(iv), and (b)(2);

The revisions read as follows:

§ 982.307 Tenant screening.

(a) * * *

(3) The owner is responsible for screening of families on the basis of their tenancy histories. Consistent with the requirements of the Fair Housing Act, including those found at 24 CFR 100.500, an owner may consider a family's background with respect to such factors as:

* * * * *

(iv) Drug-related criminal activity, violent criminal activity, or other criminal activity that is a threat to the health, safety or property of others; and

* * * * *

(b) * * *

(2) When a family wants to lease a dwelling unit, the PHA may offer the owner other information in the PHA possession about the tenancy history of the family members.

* * * * *

40. Amend § 982.310 by revising the headings for paragraphs (c)(1) and (2) and revising paragraphs (c)(3) and (h)(1) through (3) to read as follows:

§ 982.310 Owner termination of tenancy.

* * * * *

(c) * * *

(1) *Evicting tenants on the basis of drug-related criminal activity on or near the premises.* * * *

(2) *Evicting tenants on the basis of other criminal activity.* * * *

(3) *Evidence of criminal activity.* The owner may terminate tenancy and evict by judicial action a family for criminal activity by a covered person in accordance with this section if the owner determines that the covered person has engaged in the criminal activity. This determination shall be made on a preponderance of the evidence. The fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting termination of tenancy or eviction pursuant to this section. (See 24 CFR part 5, subpart J, for provisions concerning access to criminal records.) The

owner may terminate tenancy and evict by judicial action based on the conduct underlying an arrest if the conduct indicates that the individual is not suitable for tenancy and the owner has sufficient evidence other than the fact of arrest that the individual engaged in the conduct.

* * * * *

(h) * * *

(1) *General.* If the law and regulation permit the owner to take an action but do not require action to be taken, the owner may take or not take the action in accordance with the owner's standards for eviction. The owner may consider all of the circumstances relevant to a particular eviction case, such as:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on fitness for continued tenancy;

(ii) The effect on the community of eviction or of the failure of the owner to take such action;

(iii) The extent of participation by the leaseholder in the conduct;

(iv) The effect of eviction on household members not involved in the conduct; and

(v) The extent to which the leaseholder has taken reasonable steps to prevent or mitigate the offending action.

(2) *Terminations based on criminal activity, illegal drug use or alcohol abuse.* Where eviction would be based on a finding that an individual is currently engaging in or has engaged in criminal activity, illegal drug use, or alcohol abuse, the owner may consider any relevant circumstances described in paragraphs (h)(1)(i) through (v) of this section and may also consider any of the following:

(i) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. Relevant evidence may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been

otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the owner may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse; and

(ii) Whether the leaseholder would like the owner to consider mitigating circumstances related to a medical condition of a household member.

(3) *Exclusion of culpable household member.* The owner may require an applicant (or tenant) to exclude a household member from residing in the unit in order to be admitted to the housing program (or continue to reside in the assisted unit), if the owner determines that household member has participated in or been culpable for, based on a preponderance of the evidence, action or failure to act that warrants denial (or termination). The fact that there has been an arrest is not a basis for the requisite determination that the relevant individual participated in or was culpable for the action or failure to act, but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

* * * * *

41. Amend § 982.355 by adding a sentence at the end of paragraph (c)(9) to read as follows:

§ 982.355 Portability: Administration by initial and receiving PHA.

* * * * *

(c) * * *

(9) * * * A family that moves under the portability procedures must not be subject to rescreening by the receiving PHA.

* * * * *

42. Amend § 982.552 by revising paragraphs (b)(1), (c)(1) introductory text, (c)(1)(iii) and (v), and (c)(2) and adding paragraph (f) to read as follows:

§ 982.552 PHA denial or termination of assistance for family.

* * * * *

(b) * * *

(1) For provisions on denial of admission and termination of assistance for illegal drug use, other criminal activity, and alcohol abuse that would threaten other residents or PHA employees, see § 982.553.

* * * * *

(c) * * *

(1) *Grounds for denial or termination of assistance.* The PHA may deny program assistance for an applicant, or terminate program assistance for a participant, for any of the following grounds:

* * * * *

(iii) If a PHA has terminated assistance under the program for any member of the family;

* * * * *

(v) If the family currently owes rent or other amounts to the PHA or to another PHA in connection with Section 8 or public housing assistance under the 1937 Act, other than amounts subject to a payment agreement in good standing;

* * * * *

(2) *Consideration of circumstances.* In determining whether to deny or terminate assistance because of action or failure to act by members of the family:

(i) The PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure. With respect to denials

of admission that involve criminal activity, illegal drug use, or alcohol abuse the requirements at § 982.553(a) apply. With respect to termination of assistance that involve criminal activity, illegal drug use, or alcohol abuse the requirements at § 982.553(b) apply.

(ii) The PHA may impose, as a condition of continued assistance for other family members, a requirement that other family members who participated in or were culpable for the action or failure will not reside in the unit for a reasonable period of time not to exceed the amount of time such household member could be excluded for that action or failure per admission criteria. The PHA may permit the other members of a participant family to continue receiving assistance.

(iii) If the family includes a person with disabilities, the PHA decision concerning such action is subject to consideration of reasonable accommodation in accordance with part 8 of this title.

(iv) The PHA's admission and termination actions must be consistent with fair housing and equal opportunity provisions of 24 CFR 5.105, and with the requirements of 24 CFR part 5, subpart L.

(v) In determining whether to terminate assistance on the basis of criminal activity, the PHA may stay the termination hearing while the criminal court case for the underlying activity is pending.

* * * * *

(f) *Effect of failure to disclose criminal record.* Except where a PHA solely relies on self-disclosure in reviewing an applicant's criminal record, the PHA may deny admission for failure to disclose criminal record only if that criminal record would be material to an admissions decision pursuant to this rule and the PHA's or owner's admissions standards.

43. Revise § 982.553 to read as follows:

§ 982.553 Denial of admission and termination of assistance on the basis of criminal activity, illegal drug use, or alcohol abuse.

(a) *Denial of admission*—(1) *General*. If the law and regulation permit the PHA to deny admission but do not require denial of admission based on a criminal record, a finding of criminal activity, illegal drug use, or alcohol abuse, the PHA may take or not take the action in accordance with the PHA standards for admission. All determinations to deny admission on the basis of criminal activity must be supported by a preponderance of the evidence. An arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial of admission. The actions that resulted in the arrest could be relevant to determine the applicant's risk to engage in such conduct provided there is sufficient evidence independent of the arrest that the actions occurred and must be considered alongside the factors set forth at paragraph (a)(2) of this section and other relevant mitigating factors.

(2) *Relevant circumstances and individualized assessment*. Before denying admission on the basis of a criminal record, criminal activity, illegal drug use, or alcohol abuse, the PHA must conduct an individualized assessment that takes into account circumstances relevant to a particular admission decision. The circumstances relevant to a particular admission decision include but are not limited to:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense, the extent to which it bears on suitability for tenancy, and the length of time that has passed since the conduct;

(ii) The extent to which the applicant or relevant household member has taken actions to mitigate the risk that admission of the individual would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees (e.g., evidence of post-conviction rehabilitation, treatment/recovery, employment, housing history; treatment of a medical condition of a household member);

(iii) Whether the applicant would like the PHA to consider mitigating circumstances related to a medical condition of a household member (which then must be considered);

(iv) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination, the PHA must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the PHA may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse; and

(v) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(3) *Prohibiting admission on the basis of drug-related criminal activity.* (i) The PHA *must* prohibit admission to the program of an applicant for three years from the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity. However, the PHA may admit the household if the PHA determines:

(A) That the evicted household member who engaged in drug-related criminal activity is participating in or has successfully completed substance use treatment services; or

(B) That the circumstances leading to eviction no longer exist (for example, the household member who engaged in the criminal activity has died or is imprisoned).

(ii) The PHA must establish standards that prohibit admission if:

(A) The PHA determines that any household member is currently engaging in illegal use of a drug (*see* definition of "Currently engaging in or engaged in" at 24 CFR 5.100);

(B) The PHA determines that a household member's illegal drug use or a pattern of illegal drug use threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees; or

(C) Any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(4) *Prohibiting admission on the basis of other criminal activity—(i) Mandatory prohibition.* The PHA *must* establish standards that prohibit admission to the program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In this screening of applicants, the PHA must perform criminal history background checks necessary to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where the household members are known to have resided.

(ii) *Permissive prohibitions.* (A) The PHA *may* prohibit admission of a household to the program on the basis of criminal activity only if the PHA determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission:

(1) Drug-related criminal activity;

(2) Violent criminal activity;

(3) Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or

(4) Other criminal activity that would threaten the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA (including a PHA employee or a PHA contractor, subcontractor or agent).

(B) The PHA may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (a)(3)(ii) of this section (“reasonable time”). However, prohibiting admission for a period of time longer than three years following any particular criminal activity, including prior terminations from HUD-assisted

housing for drug-related criminal activity, is presumptively unreasonable. A PHA or owner may impose a longer prohibition based on particular criminal activity only after a PHA determination, based on empirical evidence, that such longer prohibition is necessary to ensuring the health, safety, and peaceful enjoyment of other tenants or property employees.

(C) No applicant that was previously denied admission based on criminal activity shall be prohibited from applying for assistance. A PHA must not deny the application based solely on the prior denial.

(1) *Prohibiting admission on the basis of alcohol abuse.* The PHA must establish standards that prohibit admission to the program if the PHA determines that a household member's abuse or pattern of abuse of alcohol threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees.

(2) [Reserved]

(b) *Terminating assistance.* (1) *General.* If the law and regulation permit the PHA to terminate assistance but does not require the PHA to do so based on criminal record, criminal activity, illegal drug use, or alcohol abuse, the PHA may take or not take the action to terminate assistance in accordance with the PHA standards for termination. Before exercising the PHA's discretion to terminate assistance based on criminal record, a finding of criminal activity, illegal drug use, or alcohol abuse, the PHA must take into account all the circumstances relevant to a particular termination. The circumstances relevant to a particular termination may include but are not limited to:

(i) The nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on fitness for continued tenancy,

(ii) The effect on the community of termination or eviction; or of the failure of the responsible entity to take such action;

(iii) The extent of participation by the leaseholder in the conduct;

(iv) The effect of termination of assistance or eviction on household members not involved in the conduct;

(v) The extent to which the leaseholder or relevant household member has taken reasonable steps to prevent or mitigate the offending action;

(vi) Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination the PHA must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, the PHA may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse;

(vii) Whether the leaseholder would like the owner to consider mitigating circumstances related to a medical condition of a household member (which then must be considered); and

(viii) Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

(2) *Terminating assistance on the basis of drug-related criminal activity.* (i) The PHA *must* establish standards that allow the PHA to terminate assistance for a family under the program if the PHA determines that:

(A) Any household member is currently engaged in any illegal use of a drug; or

(B) A pattern of illegal use of a drug by any household member threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees.

(ii) The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(iii) The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any family member has violated the family's obligation under § 982.551 not to engage in any drug-related criminal activity.

(3) *Terminating assistance on the basis of other criminal activity.* The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any household member has violated the family's obligation under § 982.551 not to engage in violent criminal activity.

(4) *Terminating assistance on the basis of alcohol abuse.* The PHA must establish standards that allow termination of assistance for a family if the PHA determines that a household member's abuse or pattern of abuse of alcohol threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA employees.

(c) *Evidence of criminal activity.* The PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity. The fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting termination but the conduct that resulted in the arrest can be such a basis provided there is sufficient evidence that it occurred independent of the fact of the arrest.

(d) *Notification requirements—(1) Admissions decisions.* (i) Before a PHA denies admission on the basis of criminal activity, the PHA must notify the household of the proposed action and provide a copy of any relevant criminal record to the subject of the record and the applicant (except where otherwise prohibited by law) no less than 15 days prior to notification of

the denial. During the 15-day period, the PHA must provide the subject of any record an opportunity to dispute the accuracy and relevance of that record. The PHA must provide the household an opportunity to present any relevant mitigating information which may include but is not limited to the circumstances listed at 982.553(a)(2).

(ii) While a PHA is determining whether there are grounds for denial of admission based on criminal activity, the PHA cannot issue a voucher to the family, enter into a HAP contract or approve a lease, or process or provide assistance under the portability procedures.

(2) *Use of a criminal record for termination of assistance.* If a PHA proposes to terminate assistance for criminal activity as shown by a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant(except where otherwise prohibited by law) with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record in accordance with § 982.555.

(3) *Cost of obtaining criminal record.* The PHA may not pass along to the tenant the costs of a criminal records check.

(e) *Applicability of 24 CFR part 5, subpart L.* The requirements in 24 CFR part 5, subpart L apply to this section.

44. Amend § 982.555 by revising the section heading and paragraph (e)(2)(i) to read as follows:

§ 982.555 Informal hearing.

* * * * *

(e) * * *

(2) * * *

(i) *By family.* The family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing, including those that were used to make the determination that the family violated the family obligations and are grounds

for termination. If requested, the family must be allowed to copy or be provided copies of any such document at the PHA's expense. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.

* * * * *

Dated: March 19, 2024.

Marcia L. Fudge,
Secretary.

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