Community Development Commission

March 2, 2007

To: Each Deputy

From: Carlos Jackson, Executive Director

SUBJECT: FOLLOW-UP TO SECTION 8 DISCUSSIONS

As a follow-up to our discussions this week, I am providing you with the additional information you have requested. Attached are the following:

- Information on the status of the 3,000 families that are awaiting the receipt of Section 8 vouchers;
- Additional information on the 11,000 applications we received, including the number of applicants that were deemed ineligible and number of applications that are pending review;
- The number of families (in jurisdiction) that are currently on the County's Section 8 waiting list; and
- The current time on the waiting list for those families.
- Copy of the Federal Regulations governing criminal background checks in Public Housing;

Should you have any questions or would like to request additional information, please give me a call.

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Criminal Background Regulations, including the specific section that discusses when we are authorized to conduct criminal background checks.

Federal Criminal Background Regulations are attached. It is suggested that you read the regulations in their entirety, however the specific sections that you are interested in can be found on pages 28776, 28795 and 28796.

Regarding the 3,000 families that are waiting to receive vouchers, when will they receive their voucher?

Because their applications are in different stages, our rough estimate is that it could take 8 months for the total 3,000 to be issued.

Of the 11,000 applications we received, how many were determined ineligible? Do we still have applications that need to be reviewed? How many families are on the waiting list (in jurisdiction)?

Of the 11,000 applications we received, approximately 1,500 were declared ineligible. We have approximately 5,500 applicants, in various stages, which have passed initial eligibility review and are being prepared for final determination.

We have 8,200 families on the in-jurisdiction waiting list. (**Correction**: Executive Director previously reported a starting count of 37,000 families, however, the correct count was 27,000 of which we sent applications to 23,000).

What's the current time on the waiting list for those families?

We have processed in-jurisdiction applications for everyone entering our waiting list prior to February 2006. Families who registered on our waiting list since then will remain on the waiting list until we are able to process applications again. We expect to process applications again when we approach our current lease-up goal or when we anticipate termination of contracts.

Federal Register

Thursday,
May 24, 2001

Part II

Department of Housing and Urban Development

24 CFR Parts 5 et al.
Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 200, 247, 880, 882, 884, 891, 960, 966, and 982

[Docket No. FR–4495–F–02]

RIN 2501–AC63

Screening and Eviction for Drug Abuse and Other Criminal Activity

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations for the public housing and Section 8 assisted housing programs, and for other HUD assisted housing programs, such as the Section 221(d)(3) below market interest rate (BMIR) program, Section 202 program for the elderly, and Section 811 program for persons with disabilities, and Section 236 interest reduction program. All of these programs were affected by 1998 amendments to the statute authorizing the public housing and Section 8 programs. These amendments give Public Housing Agencies (PHAs) and assisted housing owners the tools for adopting and implementing fair, effective, and comprehensive policies for screening out programs applicants who engage in illegal drug use or other criminal activity and for evicting or terminating assistance of persons who engage in such activity.

DATES: *Effective Date:* June 25, 2001.

FOR FURTHER INFORMATION CONTACT: For tenant-based Section 8 and public housing—Patricia Arnaudo, Senior Program Manager, Office of Public and Assisted Housing Delivery, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4224, Washington DC, 20410; telephone (202) 708–0744 or the Public and Indian Housing Resource Center at 1–800–955–2232. Ms. Arnaudo also may be reached via the Internet at Patricia_S._Arnaudo@hud.gov.

For the Section 8 project-based programs—Willie Spearmon, Director, Office of Housing Assistance and Grants Management, Office of Housing, Department of Housing and Urban Development, Room 4220, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–3000. Mr. Spearmon also may be reached via the Internet at Willie_Spearmon&hud.gov.

Only the Public and Indian Housing Resource Center number is toll-free. Persons with hearing or speech impairments may access the above telephone numbers via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

HUD published a proposed rule to implement the applicant screening and tenant eviction procedures to make HUD-assisted housing safer places to live on July 23, 1999 (64 FR 40262), which superseded earlier proposed rules for the Section 8 and public housing programs covering this subject. Crime prevention in federally assisted housing will be advanced by the authority to screen out those who engage in illegal drug use or other criminal activity, and both prevention and enforcement will be advanced by the authority to evict and terminate assistance for persons who participate in criminal activity.

The changes proposed in that rule derived from several sources. (See the chart published in the July 23, 1999, proposed rule at 64 FR 40264–40265 for more detail.) Section 9 of the Housing Opportunity Program Extension Act (Pub. L. 104–120, 110 Stat. 834–846, approved March 28, 1996)("the Extension Act") amended sections 6 and 16 of the United Stated Housing Act of 1937 (42 U.S.C. 1437a, *et seq.*) ("the 1937 Act"). Sections 428, 506, 545, and 575–579 of the HUD Appropriation Act for Fiscal Year 1999 (Pub. L. 105–276, approved Oct. 21, 1998) amended sections 3, 6, 8, and 16 of the 1937 Act and created other statutory authority concerning crime and security provisions in most federally assisted housing (42 U.S.C. 13661–13664). Title V of the HUD Appropriation Act for Fiscal Year 1999 (Pub. L. 105–276, approved October 21, 1998) was designated the Quality Housing and Work Responsibility Act of 1998 and is referenced in this rule as "the QHWRA" or "the 1998 Act." Section 903 of the Personal Responsibility and Work Opportunity Act of 1996 (Pub. L. 104–193, approved August 22, 1996, 110 Stat. 2105, 2348) amended sections 6(l) and 8(d)(1) of the 1937 Act concerning terminating tenancy for fleeing to avoid prosecution, custody or confinement after commission of a felony, or for violation of probation or parole.

Although owners and PHAs have been free to deny admission to applicants for assisted housing on the basis of criminal activity, these new statutory provisions mandate denial of admission for specified criminal activity. In implementing the new mandatory provisions, HUD does not impair existing authority of owners and PHAs to deny admission for criminal activity other than that specified in this rule or which has taken place at times other than those specified. In addition, although this rule provides a mechanism for obtaining access to criminal records, HUD recognizes that many PHAs and owners may now use other means of obtaining criminal records and may continue to use these other means of obtaining that information. The portion of this rule that addresses access to criminal records, subpart J of part 5, does not affect those other means. However, HUD cautions PHAs and owners to handle any information obtained about criminal records in accordance with applicable State and Federal privacy laws and with the provisions of the consent forms signed by applicants.

The preamble to the July 23, 1999, proposed rule provided additional information about the proposed implementation of the Extension Act and the 1998 Act.

II. Significant Differences Between This Final Rule and the Proposed Rule

This final rule takes into consideration the public comments received on the proposed rule and attempts to simplify the rule where possible. The more significant changes made to the July 23, 1999 proposed rule by this final rule are described below.

1. *Revised and reorganized regulatory text.* HUD has revised and reorganized the majority of the proposed regulatory text. These changes are not substantive, but are designed to streamline the contents of the proposed rule and make the new requirements easier to understand. For example, the final rule uses a more reader-friendly question and answer format. The more significant of these clarifying and organizational changes are described in greater detail in this section.

2. *Cross-reference to generally applicable definitions (§ 5.100).* The final rule eliminates unnecessary redundancy by relocating the definitions of commonly used terms to subpart A of 24 CFR part 5 (see § 5.100 of this final rule). The program regulations using the defined terms have been revised to simply cross-reference to 24 CFR part 5, rather than repeating the generally applicable definitions.

3. *Authority to screen applicants and evict tenants (24 CFR part 5, subpart I).* This final rule reorganizes and clarifies the provisions of the proposed rule concerning the authority of housing providers to screen and evict tenants. Some of the 1998 Act provisions require certain actions, while other provisions authorize various actions. In the proposed rule, this distinction was not always entirely clear. HUD has made several revisions to proposed 24 CFR part 5, subpart I to clarify these

differences. For example, the final rule adds a new § 5.851, which discusses these distinctions.

The final rule also locates the specifically authorized actions in separate sections from the mandatory actions. This reorganization reveals the statutory distinction between treatment of illegal drug use and other drug-related criminal activity. Current illegal use of a drug is the subject of a mandatory prohibition on admission. Past eviction for drug-related criminal activity and conviction for methamphetamine production are also the subject of statutory prohibitions on admission. Certain other drug-related criminal activity is required by statute to be included in the lease as a basis for eviction in the Section 8 and public housing programs, and this policy has been applied to other federally assisted housing programs as well.

4. *Prohibition on admission of sex offenders (§ 5.856).* Because the prohibition against admitting persons subject to a lifetime registration requirement under a State sex offender registration program is mandatory, but not captured under the heading of the other subjects of mandatory screening, that provision is now contained in its own section of part 5 (see new § 5.856). Similarly, the sex offender provision is positioned in the other program regulations to emphasize the mandatory nature of this provision as a screening element.

5. *Reorganization of 24 CFR part 5, subpart J.* Subpart J of the final rule is reorganized slightly, to place all of the applicability and purpose discussions in one section (the new § 5.901), and all the definitions in one section (the new § 5.902). The remaining two sections on general criminal offender records and sexual offender registration are renumbered, as a result.

6. *Opportunities to dispute criminal record information (§ 5.903(f)).* This final rule adds a new § 5.903(f), which requires the PHA to provide the subject of an accessed criminal record and the applicant or tenant a copy of the record and an opportunity to dispute the accuracy and relevance of the information. This opportunity must be provided before the denial of admission, eviction, or lease enforcement action on the basis of such information.

7. *Penalties for improper release of information (§ 5.903(h)).* This final rule adds a new § 5.903(h), which describes the possible criminal penalties and civil liability for unauthorized disclosure of criminal records and information.

8. *Lease and termination of tenancy under the Section 8 Moderate Rehabilitation Program (§ 882.511).* This final rule amends 24 CFR part 882 (entitled "Section 8 Moderate Rehabilitation Program") to clarify drug-related lease requirements under the program regulations. Specifically, the final rule adds a new § 882.511(a)(2), which requires the lease to provide that certain drug-related criminal activity is grounds for termination of the tenancy. In addition, the lease must provide that the owner may terminate the tenancy when the owner determines that a pattern of illegal drug use interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

9. *Removal of duplicative provision (§ 882.514(g)).* The final rule removes one paragraph from the Section 8 Moderate Rehabilitation regulation dealing with family obligations (§ 882.514(g)), since its coverage of denial of admission and termination of tenancy is now covered in §§ 882.518(c) and (d).

10. *Admission and occupancy changes (24 CFR part 960).* On March 29, 2000 (65 FR 16692), HUD published a final rule implementing the changes to the admissions and occupancy requirements for the public housing and Section 8 assisted housing programs made by the QHWRA. Among other amendments, the Admissions and Occupancy final rule made several changes to 24 CFR part 960. The part 960 regulations had earlier been proposed to be amended by the July 23, 1999 proposed rule on screening and eviction for drug abuse and other criminal activity. Accordingly, this final rule updates or revises the proposed revisions to part 960 to reflect publication of the final rule on admissions and occupancy.

11. *Reference to PHAS screening and eviction procedures (24 CFR parts 960 and 966).* The final rule revises the regulations governing public housing admissions and occupancy (24 CFR part 960) and lease and grievance requirements (24 CFR part 966) to reference criminal screening and eviction procedures under the Public Housing Assessment System (PHAS). Under the PHAS, PHAs that have adopted policies, implemented procedures and can document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories receive points (see 24 CFR 902.43(a)(5)).

12. *Post office notification requirements (§ 966.4(l)(5)).* To correct the proposed rule's inadvertent removal of a provision from the public housing eviction provisions, the final rule restores the current rule's requirement in § 966.4(*l*)(5) that a PHA notify the local post office when the PHA evicts an individual or family for criminal activity. This provision implements a statutory requirement (42 U.S.C. 1437d(n)) that is intended to prevent the return to the development of the evicted person to obtain mail.

13. *Termination of tenancy under Housing Choice Voucher program (24 CFR part 982).* The rule for the Section 8 tenant-based certificate and voucher programs on termination of tenancy for drug-related criminal activity is based on section 8(d)(1)(B)(iii) and section 8(o)(7)(D) of the 1937 Act (42 U.S.C. 1437f(d)(1)(B)(iii) and 1437f(o)(7)(D)), as well as on section 577 of the 1998 Act. The final rule changes the proposed revision of § 982.310(c) to remove two non-exclusive examples of when the owner may terminate tenancy for drug-related criminal activity.

14. *Screening and Eviction by Responsible Entity.* Public commenters had expressed concern that in all programs the responsible entity be encouraged to consider all the circumstances of the family before taking action based on proscribed activity by one member of the household. Public commenters had objected to the provision of the proposed rule that purported to mandate a period of ineligibility for prior eviction for drug-related criminal activity that was longer than three years. Public commenters had expressed the view that the consideration of rehabilitation was not prominent enough in the rule. All of these elements, plus specific requirements, and adherence to the entity's standards and policies, are included in the provisions regarding discretion. (This provision is discussed at greater length in response to the public comments.)

15. *Clarification of eviction for drug use by guests and other persons.* Various sections of the proposed rule allow PHAs the option of evicting the tenant when a "covered person" engages in improper activity "on or off" the premises (in the case of public housing) and "on or near" the premises (in the case of Section 8 programs). The concept of "covered person" is an umbrella term including (in addition to the tenant) guests, members of the tenant's household, and "other persons under the tenant's control." HUD has defined "guest" in this context to mean anyone staying in the unit with the permission of the tenant or another household member with the authority to give such permission. In order to distinguish the concept of "other person" from "guest," HUD is defining "other person under the tenant's control" to mean a short-term invitee

who is not "staying" in the unit. The rule specifies that such a person is only under the tenant's control during the period of the invitation, and the person is on the premises because of that invitation. Hence, in §§ 5.858, 882.511, 882.518(c)(1), 966.4(f)(12), 966.4(l)(5), and 982.310(c), the final rule replaces the proposed term "covered person" with more specific language to clarify this distinction.

16. *More precise cross-references.* Sections 247.3, 880.607, and 884.216, describing when landlords in the assisted housing programs governed by those sections may terminate tenancy for criminal activity or alcohol abuse, provide cross-references to part 5, subparts I and J generally. The final rule cross-references directly to the most applicable sections of part 5 to avoid any potential for confusion.

III. Responses to Public Comments

The public comment period on the proposed rule closed on September 21, 1999. During this period, HUD received 29 public comments. The commenters were comprised of 17 public housing agencies (PHAs) and their representatives, including four State Housing Finance Agencies and their representatives, three legal aid organizations, three managers of Section 8 housing, four resident groups, one Federal government agency, and one legal organization representing PHAs. The following discussion of comments (and HUD's responses to the comments) is organized according to the regulatory section to which the comment applies, in sequential order. The corresponding sections for particular programs are also listed in the headings.

A. General Comments Not Regarding a Particular Regulatory Section

Comment. Residents of an assisted development that had been for elderly persons only but had added other residents recently expressed their general support for the rule, hoping that the rule will help rid their development of problem tenants engaged in drug-related activity. An owner of a Single Room Occupancy project who participates in HUD's Shelter Plus Care program praised the rule for giving the owner the ability to reject and evict tenants who engage in illegal activities specifically related to drug and alcohol use, noting that the rule will improve the quality of life for its 195 residents. This owner also praised the new authority for a PHA to check criminal records, as a way to restrict tenancy to suitable applicants.

Response. With the new statutory authority owners and PHAs should have the tools to deny or terminate assistance to families whose criminal actions interfere with the safety and security of the other residents.

Comment. A legal organization representing PHA interests commended the Department for an excellent overall effort in its regulatory implementation of the 1998 Act. The organization commented that HUD had shown a commendable reluctance to further complicate an already complex statutory scheme with regulations that are more detailed than necessary.

Response. In that vein, HUD declines to elaborate upon some of the statutory terms that commenters have urged HUD to define. In some cases, the terms may already have been the subject of judicial clarification. HUD is attempting to limit its role to amplifying the statute only where necessary.

B. Definitions—§ 5.100

Comment. HUD's adoption of a revised definition of "violent criminal activity" was praised by a legal aid organization, but the organization recommended the "nontrivial bodily injury or property damage" be changed to "serious bodily injury or property damage." An organization providing legal support to PHAs and their counsel also expressed support of this revised definition, particularly with respect to its inclusion of threatening behaviors.

Response. HUD has adopted this change. On further consideration of the issue, HUD has decided that the word "serious" is a more common legal term and therefore preferable. HUD intends no change in meaning.

C. Prohibiting Admission of Drug Criminals—§§ 5.854, 960.204, 982.553

Comment. Sections 5.854 and 960.204 (§§ 5.853, 960.203 at the proposed rule stage), and 982.553(a) of the proposed rule provide that the responsible entity must adopt standards that prohibit admission of applicants:

- If the entity determines that a household member is engaged in or has engaged in drug-related criminal behavior; or
- If the entity determines it has reasonable cause to believe that illegal drug use by a household member may threaten peaceful enjoyment by other residents.

Comments asserted that most of the provisions concerning whether a family is eligible for admission or continued occupancy use a phrase placing the responsibility on the owner or PHA determination of a condition, not on the objective existence of the condition. Representatives of housing owners and residents asked what is meant by reasonable cause for an owner to believe that a condition exists (e.g., that there is illegal use of a drug by a household member that is a threat to others, as described in § 5.854(a)(2)). They noted a contrast with other provisions that seem to be based on the existence of the condition, such as whether a household member "has been evicted from federally assisted housing for drug-related criminal activity." (§ 5.853 proposed; § 5.854 final) They recommended that the rule should either (1) make the objective existence of the condition rather than a PHA or owner determination the critical factor resulting in ineligibility or termination of assistance; or (2) state the process and standards to be used by the PHA or owner in making its determination.

Response. Section 576 of the 1998 Act refers to the PHA or owner's determination with respect to drug use, criminal activity, or a pattern of activity that would have potential negative impact on other residents. In these provisions, the Congress and the Department recognize that the entities that are responsible for direct administration of the assisted housing programs should have latitude for practical and reasonable day-to-day judgments whether household members have committed criminal activity or other activity that is grounds for denial or termination of assistance. Thus, the final rule simply reflects the statutory language. HUD notes, however, that nothing in the language of the rule on the question of owner determinations would change any ability to challenge in court the responsible entity's action or change any applicable court standard of review of such action.

Comment. A legal aid organization criticized HUD's implementation of restrictions against persons who have engaged in illegal drug use in § 5.854 (§ 5.853 of the proposed rule). The commenter argued that, based on section 576(b) of the 1998 Act, the rule should permit such persons to be excluded only if there is a link with a threat to health, safety or peaceful enjoyment of others.

Response. HUD disagrees that this link must be present in every case related to illegal drug use or drug-related criminal activity. Section 576(b)(1)(A) of the 1998 Act provides independent authority to bar admission of persons currently engaged in illegal drug use, without reference to any effect on health, safety, or right to peaceful enjoyment of the premises. Although section 576(b) links a pattern of illegal drug use to interference with the rights of others, the language of section 576(c) gives broad authority to owners to

screen out applicants involved in drug-related activity—which includes illegal drug use, as well as commercial drug crime—without any necessary finding of current interference with the rights of others.

The language of section 576(c) mentions the anticipated effect on others in connection with an owner's choice to prohibit admission of persons involved in forms of criminal activity other than drug-related criminal activity or violent criminal activity—to designate serious forms of criminal activity in addition to drug crime or violent crime. While section 576(c) confirms that an owner may deny admission to criminal offenders, the law also specifies that this new statutory authority is "in addition to any other authority to screen applicants. * * * " Section 8 of the 1937 Act already provided that "the selection of tenants shall be the function of the owner." (See 42 U.S.C. 1437f(d)(1)(A).) In public housing also, there is nothing that requires the PHA to admit certain families or precludes the PHA from screening for potential of disruptive behavior. For many years, the public housing regulations in part 960 have, in fact, required the PHA to screen out families likely to engage in such behavior.

Following the structure of section 576 of the 1998 Act, § 5.854 implements the mandatory screening provisions of paragraphs (a) and (b) of the statute, and § 5.855 implements the permissive screening provisions of paragraph (c) of the statute. Section 576(c) permits exclusion without a showing of current interference with others.

Comment. Based on section 576(c) of the 1998 Act, the rule should require exclusion for past drug-related criminal activity in § 5.854 (§ 5.853 of the proposed rule) to be limited to activity during a "reasonable time preceding the date when the applicant household would otherwise be selected for admission" (or past criminal activity in § 5.854(a).)

Response. HUD agrees with the commenter about when the reasonable period should apply and has added this language to § 5.855(a) (§ 5.854 of the proposed rule), which deals with the owner's authority to prohibit admission for violent criminal activity or other criminal activity that threatens the peaceful enjoyment of other residents. In each case, HUD has made corresponding changes in comparable provisions of §§ 960.203 (concerning standards for PHA tenant selection criteria) and 982.553 (concerning admission to the Section 8 voucher program).

Comment. A legal aid organization recommended that HUD specify what a reasonable time period is, for consistency nationwide. A distinction should be made between an appropriate period for drug-related or violent criminal activity and other disqualifying criminal activity, with "no more than three years" applying to drug-related and violent criminal activity, and a shorter period for other criminal activity. A PHA that expressed an opinion on the subject recommended that the time period be left to the determination of the owner (or PHA).

Response. HUD believes it would be too rigid for it to define a reasonable time period in a manner that covers every circumstance nationally. The reasonable time period is still left up to the owner (or PHA) to determine in its admission policies. Owners and PHAs may want to adopt standards that differentiate what is a reasonable period for different categories of criminal activity. While HUD considers that five years may be a reasonable period for serious offenses, depending on the offense, some PHAs or owners may not agree. The owners and PHAs should make these decisions in the best interests of their communities.

Comment. Legal aid organizations and a mental health organization objected to the provision of proposed § 5.853(c) (final § 5.854(a)) that permits an owner to establish a reasonable period during which a person previously evicted from a federally assisted project for drug-related criminal activity may be denied admission to assisted housing. They argued that the statute sets this period at three years, giving the owner authority to override the requirement to deny admission if there is evidence of rehabilitation. They pointed out that the rule would permit exclusion of a person on this basis for longer than three years without any evidence that the applicant would interfere with the health, safety, or enjoyment of other tenants, in violation of the statute.

Response. Section 576(a) of the 1998 Act provides that an applicant "shall not be eligible" for admission to federally assisted housing "during the three-year period beginning on the date of [eviction from such housing by reason of drug-related criminal activity]." However, the statutory language does not in any way limit the authority of the responsible entity to screen out applicants in any other circumstance—whether for criminal activity or for any other reason. There is nothing in the statute that requires an owner or PHA to admit an applicant who has previously been evicted from federally assisted housing for drug-related criminal activity at any point in time.

Since the intent of the statute was to strengthen protections against admitting persons whose presence in assisted housing might be deleterious, HUD does not interpret this new provision as a constraint on the screening authority that owners and PHAs already had. Therefore, the statute permits owners and PHAs to establish a reasonable period, which may vary depending on the type of drug-related criminal activity involved.

The final rule distinguishes the mandatory ineligibility provision applicable during a three-year period from the owner's authority to establish a reasonable period longer than three years to prohibit admission of such applicants. The first, mandatory, prohibition on admission is found in § 5.854(a). The second, discretionary, extension of the period of the prohibition is referenced in § 5.852(d)).

Comment. The exceptions permitting eligibility for a previously evicted applicant are stated in proposed § 5.853(a). The elaboration on the statutory language "the circumstances leading to the eviction no longer exist" provided in the rule are when "the criminal household member has died or is imprisoned." One commenter urged HUD to add a third example: When that household member "is no longer in the household."

Response. HUD declines to add this example (§ 5.853 of the proposed rule is § 5.854 at the final rule stage). Temporary absence from the household is not a sufficient basis for granting an exception. PHAs and owners can make determinations of circumstances that they are certain satisfy the statutory language.

Comment. A PHA objected to § 5.853(b) of the proposed rule concerning submission of evidence related to drug-related criminal activity, because the section appeared to require the submission of evidence by every applicant, regardless of the absence of any allegations of drug-related criminal activity by any household members at any time. Other commenters expressed concern about abuse of the authority to seek such evidence unless the evidence were sought from every applicant.

Response. Proposed 24 CFR 5.853(b) was intended to implement the provision of section 576(c) of the 1998 Act that provides the authority to prohibit admission. The rule provides that the owner may choose to consider the application of an applicant to whom the owner has previously denied admission if the owner has sufficient evidence that no member of the

household is engaged in criminal activity. In such a case, a family must supply information or documentation required by HUD or the responsible entity to make an admission decision. This provision, and the statute on which it is based, do not preclude the owner from asking for criminal background information in connection with the initial application. (See § 5.903(b) of this final rule with respect to obtaining consent from every applicant family for release of criminal records.)

Comment. An organization representing owners of assisted housing in the State of Minnesota, wrote to point out conflicts between the actions to prohibit admission of persons who have been engaged in drug use and State law that prohibits discrimination on the basis of past drug use. Does this rule preempt State law with respect to this protection?

Response. HUD declines to speculate here about the applicability of this rule to particular local situations. If there is a concern about a specific potential conflict between the HUD rule and a State or local law, the applicable HUD field office should be contacted.

Comment. One commenter criticized the statement in the preamble of the proposed rule that the 1998 Act amendments to the 1996 Extension Act provisions on ineligibility of illegal drug users and alcohol abusers confirm that a PHA or owner may deny admission or terminate assistance for the whole household that includes a person involved in the proscribed activity. In essence, since rehabilitation of the household member with the offending substance abuse problem is the only way to cure the household's ineligibility, the preamble to the proposed rule stated that the whole household is held responsible for that member's rehabilitation. The commenter said that the statute did not authorize such action.

Response. Both the denial of admission and termination of assistance provisions of the 1998 Act contain provisions that give PHAs the discretion to hold an entire household responsible for the actions of members. Section 576(b) of the 1998 Act (42 U.S.C. 13661(b)) provides that a household must be denied admission if the household has "a member" with respect to whom the PHA or owner determines that it has reasonable cause to believe is involved in illegal drug use or alcohol abuse that is a threat to others. The statute provides that rehabilitation of the member can render the household eligible for admission. Similarly, section 577 of the 1998 Act (42 U.S.C. 13662(a)) allows a PHA or owner to terminate the tenancy or assistance for any household with a member who is determined to be illegally using drugs or whose illegal drug use or alcohol abuse is determined to be a threat to others.

Comment. A legal aid organization stated that section 576(c)(2) of the 1998 Act (42 U.S.C. 13661(c)(2)) gave HUD the responsibility for specifying "by regulation" what would constitute sufficient evidence to ensure that a member of the family who had engaged in criminal activity has not engaged in such activity for a reasonable period. A PHA recommended that the standard should be the absence of an arrest for drug-related crimes within a time specified by the owner or PHA.

Response. HUD agrees that the rule should include more guidance concerning the evidence obtained after the owner's initial denial of admission because of criminal activity by a household member. The final rule addresses this issue in § 5.855(c), which states that an owner would have "sufficient evidence" if the individual submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the reasonable period, supported by evidence from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which the owner verified. The applicant will need to supply information that will permit the owner to contact these sources of information, and the owner will need to verify supporting evidence. Comparable changes have been made to the sections on both drug-related and other crimes in parts 960 and 982.

D. Prohibiting Admission of Other Criminals—§§ 855, 5.856, 960.204, 982.553

Comment. Two representatives of owners point out that § 5.854 of the proposed rule (§ 5.855 of the final rule) merely permits owners to prohibit admission of applicants who are engaged in violent criminal activity, while § 5.853 of the proposed rule (§ 5.854 of the final rule) requires owners to prohibit admission of applicants they have "reasonable cause" to believe are currently involved in drug-related criminal activity or alcohol abuse. They recommended that HUD require denial of admission in both cases.

Response. The statutory language on which these two sections are based makes that distinction. Compare section 576(c) with section 576(b)(1)(B) (42 U.S.C. 13661(c) with 13661(b)(1)(B)).

Comment. An organization representing owners suggested that the rule may not permit denial of admission because of theft or fraud, or any other crime that does not fit the definitions of threatening criminal activity.

Response. The rule does not overrule an owner's authority to screen tenants for crimes or behavior not described in the rule. Section 576 of the 1998 Act recognized existing screening authority of PHAs and owners with its lead in phrase: "*in addition to any other authority to screen applicants,* * * *." [emphasis added] The final rule covers this subject in a new § 5.851. In addition, the final rule separates mandatory actions from permissive actions, both of which reside in the context of existing authority.

Comment. The requirement of § 5.854(c) of the proposed rule to check whether any member of a household is the subject of a lifetime registration requirement under a State sex offender registration program constitutes a significant burden. The search should be limited to consultation with appropriate officials of the state in which the PHA (or owner) is located and to any state in which the applicant is known to have resided.

Response. HUD agrees that the search can be limited to these states. The final rule reflects this policy—in the new § 5.856 and in § 5.905(a).

E. Prohibiting Admission of Alcohol Abusers—§§ 5.857, 960.204, 982.553

Comment. A legal aid organization argued that alcohol abusers must be found to be a threat to others, and that the rule should focus on behavior rather than status. The organization commented that this provision should cross-reference the applicability of consideration of rehabilitation.

Response. Section 5.857 of the final rule includes the link between admissions standards and the alcohol abuser's impact on others, as the proposed rule did. The rule concerning consideration of rehabilitation is found in another paragraph of the same section in the case of public housing (proposed § 960.203; final § 960.205) and the voucher program (§ 982.553), and in a nearby section in the case of other project-based programs (proposed § 5.855; final § 5.862), so no cross-reference is necessary.

F. Termination of Assistance for Drug-Related Criminal Activity—§§ 5.858, 966.4(f)(12)(i) & (l)(5)(i), and 982.310(c)

Comment. A legal aid organization criticized regulatory language that would allow a project owner to terminate an assisted tenancy because a tenant "has engaged in" drug-related criminal activity. The comment stated

that section 577(a) of the 1998 Act only supports eviction for past drug-related criminal activity when there is a pattern of illegal drug use that interferes with the "health, safety, and peaceful enjoyment" of others. The commenter recommended that the rule follow the statute more closely and that the rule add a reference to consideration of rehabilitation.

Response. Section 577 of the 1998 Act requires the owner to use lease provisions that allow the owner to terminate tenancy if a household member "is illegally using" a controlled substance, or if the owner determines that drug use or abuse interferes with peaceful enjoyment by other residents. However, section 577 of the 1998 Act does not supplant or supersede statutory and regulatory authority that authorize the owner to terminate tenancy for drug-related criminal activity (e.g., for present or past drug dealing during the term of the tenancy), or that require the owner to use a lease that allows the owner to terminate the tenancy for such drug crime. The 1998 Act was enacted to promote "safety and security in public and assisted housing" by supplementing and strengthening existing statutory tools for fighting criminal activity by assisting housing residents (see subtitle F of the 1998 Act, which includes section 577).

For Section 8 programs, section 8(d) mandates that program leases "shall provide" that "any drug-related criminal activity" on or near the premises by a covered person during the term of the lease is grounds for termination of tenancy (42 U.S.C. 1437f(d)(1)(B)(iii)). The additional "safety and security" requirements enacted in the 1998 law must be implemented in tandem with the existing termination requirements in section 8 of the 1937 Act, so that owners have authority to evict drug dealers as well as drug users, and the authority to evict for past drug-related criminal activity during the term of tenancy, as well as for continuing or recent drug-related criminal activity. Existing HUD program regulations for the various assisted housing programs already provide authority for an assisted project owner to terminate tenancy for drug-related and other forms of criminal activity (see 24 CFR part 247, 24 CFR 880.607). Such provisions are included in the HUD model lease for Section 8, Section 236, and Section 221(d)(3) below-market interest rate projects. The new termination of tenancy requirements under this rule (§§ 5.856 and 5.857 of the proposed rule; §§ 5.858 through 5.861 of the final rule) are consistent with termination of tenancy requirements in the existing program regulations.

For public housing, the 1937 Act (section 6(l)(6)), 42 U.S.C. 1437d(l)(6)) requires that a PHA use leases that "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 [covered person] shall be cause for termination of tenancy." Thus, the illegal drug use criterion of section 577 of the 1998 Act adds little regarding eviction of illegal drug users for the public housing program, but adds a provision on alcohol abuse. None of the statutes explicitly addresses the timing of the offending activity. The final rule does not include the phrase "during the term of the lease" that would have been added by the proposed rule, since that phrase is unnecessary. Activity occurring only prior to the time the leaseholder signed the lease, or the household member or guest joined the household or became a guest, would not be a basis for termination of tenancy. The provision on consideration of rehabilitation is not included in the eviction provision itself but is included in the regulatory provisions that address generally the authority of a responsible entity in making admission and termination decisions (see §§ 5.852, 960.203, 966.4, 982.310, and 982.552).

Comment. A PHA challenged the use of term "on or near such premises" with respect to the location of the drug-related criminal activity that is grounds for eviction (in proposed § 5.856) (eviction from assisted projects) and §§ 982.310(c)(1)(i) and (c)(2)(i)(C)) (eviction from housing of families assisted Section 8 tenant-based programs). A PHA noted that the phrase was changed to "on or off such premises" by a 1996 statute.

Response. Sections 6(k) and 6(l)(6) of the 1937 Act now use the term "on or off such premises" with respect to drug-related or violent criminal activity in stating conditions for which leases must require termination of tenancy, and in distinguishing which types of termination of tenancy can be the subject of an expedited grievance procedure, respectively, in the *public housing program.* However, sections 8(d)(1)(B)(iii) and 8(o)(7)(D)of the 1937 Act, concerning leases used in the *Section 8 programs,* still use the term "on or near such premises" with respect to drug-related criminal activity that is cause for termination of tenancy. Section 576(c) of the 1998 Act, referenced in section 6(l)(7) of the 1937 Act, provides for denial of admission on the basis of drug-related or violent criminal activity, without mention of its location.

In the final rule, the provisions applicable only to public housing (part 966) use the term "on or off." References to "on or near" are found in all the provisions concerning termination of tenancy applicable to Federal Housing Administration subsidized housing and assisted housing for the elderly, as well as to the Section 8 program (part 5, subpart I, and part 982).

Comment. One commenter pointed out that § 966.51(a)(2)(i)(B), which implements the expedited public housing grievance procedure provision of the statute, should reflect the statutory change authorizing eviction for drug-related criminal activity "on or off" public housing premises.

Response. HUD has made this change.

Comment. Two representatives of public housing tenants objected to the provision of § 966.4(f)(12)(i) that permits eviction from public housing based on criminal activity off the premises by a guest of the household unrelated in time to the visit to the premises and unrelated to its effect on residents of the premises or the vicinity. One of them stated that the Section 8 rule is more reasonable in that the Section 8 rule only permits such eviction if the guest's criminal activity took place on or near the premises. This commenter suggested that the provision requires a demonstration that the resident had control over the guest's actions and that the actions constituted a serious violation of the resident's lease. Another commenter suggested that the criminal activity serving as the basis for termination be required to take place on the premises.

Response. HUD is not persuaded by these arguments to change the "on or off the premises" language of rule, because the "on or off the premises" language in the statute pertaining to public housing, 42 U.S.C. 1437d(l)(6), potentially applies to guests and "other persons under the tenant's control," and is not qualified by whether the resident knew about or literally "controlled" the guest's unlawful actions. Rather, the question is one of legal control; by "control," the statute means control in the sense that the tenant has permitted access to the premises. See HUD's 1991 rule on public housing lease and grievance procedures, 56 FR 51560, 51562 ("the question * * * is whether the person in question was in the premises with the consent of a household member at the time of the criminal activity * * *.") See also, for example, *Housing Authority of New*

Orleans v. *Green*, 657 So.2d 552, 553 (La.Ct.App.), *writ denied*, 661 So.2d 1355 (La.1995), *cert. denied*, 517 U.S. 1169, 116 S.Ct. 1571, 134 L.Ed.2d 670 (1996). HUD has revised the definition of "guest" and added a definition of "other person under the tenant's control" to the general definitions section of 24 CFR part 5. HUD has also revised 24 CFR 966.4(f)(12) and 966.4(l)(5)(i)(B) to clarify how the concept of "control" relates to tenant liability for the behavior of guests and others.

In order to provide guidance as to the scope of the tenant's legal control and hence potential responsibility, the rule has been revised to provide that a "guest" is a person temporarily staying in the unit with the consent either of the tenant or of a household member with express or implied authority to consent on behalf of the tenant. The definition of "guest" also has been revised to clarify that the activity of a guest is actionable under this provision only if the activity takes place while the person is a guest; only in that case can the tenant's legal control extend to actions that occur off public housing premises.

In contrast, if a person (with the tenant's consent) visits public housing premises for only a short period of time and is not "staying" in the tenant's unit, the tenant's legal control necessarily would be limited by the brevity of the visit and would not extend to activity off public housing premises. Because the rule's definition of "guest" now includes only persons "staying" in the unit with consent, the rule uses the phrase "other person under the tenant's control" to denote this latter category of non-guest invitee, over whom the tenant's legal control necessarily applies only during the period of invitation onto public housing premises. HUD has made similar changes in the relevant sections dealing with Section 8 assistance to make those provisions consistent with public housing.

HUD has also clarified that a commercial visitor such as a delivery person only visiting the premises for the purpose of making a delivery and having no other contact with the unit or relationship with the tenant ordinarily would not be a person under the tenant's control, and hence the tenant would not be liable for any improper activity by the delivery person. HUD has added to the definition of "other person under the tenant's control" a sentence clarifying the exclusion from the definition of persons on the premises for brief, infrequent visits for legitimate commercial purposes. Of course, if it could be shown that if such a commercial visitor were engaging in prohibited activity and the tenant knew about it or was somehow involved in it, there would be no such exclusion.

Some courts have disagreed with HUD's concept of legal control and have read into 42 U.S.C. 1437d(6)(l) a requirement that the tenant have some degree of knowledge or ability to control the unlawful behavior. See, for example, *Rucker* v. *Davis*, 237 F.3d 1113 (9th Cir., 2001) (*en banc*).

If individual PHAs are subject to binding court decisions, of course they should follow them even though HUD's interpretation may differ. Quite apart from these decisions, PHAs may conclude in particular instances that no useful purpose would be served by terminating a tenancy on the basis of a crime committed by a guest or other person with whom the leaseholder only had a minimal connection. The fact that statutorily required lease provisions would allow PHAs to terminate tenancy under certain circumstances does not mean that PHAs are required to do so in each case where the lease would allow it.

Comment. A PHA requested that in the Section 8 tenant-based assistance program HUD not restrict an owner's right to terminate tenancy for violent criminal activity that occurs only "on or near the premises." The owner should not have to wait until the criminal activity comes "home" before removing such a tenant.

Response. Section 8 authorizes eviction for violent criminal activity "on or near the premises," or alternatively for any criminal activity that threatens other residents of the development or the peaceful enjoyment of their homes of residents in the vicinity (42 U.S.C. 1437f(d)(1)(B)(iii) and 1437f(o)(7)(D)). The final rule reflects these distinctions. (See § 982.310.)

G. Evicting Other Criminals—§§ 5.859, 966.4(l)(5), 982.310(c)(2), and 982.553(b)(2)

Comment. A legal services organization recommended restoring language of § 966.4(l)(5), preserving for PHAs (and adding for courts) "discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." The commenter cited support for this position in a Congressional committee report on the 1990 amendment to the statutory foundation for this provision. That report suggested that eviction would be inappropriate if the tenant had no knowledge of the criminal activities of guests or had taken reasonable steps to prevent the activity. (S. Rep. No. 316, 101st Congress, 2d Sess. 179, reprinted in 1990 U.S. Code Cong. & Admin. News 5763, 5941.) The commenter urged changes to the rules for Section 8 project-based and tenant-based assistance, as well, to encourage courts to consider all circumstances and exercise discretion in a humane manner when evicting a tenant for another person's criminal activity.

Response. As discussed in more detail elsewhere in the preamble, the final rule allows the necessary flexibility for PHAs with respect to public housing and owners with respect to project-based assistance and tenant-based assistance. This is consistent with the cited committee report language, which in any event has not been reflected in any statute. The committee report language for both the House and Senate versions of the QHWRA emphasizes efforts to make assisted housing safer for residents, which is consistent with the final rule.

The statute does not authorize courts to exercise this same type of discretion. Courts determine whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction of the persons whom the PHA seeks to evict. In the latter regard, HUD recognizes that some courts, such as the Ninth Circuit in *Rucker* v. *Davis*, prompted by their differing view of Congressional intent, have read into the lease provision mandated by Section 6(l)(6) a requirement that a PHA, in certain circumstances, demonstrate particularized fault or other lack of "innocence" on the part of a leaseholder when a PHA seeks to terminate a lease based on a crime committed by someone other than the leaseholder. Obviously, PHAs must abide by any such binding court decisions in their jurisdictions, even though HUD has a differing view. However, it is important to recognize that even in those jurisdictions, a court's function under HUD's regulations is to determine whether an eviction meets the requirements of the lease and of Section 6(l)(6) as they have been interpreted in that jurisdiction, and not whether a PHA has considered additional social and situational factors that HUD's regulations authorize, but do not require, a PHA to consider in making its decision whether or not to pursue eviction of any family or individual whom, under the lease, the PHA has the legal right to evict (see, for example, § 966.4(f)(5)(vii)(B).) See *Minneapolis Public Housing Authority* v. *Lor*, 591 N.W.2d 700 (Minn. 1999).

Comment. Another commenter took a different view of such discretion conferred on PHAs with respect to termination of tenancy. A legal organization representing PHA interests, stated that when PHAs are given discretion to do something they are not required to do it. Certainly, courts should not exercise the discretion for them. To avoid this possibility, this commenter recommended adding language to the effect that (a) the existence of discretion on the part of PHAs does not obligate them to exercise the discretion in any particular case; and (b) the discretion in the regulation is not intended to confer the discretion to consider circumstances other than proof of lease violation on any court or party other than the PHA. The commenter argued that such a position is consistent with the policy of giving PHAs the maximum flexibility possible in the operation of assisted housing, ensuring safe and livable environments.

Response. HUD agrees that conferring discretion on PHAs to take action does not require them to take action, and that HUD's conferral of discretion on PHAs in deciding whether to terminate tenancy in each case does not constitute a conferral of discretion on local courts to consider factors other than those appropriate under the lease. Of course, by the same logic, it should also be noted that, insofar as PHAs possess discretion to determine for themselves when to initiate eviction proceedings, they are neither required by law nor encouraged by HUD to terminate leaseholds in every circumstance in which the lease would give the PHA grounds to do so. However, the rule does not need to add the language suggested by the commenter as these points are already inherent in the regulatory language.

Comment. One PHA recommended that, in the Housing Choice Voucher Program, the rule authorizing an owner to terminate the tenancy of any tenant who engages in violent criminal activity on or near the premises (§ 982.310(c)(2)) should be revised to cover commission of a felony or serious misdemeanor, regardless of where it was committed. This PHA also recommended a change in the provision that prohibits participants from engaging in drug-related or violent criminal activity, or other criminal activity or alcohol abuse that threatens the health, safety, or peaceful enjoyment of the premises (§ 982.551(l) and (m). The commenter urged HUD to revise this provision so that the criminal activity that is actionable does not require force and does not have to be committed in the vicinity of the development. Provisions authorizing PHAs to terminate assistance to participants (§§ 982.552 and 982.553) should also be revised, according to this commenter, to permit termination of assistance of participants who commit a felony or misdemeanor, regardless of where it is committed. This recommendation is based on the need for public support for assisted housing programs.

Response. In the voucher program, an owner's termination of tenancy must be based on a serious or repeated violation of the lease, violation of law that imposes obligations on the tenant in connection with occupancy, or other good cause (§ 982.310). The existing rule describes certain types of criminal activity that violate federal law with respect to the obligations of tenants. This rule amends the existing regulations to reflect the requirements of the statutes it is implementing with respect to criminal activity and tenant obligations as they relate to an owner's right to terminate tenancy. This rule also reflects these provisions with respect to a PHA's rights and obligations to terminate assistance with respect to criminal activity.

The statutes being implemented in this rulemaking specifically require owners to adopt leases that authorize eviction for illegal drug use (or for a pattern of illegal drug use that would interfere with other residents' rights) without regard to location, but they do not broaden the type of criminal activity or remove the proximity condition with respect to other drug-related or violent criminal activity as the commenter urges HUD to do in the rule. Nonetheless, the rule permits an owner to specify in the lease grounds for eviction other than those specifically mandated by these statutes to be included in the lease or to evict for "other good cause." An owner who used a standard lease that provided that commission of any felony or serious misdemeanor by a household member is grounds for termination would have grounds to evict a tenant for serious lease violation for such criminal behavior, in accordance with § 982.310, if that lease provision were consistent with State and local law and were applied equally to voucher holders and other tenants. (See section 8(o)(7)(B) (42 U.S.C. 1437f(o)(7)(B).) "Other good cause" is subject to interpretation by local courts, but may well encompass some categories of activity and location that the commenter seeks to cover.

Comment. One commenter stated that there is statutory authority for termination of tenancy for criminal activity other than drug-related criminal activity if the criminal activity is a threat to others in the Section 8 existing housing program. While that authority is reflected in § 5.857 of the proposed rule, applicable to termination of tenancy in the project-based assistance program, there is no comparable provision pertaining to tenant-based assistance.

Response. Section 982.310(c)(2) of the proposed rule reflects this authority. Since the statute speaks in terms of termination of tenancy, not termination of assistance, the language is not repeated in the section on termination of assistance in the tenant-based assistance program, § 982.553.

Comment. One PHA expressed disappointment that the public housing rule provision on termination of tenancy does not go farther, to terminate for violent criminal activity on or off the premises and for criminal or other activity by a covered person that threatens other residents, PHA employees, or residents in the immediate vicinity. The PHA stated that the provisions of the "Public Housing Management Reform Act of 1997" require that these form the basis for termination of tenancy in the public housing program.

Response. The referenced proposed legislation was not enacted. This final rule implements the legislation that was enacted. The 1937 Act already provided for termination if a member of the household, guest or other person under the tenant's control engaged in criminal activity that threatens residents or in any drug-related criminal activity on or off the premises.

Paragraphs (1)(2)(iii) and (1)(5) of § 966.4 of the proposed rule addressed the issue of what activity forms the basis for termination of tenancy—the first in terms of what constitutes "other good cause", and the other in terms of criminal activity or alcohol abuse that is actionable, based on the recent statutory revisions. Notable differences between the two provisions are that:

(1) Paragraph (1)(2) used the term "member of the household", whereas paragraph (1)(5) used the broader term "covered person," which is defined in § 966.2;

(2) Paragraph (1)(2) addressed other criminal activity if the activity is a threat to others, whereas paragraph (1)(5) addressed only criminal activity; and

(3) Paragraph (1)(2) was silent about where the activity takes place, whereas paragraph (1)(5) specified that drug-related criminal activity is actionable regardless of whether it is committed on or off the premises.

The final rule consolidates these provisions in paragraph (1)(5). The

consolidated provision deals only with criminal activity. The final rule retains the reference to "covered person," with the difference that, in the case of drug-related criminal activity, in order to clarify the reasonable extent of the tenant's legal "control," the rule, as discussed above, differentiates between "other person under the tenant's control" and tenants themselves, guests and other household members. The final rule maintains the provision that specifies the location of criminal activity only with respect to drug-related criminal activity, consistent with the statute for public housing. (Authority for Section 8 project-based assistance is similar to that for public housing on this issue, while the authority for tenant-based assistance (section 8(o)(7)(D)) puts violent criminal activity in the same category as drug-related for purposes of the location where it takes place—"on or near the premises".) It is clear, however, that if violent criminal activity threatens the residents of the housing, that activity would be actionable under the rule, even without the location being specified.

Comment. Section 5.857(a) of the proposed rule requires that criminal activity that threatens the health, safety, or peaceful enjoyment of their residences by persons residing in the "immediate vicinity of the premises" is cause for termination of tenancy (based on the authority of sections 8(d)(1)(B)(iii) and 8(o)(7)(D)). For the public housing program, the proposed rule seemed to cover action that is a threat to persons residing in the "immediate vicinity" in § 966.4(l)(2) but did not in § 966.4(l)(5). That difference was resolved in favor of covering such impact. Two representatives of owners asked for guidance on the meaning of the phrase "immediate vicinity of the premises." Litigation impeded their implementation of "on or near the premises" language formerly found in the 1937 Act. A PHA asked whether "near the premises" in proposed § 5.856 and "in the immediate vicinity of the premises" in proposed § 5.857 had different meanings, and whether either of them meant farther away than the "1000 feet" away that their current leases provide. A tenant organization also asks for clarification of what specific distance is meant.

Response. The terms used in proposed §§ 5.856 and 5.857 (final §§ 5.858 and 5.859) are both derived directly from the statute. The courts will interpret these terms as part of endorsing or repudiating actions taken by PHAs under their standards.

Comment. Proposed §§ 5.857(b) and 982.553(b)(2)(ii) (see also, §§ 966.4(l)(5)(ii)(B)) require that the lease must provide that the owner may terminate the tenancy if a member of the household is fleeing prosecution or confinement for a felony or is violating parole. A PHA pointed out that although the rule requires the lease to contain this provision, the rule states that PHAs and owners "may" terminate tenancy on this basis. The PHA objects to requiring this as a lease provision if the PHA or owner has no intention of enforcing it. An owner representative points out that a court is unlikely to enforce such a provision by evicting an entire family because one person fits one of these categories. The commenter states that it is more likely that the court would simply evict the offender if the other household members have not caused a disturbance and are current in the rent.

Response. The rule provisions follow the statutory requirements. This final rule does make one adjustment: where the proposed rule applied the fugitive felon provision to "a member of the household," in fact, Section 6(l)(9) of the 1937 Act, as added by section 903 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, 110 Stat 2105, requires PHAs to use leases that provide that the fact that a "tenant" is fleeing to avoid prosecution, custody or confinement for a felony, or is violating a condition of probation or parole, is a basis for termination of tenancy. Similarly, section 8(d)(1)(B)(v) of the 1937 Act requires HAP contracts between PHAs and Section 8 owners to require the owners to use leases that include the fugitive felon provisions in respect to "tenants" as a basis for termination of tenancy. Section 8(o)(7) of that Act requires the HAP contract between a PHA and owner participating in the Section 8 voucher program to contain terms generally applicable to the owner's other tenants and include any addenda required by the Secretary. This provision is included in an addendum required by the Secretary for the voucher program. Hence, the final rule applies the fugitive felon provisions to "tenants." Of course, a PHA can include additional lease provisions that do not violate 42 U.S.C. 1437d(l)(2) or any express statutory provision. Hence, PHAs may include, so long as they do not violate any applicable laws, reasonable lease provisions that could, for example, require the tenants to exclude fugitive felons or parole violators from the household, and make failure to do so a basis for breach of the lease. Of course, PHAs may also consider other circumstances per section 982.552(c)(2).

While some PHAs and owners may choose not to take action against tenants who are fleeing felons or parole violators, the statute requires that PHAs and owners use leases that afford that option. The statutes and these implementing regulations also leave to PHAs and owners sufficient discretion to use their authority in a way that serves the best interests of the development and the community.

It should be noted that proposed §§ 5.857(b) is § 5.859(b) in this final rule. Also, the Section 8 fugitive felon provision, proposed 982.553(b)(2)(ii), is located at § 982.310(c)(2)(ii) of the final rule.

H. Evidence of Criminal Activity—§§ 5.861, 966.4(l)(5), and 982.553(c)

Comment. A legal aid organization and a mental health organization challenged this section because the section does not specifically reference a threat posed by the criminal activity to other residents. (Other similar sections cited by the commenter were §§ 882.518(b)(3), 960.203(d), 966.4(l)(5)(iii), and 982.553(c).)

Response. The intent of proposed § 5.858 was not to provide an independent basis for denial of admission or termination of tenancy but to add a provision applicable to all the other sections. HUD has clarified that by adding to that section (§ 5.861 of the final rule) after the words "by a family member" the phrase "in accordance with the provisions of this subpart," and comparable language to § 966.4(l)(5). In fact, §§ 882.518(b)(3), 960.203(d), and 982.553(c) already contain such references.

Comment. Several commenters noted that § 982.553(c) uses the term "household member" as opposed to "covered person"; stated that the same problem is found in § 982.310(c)(1)(B) and (c)(3); and questioned where there is any significance to that difference in terminology.

Response. The statutory restrictions on admission pertain to members of the household, while most (but not all) provisions relating to termination of tenancy refer to actions by the broader category of "covered person" (which includes tenants, guests, and "other persons under the tenant's control"). (As examples of eviction provisions that apply to categories more narrow than "covered person," see § 577 of QHWRA, 42 U.S.C. 13662 (household members) and 42 U.S.C. 1437d(l)(9) (tenants).) The sections in the final rule that apply only to termination of tenancy use the term "covered person," except that, in some

cases where the proposed rule referred to "covered person," the final rule differentiates between tenants, household members and guests and "other persons" in order to clarify potential tenant responsibility for the off-premises actions of others.

Comment. A problem was stated by representatives of owners, PHAs, and tenants: what type of evidence and what standard of evidence should be used to determine that a person has engaged in criminal activity. The proposed rule just stated that the owner or PHA need not rely on an arrest or conviction. Some commenters observed that, in the absence of a conviction, courts have been skeptical of owners seeking to evict a tenant for criminal activity, and owners are generally not prepared to provide their own witnesses to prove such an offense. Proposed solutions included (1) stating only that a conviction is unnecessary; (2) restoring the language of the current § 982.553(c), which authorizes a PHA to terminate assistance when a preponderance of the evidence indicates that a family member has engaged in drug-related or violent criminal activity; and (3) stating who bears the burden of proof and the procedures to be followed. The legal aid organization recommending the second solution said that it interprets this language to mean that the allegation is more likely so than not so. The organization recommends this standard to avoid arbitrary determinations by owners or PHAs.

Response. In the final rule, HUD has adopted the first recommended approach with respect to most programs. Section 5.861 specifies that with respect to eviction for criminal activity, neither an arrest nor a conviction is necessary, and the responsible entity need not satisfy the standard of proof used for a criminal conviction. This provision is replicated elsewhere for public housing (§§ 960.203(d) and 966.4(l)(5)(iii)). For termination of assistance, however, in the Section 8 tenant-based and moderate rehabilitation programs, the final rule retains the reference to preponderance of evidence, since there is no expectation of a court proceeding with respect to this termination of a benefit, and HUD wants to assure that the action is not taken lightly. (See §§ 882.518(d), 982.310(c), and 982.553(c).)

I. Terminating Assistance to Alcohol Abusers—§§ 5.860, 966.4(l)(5), 982.310(c), and 982.553(b)

Comment. A legal services organization criticized these sections for appearing to require abstinence from alcohol to be considered rehabilitated from alcohol abuse that would threaten others. The language of § 982.553(e) of the proposed rule, for example, refers to a "household member who is no longer engaging in such abuse" and successful completion of "a supervised drug or alcohol rehabilitation program."

Response. These provisions (the language of § 982.553(e) is found in § 982.552(c)(2)(iii) of the final rule) relate only to cessation of alcohol "abuse" sufficient to constitute a threat, and to the PHA's option to consider the successful completion of a treatment program. The commenter reads content into the rule that is not there. Therefore, HUD declines to change the rule in response to this comment.

Comment. An owner's representative noted that, although the owner's lease must provide for termination of tenancy for alcohol abuse that threatens the health or safety of other residents, the action to terminate such a tenancy is a voluntary one by the owner. This decreases the potential conflict between human rights protection for alcohol abusers and this rule.

Response. HUD agrees with this comment. No change in the language of the rule is needed.

J. Drug Use and Alcohol Abuse: Consideration of Circumstances—§§ 5.852, 966.4(l)(5), 982.553(e)

Comment. A resident organization objected to the fact that an owner is not required to consider whether the household member involved has completed or is participating in a rehabilitation program. Another organization recommended that the rule make more explicit that a PHA is not required to consider rehabilitation.

Response. The statute clearly states that the PHA or owner may consider whether the person is rehabilitated. The rule reflects this statutory language in § 5.852 of the final rule.

Comment. A legal services organization criticized the organization of the treatment of rehabilitation as a consideration in admission and termination decisions. This commenter recommended creating a stand-alone section on rehabilitation that is then cross-referenced in all of the admission and termination-related sections.

Response. In subpart I of part 5, proposed § 5.860 addressed the issue of rehabilitation, and the final rule continues to address this matter in § 5.852. Each of the specific program regulations contains a comparable provision. Of course, where rehabilitation is an element that would render an applicant not ineligible under the law—with respect to a tenant previously evicted for drug-related criminal activity—the applicable rule provision mentions this element. Additional language to cross-reference these rehabilitation provisions is unnecessary.

Comment. Proposed § 5.860(a) includes three ways of demonstrating rehabilitation: (1) current participation in a supervised program; (2) successful completion of a supervised program; or (3) otherwise having been rehabilitated successfully. A legal aid organization and a mental health organization pointed out in paragraph (b) of this section does not include the third prong in the discussion of the types of evidence that may be submitted by a household member and argues that such persons (who may have succeeded with Alcoholics Anonymous) should not be excluded for lack of proof of participation in a supervised program. (See the comparable provisions in parts 882, 960, and 966.)

Response. HUD has revised the rule in response to this comment (See section 5.852(c) of the final rule).

Comment. One legal aid organization criticized the provision that requires evidence to be provided of participation in rehabilitation program, claiming that the requirement inherently conflicts with the privacy of rehabilitation records and the lack of any obligation on the part of rehabilitation facilities to provide information to PHAs or owners.

Response. The statute contemplates consideration by the PHA or owner of such evidence. (see 42 U.S.C. 13661(b)(2).) In order to be able to consider the evidence, the regulation provides that the PHA or owner may require the applicant or tenant to provide it. In addition, the household could provide the evidence voluntarily to bolster its application for admission or its response to a proposal to terminate tenancy.

Comment. Two organizations representing tenants objected to provisions, such as proposed § 5.860(b)(1), that permit an owner or PHA to require the exclusion from the household of a person who engaged in or is culpable for the drug use or alcohol abuse. They contended that such authority could be used against individuals who have been in recovery for a long period of time and present no threat to other tenants or the premises. They argued that such treatment would constitute a violation of their rights under the Fair Housing Act and the Americans with Disabilities Act.

Response. This provision has no effect unless the owner or PHA has the right under the regulations to deny admission or to terminate tenancy on the basis of

the offending activity. The regulation follows the statute.

Comment. Another commenter suggested that HUD revise the rule's provision for conditional admission or continued assistance to provide that after the eligibility determination is made, the household be allowed to decide whether to revise its composition to eliminate a member whose conduct prevents admission or continued occupancy for the entire household.

Response. Owners and PHAs may permit withdrawal of a problematic family member from the applicant's household once a negative decision has been made, but there is no statutory basis to require them to do so. The final rule addresses this matter in § 5.852.

Comment. A legal organization representing PHA interests and a representative of public housing and Section 8 tenants advocated extending the discretion of PHAs to exclude a household member to avoid evicting innocent family members more broadly than provided in the proposed rule. For example, § 966.4(1)(5)(vi)(B) of the proposed rule would give PHAs the discretion to impose as a condition of continued assistance to family members the exclusion of the household member engaged in alcohol and drug abuse but does not cover criminal activity generally.

Response. In fact, one section currently mentions the authority to exclude culpable family members with respect to any action or failure to act on the part of the family—§ 982.552(c)(2)(ii), as amended on October 21, 1999 (64 FR 56915). On further reflection, HUD has decided that the responsible entity's authority to exclude culpable family members should be stated explicitly, and this authority should apply to any basis for termination. As discussed above, HUD has created a section in 24 CFR part 5 to address this issue, § 5.852, and HUD has revised sections that previously just applied to drug and alcohol abuse to deal more broadly with a responsible entity's authority in this area. HUD has revised § 982.552(c) to reflect a PHA's authority generally in screening and eviction.

K. Access to Criminal and Drug Treatment Records and Information—§§ 5.903, 5.905, 960.204, 960.205 and 982.553

Comment. A legal organization representing PHA interests suggested that information about a person being subject to a lifetime sex offender registration requirement might be obtained in more than one way. The organization requested that the rule require denial of admission to an applicant if law enforcement authorities inform the owner or PHA that a member of the household is subject to such a requirement, making the public document check or PHA criminal history background check unnecessary in such a circumstance.

Response. The method a responsible entity uses to assure that it is not admitting a person ineligible on this basis is up to the responsible entity, based on its assessment of good business practice. The primary regulatory provision on sex offender registration verification is § 5.905, which applies only to obtaining records under section 578 of the 1998 Act (42 U.S.C. 13663). (See also §§ 960.204(a)(4) and 982.553(a)(2)(ii).) A responsible entity may verify such information in another manner, such as obtaining information lawfully from law enforcement agencies or other sources, or directly accessing a listing of persons subject to a lifetime registration requirement under a State sex offender registration program.

Comment. A PHA asked what agencies maintain information about persons who are subject to a lifetime sex offender registration requirement. The PHA stated that its local law enforcement agencies do not keep this information.

Response. Many states have passed legislation that authorizes the establishment of automated data bases that provide information on all registered sex offenders. (For example, the Texas Department of Public Safety maintains a web site at www.sexoffenders.com with this information, in compliance with State law.) In states where an automated system is not yet in operation, a responsible entity may need to perform another form of criminal history check. In such States, a computerized inquiry may generate a message that suggests contacting the Governor's office or District Attorney to obtain information on registered sex offenders.

Comment. A PHA organization objected to the provisions of § 5.902(d) and (e) of the proposed rule, which provide for PHAs to obtain records for owners and to apply owners' admissions standards, and the underlying statutory provisions. The organization stated that PHAs are not in the business of interpreting leases and owners' application criteria and that this function is not consistent with the responsibility or mission of public housing.

Response. The statute (42 U.S.C. 1437d(q)(1)(B) requires these procedures, which are found in § 5.903 of the final rule.

Comment. A legal organization representing PHA interests suggested that § 5.902(f) of the proposed rule be modified to provide that a PHA could condition the performance of criminal records checks and applying the owner's admissions standards on obtaining a reasonable agreement with the owner holding the PHA harmless from costs associated with third-party claims and litigation arising out of the performance of these services. The organization recommended that the rule specifically hold PHAs harmless from legal actions directed at the owner because of the owner's admission policies, action or inaction, and regarding the owner's use of criminal conviction records, should the PHA be required to disclose them in accordance with § 5.902(f)(8) of the proposed rule.

Response. Congress has made performance of these criminal records checks for owners part of the responsibilities of PHAs. (See 42 U.S.C. 1437d(q)(1)(B).) They must, therefore, perform them in accordance with legal requirements, including the requirements not to act negligently and to adhere to confidentiality provisions of the statute. However, HUD agrees that PHAs should not be required to absorb costs incurred as the result of being brought into litigation arising from a challenge to the validity of an owner's admission standards.

The final rule makes two changes in response to this comment. Paragraph (d)(4) of § 5.903 provides that the reasonable costs incurred by a PHA for which the PHA is entitled to reimbursement includes not only any fees charged to the PHA by the law enforcement agency but also the PHA's own related staff and administrative costs. The administrative costs would include a portion of insurance costs to cover any potential liability for performing functions for owners and litigation costs that are solely attributable to the owner's policies. With respect to release of criminal records to the owner, § 5.903(e)(2) of the final rule provides protection for a PHA requested to release records in connection with an eviction. The new paragraph provides that the PHA may rely on an owner's certification that the criminal record is necessary to proceed with a judicial eviction to evict the tenant based on criminal activity of the identified household member as demonstrated by the criminal conviction record.

Comment. An owner's representative suggested that HUD require current residents to sign consent release forms

for criminal background checks at the annual reexaminations. Otherwise, problem tenants may refuse to sign a consent form.

Response. The occasion for residents to sign a consent form for verifications related to their occupancy of assisted housing is not currently prescribed by regulation. HUD declines to change that policy in this rulemaking, but is exploring a possible change in this policy in the future.

Comment. One PHA reported that the FBI has refused to give the PHA the identification number that is necessary to access the background records because the PHA does not administer a public housing program, in addition to its Section 8 housing assistance programs.

Response. Section 575(c) of the QHWRA expanded the applicability of criminal background check authority from "public housing" to "covered housing assistance," which includes tenant-based and project-based assistance under Section 8. That section also required that a PHA receiving information on behalf of an owner keep the information it receives confidential, in accordance with regulations to be prescribed by HUD. Therefore, the FBI is awaiting publication of this final rule before providing access to criminal records to PHAs that do not administer a public housing program.

Comment. A PHA and a representative of housing owners reported that private apartment owners routinely obtain criminal conviction records, as well as numerous other types of confidential records, directly or through firms that provide screening services. They questioned the need to give PHAs responsibility to obtain such records and apply the owner's criteria to screen applicants. One suggested this only be done where an owner certifies and documents that it is unable to access criminal conviction records directly or through a readily available service. The other recommended that the rule authorize owners to obtain the records directly and require them to establish a system of records management that would adequately safeguard them.

Response. The final rule is not changed with respect to this request. The statute does not require that access through PHAs be a last resort. This rule does not prevent owners from obtaining records in another way, as stated in § 5.903 of the final rule.

Comment. A PHA indicated that the rule provisions authorizing PHAs to charge owners a fee for obtaining criminal records relevant to the owner's admission or occupancy standards ignore the difficulty of establishing what is a reasonable fee. How will disputes be resolved? Other PHAs indicated that they do not have the staff to perform the criminal records (or sex offender registration) check function, and charging a fee could not provide sufficient compensation for them to hire additional staff. They also objected to expecting a PHA to review owners' policies and make decisions regarding admission for the owners, saying it would be an undue burden and would subject the PHA to potential liability.

Response. The statute requires PHAs to perform the function. They may, however, pass along the costs attributable to performing this function to the owner. See discussion above responding to concerns about liability. HUD trusts that owners and PHAs will be able to reach agreement on reasonable fees to reimburse PHAs for their costs.

Comment. Two State housing finance agencies and an organization representing State housing agencies questioned whether the statute and regulation requiring a PHA to obtain criminal records on behalf of an owner apply to their operation of Section 8 New Construction and Substantial Rehabilitation projects. Although they agreed that criminal records are required to be provided by PHAs administering "covered housing assistance," which does include such projects, they stated that the term used with respect to owner requests for assistance is "project-based assistance under Section 8," which is defined in section 8(f)(6) not to include new construction and substantial rehabilitation projects. They argued that project owners should be responsible for performing this function.

Response. The legislative history indicates a clear intent to cover new construction and substantial rehabilitation projects under the provision requiring PHA performance of this function. (See H.R. 2, 105th Cong., 2d Sess. § 641, and especially § 645; S. 462, 105th Cong., 2d Sess. §§ 301 and 305 (1998).)

Comment. One of these State housing finance agencies took the approach that none of the provisions of Subpart J, concerning criminal background checks, should be applicable to State housing finance agencies. The agency argued that it entered the program as a financier of projects, using that skill to get the projects built, and criminal background checks were not required at that time. The State agency's skills are not related to the skills necessary for this function, and owners can get this kind of information in other ways. "Addition of this responsibility is a unilateral expansion of a PHA's responsibilities, not only with respect to the projects whose HAP contracts the PHA administers, but also with respect to any assisted housing that exists within the PHA's jurisdiction, whether or not there is a contractual relationship between the PHA and the owner."

Response. The rule is not changed, because the statute applies this provision to all PHAs, including State housing finance agencies that are administering programs covered under 24 CFR 5.100.

Comment. Section 5.902(e)(1)(i) of the proposed rule permits use of criminal conviction records for applicant screening for all the covered programs. However, § 5.902(e)(1)(ii) of the proposed rule explicitly excludes the Section 8 tenant-based assistance program from using the records for lease enforcement and eviction. This poses a problem in persuading owners to participate in the program, according to two representatives of owners.

Response. This distinction is based on the statute. Section 6(q)(1)(B) of the 1937 Act is limited to obtaining information for owners of project-based Section 8 projects.

Comment. A legal aid organization pointed out that § 966.4(l)(5) of the proposed rule provides that public housing leases must provide that if a "PHA seeks to terminate the tenancy for criminal activity as shown by a criminal record, the PHA must provide the tenant with a copy of the criminal record before a PHA grievance hearing or court trial concerning the termination of tenancy or eviction, and the tenant must be given an opportunity to dispute the accuracy and relevance of that record in the grievance hearing or court trial." Section 982.553(d) contains a similar provision with respect to the Section 8 tenant-based assistance program. However, § 5.902 of the proposed rule does not provide an applicant or tenant of a Section 8 project-based project the right to see and dispute the accuracy and relevance of a criminal conviction, as required by the statute (section 6(q)(2) of the 1937 Act). Tenants of project-based assistance should have this opportunity to dispute a record to be used in case of denial of admission, lease enforcement and/or eviction. The PHA that obtains the records should be the entity that provides the right to dispute the accuracy or relevance of the record.

Response. Section 5.903(g) of the proposed rule (§ 5.903(f) of the final rule) provides for the PHA to offer such an opportunity with respect to sex offender registration information. A

similar paragraph has been added to the general criminal records section and to § 966.4(l)(5).

Comment. A PHA stated that § 966.4(l)(5)(iv) of the proposed rule is inconsistent with § 966.51(a)(2), which permits a PHA to omit a grievance hearing and proceed directly with court action where there is a termination of tenancy or eviction that involves threat to the health, safety, or right to peaceful enjoyment of the premises by other tenants or employees of the PHA or any drug-related criminal activity.

Response. Under § 966.51(a)(2), the opportunity to dispute the accuracy and relevance of the record required by § 966.4(l)(5) may be provided at the eviction proceeding rather than at a grievance hearing, if the direct eviction proceeding is authorized.

Comment. A legal aid organization stated that the rule does not give tenants a chance to dispute the criminal record and its relevancy before the adverse action is taken, i.e., before the eviction action is filed in court. The organization bases the right of tenants to have this opportunity on section 6(q)(2) of the 1937 Act, which requires that before an adverse action is taken with respect to assistance under the assisted housing programs on the basis of a criminal record, the PHA must provide the tenant or applicant a copy of the record an opportunity to dispute the accuracy and relevance of the record. The organization recommends changing the rule language allowing the challenge "in the grievance hearing or court trial" to allowing this challenge "before the grievance hearing or commencement of court proceedings."

Response. Allowing the record to be disputed in the grievance hearing or the trial, rather than before such events, protects tenants and applicants sufficiently from "adverse action" and comports with due process. The actual adverse action does not occur until the completion of the proceeding. HUD declines to add an unnecessary layer of administrative proceedings.

Comment. A legal aid organization also recommended that the rule include a statement that the rule does not preempt any state law that provides stronger protections for the subject of criminal record inquiries, such as where the opportunity to dispute is stronger.

Response. Congress did not address the issue of preemption, and HUD declines to generalize.

Comment. A legal services organization and a mental health organization objected to the language of § 960.204(c)(3) of the proposed rule requiring a drug abuse treatment facility to provide information at the request of a PHA. They stated that the law governing release of such information, the Public Health Service Act (42 U.S.C. 290dd–2) and implementing regulations (42 CFR part 2), authorizes but does not require the release of information if the patient has signed an appropriate consent form. They urged HUD to remove this paragraph. A legal organization representing PHAs took the other side of the argument. This organization stated that drug treatment facilities should be required to provide the information requested by PHAs as long as the request is made consistent with the Public Health Service Act. Such information is necessary to successful implementation of the provisions of the 1998 Act.

Response. The 1998 Act does not require release of the information. The Act states that the facility will not be liable for damages for releasing information if done consistent with the Public Health Service Act. The final rule (in § 960.205, which now addresses this matter) removes the subject paragraph, relying instead on the paragraph that emphasizes the lack of liability for proper release.

Comment. Section 960.204(c) of the proposed rule should reference the Public Health Service Act, 42 U.S.C. 290dd-2 and the HHS implementing regulations, 42 CFR part 2, to make sure that PHAs are aware of all the relevant law, according to a legal aid organization. HUD should provide a model form to be used for consent to access treatment facility records.

Response. The proposed rule did reference the statute in § 960.204(d)(3). The final rule adds the requested statutory and regulatory reference to § 960.205(c)(1).

Comment. To conform to section 6(t) of the 1937 Act, there are two points at which the rule must assure nondiscrimination, a legal aid organization insists. First, § 960.204(c) must be revised to clarify that the treatment facility consent form may only be requested of an applicant if all applicants are asked to sign such a form. Second, the PHA must make inquiry only about every applicant or about every applicant that satisfies the statutory criteria related for special interest. This commenter urged HUD to use the carefully crafted language of the statute on this point.

Response. The final rule (in § 960.205(c)) clarifies that a PHA may require an applicant to sign a consent form for obtaining information from a drug abuse treatment facility only if all applicants are required to provide such consent.

Comment. Section 960.204(d) of the proposed rule recognizes the authority of a treatment facility to charge the PHA a fee for providing information. A legal aid organization suggests that the rule clarify that there is no statutory basis for the PHA to pass these fees on to the applicant or resident.

Response. The statute is silent with respect to this issue. However, historically the costs for obtaining and verifying necessary information to admit applicants and make subsequent determinations about their income and rent have been considered an expense of doing business for the PHA or owner, covered through the administrative fee or operating subsidy (see §§ 5.903(d)(4) and 982.553(d)(3)), since the purpose of the programs is to serve low income families. Therefore, consistent with current HUD policy, the rule (§ 960.205(d)(5)) prohibits PHAs and owners from passing on the cost of obtaining drug abuse treatment facility records to applicants or residents.

Comment. The question of a PHA's liability for its policy on using a consent form for applicants to inquire about them at drug abuse treatment facilities is not addressed in the rule, one PHA stated. Proposed § 960.204(e) describes the two possible policies that are permitted. Another paragraph should be added to declare that a PHA will not be liable for damages based on which policy the PHA adopts.

Response. Section 960.205(d)(4) of the final rule is clear that the PHA is not liable if the PHA does not request or receive information of this sort.

L. Management of Records—5.903(g), and 960.205(f)

Comment. PHAs and the FBI commented on management of the records. (Proposed § 960.204(f)(1)(iii)(B) provides that a drug abuse treatment facility record be destroyed after the statute of limitations for a civil action has expired—presumably without a suit having been filed. Sections 5.902(g) and 5.903(f) of the proposed rule provide more generally that criminal records must be destroyed once the purpose for which the record was requested has been accomplished.) PHAs objected to keeping the record of criminal conviction separate from the applicant or tenant file and to the requirement that the record be destroyed once it is no longer needed. Their concern is that they would not have ready access to the record to defend a denial of admission to a program.

Response. To assure the confidentiality of criminal records, the final rule (§ 5.903(g)) adopts the approach used with respect to drug

abuse treatment facility records for criminal records. The records must be destroyed when the purpose(s) for which the record was requested has been accomplished and the time has expired for a challenge to the action being taken without the institution of a court action, or final disposition of any such litigation has been concluded. We note that a PHA might use application and consent forms that apply to all of its housing programs. In that case, the PHA might retain a record until it had acted on the application with respect to all of its programs before concluding that all of the purposes for which the record was sought have been accomplished. This authority in no way prevents a PHA from disposing of the record after using it with respect to the first program on which the PHA makes a determination and obtaining more recent records before making a subsequent determination for another program with respect to the same applicant.

Comment. Proposed § 960.204(f) addresses when treatment facility information must be destroyed. A legal aid organization stated that the statute's provision that an applicant's consent expires 5 days after the PHA's decision to approve or deny the application, means that the rule should provide for destruction of the record containing such information 5 days after the decision to approve the application. The record should not be allowed to be kept until 5 days after admission to a unit, since placement on a waiting list might take place substantially before admission to a unit.

Response. The rule does not delay destruction of the record until actual admission. Section 960.205(c)(2) of the final rule provides that the consent form expires automatically after the PHA makes the final decision to either approve or deny the admission of such person. However, § 960.205(f) provides that, if the person is denied admission, the record is to be destroyed in a timely manner after the statute of limitations for a civil action challenging the denial has expired. This provision tracks the statute and is necessary to assure that the PHA has the necessary records to respond to possible litigation. The final rule expands on this provision so that, if a court challenge is filed, the rule permits preservation of the record until final disposition of the action.

Comment. On the other side of the issue, the FBI wanted the actual criminal record to be sealed. The FBI stated that although the applicant or tenant's record would have to refer to the existence of a criminal record concerning a household member, the actual record should not be maintained in a manner to allow access for unofficial purposes.

Response. In view of the penalties for unauthorized disclosure provided by section 6(q)(1) of the 1937 Act—misdemeanor conviction, $5,000 fine, and liability for damages and attorney fees and costs—the agencies have agreed that it is unnecessary to provide that the record be sealed.

Comment. A PHA objected to the requirement of proposed § 960.204(c)(2) that requires that the consent form used to obtain information from a drug treatment facility expire automatically after the PHA has made a final decision to approve or disapprove an application for admission. A single consent form is routinely used for many agencies, which is often updated annually.

Response. The statute specifies this limitation (found in § 960.205(c)(2) of the final rule). PHAs can alter the consent forms they use to address the statutory requirement.

Comment. A legal aid organization recommended that the penalties for violation of confidentiality obligations be stated clearly in any section dealing with access to criminal records. The organization also recommended that PHAs be instructed in the use of NCIC records, especially the fact that any incident for which there is no final disposition must be treated as if the subject is innocent.

Response. The final rule includes reference to the penalties for violation of confidentiality obligations, as well as referencing that some sources (such as the NCIC) may specify how their records are to be used. (See revised § 5.903 of the final rule.)

Comment. In connection with use of a criminal conviction record in judicial eviction proceedings, the FBI wanted the PHA (and not the owner) to retain the records if the PHA took responsibility for initiating the proceedings. If the information must be provided to owners, the FBI recommended establishing a penalty for misuse of the information similar to that provided for misuse by officers, employees, and authorized representatives of a PHA. And the consent form used by owners should reflect the possible use of criminal records in an eviction action.

Response. The statute provides that "any person" who knowingly and willfully discloses criminal records information obtained under the authority of section 575 of the 1998 Act to an individual not authorized by law to receive it is subject to conviction of a misdemeanor and a fine of up to $5,000. The statute gives examples of who is covered by the term "any person" that relate to PHA agents—not project owners, but the words do not limit the term's meaning to PHA agents. The final rule includes project owners in the examples of entities who may be subject to a criminal penalty. The statute does not appear to authorize civil liability against any entity other than a PHA, so the rule reflects that conclusion. The rule is silent about the content of the owner's consent form.

Comment. Section 960.203(e) of the proposed rule provides that before denying admission to the public housing program on the basis of a criminal record, the PHA must provide the "household" with a copy of the record. Section 982.553(d) has a comparable provision, using the term "family" instead of "household." The FBI commented that dissemination of criminal records is limited to those with authorization (such as the PHA) and the person who is the "subject" of the record, not to other persons in the household.

Response. The final rule reflects HUD's statutory requirement to provide information to the applicant or tenant to permit the applicant or tenant to dispute the accuracy or relevance of the record. (See §§ 5.903, 5.905, 960.205, 966.4, and 982.553, implementing 42 U.S.C. 1437d(q) and 13663(d).)

Comment. If a PHA currently obtains criminal conviction records, i.e., without the authority of the new rule, and obtains drug abuse treatment program records without this new authority, is the PHA free of the restrictions on records management imposed by the new rule? Although § 5.903(f)(2) of the proposed rule, concerning sex offender registration, and § 960.204(f), concerning drug abuse treatment program information, refer to information received under the authority of their provisions, § 5.902 of the proposed rule, concerning criminal conviction records, is not so limited. The final rule should emphasize that current information collection practices dealing with all of these subjects may continue unaffected by the new rule.

Response. The rule does not affect other means used by PHAs to verify suitability for admission. However, HUD cautions PHAs and owners to handle any information obtained from other records in accordance with applicable State and Federal privacy laws and with the provisions of the consent forms signed by applicants.

Comment. A legal services organization urged HUD to emphasize, in the rule or preamble, that a PHA or owner cannot avoid the records safeguards of this rule by requiring the

applicant to obtain the information for them. PHAs and owners should be directed not to rely on criminal conviction records obtained from credit reports.

Response. The final rule clarifies that records received directly from the family are subject to the limitations of this subpart. Since PHAs and owners may determine that a household member has engaged in criminal activity without relying on a conviction, HUD is not prohibiting them from consulting evidence from sources other that those provided under proposed 24 CFR part 5, subpart I.

M. Miscellaneous

Comment. One criticism of the rule's organization was that any provision that might involve access to criminal records or lifetime sex offender registries should include a cross-reference to the sections stating the requirements for gaining access, and the associated protections.

Response. The final rule adds these cross-references to 24 CFR part 5, subpart J. (See §§ 882.518(b)(3), 960.204, 966.4(l)(5), 982.310(c)(3), and 982.553(d).)

Comment. A legal services organization criticized the revision of § 966.4(l)(2)(i) of the proposed rule on the basis that HUD's revision eliminates the distinction between serious lease violations and minor lease violations. The organization stated that this section, as revised, categorizes as serious "any violation of a household obligation under § 966.4(f)." This commenter recommended that the paragraph be revised to state that a serious lease violation "includes a serious violation of any material term of the lease or a serious violation of any household obligation described in paragraph (f) of this section."

Response. The final rule follows the organization of this section made by another recently published final rule that addresses admission and occupancy issues (65 FR 16730–16731, March 29, 2000). That rule restored the language concerning serious lease violations that this commenter favored. This final rule now only adds the provisions needed in this section to implement the provisions of the 1998 Act.

Comment. A representative of PHA interests suggested that the rule authorize termination of tenancy in two additional cases: (1) where the PHA attempted to obtain criminal background information before admitting an applicant but only discovers after admission the facts that should have disqualified the tenant because of a criminal conviction; and (2) where the tenant is found to have made one or more material false statements or omissions or otherwise committed fraud in connection with any application for assistance or recertification. The commenter stated that this would afford PHAs a method of avoiding tort exposure that might result from the continued presence of potentially dangerous individuals.

Response. In the final rule, these two examples have replaced the examples relating to criminal activity stated as "other good cause" in the proposed rule. (Criminal activity is already specifically listed as a grounds for termination under paragraphs (l)(2)(ii), referring to paragraph (l)(5) of § 966.4.)

Comment. A representative of assisted tenants recommended that HUD endorse the practice of using an informal fact finding committee before terminating any tenancy. The committee, to be composed of tenants and staff, could interview residents and neighbors and investigate allegations of criminal or drug-related incidents, making findings of fact on which a decision to proceed with termination would be based. Another residents' representative recommended that the final rule require all PHAs to establish a panel of residents and PHA staff to set policy and oversee implementation of the PHA's grievance procedure.

Response. Owners of project-based assistance developments are encouraged to employ administrative actions to resolve potential eviction cases before resorting to court action. The rule does not prescribe particular procedures. PHA grievance procedure operation is unchanged in this rule.

Comment. A PHA was disappointed that the rule does not address how to handle domestic violence, which is often related to drug and alcohol abuse, and for which eviction is often a remedy that would penalize the victim. The PHA recommended that HUD require tenants who are victims or perpetrators of domestic violence to counseling within 72 hours of the occurrence. Only after such counseling is ineffective would eviction proceedings be initiated.

Response. If a responsible entity has grounds to evict a family because of domestic violence (for violent criminal activity), then the entity has the authority to take various actions short of eviction. Those may include the counseling suggested by the commenter or permitting continued occupancy on condition that the household member who has committed the domestic violence is removed from the lease and vacates the unit.

IV. Findings and Certifications

Paperwork Reduction Act

The information collections contained in §§ 5.853, 5.854, 5.855, 5.903, 5.905, 882.517, 960.205a, and 982.553 have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) and assigned OMB approval number 2577–0232. 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.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in connection with publication of the proposed rule, in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). The Finding is applicable to this final rule and is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This final rule does not impose a Federal mandate that will result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year within the meaning of Unfunded Mandates Reform Act of 1995.

Executive Order 12866

The Office of Management and Budget (OMB) reviewed this final rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this final rule is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the final rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) (the RFA), has reviewed and approved this final rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The reasons for HUD's determination were described in some detail in the preamble to the proposed rule, and they are applicable to this final rule, as well. No public comments addressed this issue, in response to the specific request for comment regarding any less burdensome alternatives to the proposed rule that would meet HUD's objectives as described in that rule.

Executive Order 13132, Federalism

This final rule does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of Executive Order 13132.

Catalog

The Catalog of Federal Domestic Assistance numbers for the programs affected by this interim rule are 14.120, 14.195, 14.850, 14.855 and 14.857.

List of Subjects

24 CFR Part 5

Administrative practices and procedures, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 200

Administrative practice and procedure, Aged, Civil rights, Grant programs—housing and community development, Loan programs—housing and community development, Reporting and recordkeeping requirements.

24 CFR Part 247

Grant programs—housing and community development, Loan programs—housing and community development, Low and moderate income housing, Rent subsidies.

24 CFR Part 880

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 882

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

24 CFR Part 884

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements, rural areas.

24 CFR Part 891

Aged, Capital advance programs, Civil rights, Grant programs—housing and community development, Individuals with disabilities, Loan programs—housing and community development, Low- and moderate-income housing, Mental health programs, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 960

Aged, Grant program—housing and community development, Individuals with disabilities, Public housing.

24 CFR Part 966

Grant programs—housing and community development, Public housing.

24 CFR Part 982

Grant programs—housing and community development, Housing, Rent subsidies, Reporting and recordkeeping requirements.

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 42 U.S.C. 3535(d), unless otherwise noted.

2. Amend § 5.100 by adding the definitions of *covered person, drug, drug-related criminal activity, federally assisted housing, guest, household, other person under the tenant's control, premises,* and *violent criminal activity* in alphabetical order:

§ 5.100 Definitions.

Covered person, for purposes of 24 CFR 5, subpart I, and parts 966 and 982, means a tenant, any member of the tenant's household, a guest or another person under the tenant's control.

* * * * *

Drug means a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

Drug-related criminal activity means the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug.

* * * * *

Federally assisted housing (for purposes of subparts I and J of this part) means housing assisted under any of the following programs:

(1) Public housing;

(2) Housing receiving project-based or tenant-based assistance under Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. 1437f);

(3) Housing that is assisted under section 202 of the Housing Act of 1959, as amended by section 801 of the National Affordable Housing Act (12 U.S.C. 1701q);

(4) Housing that is assisted under section 202 of the Housing Act of 1959, as such section existed before the enactment of the National Affordable Housing Act;

(5) Housing that is assisted under section 811 of the National Affordable Housing Act (42 U.S.C. 8013);

(6) Housing financed by a loan or mortgage insured under section 221(d)(3) of the National Housing Act (12 U.S.C. 1715*l*(d)(3)) that bears interest at a rate determined under the proviso of section 221(d)(5) of such Act (12 U.S.C. 1715*l*(d)(5));

(7) Housing insured, assisted, or held by HUD or by a State or local agency under section 236 of the National Housing Act (12 U.S.C. 1715z–1); or

(8) Housing assisted by the Rural Development Administration under section 514 or section 515 of the Housing Act of 1949 (42 U.S.C. 1483, 1484).

* * * * *

Guest, only for purposes of 24 CFR part 5, subparts A and I, and parts 882, 960, 966, and 982, means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. The requirements of parts 966 and 982 apply to a guest as so defined.

* * * * *

Household, for purposes of 24 CFR part 5, subpart I, and parts, 960, 966, 882, and 982, means the family and PHA-approved live-in aide.

* * * * *

Other person under the tenant's control, for the purposes of the definition of *covered person* and for parts 5, 882, 966, and 982 means that the person, although not staying as a guest (as defined in this section) in the unit, is, or was at the time of the activity in question, on the premises (as *premises* is defined in this section)

because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not *under the tenant's control.*

Premises, for purposes of 24 CFR part 5, subpart I, and parts 960 and 966, means the building or complex or development in which the public or assisted housing dwelling unit is located, including common areas and grounds.

* * * * *

Violent criminal activity means any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage.

3. Amend part 5 by adding new subparts I and J, to read as follows:

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

General

Sec.

5.850 Which subsidized housing is covered by this subpart?
5.851 What authority do I have to screen applicants and evict tenants?
5.852 What discretion do I have in screening and eviction actions?
5.853 Definitions.

Denying Admissions

5.854 When must I prohibit admission of individuals who have engaged in drug-related criminal activity?
5.855 When am I specifically authorized to prohibit admission of individuals who have engaged in criminal activity?
5.856 When must I prohibit admission of sex offenders?
5.857 When must I prohibit admission of alcohol abusers?

Terminating Tenancy

5.858 When authority do I have to evict drug criminals?
5.859 When am I specifically authorized to evict other criminals?
5.860 When am I specifically authorized to evict alcohol abusers?
5.861 What evidence of criminal activity must I have to evict?

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

General

§ 5.850 Which subsidized housing is covered by this subpart?

(a) If you are the owner of federally assisted housing, your federally assisted housing is covered, except as provided in paragraph (b) or (c) of this section.

(b) If you are operating public housing, this subpart does not apply, but similar provisions applicable to public housing units are found in parts 960 and 966 of this title. If you administer tenant-based assistance under Section 8 or you are the owner of housing assisted with tenant-based assistance under Section 8, this subpart does not apply to you, but similar provisions that do apply are located in part 982 of this title.

(c) If you own or administer housing assisted by the Rural Housing Administration under section 514 or section 515 of the Housing Act of 1949, this subpart does not apply to you.

§ 5.851 What authority do I have to screen applicants and to evict tenants?

(a) *Screening applicants.* You are authorized to screen applicants for the programs covered by this part. The provisions of this subpart implement statutory directives that either *require* or *permit* you to take action to deny admission to applicants under certain circumstances in accordance with established standards, as described in this subpart. The provisions of this subpart do not constrain your authority to screen out applicants who you determined are unsuitable under your standards for admission.

(b) *Terminating tenancy.* You are authorized to terminate tenancy of tenants, in accordance with your leases and 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, as provided in 42 U.S.C. 1437f, 1437n, and 13662, in accordance with established standards, as described in this subpart. You retain authority to terminate tenancy on any basis that is otherwise authorized.

§ 5.852 What discretion do I have in screening and eviction actions?

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

(1) The seriousness of the offending action;

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

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

(4) The effect of denial of admission or termination of tenancy on household members not involved in the offending action;

(5) The demand for assisted housing by families who will adhere to lease responsibilities;

(6) The extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action; and

(7) The effect of the responsible entity's action on the integrity of the program.

(b) *Exclusion of culpable household member.* You may require an applicant (or tenant) to exclude a household member in order to be admitted to the housing program (or continue to reside in the assisted unit), where that household member has participated in or been culpable for action or failure to act that warrants denial (or termination).

(c) *Consideration of rehabilitation.* (1) In determining whether to deny admission or terminate tenancy for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, you may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. 13661). For this purpose, you may require the applicant or tenant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(2) If rehabilitation is not an element of the eligibility determination (see § 5.854(a)(1) for the case where it must be considered), you may choose not to consider whether the person has been rehabilitated.

(d) *Length of period of mandatory prohibition on admission.* If a statute requires that you prohibit admission of persons for a prescribed period of time after some disqualifying behavior or

event, you may apply that prohibition for a longer period of time.

(e) *Nondiscrimination limitation.* Your admission and eviction actions must be consistent with fair housing and equal opportunity provisions of § 5.105.

§ 5.853 Definitions.

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

(b) *Additional terms* used in this part are as follows.

Currently engaging in. With respect to behavior such as illegal use of a drug, other drug-related criminal activity, or other criminal activity, *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.

Owner. The owner of federally assisted housing.

Responsible entity. For the Section 8 project-based certificate or project-based voucher program (part 983 of this title) and the Section 8 moderate rehabilitation program (part 882 of this title), *responsible entity* means the PHA administering the program under an Annual Contributions Contract with HUD. For all other federally assisted housing, the responsible entity means the owner of the housing.

Denying Admissions

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

(a) You *must* prohibit admission to your federally assisted housing of an applicant for three years from the date of eviction if any household member has been evicted from federally assisted housing for drug-related criminal activity. However, you may admit the household if:

(1) The evicted household member who engaged in drug-related criminal activity has successfully completed an approved supervised drug rehabilitation program; or

(2) The circumstances leading to the eviction no longer exist (for example, the criminal household member has died or is imprisoned).

(b) You *must* establish standards that prohibit admission of a household to federally assisted housing if:

(1) You determine that any household member is currently engaging in illegal use of a drug; or

(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 may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

§ 5.855 When am I specifically authorized to prohibit admission of individuals who have engaged in criminal activity?

(a) You may prohibit admission of a household to federally assisted housing under your standards if you determine that any 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*).

(c) If you previously denied admission to an applicant because of a determination concerning a member of the household under paragraph (a) of this section, you may reconsider the applicant if you have sufficient evidence that the members of the household are not currently engaged in, and have not engaged in, such criminal activity during a reasonable period, determined by you, before the admission decision.

(1) You would have *sufficient evidence* if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which you verified. (See subpart J of this part for one method of checking criminal records.)

(2) For purposes of this section, a household member is *currently engaged in* the criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

§ 5.856 When must I prohibit admission of sex offenders?

You must establish standards that prohibit admission to federally assisted housing if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In the screening of applicants, you must perform necessary criminal history background checks in the State where the housing is located and in other States where the household members are known to have resided. (See § 5.905.)

§ 5.857 When must I prohibit admission of alcohol abusers?

You must establish standards that prohibit admission to federally assisted housing if you determine you have reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

Terminating Tenancy

§ 5.858 What authority do I have to evict drug criminals?

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 grounds for you to terminate tenancy. 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 interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

§ 5.859 When am I specifically authorized to evict other criminals?

(a) *Threat to other residents.* The lease *must* provide that the owner may terminate tenancy for any of the following types of criminal activity by a covered person:

(1) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or

(2) 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.

(b) *Fugitive felon or parole violator.* The lease *must* provide that you may terminate the tenancy during the term of the lease if a tenant 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.

§ 5.860 When am I specifically authorized to evict alcohol abusers?

The lease must provide that you may terminate the tenancy if you determine 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.

§ 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, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying a criminal conviction standard of proof of the activity.

Subpart J—Access to Criminal Records and Information

Sec.
5.901 To what criminal records and searches does this subpart apply?
5.902 Definitions.
5.903 What special authority is there to obtain access to criminal records?
5.905 What special authority is there to obtain access to sex offender registration information?

Subpart J

Access to Criminal Records and Information

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

(a) *General criminal records searches.* This subpart applies to criminal conviction background checks by PHAs that administer the Section 8 and public housing programs when they obtain criminal conviction records, under the authority of section 6(q) of the 1937 Act (42 U.S.C. 1437d(q)), from a law enforcement agency to prevent admission of criminals to public housing and Section 8 housing and to assist in lease enforcement and eviction.

(b) *Sex offender registration records searches.* This subpart applies to PHAs that administer the Section 8 and public housing programs when they obtain sex offender registration information from State and local agencies, under the authority of 42 U.S.C. 13663, to prevent admission of dangerous sex offenders to federally assisted housing.

(c) *Excluded records searches.* The provisions of this subpart do not apply to criminal conviction information or sex offender information searches by a PHA or others of information from law enforcement agencies or other sources other than as provided under this subpart.

§ 5.902 Definitions.

(a) *Terms found elsewhere.* The following terms used in this subpart are defined in subpart A of this part: *1937 Act, drug, federally assisted housing, household, HUD, public housing, public housing agency (PHA), Section 8.*

(b) *Additional terms* used in this subpart are as follows:

Adult. A person who is 18 years of age or older, or who has been convicted of a crime as an adult under any Federal, State, or tribal law.

Covered housing. Public housing, project-based assistance under section 8 (including new construction and substantial rehabilitation projects), and tenant-based assistance under section 8.

Law enforcement agency. The National Crime Information Center (NCIC), police departments and other law enforcement agencies that hold criminal conviction records.

Owner. The owner of federally assisted housing.

Responsible entity. For the public housing program, the Section 8 tenant-based assistance program (part 982 of this title), the Section 8 project-based certificate or project-based voucher program (part 983 of this title), and the Section 8 moderate rehabilitation program (part 882 of this title), *responsible entity* means the PHA administering the program under an Annual Contributions Contract with HUD. For all other Section 8 programs, responsible entity means the Section 8 owner.

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

(a) *Authority.* If you are a PHA that administers the Section 8 program and/or the public housing program, this section authorizes you to obtain criminal conviction records from a law enforcement agency, as defined in § 5.902. You may use the criminal conviction records that you obtain from a law enforcement agency under the authority of this section to screen applicants for admission to covered housing programs and for lease enforcement or eviction of families residing in public housing or receiving Section 8 project-based assistance.

(b) *Consent for release of criminal conviction records.* (1) In order to obtain access to records under this section, as a responsible entity you must require every applicant family to submit a consent form signed by each adult household member.

(2) By execution of the consent form, an adult household member consents that:

(i) Any law enforcement agency may release criminal conviction records concerning the household member to a PHA in accordance with this section;

(ii) The PHA may receive the criminal conviction records from a law enforcement agency, and may use the records in accordance with this section.

(c) *Procedure for PHA.* (1) When the law enforcement agency receives your request, the law enforcement agency must promptly release to you a certified copy of any criminal conviction records concerning the household member in the possession or control of the law enforcement agency. NCIC records must be provided in accordance with NCIC procedures.

(2) The law enforcement agency may charge you a reasonable fee for releasing criminal conviction records.

(d) *Owner access to criminal records.*—(1) *General.* (i) If an owner submits a request to the PHA for criminal records concerning an adult member of an applicant or resident household, in accordance with the provisions of paragraph (d) of this section, the PHA must request the criminal conviction records from the appropriate law enforcement agency or agencies, as determined by the PHA.

(ii) If the PHA receives criminal conviction records requested by an owner, the PHA must determine whether criminal action by a household member, as shown by such criminal conviction records, may be a basis for applicant screening, lease enforcement or eviction, as applicable in accordance with HUD regulations and the owner criteria.

(iii) The PHA must notify the owner whether the PHA has received criminal conviction records concerning the household member, and of its determination whether such criminal conviction records may be a basis for applicant screening, lease enforcement or eviction. However, except as provided in paragraph (e)(2)(ii) of this section, the PHA must not disclose the household member's criminal conviction record or the content of that record to the owner.

(2) *Screening.* If you are an owner of covered housing, you may request that the PHA in the jurisdiction of the property obtain criminal conviction

records of an adult household member from a law enforcement agency on your behalf for the purpose of screening applicants.

(i) Your request must include a copy of the consent form, signed by the household member.

(ii) Your request must include your standards for prohibiting admission of drug criminals in accordance with § 5.854, and for prohibiting admission of other criminals in accordance with § 5.855.

(3) *Eviction or lease enforcement.* If you are an owner of a unit with Section 8 project-based assistance, you may request that the PHA in the location of the project obtain criminal conviction records of a household member from an appropriate law enforcement agency on your behalf in connection with lease enforcement or eviction.

(i) Your request must include a copy of the consent form, signed by the household member.

(ii) If you intend to use the PHA determination regarding any such criminal conviction records in connection with eviction, your request must include your standards for evicting drug criminals in accordance with § 5.857, and for evicting other criminals in accordance with § 5.858.

(iii) If you intend to use the PHA determination regarding any such criminal conviction records for lease enforcement other than eviction, your request must include your standards for lease enforcement because of criminal activity by members of a household.

(4) *Fees.* If an owner requests a PHA to obtain criminal conviction records in accordance with this section, the PHA may charge the owner reasonable fees for making the request on behalf of the owner and for taking other actions for the owner. The PHA may require the owner to reimburse costs incurred by the PHA, including reimbursement of any fees charged to the PHA by the law enforcement agency, the PHA's own related staff and administrative costs. The owner may not pass along to the applicant or tenant the costs of a criminal records check.

(e) *Permitted use and disclosure of criminal conviction records received by PHA—(1) Use of records.* Criminal conviction records received by a PHA from a law enforcement agency in accordance with this section may only be used for the following purposes:

(i) *Applicant screening.* (A) PHA screening of applicants for admission to public housing (part 960 of this title);

(B) PHA screening of applicants for admission to the Housing Choice Voucher Program (section 8 tenant-based assistance) (part 982 of this title);

(C) PHA screening of applicants for admission to the Section 8 moderate rehabilitation program (part 882 of this title); or the Section 8 project-based certificate or project-based voucher program (part 983 of this title); or

(D) PHA screening concerning criminal conviction of applicants for admission to Section 8 project-based assistance, at the request of the owner. (For requirements governing use of criminal conviction records obtained by a PHA at the request of a Section 8 owner under this section, see paragraph (d) of this section.)

(ii) *Lease enforcement and eviction.* (A) PHA enforcement of public housing leases and PHA eviction of public housing residents;

(B) Enforcement of leases by a Section 8 project owner and eviction of residents by a Section 8 project owner. (However, criminal conviction records received by a PHA from a law enforcement agency under this section may not be used for lease enforcement or eviction of residents receiving Section 8 tenant-based assistance.)

(2) *PHA disclosure of records.* (i) A PHA may disclose the criminal conviction records which the PHA receives from a law enforcement agency only as follows:

(A) To officers or employees of the PHA, or to authorized representatives of the PHA who have a job-related need to have access to the information. For example, if the PHA is seeking to evict a public housing tenant on the basis of criminal activity as shown in criminal conviction records provided by a law enforcement agency, the records may be disclosed to PHA employees performing functions related to the eviction, or to a PHA hearing officer conducting an administrative grievance hearing concerning the proposed eviction.

(B) To the owner for use in connection with judicial eviction proceedings by the owner to the extent necessary in connection with a judicial eviction proceeding. For example, criminal conviction records may be included in pleadings or other papers filed in an eviction action, may be disclosed to parties to the action or the court, and may be filed in court or offered as evidence.

(ii) This disclosure may be made only if the following conditions are satisfied:

(A) If the PHA has determined that criminal activity by the household member as shown by such records received from a law enforcement agency may be a basis for eviction from a Section 8 unit; and

(B) If the owner certifies in writing that it will use the criminal conviction records only for the purpose and only to the extent necessary to seek eviction in a judicial proceeding of a Section 8 tenant based on the criminal activity by the household member that is described in the criminal conviction records.

(iii) The PHA may rely on an owner's certification that the criminal record is necessary to proceed with a judicial eviction to evict the tenant based on criminal activity of the identified household member, as shown in the criminal conviction record.

(iv) Upon disclosure as necessary in connection with judicial eviction proceedings, the PHA is not responsible for controlling access to or knowledge of such records after such disclosure.

(f) *Opportunity to dispute.* If a PHA obtains criminal record information from a State or local agency under this section showing that a household member has been convicted of 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 a copy of such information, and an opportunity to dispute the accuracy and relevance of the information. This opportunity must be provided before a denial of admission, eviction or lease enforcement action on the basis of such information.

(g) *Records management.* Consistent with the limitations on disclosure of records in paragraph (e) of this section, the PHA must establish and implement a system of records management that ensures that any criminal record received by the PHA from a law enforcement agency is:

(1) Maintained confidentially;

(2) Not misused or improperly disseminated; and

(3) Destroyed, once the purpose(s) for which the record was requested has been accomplished, including expiration of the period for filing a challenge to the PHA action without institution of a challenge or final disposition of any such litigation.

(h) *Penalties for improper release of information.*—(1) *Criminal penalty.* Conviction for a misdemeanor and imposition of a penalty of not more than $5,000 is the potential for:

(i) Any person, including an officer, employee, or authorized representative of any PHA or of any project owner, who knowingly and willfully requests or obtains any information concerning an applicant for, or tenant of, covered housing assistance under the authority of this section under false pretenses; or

(ii) Any person, including an officer, employee, or authorized representative of any PHA or a project owner, who

knowingly and willfully discloses any such information in any manner to any individual not entitled under any law to receive the information.

(2) *Civil liability.* (i) A PHA may be held liable to any applicant for, or tenant of, covered housing assistance affected by either of the following:

(A) A negligent or knowing disclosure of criminal records information obtained under the authority of this section about such person by an officer, employee, or authorized representative of the PHA if the disclosure is not authorized by this section; or

(B) Any other negligent or knowing action that is inconsistent with this section.

(ii) An applicant for, or tenant of, covered housing assistance may seek relief against a PHA in these circumstances by bringing a civil action for damages and such other relief as may be appropriate against the PHA responsible for such unauthorized action. The United States district court in which the affected applicant or tenant resides, in which the unauthorized action occurred, or in which the officer, employee, or representative alleged to be responsible resides, has jurisdiction. Appropriate relief may include reasonable attorney's fees and other litigation costs.

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

(a) *PHA obligation to obtain sex offender registration information.* (1) A PHA that administers a Section 8 or public housing program under an Annual Contributions Contract with HUD must carry out background checks necessary to determine whether a member of a household applying for admission to any federally assisted housing program is subject to a lifetime sex offender registration requirement under a State sex offender registration program. This check must be carried out with respect to the State in which the housing is located and with respect to States where members of the applicant household are known to have resided.

(2) If the PHA requests such information from any State or local agency responsible for the collection or maintenance of such information, the State or local agency must promptly provide the PHA such information in its possession or control.

(3) The State or local agency may charge a reasonable fee for providing the information.

(b) *Owner's request for sex offender registration information.*—(1) *General.* An owner of federally assisted housing that is located in the jurisdiction of a PHA that administers a Section 8 or public housing program under an Annual Contributions Contract with HUD may request that the PHA obtain information necessary to determine whether a household member is subject to a lifetime registration requirement under a State sex offender registration requirement.

(2) *Procedure.* If the request is made in accordance with the provisions of paragraph (b) of this section:

(i) The PHA must request the information from a State or local agency;

(ii) The State or local agency must promptly provide the PHA such information in its possession or control;

(iii) The PHA must determine whether such information may be a basis for applicant screening, lease enforcement or eviction, based on the criteria used by the owner as specified in the owner's request, and inform the owner of the determination.

(iv) The PHA must notify the owner of its determination whether sex offender registration information received by the PHA under this section concerning a household member may be a basis for applicant screening, lease enforcement or eviction in accordance with HUD requirements and the criteria used by the owner.

(3) *Contents of request.* As the owner, your request must specify whether you are asking the PHA to obtain the sex offender registration information concerning the household member for applicant screening, for lease enforcement, or for eviction and include the following information:

(i) Addresses or other information about where members of the household are known to have lived.

(ii) If you intend to use the PHA determination regarding any such sex offender registration information for applicant screening, your request must include your standards in accordance with § 5.855(c) for prohibiting admission of persons subject to a lifetime sex offender registration requirement.

(iii) If you intend to use the PHA determination regarding any such sex offender registration information for eviction, your request must include your standards for evicting persons subject to a lifetime registration requirement in accordance with § 5.858.

(iv) If you intend to use the PHA determination regarding any such sex offender registration information for lease enforcement other than eviction, your request must include your standards for lease enforcement because of criminal activity by members of a household.

(4) *PHA disclosure of records.* The PHA must not disclose to the owner any sex offender registration information obtained by the PHA under this section.

(5) *Fees.* If an owner asks a PHA to obtain sex offender registration information concerning a household member in accordance with this section, the PHA may charge the owner reasonable fees for making the request on behalf of the owner and for taking other actions for the owner. The PHA may require the owner to reimburse costs incurred by the PHA, including reimbursement of any fees charged to the PHA by a State or local agency for releasing the information, the PHA's own related staff and administrative costs. The owner may not pass along to the applicant or tenant the costs of a sex offender registration records check.

(c) *Records management.* (1) The PHA must establish and implement a system of records management that ensures that any sex offender registration information record received by the PHA from a State or local agency under this section is:

(i) Maintained confidentially;

(ii) Not misused or improperly disseminated; and

(iii) Destroyed, once the purpose for which the record was requested has been accomplished, including expiration of the period for filing a challenge to the PHA action without institution of a challenge or final disposition of any such litigation.

(2) The records management requirements do not apply to information that is public information, or is obtained by a PHA other than under this section.

(d) *Opportunity to dispute.* If a PHA obtains sex offender registration information from a State or local agency under paragraph (a) 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 and relevance of the information. This opportunity must be provided before a denial of admission, eviction or lease enforcement action on the basis of such information.

PART 200—INTRODUCTION TO FHA PROGRAMS

4. The authority citation for part 200 continues to read as follows:

Authority: 12 U.S.C. 1701–1715z–18; 42 U.S.C. 3535(d).

5. Add a new § 200.37 to read as follows:

§ 200.37 Preventing crime in federally assisted housing.

See part 5, subparts I and J of this title, for provisions concerning preventing crime in federally assisted housing, including programs administered under section 236 and under sections 221(d)(3) and 221(d)(5) of the National Housing Act.

PART 247—EVICTIONS FROM SUBSIDIZED AND HUD-OWNED PROJECTS

6. The authority citation for part 247 continues to read as follows:

Authority: 12 U.S.C. 1701q, 1701s, 1715b, 1715l, and 1715z–1; 42 U.S.C. 1437a, 1437c, 1437f, and 3535(d).

7. In § 247.2, revise the last sentence in the definition of "subsidized project" to read as follows:

§ 247.2 Definitions.

* * * * *

Subsidized project. * * * For purposes of this part, *subsidized project* also includes those units in a housing project that receive the benefit of:

(1) Rental subsidy in the form of rent supplement payments under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); or

(2) Housing assistance payments for project-based assistance under Section 8 of the 1937 Act (42 U.S.C. 1437f). However, this part is not applicable to Section 8 project-based assistance under parts 880, 881, 883 and 884 of this title (except as specifically provided in those parts).

8. In § 247.3, revise paragraph (a)(3) to read as follows:

§ 247.3 Entitlement of tenants to occupancy.

(a) * * *

(3) Criminal activity by a covered person in accordance with sections 5.858 and 5.859, or alcohol abuse by a covered person in accordance with section 5.860. If necessary, criminal records can be obtained for lease enforcement purposes under section 5.903(d)(3).

* * * * *

PART 880—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR NEW CONSTRUCTION

9. The authority citation for part 880 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

10. In § 880.607, revise paragraph (b)(1)(iii) to read as follows:

§ 880.607 Termination of tenancy and modification of lease.

* * * * *

(b) * * *

(1) * * *

(iii) Criminal activity by a covered person in accordance with sections 5.858 and 5.859, or alcohol abuse by a covered person in accordance with section 5.860. If necessary, criminal records can be obtained for lease enforcement purposes under section 5.903(d)(3).

* * * * *

PART 882—SECTION 8 MODERATE REHABILITATION PROGRAMS

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

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

12. In § 882.102, amend paragraph (b) by removing the definitions of the terms *drug-related criminal activity, drug-trafficking,* and *violent criminal activity,* and revise paragraph (a) to read as follows:

§ 882.102 Definitions.

(a) *Terms found elsewhere.* The following terms are defined in part 5, subpart A of this title: *1937 Act, covered person, drug, drug-related criminal activity, federally assisted housing, guest, household, HUD, MSA, other person under the tenant's control, public housing agency (PHA), Section 8, and violent criminal activity.*

* * * * *

13. In § 882.511, amend paragraph (a) by adding after the heading a paragraph designation (1), and by adding a new paragraph (a)(2).

§ 882.511 Lease and termination of tenancy.

(a) * * *

(2) 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 grounds for the owner to terminate tenancy. In addition, the lease must provide that the owner may terminate the tenancy of a family when the owner determines that a household member is illegally using a drug or when the owner 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.

* * * * *

§ 882.514 [Amended]

14. In § 882.514, remove paragraph (a)(2) and redesignate paragraph (a)(3) as paragraph (a)(2), and remove paragraph (g).

15. Add § 882.518 to read as follows:

§ 882.518 Denial of admission and termination of assistance for criminals and alcohol abusers.

(a) *Requirement to deny admission.*—(1) *Prohibiting admission of drug criminals.* (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 has successfully completed an approved supervised drug rehabilitation program, or

(B) The circumstances leading to the termination of tenancy no longer exist (for example, the criminal household member 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 it has reasonable cause to believe that a household member's pattern of illegal use of a drug, as defined in § 5.100 of this title, may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(2) *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 of other criminals.* The PHA may prohibit admission of a household to the program under standards established by the PHA if the PHA determines that any

household member is currently engaged in or has engaged in during a reasonable time before the admission decision:

(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;

(iv) 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.

(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".

(3) *Sufficient evidence.* If the PHA has denied admission to an applicant because a member of the household engaged in criminal activity in accordance with paragraph (b)(1) of this section, the PHA may reconsider the applicant if the PHA has sufficient evidence that the members of the household are not currently engaged in, and have not engaged in criminal activity during a reasonable period, as determined by the PHA, before the admission decision.

(i) The PHA would have "*sufficient evidence*" if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which the PHA verified.

(ii) For purposes of this section, a household member is "currently engaged in" criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

(4) *Prohibiting admission of alcohol abusers.* The PHA must establish standards that prohibit admission to the program if the PHA determines that it has reasonable cause to believe 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.

(c) *Terminating assistance.*—(1) *Terminating assistance for drug criminals.* (i) 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. In addition, 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 interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(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.

(2) *Terminating assistance for other criminals.* (i) 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.

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

(A) 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

(B) 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 a covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity.

(ii) See part 5, subpart J, of this title for provisions concerning access to criminal records.

(4) *Terminating assistance for alcohol abusers.* 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.

PART 884—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM, NEW CONSTRUCTION SET-ASIDE FOR SECTION 515 RURAL RENTAL HOUSING PROJECTS

16. The authority citation for part 884 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

17. In § 884.216, revise paragraph (b) to read as follows:

§ 884.216 Termination of tenancy.

* * * * *

(b) Termination of tenancy for criminal activity by a covered person is subject to 24 CFR 5.858 and 5.859, and termination of tenancy for alcohol abuse by a covered person is subject to 24 CFR 5.860.

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

18. The authority citation for part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

19. Revise § 891.430 to read as follows:

§ 891.430 Denial of admission, termination of tenancy, and modification of lease.

(a) The provisions of part 5, subpart I, of this title apply to Section 202 and Section 811 capital advance projects.

(b) The provisions of part 247 of this title apply to all decisions by an owner to terminate the tenancy or modify the lease of a household residing in a unit (or residential space in a group home).

20. Revise § 891.630 to read as follows:

§ 891.630 Denial of admission, termination of tenancy, and modification of lease.

(a) The provisions of part 5, subpart I, of this title apply to Section 202 direct loan projects.

(b) The provisions of part 247 of this title apply to all decisions by a Borrower to terminate the tenancy or modify the lease of a family residing in a unit.

21. Revise § 891.770 to read as follows:

§ 891.770 Denial of admission, termination of tenancy, and modification of lease.

(a) The provisions of part 5, subpart I, of this title apply to Section 202 direct loan projects with Section 162 assistance for disabled families.

(b) The provisions of part 247 of this title apply to all decisions by a Borrower to terminate the tenancy or modify the lease of a family residing in a unit (or residential space in a group home).

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

22. 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).

23. In § 960.102, paragraph (a)(1) is revised to read as follows:

§ 960.102 Definitions.

(a) *Definitions found elsewhere.* (1) *General definitions.* The following terms are defined in part 5, subpart A of this title: *1937 Act, drug, drug-related criminal activity, federally assisted housing, guest, household, HUD, MSA, premises, public housing, public housing agency (PHA), Section 8, violent criminal activity.*

* * * * *

24. Subpart B of part 960 is revised to read as follows:

Subpart B—Admission

960.200 Purpose.
960.201 Eligibility.
960.202 Tenant selection policies.
960.203 Standards for PHA tenant selection criteria.
960.204 Denial of admission for criminal activity or drug abuse by household members.
960.205 Drug use by applicants: obtaining information from drug treatment facility.
960.206 Waiting list: Local preferences in admission to public housing program.
960.208 Notification to applicants.

§ 960.200 Purpose.

(a) This subpart states HUD eligibility and selection requirements for admission to public housing.

(b) See also related HUD regulations in this title concerning these subjects:

(1) 1937 Act definitions: part 5, subpart D;

(2) Restrictions on assistance to noncitizens: part 5, subpart E;

(3) Family income and family payment: part 5, subpart F;

(4) Public housing agency plans: part 903;

(5) Rent and reexamination: part 960, subpart C;

(6) Mixed population developments: part 960, subpart D;

(7) Occupancy by over-income families or police officers: part 960, subpart E.

§ 960.201 Eligibility.

(a) *Who is eligible?* (1) Basic eligibility. An applicant must meet all eligibility requirements in order to receive housing assistance. At a minimum, the applicant must be a family, as defined in § 5.403 of this title, and must be income-eligible, as described in this section. Such eligible applicants include single persons.

(2) *Low income limit.* No family other than a low income family is eligible for admission to a PHA's public housing program.

(b) *Income used for eligibility and targeting.* Family annual income (see § 5.609) is used both for determination of income eligibility under paragraph (a) and for PHA income targeting under § 960.202

(c) *Reporting.* The PHA must comply with HUD-prescribed reporting requirements that will permit HUD to maintain the data, as determined by HUD, necessary to monitor compliance with income eligibility and targeting requirement.

§ 960.202 Tenant selection policies.

(a) *Selection policies, generally.* (1) The PHA shall establish and adopt written policies for admission of tenants.

(2) These policies shall provide for and include the following:

(i) Targeting admissions to extremely low income families as provided in paragraph (b) of this section.

(ii) Deconcentration of poverty and income-mixing in accordance with the PHA Plan regulations (see 24 CFR part 903).

(iii) Precluding admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment;

(iv) Objective and reasonable policies for selection by the PHA among otherwise eligible applicants, including requirements for applications and waiting lists (see 24 CFR 1.4), and for verification and documentation of information relevant to acceptance or rejection of an applicant, including documentation and verification of citizenship and eligible immigration status under 24 CFR part 5; and

(v) Policies of participant transfer between units, developments, and programs. For example, a PHA could adopt a criterion for voluntary transfer that the tenant had met all obligations under the current program, including payment of charges to the PHA.

(b) *Targeting admissions to extremely low income families.*

(1) *Targeting requirement.* (i) Not less than 40 percent of the families admitted to a PHA's public housing program during the PHA fiscal year from the PHA waiting list shall be extremely low income families. This is called the "basic targeting requirement."

(ii) To the extent provided in paragraph (b)(2) of this section, admission of extremely low income families to the PHA's Section 8 voucher program during the same PHA fiscal year is credited against the basic targeting requirement.

(iii) A PHA must comply with both the targeting requirement found in this part and the deconcentration requirements found in part 903 of this chapter.

(2) *Credit for admissions to PHA voucher program.* (i) If admissions of extremely low income families to the PHA's voucher program during a PHA fiscal year exceeds the 75 percent minimum targeting requirement for the PHA's voucher program (see 24 CFR 982.201(b)(2)), such excess shall be credited (subject to the limitations in paragraph (b)(2)(ii) of this section) against the PHA's basic targeting requirement for the same fiscal year.

(ii) The fiscal year credit for voucher program admissions that exceed the minimum voucher program targeting requirement shall not exceed the lower of:

(A) Ten percent of public housing waiting list admissions during the PHA fiscal year;

(B) Ten percent of waiting list admission to the PHA's Section 8 tenant-based assistance program during the PHA fiscal year; or

(C) The number of qualifying low income families who commence occupancy during the fiscal year of PHA public housing units located in census tracts with a poverty rate of 30 percent or more. For this purpose, qualifying low income family means a low income family other than an extremely low income family.

(c) *Adoption and availability of tenant selection policies.* These selection policies shall:

(1) Be duly adopted and implemented;

(2) Be publicized by posting copies thereof in each office where applications are received and by furnishing copies to applicants or tenants upon request, free or at their expense, at the discretion of the PHA; and

(3) Be consistent with the fair housing and equal opportunity provisions of § 5.105 of this title; and

(4) Be submitted to the HUD field office upon request from that office.

§ 960.203 Standards for PHA tenant selection criteria.

(a) The tenant selection criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons

of which an applicant may be a member. The PHA may use local preferences, as provided in § 960.206.

(b) Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures and can document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories receive points. (See 24 CFR 902.43(a)(5).) This policy takes into account the importance of screening to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.

(c) In selection of families for admission to its public housing program, or to occupy a public housing development or unit, the PHA is responsible for screening family behavior and suitability for tenancy. The PHA may consider all relevant information, which may include, but is not limited to:

(1) An applicant's past performance in meeting financial obligations, especially rent;

(2) A record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences which may adversely affect the health, safety or welfare of other tenants; and

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

(i) The PHA may require an applicant to exclude a household member 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.

(ii) The PHA may, where a statute requires that the PHA prohibit admission for a prescribed period of time after some disqualifying behavior or event, choose to continue that prohibition for a longer period of time.

(d) In the event of the receipt of unfavorable information with respect to an applicant, consideration shall be given to the time, nature, and extent of the applicant's conduct (including the seriousness of the offense).

(1) In a manner consistent with the PHA's policies, procedures and practices referenced in paragraph (b) of this section, consideration may be given to factors which might indicate a reasonable probability of favorable future conduct. For example:

(i) Evidence of rehabilitation; and

(ii) Evidence of the applicant family's participation in or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs;

(2) *Consideration of rehabilitation.* (i) In determining whether to deny admission for illegal drug use or a pattern of illegal drug use by a household member who is no longer engaging in such use, or for abuse or a pattern of abuse of alcohol by a household member who is no longer engaging in such abuse, the PHA may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. 13661). For this purpose, the PHA may require the applicant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(ii) If rehabilitation is not an element of the eligibility determination (see § 960.204(a)(1)), the PHA may choose not to consider whether the person has been rehabilitated.

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

(a) *Required denial of admission.* (1) *Persons evicted for drug-related criminal activity.* The PHA standards must prohibit admission of an applicant to the PHA's public housing program for three years from the date of the eviction if any 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:

(i) The evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA; or

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

(2) *Persons engaging in illegal use of a drug.* The PHA must establish standards that prohibit admission of a household to the PHA's public housing program if:

(i) The PHA determines that any household member is currently engaging in illegal use of a drug (For purposes of this section, a household member is "currently engaged in" the criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current); or

(ii) 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.

(3) *Persons convicted of methamphetamine production.* The PHA must establish standards that permanently prohibit admission to the PHA's public housing 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.

(4) *Persons subject to sex offender registration requirement.* The PHA must establish standards that prohibit admission to the PHA's public housing program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In the screening of applicants, the PHA must perform necessary criminal history background checks in the State where the housing is located and in other States where household members are known to have resided. (See part 5, subpart J of this title for provisions concerning access to sex offender registration records.)

(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 it has reasonable cause to believe 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.

(c) *Use of criminal records.* Before a PHA denies admission to the PHAs public housing program on the basis of 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 applicant with a copy of the criminal record and an opportunity to dispute the accuracy and relevance of that record. (See part 5, subpart J of this title for provisions concerning access to criminal records.)

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

§ 960.205 Drug use by applicants: obtaining information from drug treatment facility.

(a) *Purpose.* This section addresses a PHA's authority to request and obtain information from drug abuse treatment facilities concerning applicants. This section does not apply to information requested or obtained from drug abuse treatment facilities other than under the authority of section 6(t).

(b) *Additional terms* used in this section are as follows:

(1) *Currently engaging in illegal use of a drug.* Illegal use of a drug occurred recently enough to justify a reasonable belief that there is continuing illegal drug use by a household member.

(2) *Drug abuse treatment facility.* An entity:

(i) That holds itself out as providing, and provides, diagnosis, treatment, or referral for treatment with respect to the illegal drug use; and

(ii) That is either an identified unit within a general care facility; or an entity other than a general medical care facility.

(c) *Authorization by household member for PHA to receive information from a drug abuse treatment facility.* (1) The PHA may require each applicant to submit for all household members who are at least 18 years of age, and for each family head or spouse regardless of age, one or more consent forms signed by such household member that:

(i) Requests any drug abuse treatment facility to inform the PHA only whether the drug abuse treatment facility has reasonable cause to believe that the household member is currently engaging in illegal drug use;

(ii) Complies with the form of written consent required by 42 CFR 2.31; and

(iii) Authorizes the PHA to receive such information from the drug abuse treatment facility, and to utilize such information in determining whether to prohibit admission of the household member to the PHA's public housing program in accordance with § 960.203. (See the Public Health Service Act, 42 U.S.C. 290dd–2, and implementing regulations at 42 CFR part 2, with respect to responsibilities of the drug abuse treatment facility.)

(2) The consent form submitted for a proposed household member must expire automatically after the PHA has made a final decision to either approve or deny the admission of such person.

(d) *PHA request for information from drug use treatment facility.* (1) The PHA may request that a drug abuse treatment facility disclose whether the drug abuse treatment facility has reasonable cause to believe that the proposed household member is currently engaging in the illegal use of a drug (as defined in § 5.100 of this title).

(2) The PHA's request to the drug abuse treatment facility must include a copy of the consent form signed by the proposed household member.

(3) A drug abuse treatment facility is not liable for damages based on any information required to be disclosed under this section if such disclosure is consistent with section 543 of the Public Health Service Act (42 U.S.C. 290dd–2).

(4) The PHA is not obligated to request information from a drug treatment facility under this section, and is not liable for damages for failing to request or receive such information.

(5) A drug abuse treatment facility may charge the PHA a reasonable fee for information provided under this section. The PHA may not pass along to the applicant or tenant the costs of obtaining this information.

(e) *Prohibition of discriminatory treatment of applicants.* (1) A PHA may request information from a drug abuse treatment facility under paragraph (d) of this section only if the PHA has adopted and has consistently implemented either of the following policies, obtaining a signed consent form from the proposed household members:

(i) *Policy A—Request for all families.* Under Policy A, the PHA must submit a request for information to a drug abuse treatment facility in accordance with paragraph (d) of this section before admitting any family to the PHA's public housing program. For each such family, the request must be submitted for each proposed household member described in paragraph (c)(1) of this section.

(ii) *Policy B—Request for certain household members.* Under Policy B, the PHA must submit a request to a drug abuse treatment facility only with respect to each proposed household member:

(A) Whose criminal record indicates prior arrest or conviction for any criminal activity that may be a basis for denial of admission under § 960.205; or

(B) Whose prior tenancy records indicate that the proposed household member:

(1) Engaged in the destruction of property;

(2) Engaged in violent activity against another person; or

(3) Interfered with the right of peaceful enjoyment of the premises of other residents.

(4) The policy adopted by the PHA must be included in the PHA administrative plan and the PHA plan.

(f) *Records management and confidentiality.* Each PHA that receives information from a drug abuse treatment facility under this section must establish and implement a system of records management that ensures that any information which the PHA receives from the drug abuse treatment facility about a person:

(1) Is maintained confidentially in accordance with section 543 of the Public Health Service Act (12 U.S.C. 290dd–2);

(2) Is not misused or improperly disseminated; and

(3) Is destroyed, as applicable:

(i) Not later than 5 business days after the PHA makes a final decision to admit the person as a household member under the PHA's public housing program; or

(ii) If the PHA denies the admission of such person as a household member, in a timely manner after the date on which the statute of limitations for the commencement of a civil action based upon that denial of admissions has expired without the filing of a civil action or until final disposition of any such litigation.

§ 960.206 Waiting list: Local preferences in admission to public housing program.

(a) *Establishment of PHA local preferences.* (1) The PHA may adopt a system of local preferences for selection of families admitted to the PHA's public housing program. The PHA system of selection preferences must be based on local housing needs and priorities as determined by the PHA. In determining such needs and priorities, the PHA shall use generally accepted data sources. Such sources include public comment on the PHA plan (as received pursuant to § 903.17 of this chapter), and on the consolidated plan for the relevant jurisdiction (as received pursuant to part 91 of this title).

(2) The PHA may limit the number of applicants that qualify for any local preference.

(3) PHA adoption and implementation of local preferences is subject to HUD requirements concerning income-targeting (§ 960.202(b)), deconcentration and income-mixing (§ 903.7), and selection preferences for developments designated exclusively for elderly or disabled families or for mixed population developments (§ 960.407).

(4) The PHA must inform all applicants about available preferences and must give applicants an opportunity to show that they qualify for available preferences.

(b) *Particular local preferences*—(1) *Residency requirements or preferences.*

(i) Residency requirements are prohibited. Although a PHA is not prohibited from adopting a residency preference, the PHA may only adopt or

implement residency preferences in accordance with non-discrimination and equal opportunity requirements listed at § 5.105(a) of this title.

(ii) A residency preference is a preference for admission of persons who reside in a specified geographic area ("residency preference area"). A county or municipality may be used as a residency preference area. An area smaller than a county or municipality may not be used as a residency preference area.

(iii) Any PHA residency preferences must be included in the statement of PHA policies that govern eligibility, selection and admission to the program, which is included in the PHA annual plan (or supporting documents) pursuant to part 903 of this chapter. Such policies must specify that use of a residency preference will not have the purpose or effect of delaying or otherwise denying admission to the program based on the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family.

(iv) A residency preference must not be based on how long an applicant has resided or worked in a residency preference area.

(v) Applicants who are working or who have been notified that they are hired to work in a residency preference area must be treated as residents of the residency preference area. The PHA may treat graduates of, or active participants in, education and training programs in a residency preference area as residents of the residency preference area if the education or training program is designed to prepare individuals for the job market.

(2) *Preference for working families.* The PHA may adopt a preference for admission of working families (families where the head, spouse, or sole member, is employed). However, an applicant must be given the benefit of the working family preference if the head and spouse, or sole member is age 62 or older, or is a person with disabilities.

(3) *Preference for person with disabilities.* The PHA may adopt a preference for admission of families that include a person with disabilities. However, the PHA may not adopt a preference for persons with a specific disability.

(4) *Preference for victims of domestic violence.* The PHA should consider whether to adopt a local preference for admission of families that include victims of domestic violence.

(5) *Preference for single persons who are elderly, displaced, homeless or a person with disabilities.* The PHA may adopt a preference for admission of single persons who are age 62 or older, displaced, homeless, or persons with disabilities over other single persons.

(c) *Selection for particular unit.* In selecting a family to occupy a particular unit, the PHA may match characteristics of the family with the type of unit available, for example, number of bedrooms. In selection of families to occupy units with special accessibility features for persons with disabilities, the PHA must first offer such units to families which include persons with disabilities who require such accessibility features (see §§ 8.27 and 100.202 of this title).

(d) *Housing assistance limitation for single persons.* A single person who is not an elderly or displaced person, or a person with disabilities, or the remaining member of a resident family may not be provided a housing unit with two or more bedrooms.

(e) *Selection method.* (1) The PHA must use the following to select among applicants on the waiting list with the same priority for admission:

(i) Date and time of application; or

(ii) A drawing or other random choice technique.

(2) The method for selecting applicants must leave a clear audit trail that can be used to verify that each applicant has been selected in accordance with the method specified in the PHA plan.

§ 960.208 Notification to applicants.

(a) The PHA must promptly notify any applicant determined to be ineligible for admission to a project of the basis for such determination, and must provide the applicant upon request, within a reasonable time after the determination is made, with an opportunity for an informal hearing on such determination.

(b) When a determination has been made that an applicant is eligible and satisfies all requirements for admission, including the tenant selection criteria, the applicant must be notified of the approximate date of occupancy insofar as that date can be reasonably determined.

PART 966—PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE

25. The authority citation for part 966 is revised to read as follows:

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

26. The heading for part 966 is revised to read as set forth above.

27. Revise § 966.1 to read as follows:

§ 966.1 Purpose and applicability.

(a) This part is applicable to public housing.

(b) Subpart A of this part prescribes the provisions that must be incorporated in leases for public housing dwelling units.

(c) Subpart B of this part prescribes public housing grievance hearing requirements.

28. Add a new § 966.2 to read as follows:

§ 966.2 Definitions.

The following terms are defined in part 5, subpart A of this title: *1937 Act, covered person, drug, drug-related criminal activity, federally assisted housing, guest, household, HUD, other person under the tenant's control, public housing, premises, public housing agency, Section 8, violent criminal activity.*

29. In § 966.4, revise paragraphs (d)(1), (f)(12), (1)(2), (1)(3)(i), and (1)(5) to read as follows:

§ 966.4 Lease requirements.

* * * * *

(d) Tenant's right to use and occupancy. (1) The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests. The term *guest* is defined in 24 CFR 5.100.

* * * * *

(f) *Tenant's obligations.* The lease shall provide that the tenant shall be obligated: * * *

(12) (i) To assure that no tenant, member of the tenant's household, or guest engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on or off the premises;

(ii) To assure that no other person under the tenant's control engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on the premises;

(iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

* * * * *

(1) * * *

(2) *Grounds for termination of tenancy.* The PHA may terminate the tenancy only for:

(i) Serious or repeated violation of material terms of the lease, such as the following:

(A) Failure to make payments due under the lease;

(B) Failure to fulfill household obligations, as described in paragraph (f) of this section;

(ii) Other good cause. Other good cause includes, but is not limited to, the following:

(A) Criminal activity or alcohol abuse as provided in paragraph (1)(5) of this section;

(B) Discovery after admission of facts that made the tenant ineligible;

(C) Discovery of material false statements or fraud by the tenant in connection with an application for assistance or with reexamination of income;

(D) Failure of a family member to comply with service requirement provisions of part 960, subpart F, of this chapter—as grounds only for non-renewal of the lease and termination of tenancy at the end of the twelve-month lease term; and

(E) Failure to accept the PHA's offer of a lease revision to an existing lease: that is on a form adopted by the PHA in accordance with § 966.3; with written notice of the offer of the revision at least 60 calendar days before the lease revision is scheduled to take effect; and with the offer specifying a reasonable time limit within that period for acceptance by the family.

(3) *Lease termination notice.* (i) The PHA must give written notice of lease termination of:

(A) 14 days in the case of failure to pay rent;

(B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days):

(1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or

(2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or

(3) If any member of the household has been convicted of a felony;

(C) 30 days in any other case, except that if a State or local law allows a shorter notice period, such shorter period shall apply.

* * * * *

(5) *PHA termination of tenancy for criminal activity or alcohol abuse.*

(i) *Evicting drug criminals.* (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 other criminals.* (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 that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.

(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 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 alcohol abusers.* 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 of illegal drug users or alcohol abusers.

(vii) *PHA action, generally.* (A) *Assessment under PHAS.* Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures and can document that they appropriately evict any public housing residents who engage in certain activity detrimental to the public housing community receive points. (See 24 CFR 902.43(a)(5).) This policy takes into account the importance of eviction of such residents to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.

(B) *Consideration of circumstances.* In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

(C) *Exclusion of culpable household member.* The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

(D) *Consideration of rehabilitation.* In determining whether to terminate tenancy for illegal drug use or a pattern of illegal drug use by a household member who is no longer engaging in

such use, or for abuse or a pattern of abuse of alcohol by a household member who is no longer engaging in such abuse, the PHA may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. 13662). For this purpose, the PHA may require the tenant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(E) *Length of period of mandatory prohibition on admission.* If a statute requires that the PHA prohibit admission of persons for a prescribed period of time after some disqualifying behavior or event, the PHA may apply that prohibition for a longer period of time.

(F) *Nondiscrimination limitation.* The PHA's eviction actions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title.

* * * * *

30. In § 966.51, revise paragraphs (a)(2)(i)(A) and (a)(2)(i)(B) and add paragraph (a)(2)(i)(C) to read as follows:

§ 966.51 Applicability.

(a) * * *

(2)(i) * * *

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other residents or employees of the PHA;

(B) Any violent or drug-related criminal activity on or off such premises; or

(C) Any criminal activity that resulted in felony conviction of a household member.

* * * * *

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

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

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

32. Amend § 982.4 as follows:

a. Remove the definitions of *drug-related criminal activity, drug-trafficking,* and *violent criminal activity* from paragraph (b);

b. Revise paragraph (a)(2) to read as follows:

§ 982.4 Definitions.

(a) * * *

(2) *Terms found elsewhere.* The following terms are defined in part 5, subpart A of this title: *1937 Act, covered person, drug, drug-related criminal activity, federally assisted housing, guest, household, HUD, MSA, other person under the tenant's control, public housing, Section 8,* and *violent criminal activity.*

* * * * *

33. In § 982.54, add a new paragraph (d)(4)(iii) to read as follows:

§ 982.54 Administrative plan.

* * * * *

(d) * * *

(4) * * *

(iii) Standards for denying admission or terminating assistance based on criminal activity or alcohol abuse in accordance with § 982.553;

* * * * *

34. In § 982.310, revise paragraph (c) and add a new paragraph (h) to read as follows:

§ 982.310 Owner termination of tenancy.

* * * * *

(c) *Criminal activity.* (1) *Evicting drug criminals due to drug crime on or near the premises.* The lease must provide that drug-related criminal activity engaged in, on or near the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant's control, is grounds for the owner to terminate tenancy. In addition, the lease must provide that the owner may evict a family when the owner determines that a household member is illegally using a drug or when the owner 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.

(2) *Evicting other criminals.* (i) *Threat to other residents.* The lease must provide that the owner may terminate tenancy for any of the following types of criminal activity by a covered person:

(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises);

(B) 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

(C) Any violent criminal activity on or near the premises by a tenant, household member, or guest, or any such activity on the premises by any other person under the tenant's control.

(ii) *Fugitive felon or parole violator.* The lease must provide that the owner may terminate the tenancy if a tenant is:

(A) 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

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

(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, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction. (See part 5, subpart J, of this title for provisions concerning access to criminal records.)

* * * * *

(h) *Termination of tenancy decisions.*—(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 seriousness of the offending action;

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

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

(iv) The effect of denial of admission or termination of tenancy on household members not involved in the offending activity;

(v) The demand for assisted housing by families who will adhere to lease responsibilities;

(vi) The extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action;

(vii) The effect of the owner's action on the integrity of the program.

(2) *Exclusion of culpable household member.* The owner may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

(3) *Consideration of rehabilitation.* In determining whether to terminate

tenancy for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, the owner may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. 13661). For this purpose, the owner may require the tenant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(4) *Nondiscrimination limitation.* The owner's termination of assistance actions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title.

35. Amend § 982.551 by redesignating paragraph (m) as paragraph (n); adding a new paragraph (m); and revising paragraph (l) to read as follows:

§ 982.551 Obligations of participant.

* * * * *

(l) *Crime by household members.* The members of the household may not engage in drug-related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises (see § 982.553).

(m) *Alcohol abuse by household members.* The members of the household must not abuse alcohol in a way that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises.

* * * * *

36. Amend § 982.552 by revising paragraphs (b)(1), (c)(1)(iv) and (c)(2), and by adding new paragraph (c)(1)(xi), to read as follows:

§ 982.552 PHA denial or termination of assistance for family.

* * * * *

(b) *Requirement to deny admission or terminate assistance.* (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, see § 982.553.

* * * * *

(c) * * *

(1) * * *

(iv) If any member of the family has committed fraud, bribery, or any other corrupt or criminal act in connection with any Federal housing program (see also § 982.553(a)(1));

* * * * *

(xi) If the family has been engaged in criminal activity or alcohol abuse as described in § 982.553.

(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.

(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. The PHA may permit the other members of a participant family to continue receiving assistance.

(iii) In determining whether to deny admission or terminate assistance for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, the PHA consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. 13661). For this purpose, the PHA may require the applicant or tenant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(iv) 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.

(v) *Nondiscrimination limitation.* The PHA's admission and eviction actions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title.

* * * * *

37. Revise § 982.553 to read as follows:

§ 982.553 Denial of admission and termination of assistance for criminals and alcohol abusers.

(a) *Denial of admission.* (1) *Prohibiting admission of drug criminals.*

(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 has successfully completed a supervised drug rehabilitation program approved by the PHA; or

(B) That the circumstances leading to eviction no longer exist (for example, the criminal household member 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;

(B) The PHA determines that it has reasonable cause to believe that a household member's illegal drug use or a pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; 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.

(2) *Prohibiting admission of other criminals—(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 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 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

(4) Other criminal activity which may 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 to have engaged in the activities specified in paragraph (a)(2)(i) of this section ("reasonable time").

(C) If the PHA previously denied admission to an applicant because a member of the household engaged in criminal activity, the PHA may reconsider the applicant if the PHA has sufficient evidence that the members of the household are not currently engaged in, and have not engaged in, such criminal activity during a reasonable period, as determined by the PHA, before the admission decision.

(1) The PHA would have "sufficient evidence" if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which the PHA verified.

(2) For purposes of this section, a household member is "currently engaged in" criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

(3) *Prohibiting admission of alcohol abusers.* The PHA must establish standards that prohibit admission to the program if the PHA determines that it has reasonable cause to believe 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.

(b) *Terminating assistance*—(1) *Terminating assistance for drug criminals.* (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 interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(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.

(2) *Terminating assistance for other criminals.* 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.

(3) *Terminating assistance for alcohol abusers.* 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 may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(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, regardless of whether the household member has been arrested or convicted for such activity.

(d) *Use of criminal record.*—(1) *Denial.* If a PHA proposes to deny admission for criminal activity as shown by a criminal record, the PHA must provide the subject of the record and the applicant 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 the informal review process in accordance with § 982.554. (See part 5, subpart J for provision concerning access to criminal records.)

(2) *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 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.

Dated: April 25, 2001.

Mel Martinez,

Secretary.

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