

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

**Office of the Assistant Secretary for  
Public and Indian Housing**

**24 CFR Part 882**

[Docket No. FR-3709-P-01]

RIN 2577-AB48

**Section 8 Moderate Rehabilitation;  
Rent Adjustments; Annual and Special  
Adjustments; Comparability Studies;  
Rent Reductions**

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would revise the current regulations on adjusting Section 8 Moderate Rehabilitation Contract Rents. The rule would modify the method used by Public Housing Agencies (PHAs) to determine the amount of the annual increase in the Contract Rents by providing for PHAs to conduct comparability studies for Moderate Rehabilitation projects to prevent the application of the Annual Adjustment Factors from resulting in a material difference between rents charged for assisted units and similar unassisted units. The proposed rule provides a substitute method of determining the initial difference between Moderate Rehabilitation rents and rents charged for comparable unassisted units, if the PHA failed to establish the amount of the difference when the initial Contract Rents were determined. The proposed rule also provides, subject to the availability of appropriations, for special adjustments when an exemption from real property tax expires under certain circumstances. The proposed rule also adds insurance to the categories of cost increases that may result in a special adjustment.

**DATES:** Comment Due Date: December 1, 1995.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Rules Docket Clerk, Office of General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Madeline Hastings, Rental Assistance Division, Room 4226, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708-2841 (voice) or (202) 708-4594 (TDD). (These are not toll-free numbers.)

**SUPPLEMENTARY INFORMATION:**

**I. Paperwork Reduction Act Statement**

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

The public reporting burden for each of these collections of information is estimated to include the time for reviewing and instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the preamble heading, Other Matters.

Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street SW, Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for HUD, Washington, DC 20503. At the end of the public comment period on this rule, the Department may amend the information collection requirements set out in this rule to reflect public comments or OMB comments received concerning the information collection.

**II. Background**

**A. Applicability**

This proposed rule would be applicable to all projects which are currently, or will be in the future, under a Section 8 Moderate Rehabilitation Housing Assistance Payments (HAP) Contract, as provided in the regular Section 8 Moderate Rehabilitation Program, and the Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) Program for Homeless Individuals. This rule proposes to revise

the current regulations in 24 CFR part 882, subpart D, that govern the special procedures for adjusting Contract Rents of regular and SRO Moderate Rehabilitation projects during the term of the HAP Contract. The procedures for both annual and special rent adjustments would be revised by the rule. These are the only upward adjustments to the initial base and Contract Rents set forth in the HAP Contract that are allowed during the term of the HAP Contract. Downward adjustments due to changes in project financing are also permitted during the term of the HAP Contract.

Regulations governing annual and special rent adjustments for the other Section 8 Programs have been and will be addressed by separate rulemaking. A proposed rule, entitled "Annual Adjustments of Contract Rents for Section 8 Assisted Housing; Comparability Studies," was published in the Federal Register on October 29, 1992 (57 FR 49120). The Department received considerable public comment on the October 29, 1992 proposed rule, and, as a result of this public comment, is further considering its October 29, 1992 proposal. Accordingly, the language of this proposed rule which is limited to the Section 8 Moderate Rehabilitation Program and which would make similar amendments to those amendments proposed to be made by the October 29, 1992 rule is not based on the language of the October 29, 1992 proposed rule.

Additionally, the Department notes that 24 CFR part 888, subpart B, does not apply to the process utilized under the Section 8 Moderate Rehabilitation Program. Although subpart B currently applies to all Section 8 Housing Assistance Programs, its scope is limited to the Automatic Annual Adjustment factors. The Section 8 Moderate Rehabilitation Program does not utilize automatic adjustments and, therefore, adjustments will be made in accordance with § 882.410, not 24 CFR part 888, subpart B.<sup>1</sup>

**B. Comparability Studies**

This proposed rule would implement section 801(c) of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (HUD Reform Act), by providing for PHAs to conduct comparability studies for Moderate Rehabilitation projects to prevent a material difference between

<sup>1</sup> Another proposed rule applicable to the section 8 regulations and entitled "Section 8 Certificate and Voucher Programs Conforming Rule" was published on February 24, 1993 (58 FR 11292).

rents charged for assisted units and similar unassisted units. The rule also would revise 24 CFR 882.410 to provide that upon request to the PHA by the Moderate Rehabilitation owner (Owner) to the PHA for an annual adjustment, a comparability study may be conducted to ensure that the application of the Annual Adjustment Factor (AAF) would not result in a new Contract rent that is materially different from the rents charged for comparable unassisted units. HUD will prescribe procedures on how a comparable rent shall be determined.

Under the proposed rule, when the application of the AAF to the base rent, plus the monthly rehabilitation debt service and utility allowance, produces an amount which is 110 percent or more of the most recently published Fair Market Rents (FMRs) for Existing Housing or exception rent approved by HUD, a comparability study would be conducted by the PHA. The Owner would be given notice of the PHA's intent to conduct a comparability study within a limited timeframe. Where the results of the PHA's comparability study show that a material difference would result between the adjusted Contracts Rents and rents being charged for similar unassisted units, allowing for any difference which may have existed with respect to the initial Contract Rent (see Section D of this preamble), the Contract rent would be set at the maximum allowable Contract rent (which will be defined later in this preamble). However, the Contract Rent would be reduced below its current level based upon the comparability study.

A material difference between the assisted and comparable unassisted rents exists if the adjusted base rent is greater than the maximum allowable Contract rent plus any amount attributable to an initial difference. The maximum allowable base rent is a dollar amount equal to 105 percent of the comparable rent.

The rule also would provide that Contract Rents will never be reduced as a result of a comparability study. Contract rents may be reduced when the project has been refinanced in such a manner that the periodic payment of the Owner has been reduced. The Owner is required to notify the PHA of any refinancing that occurs during the term of the HAP Contract.

#### C. Initial Difference

In determining whether a material difference exists, the PHA must allow for any difference which may have existed with respect to the initial Contract Rent. The initial difference is

defined as a dollar amount equal to the difference between the original comparable rent at the time the unit went under HAP contract and the initial Contract Rent. In many cases, however, PHAs never established the initial difference. The Regular Moderate Rehabilitation rent formula is based on a cost approach and therefore in most instances PHAs neglected to perform a comparability analysis. Because of the nature of the Moderate Rehabilitation program, the Department will assume that in most cases an initial difference actually existed between comparable unassisted rents and initial Contract Rents.

For those contracts where an initial difference was never established, the Department has created a substitute method to allow for the initial difference. Where an initial difference was never established, the initial difference will be assumed to be ten percent of the initial Contract Rent, unless an owner can document that the initial difference was greater.

Providing for a substitute method that assumes the initial difference is ten percent if it was never established is consistent with HUD's procedures established for Section 8 New Construction and Substantial Rehabilitation Properties where current contract rents are above the published FMRs. In a direct issuance to HUD's Field Offices (Notice H-95-12, issued March 7, 1995), HUD stated: "In order to provide a fair number to owners who may not be able to show proof of the initial difference which existed in the initial Section 8 contract rents, HUD will use 10% of the initial Section 8 contract rent (plus the Financial Adjustment Factor, if applicable) where evidence of the initial difference cannot be provided by the owner." (Page 4 of Notice H-95-12). Accordingly, HUD's use of the 10 percent initial difference in this rule is to maintain consistency and uniformity, to the extent possible, in its Section 8 programs.

#### D. Special Adjustments

This proposed rule would clarify and expand the availability of special rent adjustments. Special adjustments may not be approved because of cost increases particular to operation of the individual Owner or project, but only may be granted for "general increases" that affect operation of housing in the community. The proposed rule would provide that these special adjustments may only be approved to reflect "substantial general" increases in "actual and necessary" expenses of owning and maintaining the dwelling unit. The Owner does not have a

contractual or regulatory right to receive the special adjustment. HUD "may approve" a special adjustment, and the PHA "may make" a special adjustment. A special adjustment must be determined in accordance with HUD procedures and be approved by HUD.

The proposed rule would implement section 142 of the Housing and Community Development Act of 1992 (Pub.L. 102-550, approved October 28, 1992). Section 142 allows HUD to give a special adjustment, subject to the availability of appropriations, to the extent HUD determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units that have resulted from the expiration of a real property tax exemption. In addition, the proposed rule would include insurance in the categories of cost increases that may result in a special adjustment, provided that the insurance cost increases are actual and necessary expenses which have resulted from substantial general increases in insurance costs. Special adjustments are currently limited by the regulations pertaining to real property taxes or special assessments, and increases of utility rates or cost of utilities not covered by regulated rates.

On September 16, 1994 (59 FR 47772), HUD published a final rule that implements section 542 of the Cranston-Gonzalez National Affordable Housing Act of 1990 (Pub.L. 101-625, approved November 28, 1990). Consistent with section 542, the September 16, 1994 final rule provides for PHAs to recommend, and HUD to approve, subject to the availability of appropriations, a special adjustment, on a project by project basis, to reflect substantial increases in operating, maintenance and capital repair costs primarily due to the general prevalence in the community of drug-related criminal activity. The authority for this special adjustment is strictly subject to the availability for appropriations for this purpose.

The September 16, 1994 final rule codified the section 542 special rent adjustments provisions in § 882.410(a)(2). This proposed rule would move these provisions to § 882.410(d), and would make some organizational and minor clarifying language changes. However, the substance of the special rent adjustment provisions as implemented in § 882.410(a)(2) in the September 16, 1994 final rule, remains the same as in § 882.410(d)(1),(2),(4) and (6) of this proposed rule.

III. Other Matters

*Executive Order 12866*

This proposed rule was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866 on Regulatory Planning and Review, issued by the President on September 30, 1993. Any changes made in this proposed rule as a result of that review are clearly 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.

*Environmental Impact*

With respect to the rule's proposal to implement the comparability studies provision of the HUD Reform Act, an environmental assessment is unnecessary since statutorily required establishment and review of rent schedules that do not constitute a development decision affecting the physical condition of specific project areas or buildings sites is categorically excluded from HUD's National Environmental Policy Act (NEPA) procedures under 24 CFR 50.20(l). With respect to the proposed rule's special rent adjustment provision, a Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implements section 102(2)(C) of NEPA in connection with

development of the September 16, 1994 final rule that implements section 542 of the NAHA, and which provides for special rent adjustments certain operating and maintenance costs incurred as a result of a general prevalence of drug-related criminal activity in the community. That Finding of No Significant Impact is applicable to this proposed rule available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development Room 10276, 451 Seventh Street, SW, Washington, DC 20410.

*Executive Order 12612, Federalism*

The General Counsel, as the Designated Official for HUD under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this proposed rule do not have federalism implications and, thus, are not subject to review under the order. The rule is limited to revising the regulations applicable to the Section 8 Moderate Rehabilitation Program on the matter of adjustment of Contract Rents.

*Executive Order 12606, the Family*

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule

would not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the order. The rents paid by families in housing governed under this rule are based on the income of the families, and not on the Contract Rents affected by this rule. Therefore, the proposed rule is not subject to review under that order.

*Regulatory Flexibility Act*

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. Specifically, the rule would modify the procedures for adjusting Contract Rents in the Section 8 Moderate Rehabilitation Program.

*Paperwork Reduction Act Statement*

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). The following provisions of the rule have been determined by the Department to contain collection of information requirements:

Submission requirements	Number of respondents	Number responses per respondent	Total annual responses	Hours per response	Total hours
PHAs complete study .....	130	1	130	20	2600
Notify owners of results where it is found that a material difference exists .....	65	1	65	1	65
Owner appeal of results .....	22	1	22	8	176
PHA process appeal .....	22	1	22	4	88
Owner final appeal .....	4	1	4	4	16
HUD review of final appeal and notify owner of result .....	4	1	4	4	16
Owner submit request for special rent adjustment due to expiration of real property tax exemption .....	100	1	100	10	1000
PHA process owner request for special rent adjustment due to expiration of real property tax exemption .....	100	1	100	8	800
HUD review request for special rent adjustment due to expiration of real property tax exemption .....	75	1	75	8	600
Owner submit request for special rent adjustment due to increases in insurance costs .....	100	1	100	10	1000
PHA process owner request for special rent adjustment due to increases in insurance costs .....	100	1	100	8	800
HUD review request for special rent adjustment due to increases in insurance costs .....	75	1	75	8	600
<b>Total .....</b>	<b>7,761</b>				

List of Subjects in 24 CFR Part 882

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

Accordingly, 24 CFR part 882, subpart D is proposed to be amended as follows:

**PART 882—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—EXISTING HOUSING**

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

Authority: 42 U.S.C. 1437a, 1437c, 1437f, and 3535(d). Subpart H is also issued under 42 U.S.C. 11361 and 11401.

2. Section 882.410 is revised to read as follows:

**§ 882.410 Rent adjustments.**

(a) *Annual adjustments.* (1) Contract Rents will be adjusted annually as provided in paragraph (a) of this section upon submittal to the PHA by the Owner of a revised schedule of Contract Rents, provided that the unit is in decent, safe, and sanitary condition and that the Owner is otherwise in compliance with the terms of the Lease and Contract. The Annual Adjustment Factors (AAFs) which are published annually by HUD (see Schedule C, 24 CFR part 888) will be utilized.

(2) On or after each annual anniversary date of the Contract, the Contract Rents may be adjusted in accordance with this paragraph and other established HUD procedures. Contract Rents will only be adjusted for housing assistance payments for the months commencing 60 days after the PHA receives the Owner's revised schedule of Contract Rents. Contract Rents will not be adjusted retroactively or cumulatively. The annual adjustment with respect to any anniversary date must be requested prior to the next annual anniversary date.

(3) The adjusted Contract Rents cannot exceed the amount established by multiplying the applicable AAF by the base rents then adding the monthly rehabilitation debt service.

(4) Rents to be adjusted by the AAF must then be examined in accordance with paragraphs (b) and (c) of this section and may be adjusted accordingly.

(b) *Overall limitation.* (1) Notwithstanding any other provisions of this part, adjustments as provided in this section must not result in material differences between the rents charged for assisted and unassisted units of similar age, quality, and type in the same market area, as determined by the PHA (and approved by HUD in the case of adjustments under paragraph (d) of this section). A material difference between the assisted and comparable unassisted rent is determined to exist if the adjusted Contract rent is greater than the maximum allowable Contract rent plus any difference which may have existed initially. The maximum allowable base rent is a dollar amount equal to 105 percent of the comparable rent.

(2) In determining whether a material difference exists, the PHA must allow for any difference which may have existed with respect to the initial

Contract Rent. If the PHA did not establish an initial difference at the time the HAP contract was executed, ten percent of the initial Contract Rent shall be used as a substitute, unless an owner can document that the initial difference was greater.

(c) *Comparability Studies.* (1) A comparability study will be conducted for the purpose of determining whether a material difference, as described in paragraph (b) of this section, will result from application of the AAF. The PHA will notify the Owner in writing of its intention to conduct a comparability study.

(2) If the Contract rent, as adjusted by the AAF, plus the utility allowance, is less than 110 percent of the current Existing Housing FMR or exception rent (if granted for a geographical area in accordance with § 882.408(b)), the adjusted Contract Rent for the project shall be approved by the PHA in accordance with HUD prescribed procedures and the PHA shall not conduct a comparability study.

(3) If the Contract rent, adjusted by the AAF, plus the utility allowance, is 110 percent or more of the current Existing Housing FMR or if an exception rent limit (if granted for a geographical area in accordance with § 882.408(b)), the PHA will conduct a comparability study to determine and approve an adjusted base rent that is not materially different from rents charged for comparable unassisted units.

(4)(i) In conducting a comparability study, the project's Contract rents, as adjusted by the AAFs, will be compared to rents charged for unassisted units of similar quality, type and age in the same market area.

(ii) Comparability studies will be conducted by PHA staff. PHA staff conducting the comparability studies will make adjustments necessary to accommodate any difference between the comparables and the assisted project that significantly affect the amount of rent charged (including, without limitation, adjustments for utility charges).

(5) If it is determined by the comparability study that a material difference would result (as provided in paragraph (b) of this section) from application of the full AAF, a notice showing the results of the study will be provided to the Owner within 30 business days of receipt of the Owner's request for a rent increase. The Contract Rent will be set at the maximum allowable Contract rent (as defined in paragraph (b) of the section). However, the Contract Rent will never be reduced as a result of a comparability study.

(6) Where the results of a comparability study show that a material difference would not result from application of the full AAF, the base rent will be adjusted by the full AAF to determine the new Contract Rent.

(7)(i) Appeals of the decision to disapprove a full adjustment under the AAF must be made to the appropriate PHA within 30 business days from the date of the notice as required in paragraph (c)(5) of this section. Sufficient documentation must be provided of any objections to the decision.

(ii) The PHA will review the appeal within 30 business days from receipt of the documentation.

(8) Final appeals of the PHA decision may be made to the appropriate HUD Field Office.

(d) *Special adjustments.* (1) A special adjustment, to the extent determined by HUD to reflect increases in the actual and necessary expenses of owning and maintaining the unit which are not adequately compensated for by annual adjustments under this part, and which have resulted from substantial general increases in real property taxes, assessments, utility rates, utilities not covered by regulated rates, or increases in insurance costs, may be recommended by the PHA for approval by HUD.

(2) Subject to the availability of appropriations for the purpose specified in paragraph (d)(2) of this section, a special adjustment may be recommended by the PHA for approval by HUD when HUD determines, based upon a clear demonstration by the Owner, that a project is located in a community where drug-related criminal activity is generally prevalent, and not specific to a particular project, and the project's operating, maintenance, and capital repair expenses have substantially increased primarily as a result of the prevalence of such drug-related activity.

(i) HUD may, on a project-by-project basis, provide adjustments to the maximum monthly rents to a level no greater than 120 percent of the current gross rents for each unit size under a Housing Assistance Payments Contract to cover the costs of maintenance, security, capital repairs and reserves required for the Owner to carry out a strategy acceptable to HUD for addressing the problem of drug-related criminal activity.

(ii) Where the strategy involves physical improvements, HUD will perform an environmental review to the extent required under HUD's environmental regulations at 24 CFR

part 50 prior to approving the special adjustment.

(3) Subject to the availability of appropriations, a special adjustment also may be recommended by the PHA for approval by HUD when and to the extent HUD determines such adjustments are necessary to reflect increases in such actual and necessary expenses that have resulted from expiration of an exemption from real property tax.

(4) The special rent adjustments described in paragraph (d) of this section only will be approved if and to the extent the Owner clearly demonstrates that these general increases have caused increases in the Owner's operating costs which are not adequately compensated for by annual adjustments.

(5) Special adjustments are a separate component of the Contract Rent and are never added to the Base Rent for the purpose of calculating annual rent adjustments.

(6) The Owner must submit financial information to the PHA which clearly supports the increase. For Contracts of

more than twenty units, the Owner must submit audited financial information.

(e) *Effective date of special adjustments.* The effective date of the adjusted Contract Rent will be the first day of the month following the actual increase, or the first day of the month after the Owner's written request for the special adjustment, whichever is later. Special adjustments for security will not be made retroactively.

(f) *Term of special adjustments.* (1) The term of a special rent adjustment will be coterminous with the period of the increased cost to the Owner, subsequent to its effective date. HUD will approve the term of the special adjustment and the special adjustment must be terminated at the end of the specified term. The special adjustment must be reviewed annually by the PHA to determine whether it is still justifiable. The PHA may request and HUD may approve a decrease or an increase in the term.

(2) Special adjustments are removed from the Contract Rent at the end of the approved term. The removal of a special adjustment from the Contract Rent at the

end of the approved term is not and will not be considered a reduction of Contract Rents.

(g) *Rent reductions.* Contract Rents will never be reduced as a result of a comparability study, but may be reduced when the project has been refinanced in such a manner that the periodic payment of the Owner has been reduced. The Owner is required to notify the PHA of any refinancing that occurs during the term of the HAP Contract. When the property acquisition portion of a loan has been refinanced, procedures prescribed by HUD will be utilized to recompute the base rents in relation to AAFs. Such procedures shall not be applicable to projects under subpart H of this part.

Editorial Note: This document was received at the Office of the Federal Register on September 26, 1995.

Dated: December 1, 1994.

Joseph Shuldiner,  
*Assistant Secretary for Public and Indian Housing.*

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