

determine whether or not it is complete. If an application lacks certain technical items or contains a technical error, such as an incorrect signatory, HUD will notify the applicant in writing that it has fourteen (14) calendar days from the date of written notification to cure the technical deficiency. If the applicant fails to submit the missing material within the fourteen day cure period, HUD may disqualify the application.

This fourteen day cure period applies only to nonsubstantive deficiencies or errors. Any deficiency capable of cure will involve only items not necessary for HUD to assess the merits of an application against the factors specified in this NOFA.

V. Other Matters

A. Environmental Impact

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(b) of the HUD regulations, the policies and procedures in this document relate only to the provision of technical assistance, and, therefore, are

categorically excluded from the requirements of the National Environmental Policy Act.

B. Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies and procedures contained in this NOFA will not have substantial direct effects on States or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government. Specifically, the NOFA solicits participation in an effort to provide technical assistance to help residents of PHA sites become self-employed. The NOFA does not impinge upon the relationships between the Federal government, and State and local governments.

C. Family Impact

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

have potential for significant beneficial impact on family formation, maintenance, and general well-being. The technical assistance to be provided by the funding under this NOFA is expected to help residents of PHA sites to become successfully self-employed, which in turn will help them become economically self-sufficient. Since the impact on the family is considered beneficial, no further review under the Order is necessary.

(The Catalog of Federal Domestic Assistance Program number is 14.227)

Authority: Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301-5320); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)); 24 CFR 570.402.

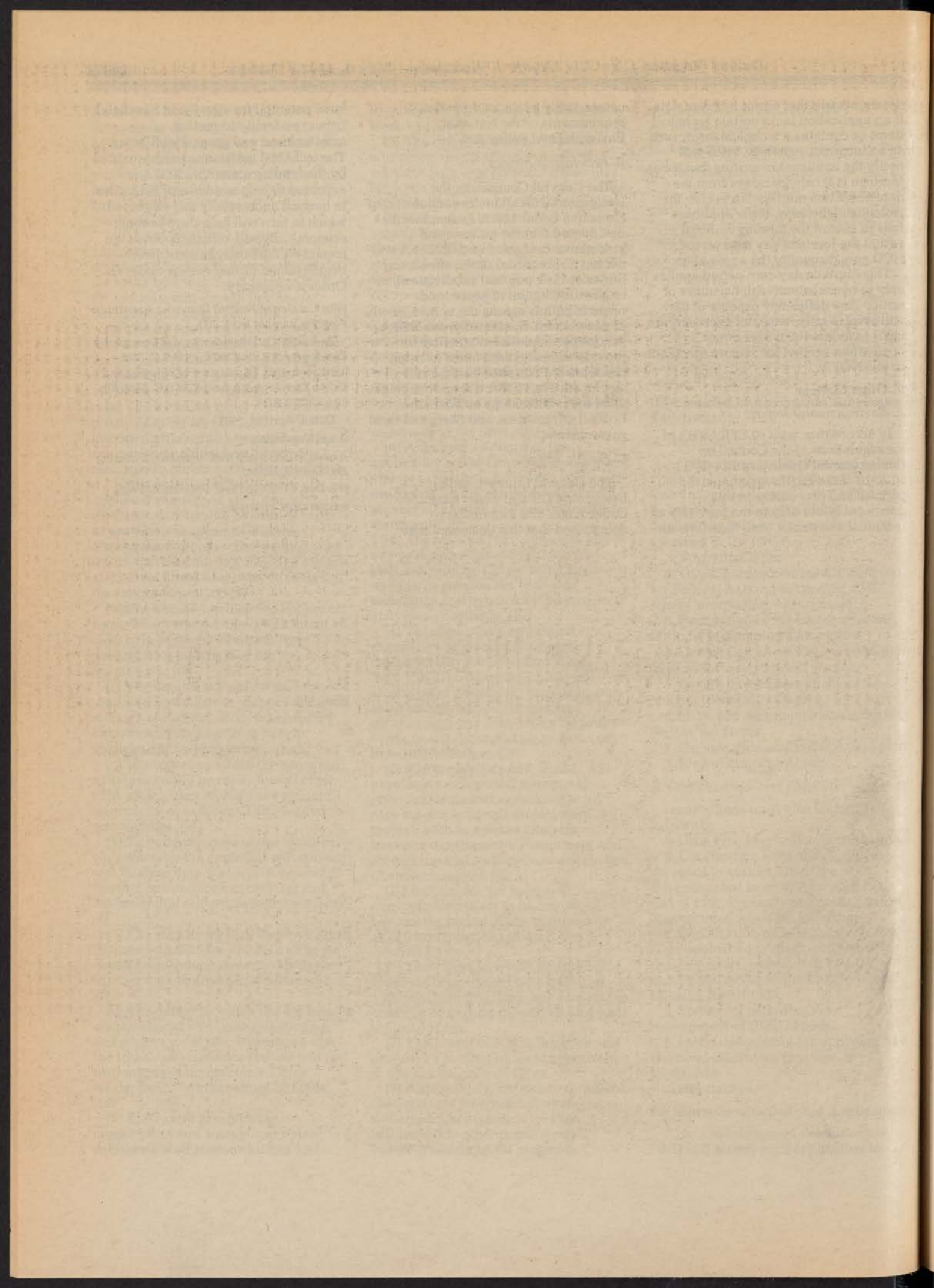
Dated: April 23, 1991.

Anna Kondratas,

Assistant Secretary for Community Planning and Development.

[FR Doc. 91-10226 Filed 4-30-91; 8:45 am]

BILLING CODE 4210-29-M



Register

Wednesday
May 1 1991

Part III

Department of Education

Rehabilitation Training Program; Request for Public Comment

DEPARTMENT OF EDUCATION**Rehabilitation Training Program****AGENCY:** Department of Education.**ACTION:** Notice of request for public comment on issues regarding the Rehabilitation Training Program.

SUMMARY: The Secretary of Education invites written comments from the public on issues regarding the Rehabilitation Training Program, authorized by section 304 of the Rehabilitation Act of 1973, as amended. The comments will assist in a review of the policies and practices of the Department in administering the program and will assist the Secretary in targeting fiscal year 1992 rehabilitation training funds.

DATES: Written comments must be received on or before May 31, 1991.

ADDRESSES: Written comments should be addressed to Nell C. Carney, Commissioner, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 400 Maryland Avenue SW., (room 3024 Switzer), Washington, DC 20202-2531.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Melia, Office of Developmental Programs, Rehabilitation Services Administration, U.S. Department of Education, 400 Maryland Avenue SE., (room 3324 Switzer), Washington, DC 20202-2649. Telephone (202) 732-1400. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 (in the Washington, DC 202 area code, telephone 708-9300) between 8 a.m. and 7 p.m. Eastern time.

SUPPLEMENTARY INFORMATION: The Secretary is requesting public comment on issues regarding the Rehabilitation Training Program. The program is authorized by title III, section 304 of the Rehabilitation Act of 1973, as amended, and provides grants to and contracts with States and public or nonprofit agencies and organizations, including institutions of higher education, to pay part of the costs of projects for training, traineeships, and related activities designed to assist in increasing the numbers of qualified personnel trained in providing vocational, medical, social, and psychological rehabilitation and independent living services to individuals with disabilities. Funding through the Rehabilitation Training Program supports the following areas of training:

- (1) Long-Term Training.
- (2) Experimental and Innovative Training.

(3) Rehabilitation Continuing Education Programs.

(4) Short-Term Training.

(5) In-Service Training.

(6) Training Interpreters for Individuals Who Are Deaf.

Section 304(c) of the Rehabilitation Act of 1973, as amended, requires the Rehabilitation Services Administration (RSA) to target rehabilitation training funds to areas of personnel shortage. Specifically, section 304(c) requires that RSA:

(1) Determine training needs of qualified personnel necessary to provide services to individuals with disabilities;

(2) Develop a long-term rehabilitation manpower plan designed to target resources on areas of personnel shortage; and

(3) Develop an annual report containing:

(i) Findings on personnel shortages;

(ii) Funding allocations by professionals discipline and program area; and

(iii) The justification for these allocations, based on personnel shortages.

On March 18, 1991, the Secretary published in the *Federal Register* a notice of public meeting (56 FR 11411) to solicit public comment regarding the Rehabilitation Training Program. This meeting is scheduled for May 9, 1991, in Washington, DC.

Issues for Public Comment

The Secretary solicits comments and suggestions regarding the Rehabilitation Training Program. Comments are especially invited on the following issues:

General Issues

Are there emerging needs or trends in practice in the vocational rehabilitation field that the Rehabilitation Training Program could address? Should RSA training funds target the initiation of new training programs or expand and continue ongoing programs?

Doctoral and Leadership Training Program Needs

Should RSA emphasize fellowships and related methods of encouraging rehabilitation education leadership development? If so, in which fields? Is this strategy appropriate for rehabilitation medicine and allied health disciplines?

Curriculum Requirements

Should RSA publish priorities that have implications for the content of curriculum? Should the level of training (certificate, associates, bachelors, masters, doctoral) be specified? Should

RSA training prepare persons for "technical support" positions as well as "professional" positions?

Short-Term Training

Are short-term training needs being adequately addressed through present training programs (Regional Rehabilitation Continuing Education Programs, in-service training grants, post-employment emphasis in long-term training)? What program areas and disciplines require new approaches to short-term training?

Regional and Geographic Needs

Should training priorities be targeted for specific geographic areas? What criteria should define a regional or geographic training need? What program areas or disciplines have acute geographic or distribution needs? Do recipients of rehabilitation training tend to accept employment in the same geographic area in which training was provided?

Consolidation of Program Areas

Are there program categories that are duplicative, outdated, or unclear? Which areas should be changed? Why? Are personnel in areas such as "Rehabilitation Facility Workshop Personnel," "Vocational Evaluation and Work Adjustment," "Job Development and Placement," and "Supported Employment" interchangeable to some extent in meeting program needs?

Multiple Disabilities and Special Populations

Should priorities be developed that target specific disabilities (such as individuals who are deaf-blind) or should they be incorporated within a larger category? How should special populations based on functional capacity or diagnostic groupings such as "hard-of-hearing" and "low vision" be addressed in planning and priorities?

Purchase of Services by Rehabilitation Agencies

Can problems of inadequate availability of "vendors" be addressed in the training program? Are problems of access to services in specific program areas or disciplines (such as rehabilitation engineering) directly related to training?

Rehabilitation Counseling

Should masters degree rehabilitation counseling programs funded under this program category be limited to generalist counselors, with specialist counselors being trained under other program areas? Is training for certain

specialty areas better provided during post-employment?

Attracting Individuals With Disabilities and Culturally Diverse Populations to Rehabilitation

How can training priorities improve the access to training and increase the number of persons from special groups who participate in the training?

Americans With Disabilities Act (ADA)

Are there new training needs among rehabilitation professionals regarding the ADA?

Format for Comments

This request for comments is designed to elicit views of interested parties on the Rehabilitation Training Program and to provide the Department with knowledge of program areas that could be improved. It is not intended to express any view on any issue or to represent the intention of the Secretary to propose legislative changes in the program.

The Secretary requests that each respondent identify his or her role in rehabilitation and rehabilitation

training, if any. In proposing modification or alternatives, the respondents may want to address the issues listed under Issues for Public Comment, as well as other rehabilitation training issues.

The Secretary urges each commenter to be specific regarding his or her suggestions.

Dated: April 25, 1991.

Lamar Alexander,

Secretary of Education.

[FR Doc. 91-10211 Filed 4-30-91; 8:45 am]

BILLING CODE 4000-01-M

Testis Testis Testis

Wednesday
May 1, 1991

Part IV

Department of Housing and Urban Development

Office of the Assistant Secretary for
Housing—Federal Housing Commissioner

24 CFR Part 888

Annual Rent Adjustments for Section 8
Assisted Housing; Retroactive Housing
Assistance Payments; Final Rule

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

Office of the Assistant Secretary for
Housing—Federal Housing
Commissioner

24 CFR Part 888

[Docket No. R-91-1484; FR-2745-F-03]

RIN 2502-AE81

**Annual Rent Adjustments for Section 8
Assisted Housing; Retroactive
Housing Assistance Payments**

AGENCY: Office of the Assistant
Secretary for Housing—Federal Housing
Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This rule makes final a proposed rule published on June 19, 1990 at 55 FR 25054 (as corrected on July 2, 1990 at 55 FR 27251). The rule implements portions of Section 801 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (Reform Act), by providing the criteria under which HUD will make retroactive Housing Assistance Payments to owners of section 8 projects for which the use of comparability studies as an independent limitation on annual rent adjustments, for the period from October 1, 1979 until the effective date of this rule, resulted in the reduction of rents or the failure to increase the rents to the entire amount permitted by Annual Adjustment Factors; or to owners of section 8 projects whose contracts require them to request annual adjustments and who will certify that they did not request such adjustments because they anticipated reductions in rents. Under this rule, owners eligible for retroactive payments also have the opportunity to request a one-time determination of the contract rent upon which to base future rent adjustments.

EFFECTIVE DATE: May 31, 1991.

FOR FURTHER INFORMATION CONTACT: Moderate Rehabilitation program: Madeline Hastings, Room 6130, telephone (202) 708-0420; all other programs: James Tahash, Room 6182, telephone (202) 708-3944; Department of Housing and Urban Development, 451 Seventh Street, Washington, DC 20410. TDD number for the hearing- and speech-impaired (202) 708-4594. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The information collection requirements contained in this rule were approved by the Office of Management and Budget (OMB) under the Paperwork Reduction

Act of 1980, and assigned OMB control number 2502-0042.

I. Background

This rule makes final a proposed rule published by the Department on June 19, 1990 (55 FR 25054) (as corrected on July 2, 1990 at 55 FR 27251). The rule implements section 801(a) and (d) of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (Reform Act). The rule provides the criteria under which HUD will make retroactive Housing Assistance Payments to owners of section 8 projects for which the use of comparability studies as an independent limitation on annual rent adjustments, for the period from October 1, 1979 until the effective date of this rule, resulted in the reduction of rents or the failure to increase the rents to the entire amount permitted by Annual Adjustment Factors; or to owners of section 8 projects whose contracts require them to request annual adjustments and who certify that they did not request adjustments because they anticipated reductions in rents. Under this rule, owners eligible for retroactive payments also have the opportunity to request a one-time determination of the contract rent upon which to base future rent adjustments.

[Section 801(c) of the Reform Act amends section 8 of the U.S. Housing Act of 1937 (1937 Act), clarifying and reaffirming HUD's ability to use comparability studies in the future as a basis for adjusting contract rents. A proposed rule implementing section 801(c) will be published at a later date. Until a final rule is published on the future use of comparability studies, section 8 contract rents will be adjusted by applying the full AAF.]

II. Public Comments

HUD received 24 public comments on the proposed rule. Two commenters supported the rule without further comment on its provisions, and another commenter stated its opposition to making retroactive payments at all. The other comments focused on particular provisions of the rule, as described below.

Applicability/Eligibility (§§ 888.301(b)-(c) and 888.401(b)-(c))

The rule, as stated in the proposed rule, applies to all projects receiving project-based section 8 assistance whose contract rents are adjusted by AAFs. These include section 8 contracts under New Construction (Part 880); Substantial Rehabilitation (Part 881); State Finance Agencies (Part 883);

Section 515 Farmers Home Administration (Part 884); Section 202 Elderly or Handicapped Housing (Part 885); Loan Management Set-Aside (Part 886, Subpart A); Property Disposition (Part 886, Subpart C); and Moderate Rehabilitation (Part 882, Subparts D, E, and H). The proposed rule further stated, as does this final rule, that it does not apply to project-based section 8 contracts whose rents are adjusted using the budget approach (e.g., some section 202 projects and Special Allocation projects), nor would it apply to tenant-based assistance programs, such as the section 8 Certificate and Housing Voucher programs.

One commenter questioned how the rule would apply to Farmers Home Administration (FmHA) projects whose rents have been established without benefit of the use of the AAFs, but rather on a budget approach basis when a rent increase has been approved by FmHA. Section 801(a) applies only where HUD limited or reduced contract rents based on a comparability study conducted by HUD. If HUD granted a rent adjustment based on the full AAF that was subsequently modified by FmHA, this rule does not apply. However, where contract rents were reduced or limited by HUD as a result of a comparability study conducted by HUD, the rule does apply.

A commenter expressed concern that owners of 80-20 split projects developed under section 221(d)(3) and (d)(4) of the National Housing Act were excluded from the rule. Certain projects insured under section 221(d)(3) and (d)(4) receive rental assistance payments for less than 100 percent of their units under various section 8 programs (e.g., New Construction or Substantial Rehabilitation). The rule applies to those projects to the extent that it applies to the section 8 program under which the projects receive assistance payments and are regulated.

Another commenter questioned the rule's application to Loan Management Set-Aside (LMSA) projects using the budgeted increase approach to rent adjustments. The rule does not apply to those projects. Only projects whose rents are adjusted by the AAFs, which includes some LMSA projects, are covered by the rule; any project whose rents are adjusted by the budgeted rent increase method is not covered by this rule. This latter includes not only some LMSA projects, but also Section 202/8 projects that currently use the budgeted rent increase approach, even though those projects may have previously used the AAFs to adjust rents.

One commenter questioned whether the rule would apply only to those projects whose rents were identified as incomparable and adjusted solely on the basis of comparability studies, or would also apply to projects whose rents were identified as excessive because their profits exceeded the net profit distribution allowance. Section 801(a) is clear in its application to projects where the rent reduction or limitation was based on the results of a comparability study. If the latter project's rents were, in the end, adjusted on the basis of a comparability study, the rule will apply.

Two commenters suggested that the rule include owners with anniversary dates in September or August 1979, rather than beginning with October 1, 1979. The calculations for retroactive payments and the one-time contract rent determination will be for the period beginning October 1, 1979 and ending on the effective date of this rule. Section 801(a) specifies that the retroactive payments are for rental adjustments for fiscal year 1980. The Department interprets this to mean the Federal Government fiscal year 1980, which began October 1, 1979. Any project owner whose rents were reduced or limited as a result of a comparability study during the period beginning on October 1, 1979 and ending on the effective date of this rule is eligible for a retroactive payment, regardless of the anniversary date of the project.

Three commenters expressed a concern regarding notification to owners, and asked whether HUD would determine eligibility. They also believed the rule should provide more guidance on what HUD would accept with the certification of those owners who claim they did not request adjustments because they anticipated rent decreases.

Either HUD or the Contract Administrator will give written notice to all current owners about the retroactive payments to be made under this rule. The notification will inform owners of the eligibility requirements and request owners who believe they meet the eligibility requirements to respond with a request for the calculation within the timeframe set forth in §§ 888.310(a) and 888.410(a). (Project owners, however, who have obtained in Federal district court judgments declaring that section 801 is unconstitutional are free to disregard such notices, as well as the implementing regulations, unless those judgments are vacated.) When the calculations have been completed by HUD or the Contract Administrators, owners who responded to the initial notification will be informed of the results of the calculations.

Owners who are required to request rent adjustments and who are applying for retroactive payments and/or a one-time rent determination must submit a certification that they anticipated a rent reduction, accompanied by a statement of the basis for the belief. The statement should set forth the circumstances that led the owner to believe project rents would be reduced if a rent increase was requested.

Calculating the Total Rent Adjustment and Retroactive Payment (§ 888.305)

As set out in both the proposed rule and this final rule in § 888.305(a), HUD (or the Contract Administrator) will recalculate the total rent adjustments by applying the applicable AAF for FY 1980 to the FY 1979 contract rent minus the debt service. (This method of calculation applies to New Construction, Substantial Rehabilitation, State Finance Agencies, FmHA, Section 202, Property Disposition, and LMSA projects. Calculations for the Moderate Rehabilitation program differ in that the base rent, to which the AAF is normally applied in adjusting rents and will be applied in calculations under this rule, already has had the debt service subtracted. See § 888.405(a).) The debt service will then be added back into the formula to provide the adjusted contract rent for FY 1980. The recalculated FY 1980 contract rent (again minus debt service) will then be used to calculate the rent adjustment for the next year (FY 1981). The same process will continue for each year until the effective date of this rule. Under § 888.305(e), any special adjustments granted by HUD during the relevant time period will also be deducted from the Contract Rent before applying the AAF. (Section 888.405(e) provides the same procedure for Moderate Rehabilitation projects.)

As retroactive payment, HUD will pay the amount, if any, by which the total rent adjustments, calculated in the manner described above, exceed the total adjustments actually approved. However, no eligible project owner will be paid an amount less than 30 percent of the aggregate of the full contract rent (i.e., including debt service) multiplied by the applicable AAF minus the amount of rent adjustments actually approved, for the same time period. (See §§ 888.305(b) and 888.405(b).) As set forth in §§ 888.305(c) and 888.405(c), payments will be based on the number of units occupied (including vacancies eligible for payment, in accordance with HUD regulations) during the time period for which the retroactive payments are made.

Several commenters requested that

examples be included for projects with special adjustments and less than 100% occupancy. The following example calculation shows how special adjustments and occupancy rates will be used in the calculation:

Project X was given a special adjustment of \$10 per-unit per-month in 1984. The per-unit per-month debt service is \$250. In FY 1985, the applicable AAF was 1.064. The recalculated rent (contract rent minus debt service times AAF plus debt service) in 1984 is \$520 per unit. To find the recalculated rent for 1985, the special adjustment of \$10, as well as the debt service, will be subtracted before applying the AAF.

Example calculation:

$(\$520 - \$250 - \$10) \times 1.064 = \$277$
 $\$277 + \$250 + \$10 = \$537$ (1985 recalculated rent)

After completing all calculations for Project X, the retroactive payment, based on 100 percent occupancy is \$200,764. However, the average occupancy rate for the project throughout the 10-year period was 98 percent. Under the regulations, HUD pays 80 percent of the contract rent for eligible vacant units.

Example calculation:

98 percent of \$200,764 @ 100 percent = ...	\$196,749
2 percent of \$200,764 @ 80 percent = ...	3,212
Payment (adjusted for occupancy)	\$199,961

One commenter considers the 30 percent recovery to be unfair, and is currently involved in litigation to recover the full amount. Four other commenters believe the rule should state that owners are to be precluded from pursuing full payment through the courts. Project owners do not need HUD's authority to institute lawsuits. Indeed, some already have sued and obtained Federal district court judgments declaring section 801 unconstitutional. HUD believes those judgments are erroneous and has sought to appeal them. Accordingly, HUD will continue to implement section 801 with its specified limits on recovery. As stated above, owners who have obtained declaratory judgments are not bound by this regulation unless those judgments are vacated. If such a judgment is vacated, affected owners will have 60 days from the date of the order vacating the judgment to respond to the written notification that will be sent by HUD.

One commenter stated that HUD should not expect owners and managers to know the AAF rent or the rent approved and paid for all past years. HUD field offices will use project files to determine the approved rent and AAFs applied during the relevant time period.

Five commenters questioned what the "applicable AAF" is. They stated that in years when AAFs were published late, i.e., after November 8, owners with anniversary dates falling between November 8 and the publication date were given the option to use the higher of the factor published prior to the anniversary date ("available factor") or subsequent to the anniversary ("applicable factor"). The commenters believe that in determining the payment HUD should continue to allow the owner to choose the factor to be applied. The final rule now provides in §§ 888.305(h) that, where factors were published late by the Department, the applicable AAF is the factor that was chosen by the owner. (This provision does not apply to Moderate Rehabilitation projects.)

Another commenter suggested that the applicable AAF should be that factor that would be applied to a rent at the level of the contract rent minus the debt service. The applicable AAF, when calculating the adjustments to the contract rent minus the debt service, is the factor that applies to the full contract rent (including the debt service). Section 801(a)(1) clearly refers to the application of "the annual adjustment factor" in calculations both including and excluding debt service. HUD interprets this to mean that the same factor is to be applied in these calculations.

With regard to subtracting the debt service before applying the AAF, two commenters were opposed. The subtraction of debt service from rents for purposes of calculating the retroactive payment is a statutory requirement included in the formula set out in section 801(a).

One commenter objected to the inclusion of the mortgage insurance premium in the definition of debt service, and another objected to the inclusion of the financial adjustment factor (FAF) for State Finance Agencies projects.

HUD disagrees that mortgage insurance premiums should not be included as part of the debt service. The definition of "debt service" contained in section 801(a) provides that mortgage insurance premiums, if any, are to be included along with principal and interest. However, HUD has determined that the FAF (or called FA in the case of some projects) should not be included as

a part of the debt service. The FAF, which allowed for an increase in contract rents to cover increased interest rates on loans, will be included in the contract rent for those projects that benefited from such an adjustment. The final rule has been changed to eliminate the reference to the FAF as a part of debt service.

Two commenters believe the rule should give guidance on what constitutes debt service for projects financed with non-standard financing, such as 11(b) bond financing or non-HUD insured where credit enhancement costs take the place of the MIP. Generally, debt service should be computed the same way in projects with non-standard financing as it is in projects with standard financing. A mortgage is almost always present, and payments on that mortgage include principal and interest, which may or may not include a mortgage insurance premium. For projects with no mortgage or debt service, no subtraction will be made.

Two other commenters felt the rule should be more explicit about how to calculate the debt service, and another was concerned that Contract Administrators may not know what the debt service of a project is. HUD agrees, and the final rule now provides that the monthly debt service set forth in the original mortgage documents will be used to compute the debt service. Field Offices will compute the debt service portion of the contract rent by comparing the debt service to the spread of unit sizes included in the original HAP contract. For example, if the debt service per month is determined to be \$6,480 and the original HAP contract covers 20 one-bedroom units with rents of \$250 per month and 20 two-bedroom units with rents of \$290 per month, the debt service for the one-bedroom units is \$150 per month, while the debt service for the two-bedroom units is \$174 per month. If, in some cases, the Contract Administrator or HUD does not know and cannot determine the debt service for particular projects, project owners will be asked to provide documentation of the debt service as calculated above. Owners in this category will be notified by HUD or the Contract Administrator of the need for documentation of the debt service, and will be given 30 days to respond. Exceptions to the 30-day response deadline may be granted on a case-by-case basis. If an owner does not provide the requested debt service information, the calculations necessary to make retroactive payments cannot be made.

One commenter stated that debt service should be based on the size of

the unit in relation to the whole project, and another on the number of bedrooms in a unit. Debt service will be based on the percentage of total rent potential of the various unit types. Field offices will use the unit type spread set forth in the original HAP contract in determining the debt service portion of the contract rents. This is also included in the final version of the rule.

Two commenters expressed concern about project owners who had been notified by HUD that they were due back payments in accordance with section 1004 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. 100-628, approved Nov. 8, 1988) and had not yet been paid. They do not believe that the statutory formula should apply to that payment. HUD agrees, and all payments made in accordance with the McKinney Act provision will be made separate from the retroactive payments described in this rule. The rents as restored according to the McKinney Act provisions will be used in the calculations for retroactive payments and the one-time contract rent determination under this rule.

Occupancy Rates (§§ 888.305(c) and 888.405(c))

A commenter felt that the use of an annual or monthly vacancy factor would be simpler. (The proposed rule provided that owners may submit occupancy rates for the period from October 1, 1979 to the effective date of the rule, but did not specify whether this should be an annual or monthly rate.) The final rule clarifies that HUD will accept documentation of either a monthly or annual occupancy rate.

A second commenter stated that owners should have the right to document the occupancy rate as well as the right to appeal a HUD-determined average. The commenter also questioned what constitutes an "eligible" vacancy. Other commenters questioned what HUD will use to establish an average occupancy rate. HUD is requesting that project owners document occupancy rates by submitting official monthly or annual records indicating the level of occupancy. If full documentation is not available, HUD will utilize the available data from the three years preceding the effective date of this rule. Field Offices will simply average the monthly occupancy rate figures that have been submitted to HUD. The determination is subject to correction if it is found that an error was made in the calculation of the average. Vacant units eligible for vacancy payments (80 percent of the

contract rent) are also eligible for retroactive payments. An "eligible" vacancy is a unit that meets the requirements specified in the relevant HUD regulations at 24 CFR 880.611, 881.611, 882.411, 883.712, 884.106, 885.985, 886.109, or 886.309.

Finally, a commenter stated that Section 801 does not authorize adjusting the payments for vacancies, but if HUD does so, the method used and the definition of vacancy should be included in the rule. HUD interprets section 801(a) as requiring retroactive payments to be made on the basis of rents that would have resulted if the full AAF had been applied and comparing these to the payment that was actually approved. Units vacated by eligible tenants may, in most cases, receive vacancy payments equal to only 80 percent of the contract rent. The absence of manageable documentation makes it difficult, if not impossible, to determine the exact amount of vacancy payments made. The use of an average occupancy rate ensures that owners are fully compensated for adjustments on those units receiving vacancy payments.

Special Adjustments (§§ 888.305(e) and 888.405(e))

Three commenters wrote that special adjustments should not be deducted from the contract rent before applying the AAF when recalculating the total rent adjustment and amount of retroactive payments, and five suggested that the rule be more specific on this issue. Two commenters asked whether a request for a special adjustment that was denied because of a comparability study or a "rent reasonableness" test is eligible to be included as a reduced or limited rent adjustment for purposes of eligibility for a retroactive payment. Another commenter asked whether comparability studies will be required for special adjustments after the rule becomes effective.

Special adjustments are typically granted, to the extent determined necessary by HUD, to reflect increases in expenses that have resulted from substantial general increases in property taxes, assessments, utility rates, and utilities not covered by regulated rates, and that are not adequately compensated for by the AAFs. The amount approved for the special adjustment is a fixed amount and, as such, HUD believes should not be adjusted each year by the AAF. For example, a special adjustment of \$10 per unit per month, granted because of an increase in taxes, should not be adjusted each year, because the tax itself does not increase accordingly. Future AAFs

for the area should account for this tax with higher rent adjustments.

A request for a special adjustment that was denied because of a comparability study is not eligible for inclusion in the retroactive payment. Section 801(a) is clear that retroactive payments are to be made only in cases where the use of a comparability study acted as an independent limitation on the amount of rental adjustment that would have resulted from the application of an AAF.

A rule for the future conduct of comparability studies, as authorized by section 801(c), has not been developed. HUD will publish a proposed rule implementing section 801(c) for public comment at a later date. No comparability studies will be conducted until a final rule implementing section 801(c) has been published.

60-day Deadline for Request for Payment (§§ 888.310(a) and 888.410(a))

One commenter believes that the 60 days allowed after notice of eligibility to request payment or a rent determination is an unfair limitation. The commenter is involved in litigation for 100 percent recovery, and stated that if the suit is unsuccessful, the 60-day period would be over. HUD believes that the 60-day deadline is necessary so that field offices can carry out the research and calculations for all requests at the same time for two reasons. First, the complexity of the process requires that field offices focus on the collection of data and the accuracy of computations at one time. Secondly, section 801(b) requires that HUD make payments within a certain time frame. However, owners involved in litigation filed before the effective date of this rule will be given 60 days from the date of a final judgment in those suits in which to request retroactive payments under this rule.

Eight commenters believe that HUD should also have a deadline for making the payments or notifying owners of the amount due. (The rule does not give a deadline for HUD, but provides that payments will be made over a three-year period as funds are appropriated. The preamble to the proposed rule stated that owners will be notified by HUD of the amount of the payment or the contract rent determination "in as timely a manner as possible.") The calculations required under this rule are complex and time- and staff-intensive. Because the Department cannot predict with any degree of accuracy the number of respondents who will request payments and rent determinations, it cannot estimate the amount of time required to complete the processing.

However, the Department is committed to carry out its obligations under the legislation and this rule in a timely manner.

Miscellaneous Comments With Regard to Payment

One commenter asked whether owners who are to receive large sums will be paid interest on the unpaid balance, since the rule indicates the payments will be made over a three-year period as appropriations become available. The Department does not interpret any provision in section 801 as authorizing the payment of interest.

A commenter asked whether any consideration had been given to the possibility that funds would not be appropriated for the payments, and another urged HUD to include a request for funds for the payments in its appropriations requests to Congress. Section 801(b) specifies that the retroactive payments must be made from funds appropriated by Congress for this purpose. HUD requested and Congress appropriated \$70 million for payments in 1991. While the Department has no control over the appropriations process, it intends to request the funds necessary to comply with Section 801(b) in its 1992 and 1993 budget submissions.

Transfer of Ownership (§§ 888.310(d) and 888.410(d))

A commenter suggested that the rule more clearly define the position of HUD if owners disagree or protest a proportionate award. The commenter asked where HUD's financial responsibility would end and, in the event of a dispute, what would govern. The Department will not become involved in any dispute arising between past and present owners over rights to the payments. As the rule states, the payment will not be made until the current owner either certifies that it is entitled to the entire amount or provides documentation of an agreement between it and the past owner regarding the proportionate share to which each is entitled.

Use of Payment (§ 888.315(a))

One commenter proposed that Section 202/8 projects be allowed to deposit 50 percent of the payment into a special account set up to provide supportive services for tenants who are aging in place or the frail elderly. The commenter suggested that those projects need greater flexibility to use the reserve for replacements and residual receipts to finance retrofit or supportive services. The commenter stated that it understood that residual receipts in excess of the

amount necessary for emergency debt servicing may be used for "amenities consistent with the program under which the project was developed," and urged HUD to recognize the need to use excess reserves for meeting the needs of the frail elderly in assisted housing.

The retroactive payments, as contemplated by section 801, represent past housing assistance payments. Non-profit sponsors who receive retroactive payments for Section 202/8 projects must deposit those payments into the project accounts appropriate for housing assistance payments, as required by current HUD regulations, and the payments may then be used in a manner consistent with the regulations or contract. While the Department understands and appreciates the responsibility sponsors feel toward meeting the special needs of their tenants, it believes that this rule is not the appropriate place for addressing these suggestions.

Reserve for Replacements (§ 888.315(b))

Several commenters objected to the proposed rule's treatment of the percentage of the retroactive payment to be paid into the reserve for replacements account. The commenters all stated that the deposit should not vary according to the amount of the payment, but rather that the reserve deposit should be increased by the same percentage as the rent potential is increased. For example, if the percentage of the rent potential that must be deposited in the reserve for replacement account is 3 percent, then 3 percent of the retroactive payment must be deposited in the account. HUD agrees with the commenters. Although the example used in the preamble of the proposed rule was incorrect, the provision dealing with this issue in the rule text requires no change.

Physical Inspection of Projects (§§ 888.315(c) and 415(c))

One commenter questioned the appropriateness of requiring owners to correct deficiencies before they may receive the payment, since the deficiency is a present liability, and the payment represents past income. The commenter also argued that deposits to the Reserve for Replacement Account, combined with routine maintenance, are sufficient for compliance.

HUD does not agree that the retroactive payments should not be utilized to address current physical deficiencies. The payments are project income and must be used as such to address physical deficiencies and ensure proper maintenance of the project. If no physical deficiencies have

been identified, then the requisite deposit to the Reserve for Replacement Account, accompanied by appropriate routine maintenance, is sufficient for compliance with the requirement that physical deficiencies be resolved prior to the inclusion of the payments in the surplus cash computation.

Two commenters suggested that the rule be more specific on what will be expected to satisfy HUD in the correction of deficiencies. According to HUD regulations at 24 CFR 880.601(b), 881.601(b), 882.516(a), 883.702(b), 884.217(a), 886.123(a), and 886.323(a), owners are responsible for the maintenance and repair of the property. Deficiencies, if any, included on the current physical inspection performed by the mortgage, or by HUD or the Contract Administrator if a current mortgage inspection is not present, must be addressed. All deficiencies, whether marked for immediate repair or repair within one year, must be addressed either through repair or through submitting a plan for repair. HUD will follow current instructions regarding acceptable corrections and plans for corrections.

One commenter suggested that owners should be required to repair only where the deficiency is of such serious nature that it clearly and directly affects habitability. The commenter also noted that payments may be withheld from surplus cash distribution only after proper notification to the owner and in accordance with current HUD requirements and procedures, and, if the owner fails to respond or to exercise due diligence in correcting the deficiencies, sanctions may be imposed. However, the commenter pointed out, the sanctions listed do not include withholding of distribution.

The Department disagrees with both of these assertions. First, section 8 of the 1937 Act requires that projects must be decent, safe, and sanitary to be eligible for assistance, not merely habitable. Secondly, HUD regulations for insured and state agency projects specify the requirements that must be met for an owner to take a distribution from surplus cash. Based on these sections, including §§ 880.205, 881.205, and 883.306, retroactive payments will not be made available for distribution until deficiencies noted in the physical inspection report have been answered. With regard to Moderate Rehabilitation projects, § 882.516(c) clearly states that abatement of housing assistance payments is a remedy that may be exercised when a project is not maintained in decent, safe and sanitary condition.

One-time Contract Rent Determination (§§ 888.320 and 888.420)

Several comments were submitted on the provision in the rule on the one-time contract rent determination. Some commenters seemed confused about whether an owner had to choose between requesting the rent determination or the payments, or whether an owner not eligible for retroactive payments was required to request a rent determination. An owner must meet the eligibility requirements described in §§ 888.301(c) or 888.401(c) to be eligible for either retroactive payments or a one-time rent determination. An owner may request both a retroactive payment and a one-time contract rent determination, or may choose to request either the payment or the rent determination.

One commenter stated that the rule should provide that the payments and the rent determination will be effective on the first anniversary date following the effective date of the rule regardless of the date the calculation is completed.

Section 801(a)(1) specifies that the calculation with regard to the retroactive payments should cover the period from 1980 "until regulations implementing this section take effect." Thus, HUD is precluded from extending the calculation for the retroactive payments beyond the effective date of this final rule.

With regard to the effective date of any increased rent as a result of the one-time contract rent determination, the new rent will become effective on the effective date of this rule. The proposed rule provided for the new rents to become effective on the first of the month following notification to the owners. HUD has revisited this issue, and has changed the final rule to provide that the rents will be effective on the effective date of the rule. Because there will be lag-time between the effective date of the rule and the one-time rent determination, it will be necessary for the HAP payments covering that time to be made retroactively.

Finally, one commenter asked whether HUD Form 92458 (Rental Schedule) may be used where there is no formal HAP contract amendment from which to obtain the currently approved rent. HUD agrees that this form may serve as documentation if the owner or HUD cannot locate the formal amendment to the HAP contract.

Appeals From HUD Determination

Three commenters stated that the rule should provide for an appeal process for

owners who disagree with HUD's determination of the amount due for retroactive payments or the new contract rent. Since the retroactive payments represent past housing assistance payments for contract rents, any challenges to a determination by HUD (or the PHA, in the case of Moderate Rehabilitation projects) under this rule may be appealed in the same manner an owner would appeal any contract rent determination. Decisions at the Regional Office level will be considered a final administrative decision.

Reviews of Initial Mod Rehab Rents (§ 888.415(b))

Four commenters objected to the provision of the rule providing that, before calculating the amount of a retroactive payment, the PHA will review whether rents in Mod Rehab projects were excessive when initially set, if directed by HUD. The commenters stated that any modification would violate the contract where an owner has relied on the initial approval, and could result in a serious adverse effect. The Department believes that a review of initial contract rents is consistent with the terms of the HAP contract, which explicitly authorizes a change of contract rents to correct errors in the computation of the initial rents. Further, the contract provides that rents are subject to post-audit and change in accordance with HUD requirements, including the correction of errors in computation and adherence to HUD procedures. The contention that reviewing and modifying rents, if appropriate, in connection with the calculation of retroactive payments is in violation of the contract is without legal basis.

Present or Future Use of Comparability Studies

A PHA submitted a comment asking whether the rule eliminates the use of comparability studies after its effective date, or could studies still be used as a basis to deny or limit rent adjustments. Field offices and PHAs (as Contract Administrators) were instructed by HUD to discontinue all comparability studies for purposes of limiting AAFs, effective December 15, 1989, the date of enactment of the HUD Reform Act. A project for which a comparability study was conducted after that date that resulted in a reduction or limitation of AAFs is eligible for retroactive payments and a one-time determination under this rule. Section 801(c) of the Reform Act, which amends section 8(c)(2)(C) of the 1937 Act by clarifying and reaffirming HUD's authority to

conduct comparability studies for use with AAFs, must be implemented by rulemaking before studies may be conducted in the future.

III. Other Matters

The information collection requirements contained in this rule were approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, and assigned OMB control number 2502-0042.

This rule does not constitute a "major rule" as that term is defined in section 1(d) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it does not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

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 building sites is categorically excluded from the Department's National Environmental Policy Act procedures under 24 CFR 50.20(f).

The General Counsel, as the designated official under Executive Order 12606, *The Family*, has determined that this rule will not have a potential significant impact on the formation, maintenance, and general well-being of the family and, thus, is not subject to review under that Order. Adjustments in contract rents do not affect the amount of rent a tenant family in Section 8 assisted housing is required to pay, which is an amount based on the tenant family's income.

The General Counsel has also determined, as the Designated Official for HUD under section 6(a) of Executive Order 12612, *Federalism*, that the policies contained in this rule do not have federalism implications and, thus, are not subject to review under that Order. The rule would affect the amount of housing assistance payments paid by HUD to owners of Section 8 assisted projects.

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule will not have a significant economic

impact on a substantial number of small entities. The rule governs the procedures under which HUD will make retroactive housing assistance payments to owners of Section 8 assisted projects.

This rule was listed as item number 1309 in the Department's Semiannual Agenda of Regulations published at 56 FR 17360, 17390 on April 22, 1991, under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 888

Grant programs; housing and community development, Rent subsidies.

For the reasons stated in the preamble, part 888 of title 24 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 888 continues to read as follows:

Authority: Secs. 5 and 8, U.S. Housing Act of 1937 (42 U.S.C. 1437c and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. In part 888, the heading for part 888 and for subpart B is revised, and subparts C and D are added, to read as follows:

PART 888—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—FAIR MARKET RENTS AND CONTRACT RENT ANNUAL ADJUSTMENT FACTORS

* * * * *

Subpart B—Contract Rent Annual Adjustment Factors

* * * * *

Subpart C—Retroactive Housing Assistance Payments for New Construction, Substantial Rehabilitation, State Finance Agencies, Section 515 Farmers Home Administration, Section 202 Elderly or Handicapped, and Special Allocations Projects

Sec.

888.301 Purpose and scope.

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Sec.

888.401 Purpose and scope.

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888.415 Restrictions on retroactive payments.
888.420 One-time Contract Rent determination.
* * *

Subpart C—Retroactive Housing Assistance Payments for New Construction, Substantial Rehabilitation, State Finance Agencies, Section 515 Farmers Home Administration, Section 202 Elderly or Handicapped, and Special Allocations Projects

§ 888.301 Purpose and scope.

(a) *Purpose.* This subpart describes the basic policies and procedures for the retroactive payment of Housing Assistance Payments to eligible project owners for the period from October 1, 1979 to May 31, 1991 and for one-time Contract Rent determinations for such eligible project owners.

(b) *Applicability.* This subpart applies to all project-based Section 8 Housing Assistance Payments Contracts under New Construction (Part 880); Substantial Rehabilitation (Part 881); State Finance Agencies (Part 883); and Section 515 Farmers Home Administration (Part 884). It also applies to those projects under Section 202 Elderly or Handicapped (Part 885) and Special Allocations (Part 886, Subparts A and C) whose Contract Rents are adjusted by use of the Annual Adjustment Factors (AAFs), as described in subpart B of this part.

(c) *Eligible project owners.* Project owners may be eligible for retroactive payments if, during the period from October 1, 1979 to May 31, 1991:

(1) The use of a comparability study by HUD (or the Contract Administrator), which was conducted as an independent limitation on the amount of rent adjustment that would have resulted from use of the applicable AAF, resulted in the reduction of the maximum monthly Contract Rents for units covered by a Housing Assistance Payments (HAP) contract or resulted in less than the maximum increase for those units than would otherwise be permitted by the AAF; or

(2) The HAP contract required a project owner to request annual rent adjustments; and the project owner certifies that a request was not made because of an anticipated reduction of the maximum monthly Contract Rents resulting from a comparability study.

§ 888.305 Amount of the retroactive Housing Assistance Payments.

(a) *Recalculating the total rent adjustment.* To establish the amount of the retroactive HAP payment for which a project owner meeting the criteria in § 888.301(c) is eligible, the total rent

adjustment will be recalculated for the period from October 1, 1979 to May 31, 1991. For purposes of establishing the amount of the retroactive payment only, the total rent adjustment will be an amount equal to the Contract Rent, minus the amount of the Contract Rent attributable to debt service, multiplied by the applicable AAF, for each year.

(b) *Calculating the retroactive payment.* HUD (or the Contract Administrator) will pay, as a retroactive Housing Assistance Payment, the amount, if any, by which the total rent adjustment, calculated under paragraph (a) of this section, exceeds the rent adjustments actually approved for the same time period, except that in no event will any payment be an amount less than 30 percent of the aggregate of the full Contract Rent multiplied by the applicable AAF, minus the sum of the rent adjustments actually approved for the same time period, adjusted by the average occupancy rate.

(c) *Occupancy rates.* (1) Retroactive payments will be made only for units that were occupied, based on average occupancy rate, including units qualifying for vacancy payments under 24 CFR 880.611, 881.611, 883.712, 884.106, 885.985, 886.109, or 886.309, during the time period from October 1, 1979 to May 31, 1991.

(2) When requesting retroactive payment, a project owner must, if the information is available, submit documentation of occupancy rates, on either an annual or monthly basis, for the same time period. The average occupancy rate will be based on these records. If records are unavailable for the full time period, HUD (or the Contract Administrator) will establish an average occupancy rate, to be used for the entire period, from the occupancy rate for the three years immediately preceding May 31, 1991.

(d) *Revised AAFs.* For any year during the period from October 1, 1979 to May 31, 1991, where a HUD field office published a revised Annual Adjustment Factor that replaced the applicable AAF for a specific locality under 24 CFR 888.204, the revised Annual Adjustment Factor, which applied to all projects in that area, will be used to recalculate the total rent adjustment under paragraph (a) of this section, and to establish the amount of the retroactive payments.

(e) *Special adjustments.* When calculating the total rent adjustments and establishing the amount of the retroactive payments under paragraphs (a) and (b) of this section, any special adjustments granted under 24 CFR 880.609(b), 881.609(b), 883.710(b), 884.109(c), 886.112(c), or 886.312(c) during the time period from October 1,

1979 to May 31, 1991, to reflect substantial general increases in real property taxes, assessments, utility rates, utilities not covered by regulated rates, or for special adjustments for any other purpose authorized by a waiver of the regulations, will be deducted from the Contract Rent before applying the AAF.

(f) *AAFs less than 1.0.* For any area where an AAF of less than 1.0 was published, a factor of 1.0 will be used to recalculate the total rent adjustments and to establish the amount of the retroactive payments under paragraphs (a) and (b) of this section.

(g) *Debt service.* (1) For purposes of this section, debt service includes principal, interest, and the mortgage insurance premium, if any.

(2) The monthly debt service set forth in the original mortgage documents for a project will be used to compute the debt service portion of the contract rent. The debt service will be compared to the spread of unit sizes included in the original HAP contract, and the amount used in the calculation will be based on the percentage of total rent potential of the various unit types.

(3) If, in some cases, HUD or the Contract Administrator cannot determine the debt service for a project, the project owner will be asked to provide documentation of the debt service. The project owner will be notified by the HUD Field Office or the Contract Administrator of the need for documentation of the debt service, and allowed 30 days to respond, or for such longer period as approved by HUD or the Contract Administrator on a case-by-case basis. Where the debt service is not available to HUD or the Contract Administrator and the owner is unable to provide the necessary information, retroactive payments cannot be made.

(h) *Applicable AAF.* The applicable AAF is the factor in effect on the anniversary date of the contract and appropriate for the area, for the size of the unit, and for the treatment of utilities; except where, for any year when AAFs were published after November 8 and made retroactive to November 8, a project owner was given the option to choose the factor in effect on the anniversary date or the retroactive factor, the applicable AAF is the factor chosen by the project owner in that year.

(Approved by the Office of Management and Budget under control number 2502-0042)

§ 888.310 Notice of eligibility requirements for retroactive payments.

(a) *Notice of eligibility requirements.* HUD (or the Contract Administrator)

will give written notice to all current owners of projects of the eligibility requirements for retroactive payments. Eligible project owners must make a request for payment and a request for a one-time contract determination within 60 days from the date of the notice.

(b) *Request for payment.* (1) Owners eligible for retroactive payments under § 888.301(c) must submit a request for a calculation of the total rent adjustments and the establishment of the amount of the retroactive payment, as described in § 888.301 (a) and (b), and documentation of the occupancy rate for the period from October 1, 1979, to May 31, 1991, if available.

(2) Owners whose HAP contract requires a request to be made for annual rent adjustments must certify that a request was not made because of an anticipated reduction in the Contract Rents as a result of a comparability study. The certification must contain the year or years upon which the request for payment is based and a statement of the basis for the belief that rents would have been reduced.

(3) Retroactive payments will be made to owners over a three-year period as funds are appropriated for that purpose. When funds are available for payment, HUD will publish a Federal Register notice containing procedures for claiming payments.

(c) *Request for one-time contract rent determination.* When making a request for payment, eligible owners may also request a one-time contract rent determination, as described in § 888.320. Eligible owners may request a one-time contract rent determination even if they choose not to request retroactive payments, provided they are eligible for retroactive payments.

(d) *Transfer of ownership since October 1, 1979.* Eligible owners who request retroactive payments must certify that they are entitled to the entire amount of the payment. Any owner who is unable to certify must present documentation of an agreement between the current and former owners of the proportionate share of the payment for which each is eligible.

(Approved by the Office of Management and Budget under control number 2502-0042)

§ 888.315 Restrictions on retroactive payments.

(a) *Restrictions on distribution of surplus cash.* Retroactive payments for HUD-insured projects and other projects subject to limitations on the distribution of surplus cash will be deposited, in the manner of Housing Assistance Payments, into the appropriate project account. The payments will be subject to HUD rules and procedures (or rules

and procedures of other agencies, as appropriate), described in the applicable regulations and the HAP contracts, for distribution of surplus cash to project owners.

(b) *Replacement reserve.* Projects required by HUD regulations to maintain a reserve for replacement account and to adjust the annual payment to the account each year by the amount of the annual rent adjustment must deposit into the account the proportionate share of any retroactive payment received, in accordance with HUD regulations and the HAP contract.

(c) *Physical condition of HUD-insured or State-financed projects.* If the most recent physical inspection report of a HUD-insured project, completed by the mortgagee, or by HUD or the Contract Administrator if a mortgagee inspection is not present, shows significant deficiencies that have not been addressed to the satisfaction of HUD by the date the retroactive payment is deposited into the project account, the payment will not be made available for surplus cash distribution until the deficiencies are resolved or a plan for their resolution has been approved by HUD.

§ 888.320 One-time Contract Rent determination.

(a) *Determining the amount of the new Contract Rent.* Project owners eligible for retroactive payments, as described in § 888.301(c), may request a one-time Contract Rent determination, to be effective as described in paragraph (c) of this section. The request for a one-time rent determination must be made when submitting a request for retroactive payments, as described in § 888.315. If no claim for retroactive payments is made, an owner may submit only the request for a one-time rent determination, provided the owner is eligible for retroactive payments. The new Contract Rent under this provision will be the greater of:

(1) The Contract Rent currently approved by HUD (or the Contract Administrator); or

(2) An amount equal to the applicable AAF multiplied by the Contract Rent minus debt service, calculated for each year from October 1, 1979, to May 31, 1991.

(b) *Currently approved rent.* The Contract Rent currently approved by HUD (or the Contract Administrator) is the Contract Rent stated in the most recent amendment to the HAP Contract signed by both HUD (or the Contract Administrator) and the owner, or as shown on HUD Form 92458 (Rental Schedule) if the most recent amendment to the HAP Contract cannot be located.

(c) *Effective date of new Contract Rent.* The new Contract Rent, determined under paragraph (a) of this section, will be effective on May 31, 1991.

(Approved by the Office of Management and Budget under control number 2505-0042)

Subpart D—Retroactive Housing Assistance Payments for Moderate Rehabilitation Projects

§ 888.401 Purpose and scope.

(a) *Purpose.* This subpart describes the basic policies and procedures for the retroactive payment of Housing Assistance Payments to eligible project owners for the period from October 1, 1979 to May 31, 1991 and a one-time Contract Rent determination for such eligible project owners.

(b) *Applicability.* This subpart applies to all Moderate Rehabilitation projects under 24 CFR part 882, subparts D, E, and H.

(c) *Eligible project owners.* Project owners may be eligible for retroactive payments if, during the period from October 1, 1979 to May 31, 1991:

(1) The use of a comparability study by the Public Housing Agency (PHA) as contract administrator, which was conducted as an independent limitation on the amount of rent adjustment that would have resulted from use of the applicable AAF, resulted in the reduction of the maximum monthly Contract Rents for units covered by a Housing Assistance Payments (HAP) contract or resulted in less than the maximum increase for those units than would otherwise be permitted by the AAF; or

(2) The project owner certifies that a request for an annual rent adjustment was not made because of an anticipated reduction of the maximum monthly Contract Rents resulting from a comparability study.

§ 888.405 Amount of the retroactive Housing Assistance Payments.

(a) *Recalculating the total rent adjustment.* To establish the amount of the retroactive HAP payment for which a project owner meeting the criteria in § 888.401(c) is eligible, the total rent adjustment will be recalculated for the period from October 1, 1979 to May 31, 1991. Rents for that period will be recalculated, under the procedures set out in 24 CFR 882.410(a)(1), by applying the AAF for any affected year, and recalculating the rents for the remainder of the period as necessary. For each year thereafter, all rent adjustments made at the request of the owner at the time will be recalculated, under the

procedures in 24 CFR 882.410(a)(1), to account for the new adjustments.

(b) *Calculating the retroactive payment.* HUD will pay, through the PHA, as a retroactive Housing Assistance Payment the amount, if any, by which the total rent adjustment, calculated under paragraph (a) of this section exceeds the rent adjustments actually approved for the same time period.

(c) *Occupancy rate.* (1) Retroactive payments will be made only for units that were occupied, based on average occupancy rate, including units qualifying for vacancy payments under 24 CFR 882.411, during the time period from October 1, 1979 to May 31, 1991.

(2) When requesting a retroactive payment, a project owner must, if the information is available, submit documentation of occupancy rates, on either an annual or monthly basis, for the same time period. The average occupancy rate will be based on these records. If records are unavailable for the full time period, the PHA will establish an average occupancy rate, to be used for the entire period, from the occupancy rate for the three years immediately preceding May 31, 1991.

(d) *Revised AAFs.* For any year during the period from October 1, 1979 to May 31, 1991, where a HUD field office published a revised Annual Adjustment Factor that replaced the applicable AAF for a specific locality under 24 CFR 888.204, the revised Annual Adjustment Factor, which applied to all projects in that area, will be used to recalculate the total rent adjustment under paragraph (a) of this section, and to establish the amount of the retroactive payments.

(e) *Special adjustments.* When calculating the total rent adjustments and establishing the amount of the retroactive payments under paragraphs (a) and (b) of this section, any special adjustments granted under 24 CFR 882.410(a)(2) during the period from October 1, 1979 to May 31, 1991, to reflect substantial general increases in real property taxes, assessments, utility rates, utilities not covered by regulated rates, or for special adjustments for any other purpose authorized by a waiver of the regulations, will be deducted from the base rent before applying the AAF.

(f) *AAFs less than 1.0.* For any area where an AAF of less than 1.0 was published, a factor of 1.0 will be used to recalculate the total rent adjustments and to establish the amount of the retroactive payments under paragraphs (a) and (b) of this section.

(Approved by the Office of Management and Budget under control number 2502-0042)

§ 888.410 Notice of eligibility requirements or retroactive payments.

(a) *Notice of eligibility requirements.* PHAs will give written notice to all current owners of projects, for which they are the Contract Administrators, of the eligibility requirements for retroactive payments. Eligible project owners must make a request for payment or a request for a one-time contract determination within 60 days from the date of the notice.

(b) *Request for payment.* (1) Owners eligible for retroactive payments under §§ 888.401(c) must submit a request for a calculation of the total rent adjustments and the establishment of the amount of the retroactive payment, as described in § 888.401 (a) and (b), and documentation of the occupancy rate for the period from October 1, 1979 to May 31, 1991, if available.

(2) Owners claiming eligibility under § 888.401(c)(2) must certify that a request was not made because of an anticipated reduction in the Contract Rents as a result of a comparability study. The certification must contain the year or years upon which the request for payment is based and a statement of the basis for the belief that rents would have been reduced.

(3) Retroactive payments will be made to owners over a three-year period as funds are appropriated for that purpose. When funds are available for payment, HUD will publish a *Federal Register* Notice containing procedures for claiming payments.

(c) *Request for one-time contract rent determination.* When making a request for payment, eligible owners may also request a one-time contract rent determination, as described in § 888.420. Eligible owners may request a one-time contract rent determination even if they choose to forgo receiving retroactive payments, provided they are eligible for retroactive payments.

(d) *Transfer of ownership since October 1, 1979.* Eligible owners requesting retroactive payments must certify that they are entitled to the entire amount of the payment. Any owner who is unable to certify must present documentation of an agreement between the current and former owners of the proportionate share of the payment for which each is eligible.

(Approved by the Office of Management and Budget under control number 2502-0042)

§ 888.415 Restrictions on retroactive payments.

(a) *Restrictions.* Retroactive payments are subject to all regulations, procedures, or restrictions that apply to Housing Assistance Payments.

(b) *Review of initial rents.* Before calculating the amount of any retroactive payment, the PHA, if directed by HUD, will review whether rents were excessive when initially set.

(c) *Physical condition of projects.* If the most recent physical inspection report by the PHA shows significant deficiencies that have not been addressed to the satisfaction of the PHA by the date the retroactive payment is deposited into the project account, the payment will not be made available until the deficiencies are resolved or a plan for their resolution has been approved by the PHA.

§ 888.420 One-time Contract Rent determination.

(a) *Determining the amount of the new Contract Rent.* Project owners eligible for retroactive payments, as described in § 888.401(c), may request a one-time Contract Rent determination, to be effective as described in paragraph (c) of this section. The request for a one-time rent determination must be made when submitting a request for retroactive payments, as described in § 888.415. If no claim for retroactive payments is made, an owner may submit only the request for a one-time rent determination, provided the owner is eligible for retroactive payments. The new Contract Rent under this provision will be the greater of:

- (1) The Contract Rent currently approved by the PHA; or
- (2) An amount equal to the Contract Rent as adjusted to May 31, 1991 under § 888.405(a).

(b) *Currently approved rent.* The Contract Rent currently approved by the PHA is the Contract Rent stated in the most recent amendment to the HAP Contract signed by both the PHA and the owner.

(c) *Effective date of new Contract Rent.* The new Contract Rent, determined under paragraph (a) of this section, will be effective on May 31, 1991.

(Approved by the Office of Management and Budget under control number 2502-0042)

Dated: April 12, 1991.

Arthur J. Hill,

Acting Assistant Secretary for Housing—
Federal Housing Commissioner.

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