DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 903

[Docket No. FR–4677–F–02]

RIN 2577–AC31

Public Housing Agency Plans: Deconcentration—Amendments to ''Established Income Range'' Definition

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends the deconcentration component of HUD's Public Housing Agency (PHA) Plans regulations and revises the definition of Established Income Range (EIR) to include within the EIR those developments in which the average income level is at or below 30 percent of the area median income, and therefore ensure that such developments cannot be categorized as having average income ''above'' the EIR. An income level that is at or below 30 percent of the area median income is defined as ''extremely low income'' in HUD's regulations. HUD believes that developments with an average family income at or below 30 percent of the area median income should not be categorized as higher income developments for purposes of income mixing because efforts to place lower income families into these developments would not result in income deconcentration as contemplated by the statute. This rule follows publication of an August 15, 2001, proposed rule, takes into consideration public comment received on the proposed rule, and slightly revises the proposed rule for clarity.

DATES: Effective Date: September 5, 2002.

FOR FURTHER INFORMATION CONTACT: Rod Solomon, Deputy Assistant Secretary, Office of Policy, Program and Legislative Initiatives, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 4116, Washington, DC 20410; telephone (202) 708–0713 (this is not a toll-free number). Persons with hearing or speech impairments may access that number via TTY by calling the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On December 22, 2000 (65 FR 81214), HUD amended the deconcentration provisions of its Public Housing Agency (PHA) Plan regulations to achieve two purposes: (1) to assure that PHAs know what they must do to deconcentrate poverty in the public housing program; and (2) to assure that PHAs know what they must do to affirmatively further fair housing, as it relates to admissions to public housing. The December 22, 2000, final rule was preceded by an April 17, 2000, proposed rule, and took into consideration public comment received on the proposed rule. By a final rule published on February 5, 2001 (66 FR 8897), HUD amended the December 22, 2000, final rule to provide that the first PHA fiscal year that is covered by the new deconcentration requirements of the December 2000 final rule is the PHA fiscal year that begins October 1, 2001. (The December 22, 2000, final rule provided that the first PHA fiscal year that is covered by the new deconcentration requirements is the PHA fiscal year that begins July 1, 2001.)

Following issuance of the December 22, 2000, final rule, HUD received additional feedback from PHAs. PHAs advised HUD that in determining Established Income Range (EIR) for certain developments, in accordance with the procedures of the rule, the EIR for these developments is sufficiently low that some developments for which the average income is at or below 30 percent of the area median income, actually fall above the EIR. Developments that fall above the EIR are categorized as ''higher income developments'' and, in accordance with the deconcentration requirements, PHAs must undertake efforts to place lower income families into higher income developments. HUD regulations issued in December 2000 defined an income level that is at or below 30 percent of the area median income as ''extremely low income'' (24 CFR 5.603(b)). HUD agreed with PHA concerns that in all practicality deconcentration would not be fostered through efforts to place lower income families in developments categorized as higher income in which the average family income is in fact at the extremely low-income level.

While HUD's regulations issued on December 22, 2000, allowed a PHA to seek an exemption from income mixing by explaining why, in a given case, efforts to income mix would not effectively promote income deconcentration, HUD believed that this situation was widespread enough to merit a change in the regulation rather than PHAs and HUD having to treat developments in which the average family income is extremely low income on a case-by-case basis. On August 15, 2001 (66 FR 42926), HUD therefore published a proposed rule that would amend the deconcentration component of HUD's PHA Plans regulations to revise the definition of EIR to include within the EIR those developments in which the average income level is at or below 30 percent of the area median income.

II. This Final Rule

This final rule follows the August 15, 2001 proposed rule and is issued to help ensure that developments in which the average income level is at or below 30 percent of the median income cannot be categorized as having average income ''above'' the EIR. This final rule takes into consideration the public comments received on the proposed rule and slightly revises the proposed rule for clarity.

III. Public Comments Generally

The public comment period for the proposed rule closed on October 15, 2001. HUD received ten comments. Seven of the comments received were from PHAs; the remaining three comments were from legal service organizations. Most of the commenters expressed their support for HUD's proposed amendment to the deconcentration rule. However, most of the commenters also expressed that, while they supported HUD's efforts to revise the definition of EIR, they did not support the overall rule to deconcentrate. Several commenters in support of HUD's deconcentration efforts wrote that developments with average annual income at or below 30 percent of the area median income should not be categorized as ''higher income'' developments. Another commenter wrote that it is impractical to place ''higher income'' families in lower income developments as a mechanism to raise the average household income in these developments. All ten commenters offered suggestions to clarify and strengthen the deconcentration policy to better serve the housing community.

HUD also sought comments from PHAs on the requirements of the December 22, 2000, final rule for placing ''higher income families'' into ''lower income developments''. No changes were being proposed to those requirements in this rule. In requesting comments on this issue, however, HUD recognized that the success of income mixing actions may depend on marketability of a development and therefore may be beyond the PHA's control, at least to a certain extent; and that PHA efforts to achieve deconcentration by supporting resident self-sufficiency efforts as well as

necessary admissions efforts should be encouraged. HUD was therefore interested in PHA comments and feedback on the suitability of the December 22, 2000, final rule in this regard. In particular, HUD requested comments on whether the current rule's provisions that allow for explanations and justifications (and require corrective actions in the event HUD determines the explanations are not adequate) are sufficiently flexible to take into account these concerns. The following section of the preamble presents a summary of the significant issues raised by the public commenters on the August 15, 2001, proposed rule and HUD's responses to these comments.

IV. Discussion of Public Comments Received on the August 15, 2001, Proposed Rule

Comment: In the August 15 proposed rule HUD proposes to exclude from the requirement public housing developments with average incomes below 30 percent of area median income. The commenter wrote that should the amendment be adopted, every public housing development in its State would be exempt and there would be no need for the rule. The commenter noted further that should the amendment be adopted, such a result, could not have been anticipated by Congress.

HUD Response: According to HUD data about 82 percent of public housing family developments have average incomes below 30 percent of the area median income and 18 percent of public housing family developments have average incomes above 30 percent of the area median income. HUD believes that developments with an average family income at or below 30 percent of the area median income should not be categorized as higher income developments for purposes of income mixing because efforts to place lower income families into these developments would not result in income deconcentration as contemplated by the statute. Also, the deconcentration and income mixing policy should address only extensive income disparities among developments within a PHA.

Comment: HUD should consider changing ''the 30 percent of median'' criteria to ''30 percent of the national median income'' or, 30 percent of area median, whichever is higher. The commenter wrote that pursuant to HUD Notice PDR–2001–03 (April 6, 2001), the national median income is $52,500. Thirty percent of that amount is $15,750. The commenter noted that $15,750 is no more high-income than 30 percent of the median-income ($11,040) in their jurisdiction, and it is illogical to put lower income people into a $15,750 development to bring down the average as it is to put them into an $11,040 average development to bring down that average.

HUD Response: It is appropriate for HUD to take into account local market conditions when calculating median incomes. This method is used for public housing as well as HUD's other assisted housing programs when calculating median incomes.

Comment: HUD should abandon the deconcentration proposal in order to avoid harming low-income families in high-income states. One commenter wrote that in a state that has a much higher cost of living than most other wealthy states, low-income families with incomes that may be much higher than incomes elsewhere may be in greater distress. The commenter further noted that these families should not be deprived of the opportunity to reside in better and newer housing in less impacted neighborhoods.

HUD Response: As mentioned above, HUD's method for calculating median incomes takes into account local market conditions and makes adjustments for unusually high housing costs to income relationships. Also, nothing in this rule excludes low-income families from residing in better or newer housing. Admission policies, including preferences, are established at the local level.

Comment: HUD has failed to justify the need for the rule. One commenter wrote that HUD's deconcentration policy remains seriously flawed, and that the rule is unnecessary. The commenter noted further that their own statistical analysis indicates that there are very few developments that would fall outside the EIR and have residents with incomes above 30 percent of area median income. Additionally, the commenter wrote that HUD's deconcentration policy is administratively burdensome, and will require PHAs to do unnecessary income analysis of their developments.

HUD Response: As already discussed, HUD data indicate about 82 percent of public housing family developments have average incomes below 30 percent of the area median income and 18 percent of public housing family developments have average incomes above 30 percent of the area median income. This rule will simplify administrative requirements and not require a PHA to seek an exemption when the EIR for certain developments is sufficiently low that some developments for which the average income is at or below 30 percent of the area median income, actually fall above the EIR.

Comment: The policy requires an admissions-based solution if even one development in a portfolio is outside the parameters set by HUD. One commenter wrote that key management and policy decisions should be made through a local planning process that is responsive to local conditions, and not be mandated by the Federal government. The commenter noted further that he opposes the Federal requirement that the PHAs must ''deconcentrate'' through their admissions policies. Additionally, the commenter noted that the more important goal should be improving the economic conditions of all residents, rather than focusing on choosing families for a development based solely on their income.

HUD Response: Achieving deconcentration through admission policies is a statutory requirement. However, the final deconcentration rule published on December 22, 2000, does permit agencies to explain or justify cases where developments fall outside the EIR. HUD agrees that improving the economic conditions of all residents is an important goal.

Comment: HUD should amend the deconcentration rule to allow PHAs to adjust for unit/family size in a more refined method than required by the final rule. The commenter wrote that HUD's established method of adjustment is imprecise. The commenter noted further that PHAs should have the option of utilizing a range of methodologically valid techniques to make these adjustments instead of the prescribed method currently allowed by HUD.

HUD Response: This rule amends the definition of EIR but does not make changes to the broader deconcentration policy as described by the comment. However, the final deconcentration rule published on December 22, 2000, permits an agency to use median income instead of average income and to adjust its income analysis for unit size. This approach strikes a balance and provides agencies flexibility to perform their analysis, but at the same time makes administration and monitoring for HUD manageable.

Comment: True income mixing in public housing requires marketable units and adequate service levels. The commenter wrote that marketing to higher income families would be extremely difficult given the current poor condition of some public housing stock due to under funding of both the capital and operating costs. The commenter noted further that according

to HUD's own data, PHA operating subsidies have been under funded in the amount of almost $1.2 billion from fiscal year 1993 to fiscal year 2001.

HUD Response: This rule amends the definition of the EIR but does not make changes to the broader deconcentration policy as described by the comment. However, the final deconcentration rule published on December 22, 2000, does permit agencies to explain or justify cases where developments fall outside the EIR.

Comment: Increasing incomes in public housing will require more than administrative remedies. The commenter wrote that an admissions-based policy alone would never have the salutary effect of creating more viable, functional communities. The commenter suggested that this goal would be better served by strategies that aim not only to bring new, higher income residents into public housing, but that have the primary purpose to increase the incomes of existing public housing families.

HUD Response: HUD agrees that it is important to increase the incomes of existing residents. HUD has a strong commitment to providing employment opportunities, training, and supportive services to help low-income persons become self-sufficient. HUD has aggressively implemented laws to further many self-sufficiency efforts, for example by providing a model cooperation agreement for economic self-sufficiency between PHAs and Temporary Assistance to Needy Families (TANF) agencies. HUD plans additional initiatives to strengthen self-sufficiency efforts in the near future.

Comment: The rule should be modified to allow for certain family developments to always be treated as higher income. The commenter wrote that small developments in non-poverty areas, HOPE VI, mixed income, mixed finance and any development built after October 1998, the date Congress enacted the deconcentration policy, should always be treated as higher income. The commenter wrote that alternatively, if HUD decides to adopt the proposed 30 percent of the Area Median Income (AMI) rule, it should create an exception to that rule and not permit PHAs to exclude small developments in non-poverty areas, HOPE VI, mixed income, mixed finance, and any development built after October 1998, the date Congress enacted the deconcentration policy. The commenter noted further that these developments might be excluded if the 30 percent rule was applied uniformly.

HUD Response: HUD is not changing the rule to always treat certain developments as higher income. This would unnecessarily complicate the rule. Further, an income level that is at or below 30 percent of the area median income is defined as ''extremely low-income'' in HUD's regulations and is a low enough standard as a national policy. Nothing in this rule excludes extremely low-income families from residing in HOPE VI, mixed income, small, or scattered site developments of a PHA. The income mix of such developments may be addressed locally, including through local admissions preferences.

Comment: With respect to high-income Metropolitan Statistical Areas (MSAs), the rule should not apply. One commenter wrote that it is misleading to use 30 percent of the MSA median income of high-income MSAs, when there are great income disparities within the MSA as a result of affluent suburban areas or wealthy urban pockets. The commenter further noted that even in MSAs that are not high-income, it would be far more appropriate to use the median income figure for the area over which the PHA units are located (usually the central city) if there is to be any exclusion from the current rule at all. Additionally the commenter noted that it is inconceivable to use income figures based on areas in which the PHA has no units, when there is no way the deconcentration rule would result in any housing being offered in those areas.

HUD Response: As discussed in an earlier response, all HUD assisted housing programs use the same method to calculate income limits. HUD will not deviate from this approach and thus complicate the rule. PHAs may address the types of concerns raised by the comments through means such as local admissions preferences.

Comment: Scattered site developments should be excluded from the exemption. The commenter wrote that such developments should be excluded or at least subjected to closer scrutiny, perhaps by basing the analysis on the median income of the census tract in which the units are located.

HUD Response: As discussed in an earlier response, all HUD assisted housing programs use the same method to calculate income limits and HUD will not deviate from this approach. Also, local admissions preferences can address such situations.

Comment: The wording of the proposed rule is not entirely clear. The commenter wrote that the rule would be easier to understand if it read as follows: ''The EIR is from 85 percent to 115 percent (inclusive) of the average family income (the PHA-wide average income for covered developments as defined in Step 1), except that the upper limit shall never be less than the extremely low-income threshold (30 percent of median income) for the jurisdiction.''

HUD Response: HUD has accepted the suggestion and agreed to change part of the regulatory language. However, the rule will continue to reference the definition of extremely low-income family under 24 CFR 5.603(b) since the complete definition is too lengthy to repeat and the definition cite is referenced so that any future changes to the definition are made in one place only. The revised language at § 903.2(c)(1)(iii) Step 3 reads as follows: ''A PHA shall determine whether each of its covered developments falls above, within or below the EIR. The EIR is from 85 percent to 115 percent (inclusive) of the average family income (the PHA-wide average income for covered developments as defined in Step 1), except that the upper limit shall never be less than the income at which a family would be defined as an extremely low-income family under 24 CFR 5.603(b).''

Comment: HUD's resident database does not facilitate accurate analysis of poverty concentrations, so PHAs have to spend more time doing their own data analysis. The commenter wrote that HUD should suspend the ''deconcentration of poverty'' rule until the Multifamily Tenant Characteristics System (MTCS) or the Public Housing Information Center can provide accurate information on average tenant incomes for each family development. For example, the PHA has a 153-unit hi-rise for elderly and disabled residents in the same development (same HUD project number) as a 298-unit family townhouse development. The MTCS standard reports blend all of the resident data together, so a PHA cannot isolate the family development data needed to analyze ''concentration of poverty.''

HUD Response: The MTCS has a field that identifies the HUD project number of the development in which the resident lives. A public housing development includes units or buildings with the same project number. Typically developments with more than one building house similar types of residents, such as elderly or disabled persons or families, in each building. In the case described, where one project number includes an elderly and disabled resident hi-rise and a family townhouse development, this is considered a single development for purposes of deconcentration. If such a development falls outside the EIR, the final deconcentration rule published on December 22, 2000, permits an agency

to explain or justify the circumstances of how this development meets the goals of deconcentration and income mixing.

Comment: As amended, the deconcentration rule imposes new administrative burdens on PHAs and further complicates the already difficult task of running public housing, thereby driving up administrative costs. The commenter wrote that applicants and advocates are likely to be confused by a system of ''higher income'' and ''lower income'' buildings and developments, resulting in more complaints, more staff time devoted to explaining the system, more customer dissatisfaction, and more fair housing complaints.

HUD Response: This rule, which revises the definition of EIR to include within the EIR those developments in which the average income level is at or below 30 percent of the area median income, and therefore ensure that such developments cannot be categorized as having average income ''above'' the EIR, will simplify deconcentration requirements for many PHAs that will no longer have to explain or justify why they need not undertake documentation measures for some of their developments.

V. Findings and Certifications

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule, and in so doing certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule amends the deconcentration component of HUD's PHA Plans regulations and revises the definition of EIR to ensure that included within that range are developments in which the average income level is at or below 30 percent of the area median income and therefore such developments cannot be categorized as having average income ''above'' the EIR. This rule does not impose a burden on small entities. This rule alleviates an administrative burden on PHAs that have developments in which the average income is extremely low-income.

Executive Order 13132, Federalism

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

Environmental Impact

This issuance involves a discretionary establishment of external administrative or fiscal requirements or procedures related to rate or cost determinations that do not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Planning and Review

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

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers applicable to the programs affected by this rule are 14.850 and 14.855.

List of Subjects in 24 CFR Part 903

Administrative practice and procedure, Public housing, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD amends part 903 of title 24 of the Code of Federal Regulations as follows:

PART 903—PUBLIC HOUSING AGENCY PLANS

1. The authority for 24 CFR part 903 continues to read as follows:

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

2. In § 903.2, paragraph (c)(1)(iii) is revised to read as follows:

§ 903.2 With respect to admissions, what must a PHA do to deconcentrate poverty in its developments and comply with fair housing requirements?

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(c) * * *

(1) * * *

(iii) *Step 3*. A PHA shall determine whether each of its covered developments falls above, within or below the Established Income Range. The Established Income Range is from 85 to 115 percent (inclusive) of the average family income (the PHA-wide average income for covered developments as defined in Step 1), except that the upper limit shall never be less than the income at which a family would be defined as an extremely low income family under 24 CFR 5.603(b).

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Dated: July 9, 2002.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

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