DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Ch. IX

[Docket No. N-94-3858; FR-3647-N-01] RIN 2577-AB44

Vacancy Rule: Notice of Intent To Establish a Negotiated Rulemaking Advisory Committee and Notice of First Meeting

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

ACTION: Notice of intent to establish committee and of first meeting.

SUMMARY: The Department is considering the establishment of a Negotiated Rulemaking Advisory Committee under the Federal Advisory Committee Act (FACA). The purpose of the Committee would be to discuss and negotiate a proposed rule that would change the current method of determining the payment of operating subsidies to vacant public housing units. The Committee would consist of representatives with a definable interest in the outcome of a proposed rule. HUD has prepared a charter and has initiated the requisite consultation process pursuant to the FACA, Executive Order 12838, and the implementing regulations.

DATES: Comments must be received by February 2, 1995.

If the charter is approved and a final determination is made to form the Committee, the first meeting will take place March 7–9, 1995, at a location to be announced in Washington, D.C.

ADDRESSES: Interested persons are invited to submit comments regarding the proposed Committee and membership to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. Comments or any other communications submitted should consist of an original and four copies and refer to the above docket number and title. Facsimile (FAX) comments are *not* acceptable. The docket will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

The exact location of the first meeting on March 7–9, 1995, in Washington, D.C., will be announced in a subsequent **Federal Register** notice. Interested persons may also contact John Comerford, at the telephone number listed below, for this information.

FOR FURTHER INFORMATION CONTACT: John T. Comerford, Director, Financial Management Division, Public and Indian Housing, Room 4212, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500; telephone (202) 708–1872, or (202) 708–0850 (TDD). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Background

HUD uses a formula approach called the Performance Funding System (PFS) to distribute operating subsidies to public housing agencies (PHAs) and Indian housing authorities (IHAs). (NOTE: the term housing agency (HA) is used by HUD to mean both PHAs and IHAs.) A regulatory description of the PFS can be found at 24 CFR 990. Although somewhat oversimplified, the amount of subsidy received by a HA is the difference between projected expenses and projected income, with the PFS regulations detailing how these projections will be made. HAs calculate their PFS eligibility annually and submit a request for funding as part of their budget process. While the amount varies, this subsidy can represent a substantial amount of revenue to a HA. In 1994, HUD distributed over \$2.6 billion in operating subsidies to HAs.

The amount of dwelling rental income expected to be received is an important element in estimating subsidy eligibility. If rental income increases, it can generally be expected that operating subsidy eligibility will decrease. Likewise, if rental income decreases, an HA may receive a greater amount of subsidy. With some exceptions, HUD expects that HAs will project an occupancy level of 97 percent. This standard of 97 percent has been part of the PFS since its implementation in 1975.

That part of the PFS that deals with the projection of occupancy levels is known as the vacancy rule. The vacancy rule was published as a final rule in 1986 (51 FR 16835, May 7, 1986) and was intended to create incentives to HAs to return vacant units to occupancy and to maintain an occupancy level of 97 percent or higher. The rule provided these incentives by defining the conditions under which HUD would approve the use of an occupancy level of less than 97 percent; by specifying that an HA need not use an occupancy level higher than 97 percent; and, in recognition that a low number of vacancies may make it difficult for a

small HA to reach 97 percent, by finding it acceptable to use an occupancy percentage based on having five or fewer vacant units.

In September 1991, HUD published a proposed rule (56 FR 45814, September 6, 1991) that would have made significant changes to the way in which vacant units would be considered eligible for operating subsidy. These changes included:

- 1. Increasing the occupancy standard from 97 percent to 98 percent;
- 2. Eliminating HUD-approved Comprehensive Occupancy Plans (COPs) as a means to justify using less than the occupancy standard;
- 3. Limiting the amount of subsidy paid for vacant units greater than 2 percent of the total number of units available for occupancy; and
- 4. Instituting a year-end review to compare the actual occupancy achieved with the projected occupancy percentage.

HUD argued that the changes were needed in order to correct what it perceived to be a situation in which full operating subsidies (100 percent of the Allowable Expense Level) being paid for vacant units in modernization programs or in COPs were greater than the direct operating expenses incurred by the HA. With regard to COPs, HUD stated that HAs with the most extensive and difficult vacancy problems were expected to develop five year COPs in 1986 and that most of these would soon expire.

Before the comment period on the proposed rule expired, Congress inserted language in HUD's Appropriation Act for 1992 (105 Stat. 757) that prohibited HUD from using appropriated funds to implement the proposed rule. Later, Congress included a provision in the Housing and Community Development Act of 1992 (section 114(b), Pub. L. 102-550; approved October 28, 1992) to require that any changes to the PFS relating to the payment of operating subsidies to vacant public housing units be accomplished only through the use of negotiated rulemaking procedures.

Regulatory Negotiation

Negotiated rulemaking, or "reg-neg", is a relatively new process for the Federal government and this will be the first use of the process at HUD. The basic concept of reg-neg is to have the agency that is considering drafting a rule bring together representatives of affected interests for face-to-face negotiations that are open to the public. The give-and-take of the negotiation process is expected to foster