

little need to stimulate family interest and demand for participation.

### C. Equal Opportunity Requirements

The rule lists federal civil rights law and regulations that apply to the tenant-based programs. (§ 982.53)

Requirements under Section 3 of the Housing and Community Development Act of 1983 apply to construction or rehabilitation under the Section 8 program, but do not apply to Section 8 tenant-based assistance. Under the final rule, reference to Section 3 requirements is moved to 24 CFR part 983, which contains the requirements for projects constructed or rehabilitated under the Section 8 project-based certificate program. (§ 982.11(c)(3)) HAs are encouraged to recruit qualified program staff in a manner that furthers Section 3 goals.

Comments recommend that the rule should require HA compliance with State and local fair housing laws. HUD believes that the federal program rule and program enforcement should only require compliance with federal fair housing requirements. State and local governments can of course impose additional requirements. The federal regulation is not intended to pre-empt the operation of such State or local laws.

Some comments recommend that the rule should impose extensive additional fair housing procedures, including HA help for persons who need assistance in presenting a claim for illegal discrimination; HA collection of fair housing data and HA analysis of barriers to housing choice; and fair housing training of HA staff. As noted above, HA operation of the program is subject to civil rights statutes and regulations. In addition, the basic structure of the tenant-based program is a powerful instrument for promoting housing choice by low income and minority families.

An HA must certify that it will comply with equal opportunity regulations and requirements. (§ 982.53(c)) A comment notes that the certification is unnecessary, since the HA must follow the law in any case. HUD agrees that the HA is bound by the law and regulations, but retains the requirement for equal opportunity certification, in accordance with historical practice in HUD programs. The certification is not burdensome, and reminds the HA of its responsibility to administer its tenant-based program in accordance with the federal fair housing requirements.

## II. Funding and HA Application for Funding

### A. Competition for Funds; Criteria for Selection

Some program funding is distributed by HUD to HAs through a competitive process. So HAs can compete for such funding, the Department publishes a public notice in the **Federal Register**, called a "Notice of Funding Availability" or "NOFA". The HUD Reform Act of 1989 provides that the **Federal Register** notice must state the "criteria" for selection of applicants. The competitive criteria in a **Federal Register** NOFA may include any objective measure of housing need, project merit and efficiency. (HUD Reform Act of 1989, Section 102(a)(3), Pub. L. 101-235, 103 Stat. 1990; 42 U.S.C. 3545(a)(3))

Under the law, HUD must publish a description of how to apply for assistance under the NOFA, including any deadlines. (Id. section 102(a)(2)) The Reform Act requirements are implemented in a HUD regulation at 24 CFR part 12. The Section 8 program regulation describes the procedure for HUD publication of a NOFA to govern competitive award of funds in accordance with part 12 (§ 982.101(c)), for HA submission of applications in accordance with the NOFA (§ 982.102(b)), and for evaluation of HA applications based on selection criteria in the NOFA (§ 982.103(a)(2)).

In recent years, HUD has published a number of NOFAs each federal fiscal year to distribute Section 8 tenant-based funding for various purposes identified in the appropriation act and conference report. For example, in federal fiscal year 1994, HUD published separate NOFAs stating criteria for award of program funding distributed under a statutory fair share formula, for funds set aside for homeless persons with disabilities, for homeless veterans with severe psychiatric or substance abuse disorders, for family self-sufficiency (FSS) program coordinators, for elderly service coordinators and for the family unification program.

Some public comments object to award of funding under selection criteria in a **Federal Register** NOFA. The comments recommend that criteria for award of funds should be determined in a full dress rulemaking, with notice and opportunity for public comment. Comments indicate that the competitive criteria should be included in the standing program regulation.

Comments also object to criteria used by HUD to select HA applications for funding. Comments state that the selection criteria should give greater

weight to efforts to further fair housing, and should penalize an applicant HA that has a residency preference or other policies that have an "exclusionary" effect. Comments state that the criteria for selection should give funding preference to HAs that do not use a residency preference for selection of applicants, and that have an open waiting list.

The competitive selection scheme under a HUD NOFA may emphasize the administrative capability of applicant HAs. Comments claim that application of this HUD selection criterion to distribution of fair share funding in some metropolitan areas tends to favor a suburban HA (with greater presumed administrative competence) over the HA for a core city. Comments also claim that emphasis on the capability criterion is too subjective. Other comments recommend that funding should be distributed by formula, rather than by a competitive process.

HUD believes that award of competitive funds according to criteria stated in a **Federal Register** notice carries out precisely the process intended by the 1989 HUD Reform Act, and the regulation adopted by HUD to implement the Reform Act requirements (24 CFR part 12). HUD is not required to establish competitive criteria by notice and comment rulemaking.

Funding for individual HUD programs, such as the Section 8 tenant-based assistance programs, is typically appropriated by the Congress in each separate fiscal year. Each year Congress determines the amount of funding available for different purposes. The breakdown of Section 8 program funding is not definitively known until enactment of the appropriation act. (The detailed breakdown is generally expressed in a Table that is included in the Conference Report.) In this context, the use of a notice and comment rulemaking process to determine criteria for competitive award of funds in each fiscal year would paralyze the administrative process, prevent the timely award of appropriated funds, and deny flexibility in determining appropriate criteria for award of funding under the annual appropriation.

Comments recommend that HUD adopt new procedures for denial of HA funding applications. The comments suggest that HUD should give the rejected applicant a written statement or checklist of the reasons for denial of the HA's application. Comments also suggest that a rejected applicant should be granted the right to appeal HUD's funding decision.

For funding awarded by a competitive process, HUD has issued regulations