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

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

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

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

C. Initial Difference

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

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

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

D. Special Adjustments

This proposed rule would clarify and expand the availability of special rent adjustments. Special adjustments may not be approved because of cost increases particular to operation of the individual Owner or project, but only may be granted for ''general increases'' that affect operation of housing in the community. The proposed rule would provide that these special adjustments may only be approved to reflect ''substantial general'' increases in ''actual and necessary'' expenses of owning and maintaining the dwelling unit. The Owner does not have a contractual or regulatory right to receive the special adjustment. HUD ''may approve'' a special adjustment, and the PHA ''may make'' a special adjustment. A special adjustment must be determined in accordance with HUD procedures and be approved by HUD.

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

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

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