

**HFA Questions and Concerns About the  
Screening and Eviction for Drug Abuse and Other Criminal Activity  
Final Rule**

*Question:*

1. PHAs that are HFAs need more time to implement this complex legislation. HFAs did not believe that they would be considered PHAs because of comments submitted by NCSHA and several HFAs on the Proposed Rule, published in July 23, 1999, maintaining the Final Rule should not apply to State HFAs. HFAs only received the Final Rule, stating that they would be considered PHAs, in May. HFAs need time to change administrative policies, train staff, make decisions about a standard lease, give law enforcement officials time to understand the Rule and become familiar with what is required by the National Crime Information Center. Furthermore, the HFA boards must approve any new policy, HFAs must make budgetary allowances, and HFAs need clarification and guidance from HUD on this rule. It is also likely to take considerable time to resolve conflicts with existing state laws.

*Answer:*

**The rule was designed as a mechanism to assist both assisted housing Owners and PHAs in admissions, screening criteria, lease enforcement, and terminating and evicting procedures for program applicants that are involved in illegal drug use and criminal activity. We realize that there is much concern regarding implementation of this rule. However, because of the concern for safety of the residents living in Federally-assisted properties, the Department strongly feels that the effective date cannot be altered. A Housing Notice will be issued in the very near future that will provide guidance regarding the requirements of this rule.**

*Question:*

2. The new responsibilities under this rule will add significant costs to a PHA's administrative budget. Costs will include, but are not limited to, staffing, postage, copying, follow-up, staff training, fees, and court costs. While the regulation allows fees to be passed on to the owner, it is unlikely that this would fully compensate the PHA for the time spent in causing searches to be conducted, comparing results with owners' leases and policies, and in providing the "opportunity to dispute". Furthermore tenant-based programs would not be able to request fees from owners. If they attempted to do so, owners are likely to refuse to accept Section 8 vouchers.

*Answer:*

**The regulation at 24 CFR 5.903(d)(4) provides that the PHA may charge the Owner reasonable fees for making requests on behalf of the Owner for criminal conviction records and for taking other action for the owner. The PHA may require the Owner to reimburse costs incurred by the PHA, including reimbursement of any fees charged to the PHA by the law enforcement agency, the PHA's own related staff and administrative costs. The fee that a PHA may charge for these requirements is separate from the administrative fee paid by HUD.**

*Question:*

3. What should PHAs do if they know of current residents of Section 8 properties who are listed on the sex offender register, but have done nothing to break the terms of their current lease?

*Answer:*

**The statutory prohibition is limited to admissions and screening provisions. The statute and its implementing regulations are silent with respect to termination of tenancy for sex offenders subject to a lifetime registration requirement under a State sex offender registration program. Current residents of units with Section 8 project-based assistance are not subject to the prohibition of admission to Federally-assisted housing if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. PHAs and Owners are not prohibited by the statute or regulation from establishing policies and procedures and a lease provision that provides sex offenders subject to a lifetime registration requirement under a State sex offender registration program residing in Federally-assisted housing is a cause for termination of tenancy.**

*Question:*

4. §5.905(a) *requires* PHAs that administer a Section 8 or public housing program under an ACC with HUD to carry out background checks to determine if applicants for admission to any federally assisted housing are subject to a lifetime sex offender registration requirement. This seems to be an unconditional requirement. Paragraph (b) contains a separate provision where Owners of Federally-assisted housing *may* request PHAs to obtain information to determine if a household member is subject to a lifetime registration requirement. Are PHAs required to conduct these searches, regardless of whether or not they receive a request from an Owner?

*Answer:*

**No, the PHA must receive a request from an Owner to conduct a criminal history check concerning sex offenders. The regulation at 24 CFR 5.905(a) requires that PHAs administering Section 8 carry out background checks to determine if applicants or household members applying for admission to Federally-assisted housing are suitable. Owners of Federally-assisted housing may request PHAs to obtain sex offender registration information concerning a “household member” for applicant screening, lease enforcement or eviction. Owners must provide written signed consent forms from the applicant or household member. The rule at 5.100 defines Federally-assisted housing as any of the following programs: public housing, project-based or tenant-based Section 8, Section 202 and 811, Section 221(d)(3), Section 236, and Rural Housing Sections 514 or 515.**

**PHAs that administer a Section 8 or public housing program with HUD must perform a background check upon the Owner’s request.**

*Question:*

5. §5.806 requires standards to prohibit admission if a household member is a registered sex offender. §5.905(b)(3)(ii) requires owners, when requesting a PHA to conduct a background check, to include their standards in accordance with §5.855(c) for prohibiting admission of lifetime sex offender registrants. But §5.855 makes prohibition of criminals an option, not a requirement, and makes no special provisions regarding the status of registered sex offenders. The statute prohibits the admission of sex offenders subject to a lifetime registration requirement, which seemingly would override any owner-established “standards.” Are owners required by law to prohibit admission of all sex offenders who are under a lifetime registration requirement?

*Answer:*

**Yes, the regulation at 24 CFR 5.856 requires owners to “...establish standards that prohibit admission to federally-assisted housing if any member of the household is subject to a lifetime registration requirement under a State sex offender program...” The reference to section 5.806 in the question above is incorrect. The regulatory cite should be 24 CFR 5.856.**

*Question:*

6. It is clear that PHAs need to screen out or advise owners to evict sex offenders who are listed on the state sex offender register, however, not all sex offenders are listed on the register. The requirements and statute refer to persons who are “subject to a lifetime registration requirement”. Does “subject to a lifetime registration requirement” include offenders who were either convicted before the existence of a register or should be on the register and are not? Is a PHA liable or accepting a tenant who is a sex offender, but not listed on the state sex offender register?

*Answer:*

**No, current residents are not subject to the statutory and regulatory prohibition. The rule at 24 CFR 5.856 prohibits admission of sex offenders “...subject to a lifetime registration requirement under a State sex offender program”. Sex offenders not subject to a lifetime registration requirement under a State sex offender program are not subject to the prohibition. Owners have the discretion to “screen out applicants who the Owner determines to be unsuitable under the Owner’s established standards for admission, i.e. sex offenders who were convicted before the existence of a register.” Neither the statute nor the regulations include provisions that provide that a PHA is liable for accepting a tenant who is a sex offender, but not listed on the state sex offender register.**

*Question:*

7. The rule states that PHAs must conduct checks of state sex offender registers in the state where the public housing agency is located and other states the tenant/applicant is “known” to have resided. Is it enough to ask the applicant where they have lived in the past or must the PHA take some other step to determine where a tenant/applicant has lived previously? If so, what must they do?

*Answer:*

**In the screening of applicants, the PHA must conduct background checks in those states where the applicant resides and has resided. HUD does not prescribe the manner in which PHAs shall obtain this information. PHAs may rely on the applicant's declarations regarding residences and any other information disclosed to the PHA.**

*Question:*

8. Can PHAs contract out to other groups to analyze the results of criminal records checks and make decisions about evictions and tenant screenings? Is it a violation of confidentiality if contract staff, rather than full time staff conduct these analyzes? If a PHA contracts with another organization, is the PHA liable for the decisions made by that organization?

*Answer:*

**PHAs have the discretion to contract out their screening activities. PHAs will be responsible for the action and decisions made by its contractors.**

*Question:*

9. Misdemeanors are not listed on criminal records. Must PHAs make decisions about eviction and tenant screening based on misdemeanors as well as felonies? If so, how should they acquire this information?

*Answer:*

**The PHA can make a decision only on the information that it obtains. Misdemeanors should be disclosed by the applicants. If the misdemeanor offense doesn't show on the background check, there can be no decision made relative to that lack of information. If, subsequent to the background check, the information is discovered, and the tenant had not revealed the information, the tenant may be in violation of the lease (e.g., providing information fraudulently (this provision is contained in the model lease)).**

*Question:*

10. Does conducting a statewide criminal records check exempt the PHA from further liability, or must the PHA conduct a National Crime Information Center (NCIC) check with the FBI?

*Answer:*

**The PHA can determine its source for obtaining and conducting background checks. See the regulation at 24 CFR 5.903(d) which provides "...the PHA must request...records from the appropriate law enforcement agency, or agencies, as determined by the PHA." Section 5.902 (b) defines "law enforcement agency" as "the National Crime Information (NCIC), police departments and other law enforcement agencies that hold criminal conviction records. The regulations provide that the PHA may be held liable in instances involving the disclosure of criminal records information (See the regulation at 24 CFR 5.903(h)(2)).**

*Question:*

11. If a PHA uses the NCIC to obtain criminal records of tenants and applicants, they will need to have the fingerprints of these applicants/tenants. State HFAs who act as PHAs under this rule are concerned about their ability to facilitate fingerprinting in rural areas of their states, given the distances that must be covered to reach all applicants/residents.

*Answer:*

**The PHA must request records from the most appropriate law enforcement agency, NCIC, police departments, and other law enforcement agencies that hold criminal conviction records. PHAs and Owners should adopt procedures for processing requests for criminal histories.**

*Question:*

12. Fingerprinting, necessary for an NCIC check, will take a significant amount of time, estimated at 3 to 4 weeks. During this time the apartment will be empty and Owners will lose money. Applicants, including those who do not have a criminal record, may be left homeless if the 30-day notice they give their landlord expires before the record check is completed.

*Answer:*

**The Owner should consider processing applications for vacant units from its waiting list as soon as the owner learns that the unit will be vacated.**

*Question:*

13. Do PHAs need to conduct a criminal records check, upon Owners' request, on all tenants currently residing in federally assisted housing? If so, how can they do this without the tenants' signed written consent? If PHAs do not have to conduct checks on current residents, must they conduct record checks at the time of lease recertification? If so, must PHAs conduct a check of either or both criminal records and sex offender status every time a lease is recertified? Is a PHA liable if a tenant commits a crime after the PHA conducted a record check on that tenant?

*Answer:*

- (a) **If an Owner submits a request to a PHA for criminal records on adult household members residing in Federally assisted housing the, PHA must request the criminal conviction records from a law enforcement agency. The PHA is prohibited by the statute and its implementing regulations from processing requests for criminal records unless, the request is accompanied by written consent form signed by the household member.**
- (b) **No, PHAs are not required to conduct criminal record checks of current tenants at lease recertification. However, Owners have the discretion to require criminal background checks at recertification.**
- (c) **PHAs that obtain criminal records are not responsible for updating the criminal history. Criminal records are to be managed in accordance with the requirements in the regulations at 24 CFR 5.903(g). Criminal Records must be destroyed once "the purposes for which the record was requested has been accomplished, including expiration of the PHA action without the instrument of a challenge or final disposition of any such litigation."**

*Question:*

14. When determining if an applicant has been evicted for a drug-related offense within the last 3 years, is it enough to ask the applicant about his/her eviction history? It will be problematic if HUD requires PHAs to contact prior housing of each tenant because eviction records are often not made or not kept for long, and PHAs have no way of knowing where an applicant lived previously, other than asking that applicant. It will be problematic if PHAs rely only on applicants' criminal records because a tenant may have been evicted from housing for drug-related offenses, but not prosecuted.

*Answer:*

**The PHA has the discretion to rely solely on the tenant's declaration regarding his or her eviction history.**

*Question:*

15. Are PHAs that run tenant-based Section 8 programs required to conduct a criminal records check on every new adult applicant?

*Answer:*

**We will consult with the Office of Public and Indian Housing to respond to this question.**

*Question:*

16. Can the HUD authorization for information release form be altered to include access to criminal records?

*Answer:*

**No, the HUD Form 9887 is used for income verification only. The Owner must develop its written consent form.**

*Question:*

17. Are PHAs required/permitted to conduct background checks on tenants who want to live in, or already live in, an unassisted unit in an otherwise project-based assisted project?

*Answer:*

**No, section 42 USC 13664(a)(2) of the U.S. Housing Act of 1937 defines “Federally-assisted housing as a “...dwelling unit in housing that is provided project-based assistance under multifamily programs.” The “project” means only the part of the development that is HUD-assisted when a development is only partially HUD assisted.**

*Question:*

18. Our understanding based on HUD’s response is that PHAs are not required to conduct background checks on tenants who apply for unassisted units in an otherwise project-based assisted project, even at an Owner’s request. Owners may conduct background checks on applicants for non-assisted units if they wish; however, the PHA is under no obligation to assist the Owner. Please let us know if this is incorrect.

*Answer:*

**Owners are not required to have background checks conducted on applicants applying for an unassisted unit or tenants living in an unassisted unit receiving project-based assistance. Owners may conduct background checks on applicants for unassisted units if they wish. However, the PHA is under no obligation to assist the Owner.**

*Question:*

19. Are PHAs required to conduct sex-offender registry and criminal records checks (if requested by an owner) on qualified managers or maintenance personnel renting temporarily offline, subsidized units?

*Answer:*

**Yes, if requested by the Owner. The rule applies to all applicants.**

*Question:*

20. According to QHWRA, police officers and other security personnel may rent subsidized units. In this case, are PHAs permitted/required to conduct criminal records and sex-offender registry checks on these individuals?

*Answer:*

**Yes, if requested by the Owner. The rule applies to all applicants.**

*Question:*

21. Sec 5.903(f) provides tenants or applicants the right to dispute criminal record information that the PHA receives from a “state or local agency”. However, criminal records are obtained from “law enforcement agencies.” “State or local agency” is a term that is undefined and is used elsewhere in the rule exclusively with reference to a provider of information regarding lifetime sex offender registration. Are PHAs required to give tenants and applicants an opportunity to dispute records received from “law enforcement agencies?” Are residents unable to dispute NCIC records, as these are national records, not derived from a “state or local agency?”

*Answer:*

**It is not the intent of the rule to exclude records obtained from the NCIC from the tenant’s or applicant’s right to dispute. Applicants and tenants have the right to dispute information obtained by the PHA including from any law enforcement agency used to deny admission or as a basis for termination of tenancy.**

*Question:*

22. §5.905(d) provides tenants and applicants an opportunity to dispute sex offender registration information. The statute (§579(d)) limits the opportunity to dispute to “an applicant for federally assisted housing.” Is it HUD’s intent to offer opportunities to dispute the records to tenants when the information may be used for the purposes of lease enforcement or eviction, or did the rule go beyond the statute by design?

*Answer:*

**The rule mirrors the statute. Applicants and tenants have the opportunity to dispute sex offender registry information.**

*Question:*

23. Sec 5.903(d)(2) allows owners to “request that the PHA in the jurisdiction of the property obtain criminal conviction records.” Does this mean that Owners can choose to ask either a local PHA or the state HFA, as the HFA has jurisdiction over the whole state? This leads to problems with fair housing regulations because the state HFA cannot monitor Owners’ requests.

*Answer:*

**Owners are encouraged to contact the local PHA if there is one, and to contact the state HFA only if there is no local PHA within the jurisdiction of the property to obtain criminal conviction records.**

*Question:*

24. How does HUD plan to encourage Owners to contact their local PHA if one exists?

*Answer:*

**HUD will state so in a Notice encouraging Owners to contact the local PHA if there is one.**

*Question:*

25. How long must the Owner refrain from renting the unit so that the subject has the opportunity to dispute information leading to an eviction? Is the PHA obliged to consider and accept the alternative information that is being provided by the subject of the investigation? What happens if a PHA accepts false information and allows a tenant to return to public housing?

*Answer:*

**The Owner should follow its normal policies and procedures for screening and termination of tenancies.**

*Question:*

1. Because of this rule, PHAs will need to decide if they should store Owner's admissions policies or require a copy of the policy with each request. If the PHA decides to store the owner's policies, what happens if the owner's policies change? Does a PHA need to review and update them, or is this up to the owner to contact the PHA if he/she makes changes to the admission policies?

*Answer:*

**The PHA is not required to store the Owner's admissions policies. Each request should contain the Owner's current admission policies.**

*Question:*

2. PHAs are concerned because leases and Owner policies for tenant selection differ and are not always clear. PHAs would be responsible for understanding and interpreting each individually. Not only would this be a considerable undertaking for staff, but also PHAs may incorrectly interpret an Owner's intention. Is a PHA liable if it rejects an applicant that the owner would have accepted, or accepts an applicant the Owner would have rejected?

*Answer:*

**Neither the statute nor its implementing regulations impose liability on PHAs for rejecting applicants, which the owner would have accepted or accepts an application the owner would have rejected. The PHA's determination with regard to the screening and admission of applicants is based upon the criminal conviction record and the owner's standards for prohibiting admission. If the Owner's selection criteria are not clear, the PHA should contact the owner for clarity. The PHA makes recommendations based on the information provided by the Owner.**

*Question:*

3. The requirements imposed by this rule are not currently included as a responsibility in the contracts HFAs have with HUD for contract administration.

*Answer:*

**In accordance with the ACC between HUD and the Performance-Based Contract Administrator (referred to a PHA in the ACC) agrees to perform all of its responsibilities in accordance with applicable provisions of “The United States Housing Act of 1937 and other Federal laws, including any amendments or changes in the law and HUD regulations and other requirements including any amendments or changes in HUD requirements.” Exhibit A of the ACC, subsections 2.1 and 3.1.1, provide that PHAs must comply with HUD regulations and requirements, both current and as amended in the future governing administration of Section 8 HAP contracts. See the provisions below:**

**Subsection 2.1. Overview of Public Housing Agency responsibilities provides:**

**... The major tasks of the PHA include, but are not limited to the following:**

**... Comply with HUD regulations and requirements, both current and as amended in the future, governing administration of Section 8 HAP contracts.**

**Subsection 3.1.1. Performance-based Service Contracting provides:**

**... The PHA must complete all tasks described in Exhibit A of the ACC, including both requirements specifically designated as “incentive-based performance standards” and all other “requirements.”**

**PHA failure to complete the tasks or comply with other PHA obligations under the ACC will constitute a default under the ACC. HUD may terminate the ACC at any time in whole or in part if HUD determines that the PHA has committed any default under the ACC.**

*Question:*

4. Penalties can be imposed against a PHA and its staff for “knowing and willful” mismanagement of records, however a tenant can bring a civil suit for “negligent or knowing” mismanagement of records. Negligent could amount to accidental, while knowing/willful requires a measure of intent. These different standards are inconsistent.

*Answer:*

**The rule mirrors the statutory provisions contained at Sections 42 USC 1437d(q)(6) and (7) of the U.S. Housing Act of 1937.**

*Question:*

5. §5.905(b)(4) prohibits sharing sex offender registration information with the Owner, but §5.905(c)(2) exempts public information from the records management prohibition against improper dissemination of records. May the PHA share sex offender registration information records with owners if the records are public information? The records management relative to criminal background checks does not have a similar exemption for public information. If criminal background information is public information, may the PHA disclose the record to the owner? If a PHA discloses records to a tenant or applicant in the context of providing an opportunity to dispute the records and the records turn out to not be records of the tenant or applicant, is such a disclosure permissible under the records management requirement of the rule? Section 8 Owners are currently obtaining this information themselves without a PHA intermediating.

*Answer:*

**The statute and its implementing regulations at 24 CFR Part 5, Subpart J do not apply to criminal conviction information or sex offender information searches by a PHA or others of information from law enforcement agencies or other sources other than as provided under Subpart J. (See the regulation at 24 CFR 5.901(c).) If a PHA obtains state sex offender information from public information records, Subpart J of the regulation is not applicable. PHAs may release this information in accordance the requirements under State and local law. HUD cautions PHAs and Owners to handle any information obtained from other records in accordance with applicable State and Federal privacy laws and with the provisions of consent forms signed by the applicants.**

*Question:*

31. In some states, state law dictates that records become public when they are given to the HFA. If PHAs can share public information with owners, does this mean that all criminal records become public information upon receipt by the PHA and can therefore be shared with Owners?

*Answer:*

**HUD declines to speculate here about the applicability of this rule to particular local situations. If there is a concern about a specific potential conflict between the HUD rule and a State or local law, the applicable HUD Field Office should be contacted.**

*Question:*

32. When do you expect HUD to give the necessary guidance to HUD Field Offices?

*Answer:*

**We would expect a Notice to go out by May 2002.**

*Question:*

33. The statute permits PHAs to require authorizations to conduct criminal background checks (Sec 575(d)), but the rule requires the authorizations (§5.903(b)). Are the signed authorizations mandatory, even if the statute does not require them? May a PHA require signed authorizations for conducting the sex offender registration search?

*Answer:*

**Signed written consents must be obtained prior to obtaining criminal background checks for criminal activity or sex offender registration. The use of consent forms is not necessary to obtain information that is public.**

*Question:*

34. Drug related criminal activity - §5.854(b) requires a standard to prohibit admission if the owner determines that any household member is currently engaging in illegal use of a drug, but Criminal activity - §5.855 contradicts that requirement: “You may prohibit admission of a household ... if you determine that any household member is currently engaging in ... drug-related activity.” Drug-related activity is defined to include the illegal use of a drug. Is it true that under this rule an owner can have a standard that permits a user of illegal drugs to be admitted to the housing? Is it true that under this rule an owner is not required to prohibit admission to a seller of illegal drugs, but may prohibit his/her admission?

*Answer:*

**No, the statute provides that “notwithstanding any other provision of law, a public housing agency or an owner of Federally-assisted housing, as determined by the Secretary, shall establish standards that prohibit admission to the program or admission to Federally-assisted housing for any household member who the public housing agency or owner determines is illegally using a controlled substance.” Illegal drug users are not eligible for admission to Federally-assisted housing. The regulations must be revised in order to comply with the statutory requirement.**

*Question:*

35. In addition to the above questions and comments, NCSHA is concerned about the fair housing implications of this rule. For example, a PHA conducting criminal records screenings on behalf of an owner would have no way of knowing if the Owner is discriminating against a particular group of people, i.e., only requesting screenings for minority applicants.

In this Q & A document or elsewhere, will HUD provide guidance for reconciling this rule’s implications and fair housing rules to provide Owners and PHAs guidance on such matters?

*Answer:*

**The Notice will remind Owners to adhere to fair housing principles. HFAs are responsible for information in response to requests from owners.**

*Question:*

36. How will Section 504 and The Fair Housing Act that requires all owners to provide reasonable accommodations to applicants and residents with

disabilities, and alcoholics and rehabilitated drug users, who are considered disabled be interpreted within the regulatory requirements for screening and eviction?

*Answer:*

**For the purpose of low income housing programs, the QHWRA statute at Section 506 amended Section 3 of the U.S. Housing Act to state that “Notwithstanding any other provision of law, no individual shall be considered a person with disabilities, for purposes of eligibility for low-income housing under this Title, solely on the basis of any drug or alcohol dependence.”**

**Given the amendment to the statute and the re-defining of persons with disabilities, the Department is not required to provide reasonable accommodations, for purposes of project-based assisted programs, for applicants and residents whose sole disability is drug-addiction and alcoholism.**