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## **Revision of the Project-Based Voucher Statute**

by Barbara Sard

Section 232 of Pub.L. 106-377, the FY 2001 VA-HUD appropriations bill signed by the President on October 27, 2000, revises the statutory authority for public housing agencies (PHAs) to project-base vouchers (section 8(o)(13) of the U.S. Housing Act, 42 U.S.C. §1437f(o)(13)). On January 16, 2001, HUD published its Initial Guidance concerning the statutory changes. 66 Fed. Reg. 3605. This notice makes most of the statutory changes effective immediately. The key features of the new PHA project-based Section 8 voucher program are briefly described below and compared with the provisions previously in effect.

### **Background**

For about 10 years, public housing agencies that administer the Section 8 tenant-based rental assistance program have had the option to contract with private owners to use up to 15 percent of their subsidy funds in particular buildings. This is known as "project-basing" what are otherwise tenant-based vouchers. Few PHAs have used this option because it could only be employed if an owner used other funds to rehabilitate the property, the procedures were cumbersome, and there were no incentives for owners to commit units to the program. When Congress revamped the low-income housing programs in 1998, no significant changes were made in this provision.

The conference report accompanying the fiscal year 2001 VA-HUD appropriations act (H. Rpt. 106-988) acknowledges that the project-based option has never worked effectively. The revision of the statute is aimed at easing the barriers to PHA use of the project-based option. HUD's notice states that "it is also HUD's objective to make the project-based voucher program more flexible and more workable, and to help PHAs, owners, and eligible families in need of housing take immediate advantage of the new statutory features." 66 Fed. Reg. at 3606.

### **Key Provisions**

Each of the provisions discussed below is effective January 16, 2001, the date of HUD's Initial Guidance, unless otherwise noted. To enable PHAs to implement the new statute in advance of new regulations being issued, HUD specifies in the Initial Guidance that certain pre-

existing regulations for the project-based certificate program are inapplicable to new project-based voucher contracts.<sup>1</sup> HUD notes that it may waive other provisions of the project-based certificate regulations or directives in the Initial Guidance for good cause. 66 Fed. Reg. 3607. (HUD cannot waive statutory provisions.)

1. The *maximum percentage of funds that a PHA may project-base* is increased to 20 percent of its total tenant-based section 8 funds. The prior limit was 15 percent. HUD's Initial Guidance permits PHAs to implement this provision by project-basing up to 20 percent of the number of voucher units that they are authorized to administer. Existing contracts for project-based certificates under the previous statutory authority count toward this limit. 66 Fed. Reg. 3608.
2. *Purposes* – A PHA may project-base voucher assistance without any requirement that the owner invest other funds in the property. Previously, investment by the owner of at least \$1,000 per unit was required before a unit could receive a project-based voucher. This change allows PHAs to decide whether to project-base vouchers as a way to encourage new construction or rehabilitation or simply to use project-basing as a tool to promote voucher utilization and expand housing opportunities. In addition, it permits funds from programs authorized under the U.S. Housing Act (public housing and Section 8) to be used for construction or rehabilitation of properties, if such use is otherwise authorized.

If newly constructed or rehabilitated units require less than \$1,000 of work to meet inspection standards at the time a PHA selects the units to receive project-based voucher assistance, the units are considered “existing” housing. 66 Fed. Reg. 3607.<sup>2</sup> (Other units that require no additional work or only minor rehabilitation — i.e., less than \$1,000 per unit — also are included in the definition of existing housing.) The distinction between “existing” and newly constructed or rehabilitated housing is important. The project-basing of vouchers in “existing” housing relieves PHAs of a number of obligations, including the requirement to select units competitively and the need to obtain HUD approval of the criteria for competition and the location of selected developments. (See

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<sup>1</sup>The project-based certificate program was superceded by the certificate/voucher merger enacted by the Quality Housing and Work Responsibility Act of 1998, but HUD instructed PHAs to continue to use the project-based certificate regulations at 24 C.F.R. Part 983 until new rules are issued.

<sup>2</sup>Beginning Jan. 16, 2001, the detailed rules concerning rehabilitation and new construction at 24 C.F.R. 983.8, 983.10(a), and 983 Subparts B and C (with a few exceptions) will not apply to the project-basing of vouchers in such “existing” housing even if the units had not been occupied subsequent to the construction or rehabilitation. 66 Fed. Reg. at 3608.

paragraphs 12, 14 and 15 below.)

3. *Income Mix* – No more than 25 percent of the units in a building may receive project-based voucher assistance unless the assisted units are made available to elderly or disabled families or families receiving supportive services. The statute does not define what it means to receive supportive services. HUD’s Initial Guidance states that the “supportive services” exception to the limit on the percentage of units in a building that may receive project-based voucher assistance is not yet effective and will be implemented through future rulemaking. (66 Fed. Reg. at 3608.) Single-family dwellings also are exempt from the 25 percent limit. HUD’s Initial Guidance clarifies that a building with up to four units is considered a single family dwelling. *Id.* Under prior law, there was no limitation on the percentage of units in a development that could receive project-based assistance. Note that this limitation applies only to units assisted with project-based vouchers; there is no provision regarding the income of other tenants or whether families in other units receive tenant-based rental assistance.
4. *Resident Choice and Continued Assistance* – In a paradigm shift from previous federal housing policy, families occupying units with project-based voucher assistance have the right to move after one year with a tenant-based Section 8 voucher or its equivalent. Until HUD issues new regulations defining what may qualify as rental assistance that is “comparable” to a Section 8 voucher, only a Section 8 voucher satisfies the continued assistance requirement. If no voucher is available when a family receiving project-based assistance moves, the PHA must give the family priority to receive the next available voucher.<sup>3</sup> As described in more detail below, when a family moves out of a unit with project-based voucher assistance, it must be replaced by a family that is referred from the

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<sup>3</sup>66 Fed. Reg. at 3609. HUD estimates that about 11 percent of existing housing vouchers become available for reissuance each year as families leave the program, making the provision of immediate continued assistance feasible for all but the smallest PHAs, regardless of whether a PHA receives funding from HUD for new vouchers. HUD’s Initial Guidance states that special purpose vouchers such as Family Unification or Mainstream vouchers for the disabled cannot be used for such continued assistance. *Id.* The guidance does not discuss whether, if such special purpose vouchers are project-based (to facilitate the provision of intensive services or for other purposes), a tenant-based voucher imbued with the same program purpose could then be issued to a tenant who wishes to move. No statutory provision appears to preclude a PHA from deciding to project-base vouchers awarded under the Mainstream program. Family Unification voucher funds must be used for “tenant-based assistance under section 8.” 42 U.S.C. § 1437f(x)(2). It is not clear whether this provision precludes the project-basing of such voucher assistance, as the revised project-based voucher program is a component of the Section 8 tenant-based program.

PHA's waiting list. This will ensure that the specified number of subsidies continue to be used at the development throughout the term of the PHA's contract with the owner.

5. *Contract Term and Extension* – PHAs have discretion to set the initial contract term for any period of time up to a maximum of ten years, subject to the availability of adequate annual appropriations. The initial contract may be extended for the period that the PHA considers appropriate to achieve long-term affordability or to expand housing opportunities. At the PHA's option, the initial contract may bind the owner to accept extensions offered by the PHA. These provisions substantially change prior law, which in effect prevented a contract longer than one year but required owners to agree to any offered extension. In addition, the new provisions eliminate the previous statutory requirement that HUD must approve a PHA decision to extend a contract with an owner.
6. *Inspections* – Project-based voucher contracts are subject to the same annual inspection requirements as regular vouchers, except that a PHA is permitted to develop a streamlined inspection system for the development rather than inspecting each unit each year.<sup>4</sup>
7. *Rent* – The PHA's contract with the owner sets the rent for each unit with project-based assistance. The amount of the rent may not exceed the lower of the applicable maximum level, as explained below, or the "reasonable" rent in light of the rents charged for comparable unassisted units in the area. In most cases, the applicable maximum is the maximum voucher payment standard: 110 percent of the HUD-determined fair market rent (FMR), or any higher exception payment standard approved by HUD. Up to this maximum, the rent for a unit with a project-based voucher may exceed the payment standard established by the PHA for the area, so long as the rent is reasonable.

To ensure that vouchers can be used in units located in better neighborhoods that are financed with Low Income Housing Tax Credits, rents for these units are subject to a special exception. If a tax credit development is located outside of a qualified census tract,<sup>5</sup> the rent may be as high as the rent charged for comparable units in the

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<sup>4</sup>It is not clear from HUD's Initial Guidance whether, prior to the issuance of new rules, PHAs may inspect only a representative sample of the project-based voucher units in a project after the first year. See 66 Fed. Reg. 3607. The notice does not address the continued applicability of 24 C.F.R.983.204(c), which requires annual inspections of each unit.

<sup>5</sup>As amended by P.L. 106-554, enacted Dec. 21, 2000, a "qualified census tract" is an area where at least half of the households have incomes below 60 percent of the area median income or where the poverty rate is at least 25 percent.

development with tax credit subsidies but without additional rental assistance. That is, if the rent for a LIHTC-financed unit is higher than the maximum voucher payment standard, the PHA may set the project-based voucher rent for the unit above the payment standard, up to the amount charged in the other LIHTC-financed units. The impact of this provision could be substantial. Based on a comparison of Fair Market Rents for FY 2000 and maximum LIHTC rents,<sup>6</sup> we calculate that in 243 metropolitan areas that contain nearly 60 percent of the nation's metropolitan population, maximum LIHTC rents exceed 110 percent of the FMR.<sup>7</sup>

Rent increases during the term of the contract may be approved by the PHA so long as the increased rents do not exceed these maximums and are reasonable. Previously, rents were limited to the FMR and could be increased only by HUD's annual adjustment factors.<sup>8</sup>

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<sup>6</sup>Generally, the maximum rent that an owner may charge for a unit that receives federal low income housing tax credits is 30 percent of the income of a household whose income is 60 percent of the area median income.

<sup>7</sup>For units in tax credit units located outside of qualified census tracts, the statute permits a PHA to set the rent at the *higher* of the maximum voucher payment standard or the rent charged for other tax credit units that are located in the same development but do not receive other rental assistance. 42 U.S.C. § 1437f(o)(13)(H). There were reports that some HUD field staff were interpreting HUD's Initial Guidance (at 3609) to require that, for tax credit units outside of qualified census tracts, the rent for a project-based voucher unit may not exceed the rent charged for other tax credit units in the development, even if the rent charged for the other units is less than the maximum voucher payment standard. HUD headquarters staff have now agreed that this earlier interpretation was incorrect. The following example may help to clarify the maximum rent for a project-based voucher in a tax credit unit located outside of a qualified census tract. If the maximum voucher payment standard is \$800 and the actual rent charged for a comparable tax credit unit in the same development without other rental assistance is \$600, the PHA may approve a rent of \$800 if it is reasonable in comparison to other non-assisted units in the area (i.e., non-tax credit units). But if the maximum voucher payment standard is \$800 and the actual rent charged for a comparable tax credit unit in the same development without other rental assistance is \$1,000, the PHA may approve a rent of \$1,000, subject to the same test of rent reasonableness.

<sup>8</sup>HUD's Initial Guidance states that during the term of the contract, the reasonableness of any adjustments in the rents of units with project-based voucher assistance must be determined using the rent comparability provisions of 24 C.F.R. 983.256. 66 Fed. Reg. 3609. Perhaps due to oversight, the guidance does not specify that 24 C.F.R. 983.252(b), which caps rents at the FMR or the exception rent, is inapplicable, although the guidance does state that the new statutory rent provisions are effective immediately. It is not clear if a waiver of this rule is

8. *Family share of the rent* – The previous statutory requirement that families with project-based vouchers pay 30 percent of their adjusted income for rent (subject to certain exceptions) is unchanged.
9. *Waiting list* – PHAs maintain the waiting lists for project-based voucher assistance. A PHA may use its single waiting list for its voucher program as a whole, or it may use a separate waiting list for project-based voucher units if all applicants on the tenant-based list are given the opportunity to place their names on the separate list as well. (This gives applicants already on the agency’s tenant-based waiting list the option to pursue a project-based opening before project-based units are made available to new applicants.) PHAs are authorized to use special preferences or criteria for selecting applicants to receive project-based assistance (e.g., to be consistent with a supportive housing program). Such preferences must be part of a PHA’s admissions policy, which must be incorporated in the annual PHA Plan.

Owners are responsible for selecting tenants for units assisted with project-based vouchers from among the families referred by the PHA from its waiting list.<sup>9</sup> An owner may refer families that apply directly to the development to the PHA to be placed on the waiting list. (Owners may be able to make such referrals to PHAs electronically.) Any special waiting list procedures that apply to owner referrals must be included in a PHA’s Section 8 administrative plan. No family is required to accept project-based assistance; families that reject an offer of project-based assistance or are rejected by the owner and are on the tenant-based list retain their place on that list. PHAs may not permit owners to maintain their own waiting lists.

10. *Targeting* – Tenant-based voucher eligibility and targeting rules apply. This means that the income of families selected for project-based voucher units is considered in determining whether the PHA has complied with the requirement that at least 75 percent of new admissions to the voucher program each year must have incomes at or below 30 percent of the area median income. Prior to the enactment of the recent legislation, the

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required before a PHA sets the rent for project-based voucher units above 100 percent of the FMR. Pre-existing rules on rent adjustments during the term of the contract remain valid only for agreements between PHAs and owners to project-base assistance in newly constructed or rehabilitated housing that were executed prior to January 16, 2001.

<sup>9</sup>HUD’s Initial Guidance retains the rules that require owners to have written tenant selection procedures and to provide written notice to any rejected family of the grounds for the rejection. 24 C.F.R. 983.203(c)(4).

statute was ambiguous regarding whether the 75 percent targeting requirement for the tenant-based program or the 40 percent targeting requirement for the project-based section 8 program applied to project-based vouchers. The new provision resolves the ambiguity.

11. *Vacancy payments* – As an incentive for owners to enter into project-based contracts, PHAs have discretion to decide whether to offer vacancy payments to owners. No vacancy payments were permitted under prior law. Now vacancy payments are limited to 60 days. However, PHAs and owners must seek to reduce the need for vacancy payments, and such payments may not be made if the vacancy is the fault of the owner (e.g., the unit does not pass reinspection or a PHA refers a reasonable number of families to the owner, but the owner refuses to select any of them). Any such vacancy payments are made out of regular voucher funding (rather than administrative fees). A PHA has discretion to reduce the number of units under a project-based voucher contract if no family accepts a unit within 120 days of the owner’s notice to the PHA of the vacancy. The PHA may then reissue the subsidy as a tenant-based voucher. Applicants interested in project-based units may seek judicial enforcement of the contractual obligations of owners and PHAs to act reasonably to rent available project-based assisted units.
12. *Location* – Under the revised statute, a PHA may project-base vouchers only if the contract is consistent with the goal of deconcentrating poverty and expanding housing and economic opportunities. HUD’s Initial Guidance implements this statutory requirement by requiring that all new contracts to project-base voucher assistance must be for units in census tracts with a poverty rate of less than 20 percent. HUD may approve an exception to this requirement. 66 Fed. Reg. 3608. HUD’s current site and neighborhood standards (24 C.F.R. 983.6) continue to apply to contracts to project-base voucher assistance in return for rehabilitation or new construction of more than \$1,000 per unit. The Initial Guidance states that these rules do not apply to the project-basing of vouchers in “existing” housing. 66 Fed. Reg. 3608. (See paragraph 2 concerning the definition of “existing” housing.)
13. *Consistency with PHA Plan* – Such consistency is required as a condition of a PHA entering into a contract to project-base vouchers. PHAs with fiscal years beginning July 1, 2001 or later that wish to use the project-based voucher option must attach a statement to the PHA Plan template. 66 Fed. Reg. 3608; PIH 2001-4, January 19, 2001. The statement must include the projected number of project-based units and general locations, and the PHA’s reasons for choosing to project-base a portion of its vouchers. The range of possible locations must “result in a reasonable choice of buildings or projects to be provided project-based assistance when the PHA solicits applications.” PIH 2001-4 at 6. If a PHA wishes to project-base vouchers before the anticipated approval date of its next

PHA plan, it may amend its plan to do so. If the amendment is significant under the PHA's established criteria, the PHA must consult with the Resident Advisory Board and obtain public comment. (See 24 C.F.R. 903.7(r)(2)(ii), 903.13(a)(1), 903.17, and 903.21.) Through its review of the plan, HUD may determine whether the proposed locations of project-based units comply with the goal of deconcentrating poverty and expanding housing and economic opportunities and affirmatively further fair housing.

14. *Advertising and competitive bidding* – The statute is silent regarding advertising and bidding requirements. HUD's Initial Guidance indicates that the advertising and competitive bidding requirements of the current rules continue to apply in some situations, depending on the type of development. To project-base vouchers in 25 percent or less of the units in "existing" housing, a PHA is required only to advertise its intention in a general circulation newspaper weekly for three consecutive weeks. Interested owners must have at least 30 days to apply from the date of the last publication. It appears that no HUD approval is required, and the PHA need not develop formal selection criteria. If a PHA wishes, however, to project-base vouchers in return for new construction or rehabilitation expenditures of more than \$1,000 per unit, or to project-base vouchers in more than 25 percent of the units in existing housing that will serve the elderly or disabled, the PHA must establish policies for public advertisement and competitive selection of units. Such policies must be approved in advance by the HUD field office.<sup>10</sup>
15. *HUD approval* – HUD's Initial Guidance makes inapplicable the pre-existing rules that required specific advance approval by HUD of each PHA decision to project-base vouchers in a particular development, the term of the PHA's contract with an owner, and any decision to renew the contract. All PHAs that wish to use the new option, however, must include a description of their plan to project-base vouchers in their annual PHA Plan, as discussed in paragraph 13. To project-base vouchers in connection with new construction or rehabilitation of more than \$1,000 per unit, or in more than 25 percent of units in an "existing" building, PHAs must obtain HUD approval of their public advertisement and competitive bidding policies. Except when vouchers are project-based in "existing" housing, HUD approval is required of the location of units to receive project-based vouchers, as discussed in paragraph 12. It appears that PHAs that wish to project-base vouchers in buildings they own continue to need HUD approval until HUD

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<sup>10</sup>See HUD's Initial Guidance at 66 Fed. Reg. 3608. The advertising and competitive selection requirements are contained in 24 C.F.R. 983.51. It is not clear whether the HUD approval required by this section is now subsumed in the process of HUD approval of the PHA plan or remains a separate requirement.

issues further rules.<sup>11</sup> For project-basing of vouchers in all types of developments, PHAs are required to use a new HUD form contract and a new Tenancy Addendum that are to be issued “soon.” 66 Fed. Reg. 3610.

16. *Financial incentives* – Under the revised statute, financial incentives for owners to enter into a project-based voucher contract may include increased rent levels, vacancy payments, and the security of long-term contracts. Whether and how a PHA uses these tools, in addition to other incentives the PHA or the locality may be able to offer through other funds, is up to the PHA.

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<sup>11</sup>24 C.F.R. 983.7(f) requires active HUD involvement in the project-basing of vouchers in units owned by PHAs. HUD’s Initial Guidance does not discuss how the amended statute applies to this situation, now does it refer to this rule. As a result, it appears that HUD does not consider the statutory provisions that authorize local governments to inspect PHA-owned units and set the contract rent and duration for such units to be immediately effective.