



703 Market St., Suite 2000  
San Francisco, CA 94103  
Telephone: 415-546-7000  
Fax: 415-546-7007  
nhlp@nhlp.org  
www.nhlp.org

## MEMORANDUM

**TO:** Ben Metcalf, Deputy Assistant Secretary, Office of Multi-Family Housing  
Rebecca Primeaux, Director, Public Housing Management and Occupancy Division,  
Office of Public & Indian Housing

**FROM:** Jim Grow & Stephen Knight, NHLP

**RE:** Coverage of PBV Tenants by Tenant Participation Statute and Rules

**DATE:** April 22, 2015

---

This memo sets forth our position that tenants residing in units assisted by the Project-Based Voucher (PBV) program are covered by both the tenant participation statute and regulations because they are recipients of “project-based assistance.” We urge you to issue clarifying guidance on this issue in future materials related to tenant participation.

Federal law recognizes “the importance and benefits of cooperation and participation of tenants in creating a suitable living environment in multifamily housing projects and in contributing to the successful operation of such projects. . . .” 12 U.S.C. § 1715z-1b(a); 24 C.F.R. § 245.5. HUD has stated that “tenant participation is an important element to maintaining sustainable projects and communities.” HUD Housing Notice H2012-21 § (A) (Oct. 17, 2012). HUD must ensure that “project owners do not impede the reasonable efforts of resident tenant organizations to represent their members or the reasonable efforts of tenants to organize.” 12 U.S.C. § 1715z-1b(b)(4).

In 1998, Congress expanded the scope of its tenant participation mandate in multifamily housing to include, among other properties, “a project which receives project-based assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f). . . .” Pub.L. No. 105-276, § 599, 112 Stat. 2660 (1998).

In 2000, HUD issued final regulations implementing the 1998 amendment. 65 Fed. Reg. 36272 (June 7, 2000) (amending 24 C.F.R. pt. 245). Among other things this rule (§ 245.10(a)(4)) extended coverage to projects that receive “project-based assistance under section 8 of the United States Housing Act of 1937 . . .”. 24 C.F.R. § 245.10(a)(4); *see also* HUD Housing Notice H2012-21, § (B)(4).

Without explanation, in the final rule HUD added an ambiguous parenthetical after the expansion of coverage to project-based assistance and Section 8: “(this regulation does not cover tenant participation in PHAs that administer such project-based assistance)”. 65 Fed. Reg. 36272 (2000); compare 64 Fed. Reg. 32782, 32784 (June 17, 1999) (no such reference). This exclusion could have two meanings: the rule does not cover tenant participation in PHA operations or the rule does not

cover any properties where PHAs administer project-based assistance, such as Section 8 Mod Rehab or other programs, like project-based certificates or project-based vouchers. Literally, the former seems most plausible, for two reasons: (1) PHA operations are covered by other HUD rules and policies, and (2) HUD has no authority to take regulatory action contrary to the plain terms of the statute, which requires certain tenant participation rights in properties with “Section 8 project-based assistance,” regardless of the specific subprogram involved or the identity of the owner or contract administrator.

The PBV program was created in 1998 and revised in 2000. *See* 70 Fed. Reg. 59892 (Oct. 13, 2005) (HUD explanation of history of PBVs). PBVs are provided for in 42 U.S.C. § 1437f(o)(13), a subsection of Section 8 of the 1937 Act, under the heading “PHA project-based assistance.” In the Section 8 statute, 42 U.S.C. § 1437f(f)(6), Congress defines “project-based assistance” as “rental assistance under subsection (b) that is attached to the structure pursuant to subsection ... (o)(13).” Accordingly, PBVs are clearly project-based assistance within the meaning of both the tenant participation statute and the Section 8 statute.

Congress has imposed no further limitation on the meaning of the term “project-based assistance under section 8.” HUD lacks the authority to deny tenant participation rights to tenants residing in properties receiving project-based Section 8 of any type, whether PBVs, Mod Rehabs, or other PHA or state agency administered Section 8 subprograms. The fact that the HUD 245 regulations are issued by the Office of Housing has no significance to the resolution of this question concerning the Secretary’s legal duty. Thus, tenants receiving PBVs are entitled to the protections governing tenant participation.