

(c) \* \* \*  
(5) \* \* \*

(v) Gas turbine engine hot sections covered by Category XIX(f);  
\* \* \* \* \*

■ 9. Section 124.12 is amended by revising paragraph (a)(9) to read as follows:

**§ 124.12 Required information in letters of transmittal.**

(a) \* \* \*

(9) For agreements that may require the export of classified information, the Defense Security Service cognizant security offices that have responsibility for the facilities of the U.S. parties to the agreement shall be identified. The facility security clearance codes of the U.S. parties shall also be provided.  
\* \* \* \* \*

**PART 126—GENERAL POLICIES AND PROVISIONS**

■ 10. The authority citation for part 126 continues to read as follows:

**Authority:** Secs. 2, 38, 40, 42, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117; Pub. L. 111–266; Sections 7045 and 7046, Pub. L. 112–74; E.O. 13637, 78 FR 16129.

■ 11. Section 126.9 is amended by revising paragraph (a) to read as follows:

**§ 126.9 Advisory opinions and related authorizations.**

(a) *Preliminary authorization determinations.* A person may request information from the Directorate of Defense Trade Controls as to whether it would likely grant a license or other approval for a particular defense article or defense service to a particular country. Such information from the Directorate of Defense Trade Controls is issued on a case-by-case basis and applies only to the particular matters presented to the Directorate of Defense Trade Controls. These opinions are not binding on the Department of State and may not be used in future matters before the Department. A request for an advisory opinion must be made in writing and must outline in detail the equipment, its usage, the security classification (if any) of the articles or related technical data, and the country or countries involved.  
\* \* \* \* \*

■ 12. Section 126.10 is amended by revising paragraph (b) to read as follows:

**§ 126.10 Disclosure of information.**

\* \* \* \* \*

(b) *Determinations required by law.* Section 38(e) of the Arms Export

Control Act (22 U.S.C. 2778(e)) provides, by reference to section 12(c) of the Export Administration Act (50 U.S.C. 2411), that information obtained for the purpose of consideration of, or concerning, license applications shall be withheld from public disclosure unless the release of such information is determined by the Secretary to be in the national interest. Section 38(e) of the Arms Control Export Act further provides that, the names of countries and types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless certain determinations are made that the release of such information would be contrary to the national interest. Such determinations required by section 38(e) shall be made by the Assistant Secretary of State for Political-Military Affairs.  
\* \* \* \* \*

**PART 127—VIOLATIONS AND PENALTIES**

■ 13. The authority citation for part 127 continues to read as follows:

**Authority:** Sections 2, 38, and 42, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); 22 U.S.C. 401; 22 U.S.C. 2651a; 22 U.S.C. 2779a; 22 U.S.C. 2780; E.O. 13637, 78 FR 16129; Pub. L. 114–74, 129 Stat. 584.

■ 14. Section 127.7 is amended by revising paragraph (b) to read as follows:

**§ 127.7 Debarment.**

\* \* \* \* \*

(b) *Statutory debarment.* It is the policy of the Department of State not to consider applications for licenses or requests for approvals involving any person who has been convicted of violating the Arms Export Control Act or convicted of conspiracy to violate that Act for a three year period following conviction and to prohibit that person from participating directly or indirectly in any activities that are subject to this subchapter. Such individuals shall be notified in writing that they are statutorily debarred pursuant to this policy. A list of persons who have been convicted of such offenses and debarred for this reason shall be published periodically in the **Federal Register**. Statutory debarment in such cases is based solely upon the outcome of a criminal proceeding, conducted by a court of the United States, which established guilt beyond a reasonable doubt in accordance with due process. Reinstatement is not automatic, and in all cases the debarred person must submit a request for reinstatement to the Department of State and be approved for reinstatement before engaging in any activities subject

to this subchapter. The procedures of part 128 of this subchapter are not applicable in such cases.  
\* \* \* \* \*

■ 15. Section 127.11(c) is revised to read as follows:

**§ 127.11 Past violations.**

\* \* \* \* \*

(c) *Debarred persons.* Persons debarred pursuant to § 127.7(b) (statutory debarment) may not utilize the procedures provided by paragraph (b) of this section while the statutory debarment is in force. Such persons may utilize only the procedures provided by § 127.7(d).

Dated: November 18, 2016.

**Tom Countryman,**

*Acting Under Secretary, Arms Control and International Security, Department of State.*

[FR Doc. 2016–28406 Filed 12–2–16; 8:45 am]

**BILLING CODE 4710–25–P**

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Parts 965 and 966**

[Docket No. FR 5597–F–03]

**RIN 2577–AC97**

**Instituting Smoke-Free Public Housing**

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Final rule.

**SUMMARY:** This rule requires each public housing agency (PHA) administering public housing to implement a smoke-free policy. Specifically, no later than 18 months from the effective date of the rule, each PHA must implement a “smoke-free” policy banning the use of prohibited tobacco products in all public housing living units, indoor common areas in public housing, and in PHA administrative office buildings. The smoke-free policy must also extend to all outdoor areas up to 25 feet from the public housing and administrative office buildings. This rule improves indoor air quality in the housing; benefits the health of public housing residents, visitors, and PHA staff; reduces the risk of catastrophic fires; and lowers overall maintenance costs.

**DATES:** *Effective date* February 3, 2017.

**FOR FURTHER INFORMATION CONTACT:** Leroy Ferguson, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–0500; telephone number 202–402–2411 (this is not a toll-free number). Persons who

are deaf or hard of hearing and persons with speech impairments may access this number through TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary**

*A. Purpose of the Rule*

The purpose of the rule is to require PHAs to establish, within 18 months of the effective date, a policy disallowing the use of prohibited tobacco products, as such term is defined in § 965.653(c), inside all indoor areas of public housing, including but not limited to living units, indoor common areas, electrical closets, storage units, and PHA administrative office buildings, and in all outdoor areas within 25 feet of the housing and administrative office buildings (collectively, “restricted areas”). As further discussed in this rule, such a policy is expected to improve indoor air quality in public housing; benefit the health of public housing residents, visitors, and PHA staff; reduce the risk of catastrophic fires; and lower overall maintenance costs.

*B. Summary of Major Provisions of the Rule*

This rule applies to all public housing other than dwelling units in mixed-finance buildings. PHAs are required to establish, within 18 months of the effective date of the rule, policies disallowing the use of prohibited tobacco products in all restricted areas. PHAs may, but are not required to, further restrict smoking to outdoor

dedicated smoking areas outside the restricted areas, create additional restricted areas in which smoking is prohibited (e.g., near a playground), or, alternatively, make their entire grounds smoke-free.

PHAs are required to document their smoke-free policies in their PHA plans, a process that requires resident engagement and public meetings. The proscription on the use of prohibited tobacco products must also be included in a tenant’s lease, which may be done either through an amendment process or as tenants renew their leases annually.

*C. Costs and Benefits of This Rule*

The costs to PHAs of implementing smoke-free policies may include training, administrative, legal, and enforcement costs. The costs of implementing a smoke-free policy are minimized by the existence of current HUD guidance on many of the topics covered by the mandatory smoke-free policy required by this rule. Already, hundreds of PHAs have voluntarily implemented smoke-free policies. Furthermore, infrastructure already exists for enforcement of lease violations, and violation of the smoke-free policy would constitute a lease violation. In addition, time spent by PHA staff on implementing and enforcing the smoke-free policy will be partially offset by the time that staff no longer have to spend mediating disputes among residents over secondhand smoke (SHS) infiltration within living units. Given the existing HUD guidance, initial learning costs (such as the costs of staff and resident training

understanding of this policy) associated with implementation of a smoke-free policy may not be significant. For the hundreds of PHAs that are already implementing voluntary smoke-free policies, there will be minimal costs of updating smoke-free policies, and these minimal costs will generally apply only if their existing policies are not consistent with the minimum requirements for smoke-free policies proposed by this rule.

However, implementing the requirements successfully may require additional enforcement legal costs for cases where repeated violations lead to evictions. Total recurring costs to PHAs of implementation and enforcement are expected to be \$7.7 million, although they may be higher in the first few years of implementation, given the necessity of establishing designated smoking areas (a total of \$30.2 million in the first year).

The benefits of smoke-free policies could also be considerable. Over 700,000 units would be affected by this rule (including over 500,000 units inhabited by elderly households or households with a non-elderly person with disabilities), and their non-smoking residents would have the potential to experience health benefits from a reduction of exposure to SHS. PHAs will also benefit from a reduction of damage caused by smoking, and residents and PHAs both gain from seeing a reduction in injuries, deaths, and property damage from fires caused by prohibited tobacco products. Estimates of these and other rule-induced impacts are summarized in the following table:

| Source of impact                        | Type of impact                     | Amount (\$millions) |          |      |
|-----------------------------------------|------------------------------------|---------------------|----------|------|
|                                         |                                    | Low                 | Standard | High |
| PHA Compliance/Enforcement <sup>1</sup> | Recurring Cost (highest initially) | 6                   | 7.7      | 30   |
| Inconvenience <sup>2</sup>              | Recurring Cost                     | 56                  | 94       | 340  |
| PHA Reduced Maintenance <sup>3</sup>    | Recurring Benefit                  | 15.9                | 21.3     | 37.5 |
| PHA Reduced Fire Risk <sup>4</sup>      | Recurring Benefit                  | 4.7                 | 4.7      | 4.7  |
| Residents’ Well-Being <sup>5</sup>      | Recurring Benefit                  | 101                 | 283      | 314  |
| Net Benefits <sup>6</sup>               | Recurring Net Benefits             | -248                | +207     | +262 |

<sup>1</sup> The high estimate includes initial costs of implementation which could run as high as \$30 million per year. The low and standard include only recurring costs. The low estimate includes a low-end cost estimate of eviction to a PHA (\$700 per case and \$500,000 in aggregate). The standard estimate includes a high estimate of eviction costs (\$3000 per case and \$ 2.2 million in aggregate).

<sup>2</sup> The low and standard estimates are generated from the price-elasticity of demand for cigarettes and assumed reduction in smoking derived from studies of smoking bans. The high estimate was generated from a study of public health policies on SIDS and inferring behavioral change of smokers from the impact of SIDS.

<sup>3</sup> The low and high estimates are based on a range of \$1,250 to \$2,955 per unit. The standard estimate is based on an estimate of \$1,674 per unit.

<sup>4</sup> HUD does not have data to predict a range of fire reduction risks.

<sup>5</sup> The low and standard estimates of residents’ well-being is estimated using the rent premium approach. The high estimate is derived from Quantitative Approach #3 described in the Appendix 1.

<sup>6</sup> The standard net benefit is equal to the sum of the standard benefits less the sum of the standard costs. The low net benefit is equal to the low benefits less the high costs. The high net benefit is the high benefits less the low costs.

For additional details on the costs and benefits of this rule, please see the

Regulatory Impact Analysis (RIA) for this rule, which can be found at

[www.regulations.gov](http://www.regulations.gov), under the docket number for this rule. Additional

information on how to view the RIA is included below.

## II. Background

On November 17, 2015, HUD published a proposed rule at 80 FR 71762, soliciting input from the public on requiring PHAs to have smoke-free policies in place for public housing. The proposed rule was an outgrowth of many years of research on the harms and costs associated with smoking and ongoing efforts from HUD to promote the voluntary adoption of smoke-free policies by PHAs and the owners/operators of federally subsidized multifamily properties. The preamble of this proposed rule contains more information on HUD's efforts and the findings on which HUD relied in proposing this regulation.

As a result of these combined actions, over 600 PHAs have implemented smoke-free policies in at least one of their buildings. While this voluntary effort has been highly successful, it has also resulted in a scattered distribution of smoke-free policies, with the greatest concentration in the Northeast, West, and Northwest, which also results in unequal protection from SHS for public housing residents. This is due to several factors, including the fact that many of the benefits accrue to residents instead of PHAs, implementation of new policies can be difficult in fiscally tight times, uncertainty over whether indoor smoking bans are enforceable, and differences in the opinions and experience of the boards that govern PHAs. HUD recognizes that additional action is necessary to truly eliminate the risk of SHS exposure to public housing residents, reduce the risk of catastrophic fires, lower overall maintenance costs, and implement uniform requirements to ensure that all public housing residents are equally protected.

Therefore, HUD is requiring PHAs to implement smoke-free policies within public housing except for dwelling units in a mixed-finance project. Public housing is defined as low-income housing, and all necessary appurtenances (e.g., community facilities, public housing offices, day care centers, and laundry rooms) thereto, assisted under the U.S. Housing Act of 1937 (the 1937 Act), other than assistance under section 8 of the 1937 Act.

In finalizing this policy, it is important for HUD to reiterate that HUD's rule does not prohibit individual PHA residents from smoking. PHAs should continue leasing to persons who smoke. In addition, this rule is not intended to contradict HUD's goals to end homelessness and help all

Americans secure quality housing. Rather, HUD is prohibiting smoking inside public housing living units and indoor common areas, public housing administrative office buildings, public housing community rooms or community facilities, public housing day care centers and laundry rooms, in outdoor areas within 25 feet of the housing and administrative office buildings, and in other areas designated by a PHA as smoke-free (collectively, "restricted areas"). PHAs have the discretion to establish outdoor designated smoking locations outside of the required 25 feet perimeter, which may include partially enclosed structures, to accommodate smoker residents, to establish additional smoke-free areas (such as in and around a playground), or, alternatively, to make their entire grounds smoke-free.

Furthermore, section 504 of the Rehabilitation Act of 1973, the Fair Housing Act, and the Americans with Disabilities Act provide the participant the right to seek a reasonable accommodation, including requests from residents with mobility impairments or mental disabilities. A request for a reasonable accommodation from an eligible participant must be considered, and granted unless there is a fundamental alteration to the program or an undue financial and administrative burden.

## III. Changes Made at the Final Rule Stage

The only substantive change in this final rule from the proposed rule is that now waterpipes (also known as hookahs) are included in the list of products that may not be used in the restricted areas. PHAs are required under this final rule to only permit the use of waterpipes outside the restricted areas. While HUD found no evidence of human fatalities associated with hookahs, there were sufficient incidents of property damage to warrant their inclusion in this rule.

In addition, HUD has changed the items covered under the smoking ban from "lit tobacco products" to "prohibited tobacco products" to make clear that waterpipes are included in the list of prohibited products.

## IV. Responses to Comments

### *25-Foot Boundary From Buildings*

Some commenters objected to the proposed 25-foot smoke-free perimeter around all public housing buildings. Some felt that the distance was too large because it would force smokers off the property and onto sidewalks or adjacent areas, including the street. Others

expressed concern that the distance would be too great for elderly residents or residents with disabilities or would place residents in danger from having to travel so far. Some believed that the distance could subject smokers to crime or would force parents to leave sleeping children. Some also suggested that forcing residents to go so far to smoke would cause them to leave public housing, increasing turnover costs for PHAs.

Other reasons for objecting included an argument that it would effectively require PHAs to build designated smoking areas or it would be impossible to enforce. Commenters stated that requiring smokers to go outdoors is enough and that residents should be able to smoke on their porches or balconies. Some wrote that any extra perimeter is unfair if there is not a shared porch or landing where smoking there would affect others.

Commenters objecting to the 25-foot distances suggested that instead PHAs be allowed to create their own policies regarding outdoor smoking and any distance restrictions around buildings, taking their own layouts into account. Others suggested that HUD allow PHAs to comply with existing smoke-free policies or use minimum distances required by state laws.

Several commenters pointed out that PHAs may use office space in buildings not owned by the PHA, and the PHA has no control over the actions of other tenants in the building. These commenters asked for additional clarity on how the proposed rule would apply to such situations.

Some commenters suggested alternative requirements to the 25-foot barrier, including a minimum distance from common entrances or using a shorter distance such as 15 or 20 feet. Commenters also asked HUD for additional insight into their rationale for a 25-foot perimeter.

A group of commenters, however, supported the perimeter and even requested that HUD expand the outdoor restrictions. Some stated that 25 feet may not be enough to protect children, and that outdoor smoking should also be banned in areas frequented by children, particularly playgrounds. Some suggested that the perimeter be extended to 25 feet from all playgrounds. Other commenters suggested that all common areas, such as pools, should also be included in the smoke-free zone. Commenters suggesting that the smoke-free zone be more than 25 feet asked for a range of new distances, from 40–50 feet to 100 feet. Commenters stated that 25 feet may still be too close to buildings to prevent

smoke drift. Some also asked that HUD expressly prohibit parking lots from being used as designated smoking areas.

Several commenters suggested that the smoke-free perimeter should be extended to cover the entire property. These commenters stated that such a policy would protect residents from drifting smoke in designated areas or would make smoke-free enforcement easier. Another commenter suggested that HUD should allow a PHA to designate a smoking area, outside of which no smoking would be allowed.

*HUD Response:* HUD appreciates the comments on this part of the rule, and recognizes that for some developments, residents may have to cross the street to be 25 feet away from the building. HUD included the 25-foot perimeter in the proposed rule based on several factors. A smoke-free perimeter of sufficient size must be established around doorways in order to limit smoke exposure to individuals entering and leaving buildings. A sufficient perimeter is also needed to prevent SHS from entering windows that are open in units on lower floors and to prevent SHS exposure to individuals on lower floor balconies or porches. One study found that toxins present in SHS approach ordinary background levels approximately 23 feet from the source (Repace, 2005). In addition, local government ordinances have customarily adopted 25-foot boundaries as standard practice when prohibiting outdoor smoking in the vicinity of public building entrances and windows. PHAs without ample grounds may consider working with their local municipalities to identify nearby public areas where residents who wish to continue smoking can do so in a safe environment. PHAs may also consider, if available, offering these residents the option to move to an alternate site that has more accessible space for outdoor smoking. The smoke-free policy must extend to all outdoor areas up to 25 feet from the housing and administrative office buildings, or to the PHA's property boundary in situations where the boundary is less than 25 feet from the PHA-owned buildings. These decisions are at the discretion of the PHA. However, the rule requires the 25-foot restriction to be enforced across all PHAs.

This policy is not intended to force anyone to move out of public housing, but instead to offer safe, decent and sanitary housing for all populations. HUD is not requiring any PHA to build a designated smoking area, but to work with residents to address any difficulties they encounter. HUD understands that PHAs only have the authority to implement smoke-free

policies in buildings and office spaces they own.

#### *Burden on PHAs*

Commenters objected to the proposed rule on the basis that it would impose too great a burden on PHAs. Some stated that this was an unfunded mandate from HUD. Others stated that the proposed rule would necessitate increased monitoring of residents without increasing funding for PHAs, or would increase the workload of an already inadequate staff. Several commenters wrote that the proposed rule would add administrative burden in implementing the policies by requiring education of residents, and through increased enforcement efforts. Several commenters pointed out that implementing the policies would have costs related to unit turnaround, either due to increased evictions or as a result of residents voluntarily moving out. Some stated that the proposed rule would increase paperwork on the PHA without providing additional benefits to residents or that putting the burden of monitoring and enforcement on public housing administrators is not practical or fair.

Commenters also stated that the policies would increase vacancies at public housing properties, stressing PHAs both financially and in Real Estate Assessment Center (REAC) evaluations. Commenters asked that HUD make financial incentives available to PHAs to offset implementation costs.

*HUD Response:* HUD acknowledges that PHAs may incur training, administrative, legal and enforcement costs, as well as additional expenditure of staff time in these areas. These expenses are outlined in the Regulatory Impact Analysis (RIA). All PHAs receive an annual operating subsidy and capital fund grants, and could also use their operating reserves to cover the initial costs of implementing smoke-free policies. PHAs that have already implemented smoke-free policies indicated in stakeholder listening sessions that the costs were less than they expected once the smoke-free policy was fully implemented, and after that there were savings in unit turnover costs. HUD expects that costs will be minimized by PHAs' utilization of existing HUD resources on the smoke-free policy and continued usage of standard lease enforcement procedures. Additionally, HUD has no evidence that this policy will increase vacancies. In contrast, housing agencies that have implemented smoke-free policies have experienced greater demand for their units. This rule will not impose any Federal mandates on any state, local, or

tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995 (UMRA).

#### *Burden on Small PHAs*

In addition to the concerns about burdens on PHAs generally, some commenters expressed concerns with burdens on small PHAs. Some stated that the proposed rule would have an outsized impact on small PHAs' administrative expenses. Others commented that there was not enough information in the proposed rule on how maintenance or insurance costs would be lower for small PHAs. Others stated that small, rural PHAs would be at a disadvantage because they are unable to partner with outside organizations to help with implementing the rule in a way that larger, more urban PHAs could. Some commenters also expressed concerns that small PHAs face greater competition in the affordable housing market, so a smoking ban would increase their vacancy rates.

*HUD Response:* Although some aspects of the rule may be burdensome, as noted in the RIA, HUD expects these burdens to be accompanied by the benefits of smoke-free policies, including reduction in maintenance costs, less risk of catastrophic fires, and fewer residential complaints from residents who are impacted by smoke. Additionally, creating a smoke-free environment may be more attractive to tenants and could result in increased leasing. In fact, some PHAs use smoke-free policies as a marketing feature to attract tenants. Cost savings are expected to be realized in the less expensive turnover of rental units. For example, painting and carpet cleaning costs are expected to be much lower with a smoke-free policy in place.

The capital and operating funds can be used to implement smoke-free policies. Note, however, that capital funds can only be used for eligible activities identified in 24 CFR 905.200. Financial costs relative to funding for small PHAs are not expected to be greater than relative costs facing larger PHAs. Small PHAs, like large PHAs, can request insurance premium allowances from their insurance providers after implementing smoke-free policies.

Housing agencies are encouraged to start the process of implementing smoke-free policies early so that the necessary implementation activities can be spread out over the allowed 18-month implementation period with regular lease renewal practices (e.g., lease recertification). Small PHAs unable to partner with as many outside organizations will have access to

national smoking cessation resources such as 1-800-QUIT-NOW, a toll-free portal which routes callers to their state quitline, and community health centers for any smoking cessation needs. HUD is also working with federal partners to identify geographical areas with the greatest need for resources, and will, when possible, work to provide additional technical assistance. Best practices on moving to a smoke-free environment are found on HUD's Web page for Smoke-Free Housing Toolkits (<http://portal.hud.gov/hudportal/HUD?src=/smokefreetoolkits1>). Additional smoke-free guidance will be made available to PHAs.

HUD has no evidence that this policy will increase vacancies. In contrast, housing agencies that have implemented smoke-free policies have experienced greater demand for their units.

#### *Burden on Residents*

Many commenters objected to the proposed rule because of the burden it would place on public housing residents. Some stated that an indoor smoking ban is unfair to persons with disabilities who cannot easily travel outside their units, particularly if they live alone and cannot leave without help. Others commented that it was not right to force the elderly or persons with disabilities outside in bad weather, putting their health at risk. Some simply stated that it would be unfair to make the elderly or persons with disabilities walk that far to smoke. Some commented that people use smoking to deal with medical issues; prohibiting indoor smoking would force them to forego the use of nicotine to combat their pain.

Other commenters focused on the effects the proposed ban would have on those with mental health issues who may rely on smoking to help deal with those issues. Some stated that residents in acute stages of post-traumatic stress syndrome need to smoke to calm down but cannot leave their apartment. Some stated that smoking helps people calm down and relieve stress, and this rule would increase their burden. Several commenters stated that the use of eviction as an enforcement mechanism would result in the most vulnerable residents in public housing, who need secure housing the most, being forced out of their homes.

Some commenters stated that forcing residents, particularly women, outside at night and in bad weather would put them in danger.

Commenters stated that the rule should exempt PHAs serving seniors or residents with disabilities to avoid

discrimination problems. Others asked that HUD allow PHAs to grandfather in existing residents; some pointed out that the smoke damage is already done, and it will be difficult to tell if the smell of smoke is from current or past smoking. However, other commenters stated that HUD should not allow smoke-free policies to be grandfathered in for existing public housing residents. These commenters stated that grandfathering the smoking ban for some but not all the residents would make enforcement difficult.

*HUD Response:* Although smokers will face new requirements, other residents will generally benefit from an improved quality of life that minimizes the dangers of indoor smoking and SHS exposure. In addition, residents should experience improved indoor air quality and reduced interpersonal friction among neighbors exposed to others' smoking.

There is no "right" to smoke in a rental home, and smokers are not a protected sub-class under anti-discrimination laws. In addition, this rule does not prohibit smoking by residents; rather, it requires that if residents smoke that they do so at least 25 feet away from the buildings. HUD is aware that commenters and national surveys suggest that persons with disabilities tend to smoke at a higher rate than persons without a disability. See national survey of smoking prevalence among those with disabilities at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6444a2.htm>. PHAs are encouraged to engage with these residents early and often when developing the smoke-free policy and to work with social service agencies to identify other alternatives to smoking in their units. This rule grants flexibilities to PHAs in addressing difficulties encountered by residents. In the case that a particular resident is especially burdened by the smoke-free policy, the PHA may consider such flexibilities as moving that resident to a first-floor unit which would provide easier access to smoking outside of their units, or modifying a walkway for easier use by that resident (e.g. adding additional lighting). HUD encourages PHAs to ensure an appropriately safe environment for all residents, smokers and nonsmokers alike.

HUD is not aware of any medical conditions for which smoking is considered a legitimate, proven treatment. Also, in situations where nicotine treatment is appropriate (i.e., smoking cessation) it can be delivered orally or through dermal applications. Research has shown that smokers with behavioral health conditions (i.e.,

mental and/or substance abuse disorders) actually benefit from quitting smoking. As summarized by the Substance Abuse and Mental Health Services Administration, research has demonstrated that quitting smoking can decrease depression, anxiety, and stress, and for those in treatment for substance use disorders, smoking cessation can increase long-term abstinence from alcohol or other drugs.<sup>7</sup>

Additionally, under this regulation, PHAs cannot "grandfather" tenants by exempting them from the application of the rule. PHAs that have implemented smoke-free policies have reported significant implementation challenges when they allow current residents to be "grandfathered" into the policy. Allowing this situation presents additional enforcement challenges and will only prolong the time that other residents are exposed to SHS and the risk of fire.

#### *Smoking Cessation*

Many commenters asked HUD to include cessation help in the final rule. Commenters had a variety of suggestions on the best way to provide such services. Some stated that HUD should partner with other federal agencies such as the National Institutes of Health or Health and Human Services to provide resources; they stated that Health Centers target the same populations served by public housing. Commenters referenced the national quitline or state-operated quitlines as possible resources. Commenters stated that PHAs should be required to use cessation services that are proven to be effective, and suggested that PHAs and HUD work with state and local health agencies or tobacco prevention and cessation programs for resources. Some commenters pointed out that there is cessation help available through Medicaid and private insurance plans. Commenters also asked that HUD provide toolkits or other help to PHAs looking to partner with organizations to provide cessation help.

Commenters specifically mentioned a variety of cessation methods or techniques. Commenters suggested that HUD mandate that the types of required cessation treatments be varied instead of limited to a few options. Some requested that HUD provide nicotine replacement therapy. Some stated that any cessation courses or counseling be provided on-site. Some specifically stated that PHAs should give residents information on the interaction between

<sup>7</sup> [http://www.samhsa.gov/sites/default/files/topics/alcohol\\_tobacco\\_drugs/tobacco-behavioral-health-issue-resources.pdf](http://www.samhsa.gov/sites/default/files/topics/alcohol_tobacco_drugs/tobacco-behavioral-health-issue-resources.pdf).

nicotine addiction and psychotropic drugs.

Commenters stated that cessation support should begin now and continue for a longer period of time after the effective date of the rule. Commenters stated that any cessation materials should be available in languages other than English when appropriate for the PHA's population.

Some commenters suggested that HUD should supply funding for the cessation services or at least help PHAs locate funding, especially if the PHA is serving a population with mental health issues. Several suggested that PHAs be allowed to use savings generated by the proposed rule to pay for incentives for cessation and associated costs of treatment programs such as child care or transportation. Commenters stated that the time that residents spend taking or volunteering at cessation courses should count towards their community service requirement or that PHAs should be able to count funding provided for cessation help and incentives as funding towards fulfilling Section 3 requirements.

Some commenters stated that residents face a variety of barriers to quitting smoking, including the fact that limited cellphone minutes or language barriers interfere with the use of quitlines. Others stated that it would be unfair to hold PHAs accountable for public health outcomes like cessation. Commenters were also concerned that rural PHAs would not have the same access to cessation tools and programs as PHAs in urban areas. Commenters asked HUD to explicitly forbid PHAs from requiring cessation as part of enforcement efforts.

*HUD Response:* HUD acknowledges the importance of connecting residents interested in quitting smoking to cessation resources, preferably at no cost. Although HUD will not directly provide cessation assistance, HUD has resources available on Healthy Homes Web site ([http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/healthy\\_homes/hhi](http://portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/hhi)) for residents interested in cessation. Medicaid covers the cost of tobacco cessation services and prescription smoking cessation medications for recipients, and although Medicaid coverage varies by state, all 50 states offer at least some smoking cessation coverage. Residents of all states also have access to "quitlines," which are free evidence-based cessation services that residents can access by calling 1-800-QUIT-NOW. HUD is also working closely with Federal agencies involved in tobacco control to help make cessation resources available to residents. For example, the Centers for

Disease Control and Prevention (CDC) has coordinated with state tobacco control programs (*i.e.* health departments that receive CDC tobacco control grants in all 50 states) to assist PHAs in implementing smoke-free policies in their respective states. The CDC is also developing educational materials for housing managers and residents to help link them to smoking cessation services (*e.g.* community health centers). Federally Qualified Health Centers, supported through the Health Resources and Services Administration, serve many PHA residents and have made promotion of smoking cessation a top priority. The guidance that HUD has created to date emphasizes the value of partnerships between housing providers and local organizations (*e.g.* local health departments and clinics, and tobacco control organizations such as the American Lung Association) in making smoking cessation services available to residents.

Commenters on the proposed rule provided a lengthy list of resources that they used to assist residents. HUD will make this information, where applicable, available to interested PHAs.

Section 3 is a provision of the Housing and Urban Development Act of 1968 that ensures employment and other economic opportunities generated by HUD financial assistance are directed to low-income persons, particularly those receiving housing assistance. Section 3 requirements may be fulfilled to the extent residents are employed in providing cessation services, in accordance with 24 CFR part 135, provided that employment opportunities for cessation services are generated by the use of covered PIH assistance.

#### Definitions

Commenters asked HUD for expanded definitions of several key terms, particularly "smoking". Several asked that HUD define the term broadly to capture a variety of dangerous products and not to limit the rule to "lit tobacco products" in order to be consistent with existing state and local standards.

Other requests for definitions included definitions for "smoke," "electronic smoking devices," "hookahs," "enclosed," "indoor area," and "partially enclosed." Some commenters were concerned that allowing for partially enclosed designated smoking areas would run against current state indoor smoking bans. Commenters also asked that HUD change the phrase "interior common areas" in the space where smoking is banned to be "interior areas" to make it

clearer that smoking is prohibited in all indoor areas.

Commenters often provided examples from model or existing codes and standards for HUD to use as guides for many of these definitions.

*HUD Response:* HUD does not define "smoking," but rather "prohibited tobacco products." HUD is restricting the use of prohibited tobacco products, including cigarettes, cigars, pipes, and waterpipes (hookahs). Because PHAs must ban the use of specific items, it is unnecessary to define what smoke is. In addition, this rule does not supersede state or local smoking bans, so if such laws prohibit the use of partially enclosed designated smoking areas, the PHAs would still be subject to those requirements.

HUD has changed the phrase "interior common areas" to "interior areas."

#### Designated Smoking Areas (DSAs)

Some commenters stated that the indoor ban was fine, but HUD should require PHAs to provide a reasonable DSA. Commenters wrote that any DSA should be sheltered from the weather, have shade and seating, and should be accessible to anyone with mobility issues and have appropriate safety features, such as lighting. Commenters stated that any DSA should be far enough away from buildings to prevent smoke drift, which some commenters specified as at least 25 or 50 feet from other smoke-free zones. Some stated that residents should have input on deciding whether or not to have a DSA or where any DSA should be located. Some asked that PHAs be required to sign memoranda of understanding with local police forces to clarify that using the DSA would not count as loitering.

Commenters expressed concern that the cost of building and maintaining benches or other amenities in a DSA would be too expensive for PHAs. Some stated that HUD should provide the funding or that PHAs should seek funding from the tobacco industry to pay for them. Some also stated that smokers should be allowed to contribute money to pay for covered smoking areas.

Some commenters stated that HUD should encourage outdoor smoke-free areas and discourage DSAs entirely, as having DSAs could raise concerns regarding reasonable accommodations and accessibility. Some commenters suggested that PHAs with DSAs evaluate their policies on a regular basis to determine if it would be appropriate to make the property 100 percent smoke-free. Commenters also stated that HUD should not encourage partially enclosed DSAs, as they can trap smoke,

provide hidden areas for crime, and violate state clean air laws.

*HUD Response:* HUD does not mandate DSAs. However, some PHAs have achieved better compliance with smoking bans in restricted areas when there is a designated location with seating. Also, the use of DSAs could potentially make implementation of the smoke-free policy easier because they demonstrate to a smoking resident how far he or she must move away from the building. If a PHA decides to implement a DSA, HUD recommends appropriate wellness and safety features, such as appropriate seating and shade. If a PHA chooses to designate a smoking area for residents, it must ensure that the area is accessible for persons with disabilities, in accordance with a PHA's obligations under section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Fair Housing Act. This may include a flat or paved pathway, ramp, and adequate lighting depending on the need and area selected. HUD encourages PHAs to include DSAs in future capital needs planning.

#### *Electronic Nicotine Delivery Systems (ENDS)*

Many commenters asked that HUD include ENDS in the list of prohibited tobacco products. These commenters pointed out that the aerosol emitted by the devices is not harmless, and the toxins in the aerosol are higher than in FDA-approved nicotine inhalers. Others stated that ENDS pose risks of fire or explosion due to their batteries or poisoning from the liquids. Commenters stated that ENDS also increases third-hand exposure to nicotine (nicotine that settles on surfaces within a building), and banning ENDS may help stop the increase of ENDS usage among teens.

Commenters stated that ENDS are not devices approved for stopping smoking, and their use can undermine efforts to de-normalize smoking. Others commented that the use of ENDS can undermine enforcement efforts, either by making it appear that the policy is not taken seriously, or by causing confusion about whether it is ENDS or a cigarette being used.

Some commenters supporting the ban of ENDS asked that if HUD does not include ENDS in the proposed rule, that HUD make it explicit that a PHA can choose to do so themselves. Others asked HUD to track and share research to help PHAs make the case for including ENDS in smoke-free policies.

Other commenters objected to the inclusion of ENDS in the indoor smoking ban. Some stated that the science on the harm caused by ENDS is

not settled and therefore there is no justification at this time for including them in the policy, because prohibiting ENDS does not advance the proposed rule's goals of improved health and savings on maintenance costs. Commenters stated that ENDS are an important tool in stopping smoking and allowing them would therefore help to soften the larger no-smoking policy, while adding flexibility to the proposed rule. Some commenters stated that the proposed rule does not contain enough justification to include ENDS in the policy and therefore, if HUD decides to include them, there should be another round of comments.

Commenters also asked that if HUD includes ENDS in the final policy, HUD consider limiting the places ENDS are prohibited only to common areas. Some stated that enforcing ENDS would be more difficult than only enforcing a cigarette ban, because ENDS lacks some of the markers of cigarette smoke such as a smell.

*HUD Response:* Research to date on ENDS is still developing and lacks clear consensus, in contrast with research on the effects of cigarettes and other tobacco products. Unlike with products that involve burning of substances, there is little evidence that ENDS significantly increases fire risks, and there is no conclusive evidence that the vapors emitted by ENDS cause damage to the units themselves. Therefore, prohibiting ENDS will not necessarily reduce the risk of catastrophic fires or maintenance costs for PHAs, and this rule does not prohibit the use of ENDS.

However, PHAs may exercise their discretion to include a prohibition on ENDS in their individual smoke-free policies if they deem such a prohibition beneficial. In addition, if evidence in the future arises that banning ENDS will, for example, result in significant maintenance savings, HUD will reconsider including them in items that are prohibited inside public housing.

#### *Enforcement*

Many comments focused on how PHAs are to enforce smoke-free policies. Some commenters stated that enforcement would be impossible because PHAs would not be able to prove that residents were smoking or the exact origins of a smoke smell. Commenters asked for additional guidance on how to detect violations and expressed concern that enforcing policies across scattered sites or in non-business hours would be extremely difficult. Commenters also stated that HUD should provide additional guidance on who can report violations and that HUD should place the burden

of proof of violations on the complaining party.

Commenters also expressed concern about having a primary method of enforcement be reporting from tenants. Commenters stated that relying on residents to report will erode trust and increase tensions between residents, staff, and management. Some commenters stated that requiring residents to report violations would lead to additional confrontations with police. Commenters stated that residents should be able to report violations in a way that makes them feel safe. Some commenters stated that resident reporting will require additional mediation between tenants and that HUD should create a method of enforcement that does not rely on residents reporting each other, such as using routine maintenance inspections to look for evidence of smoking indoors.

Some commenters asked for specific guidance on how PHAs are to enforce smoke-free policies, and asked for HUD to publish successful enforcement actions from agencies with smoke-free policies in place. Commenters expressed concern that some PHAs or managers would not enforce the smoke-free policies consistently, leading to liability for PHAs. To address such concerns, commenters suggested that HUD impose heavy fines on managers who do not enforce policies, conduct site visits to ensure enforcement, and provide information to residents on whom to contact if managers are not enforcing policies. Commenters also stated that the costs of enforcement will be equal to or greater than any savings on maintenance generated by smoke-free policies.

Commenters also expressed concern about the use of eviction as an enforcement mechanism, stating that evictions do not help create strong communities. Commenters also wrote that increased evictions will increase homelessness and costs to PHAs. Commenters stated that it was unfair to subject children to homelessness from eviction for the actions of their parents, that it would be unfair to evict an entire family for the actions of one individual, or that it would be unfair to evict tenants for the actions of their guests. Commenters stated that relying solely on eviction sets up residents for failure and puts groups at the highest risk for discrimination in housing or with higher health risks at even greater risk of homelessness. Some stated that if families who are evicted as a result of this rule tend to fall into a protected class, there might be a disparate impact claim against the PHA or HUD.



Some stated that evicting families for a legal activity would be impossible because courts would not uphold evictions, or even that local ordinances may make evictions for smoking illegal. Commenters suggested that the rule explicitly state that smoking in violation of the PHA's policy is an offense that can result in eviction in order to allow courts to enforce evictions.

Commenters suggest that HUD require PHAs to take specific, progressive enforcement steps prior to allowing eviction, in particular focusing on education and cessation treatments.

Others stated that the rule should minimize evictions, or eliminating evictions from enforcement options completely, perhaps using a system of fines, positive incentives, or cessation treatment instead. Commenters stated that the final rule language should specify that violation of a smoke-free policy is not a material or serious violation of the lease. Some commenters suggested that HUD consider structuring the smoke-free requirement like the community service requirement, where noncompliance mandates specific actions to allow a tenant to "cure" the violation and where PHAs do not renew leases instead of evicting tenants.

*HUD Response:* HUD believes that allowing a PHA to enforce its smoke-free policy through lease enforcement actions is the best way to ensure compliance with such policies. Upon successful implementation, smoke-free policies should be enforced similar to other policies under lease enforcement procedures. HUD does not expect the enforcement of smoke-free policies to be significantly easier or more difficult than other unit-focused policies PHAs have established. Based on experiences of the PHAs that have already implemented smoke-free policies, when there is resident engagement in developing the plan and an effective plan for implementation, policy enforcement is less likely to lead to evictions. As written in this rule, the lease and appropriate amendment(s) will be the primary smoke-free policy enforcement mechanism. All residents must sign the amendment(s) as a condition of their continuing occupancy. PHAs will have local flexibility as to how the lease amendment process occurs during the 18-month implementation period after the final rule effective date. HUD has clarified that the adoption of a PHA smoke-free policy is likely to constitute a significant amendment or modification to the PHA Plan, which would require PHAs to conduct public meetings according to standard PHA amendment procedures. Therefore,

PHAs are encouraged to obtain board approval when creating their individual smoke-free policies.

HUD affords PHAs flexibility in designing policies on reporting of violations by other residents, in order to fit the local needs of the housing communities. However, a PHA must sufficiently enforce its smoke-free policy in accordance with the rule's standards, by taking action when it discovers a resident is violating the policy. PHAs must ensure due process when enforcing the lease. If a PHA pursues lease enforcement as a remedy, public housing residents retain their right to an informal and formal hearing before their tenancy is terminated. As currently written, the new regulations intentionally distinguish lease violations based on criminal behaviors from violations based on civil behaviors, and place smoke-free violations in the latter category to discourage overly aggressive enforcement approaches and decrease the potential of eviction and homelessness.

Termination of assistance for a single incident of smoking, in violation of a smoke-free policy, is not grounds for eviction. Instead, HUD encourages a graduated enforcement approach that includes escalating warnings with documentation to the tenant file. HUD has not included enforcement provisions in this rulemaking because lease enforcement policies are typically at the discretion of PHAs, and it is appropriate for local agencies to ensure fairness and consistency with other policies. HUD also is not requiring any specific graduated enforcement procedure, because public housing leases are subject to different local and state procedural requirements that must be met prior to eviction. Best practices regarding smoke-free implementation and enforcement are available at <http://portal.hud.gov/hudportal/HUD?src=/smokefreetoolkits1>. HUD will provide additional guidance in the future with examples of graduated enforcement steps.

This rule does not expressly authorize or prohibit imposing fines on non-complying PHA managers. Once the rule takes effect, HUD may use PHA certifications to verify that PHAs have implemented a smoke-free policy within the required timeframe. HUD may also use the periodic REAC inspections and OIG audits to help monitor and confirm whether the policy is being enforced. The PIH regulations at 24 CFR 903.25 state that to ensure that a PHA is in compliance with all policies, rules, and standards adopted in the PHA Plan approved by HUD, HUD shall, as it deems appropriate, respond to any

complaint concerning PHA noncompliance with its plan. If HUD determines that a PHA is not in compliance with its plan, HUD will take whatever action it deems necessary and appropriate.

#### *Evaluation*

Commenters asked that HUD have some sort of plan in place to evaluate the effect of the proposed rule. Some stated that HUD should evaluate, after 1 or 2 years, the success of the rule in getting units smoke-free and whether there have been health benefits. Others stated that HUD should review how each PHA has implemented a smoke-free policy, including surveys to residents on how the policy is working and if improvements are needed. Some commenters stated that the evaluation should be of the PHAs themselves, including how they document violations and manage accommodation requests, how well PHAs comply with the requirements and adhere to "best practices", and the PHAs' outcomes of the smoke-free policies. These evaluations could be done as part of periodic reviews of PHA performance in general.

Other suggestions for evaluations focused on the effects of the rule itself. Some suggested that HUD should survey tenants to track smoking cessation progress. Others stated that HUD should evaluate support for the policies among tenants, numbers of complaints, health changes, costs, savings, and turnover and eviction as a result of the policies. Commenters stated that HUD should carefully keep track of the number of evictions due to smoke-free policies. Commenters suggested that HUD should study whether completely smoke-free grounds would be appropriate.

Commenters stated that HUD could partner with other agencies for evaluation studies.

*HUD Response:* HUD agrees that it is important to evaluate various aspects of the implementation of the rule by the PHAs, including the benefits on indoor air quality and resident health as well as the actual implementation process. Although HUD has identified and made available effective practices from housing providers that have implemented smoke-free policies, there is value in doing this using a more systematic process (e.g., see <http://portal.hud.gov/hudportal/documents/huddoc?id=SFGuidanceManual.pdf>). HUD is supporting research on the implementation of smoke-free policies in federally assisted multifamily properties through its Healthy Homes Technical Studies Grant Program. A goal of this research is to identify



effective implementation practices as well as impacts on indoor air quality and smoking cessation among residents. HUD has also worked with the National Center for Health Statistics to match administrative data for residents of federally assisted housing (including public housing) with multiple years of data from the National Health Interview Survey. This is a cost effective way to track potential changes in the smoking behavior of residents over time (*i.e.*, before and after the rule becomes effective). HUD is a member of a work group that includes federal partner agencies in order to explore opportunities for cooperative activities to evaluate the impact of the rule. HUD is also cooperating with researchers who are part of a university/philanthropy partnership planning to survey PHAs that have already implemented smoke-free policies, in order to capture lessons learned that will be valuable for PHAs that have not yet implemented smoke-free policies. This effort will include interviews of both management and residents.

#### *Expansion of Applicability of Rule*

Some commenters felt that it was unfair to only cover public housing with this proposed rule. Commenters felt that the covered properties should be expanded to include all multifamily dwelling units in the country, all rental and subsidized housing, mixed-finance developments, Section 8 vouchers, or all properties receiving HUD assistance.

However, other commenters stated that HUD should never consider requiring homeless assistance programs to have a smoke-free policy. Some also stated that HUD should not expand the requirement beyond public housing.

Commenters did have some questions about the applicability of the rule. Some asked about whether the rule applies to non-dwelling units leased to other entities. Others asked whether low-income housing on tribal lands would be covered. Commenters also asked how this rule would apply to public housing projects converting their assistance under the Rental Assistance Demonstration Program.

*HUD Response:* The final rule does not apply to tribal housing, mixed-finance developments, or PHA properties that have converted to project-based rental assistance contracts under RAD. HUD will continue to promote voluntary adoption of smoke-free policies by all owners receiving project-based assistance and may consider expansion of requirements to additional housing assistance programs in the future. In addition, HUD will issue a solicitation of comments in the

**Federal Register** to obtain feedback on the prospect of requiring smoke-free policies in other HUD-assisted properties. Absent regulations, private owners and PHAs can continue to use HUD's "Smoke-Free Housing Toolkit for Public Housing Authorities and Owners/Management Agents" (available at <http://portal.hud.gov/hudportal/documents/huddoc?id=pdfowners.pdf>) to help in implementation of smoke-free policies.

#### *Flexibility for PHAs*

Commenters objected to the mandate that PHAs create smoke-free policies, instead asking that it continue to be left up to the PHA's discretion. They stated that letting PHAs make the decision would allow them to decide where to allocate resources and best account for the needs of the residents and PHA. Other commenters simply asked that PHAs be allowed to craft policies they designed instead of having policies determined by HUD. Commenters also asked that small PHAs be given more flexibilities.

Commenters specifically asked that PHAs be given flexibility with the implementation phase of smoke-free policies. Some asked for the ability to implement policies at a time of the year with pleasant weather to make compliance easier. Others asked for the ability to phase-in policies by buildings or properties instead of all at once; however, some commenters explicitly opposed phasing in the policy across buildings. Commenters also asked for a longer implementation period, even as much as 5 years.

Another specific flexibility requested by commenters was for a PHA to establish buildings or scattered-site locations as designated smoking buildings, if physically separate from non-smoking buildings.

Commenters also asked that PHAs with established smoke-free policies continue to keep the existing policies, even if the perimeter around buildings is less than 25 feet. These commenters stated that it would be extremely burdensome, costly, and confusing to change existing policies, and compliance with additional restrictions might impose additional costs, such as building shelters for smokers, that they have already decided are unnecessary. However, some commenters stated that PHAs should be required to conform to any policies that are stricter than what they may currently have in place.

Some commenters also asked that HUD make it explicit that a PHA may adopt policies that are stricter than the ones required by HUD.

Commenters also asked that HUD allow PHAs to have maximum budget flexibility during implementation to pay for up-front costs.

*HUD Response:* HUD has been advocating for smoke-free housing since 2009 because the health benefits to residents are substantial, and the costs and benefits to PHAs are also compelling in terms of reduction in maintenance and unit turnover costs. HUD applauds the more than 600 PHAs that already have implemented policies in at least one building since HUD began promoting voluntary adoption of smoke-free housing policies. The rule's mandatory approach implements uniform standards and requirements which will greatly minimize the disproportionate exposure to SHS for public housing residents.

The flexibility inherent in the rule allows PHAs to implement their smoke-free policies in a way that does not violate the standards established in the final rule. The final rule bans the use of prohibited tobacco products in all public housing living units, interior common areas, and all outdoor areas within 25 feet from public housing and administrative office buildings where public housing is located. The rule also gives PHAs the flexibility to limit smoking to DSAs, which may include partially enclosed structures, to accommodate residents who smoke.

PHAs must exercise their discretion in a way that reasonably relates to the purpose of the rule, and PHAs face legal risk when imposing a standard that exceeds the scope of legal authority (*e.g.*, is arbitrary and capricious). PHAs are encouraged to exercise their discretion and may adopt stricter smoke-free policies. This approach should always consider resident feedback prior to adopting stricter smoke-free policies.

Budget flexibility in terms of combining operating, capital, or housing assistance payment funds is permitted to the extent otherwise provided under arrangements such as Moving to Work (MTW).

#### *Funding*

Commenters stated that HUD should provide funding for the implementation costs of this rule, specifically through increased Operating or Capital Fund allocations. Commenters wrote that without additional staff to help, the smoke-free policies cannot be successful. Commenters also asked for additional funding to remediate and repair any damage caused by residents who are currently smoking.

*HUD Response:* The rule provides no additional financial assistance for policy

implementation; however, HUD has already begun to mobilize our public health and private partners such as the Centers for Disease Control and Prevention, American Cancer Society, the American Lung Association and Environmental Protection Agency, among others, to support PHAs.

#### *Implementation*

Many commenters expressed concern that tenants be adequately involved in a PHA's implementation of the final rule when effective. Commenters stated that HUD should require specific engagement activities. They stated that these requirements should include multiple meetings with tenants to educate them on the policy, how to comply, and what assistance is available to them. Commenters stated that PHAs should use community advisory boards to address issues and tenant concerns during implementation. Commenters stated that HUD should require PHAs to engage their residents, particularly on health issues associated with smoking and SHS, prior to amending leases; some stated that engagement should be ongoing for a year prior to a PHA amending a lease.

To ensure that residents are fully engaged from the beginning, some commenters stated that HUD should specify that implementing a smoke-free policy would require a significant amendment to the PHAs' plans. However, other commenters stated that PHAs with smoke-free policies in place should not have to make significant amendments.

Commenters also suggested changes to the timeline for compliance with the final rule. Several stated that 18 months is not enough time for PHAs to have smoke-free policies in effect. Commenters stated that 18 months was too short a time period to adequately educate tenants and get their support, amend leases, and do other supporting tasks like constructing DSAs. Some asked for specific time periods, from 24 to 36 months to up to 3 years, while others asked for PHAs to be able to apply for more time. Commenters stated that allowing PHAs flexibility on the timeline for implementing the rule so that the PHAs could use the existing Annual Plan amendment process would save money and effort.

Commenters alternatively asked that HUD allow for an implementation timeline in stages, allowing residents to participate voluntarily for the first 6 months, year, or 2 years of the policy before being subject to penalties.

Some commenters, however, stated that 18 months was too much time, and stated that HUD should encourage PHAs

to begin implementation as soon as possible after the final rule is effective, including providing cessation help and educational resources. Commenters suggested that PHAs should be able to implement smoke-free policies for new residents prior to that deadline, and some stated that HUD should require compliance within 6 months.

Commenters asked if PHAs would be able to phase-in their properties during the 18-month period.

*HUD Response:* HUD included in the proposed rule the 18-month timeframe after the final rule effective date for PHAs to enlist the involvement and support their resident councils, initiate cessation programs, post notices, and disseminate information to the residents, pursuant to PIH regulations and best practices among early smoke-free policy adopters. In the final rule, HUD has clarified that the adoption of a PHA smoke-free policy is likely to constitute a significant amendment or modification to the PHA Plan, which would require PHAs to conduct public meetings according to standard PHA amendment procedures. Therefore, PHAs are encouraged to obtain board approval when creating their individual smoke-free policies. HUD believes this approach will allow local organizations to pledge their support for the smoke-free policy and to support the mission of providing healthier housing for low-income residents.

The PHA must consult with resident advisory boards to assist with and make recommendations for the PHA plan. Those recommendations must include input from PHA residents. With regard to the smoke-free policy, the PHA plan will list the PHA's rules, standards and policies that will govern maintenance and management of PHA operations. HUD believes that 18 months will provide PHAs sufficient time to conduct resident engagement and hold public meetings that are required when an amendment constitutes a significant change to the PHA plan.

The final rule will become effective 60 days after publication in the **Federal Register**. Once the rule is effective, PHAs will then have 18 months to implement smoke-free policies. PHAs must incorporate the smoke-free policy into resident leases. The lease will continue to be the legally binding document between the PHA and the resident. Leases (including recertifications, automatic renewals, new leases, lease addendums and modifications) can be modified at any time by written agreement between the resident and the PHA. PHAs may provide a specific date that the policy will take effect. PIH regulations permit

PHAs to modify rules and regulations to be incorporated by reference into the lease form, as long as the PHAs provide at least 30 days' notice to all affected residents (see 24 CFR 966.5), and allow resident feedback on the new lease language (see 24 CFR 966.3). PHAs must consider this feedback prior to making the changes.

To amend individual resident leases based on the modified lease form adopted by the PHA, a PHA must notify a resident of the written revision to an existing lease 60 days before the lease revision is to take effect and specify a reasonable time period for the family to accept the offer (see 24 CFR 966.4(l)(2)(iii)(E)). PIH regulations also provide that leases are required to stipulate that the resident has an opportunity for a hearing on a grievance of any proposed adverse action against the resident (see 24 CFR 966.52(b)). However, PHA grievance procedures are not applicable to class grievances and cannot be used as a forum for initiating or negotiating policy changes, including smoke-free policy changes (see 24 CFR 966.51(b)).

HUD strongly encourages PHAs to post signs referencing the new smoke-free policy. Signs must be accessible to all residents and visitors, and must be posted in multiple languages if appropriate for residents of the PHA, in accordance with HUD's current guidance on limited English proficiency. PHAs are not required to construct smoking shelters or DSAs.

#### *Leases*

Commenters stated that the smoke-free language in leases should include not only the policy, but also information on any available DSAs or cessation services.

*HUD Response:* A public housing lease specifies the rights and responsibilities between the PHA and tenant. If a PHA chooses to develop one or more DSAs, PHAs are encouraged to note the availability and location of any DSAs in the lease. HUD also encourages PHAs to share this information using less formal communication methods (e.g. letters, flyers, seminars, etc.) to ensure residents are aware of the policy. The information must be presented in pertinent places in various languages to help residents understand the policy.

#### *Objections—Civil Rights*

Commenters objected to the idea behind the proposed rule, stating that prohibiting smoking in public housing is an invasion of civil rights because it would ban an individual's freedom to do something that is legal. Others stated that it was an invasion of smokers'

privacy. Some commented that people should be able to smoke in their own homes and that a smoking ban is authoritarian and invasive.

Commenters also objected to the proposed policy because it does not prohibit smoking in private homes and therefore unfairly punishes the poor and working class. Commenters stated that smoking bans demonize and dehumanize smokers and discriminate against smokers. Some stated that if HUD is banning smoking, HUD should also ban all things that cause harm or smell, such as pet dander or smelly food.

*HUD Response:* HUD believes that focusing on public housing is appropriate, as HUD and our PHA partners have already made significant progress in this area. More than 600 PHAs have already implemented smoke-free policies in at least one of their buildings since HUD began promoting voluntary adoption of smoke-free housing policies in 2009. HUD is not using this policy as a punishment for any group of people. Instead, HUD believes this policy will benefit many residents especially vulnerable populations (e.g. children, elderly persons, and persons with disabilities). This rule will protect the health and well-being of public housing residents and PHA staff and is an opportunity to lower overall maintenance costs and reduce the risk of catastrophic fires. Smoke-free public housing helps HUD realize its mission of providing safe, decent and sanitary housing for vulnerable populations nationwide. Additionally, smoke-free policies are increasingly being adopted in market-rate rental housing and condominiums.

In Constitutional jurisprudence, courts have found that smoke-free policies do not violate the Equal Protection Clause because there is no fundamental right to smoke,<sup>8</sup> and the classification of a “smoker” does not infringe on a fundamental Constitutional right.<sup>9</sup> In addition, the act of smoking is entitled to only minimal level of protection, and courts assess smoking-related Equal Protection claims under a rational basis standard of review<sup>10</sup>—meaning that those who challenge a smoke-free regulation bear the burden to prove that the regulation is not rationally related to a legitimate government interest.

Courts<sup>11</sup> have held that protecting persons from SHS is a valid use of the State’s police power that furthers a legitimate government purpose.<sup>12</sup> And, those courts considering Equal Protection challenges to smoking restrictions have concluded that the restrictions bear a reasonable relation to such legitimate state interests as: (1) Improving resident health and safety; (2) reducing fire hazards; (3) maintaining clean and sanitary conditions; and (4) reducing non-smoker complaints and threats of litigation.<sup>13</sup>

#### *Objections—General*

Commenters stated that an indoor smoking ban would actually increase fires as people tried to hide their smoking and disposed of cigarettes improperly. Commenters also stated that they supported smoking bans in public places and near doors, but felt that smoking should still be permitted in an individual tenant’s unit. Commenters suggested that instead of a smoking ban, PHAs could require a higher security deposit from smokers.

Commenters also stated that given the number of individuals with mental health problems who rely on smoking, this rule would be unfair to that population. Commenters wrote that bans in individual units would make it harder for tenants with mental illnesses to maintain stable housing. Some objected to the rule because they stated that some individuals who smoke do so to avoid returning to prior addictions. Commenters stated that discouraging any part of the population from affordable housing programs is contrary to the mission of HUD and PHAs.

Some commenters objected to the rule because they stated that the rule contradicts a recent notice from HUD that PHAs should slow evictions based on criminal history, while now encouraging evictions for legal activities. Other commenters stated that the rule contradicts Congressional direction to increase flexibility and reduce unnecessary regulatory burdens. Commenters also objected to the rule by stating that funding should be used for priorities other than enforcement of the rule, including evictions.

*HUD Response:* This rule is an opportunity to lower overall maintenance costs and reduce the risk of catastrophic fires in properties while advancing the health of public housing

residents and PHA staff. Smoking within a tenant’s unit exposes other residents to SHS. As such, smoke-free public housing is fully aligned with HUD’s mission of providing safe, decent and sanitary housing for vulnerable populations nationwide. HUD encourages all PHAs to work with all of their residents to ensure they fully understand the policy. In order to meet a successful 18-month implementation timeframe, HUD encourages community engagement and outreach so PHAs will be able to solicit support and involvement of their resident councils and tenants. Residents who smoke and comply with the smoke-free policy can continue their residency in public housing. During enforcement of their smoke-free housing policies, HUD expects PHAs to follow administrative grievance procedures. Where there are violations of the smoke-free policy, HUD encourages PHAs to use a graduated enforcement approach that includes written warnings for repeated policy violations before pursuing lease termination or eviction. HUD will provide additional guidance with examples of graduated enforcement steps.

HUD emphasizes that this rule, unlike previous HUD guidance on smoking, is not optional or merely a recommendation. However, PHAs may not treat tenants who smoke punitively in their implementation of this regulation by, for example, requiring a higher security deposit from tenants who smoke. Residents can be charged for property damage that is beyond normal wear and tear, in accordance with 24 CFR 966.4(b)(2).

#### *Reasonable Accommodations*

Commenters asked for more information and further clarification on what PHAs could offer as a reasonable accommodation under the rule. Some expressed confusion on whether smokers were eligible for reasonable accommodations, and some commenters explained that the reasonable accommodation was not available to help with the smoking habit, but rather was intended to address the underlying disability that frustrates the tenant’s ability to comply with the smoke-free policy. Commenters explained that individuals with mental health disabilities or cognitive or learning disabilities may have difficulties in understanding the new smoke-free policies or complying with traditional cessation treatments, and that any PHA not allowing reasonable accommodations for tenants with disabilities is not considering the whole picture.

<sup>8</sup> *Brashear v. Simms*, 138 F. Supp. 2d 693, 694 (D. Md. 2001).

<sup>9</sup> *Fagan v. Axelrod*, 550 N.Y.S. 2d 552, 560 (1990).

<sup>10</sup> See *McGinnis v. Royster*, 410 U.S. 263 (1973); *Giordano v. Conn. Valley Hosp.*, 588 F. Supp. 2d 306 (2008).

<sup>11</sup> The holdings referenced here are taken from jurisprudence on smoking prohibitions in public areas and in the state prison context.

<sup>12</sup> See *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 560 (N.Y. Sup. Ct. 1990).

<sup>13</sup> See *Chance v. Spears*, 2009 U.S. Dist. LEXIS 110304.

Others asked for specific lists of permissible accommodations or for best practices in providing reasonable accommodations. Some commenters requested that HUD explicitly state in the final rule that a PHA must grant appropriate requests for reasonable accommodations. Commenters also stated that HUD should take public comment on any future reasonable accommodation guidance.

Some commenters stated that reasonable accommodations should not include the ability to smoke indoors. Commenters asked whether HUD would defend PHAs who do not allow indoor smoking as a reasonable accommodation. Some commenters stated that smoking in the tenant's unit should be allowable as a reasonable accommodation, particularly for the elderly in winter or individuals who are disabled and cannot leave their unit. Commenters have stated that smaller PHAs may not have accommodations to offer other than allowing smoking in a tenant's unit.

Commenters offered other suggestions of permissible reasonable accommodations, including allowing the tenants to use ENDS in their unit, smoking closer to the building than the 25-foot barrier, additional time for compliance for those using cessation services, or moving smokers with mobility disabilities into units closer to elevators or on the ground floor. Commenters also stated that HUD should make it clear that smoking is not a bar to receiving assistance and should allow tenants who cannot comply to receive vouchers to move out of public housing.

However, commenters also expressed concern about the reasonable accommodation process. Commenters shared concerns that relying on the reasonable accommodation process assumes all residents with disabilities know their rights, assumes at least some requests will be granted, and places all the burden on the residents with disabilities themselves. Others stated that a PHA may be unable to move residents, due to costs of moving or a low vacancy rate. Commenters suggested that HUD require that language advising residents of their right to request a reasonable accommodation be included in leases along with other smoke-free requirements.

*HUD Response:* Under section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Fair Housing Act, PHAs are prohibited from discriminating on the basis of disability and must make reasonable accommodations in their

rules, policies, practices, and services. A reasonable accommodation is a change, adaptation or modification to a policy, rule, program, service, practice, or workplace which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, or perform a job. In order to show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. This individualized determination must be made on a case-by-case basis by the PHA. When a person with a disability requests an accommodation related to his or her disability, a recipient must make the accommodation unless the recipient can demonstrate that doing so would result in a fundamental alteration in the nature of its program or an undue financial and administrative burden.

Often, a PHA's Admissions and Continued Occupancy Plan (ACOP) will include guidelines for submission consideration, but an individual with a disability is not required to use a specific format when requesting an accommodation. General guidance on the reasonable accommodation process can be found at <http://go.usa.gov/cJBBC>. HUD also issued reasonable accommodation guidance entitled, "Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodations under the Fair Housing Act," which can be found at [http://www.hud.gov/offices/fheo/disabilities/modifications\\_mar08.pdf](http://www.hud.gov/offices/fheo/disabilities/modifications_mar08.pdf). HUD has determined that additional, specific guidance on accommodations related to smoke-free public housing is unnecessary, given the case-by-case nature of these decisions.

Research shows that SHS will intrude into other units even when there is mechanical ventilation or air cleaners are installed. HUD acknowledges that some persons, including persons with disabilities, may have additional challenges in quitting, but reiterates that this rule does not require persons who smoke to stop smoking; rather, they must perform the activity in allowable areas outside of the public housing facilities and other restricted areas.

HUD's guidance, "Change is in the Air," available at <http://portal.hud.gov/hudportal//huddoc?id=smokefreeactionguide.pdf>, provides examples of how PHAs have approached and managed smoke-free policies for residents with disabilities. Not all of these examples involve reasonable accommodations, but they demonstrate a range of options that PHAs can use to implement smoke-free

policies. For instance, PHAs have allowed residents to move to the first floor or closer to an exit door, and provided designated smoking areas with an accessible walkway, cover, lighting, and seating.

HUD continues to encourage PHAs to engage residents early in the development of the policy so that there is adequate time to consider reasonable accommodations requests they receive. Language advising residents of their right to request a reasonable accommodation should already be contained within the PHA's ACOP. Under this rule, HUD is not requiring that reasonable accommodation language be contained in the lease. Public housing residents who suspect they are victims of housing discrimination can call (800) 669-9777.

The act of smoking itself is not a disability under the ADA. HUD encourages all PHAs to fully engage with their residents so they fully understand the policy. Smokers with behavioral health conditions may require individualized attention to ensure they understand the policy and available cessation resources, as well as reasonable accommodation request procedures.

#### *Scientific Basis for the Rule*

Some commenters were skeptical that there was adequate scientific justification for the rule and questioned whether SHS is dangerous. Commenters stated that the rule is merely part of a crusade against smokers.

Other commenters stated that the ban on indoor smoking would be unnecessary if better construction, insulating electrical outlets or improving ventilation, were used in public housing.

*HUD Response:* HUD relies on the conclusions of Federal agencies and other authoritative organizations regarding the health effects of exposure to SHS. Based on these conclusions, the scientific evidence for the adverse health effects of SHS exposure is compelling. In a 2006 report, the Surgeon General concluded that there is no risk-free level of exposure to SHS. In children, the U.S. Surgeon General concluded that SHS exposure can cause sudden infant death syndrome, and can also cause acute respiratory infections, middle ear infections and more severe asthma in children. In adults, the Surgeon General has concluded that SHS exposure causes heart disease, lung cancer, and stroke. In addition, SHS is designated as a known human carcinogen by the U.S. Environmental Protection Agency, the U.S. National Toxicology Program, and the

International Agency for Research on Cancer.

The Surgeon General also concluded in 2006 that “eliminating indoor smoking fully protects nonsmokers from exposure to SHS. Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposure to secondhand smoke.” HUD acknowledges that the movement of SHS from a smoker’s unit to other parts of a building can be partially reduced through improvements in ventilation systems and through the increased air sealing of units; however, these strategies cannot fully eliminate exposure. Increased air sealing could also have the disadvantage of increasing SHS exposures to non-smokers in the sealed units, and could increase the amount of SHS that settles on surfaces within the sealed units.

### Signs

Commenters asked that HUD include requirements on no-smoking signs in the final rule. Commenters stated that HUD should require a minimum amount of signage, and others stated that any signs should be in all languages applicable to a given PHA.

*HUD Response:* HUD strongly encourages PHAs to post signs referencing their smoke-free policy. These signs must be accessible to all residents, and must be posted in multiple languages if appropriate for residents of the PHA, in accordance with HUD’s guidance on limited English proficiency.

### Scope of the Rule

Commenters stated that the proposed rule does not go far enough in only banning tobacco smoking. They asked that HUD include other items in the ban, including all products creating smoke, such as non-tobacco cigarettes and scented candles and incense, or other things posing health risks such as fatty foods or alcohol.

*HUD Response:* This rule bars the use of prohibited tobacco products indoors, and outdoors within 25 feet of any building. Prohibited tobacco products include waterpipes. HUD is focusing first on public housing because HUD already has significant progress to build upon, as many PHAs have voluntarily implemented smoke-free policies. HUD intends next to turn attention to other HUD-assisted housing. Although this rule curtails a behavior that public housing regulations previously allowed, instituting smoke-free public housing would ensure that public housing residents enjoy the confirmed and significant health benefits that many higher-income market-rate residents

now enjoy and increasingly demand of the private housing market. As a practical matter, HUD also is focusing first on smoke-free public housing because, in public housing, HUD can more readily leverage the Federal government’s direct financial investments and existing regulatory framework to promote broad-based, successful policy implementation than where housing depends on private owners and contracts. However, HUD will issue a solicitation of comments in the *Federal Register* to obtain feedback from owners and tenants on the prospect of requiring smoke-free policies in other HUD-assisted properties.

### Training

Commenters asked that HUD provide specific support for training in the final rule, both for residents and for PHA staff on both the reasons for the rule and proper enforcement of no-smoking policies.

*HUD Response:* HUD agrees that PHAs and residents will need training on the reasons for the rule and proper enforcement of smoke-free policies. HUD is coordinating with other federal agencies and non-governmental organizations on providing assistance to PHAs, as appropriate, in implementing smoke-free policies. HUD will provide training to PHAs in the form of video- and print-based materials, as well as in-person training for select PHAs. Training resources will be focused on geographic areas with the greatest need, including areas where few PHAs previously implemented smoke-free policies. Resident training should be provided by PHA staff.

### Waterpipes (Hookahs)

Many commenters asked that HUD include waterpipes in the smoke-free policy. These commenters stated that they are still a fire hazard and the smoke gives off harmful elements like cigarette smoke. Some commenters stated that waterpipes pose a carbon monoxide hazard in addition to the other toxins. Commenters stated that hookah sessions frequently last longer than the time it takes to smoke a cigarette and that some experts believe the SHS from waterpipes may be more hazardous than that from cigarettes.

Commenters asked that if HUD does not include waterpipes in the smoke-free policy standard, the final rule should be explicit that PHAs may do so themselves.

Other commenters stated that HUD should not include waterpipes in the final rule, and noted that for some cultural groups, there is a cultural

significance to smoking around a waterpipe that HUD should keep in mind.

*HUD Response:* Waterpipes (hookahs) are smoking devices that use coal or charcoal to heat tobacco, and then draw the smoke through water and a hose to the user. HUD recognizes that the use of hookahs is fundamentally different from the use of cigarettes, cigars, or other handheld tobacco products. Hookahs are not held while in use, and therefore require a person to remain in one spot while using them. In addition, the lit coals, which can last for half an hour or longer, cannot be extinguished and therefore must be used or discarded, leading the users to spend longer time periods outdoors than users of other tobacco products. For many residents, there may not be a permissible way to use a hookah outside their homes. But for PHAs that establish DSAs, it may still be feasible for outdoor hookah smoking in those locations, especially if the DSA is covered, preventing precipitation from interfering with the lighting of the coals.

Both the heating source and burning of tobacco are sources of contaminant emissions. HUD agrees with commenters that there is considerable evidence that the use of waterpipes results in the emission of contaminants that are similar to those identified in SHS from other tobacco products, including carbon monoxide, respirable particulate matter (PM<sub>2.5</sub>), nicotine and benzene. There is no evidence that the drawing of tobacco smoke through water in hookahs makes the smoke less hazardous. Furthermore, because hookah sessions generally extend for longer periods than required to smoke a cigarette or other tobacco products, they can result in higher concentrations of contaminants. Finally, the presence of lit charcoal poses a fire risk to the property. Several examples of hookahs causing serious fire damage have been seen in homes around the country.<sup>14</sup> In addition, the World Health Organization<sup>15</sup> and the American Lung

<sup>14</sup> See, e.g., Raya Zimmerman, 5 Dogs Die in St. Paul House Fire Likely Started by Teen’s Hookah, Pioneer Press, May 11, 2014, [http://www.twincities.com/localnews/ci\\_25741957/5-dogs-die-st-paul-home-fire-woman](http://www.twincities.com/localnews/ci_25741957/5-dogs-die-st-paul-home-fire-woman); Jason Pohl, Mishandled hookah sparked May apartment fire, Coloradoan, July 26, 2015, <http://www.coloradoan.com/story/news/2015/07/25/pf-mishandled-hookah-sparked-may-apartment-fire/30670277/>; and Erin Wencil, Hookah Starts Fire in North Fargo Basement, KVRN News, Nov. 26, 2015, <http://www.kvrn.com/news/local-news/hookah-starts-fire-in-north-fargo-basement-no-injuries-in-wahpeton-housefire/36677270>.

<sup>15</sup> World Health Organization, “Waterpipe Tobacco Smoking: Health Effects, Research Needs and Recommended Actions by Regulators.” (2005), available at [http://www.who.int/tobacco/global\\_](http://www.who.int/tobacco/global_)

Association<sup>16</sup> recommend that hookahs should be subjected to the same regulations as cigarettes. Therefore, HUD has amended the final rule to state that waterpipes fall under the definition of a “prohibited tobacco product.”

While the use of hookahs may be viewed as a significant cultural practice, this does not qualify a resident for exclusion from the policy. As previously noted, there is no fundamental right to smoke and the act of smoking is entitled to only a minimal level of protection under the Equal Protection Clause. Therefore, smoking a hookah, as a significant cultural practice, does not itself provide a reason for exclusion from the policy.

#### *Other Comments*

Commenters stated that no matter what, smoking should not be a bar to public housing tenancy, despite some statements by PHA directors that state they already discriminate against smokers.

Commenters also wrote that HUD should state in the rule that the rule does not guarantee a smoke-free environment in order to avoid lawsuits from tenants with non-compliant neighbors.

*HUD Response:* This rule is not to be interpreted as making smoking a bar to public housing tenancy. Prospective and current residents are free to smoke outdoors with the understanding that smoking is prohibited within a 25-foot perimeter of buildings and in accordance with the PHA’s smoke-free policy. This rule does not guarantee a smoke-free environment; residents may still be exposed to SHS on public housing grounds, particularly outside the 25-foot smoke-free perimeter. HUD emphasizes that the smoke-free policy is intended to reduce financial costs for PHAs as well as improve indoor air quality for all residents.

#### *Responses to Questions*

As part of the proposed rule, HUD asked the public to share specific information, particularly from PHAs who have already implemented smoke-free policies and can share their experiences. HUD received a number of comments with past experiences and suggestions for best practices, and we appreciate all the input. The information commenters submitted has helped inform HUD as to changes in the final rule and in developing further

[interaction/tobreg/Waterpipe%20recommendation\\_Final.pdf](#).

<sup>16</sup> American Lung Association, “An Emerging Deadly Trend: Waterpipe Tobacco Use,” (Feb. 2007), available at [http://www.lungusa2.org/embargo/slati/TrendAlert\\_Waterpipes.pdf](http://www.lungusa2.org/embargo/slati/TrendAlert_Waterpipes.pdf).

guidance for PHAs on implementing and enforcing this final rule.

#### **V. Findings and Certifications**

##### *Executive Order 12866, Regulatory Planning and Review*

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866 (entitled “Regulatory Planning and Review”). OMB determined that this rule was economically significant under the order. The docket file is available for public inspection in the Regulations Division, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. The Regulatory Impact Analysis (RIA) prepared for this rule is also available for public inspection in the Regulations Division and may be viewed online at [www.regulations.gov](http://www.regulations.gov), under the docket number above. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339.

##### *Information Collection Requirements*

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2577–0226. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

##### *Impact on Small Entities*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule prohibits smoking of tobacco in all indoor areas of and within 25 feet of any public housing and administrative office buildings for all PHAs, regardless of size.

There are 2334 “small” PHAs (defined as PHAs with fewer than 250 units), which make up 75 percent of the

public housing stock across the country. Of this number, approximately 378 have already instituted a voluntary full or partial policy on indoor tobacco smoking.

HUD anticipates that implementation of the policy will impose minimal additional costs, as creation of the smoke-free policy only requires amendment of leases and the PHA plan, both of which may be done as part of a PHA’s normal course of business. Additionally, enforcement of the policy will add minimal incremental costs, as PHAs must already regularly inspect public housing units and enforce lease provisions. Any costs of this rule are mitigated by the fact that PHAs have up to 18 months to implement the policy, allowing for costs to be spread across that time period.

While there are significant benefits to the smoke-free policy requirement, the majority of those benefits accrue to the public housing residents themselves, not to the PHAs. PHAs will realize monetary benefits due to reduced unit turnover costs and reduced fire and fire prevention costs, but these benefits are variable according to the populations of each PHA and the PHA’s existing practices.

Finally, this rule does not impose a disproportionate burden on small PHAs. The rule does not require a fixed expenditure; rather, all costs should be proportionate to the size of the PHA implementing and enforcing the smoke-free policy.

Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

##### *Environmental Review*

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339. The

FONSI is also available to view online at [www.regulations.gov](http://www.regulations.gov).

*Executive Order 13132, Federalism*

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments or is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

*Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance number for the Public Housing program is 14.872.

**List of Subjects**

*24 CFR Part 965*

Government procurement, Grant programs-housing and community development, Lead poisoning, Loan programs-housing and community development, Public housing, Reporting and recordkeeping requirements, Utilities.

*24 CFR Part 966*

Grant programs-housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR parts 965 and 966 as follows:

**PART 965—PHA-OWNED OR LEASED PROJECTS—GENERAL PROVISIONS**

■ 1. The authority citation for 24 CFR part 965 continues to read as follows:

**Authority:** 42 U.S.C. 1547, 1437a, 1437d, 1437g, and 3535(d). Subpart H is also issued under 42 U.S.C. 4821–4846.

■ 2. Add subpart G to read as follows:

**Subpart G—Smoke-Free Public Housing**

Sec.  
965.651 Applicability.  
965.653 Smoke-free public housing.  
965.655 Implementation.

**Subpart G—Smoke-Free Public Housing**

**§ 965.651 Applicability.**

This subpart applies to public housing units, except for dwelling units in a mixed-finance project. Public housing is defined as low-income housing, and all necessary

appurtenances (e.g., community facilities, public housing offices, day care centers, and laundry rooms) thereto, assisted under the U.S. Housing Act of 1937 (the 1937 Act), other than assistance under section 8 of the 1937 Act.

**§ 965.653 Smoke-free public housing.**

(a) *In general.* PHAs must design and implement a policy prohibiting the use of prohibited tobacco products in all public housing living units and interior areas (including but not limited to hallways, rental and administrative offices, community centers, day care centers, laundry centers, and similar structures), as well as in outdoor areas within 25 feet from public housing and administrative office buildings (collectively, “restricted areas”) in which public housing is located.

(b) *Designated smoking areas.* PHAs may limit smoking to designated smoking areas on the grounds of the public housing or administrative office buildings in order to accommodate residents who smoke. These areas must be outside of any restricted areas, as defined in paragraph (a) of this section, and may include partially enclosed structures. Alternatively, PHAs may choose to create additional smoke-free areas outside the restricted areas or to make their entire grounds smoke-free.

(c) *Prohibited tobacco products.* A PHA’s smoke-free policy must, at a minimum, ban the use of all prohibited tobacco products. Prohibited tobacco products are defined as:

(1) Items that involve the ignition and burning of tobacco leaves, such as (but not limited to) cigarettes, cigars, and pipes.

(2) To the extent not covered by paragraph (c)(1) of this section, waterpipes (hookahs).

**§ 965.655 Implementation.**

(a) *Amendments.* PHAs are required to implement the requirements of this subpart by amending each of the following:

(1) All applicable PHA plans, according to the provisions in 24 CFR part 903.

(2) Tenant leases, according to the provisions of 24 CFR 966.4.

(b) *Deadline.* All PHAs must be in full compliance, with effective policy amendments, by July 30, 2018.

**PART 966—PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE**

■ 3. The authority section for 24 CFR part 966 continues to read as follows:

**Authority:** 42 U.S.C. 1437d and 3535(d).

■ 4. In § 966.4, revise paragraphs (f)(12)(i) and (ii) to read as follows:

**§ 966.4 Lease requirements.**

\* \* \* \* \*  
(f) \* \* \*  
(12) \* \* \*

(i) To assure that no tenant, member of the tenant’s household, or guest engages in:

(A) *Criminal activity.* (1) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents;

(2) Any drug-related criminal activity on or off the premises; or

(B) *Civil activity.* For any units covered by 24 CFR part 965, subpart G, any smoking of prohibited tobacco products in restricted areas, as defined by 24 CFR 965.653(a), or in other outdoor areas that the PHA has designated as smoke-free.

(ii) To assure that no other person under the tenant’s control engages in:

(A) *Criminal activity.* (1) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents;

(2) Any drug-related criminal activity on the premises; or

(B) *Civil activity.* For any units covered by 24 CFR part 965, subpart G, any smoking of prohibited tobacco products in restricted areas, as defined by 24 CFR 965.653(a), or in other outdoor areas that the PHA has designated as smoke-free.

\* \* \* \* \*

Dated: November 28, 2016.

**Julián Castro,**  
*Secretary.*

[FR Doc. 2016–28986 Filed 12–2–16; 8:45 am]  
**BILLING CODE 4210–67–P**

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Parts 1 and 602**

[TD 9799]

**RIN 1545–BN61**

**Tax Return Preparer Due Diligence Penalty Under Section 6695(g)**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final and temporary regulations.

**SUMMARY:** This document contains temporary regulations that modify existing regulations related to the penalty under section 6695(g) of the Internal Revenue Code (Code) relating to