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Part III

**Department of
Housing and Urban
Development**

24 CFR Part 964

**Public Housing Agency Organization;
Required Resident Membership on Board
of Directors or Similar Governing Body;
Final Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 964

[Docket No. FR-4502-F-02]

RIN 2577-AC13

**Public Housing Agency Organization;
Required Resident Membership on
Board of Directors or Similar
Governing Body**

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

ACTION: Final rule.

SUMMARY: On June 23, 1999, HUD published a proposed rule to implement section 2(b) of the United States Housing Act of 1937, which was added by section 505 of the Quality Housing and Work Responsibility Act of 1998. Section 2(b) requires, with certain exceptions, that the membership of the board of directors or similar governing body of a public housing agency (PHA) must contain not less than one member who is directly assisted by the PHA. This final rule makes effective the policies and procedures described in the June 23, 1999 proposed rule and takes into consideration the public comments received on the proposed rule.

DATES: Effective Date: November 22, 1999.

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SUPPLEMENTARY INFORMATION:

I. The June 23, 1999 Proposed Rule

On June 23, 1999 (64 FR 33644), HUD published a proposed rule to implement section 505 of the Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105-276, approved October 21, 1998; 112 Stat. 2461, 2522) (the "Public Housing Reform Act"). The Public Housing Reform Act constitutes a substantial overhaul of HUD's public housing and Section 8 assistance

programs. Among other goals, the changes made by the Public Housing Reform Act are designed to provide for more resident involvement, and to increase resident participation and awareness in creating and maintaining a positive living environment.

Section 505 of the Public Housing Reform Act amended section 2 of the United States Housing Act of 1937 (42 U.S.C. 1437) (the "1937 Act"). New section 2(b)(1) of the 1937 Act requires, except in certain cases, that:

the membership of the board of directors or similar governing body of each public housing agency shall contain not less than 1 member—(A) who is directly assisted by the public housing agency; and (B) who may, if provided for in the public housing agency plan, be elected by the residents directly assisted by the public housing agency.

New section 2(b)(2) of the 1937 Act establishes two exceptions to the resident board member requirement. First, public housing agencies (PHAs) that are located in a State that requires the members of a board of directors or similar governing body of a PHA to be salaried and to serve on a full-time basis are excepted from the resident board member requirement. Second, PHAs with less than 300 units are excepted from the resident board member requirement if they meet two conditions:

(1) The PHA must provide reasonable notice to the resident advisory board of the opportunity for residents to serve on the PHA board of directors or similar governing body; and

(2) The PHA must wait a reasonable time after the resident advisory board has received this notice.

Resident advisory boards participate in the PHA planning process and assist and make recommendations regarding the PHA Plan. The membership of a resident advisory board is made up of individuals who adequately reflect and represent the residents assisted by the PHA. (See 24 CFR 903.13 for additional information regarding resident advisory boards.) Part 903 of 24 CFR (entitled "Public Housing Agency Plans") was established by interim rule published on February 18, 1999 (64 FR 8170).

The June 23, 1999 rule proposed to implement section 2(b) in a new subpart E to 24 CFR part 964, which contains HUD's regulations concerning resident participation and resident opportunities in public housing. The preamble to the June 23, 1999 proposed rule describes in detail the proposed amendments to 24 CFR part 964.

II. Significant Changes Between June 23, 1999 Proposed Rule and This Final Rule

This final rule makes effective the policies and procedures contained in the June 23, 1999 proposed rule and takes into consideration the public comments received on the proposed rule. The major changes made by this final rule in response to public comment are described below. The rationale for these changes are discussed in greater detail in Section III of this preamble.

1. *Covered funding.* The final rule clarifies that, subject to certain exceptions, the statutory resident board member requirement applies to any PHA that has a public housing annual contributions contract with HUD or that administers Section 8 tenant-based rental assistance. The requirement does not apply to any State financed housing assistance or Section 8 project-based assistance.

2. *State and local procedures.* Sections 964.435 (which describes initial implementation of the resident board member requirement) and 964.440 (which describes the procedures for filling an open board member seat) of the proposed rule are not included in this final rule. These sections established specific board-level procedures that were intended to assist PHAs in implementing the resident board member requirement. HUD decided not to include these sections in the final rule and instead leave the type of implementation details covered by §§ 964.435 and 964.440 to State and local governments to resolve. It is important to note, however, that the exclusion of these sections from the final rule does not relieve covered PHAs of the responsibility to implement the resident board member requirement. The resident board member requirement took effect beginning on October 1, 1999. HUD believes that implementation of this new requirement should occur as soon as possible after this date. All covered PHAs must take the steps necessary to comply with this requirement if they have not done so already.

In addition, as a result of the decision to remove §§ 964.435 and 964.440, the definitions of the terms "elected board member" and "related unit of general local government" have not been included in the final rule because they are no longer necessary.

3. *Exceptions to resident board member requirement.* For purposes of clarity, this final rule reorganizes the listing of the exceptions to the statutory resident board member requirement.

The description of the exception for small PHAs is still located in § 964.425 (which has been re-designated as "Small public housing agencies"). The other two exceptions—for PHA boards with full-time salaried members and for PHAs with no governing boards—have been relocated to § 964.405 (which describes the scope of the applicability of the resident board member requirement).

4. *PHAs that only administer Section 8 assistance.* The final rule clarifies that PHAs that only administer Section 8 assistance qualify for the "small PHA" (i.e., those with less than 300 public housing units) exception to the resident board member requirement regardless of the number of Section 8 vouchers they administer.

5. *Eligibility for "small PHA" exception.* The final rule clarifies that, in order to qualify for the "small PHA" exception, the PHA must satisfy all of the conditions described in § 964.425. Specifically, the PHA must: (a) have less than 300 public housing units (or no public housing units); (b) provide reasonable notice to the resident advisory board of the opportunity for residents to serve on the governing board; (c) not be notified of the intention of any resident to participate on the governing board within a reasonable time; and (d) repeat notification to the resident advisory board at least once every year. If any of these conditions are not satisfied, the PHA is subject to the resident board member requirements. For example, if a small PHA (after providing the required notice to the resident advisory board) is notified of a resident's intention to serve on the governing board, the PHA must comply with the requirements of new 24 CFR part 964, subpart E.

6. *"Reasonable time" must not be less than 30 days.* The final rule provides that, in order to qualify for the "small PHA" exception, the PHA must provide residents with at least 30 days to express their interest in serving on the PHA governing board.

7. *Resident participation on the board must include matters regarding covered assistance.* The final rule clarifies that a resident board member must be allowed to take part in PHA board decisions related to the administration, operation, and management of Federal public housing programs and Section 8 tenant-based assistance programs. This rule does not extend to matters that: (a) Exclusively relate to other types of housing assistance (such as State financed housing assistance); or (b) do not involve housing assistance (as may occur where the city or county

governing body also serves as the PHA board).

However, a PHA may choose to expand the scope of resident member involvement to matters not covered by this rule.

8. *Eligible resident.* The final rule provides that, in order for a resident to be eligible for board membership, the resident's name must appear on the lease and the resident must be at least 18 years of age.

9. *Resident board member no longer directly assisted.* The final rule clarifies that a resident board member who is no longer directly assisted by the PHA may be removed for that cause from the PHA board, where such action is permitted under State or local law. Alternatively, the board member may be allowed to complete his/her current term as a member of the PHA governing board. However, the board member may not be re-appointed (or re-elected) to the governing board for purposes of serving as the statutorily required resident board member.

10. *Minimum qualifications for board membership.* The final rule provides that any generally applicable qualifications for board membership also apply to residents, unless the application of the requirements would result in the governing board not containing at least one eligible resident as a member. Further, PHAs and localities may not establish eligibility requirements for board membership that are solely applicable to residents.

11. *Election procedures.* The final rule adopts several of the relevant election procedures described in § 964.130. This section establishes the requirements governing the election of public housing resident councils. Further, any election procedures devised by the PHA must facilitate fair elections.

12. *Conflicts of interest.* The final rule clarifies that a resident board member may take part in any matters before the board so long as that matter is not applicable to that resident in a personal capacity. A resident board member may only be excluded from participation in a matter that uniquely applies to that resident, and the resident may be involved in any matter that is generally applicable to residents. The final rule also makes clear that having a lease with the PHA does not constitute a conflict of interest for the resident board member. Further, the rule clarifies that a board member's status as a public housing resident or recipient of Section 8 tenant-based assistance does not constitute a conflict of interest.

13. *Conforming change.* The final rule also makes a technical, non-substantive change to 24 CFR part 964. Specifically,

the rule removes outdated § 964.110, which describes HUD's policy regarding resident membership on the PHA governing board. These provisions have been incorporated in new subpart E.

III. Discussion of Public Comments Received on the June 23, 1999 Proposed Rule

The public comment period on the June 23, 1999 proposed rule closed on August 23, 1999. HUD received 71 comments on the proposed rule. Comments were submitted by PHAs; the three main organizations representing PHAs; legal services organizations; resident organizations; low-income housing advocates; and various other organizations and individuals.

This section of the preamble presents a summary of the significant issues raised by the public commenters on the May 29, 1998 proposed rule and HUD's responses to these comments.

A. Support for Proposed Rule

Several commenters supported the proposed amendments to 24 CFR part 964. One of the commenters wrote to express his strong support for the rule based on his experience as the executive director of a PHA that has had a resident board member for 25 years. However, the majority of the commenters writing in support also expressed concerns regarding the implementation of the resident board membership requirements.

B. Opposition to Resident Board Member

Several commenters opposed the resident board membership requirement. Although these commenters provided a variety of reasons for their opposition, they all agreed that a PHA board should not be required to include a public housing resident as a member.

Comment: Residents are not qualified to serve on PHA board. Several of the commenters wrote that public housing residents lack the necessary experience and expertise to serve on a PHA board. One of these commenters wrote that resident board members, many of whom have never owned property or managed a bank account, will be required to make sound financial and management decisions. Another commenter wrote that most of the qualified residents are elderly or caring for families and, therefore, unable to serve on a PHA board. The commenters feared that resident board members would lower the standard for PHA board membership and weaken the PHA's ability to garner local support. The commenters also worried that the requirement would

discourage qualified persons from serving on the PHA board.

Comment: Requirement will endanger confidentiality of board deliberations and create conflicts of interest. Several commenters wrote that resident members would endanger the confidentiality of board deliberations. Other commenters wrote that the requirement may pose a conflict of interest for a resident required to make decisions that will financially impact the resident's family. Several commenters worried about the potential for abuse of power by a resident board member.

Comment: Requirement presents logistical difficulties. Several commenters wrote about the logistical difficulties presented by the PHA board membership requirement. For example, one commenter wrote that in rural areas PHAs will have difficulty ensuring that a resident board member travels the necessary distance to attend PHA board meetings. The commenter also wrote that board meetings are often held during working hours, which makes it difficult for employed residents to attend.

Comment: Residents are not interested in serving on PHA boards. Other commenters wrote that PHAs often have difficulty attracting resident participation. According to the commenters, this could result in a resident board member who does not fully or enthusiastically participate in decisionmaking. One commenter wrote that the lack of resident interest indicates that public housing residents do not have the necessary responsibility or dedication to serve on a PHA board.

Comment: Requirement is unnecessary—residents already have input in PHA management and operations. Several commenters wrote that the PHA board membership requirement is unnecessary. These commenters noted that residents currently have the right to provide input in public housing management and operations through the resident advisory board and other forums.

HUD Response. (This response applies to all of the comments discussed in this section III.B.) HUD's part 964 regulations have always encouraged active resident participation in PHAs, including involvement in management and operation (§ 964.15) and resident membership on PHA governing boards (§ 964.110). HUD understands that these commenters have concerns regarding the effectiveness of requiring a resident board member. HUD is not in a position, however, to revise or rescind this requirement because it is a statutorily mandated requirement. As noted in the

preamble to the July 2, 1999 proposed rule and the preamble to this rule, section 2(b) of the 1937 Act requires that each PHA governing board contain at least one member who is directly assisted by the PHA. Congress enacted new section 2(b) because Congress viewed the resident board member requirement as necessary to promote a better understanding of resident concerns and to foster better relations and communication between residents and PHAs (S. Rep. No. 105-21, at 7 (1998)).

C. Federalism Concerns

Many commenters raised concerns regarding the Federalism implications of the proposed rule. The comments reflect the belief that the proposed rule infringes on the rights of PHAs, as well as the rights of States and localities. The commenters wrote that accomplishing the statutory goal of including a resident member on each PHA board will be much more difficult than the proposed rule contemplates. A large portion of the comments point out that section 2(b) conflicts with many State laws governing PHA board membership. Several of the commenters wrote that adding an additional seat to an elected board would conflict with the State election laws and infringe on the rights of States. Many of the commenters asked HUD to seek a change to the law where the organization of the board is not conducive to resident participation, such as where the board is the city council.

One of the commenters wrote that section 2(b) may be unconstitutional. According to the commenter, section 2(b) would unconstitutionally "rewrite State housing authority laws," and "prescribe the manner in which appointing authorities will exercise the prerogative of appointment, which derives from State statute." The commenter wrote that the "Federal government may neither issue directives requiring the States to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program" (quoting the United States Supreme Court decision in *Printz v. United States*, 521 U.S. 98 (1997)). The commenter also noted that many PHAs operate programs that "have nothing to do with the Federal government." However, the "Federal mandate contained in (section 2(b) and the proposed rule) necessarily affects the nonfederal activities of" PHAs.

The commenter acknowledged that the Federal government may attach conditions to the receipt of Federal

funding. However, the commenter wrote that "the mandates involved here are directed, not to the [PHA] that is party to the (Annual Contributions Contract (ACC)), but to the appointing authority, which is not." The commenter also acknowledged that the Federal government can preempt State law, but did not believe that preemption was justified in this context. Specifically, the commenter did not find explicit statutory language authorizing preemption, nor the existence of "a regulatory scheme so pervasive as to imply (a Federal) intent to occupy a particular field." Neither did the commenter believe that preemption would be justified due to a conflict between State law and section 2(b).

HUD Response. HUD agrees that this rulemaking, which seeks to implement the explicit statutory directive of section 2(b), may have direct effects on States and localities. The Federalism implications of the rulemaking, however, derive solely from the statutory text and substance of section 2(b). The scope of the rule is exclusively concerned with implementation of the statutory resident board membership requirement.

HUD believes that this rulemaking is necessary to: (1) Provide guidance to PHAs in fulfilling this requirement; (2) minimize the potential burdens on States and local governments in carrying out the statutory mandate; and (3) ensure that the Federal objective of increasing resident involvement in public housing is achieved. In most instances where section 2(b) provides HUD with the flexibility to leave a matter to the discretion of a State or locality, HUD has elected to do so. As is noted in the summary of comments below, many commenters requested additional regulatory guidance on a variety of matters related to the statutory resident board membership requirement. In most of these instances, HUD has declined to adopt the suggestion made by the commenters on the basis that States and localities should have flexibility in implementing the requirements of section 2(b). In one instance, HUD decided not to include two sections of the proposed rule (§§ 964.435 and 964.440) specifically to provide States and localities with the flexibility to reconfigure their PHA governing boards to comply with the requirements of section 2(b) in a manner best suited to local conditions.

HUD is not in a position to determine the Constitutionality of section 2(b). However, HUD has concluded that section 2(b) preempts any conflicting State laws regarding PHA board membership. This final rule reflects this

statutory preemption, and does not constitute a decision on HUD's part to preempt State law through its rulemaking authority.

Executive Order 12612, *Federalism*, was issued on October 30, 1987 (52 FR 41685). The Order requires that executive branch agencies take Federalism concerns into account when developing and implementing agency policy initiatives that have substantial, direct effects on States or their political subdivisions, or on the relationship or distribution of power among the various levels of government. Section 4 of Executive Order 12612 contains special provisions governing the preemption of State law by Federal statutes and regulations. Specifically, section 4 of the Order provides that:

To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

Although section 2(b) does not expressly provide for the preemption of State laws governing PHA board membership, HUD has concluded that "firm and palpable" evidence exists for concluding that the Congress intended the preemption of State law in those cases where the "State authority directly conflicts" with the Federal resident board membership requirement.

The first reason for HUD's conclusion is the statutory language of section 2(b). The statutory resident board membership requirement is explicit:

Except as provided * * * the membership of the board of directors or similar governing body of each (PHA) shall contain not less than 1 member * * * who is directly assisted by the (PHA).

The exceptions referred to are: (1) For small PHAs with less than 300 units; and (2) for PHAs in States that require that PHA board members be full-time salaried employees. The two statutory exceptions reflect Congressional awareness that the resident board membership requirement may be burdensome for small PHAs or conflict with certain State requirements. Nevertheless, the Congress elected to provide exceptions only for the two narrow situations described above. Accordingly, HUD has concluded that the statutory language of section 2(b) contains firm and palpable evidence that the Congress intended the resident board membership requirement to be

broadly applicable, regardless of conflicting State law.

HUD's second reason for its conclusion is based on the dominant Federal interest in the public and assisted housing programs administered under the 1937 Act. HUD's August 22, 1988 (53 FR 31926) notice implementing Executive Order 12612 provides that HUD will infer preemption where "the field is one in which Federal interest is sufficiently dominant to provide firm and palpable evidence that Congress intended to preclude enforcement of State laws on the same subject." HUD believes, for the following reasons, that the section 2(b) requirements satisfy this test.

The 1937 Act, a Federal statute, establishes the basic framework for most of the public and assisted housing programs operated by PHAs throughout the country. HUD is the Federal agency responsible for establishing and enforcing the regulatory and contractual requirements necessary to carrying out the purposes of the 1937 Act. With few exceptions, HUD is the primary source of funding for public housing developments assisted under the 1937 Act. Given this dominant Federal role in the administration of 1937 Act programs, HUD has concluded that section 2(b) preempts any conflicting State laws governing PHA board membership.

Further, as one of the commenters acknowledges, the Federal government may establish conditions on the receipt of Federal funds. For the recipients of the Federal funds, these conditions preempt any conflicting State or local requirements. As this final rule makes clear, the resident board member requirement is a condition to the receipt of funding under the 1937 Act. For example, the requirements of section 2(b) apply solely to PHAs that have an ACC with HUD or that administer tenant-based rental assistance under section 8 of the 1937 Act (see § 964.405). Additionally, resident participation is required only for those PHA board decisions related to Federally funded public housing and Section 8 tenant-based assistance programs. The requirements of section 2(b) do not extend to PHA board decisions that exclusively affect other types of housing assistance, or that do not regard housing assistance. (See § 964.430(a)(2).) As a condition of 1937 Act funding, the statutory resident board member requirement supersedes any conflicting State or local requirements regarding PHA board membership for those PHAs receiving assistance under the 1937 Act.

D. Other General Comments Regarding the Proposed Rule

Comment: Stipends and Per Diems Should be Excluded from Income. Two commenters wrote that stipends and per-diem expenses are common for PHA board members. The commenters suggested that HUD exclude these items from the income of the resident board member. Otherwise, the board member would risk an increase in rent, which is calculated based on resident income.

HUD Response. HUD agrees that counting such stipends as "income" for the purposes of determining rent could serve as a deterrent to residents who would otherwise be interested in serving on the PHA Board. HUD is addressing this issue in the final rule on Admission and Occupancy to reflect that stipends for services rendered as a resident board member are to be treated as resident services stipends, which are exempted from a resident's income to the extent other such stipends are exempt. (For additional details regarding the Admission and Occupancy rule, see the proposed rule published on April 30, 1999 (64 FR 23460).)

Comment: What happens to a resident board member who is no longer "directly assisted" by the PHA? Several commenters asked whether a resident who is no longer directly assisted by the PHA (due to eviction, etc.) could continue to serve on the PHA board. Some of the commenters wrote that requiring the resident to leave the board might conflict with State or local requirements governing the selection and removal of board members. Other commenters asked whether the resident who replaces the removed board member would complete the original board membership term or start a new term.

HUD Response. A resident board member who ceases to be directly assisted by the PHA is no longer an "eligible resident" as defined in § 964.410. Such a board member may be removed from the PHA board for that cause, where such action is permitted under State or local law. State laws and PHA policies should be changed, where necessary, to reflect that resident board members who cease to be directly assisted by the PHA may be removed from the board for cause. Alternatively, the board member may be allowed to complete his/her current term as a member of the PHA governing board. However, the board member may not be re-appointed (or re-elected) to the governing board for purposes of serving as the statutorily required resident board member.

Comment: Final rule should provide for the removal of disruptive resident board members. One commenter suggested that HUD revise the proposed rule to provide for the removal of unruly or disruptive resident PHA board members.

HUD Response. As previously noted, section 2(b) of the 1937 Act and § 964.430 of this final rule, provide that a resident board member is a full member of the governing board. As a full member, the resident board member is subject to the same rules regarding behavior as any other board member. HUD does not see any need to impose additional procedures regulating the behavior of resident board members. Moreover, the imposition of such procedures specific to resident board members would undermine the resident board member's position as a full member of the governing board and would run counter to Congress' intent in enacting the resident board member requirement.

Comment: Final rule should contain a mechanism for resident complaints, investigation, and consequences of PHA noncompliance. One commenter made this suggestion.

HUD Response. HUD has not adopted the change suggested by this commenter. PHAs that fail to comply with the requirements of this final rule are subject to the same noncompliance and enforcement procedures that apply to other 1937 Act requirements. Consequently, HUD does not see the need to implement additional compliance procedures.

Comment: Rule should provide for training and provision of resources to resident board member. Two commenters wrote that the final rule should provide for the training of resident board members by an independent training entity on all aspects of PHA operations. The commenters also suggested that resident board members should be provided with adequate resources (office space, phone, photocopier, etc.) to carry out their duties.

HUD Response. HUD has not changed the rule to reflect this request. Resident board members are to be treated as any other member of the governing board. If all board members are provided with resources, such as office space and office equipment, these must also be made available to the resident board member. HUD will not, however, require that PHAs supply additional resources to the resident board member. HUD continues to encourage PHAs to maintain partnerships to provide training to residents consistent with § 964.140.

Comment: What happens if there is only one resident who expresses interest in serving on the board? Several commenters posed this question.

HUD Response. Appointing authorities are not required to appoint any specific member to the board of directors. If there is limited interest among residents so that the PHA or appointing authority believes there is no real choice in who becomes a board member, the PHA or appointing authority may undertake outreach efforts to identify a pool of interested residents. However, a PHA is required to have a resident on its board, regardless of the number of residents who are interested.

E. Comments Regarding § 964.405—Applicability

Proposed § 964.404 identifies the types of assistance to which the resident board membership requirement applies. The proposed rule provides that new subpart E is applicable to "any [PHA] that has a public housing annual contributions contract with HUD or a housing assistance payments contract with HUD under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f)."

Comment: Does the resident board membership requirement apply to PHAs that only administer Section 8 assistance? Several commenters asked whether the resident board membership requirements are applicable to PHAs that do not administer public housing programs, but do administer Section 8 assistance. One of the commenters wrote that the wording of proposed § 964.405 is confusing because it refers to a Section 8 "housing assistance payment [HAP] contract with HUD." The commenter noted that under the tenant-based Section 8 program, there is no HAP contract with HUD. Another commenter noted that section 2(b) establishes an exception for small PHAs based on the number of "public housing units" operated by the PHA. According to the commenter, this statutory language implies that PHAs that do not operate any "public housing units" are totally exempt from the resident board membership requirements.

HUD Response. PHAs that only administer Section 8 assistance are subject to the resident board membership requirement. However, they fall within the category of PHAs with less than 300 public housing units, regardless of the number of Section 8 vouchers they administer. This means that these PHAs are exempt from the resident board member requirement, provided: (1) They have given adequate prior notice to the resident advisory

board of the opportunity for a resident to become a resident board member, and (2) that within a reasonable time of such notice, the PHA has not been notified of any residents who are interested in such participation. This rule makes the necessary qualification to § 964.425, which describes the "small PHA" exception to the resident board member requirement.

The final rule also clarifies that the resident board membership requirement applies to PHAs that "administer tenant-based rental assistance under Section 8 of" the 1937 Act. The change is in response to the commenter who noted that under the tenant-based Section 8 program there is no HAP contract with HUD.

HUD also notes that, under the interim rule on PHA Plans published in the **Federal Register** on February 18, 1998 (64 FR 8170), all PHAs (including those that only administer Section 8 assistance) are required to establish a resident advisory board. (The PHA Plan interim rule is codified at 24 CFR part 903.)

F. Comment Regarding § 964.410—Additional Definitions

Proposed § 964.410 defines various terms that are applicable to the resident board membership requirements described in new 24 CFR part 964, subpart E.

Comment: Definition of "directly assisted" should be narrowed/broadened. Proposed § 964.410 defines "directly assisted" to mean "a public housing resident or a participant in the tenant-based section 8 program." Two commenters objected to this definition. One of the commenters suggested that the scope of the definition be narrowed to only include Federal programs. The commenter noted that many PHAs administer State housing programs that should not be subject to Federal requirements. However, the second commenter suggested that the definition include all persons assisted by the PHA, including those assisted under Department of Agriculture Rural Development projects.

HUD Response. The final rule clarifies that "directly assisted" means residing in public housing or receiving Section 8 tenant-based assistance. Direct assistance does not include any State-financed housing assistance programs, section 8 project-based assistance, or Section 8 new construction assistance.

Comment: Definition of "elected board member" should exclude residents who serve on PHA board as a result of being elected to another office. The proposed rule defines "elected board member" to mean "either a

member of the governing board who is elected directly to the governing board or who serves on the board as a result of being elected to another office" (emphasis supplied). One commenter wrote that the definition should be revised to exclude resident board members who serve on the board as a result of being elected to another office. According to the commenter, including such members in the definition frustrates the democratic electoral process contemplated by section 2(b).

HUD Response. As a result of the decision to remove § 964.435 from the final rule, the definition of the term "elected board member" is no longer necessary and has also been removed from the final rule. This comment and the following discussion are included in the final rule, however, because the situation where a resident board member may serve on a governing board as a result of being elected to another office may still occur.

There are a number of jurisdictions in which certain local elected officials may also act, by virtue of their elected office, as members of the PHA governing board. For example, a city council may also act as the local PHA governing board. In cases like these, when a person is elected to the city council they are also, automatically, "elected" to the PHA governing board. These members have dual roles. The definition of "elected board member" in the proposed rule makes clear that these elected officials are elected board members. If a PHA resident is elected to such a "dual-purpose" local office, then that resident may also serve as the statutorily required resident board member under section 2(b).

The comment suggests that this creates a conflict if the PHA Plan provides for the resident board member to be "elected by the residents directly assisted by the (PHA)." The conflict appears to stem from the fact that the resident board member has not been directly elected by the residents, as provided for in the PHA Plan. In this case, however, there is no conflict.

The requirement to have at least one resident board member is mandatory, while provision for direct elections is merely permissive. If provided for in the PHA Plan, section 2(b) states that a resident may be directly elected by residents. Even if it is provided for in the PHA Plan, section 2(b) does not require the direct election by residents. Therefore, if a resident becomes a board member by virtue of holding some other elected office, that resident may also qualify as the statutorily required board member under section 2(b), even though the resident was not directly elected by

residents. However, the locality is free to decide that the "dual purpose" resident should not also serve as the statutorily required resident board member. The locality could then hold the election provided for in the PHA Plan, and have the resident board member directly elected by the public housing residents.

Comment: Definition of "eligible resident" should include additional criteria. Proposed § 964.410 provides that a resident is eligible to serve on a PHA board if the resident "is directly assisted by a [PHA] and is eighteen years of age or older." Several commenters requested that the definition provide additional eligibility criteria. For example, one of the commenters suggested that the criteria for board membership should be the same as for membership in a public housing Resident Council. However, the commenter also suggested that the Resident Council eligibility requirements at § 964.125 should be revised so that residents whose names do not appear on the lease are eligible for board membership. Other commenters recommended that only residents in good standing should be eligible for PHA board membership. One commenter suggested that any minimum qualifications for PHA board members should also apply to residents. Another commenter requested clarification on whether Section 8 Existing or New Construction residents are eligible to serve on a PHA board.

HUD Response. In response to these comments, HUD reevaluated the requirements contained in the definition of the term "eligible resident" to make sure that the definition was appropriate and capable of being implemented in a fair and consistent manner. HUD is concerned about implementation of the resident board member requirement being delayed because of conflicts over secondary issues such as the definition of an eligible resident. Accordingly, HUD has made the following changes to the definition of "eligible resident."

HUD has decided to include in the definition that to be eligible, a resident must be named in the lease. The reason for this change is to make clear exactly who may become a resident board member and to avoid any possible conflicts about who is a resident directly assisted by a PHA. A person is a resident directly assisted if he or she is listed on the lease.

HUD agrees with the commenters who wrote that any general minimum qualifications for board membership should also apply to residents. HUD has revised the proposed rule to adopt this suggestion. However, these

requirements cannot excuse a PHA's failure to comply with the requirements of section 2(b). A PHA must have at least one resident board member despite these minimum qualifications. Further, PHAs and localities may not establish eligibility requirements for board membership that are solely applicable to residents.

HUD has decided not to include a requirement that a resident be in good standing. HUD believes that the term "good standing" may be defined in different ways by each PHA and could be used to exclude a resident from participation without good cause. Other than the requirement that a resident must be named in the lease, the definition of "eligible resident" remains the same as in the proposed rule.

G. Comments Regarding § 964.420—Election of Resident Board Member

Proposed § 964.420 provides that residents directly assisted by a PHA may elect a resident board member, if provided for in the PHA Plan.

Comment: PHA should be required to advise residents of election procedures. One commenter suggested that a PHA should be required to advise all residents of the election procedures in writing. Another commenter recommended that the PHA should be required to certify that it has advised the PHA resident advisory board that resident board members may be elected.

HUD Response. HUD believes that most decisions regarding election procedure should be determined locally. However, HUD agrees that some minimal standards must be met. Accordingly, HUD has revised the proposed rule to adopt several of the relevant provisions of 24 CFR 964.130, which describes the election procedures for public housing resident councils. Specifically, the final rule requires that the PHA must provide residents with at least 30 days advance notice for nominations and elections. The notice should include a description of the election procedures, eligibility requirements, and dates of nominations and elections. Further, any election procedures devised by the PHA must facilitate fair elections.

Comment: Resident council election procedures should be incorporated in final rule. One commenter suggested that the resident council election procedures described in § 964.130 should be incorporated in new subpart E. According to the commenter, this will ensure that sufficient notice is provided to residents before elections, and that elections are held on a fair and frequent basis.

HUD Response. As noted in the response to the previous comment, HUD has revised the proposed rule to adopt several of the relevant provisions of 24 CFR 964.130, which describes the election procedures for public housing resident councils.

Comment: Final rule should require the election of resident board members. Several commenters wrote that the final rule should require that resident board members be elected. According to the commenters, this will ensure that the board membership process is fair and democratic.

HUD Response. The statute provides that the decision to allow an elected resident board member is to be made locally. Section 2(b) does not establish a right to an elected resident board member, it merely allows for the possibility and requires that this choice become part of the PHA Plan. The purpose of informing residents of the fact that a resident board member may be elected is to allow residents to petition their PHAs to allow elected resident board members. In the end, however, the decision to allow elected resident board members is a local one.

H. Comments Regarding § 964.425—Exceptions

Proposed § 964.425 describes the exceptions to the resident board membership requirements. Specifically, the proposed rule exempts PHAs that are not governed by a PHA board, or are located in a State that requires board members to serve on a full-time salaried basis. The proposed rule also provides that PHAs with less than 300 public housing units are exempted from the resident board member requirement, provided the PHA has: (1) Provided reasonable notice to the resident advisory board of the opportunity for residents to serve on the governing board; and (2) not been notified of the intention of any resident to participate on the governing board within a reasonable time of the resident advisory board receiving the notice.

As noted in Section II of this preamble, this final rule reorganizes the listing of the exceptions to the statutory resident board member requirement. The description of the exception for small PHAs is still located in § 964.425. The other two exceptions—for PHA boards with full-time salaried members and for PHAs with no governing boards—have been relocated to § 964.405 (which describes the scope of the applicability of the resident board member requirement).

Comment: Reasonable notice should be provided to all residents. Several commenters wrote that a PHA should be

required to provide reasonable notice to all residents, not just the resident advisory board. One commenter wrote that the notice could accompany the monthly rent notifications, or the mailings regarding the PHA Plan process. Another commenter suggested that the notice could be posted at each public housing site and rental office.

Several commenters were concerned that PHAs that do not administer public housing programs under the 1937 Act (but do administer Section 8 assistance) might not be able to comply with the notification requirement. According to these commenters, such agencies do not have resident advisory boards.

HUD Response. HUD has not incorporated this request into the final rule. Section 2(b) of the 1937 Act specifies that notice must be given to the resident advisory board. Section 2(b) does not require or provide for the notification of all public housing residents. The procedures for ensuring that residents are made aware of the opportunity to participate on the PHA board should be determined locally (including how the resident advisory board will notify the residents of such opportunities, and when that notice needs to be given).

In response to the commenters concerned about the ability of PHAs that do not administer 1937 Act public housing programs to comply with the notification requirements, HUD again notes that its interim rule on PHA Plans (February 18, 1999; 64 FR 8170) requires that all PHAs establish resident advisory boards (see § 901.13(b) of the interim rule).

Comment: Final rule should specify what constitutes a "reasonable time". To qualify for exemption, small PHAs must also provide residents with a "reasonable time" to express their intention to participate on the governing board. Several commenters suggested that the final rule should specify what constitutes a "reasonable time." Two commenters recommended that the rule provide for a 45-day period. Another commenter suggested a 120-day period. One of the commenters suggested that PHAs provide residents with written procedures for indicating their interest in serving on the governing board.

HUD Response. In developing this final rule (and the June 23, 1999 proposed rule), HUD wished to provide PHAs with flexibility in implementing the resident board member requirement. The language of this final rule tracks the statutory language of section 2(b) and requires that PHAs must provide residents with a reasonable time to express their interest in serving on the PHA governing board. HUD does not

believe it would be appropriate to dictate by regulation exactly how much time is "reasonable," nor what procedures should govern resident expressions of interest. HUD defers to PHAs to make these determinations on a local basis. However, HUD agrees that a minimum time period should be established to ensure that residents have adequate time to indicate their interest. Accordingly, this final rule provides that the "reasonable time" provided by PHAs must not be less than 30 days.

Comment: HUD should establish additional exemptions. Several commenters advocated that HUD expand the list of exceptions to the resident board membership requirement. For example, one commenter recommended that HUD should exempt PHAs with less than 500 public housing units. Two commenters suggested that the final rule exempt PHAs already subject to State or local resident board membership requirements. Another commenter wrote that HUD should extend the exemption for full-time salaried PHA boards to include part-time board members. Several commenters advocated the exemption of PHAs that do not administer public housing or Section 8 programs as their principal means of providing housing assistance.

Several commenters wrote that PHA boards consisting of elected officials (such as city council members or county commissioners) should not be subject to the resident board membership requirements. These commenters noted that these officials often take oaths of office and are, therefore, subject to a different standard of accountability than a public housing resident. Other commenters advocated an exemption for elected PHA boards.

HUD Response. Section 2(b) provides clear and narrow exceptions to the resident board member requirement. The statute does not provide HUD with the authority to establish additional exceptions.

Comment: Small PHAs should be required to comply with resident board membership requirement. One commenter wrote that all PHAs, even those with under 300 units, should be required to include a resident member on the governing board. Another commenter urged that HUD not revise the proposed rule to expand the list of exceptions.

HUD Response. The statutory language of section 2(b) explicitly exempts small PHAs with less than 300 units from the resident board membership requirement if they follow certain procedures. Accordingly, HUD does not have the statutory authority to

adopt the suggestion made by the commenter.

I. Comments Regarding § 964.430—Nondiscrimination

Proposed § 964.430 provides that a "resident board member is a full member of the governing board." Further, proposed § 964.430(c) provides that a PHA board "may not exclude any resident board member from participating in any matter before the governing board on the grounds that the resident board member's lease with the [PHA] either results or may result in a conflict of interest, unless the matter is clearly applicable to the resident board member only in a personal capacity."

Comment: State or local conflict of interest requirements should be applicable to resident board members. Several commenters objected to the proposed conflict of interest language quoted above. According to these commenters, the proposed rule is not strict enough, and would allow residents to unfairly benefit from their policy making position. The commenters suggested that State and local conflict of interest requirements, which apply to the other members of the PHA board, should also be applicable to resident board members.

HUD Response. Section 2(b) of the 1937 Act makes clear that resident board members must be treated as full members of the PHA governing board. In implementing this requirement, HUD has attempted to address possible conflicts of interest issues by providing a resident may not take part in any decisions or activities that relate specifically to that resident in a personal capacity. However, section 2(b) is clear that a resident must not be precluded from board membership and activities based on his or her status as a resident of public housing or a recipient of Section 8 tenant-based assistance.

Comment: Suggested clarification to conflict of interest provision. One commenter suggested that the language of proposed § 964.430(c) be clarified to provide that a resident may vote on all matters of general applicability, including issues regarding rents. The commenter recommended the following addition to the proposed regulatory language: "* * * unless the matter is clearly applicable to the resident board member only in a personal capacity which applies uniquely to that member and not generally to residents or to a subcategory of residents" (emphasis supplied to indicate additional language). Another commenter suggested that HUD issue additional guidance regarding the conflict of

interest governing resident participation on a PHA board. The commenter wrote that such guidance would prevent misinterpretation of the conflict of interest provisions and facilitate compliance with these requirements.

HUD Response. HUD has revised the rule generally to adopt the language suggested by the first commenter. HUD agrees with the commenter that the addition of this language clarifies the conflict of interest requirements, and will assist PHAs and residents to comply with these provisions. HUD believes that the regulatory language of revised § 964.430(c) makes clear that a resident board member may take part in any matters before the board so long as that matter is not applicable to that resident in a personal capacity. A resident board member may only be excluded from participation in a matter that uniquely applies to that resident, and the resident may be involved in any matter that is generally applicable to residents.

HUD wishes to reiterate that having a lease with the PHA does not constitute a conflict of interest for the resident board member. If such a lease could be viewed as constituting a conflict of interest, the intent of section 2(b) would be frustrated. Under such an interpretation, no resident with a lease with the PHA would be able to serve on its governing board. HUD also wishes to clarify that, for similar reasons, the board member's status as a public housing resident or recipient of Section 8 tenant-based assistance does not constitute a conflict of interest. Such an interpretation would prevent residents directly assisted by the PHA from serving on the governing board.

In response to the second commenter, HUD may issue additional guidance regarding the conflict of interest provisions (or other provisions of this final rule) as necessary. Such guidance may be issued in a handbook, **Federal Register** notice, or other appropriate means.

Comment: Resident participation should be limited to Federal programs. Several commenters noted that PHAs administer non-Federal housing programs. These commenters recommended that the final rule limit the participation of the resident board members to those decisions regarding Federal assistance.

HUD Response. This final rule clarifies that a resident board member must be allowed to take part in decisions related to the administration, operation, and management of Federal public housing programs and Section 8 tenant-based rental assistance programs. This rule does not extend to matters

that: (1) Exclusively relate to other types of housing assistance (such as State financed housing assistance); or (2) do not involve housing assistance (as may occur where the city or county governing body also serves as the PHA board). However, a PHA may choose to expand the scope of resident member involvement to matters not covered by this rule.

J. Comments Regarding § 964.435—Initial Implementation of Resident Board Member Requirement

Proposed § 964.435 provides that if the PHA board consists of appointed board members, the first seat on the board that becomes open on or after October 1, 1999, would have to be filled by an eligible resident. If the board consists of elected board members, the chief executive officer of the unit of general local government whose jurisdiction coincides most directly with the jurisdiction of the PHA would have to create at least one additional seat on the board, by December 31, 1999, and would have to fill that seat with an eligible resident. In the case of multi-jurisdictional PHAs, the chief executive officers of each unit of general local government that comprises the jurisdiction of the PHA would be jointly responsible for creating and filling any additional seats.

HUD received a number of public comments on the initial implementation procedures described in proposed § 964.435. Several of these commenters raised the Federalism concerns summarized in section III.C of this preamble. As noted, HUD has responded to these concerns by not including § 964.435 in the final rule. In developing the regulations implementing section 2(b), HUD wished to grant PHAs and localities flexibility in complying with the resident board member requirement. Rather than specifying regulatory procedures for the appointment of residents to a PHA board, HUD has decided to leave these procedures to each locality. HUD is mindful of the implementation difficulties presented by the statutory resident board member requirement, and encourages the development of local solutions to these problems.

Several commenters raised questions or issues about the specific procedures described in proposed § 964.435. As a result of the decision not to include § 964.435 in the final rule, these public comments are no longer applicable to this final rule and are not discussed in the summary below.

Comment: May a PHA choose to elect a resident board member in a jurisdiction where PHA board members

are typically appointed? One commenter posed this question.

HUD Response. The statutory language of section 2(b) is clear—residents directly assisted by the a PHA may elect a resident board member, if provided for in the PHA Plan. A PHA could, therefore, choose to elect a resident board member in a jurisdiction where PHA board members are usually appointed. The winner of the election would then be appointed and serve as the statutorily required board member under section 2(b). However, the choice to hold such an election would need to be provided for in the PHA Plan.

Comment: HUD should postpone implementation date until July 1, 2000. Several commenters wrote that the implementation dates provided in the proposed rule are unrealistic. The commenters noted that many jurisdictions will have to revise their local laws in order to permit the appointment of a resident board member. The commenters suggested that HUD delay the implementation dates to permit localities to conform their laws governing the selection and appointment of board members to the requirements of section 2(b). Several commenters proposed an implementation date of July 1, 2000, which reflects the probable effective date of the necessary legislation.

HUD Response. While HUD has decided not to include § 964.435 in the final rule, section 503 of the Public Housing Reform Act is clear that the amendments made by the statute, including the resident board member requirement, will take effect beginning on October 1, 1999. HUD believes that implementation of section 2(b) should occur as soon as possible after this date if a PHA is not already in compliance. Congress provided a one year period from enactment to implementation to provide PHAs and localities with adequate notice of the resident board member requirements.

Comment: Implementation should be "phased-in". Many commenters suggested that HUD "phase-in" implementation of the board membership requirement. These commenters wrote that the final rule should allow PHAs to implement the new requirement at some point during a specified period (the next 5 board vacancies, 2 years, etc.) These commenters feared that the proposed implementation schedule might force the removal of the most knowledgeable PHA board member, in order to make room for a resident.

HUD Response. HUD has not adopted the change suggested by these commenters. As noted in the response

to the previous comment, the resident board member requirement becomes effective beginning October 1, 1999. HUD believes that implementation of section 2(b) should occur as soon as possible after this date. All covered PHAs must take the steps necessary to comply with this requirement if they have not done so already. It has been one year since section 2(b) became law, providing States and PHAs time to address the concerns this provision raises and to determine how best to implement this statutory requirement.

Comment: Implementation date should not be postponed. One commenter advocated that HUD adopt the proposed implementation schedule without change. The commenter wrote that implementation should not be delayed.

HUD Response. HUD agrees with this commenter that implementation of the resident board member requirement should occur as soon as possible after October 1, 1999. All covered PHAs must take the steps necessary to comply with this requirement if they have not done so already. As noted above, States and PHAs have had time to address the concerns raised by section 2(b) and to determine how best to implement this statutory requirement.

K. Comments Regarding § 964.440—Filling an Open Board Member Seat

Proposed § 964.440 describes the procedures governing the filling of an open board seat by a resident. HUD received a number of public comments on proposed § 964.440. Several of these commenters raised the Federalism concerns summarized in Section III.C of this preamble, above. As noted, HUD has responded to these concerns by not including § 964.440 in the final rule. In developing the regulations implementing section 2(b), HUD wished to grant PHAs and localities with flexibility in complying with the resident board member requirement. Rather than specifying regulatory procedures for the appointment of residents to a PHA board, HUD has decided to leave these procedures to each locality. HUD is mindful of the implementation difficulties presented by the statutory resident board member requirement, and encourages the development of local solutions to these problems.

Several commenters raised questions or issues about the specific procedures described in proposed § 964.440. As a result of the decision not to include § 964.440 in the final rule, these public comments are no longer applicable to this final rule and are not discussed in this summary.

IV. Findings and Certifications

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Therefore, under HUD's regulations at 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act

The Secretary has reviewed this final rule before publication and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule implements section 505 of the Public Housing Reform Act (42 U.S.C. 1437), which requires with certain exceptions, that the board of directors or similar governing body of a PHA contain not less than one member who is directly assisted by the PHA. Section 505 and this final rule provide flexibility for smaller PHAs through an exception for PHAs that have less than 300 public housing units. Consequently, HUD does not believe that this final rule will have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) requires Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This final rule does not impose, within the meaning of the UMRA, any Federal mandates on any State, local, or tribal governments or on the private sector.

Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612 (captioned "Federalism"), has determined that the policies contained in this final rule will have federalism implications. Specifically, the requirement that the membership of the board of directors or similar governing body of a PHA must contain not less than one member who is directly assisted by the PHA will have direct effects on any State or local laws that govern the organization of PHAs.

HUD provided copies of the June 23, 1999 proposed rule to each of the 50 State Attorney Generals and specifically invited their comments on the proposed regulatory requirements. HUD has also prepared and submitted to the Office of Management and Budget a Federalism Assessment that addresses the Federalism implications raised by this rulemaking.

Regulatory Planning and Review

The Office of Management and Budget has reviewed this rule under Executive Order 12866 (captioned "Regulatory Planning and Review") and determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection during regular business hours (7:30 a.m. to 5:30 p.m.) at the Office of the General Counsel, Rules Docket Clerk, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

List of Subjects in 24 CFR Part 964

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

For the reasons discussed in the preamble, HUD amends 24 CFR part 964 as follows:

PART 964—TENANT PARTICIPATION AND TENANT OPPORTUNITIES IN PUBLIC HOUSING

1. The authority citation for 24 CFR part 964 is revised to read as follows:

Authority: 42 U.S.C. 1437, 1437d, 1437g, 1437l, 1437r, 1437t, and 3535(d).

2. Amend § 964.3 as follows:

- a. Revise paragraph (a);
- b. Redesignate paragraph (e) as paragraph (f); and
- c. Add new paragraph (e).

The addition and revision to § 964.3 read as follows:

§ 964.3 Applicability and scope.

(a) The policies and procedures contained in this part apply to any PHA that has a Public Housing Annual Contributions Contract (ACC) with HUD. This part, except for subpart E, does not apply to PHAs with housing assistance payments contracts with HUD under section 8 of the U.S. Housing Act of 1937.

* * * * *

(e) Subpart E of this part implements section 2(b) of the United States

Housing Act of 1937 (42 U.S.C. 1437), which provides for resident membership on the board of directors or similar governing body of a PHA.

Subpart E applies to any public housing agency that has a public housing annual contributions contract with HUD or administers tenant-based rental under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

* * * * *

§ 964.110 [Removed]

2. Remove § 964.110.

3. Add subpart E to read as follows:

Subpart E—Resident Board Members

Sec.

- 964.400 Purpose.
- 964.405 Applicability.
- 964.410 Additional definitions.
- 964.415 Resident board members.
- 964.420 Resident board member may be elected.
- 964.425 Small public housing agencies.
- 964.430 Nondiscrimination.

Subpart E—Resident Board Members

§ 964.400 Purpose.

The purpose of this subpart is to implement section 2(b) of the United States Housing Act of 1937 (42 U.S.C. 1437f).

§ 964.405 Applicability.

(a) *General.* Except as described in paragraph (b) of this section, this subpart applies to any public housing agency that has a public housing annual contributions contract with HUD or administers tenant-based rental assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

(b) *Exceptions.* The requirements of this subpart do not apply to a public housing agency that is:

- (1) Located in a State that requires the members of a governing board to be salaried and to serve on a full-time basis; or
- (2) Not governed by a governing board.

§ 964.410 Additional definitions.

The following additional definitions apply to this subpart only:

Directly assisted. Directly assisted means a public housing resident or a recipient of housing assistance in the tenant-based section 8 program. Direct assistance does not include any State financed housing assistance or Section 8 project-based assistance.

Eligible resident. An eligible resident is a person:

- (1) Who is directly assisted by a public housing agency;
- (2) Whose name appears on the lease; and

(3) Is eighteen years of age or older.

Governing board. Governing board means the board of directors or similar governing body of a public housing agency.

Resident board member. A resident board member is a member of the governing board who is directly assisted by that public housing agency.

§ 964.415 Resident board members.

(a) *General.* Except as provided in §§ 964.405(b) and 964.425, the membership of the governing board of each public housing agency must contain not less than one eligible resident board member.

(b) *Resident board member no longer directly assisted.* (1) A resident board member who ceases to be directly assisted by the public housing agency is no longer an "eligible resident" as defined in § 964.410.

(2) Such a board member may be removed from the PHA board for that cause, where such action is permitted under State or local law.

(3) Alternatively, the board member may be allowed to complete his/her current term as a member of the governing board. However, the board member may not be re-appointed (or re-elected) to the governing board for purposes of serving as the statutorily required resident board member.

(c) *Minimum qualifications for board membership.* Any generally applicable qualifications for board membership also apply to residents, unless the application of the requirements would result in the governing board not containing at least one eligible resident as a member. Further, PHAs and localities may not establish eligibility requirements for board membership that are solely applicable to residents.

§ 964.420 Resident board member may be elected.

(a) *General.* Residents directly assisted by a public housing agency may elect a resident board member if provided for in the public housing agency plan, adopted in accordance with 24 CFR part 903.

(b) *Notice to residents.* The public housing agency must provide residents with at least 30 days advance notice for nominations and elections. The notice should include a description of the election procedures, eligibility requirements, and dates of nominations and elections. Any election procedures devised by the public housing agency must facilitate fair elections.

§ 964.425 Small public housing agencies.

(a) *General.* The requirements of this subpart do not apply to any public housing agency that:

(1) Has less than 300 public housing units (or has no public housing units):

(2) Has provided reasonable notice to the resident advisory board of the opportunity for residents to serve on the governing board;

(3) Has not been notified of the intention of any resident to participate on the governing board within a reasonable time (which shall not be less than 30 days) of the resident advisory board receiving the notice described in paragraph (a)(3) of this section; and

(4) Repeats the requirements of paragraphs (a)(2) and (a)(3) of this section at least once every year.

(b) *Public housing agencies that only administer Section 8 assistance.* A public housing agency that has no public housing units, but administers Section 8 tenant-based assistance, is eligible for the exception described in paragraph (a) of this section, regardless of the number of Section 8 vouchers it administers.

(c) *Failure to meet requirements for exception.* A public housing agency that is otherwise eligible for the exception described in paragraphs (a) and (b) of this section, but does not meet the three conditions described in paragraphs

(a)(2) through (a)(4) of this section, must comply with the requirements of this subpart.

§ 964.430 Nondiscrimination.

(a) *Membership status.—(1) General.* A resident board member is a full member of the governing board.

(2) *Resident participation must include matters regarding Federal public housing and Section 8 tenant-based assistance.* A resident board member must be allowed to take part in decisions related to the administration, operation, and management of Federal public housing programs and Section 8 tenant-based rental assistance programs. This rule does not extend to matters that:

(i) Exclusively relate to other types of housing assistance (such as State financed housing assistance); or

(ii) Do not involve housing assistance (as may occur where the city or county governing body also serves as the PHA board).

(3) *Public housing agency may expand scope of resident participation.* A public housing agency may choose to expand the scope of resident member involvement to matters not required under paragraph (a)(2) of this section.

(b) *Residence status.* A governing board may not prohibit any person from serving on the governing board because that person is a resident of a public housing project or is assisted under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

(c) *Conflict of interest.* A governing board may not exclude any resident board member from participating in any matter before the governing board on the grounds that the resident board member's lease with the public housing agency, or the resident board member's status as a public housing resident or recipient of Section 8 tenant-based assistance, either results or may result in a conflict of interest, unless the matter is clearly applicable to the resident board member only in a personal capacity and applies uniquely to that member and not generally to residents or to a subcategory of residents.

Dated: October 14, 1999.

Harold Lucas,

Assistant Secretary for Public and Indian Housing.

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