

## **Top Issues in Revision 4 of the RAD Notice**

On September 5, 2019, HUD released Revision 4 of the RAD Notice (**Notice H-2019-09 PIH 2019-23 (HA)**) (the “Notice”). The Notice includes changes in eligibility and selection criteria and clarifications of existing instructions.

Detailed below are the most significant changes organized by First Component, Second Component, and a discussion of changes made to the RAD for PRAC provisions that differ from the drafting table version published February 2019.

The Notice is effective immediately, except with respect to changes in the project eligibility and project selection criteria, which are subject to a 30-day comment period. Comments on the revised notice are due October 1 and can be submitted to [RAD@hud.gov](mailto:RAD@hud.gov). Any new waivers or alternative requirements will take effect 10 days after publication in the Federal Register.

Items identified with a “\*\*\*” are largely statements of existing HUD practice or incorporate information from guidance or notices that HUD issued after Rev 3.

### **RAD First Component Changes**

1. Loosened CNA Requirements for special non-FHA Transactions
  - a. CNA e-tool narrative and financial model are no longer required if:
    - i. the annual deposit to the replacement reserve is at least \$450/unit (**or a lower amount** if justified by an alternative needs assessment acceptable to HUD, typically one performed for an investor or lender) **AND EITHER**
      1. The project will be new construction or financed with 9% credits **or**
      2. The project has been newly constructed or financed with 9% LIHTC within the last five years.
  - b. Projects financed with 4% LIHTC may omit the narrative component of the CNA e-tool.
  - c. When the total assisted units at the project will constitute less than 20% of the total units at the project, neither component is required.

2. Adjusted Faircloth Calculation for De Minimis Units –The reduction in a PHA’s Faircloth Limit includes any units removed from the inventory as de minimis units. *This change retroactively applies to all completed RAD conversions.* Any PHA that wishes to retain those de minimis units under its Faircloth Limit must contact HUD (PIHOCI@hud.gov) within 90 days of publication of RAD Notice H-2019-09 PIH-2019-23 (HA).
3. \*\* Streamlined Financing Plan for Last 50 Public Housing Units –PHAs with 50 or fewer public housing units that are closing out their public housing program may submit a streamlined financing plan that eliminates the scope of work, proposed financing, and market study and allows for a modified capital needs assessment, environmental review, sources and uses, and operating pro-forma.
4. \*\* Transfer of Assistance
  - a. Transfers at Conversion- If residents will remain in the converting project until the rehabilitation or construction is complete, the PHA and Project Owner must submit a request with their financing plan to either a) enter into the HAP contract at the close of construction financing and execute a Master Lease, or b) with HUD approval, enter into a Delayed Conversion Agreement.
  - b. Transfers at Execution of the HAP Contract- PHAs must submit a brief narrative in that financing plan that describes their plans for the converting property and at closing execute and record a 20-year “alternative use agreement” in a form approved by HUD.
  - c. Transfers after Conversion- Transfers of assistance may occur at any time with HUD approval. This expands possibilities for transfer within the first 10 years after conversion. PHAs must ensure that there will be sufficient resources available to the PHA to effectuate the transfer and meet the PHA’s obligation to provide tenant-based vouchers to those families who want them.
5. Increased Rent for PBRA Conversions in Opportunity Zones– HUD may increase RAD rents, up to \$100 per unit per month, for any PBRA conversion that (a) is located in a designated Opportunity Zone and (b) involves new construction or substantial rehabilitation. Increases are allocated on a first-come first-served basis.
6. Site Specific Utility Allowances for PBV Projects - PHAs may elect to establish a site-specific Utility Allowance for any Covered Project. The Utility Allowance shall be calculated consistent with Notice H 2015-04 unless PIH promulgates guidance specific to the PBV program. The Project Owner may carry out all of the responsibilities associated with Notice H 2015-04, but the PHA must ensure that the Utility Allowance is calculated

correctly. This waiver and alternative requirement shall also apply to non-RAD PBV units located at the Covered Project.

7. Uniform Treatment of RAD and Non-RAD PBV in Same Converting Public Housing Project – Any non- RAD PBV units located in a covered project shall be subject to the same waivers and alternative requirements as the RAD PBV units, including relocation, right to return, phase-in of tenant rent increases, termination and grievance, right to operate a resident organization, EID exclusion, under occupied units, etc.
8. Additional Resident Meetings Before Submission of Financing Plan – PHAs must hold a resident meeting after receiving a CHAP but before requesting a concept call to determine the project plans are sufficient to submit a financing plan. PHA must also hold an additional resident meeting after the concept call and before submitting the financing plan. Upon issuance of the RCC, the PHA must notify residents that conversion of the project has been approved.
9. Bi-Annual Adjustments to RAD Rent Base Year – Every two years, beginning January 1, 2021, the RAD Rent Base Year shall be reset, based on the funding levels of the immediately preceding fiscal year.
10. PHA Pooling – Two or more PHAs may pool resources or capacity with each other pursuant to a contractual agreement among the PHAs towards the effective conversion of assistance of a public housing project. PHA pooling may include contributing funds, foregoing anticipated funding, rent bundling, and transferring land currently under a DOT.

[This memo continues on the following page.]

## **Second Component Changes**

1. **\*\* Davis Bacon Wage Requirements** – are only triggered when construction or rehabilitation is performed on 9 or more units that were not previously rent assisted or restricted, and only when those units will be newly assisted as a result of the conversion. Previously the construction or rehabilitation activities alone triggered the requirements.
2. **Transfers of HAP Assistance** – For Mod Rehab PBRA transfers to a new site, the new HAP may be executed when construction financing closes and owners may use Section 8 Pass-Through funding to obtain subsidy during construction. Additionally, previously only natural disasters qualified for exemption from the general ten year prohibition on post-conversion transfers; however, HUD now recognizes eminent domain and unforeseen circumstances, and will otherwise permit transfers if approved by HUD.
3. **CNA Requirements** – Conversions involving FHA financing must use the e-tool. No CNA is required for non-FHA transactions, and the equity provider may determine the scope of work and reserve deposits, provided the annual deposit to the replacement reserve account is at least \$450/unit.
4. **No Rescreening of Tenants upon Conversion** – Current residents are grandfathered in regardless of post-conversion income eligibility or income targeting.
5. **Tenant Relocation and Right to Return** – HUD adds more specificity about tenant notice requirements and URA applicability, particularly when CDBG or HOME funds are used in connection with a conversion.
6. **Retroactive Conversion (Mod Rehab)** – Retroactive conversions to PBRA are not allowed.
7. **HAP Contract Lengths (Mod Rehab PBV)** – The initial term is increased from 15 to 20 years.
8. **Initial Contract Rent Setting (Mod Rehab)** – PBRA contracts may now reflect “as is” and “post rehab” rents, where post rehab rents are equal to the lesser of RCS rents or 110% of applicable FMRs net of utility allowances.
9. **Choice Mobility (Mod Rehab PBRA)** – For owners intending to offer choice mobility to residents, HUD requires disclosure in the Conversion Plan and inclusion of certain prescribed language in the House Rules about tenant-based rental assistance.
10. **Preferences Following SRO Conversions (Mod Rehab)** – HUD permits owners and PHAs to adopt preferences for persons who qualify for voluntary supportive services, however there may be no discrimination based on the type of disability.

## **RAD for PRAC** **Changes from Drafting Table Version**

1. **Both PBV and PBRA Conversions Are Available, However PBV Has Caveats** – HUD cautions that PBV conversions are expected to take longer due to added complexity and to allow for transfer of funds across platforms. HUD also has discretion to prioritize processing and approval of projects with immediate capital needs, third party funding sources, and PBRA conversions.
2. **Contract Effective Date – PBV Delay** – While PBRA Contracts may generally be implemented 30 days post-closing, PBV Contracts are only effective upon the expiration of the PRAC. Additionally, to allow for orderly transfers of funds to PBV, all closing conditions must be satisfied and all transactional documents must be executed and held in escrow for 90 days before the PRAC expires.
3. **Davis Bacon Wage Requirements** – are only triggered when construction or rehabilitation is performed on 9 or more units that were not previously rent assisted or restricted, and only when those units will be newly assisted as a result of the conversion.
4. **Pre-Conversion Modification of PRAC Rents** – In limited circumstances, HUD may modify PRAC rents outside of the renewal process and prior to conversion, taking into consideration the project's budget and funds available in the Housing for the Elderly Account. For instance, HUD mentions those situations where a CNA was unavailable during the most recent renewal, but a mid-term rent adjustment is necessary to update reserve for replacement deposits up to one year before conversion.
5. **Restrictions on Net Proceeds** – HUD heard our concerns that owners should be able to recover legitimate costs incurred on behalf of the property, and now only restricts proceeds that are net of certain fees and transaction costs related to the sale, any unrecovered and previously undrawn seller equity (on a pro-rata basis), and any identity of interest loans or advances used to address project or resident needs.
6. **Elderly Housing Use Agreement** – HUD responded to our request for relief from use restrictions in appropriate circumstances, and agrees to modify or terminate the Use Agreement to facilitate a transfer of assistance, or if there is a demonstrated financial burden caused by insufficient appropriations. Additionally, the Use Agreement term may not extend more than 60 years beyond the start of the Capital Advance Use Agreement.
7. **Transfers of Assistance** – HUD also heard our concerns about additional circumstances justifying a transfer and now recognizes eminent domain and other unforeseen circumstances in addition to natural disasters, and HUD may also otherwise approve transfers as may be necessary. However, residents at the original location shall not loose

rental assistance as a result of the transfer, and PBV families at HAP termination have statutory rights to TPVs, although HUD cautions that this does not trigger additional TPV assistance from HUD.

8. Ownership and Control – HUD now recognizes non-profits affiliated with a public agency, whereas the prior draft required that the non-profit be in control.
9. CNAs must be consistent with any submitted previously in support of rent adjustment requests, although the report may include discretionary items. HUD also extended CNAs' applicability by 6 months, permitting submission up to one year following completion or update of the report.
10. Operating Reserve Distributions – While HUD approval to withdraw funds is not required, the property must be in a positive surplus cash position and the Operating Reserve must meet minimum funding requirements.

Please do not hesitate to contact any of the R&C attorneys with questions or concerns on this revised notice. For more information about the attorneys at Reno & Cavanaugh, please follow [this link](#).

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