



WORKING PAPER

Utility Allowances in Federally Subsidized Multifamily Housing

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I. Introduction

There are two main reasons energy use in subsidized housing matters for the Federal Government. First, from an environmental standpoint, inefficient buildings and the inefficient use of utilities increase greenhouse gases and other pollutants in the environment and contribute to global warming. On a more practical level, energy costs represent a substantial share of the U.S. Department of Housing and Urban Development's (HUD's) budget. In fiscal year 2011, HUD estimated that total expenditures on utilities in its subsidized housing programs—Public Housing, Project Based Rental Assistance (PBRA), and Housing Choice Vouchers (HCV)—were \$7.1 billion, which represented a 4.9 percent increase from 2009 and was roughly 14 percent of its total annual budget.¹ This is the most HUD has ever spent on utilities, and it reflects an overall trend of higher utility costs in HUD's portfolio.² Moreover, the Energy Policy Act of 2005 requires that HUD take steps to promote energy efficiency in its housing stock.³ In

¹ U.S. DEP'T OF HOUS. & URBAN DEV., AFFORDABLE GREEN: RENEWING THE FEDERAL COMMITMENT TO ENERGY-EFFICIENT, HEALTHY HOUSING 9 (2012) [hereinafter AFFORDABLE GREEN]. The HUD budget was estimated to be \$50,254 billion according to HUD's FY 2012 Budget Report http://portal.hud.gov/hudportal/documents/huddoc?id=2012BudgetFinal_03_07_Web.pdf. Unfortunately, more recent published energy cost statistics are not available.

² See AFFORDABLE GREEN, *supra* note 1, at 9. Costs have likely risen even more from the date of the report's publication. See U.S. ENERGY INFO. ADMIN., SHORT-TERM ENERGY AND SUMMER FUELS OUTLOOK 9 (2014); Terrence P. Jeffery, *Electricity Price Index Soars to New Record at Start of 2014*; U.S. Electricity Production Declining, CNS NEWS (Feb. 21, 2013, 3:24 PM), <http://cnsnews.com/news/article/terrence-p-jeffrey/electricity-price-index-soars-new-record-start-2014-us-electricity>; David J. Unger, *Electricity prices on the rise. Higher bills to come?*, CHRISTIAN SCI. MONITOR (July 23, 2013), <http://www.csmonitor.com/Environment/Energy-Voices/2013/0723/Electricity-prices-on-the-rise.-Higher-bills-to-come>; The Housing Choice Voucher (HCV) program costs HUD more per unit for utilities than does any other HUD housing program according to Evan White, Utilities in Federal Subsidized Housing: A Report on Efficiency, Utility Savings, and Consistency 14 (June 2012) (unpublished M.P.P. thesis, University of California, Berkeley) (available at http://aceee.org/files/pdf/resource/white_utilities_in_federally_subsidized_housing_2012.pdf).

³ See Energy Policy Act of 2005, § 154, 42 U.S.C. § 15842 ("The Secretary of Housing and Urban Development shall develop and implement an integrated strategy to reduce utility expenses through cost-effective energy conservation and efficiency measures and energy efficient design and construction of public and assisted housing. The energy strategy shall include the development of energy reduction goals and incentives for public housing agencies. The Secretary shall submit a report to Congress, not later than 1 year after August 8, 2005, on the energy strategy and the actions taken by the Department of Housing and Urban Development to monitor the energy usage of public housing agencies and shall submit an update every 2 years thereafter on progress in implementing the strategy."); § 151, 42 U.S.C. § 1437g(d)(1)(K)–(L) (requiring that parts of the Operating Fund be directed to energy-

2012 HUD formally declared the creation of energy-efficient housing as one of its top priorities.⁴

Despite the value to HUD, these incentives, and the direct mandate to reduce utility costs, HUD's utility billing arrangement system is designed in a way that neither owners nor tenants often have clear incentives to reduce utility consumption. In this report, we analyze the utility consumption incentives created by the statutes, regulations, and guidance governing the four largest rental subsidy programs: Public Housing, Project-based Section 8, Housing Choice Vouchers, and the Low Income Housing Tax Credit- and how these policies can be modified to encourage tenants and property-owners to reduce utility costs.

Split Incentives:

Regardless of whether housing is federally subsidized or market-rate, there is a split incentive problem with respect to utility costs in multifamily housing. On the one hand, when an owner pays for the utilities, tenants do not realize the cost of their consumption and are more likely to over-consume. In a traditional market-rate property, renters may be concerned that they will bear at least a portion of this cost as owners try to increase rents to account for higher utility costs. In reality, an owner's ability to pass additional costs on to the tenant in the form of higher rent may be minimal because a profit-maximizing owner may have already priced the rent for that unit at market value. Another option is for owners to make their properties as efficient as possible to ensure utility consumption is more efficient. This would result in buildings that are more efficient than before but still have unnecessary utility costs, because tenants have no incentive to limit utility usage. In this case, a profit-maximizing owner will install individual

use reduction); § 152, 42 USC § 15841 (concerning the requirement for PHAs to purchase energy efficient appliances); § 153, 42 U.S.C. § 12709 (concerning energy efficiency in the HOPE VI program).

⁴ AFFORDABLE GREEN, *supra* note 1, at i. Subsequent to this declaration, the Presidential Climate Action Plan reiterated a federal goal to reduce energy consumption in subsidized housing <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>

metering or submetering in the property and have the utility charge tenants directly for their own utility costs if the cost of doing so is less than utility costs over time.

On the other hand, when tenants pay for their own utilities in a market-rate property, they are incentivized to consume less because they realize all of the costs of their consumption. However, owners are less motivated to make energy efficient upgrades to their properties, because the tenants bear most additional costs associated with inefficient systems. Owners may still care about the energy efficiency of their building in a perfectly competitive market because they compete for tenants, and, if a given owner's building is less efficient, there will either be less demand for that property or rents will need to be discounted to account for these higher costs. However, in markets where vacancy rates are low, the owner may not face such pressure. In addition, it is often difficult for renters to obtain information about utility costs, which creates a potential information asymmetry that inhibits a renter's ability to account for utility costs while searching for an apartment.

Split Incentives and Rental Subsidies:

This split incentive problem is even more complicated for HUD-subsidized properties. To the extent that HUD allows its subsidy to increase in accordance with utility costs increases, such as in the Project-Based Section 8 and Public Housing programs, a landlord has little incentive to reduce costs.⁵ Such reimbursement structures shield owners from financial risk due to tenant overconsumption of utilities and, in doing so, eliminate the incentive these owners have to submeter or individually meter their properties, make energy efficient upgrades, or manage their

⁵ Subsidies to landlords increase proportionally with increased utility costs in any case in which there are utility allowances, in the PBRA program with budget-based rental adjustments, and in the Public Housing program (theoretically, if the operating fund was adequately funded). In the PBRA program, rents are adjusted yearly by a factor that includes utility costs for buildings that use the Operating Cost Adjustment Factor or Annual Adjustment Factor. In the HCV program, if the landlord pays for the utilities, then there is no increase if utility costs increase.

properties efficiently. Another factor making the split incentive more complicated is that there are no incentives for owners to ensure utility costs are low to attract tenants, because eligible low-income tenants actually compete for subsidized units. There are often waiting lists for existing subsidized units,⁶ tenants in some markets have difficulty finding an owner who will accept their voucher subsidy,⁷ and subsidized housing targets low-income households who may face higher information costs than do traditional market-rate tenants. Finally, when tenants do pay for their utilities, they are often subject to a lack of incentive by the owner to make upgrades, and they can also be penalized by a reduction in their utility allowance in the future period. These dynamics may lead to higher utility costs in subsidized housing than in similar market-rate properties.

Our analysis suggests that these HUD subsidy programs are designed such that the tenants and HUD ultimately bear the majority of utility costs. On the contrary, the LIHTC program, which is governed by the Internal Revenue Service, has the strongest incentives for owners to include energy efficient upgrades during construction and rehabilitation and for owners and tenants to minimize utility costs during operation.

Preview of Recommendations:

Despite this split incentive problem, HUD has considerable leverage to reduce utility costs in its portfolio, which can benefit both HUD and households receiving a rental subsidy. While certain changes to HUD's utility scheme would require congressional action and are

⁶ See, e.g., Stephen Smith, *Why New York Is Not Actually America's Third Most Affordable Place to Live*, N.Y. YIMBY (Aug. 29, 2014), <http://www.newyorkyimby.com/2014/08/why-new-york-is-not-actually-americas-third-most-affordable-place-to-live.html> (reporting that affordable buildings in New York have thousands of applicants for little over 100 apartments).

⁷ See MERYL FINKEL & LARRY BURON, *STUDY ON SECTION 8 VOUCHER SUCCESS RATES: VOLUME I QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS* (2001).

therefore outside of HUD's direct power to change, HUD administrators could change regulations and guidance documents without seeking outside approval. Specifically, as further detailed in the policy recommendations section, HUD can issue rules and guidance to: incentivize owners and tenants to conserve energy, encourage project owners to retrofit buildings, more accurately project utility consumption, and create transparency on how allowances are calculated. Such changes will improve the financial viability of existing properties and free resources that can be repurposed for other HUD goals.⁸

⁸ In the following policy recommendations, we will note whether the policy must be changed by legislation, regulation, or guidance.

Chapter 1: Policy Recommendations

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I. Recommendations across all programs

HUD should have four overarching goals in its attempt to decrease utility costs. First, it should incentivize landlords to convert master-metered buildings to individual metering or check-metering. Second, it should incentivize owners to make energy-saving improvements to their buildings. At the same time, HUD should ensure utility allowances are systematically and accurately calculated so that utility allowances are not excessive, but still ensure tenants have sufficient allowances to cover basic utility costs. Finally, HUD should increase tenants' purchasing power with additional information about relative utility costs. In the following sections we discuss these recommendations in more detail.¹

1. Incentivize owners to switch from master-metered buildings to submetering, individual metering,² or check-metering

Many PBRA and Public Housing buildings still use master-metering to bill for utility consumption.³ The use of master-metering (i.e., a single meter measures the consumption for the entire building) removes any economic incentive on the part of the tenants to conserve utilities;⁴ whereas, if tenants pay for utilities directly via individual metering or submetering, they have a built-in incentive to minimize utility consumption.

Therefore, in order to encourage energy efficiency on the part of tenants, HUD should

¹ Many of the recommendations offered are interconnected. For example, some of the incentives discussed in section one and two can only be realized by implementing recommendations from section three.

² Submetering and individual metering are both ways in which tenants pay directly for utilities and therefore, in all of the discussed subsidized housing programs, will receive utility allowances to cover a reasonable amount of utility costs. For more information about these programs, please refer to the chapters about PBRA, Public Housing, and HCV.

³ See U.S. DEP'T OF HOUS. & URBAN DEV., AFFORDABLE GREEN: RENEWING THE FEDERAL COMMITMENT TO ENERGY-EFFICIENT, HEALTHY HOUSING, at i (2012) [hereinafter AFFORDABLE GREEN]. (showing that HUD spends 16 percent of its utility expenditures on master-metered utilities in PBRA).

⁴ See Samuel Dastrup, Simon McDonnell & Vincent Reina, *Household Energy Bills and Subsidized Housing*, 14 CITYSCAPE 127, 144 (2012) ("[The] programs' treatment of utility expenditures creates incentives for both landlords and assisted tenants to prefer including utilities in rent and does not motivate conservation or energy efficiency investments.").

mandate or incentivize the switch to submetering or check-metering. Assuming HUD accurately estimates utility allowance, submetering should not place any additional financial burden on tenants.

Currently, both the PBRA and Public Housing programs have rules that allow owners who pay utilities to be reimbursed for those costs, which dampen the owners' incentives to pay the upfront cost to install individual metering on their properties. For example, some PBRA owners are allowed to request a "budget based rent increase" through which they receive an increase in their contract rent with HUD based on operating costs.⁵ The increase in the contract rent does not increase the payment due from the tenant⁶ and only results in the owner receiving a higher subsidy from HUD to cover the stated operating costs.⁷ Assuming that contract administrators (state agencies or instrumentalities responsible for oversight of the PBRA program) actually provide rent increases in proportion to increased energy costs, the budget-based rent increase provides PBRA owners no incentive to have tenants pay their own utilities or to be mindful of operating costs, because the owners can request a rent increase from HUD to cover any higher than expected costs.⁸ In theory, HUD would reject any operating cost adjustment that appears egregious; however, because *HUD Handbook 4350.1* does not clearly define "reasonable" costs, field offices have considerable leverage in the review process.⁹ As a result, an owner has little financial incentive to rehabilitate the properties and install

⁵ See U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-2 (1996), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgb/4350.1.

⁶ See 42 U.S.C. § 1437f(a) (stipulating that tenants pay not more than 30 percent of adjusted monthly gross income in rent).

⁷ 24 C.F.R. § 880.610.

⁸ This is particularly true because owners can receive approval from HUD to increase rents above the stated HUD fair market rent limits.

⁹ See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 5.

individual meters. Other PBRA owners also get reimbursed for their utility expenses through an Operating Cost Adjustment Factor (OCAF) or an Annual Adjustment Factor (AAF), which increases the rent by a certain percentage annually, based partially on increased utility costs.¹⁰

In the Public Housing program, there is no absolute cap on the reimbursement to landlords. HUD is legally bound to establish an operating fund that would pay “the operation and management of public housing.”¹¹ Technically, the operating fund should cover the entire difference between a Public Housing Authority’s (PHA’s) income and expenses.¹² As long as PHAs are reimbursed for increased operating costs from higher utility bills, they have no economic incentive to implement energy efficient retrofits, submeter properties, or limit tenant consumption.

In 1975, HUD attempted to mandate a switchover to individual metering and check-metering in the public housing program, but was stymied in its efforts by a tenant lawsuit¹³ and a lack of financial support to make the conversion to individual meters feasible. Since then, HUD has not attempted any program-wide effort to convert buildings to individual metering or check-metering. Given the current data landscape

¹⁰ See Notice of Certain Operating Cost Adjustment Factors for 2013, 77 Fed. Reg. 63,324 (Oct. 16, 2012) (explaining the mechanics of the OCAF); Section 8 Housing Assistance Payments Program-Annual Adjustment Factors, Fiscal Year 2013, 78 Fed. Reg. 99 (explaining the AAF).

¹¹ 42 U.S.C. § 1437g(e)(1).

¹² 24 C.F.R. § 990.110(a)(2). However, PHAs have lately been underfunded and the subsidy that they receive from HUD does not necessarily cover all expenses. See Will Fischer & Barbara Sard, *Preserving Safe, High Quality Public Housing Should Be a Priority of Federal Housing Policy*, CTR. ON BUDGET AND POLICY PRIORITIES (Oct. 8, 2008), <http://www.cbpp.org/cms/?fa=view&id=655>; COUNCIL OF LARGE PUB. HOUS. AUTHS., THE FY13 HUD BUDGET PROPOSAL: CLPHA ANALYSIS AND VIEWS 1 (2012) (reporting that HUD funds only about 90 percent of PHAs’ estimated eligibility). If PHAs know that they will be underfunded, regardless of what their operating expenses are, then they might have an incentive to conserve utilities in order to cut costs.

¹³ See *Massachusetts Union of Public Housing Tenants v. Landrieu*, 656 F.2d 899 (D.C. Cir. 1981) (striking down HUD’s 1975 regulations (embodied in 24 C.F.R. § 865.404) requiring PHAs to convert to individual or check-metering based on a cost/benefit analysis that presumed consumption reductions of 25–35 percent of heating energy use. Court ruled that HUD had not demonstrated a factual or rational basis for the 25–35 percent reduction presumption).

HUD could demonstrate a basis for mandating a conversion, which would enable such regulations to stand up to judicial review.¹⁴

One concern with transferring to individual metering is that PHAs and HUD will lose information on utility consumption levels, but HUD could include a waiver in all leases that allows utility companies to provide these data directly to HUD. Alternatively, owners could move to a check-metering arrangement that allows them to monitor tenant consumption and charge tenants for consumption above the utility allowance amount. This option allows owners to better track household utility consumption and could also help avoid scenarios in which tenants who are unable to pay their utility bills have their service cut off.

2. Incentivize owners to make energy efficient upgrades

HUD should incentivize building owners to include energy-efficient upgrades during construction or rehabilitation of their properties, as well as ensure buildings are operating efficiently. Currently, HUD has a number of programs that finance retrofits of properties in its portfolio.¹⁵ HUD should expand its financing and subsidy programs that make it economic viable or obligatory for owners to make energy efficient upgrades and submeter their properties. This paper does not attempt to specify how such subsidies should look, but instead seeks to highlight the fact that adjusting utility billing schemes may not be sufficient to incentivize owners to implement energy efficiency retrofits or for tenants to reduce consumption levels. To improve both owner and tenant incentives to

¹⁴ Essentially, HUD would need to demonstrate that the regulations are neither arbitrary and capricious nor exceeding statutory authority. It should be noted that *Massachusetts Union of Public Housing Tenants v. Landrieu* was decided prior to the seminal *Chevron v. Natural Resources Defense Council* decision, which ordered courts to give substantial deference to agency decision-making. 467 U.S. 837 (1984).

¹⁵ See AFFORDABLE GREEN, *supra* note 3, at 12–36 (providing summaries of HUD’s programs meant to increase energy efficiency in affordable housing).

reduce consumption levels, a combined approach is required: on one hand, HUD should incentivize tenants to consume utilities efficiently, and, on the other hand, HUD should take an active role in incentivizing landlords to develop and operate efficient buildings.

Currently, there are insufficient financial rewards for owners who operate their buildings efficiently across HUD's PBRA, Public Housing, and HCV programs. HUD should adjust all three programs so that an owner actually receives some benefit when the utility allowances decrease or incurs costs when utility allowances are excessive. HUD has two options to achieve this goal in the PBRA and Public Housing programs. First, if there are cost savings, owners should receive a portion of the difference between the previous and current utility allowance.¹⁶ HUD currently has an Energy Performance Contracting (EPC) program that allows PHAs to recoup the savings generated by energy efficient investments, which is discussed in the Public Housing section of this report. If HCV utility allowances are no longer calculated for the region as a whole, such a reward system could be feasible in HUD's voucher program.¹⁷ The mechanics of this are further discussed in section three of this paper. In the PBRA program, if utility costs are higher than the previous allowance, HUD could change regulations to prevent owners from being able to adjust up the Housing Assistance Payments (HAP) to offset the full amount of the increase in utility allowances, which means owners must absorb a portion of the additional costs.¹⁸ A similar punishment system would be feasible in the Public Housing programs, because HUD could decline to increase the operating cost by the amount of the

¹⁶ HUD should account for potential variation from year to year due to weather and/or local utility rates.

¹⁷ As long as utility allowances are determined on a regional level and rents are adjusted the way that they currently are, it would be difficult to punish HCV landlords for increased utility allowances or reward them for decreased allowances.

¹⁸ This would require re-writing 24 C.F.R. § 880.610, which currently says "Whenever a Utility Allowance for a unit is adjusted, the owner will promptly notify affected families and make a corresponding adjustment of the tenant rent and the amount of the housing assistance payment for the unit."

increased utility costs.¹⁹ However, a punishment system might be problematic in the voucher program because PHAs currently lack the authority to charge excessive consumption fees, and such fees could make vouchers (and therefore tenants with vouchers) less appealing to market-rate owners.

3. Develop individual utility allowance based on tenant, building, and market information

In theory, if the owner incentives are aligned to run an efficient building, then utility consumption should decrease. However, if allowances are calculated based on past consumption, utility allowances will reflect past usage, regardless of the building's efficiency. In other words, even an efficient building can be used inefficiently. In fact, tenants might be incentivized to consume more in order to ensure utility allowances remain high. HUD should change its regulations for all its programs to allow the use of engineering-based utility allowance estimates instead of the current consumption-based estimates to ensure allowances are based on an ideal consumption level. In addition, if allowances are determined at a regional level, as they are in the HCV program, tenants will not see their consumption behavior directly reflected in their allowance, which creates a disincentive to change their consumption behavior. An accurate estimate of what tenants should spend on utilities based on geographic, building, and tenant characteristics will incentivize tenants to consume less in order to reduce additional out of pocket expenses.

HUD should develop a utility allowance system that uses regression-based utility allowances determined at the tenant level to ensure tenants receive accurate utility

¹⁹ In a sense, this is currently happening in that the operating fund is continually underfunded by Congress. Therefore, PHAs have a built-in incentive to keep costs down on not only utilities, but on everything else.

allowances. In order to implement a regression-based allowance, HUD would use extensive tenant, building, and market characteristics in a statistical analysis to determine how much an allowance should be. In the case of the PBRA and Public Housing programs, HUD should already have detailed building information and already requires tenants to submit extensive information when applying for a unit. Such information can be entered into a model that then predicts a level of usage based on the information provided (for example, this information could include the number of tenants in a unit, whether any have disabilities, the year of a building's construction, and whether any energy efficient retrofits were implemented). In the case of the Housing Choice Voucher program, HUD obtains all of the necessary tenant information when a tenant submits a voucher application. HUD can collect all of the necessary building information when the PHA conducts the review of the building to ensure it meets Housing Quality Standards (HQS).

Model-based estimates that account for geographic, building, and tenant characteristics will lead to a more accurate estimation of expected utility costs. For example, in the HCV program, a tenant's utility allowance currently is established by the unit size.²⁰ In theory the unit size should relate to the number of people in a household; however, that is not always the case.²¹ This means that current allowances may not always account for the number of people in a household. In addition, an allowance based on unit size is likely miscalculated because it does not include other important information about the household and the building that predict consumption. In Appendix

²⁰ See 24 C.F.R. § 982.517(d)(1).

²¹ HUD has promulgated regulations limiting the number of tenants allowed per room in the HCV program. 24 C.F.R. § 982.401(d). See also, *Occupancy Standards*, METROPOLITAN WASHINGTON COUNCIL OF GOVS., <http://www.mwcog.org/planning/housing/voucher/occupancy.asp> (last visited July 19, 2014).

Below we provide a detailed explanation of what regulations would need to be modified by program for a tenant-based utility allowance to be implemented.

These regression-based allowances would need to be adjusted over time. For example, household characteristics may change, at which point adjustments should be made to ensure the allowance reflects these changes. In addition, owners can make improvements to their properties, and these improvements should be included in the regression-based utility estimate. In the case of Public Housing and PBRA, HUD or the PHA can inspect the property to ensure these improvements were made and then make the necessary adjustments to the model. This strategy is not ideal for the HCV program because there could only be as few as one HCV tenant in a given building. As a result, HUD could require that owners, who rent to a voucher household, provide proof of the improvement, through invoices, and then proof of cost savings through lower utility bills in order to receive an allowance adjustment for efficiency improvements. Once both forms of proof are provided, the building characteristics can be changed in the regression, which will result in an adjustment to the allowance amount.

Another factor to consider when developing such projections is that HUD should be clear about which utilities are included in the allowance. Specifically, HUD should issue guidance on whether and how utility allowances treat air conditioning. The Public Housing program forbids the inclusion of air conditioning in utility allowances;²² however, it is unclear how this cost can be accurately excluded from consumption estimates.²³ The HCV program allows air conditioning utility allowances in those areas

²² 24 C.F.R. § 965.505(e).

²³ Presumably, some amount of air conditioning units are plugged into the electric outlets within public housing units.

where it is common.²⁴ There are currently no PBRA regulations that allow or disallow the inclusion of air-conditioning in utility allowances.²⁵ It is likely that many PBRA properties include the cost of air conditioning in energy consumption estimates, which effectively means air conditioning is covered by PBRA utility allowances.²⁶ There does not appear to be a distinct rationale for why HUD would have different policies governing air conditioning across its programs.²⁷ HUD should issue guidance or revisions stating whether air conditioning is allowed in each program so that this cost can be accounted for in an allowance model. To the extent possible, this policy should be universal across all programs.

There are three main challenges that must be considered when using a regression model to determine a utility allowance specific to each household. First, this requires a correct estimate of what a utility allowance should be so that subsidy recipients do not face an excessive financial burden. As a result, HUD will need to include as many significant variables as possible and conduct statistical tests about how well the model predicts behavior. In addition, as we highlight in Section Four, HUD must ensure there are clear mechanisms that owners and tenants can use to provide feedback on utility allowances. The second concern is that not all tenants will benefit from this approach. In aggregate, this modification to HUD's current system may reduce consumption and costs. However, some tenants may currently consume less than their utility allowance, which

²⁴ 24 C.F.R. § 880.610(b)(2)(ii).

²⁵ Air conditioning is not mentioned in 24 C.F.R. § 880.610 or in the *HUD Handbook 4350.1*, Chapter 7.

²⁶ Tenants' right advocates have successfully argued that utility allowances are not sufficient to cover air conditioning costs and therefore should be increased. *Rent Decrease and Lawsuit at the Village of Kaufman*, TEXAS TENANTS' UNION (Fall 2009), available at <http://nhlp.org/files/greenbook4/Chapter5/FN%20181%20Texas%20Tenants%20Union%20Newsletter%20re%20Crowder%20settlement.PDF>

²⁷ Presumably, PBRA regulations were written before air conditioning was as common as it is today. See, e.g., *The south anchors growth in use of electricity for air conditioning since 1993*, U.S. ENERGY INFO. ADMIN. (Aug. 15, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=12551>.

means they effectively pay less than 30 percent of their income in rent. Assuming the regression-based approach succeeds in measuring ideal consumption, these households will now have lower utility allowances under the regression-based approach. It is possible that these households may still be able to consume less than the regression-based estimate; however, the difference between actual costs and the projected costs will likely be smaller than under the previous utility allowance. As a result, some tenants will be slightly worse off with regression-based utility allowances. The third concern is that this will increase administrative costs for HUD, PHAs, landlords, and contract administrators. While more accurate utility allowances, especially in the HCV program, will likely decrease the utility allowances, and therefore HUD's utility expenses, HUD should ensure that these decreased costs are not offset by increased administrative costs.

In the event that HUD deems it should not or cannot embrace this option, we offer alternative suggestions about how to improve the current system for utility allowance calculations in Appendix C.

4. Give tenants more purchasing power

Most households, particularly low-income households who are competing for subsidized units, might not be able to predict future utility costs and include these projected costs in budget estimates when leasing a given unit. As a result, HUD should provide tenants with better and more accessible information. Specifically, HUD should develop a program to provide subsidized housing recipients more information about whether they will pay utilities and the expected utility costs if they do during the search

process.²⁸ Such information will increase a tenant's purchasing power and place some market pressure on owners to develop and operate properties efficiently. HUD should also provide clarity on how tenants are to be informed about their allowances and options they have to contest the allowance calculation.

There are multiple ways that HUD can provide additional information. On the most basic level, HUD could publish a brochure for applicants for subsidized housing that instructs them on how to find more energy-efficient housing. HUD could provide financing for the installation of 'smart meters' in individual units so tenants can keep track of their utility consumption in real time. The Baltimore Housing Authority has, for example, used such meters in two of its properties.²⁹ HUD could also provide tenants with a tool that provides the regression-based estimate of utility costs based on building characteristics. If HUD does not use a regression-based allowance calculation system, it could still require both private and public landlords to maintain records of past utility consumption and provide prospective tenants with an estimate of utility consumption. For example, in New York City, Local Law 84 states that all properties over 50,000 square feet must report their energy usage.³⁰ HUD could use these data for large buildings in New York City and develop similar criteria for all subsidized properties nationwide. This requirement may not be onerous on owners as some PBRA owners and PHAs already report utility costs to establish their utility allowances or receive rent adjustments. This means that HUD may be able to provide some of these data that is already has.

²⁸ For HCV tenants, the best time to provide this information would likely be during the oral briefing when a PHA selects a family to receive a voucher. See 24 C.F.R. § 982.301. The regulations could be changed to require that PHAs provide information about utility allowances.

²⁹ *Cherry Hill Showcase Project, Baltimore Housing Authority*, U.S. DEP'T OF ENERGY, <https://www4.eere.energy.gov/challenge/showcase/baltimore-housing-authority/cherry-hill> (last visited June 6, 2015).

³⁰ Local Laws of the City of New York, § 28-309.1–§ 28-309.10 (2009).

HUD should also unify tenant notice regulations across all programs to give tenants equal rights to comment on utility allowance changes. Currently, HUD offers different guidance across all of its programs about how tenants should be informed about changes to utility allowances. In Public Housing, tenants are notified of changes in utility allowances sixty days prior to the effective date and may submit comments “not less than thirty days before the proposed effective date,”³¹ but PBRA tenants must only be given notice thirty days in advance and have the same amount of time to submit comments.³² Unifying standards about how and when tenants should be informed about changes to the utility allowance would help reduce tenants’ confusion about their utility allowance and may empower them to have more control over how their allowances are calculated. In addition, providing a clear venue for tenants and owners to appeal utility allowance calculations could ensure such allowances are fairly calculated and unnecessary cost burdens are not placed on tenants or owners. Ultimately, increased transparency and a clear appeals process will lead to more accurate estimates of allowances or, at least, ensure that tenants are informed about their allowances so they can plan their utility consumption accordingly.

II. Conclusion

In this chapter we made the case for why utility costs are important to HUD and explained the split incentive problem that makes reducing such costs difficult in both market-rate and subsidized properties. We believe that HUD has considerable leverage to improve conservation incentives and reduce both consumption and costs. The four main recommendations we offer are that HUD should: incentivize landlords to convert master-

³¹ 24 C.F.R. § 965.502(c).

³² See 24 C.F.R. § 245.410(f); 24 C.F.R. § 245.420(a).

metered buildings to individual metering or submetering; incentivize owners to make energy saving improvements to their buildings; ensure utility allowances are systematically and accurately calculated so that utility allowances are not excessive, but still ensure tenants have sufficient allowances to cover basic utility costs; and increase tenants' purchasing power with additional information about utility costs. In this chapter and the appendices we offer specific ways that such modification can be made. In the four subsequent chapters we highlight all of the rules that govern the HUD programs discussed in this paper, as well as the LIHTC program. Combined, these chapters offer primary and alternative recommendations that will improve the current consumption incentives in subsidized housing and, in aggregate, reduce costs for both tenants and HUD. Ultimately, we hope this paper serves as a tool for HUD in its efforts to improve energy efficiency in its portfolio and look forward to further discussing the ideas set forward here, as well as others, with the agency.

Appendix 1: Tools Available for Policy Changes

Each housing subsidy program relies on statutes, regulations, and guidance. Therefore, in considering how to change utility allowance policy, we must consider whether to change a statute, a regulation, or a guidance document. Given the political realities of today's congress, passing any legislative act is likely to be difficult.³³ However, our initial analysis suggests that HUD has considerable leverage to issue rules and guidance to restructure the way utility costs are reimbursed.

³³ See, e.g., Dylan Stableford, *Deadlock in Congress tied to Senate, says liberal think tank*, YAHOO NEWS (Jan. 16, 2014, 2:42 PM), <http://news.yahoo.com/think-tank--senate-committees-deadlier-than-house-filibusters-194223760.html>.

1. Changing agency guidance

Changing agency “guidance”³⁴ is the easiest way for an administrative agency to enact changes in policy. Technically, “guidance” is not supposed to have a binding effect on agency decision-making.³⁵ Only regulations enacted through Formal Adjudication, Formal Rulemaking, and Informal Rulemaking are legally enforceable by courts.

Although agencies are not supposed to use guidance to set policy, HUD sets most utility allowance policy for PBRA using guidance documents.³⁶ HUD also provides very comprehensive guidance on setting utility allowances for Public Housing in the *Utility Allowance Guidebook*.³⁷ The HCV program uses guidance documents to set or supplement policy, but not to the same extent as does the PBRA or Public Housing programs.

To the best of our knowledge, tenants and landlords have not initiated legal challenges to the legality of setting utility allowance policy using guidance documents.³⁸

2. Changing regulation

Notice and comment rulemaking is the preferred method by which federal government agencies fulfill statutory obligations to promulgate rules.³⁹ An agency

³⁴ Although agency decision-making typically requires notice and comment rulemaking, certain kinds of rules are exempt from the notice and comment process, namely, “(1) interpretive rules, (2) general statements of policy, or (3) rules of agency organization, procedure, or practice.” See 7 STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 576 (2011). (quoting 5 U.S.C. § 553(b)). “Agencies also increasingly formulate and apply policy through ‘guidance’ documents or other internal memoranda that may direct decisions by lower-level agency personnel as effectively formal regulations.” *Id.* at 576.

³⁵ See *id.*

³⁶ See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 14.

³⁷ See U.S. DEP’T OF HOUS. & URBAN DEV., *UTILITY ALLOWANCE GUIDEBOOK* (2008).

³⁸ See generally Breyer, *supra* note 34, at 602–603 (discussing the difficulties of judicial review of non-notice-and-comment rules)

³⁹ Administrative agencies can also use formal rulemaking and formal adjudication to create rules, but these options have serious downsides. Formal rulemaking is time-consuming and virtually never used. Formal

engages in rulemaking by issuing a notice of proposed rulemaking (NPRM) in the Federal Register, in which it requests the public to comment on any aspects of the proposed rule.⁴⁰ After receiving comments, the agency should consider the comments provided and make changes to the NPRM, if appropriate.⁴¹ Subsequently, the agency issues a final rule in the Federal Register, in which the agency addresses the comments received and explains why certain changes were or were not adopted and issues a statement of the rules basis and purpose.⁴² The final rule then becomes incorporated into the Code of Federal Regulations (C.F.R.).

Many of the changes to the utility allowance structure would need to be made to the regulations through notice and comment rulemaking, especially in the Housing Choice Voucher program and the Public Housing program.⁴³ Changes to the Project-Based Rental Assistance programs would likely require fewer changes to the C.F.R., because PBRA's regulations have fewer strict requirements. Changes to LIHTC policy would also likely require notice and comment rulemaking; however, the IRS put into place submetering guidelines without formally incorporating them into the C.F.R. (although the IRS had issued a NPRM).⁴⁴

Even though an agency can create new regulations for utility allowances through notice and comment rulemaking and thereby avoid the legislative process, rulemaking

adjudication is commonly used by a number of agencies, but it only creates rules for the case at hand and is, therefore, ineffective at creating rules of general applicability.

⁴⁰ See BREYER, *supra* note 34, at 519.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *infra* Chapters 2 and 4.

⁴⁴ Even though the IRS rule on submetering is not yet included in the C.F.R., there is no indication that LIHTC developers do not consider it binding. See I.R.S., Notice 2009-44, (May 5, 2009) (indicating that submetering rates must be based on a tenant's actual consumption); Utility Allowances Submetering, 77 Fed. Reg. 46,987, 46,988 (Aug. 7, 2012).

can still be a cumbersome process.⁴⁵ It can take an agency anything from a few months to several years to create a regulation.⁴⁶ Any change to a regulation has to be made by going through the notice and comment process.⁴⁷

3. Changing legislation

Changing the legislation for federally subsidized housing may not be feasible or necessary in order to effect significant changes to the current utility allowance regime. The relevant statutes⁴⁸ say very little about utility allowances⁴⁹ and, therefore, give agencies a great deal of latitude in implementing utility allowance policies. The most important way in which the respective statutes affect utility allowances is by setting caps on the percentage of income that tenants are permitted or required to pay for rent in the federally subsidized programs.

⁴⁵ See OMB WATCH, FLOWCHART OF NOTICE-AND-COMMENT RULEMAKING (2007) (showing all the steps that an administrative agency needs to take prior a proposed rule becoming a real rule).

⁴⁶ *Notice-and-Comment Rulemaking*, CTR. FOR EFFECTIVE GOV., <http://www.foreffectivegov.org/node/3463> (last visited Apr. 17, 2014). Our conversations with HUD indicated that a change in HUD regulations usually takes about two years to accomplish.

⁴⁷ 5. U.S.C. § 553 (stating that notice and comment rulemaking applies to agency decision-making with only certain exceptions).

⁴⁸ The relevant statutes are 42 U.S.C. § 1437f for Project-Based Rental Assistance and Housing Choice Vouchers, 42 U.S.C. § 1437a for Public Housing, and 26 U.S.C. § 42 for LIHTC.

⁴⁹ The U.S. Housing Act of 1937, which initiated Public Housing makes only one oblique reference to utility allowances. See 42 U.S.C. § 1437a(a)(3) (“the following entities shall require the following families to pay a minimum monthly rental amount (which amount shall include any amount allowed for utilities) of not more than \$50 per month . . .”). For Project-Based Rental Assistance, the Housing Act makes no mention of utility allowances. See, e.g., 42 U.S. Code § 1437f(c)(1) (“An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made.”). For Housing Choice Vouchers, the amended Housing Act most explicitly sets forth law about utility allowances. See 42 U.S.C. § 1437f(o)(2)(A) (“if the rent for the family (including the amount allowed for tenant-paid utilities) does not exceed the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts....”). The Tax Reform Act of 1986, which initiated the LIHTC program, makes no mention of utilities or utility allowances. See 26 U.S.C. § 42.

By law, tenants in Public Housing and PBRA cannot pay more than 30 percent of their adjusted gross income on rent,⁵⁰ which was interpreted to include utilities.⁵¹

Housing Choice Voucher tenants are supposed to pay 30 percent of their income on rent, but can opt to pay as much as 40 percent of their income in rent.⁵²

⁵⁰ See 42 U.S.C. § 1437a(a)(1)(A) (setting a 30 percent income cap in the Public Housing program); 42 U.S.C. § 1437f(a) (setting a 30 percent income cap in the PBRA program).

⁵¹ PHA-Owned or Leased Projects; Maintenance and Operation; Tenant Allowances for Utilities, 47 Fed. Reg. 35,249 (Aug. 13, 1982) (stating in a proposed rule that “[i]n administering the low-income public housing program under the United States Housing Act of 1937, as amended, HUD historically has considered “rent” to include shelter cost plus a reasonable amount for utilities.”). Please note that the aforementioned proposed rule was specific to public housing, rather than to rent subsidized housing; however, the tradition of paying for tenant utilities. See also *Utility Allowances*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/phecc/allowances (last visited June 24, 2013) (“In interpreting the federal housing law, HUD has defined the Total Resident Payment for “rent” to include both shelter and the costs for reasonable amounts of utilities. The amount that a PHA determines is necessary to cover the resident’s reasonable utility costs is the utility allowance.”).

⁵² See 42 U.S.C. § 1437f(o)(2)(A) (stating that the rent for a family receiving Housing Choice Vouchers shall be either 30 percent of monthly adjusted income, 10 percent of monthly income, or the welfare rent); 42 U.S.C. § 1437f(o)(3) (stating that a family may pay up to 40 percent of its family income in rent in certain circumstances).

Appendix 2: Individualized Utility Allowances

In order for PHAs, PBCAs, and HUD to create more individualized utility allowances for tenants, HUD would need to change the regulations in each program. The amount of changes that would be required depends on which variables are taken into account in a regression-based model and how much of the current statutes and policies would remain in place. For the sake of clarity and precision, we will individually analyze the changes necessary for each program.

1. Public Housing

The regulations for the Public Housing program provide a basis for individualized utility allowances in that PHAs are required to take into account the following factors when determining utility allowances:

- (1) The equipment and functions intended to be covered by the allowance for which the utility will be used. For instance, natural gas may be used for cooking, heating domestic water, or space heating, or any combination of the three;
- (2) The climatic location of the housing projects;
- (3) The size of the dwelling units and the number of occupants per dwelling unit;
- (4) Type of construction and design of the housing project;
- (5) The energy efficiency of PHA-supplied appliances and equipment;
- (6) The utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered by the total resident payment;
- (7) The physical condition, including insulation and weatherization, of the housing project;
- (8) Temperature levels intended to be maintained in the unit during the day and at night, and in cold and warm weather; and
- (9) Temperature of domestic hot water.⁵³

Furthermore, Public Housing regulations also include provisions for relief from utility costs for elderly and disabled tenants.⁵⁴ However, Public Housing regulations require that

⁵³ 24 C.F.R. § 965.505(d).

the PHA create utility allowances for “each dwelling unit category and unit size.”⁵⁵

Therefore, if utility allowances were to be calculated on a different basis, this regulation would need to be changed.

Utility allowances could be calculated on a per unit basis by creating multiple schedules for varying family sizes. Therefore, instead of only having a schedule that differentiates between the different unit sizes, PHAs could create another with different possible family sizes. While a change in the regulations would cement this requirement, HUD could probably issue guidance that would have a similar effect. HUD could use additional tenant-level data, such as the age of the tenant, in calculating the utility allowances, and still provide relief to elderly and disabled tenants as required under current regulations.⁵⁶

If a PHA were to use a regression model, the model could take into account the number of tenants living in a unit and determine the appropriate utility consumption. In either case, the *HUD Utility Allowance Guidebook*⁵⁷ would have to be updated to instruct PHAs on the appropriate means to set these more individualized utility allowances. If HUD continues to allow PHAs to use the consumption method, then the utility allowance that is created for a given unit type could be adjusted up or down depending on the number of tenants in a unit (or by any other factor that HUD might choose to use).

2. Project-Based Rental Assistance

⁵⁴ 24 C.F.R. § 965.508.

⁵⁵ 24 C.F.R. § 965.505(a). *See, e.g.*, MIAMI-DADE PUB. HOUS. & CMTY. DEV., UTILITY ALLOWANCE SCHEDULE FOR TENANT-PURCHASED UTILITIES (2012).

⁵⁶ 24 C.F.R. § 965.508.

⁵⁷ U.S. DEP’T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK (2003).

The PBRA regulations concerning utility allowances are vague, requiring only that “the owner must submit an analysis of the project's Utility Allowances. Such data as changes in utility rates and other facts affecting utility consumption should be provided as part of this analysis to permit appropriate adjustments in the Utility Allowances.”⁵⁸ Therefore, no change would be required in PBRA regulations for HUD to initiate individualized utility allowances. However, HUD guidance, specifically *HUD Handbook 4350.1* would have to be rewritten to allow for such changes.⁵⁹

If HUD were to allow PBRA landlords or contract administrators to use the regression model, the model could take into account the number of tenants living in a unit and determine the appropriate utility consumption. Additionally, each building would either submit all relevant building data to HUD or have an engineer or other qualified professional evaluate the building to determine how energy efficient it is. Furthermore, unlike the Public Housing and HCV programs, PBRA does not have any utility allowance exceptions for the elderly or disabled who might require higher utility allowances. Therefore, a more individualized utility allowance scheme ought to address the concerns of people with special needs. However, if the current consumption model is used, HUD could issue guidance that instructs owners to account for both unit size and the number of tenants in a unit. Alternatively, the sampling methods could remain the same, but the contract administrator could adjust up or adjust down the utility allowance based on the number of tenants.

⁵⁸ 24 C.F.R. § 880.610.

⁵⁹ U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING (1996), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgb/4350.1.

3. Housing Choice Vouchers

Unlike the Public Housing and PBRA programs, which already set unique utility allowances for each unit size with each building, the HCV program sets utility allowances for each unit size within a given building type. As a result, in order to implement tenant-based utility allowances, HUD may have to do more than issue guidance. There is a chance that the statute governing this program would need to be changed; however, a more thorough analysis would be needed to determine whether legislative action would need to be taken.

Currently, the HCV statute makes only one mention of utility allowances:

General In determining the monthly assistance payment for a family under subparagraphs (A) and (B), the amount allowed for tenant-paid utilities shall not exceed the appropriate utility allowance for the family unit size as determined by the public housing agency regardless of the size of the dwelling unit leased by the family.⁶⁰

This provision can be understood to mean that there is an appropriate utility allowance for any given family size, which may prohibit incorporating more granular tenant characteristics. It also prevents a higher utility allowance for larger units that may have been an HCV family's only or best choice. As mentioned in the Chapter on HCV, this provision is one of the more confusing provisions because it seems that the HUD regulations, guidance, and common practice determine the utility based on the size of the dwelling unit.

The regulation 24 C.F.R. § 982.517 would need to be rewritten in order to allow more individualized utility allowances for HCV tenants. As mentioned in other parts of this paper, the language concerning how HCV utility allowances are determined should

⁶⁰ 42 U.S.C. § 1437f(o)(2)(D)(i).

be changed, regardless of whether HUD would choose to implement more individualized allowances. The language reads as follows:

The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates.⁶¹

In order for a PHA to set more individualized allowances, HUD may need to remove such language because it is not specific to the given tenant or to the energy consumption of an HCV tenant.

While HUD would not need to change the following section, it may want to insert additional factors that must be taken into account for individualized allowances. The section reads:

the utility allowance schedule must take into consideration unit size (by number of bedrooms), and unit types (e.g., apartment, row-house, town house, single-family detached, and manufactured housing) that are typical in the community.⁶²

For example, HUD could let PHAs take into account the building's location, square footage, and the age of its construction.

Finally, HUD may need to change the following provision:

The PHA must use the appropriate utility allowance for the size of dwelling unit actually leased by the family (rather than the family unit size as determined under the PHA subsidy standards).⁶³

This section requires that the unit size determine the utility allowance and prevents more individualized factors from being taken into account in the creation of the utility allowance. Furthermore, Form HUD-52667 would need to be altered in order to

⁶¹ 24 C.F.R. § 982.517(b)(1).

⁶² 24 C.F.R. § 982.517(b)(3).

⁶³ 24 C.F.R. § 982.517(d)(1).

accommodate more individualized utility allowances. The Housing Choice Voucher Guidebook would also need to be revised to reflect the revised regulations.⁶⁴

⁶⁴ U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, at 6-1 (2001), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook.

Appendix 3: Alternative Options in Absence of Tenant-based Allowances

In the event that HUD does not embrace tenant-level regression-based utility allowances, below are suggestions on ways to improve the current system:

1. Increase support for energy efficient building utility allowances (EEBUAs) for Housing Choice Vouchers

HUD could make major strides for energy efficiency by either providing express support for energy efficient building utility allowances (EEBUA) in the HCV program by issuing regulations or guidance, which set forth specific guidelines for implementing the revised utility allowance schedules.⁶⁵ Express support for the EEBUA would encourage PHAs to initiate their own energy efficient building utility allowances. HUD could even require that PHAs create EEBUAs; however, this might result in increased administrative costs because PHAs would have to evaluate energy efficiency measures and determine how those would affect utility consumption in their jurisdictions.⁶⁶

2. Standardize Housing Choice Voucher Utility Schedule creation

In the Housing Choice Voucher Program, HUD could either mandate or further encourage the use of the HUD Utility Schedule Model (HUSM), a Microsoft Excel spreadsheet model, “to provide a consistent basis for determining utility schedules, using

⁶⁵ An EEBUA is a utility allowance generated by a PHA for energy efficient buildings. The EEBUA is based on the normal PHA utility allowance, but adjusted to reflect better insulation, energy efficient appliances, and the like. EEBUAs are currently in use in some California jurisdictions, but are mostly used by LIHTC developers who build energy efficient buildings. *See generally* KEMA, INC., EVALUATION OF 2004-2005 DESIGNED FOR COMFORT: EFFICIENT AFFORDABLE HOUSING PROGRAM (2006); NEHEMIAH STONE, ET. AL., ENERGY EFFICIENCY-BASED UTILITY ALLOWANCES: A DRIVER FOR MORE EFFICIENT AFFORDABLE HOUSING (2004); ENTER. GREEN CMTYS., UTILITY ALLOWANCE OPTIONS FOR INVESTMENTS IN ENERGY EFFICIENCY: RESOURCE GUIDE (2011).

⁶⁶ HUD could mitigate these administrative costs if it issued comprehensive guidance about EEBUAs or incorporated EEBUA calculation into the HUSM.

form HUD-52667.”⁶⁷ HUSM allows PHAs or LIHTC building owners to calculate utility allowance schedules by entering utility rate and local climate information.⁶⁸ HUSM incorporates data on utility consumption from the U.S. Department of Energy’s Residential Energy Consumption Survey (RECS).⁶⁹ In 2008, the HUSM was endorsed for use by individual LIHTC developers (previously, it could only be used indirectly if a PHA was using it to come up with the PHA Utility Allowance Schedule).⁷⁰ HUD plans to conduct further research to refine the HUSM “to more accurately disburse funds for utilities that are actually consumed.”⁷¹

The use of the HUSM could decrease oversight costs by making it easier to ensure that proper procedures were followed in creating utility allowance schedules. The estimates produced by HUSM rely on a regression, which could be theoretically

⁶⁷ U.S. DEP’T OF HOUS. & URBAN DEV., HUD UTILITY MODEL INSTRUCTIONS 1, [hereinafter HUSM Instructions] *available at* http://www.huduser.org/portal/resources/UtilityModel/Instructions_HUDUtilityModel_Rev3.doc (describing how to use 2007 version of the HUSM). The HUSM model can be downloaded directly from the HUD website. U.S. DEP’T OF HOUS. & URBAN DEV., HUD UTILITY SCHEDULE MODEL (2013) [hereinafter HUSM], *available at* http://www.huduser.org/portal/resources/UtilityModel/HUD_Utility_Schedule_Model_Rev2.zip. An older version of the HUD Utility Schedule Model is posted on other parts of the HUD website. U.S. DEP’T OF HOUS. & URBAN DEV., HUD UTILITY SCHEDULE MODEL (2007), [hereinafter HUSM 2007] *available at* <http://www.huduser.org/resources/UtilityModel%5CHUD%20Utility%20Schedule%20Model.zip>.

⁶⁸ *Utility Allowances*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.huduser.org/portal/resources/utilallowance.html> (last visited Oct. 9, 2013).

⁶⁹ *Id.*; *see, e.g., 2009 RECS Survey Data*, U.S. ENERGY INFO. ADMIN. (May 6, 2013), <http://www.eia.gov/consumption/residential/data/2009/>. The first version of the HUSM was completed in 2002 with the help of GARD Analytics; it used a regression approach to determine most of the end-uses (utility-specific allowances), based on the RECS data. *See* GARD ANALYTICS & U.S. DEP’T OF HOUS. & URBAN DEV., UTILITY ALLOWANCE MODEL FINAL REPORT (2003) (reporting on study results and explaining how model should have been revised); JASON GLAZER & U.S. DEP’T OF HOUS. & URBAN DEV., SUMMARY REPORT: ENERGY STAR ADJUSTMENT FOR HUD-52667 SPREADSHEET MODEL 2 (2012) (summarizing history of the HUSM and explaining the changes that have been made to it). HUD uses RECS data, even though it has its limitations, because it is “[t]he best and effectively only detailed national data” on energy consumption in different kinds of housing units. RILEY & ASSOCS. & U.S. DEP’T OF HOUS. & URBAN DEV., HUD UTILITY MODEL (HUSM) REBENCHMARKING 10 (2012).

⁷⁰ *See* Section 42 Utility Allowance Regulations Update, 72 Fed. Reg. at 33,704.

⁷¹ U.S. DEP’T OF HOUS. & URBAN DEV., HUD RESEARCH ROADMAP FY 2014-FY 2018, at 89 (2013). Specifically, this plan discusses incorporating energy efficiency into the HUSM, but it appears that this was already done. *See* JASON GLAZER & U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 69.

improved by including such information as the age of the building, and the tenants, such as the number of people in a household and age.

It is unclear how many PHAs use this program to calculate the utility allowance for HCV households, but HUD has stated that transitioning to widespread use of the HUSM is a priority.⁷² HUD could rewrite the *Housing Choice Voucher Program Guidebook*⁷³ to include the HUSM or rewrite 24 C.F.R. § 982.517 to require the use of HUSM or a successor program. If HUD only wanted to encourage the use of the HUSM, it could update the *Utility Allowance Guidebook* to include the HUSM.

3. Eliminate option that allows the use of national utility averages

In the Housing Choice Voucher program, PHAs without access to good local data on utility consumption are permitted to use national average consumption data to create utility allowance schedules.⁷⁴ The use of national average consumption data is inherently imprecise. State-level utility average data from the U.S. Energy Information Administration may be a better option than using national data when there is no local utility data available, but these data are also inherently imprecise due to the larger geography covered.

4. Create nationwide standards for sampling tenant energy consumption

If HUD continues to use consumption-based utility allowances, it should create nation-wide standards for the proper sampling of tenant energy consumption. In the

⁷² In 2011, HUD made it a priority to promote the HUSM in order to generate consistency in utility allowance calculation. U.S. DEP'T OF HOUS. & URBAN DEV., CUSTOMER SERVICE PLAN 2 (2011).

⁷³ The *Housing Choice Voucher Guidebook* makes no mention of the HUSM, because it was published one year prior to the creation the first HUSM and unfortunately, has not been updated. See U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, at 6-1 (2001), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook.

⁷⁴ See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 73, at 18-4.

PBRA program, many PBCAs use different guidelines on how many units should be sampled in a utility allowance analysis.⁷⁵ Rules around how many, and which units, should be included in an analysis can lead to widely different utility estimates for the same property.⁷⁶

Specific rules for choosing samples would provide several benefits. First, it could lead to a more accurate estimate of costs. Second, it could reduce administrative burdens on project owners and PHAs because it provides a unified standard. These standards could also alleviate concerns about owners using the vagueness in current regulations to select a sample that maximizes their utility allowance.

Currently, more specific utility allowance calculation methodologies exist in Wisconsin, HUD Region IX and Region X. HUD could adopt one of these methodologies as a nationwide standard. There is ultimately no ideal sampling method, as each result in higher or lower costs, but HUD could request owners use two methodologies and take the lower, or average, of the two.

5. Clarify what is meant by an “energy conservative household”

In general, HUD should provide more specific benchmarks for consumption so as to reduce utility costs and the administrative burden faced by each PHA associated with developing and enforcing various standards. Specifically, HUD should rewrite its regulations to clarify what it means by “energy-conservative household”⁷⁷ HUD

⁷⁵ See *infra* Section V of the Utility Payments in Project-based Rental Assistance chapter.

⁷⁶ *Minutes of HUD/Performance Based Contract Administrator Call*, U.S. DEP'T OF HOUS. & URBAN DEV. (Dec. 8, 2004), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14979.pdf. (“Deborah Lear said she had heard from owners that different PBCAs are requiring different information from the owners in order to review the utility analysis submission. She asked whether the PBCAs could reach consensus on a single national standard. New York admitted they have stricter document requirements due to comments from a HUD compliance review.”).

⁷⁷ 24 C.F.R. § 5.603. This regulation applies to public housing, Project-Based Section 8, and HCV.

regulation 24 C.F.R. § 5.603 defines an appropriate utility allowance as being “an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”⁷⁸

HCV regulations state that the utility allowances shall be determined on the basis of “the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality.”⁷⁹ Even if energy conservative households were defined, it would be administratively costly and difficult to determine which households in an area are truly energy conservative.⁸⁰

The regulations also stipulate that the PHA “must use normal patterns of consumption for the community as a whole”⁸¹ This provision is problematic because it contradicts the previous line instructing PHAs to use the rates of energy conservative households. Additionally, normal patterns of consumption ignore differences in building age and size, tenant composition, construction materials and appliances.

One option to correct this issue is that HUD could remove the words “energy-conservative households that occupy housing of similar size and type in the same

⁷⁸ PBRA and Public Housing programs use the “energy-conservative household of modest circumstances” standard, while the HCV program uses “housing of a similar size and type in the same locality” in “the community as a whole.” See Evan White, *Utilities in Federal Subsidized Housing: A Report on Efficiency, Utility Savings, and Consistency* 66 (June 2012) (unpublished M.P.P. thesis, University of California, Berkeley) (available at http://aceee.org/files/pdf/resource/white_utilities_in_federally_subsidized_housing_2012.pdf). White suggests making the standards the same for PBRA, HCV, and Public Housing.

⁷⁹ 24 C.F.R. § 982.517(b)(1).

⁸⁰ A variety of factors such as family size, age, employment status, disabilities, and energy efficiency of the building could greatly skew energy consumption rates.

⁸¹ 24 C.F.R. § 982.517(b)(1).

locality”⁸² from its regulations and replace with more specific comparison groups. For example, HUD could require that utility allowances for HCV be based on the energy consumption of families within a certain percentage of Area Median Income.

Furthermore, HUD should eliminate the language in Form HUD-52667, which states that “[a]llowances must not be based on energy consumption or costs [of] above average or below average income families”⁸³ as this is also vague.

6. Clarify what is meant by “reasonable” utility costs

HUD does not provide a benchmark or clear definition for what are considered reasonable utility costs in PBRA utility allowances. HUD regulation 24 C.F.R. § 5.603 defines an appropriate utility allowance as being “an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”⁸⁴ Similarly, HUD does not provide clear guidance as to what constitutes a reasonable increase in utility costs for budget-based rental adjustments.⁸⁵ Therefore, building owners may have substantial leeway in requesting budget increases for utility costs even if their lack of energy conservation measures is directly causing or allowing those increases.

⁸² *Id.*

⁸³ U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES 2 (1997), *available at* <http://www.hud.gov/offices/adm/hudclips/forms/files/52667.pdf> [hereinafter HUD-52667].

⁸⁴ PBRA and Public Housing programs use the “energy-conservative household of modest circumstances” standard, while the HCV program uses “housing of a similar size and type in the same locality” in “the community as a whole.” See White, *supra* note 78, at 66. White suggests making the standards the same for PBRA, HCV, and Public Housing. White, *supra* note 78, at 67.

⁸⁵ See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 3, at 7-29.

7. Increase audits of PHA and PBCA calculations of utility allowances

HUD offers PHAs discretion in how utility allowances are calculated. As a result, HUD audits how PHAs calculate these allowances. In an ideal world, where there are unified standards and regression-based estimates, HUD would have less of an administrative burden in reviewing any given PHA and could audit PHAs more frequently and with more accuracy. In the absence of such standards and method, increased audits of PHA utility allowances could at least force PHAs to develop and enforce stricter local standards that better approximate utility allowances and reduce costs to HUD. These audits may require additional staffing and financial resources at HUD but ultimately the cost savings associated with better utility standards will likely free up resources to cover such costs.

Appendix 4: Alternative Approach Offered by the Moving to Work program

While there are distinct advantages to uniformity and consistency among programs and regions, providing more flexibility to PHAs, PBCAs, and municipalities might result in innovative new approaches that could be applied in other regions. The following is one such example of a regional innovation in HCVs through the Moving to Work (MTW) program, but regional innovation could also take place in PBRA or Public Housing. It should also be noted that there are other modifications to utility allowances made through the MTW program that push additional costs onto tenants rather than addressing the larger split incentive problem.

HUD could recommend that Congress allow more PHAs to enter into the Moving to Work program.⁸⁶ MTW would allow PHAs to bypass the statutory requirements of the HCV voucher program and implement homegrown innovations to achieve the goals of MTW: reducing cost and increasingly effectiveness, incentivizing self-sufficiency, and increasing housing choice for low-income families.⁸⁷ Since Congress authorized the program in an appropriations bill in 1996,⁸⁸ several PHAs used MTW as an opportunity

⁸⁶ HUD would not be able to, on its own, provide MTW waivers. HUD would be able waive its own regulations through notice-and-comment rulemaking, but could do nothing about the authorizing statutes.

⁸⁷ See *Moving to Work (MTW) FAQ*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/faq (last visited Oct. 18, 2013).

⁸⁸ See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 204, 110 Stat. 1321 (1996) (stating that one of the many purposes of the bill is to “reduce cost and achieve greater cost effectiveness in Federal expenditures.”). The fact that the Moving to Work program was initiated by statute limits its greater applicability, but the program was created for the purposes of fostering local innovation for the purpose of wide-scale implementation by HUD. See, e.g., *id.* (“... conduct detailed evaluations of up to 15 such agencies in an effort to identify replicable program models promoting the purpose of the demonstration.”). PHAs are free to implement whichever policies they want so long as they fall into the guidelines and conform to the three statutory objectives: reducing cost and achieving greater cost effectiveness, giving incentives to families with children to seek work or better work, and to increase housing choices for low-income families. See *id.*; *Moving to Work (MTW) FAQ*, *supra* note 87 (“While MTW agencies have considerable flexibility, they must still abide by all other federal rules and regulations, including the Fair Housing Act, the Civil Rights Act, labor standards, environmental rules, procurement

to revise their utility allowance guidelines.⁸⁹ PHAs enrolled in MTW reported that the flexibility afforded to them has allowed them to partially achieve the aforementioned goals of the program.⁹⁰

For example, under the MTW program, the Philadelphia Housing Authority requires HCV tenants to enroll in the Philadelphia Gas Works Customer Responsibility Program (CRP), which has gas utility allowances calculated according to an alternate methodology.⁹¹ Unlike most of the other changes initiated through MTW, implementing the requirement that tenants seek better rates would not likely require any changes to the statute and could probably be implemented through regulatory changes or guidance. Such a change would be a potentially good practice for all PHAs to adopt. Similarly, the MTW program may give PHAs more flexibility to use HUD's EPC program.

guidelines, demolition and disposition procedures and relocation regulations.”). While Congress has added five more PHAs to the MTW program, it is unlikely that the program will be expanded much past its current point. *See, e.g.*, Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 230, 121 Stat. 1844 (2007) (adding two additional PHAs to the MTW program). It is unclear how the reforms discovered via MTW to Section 8, and namely to the system of utility allowances, would have to be implemented (i.e. would Congress have to pass a statute, or could HUD initiate reforms through notice and comment rulemaking).

⁸⁹ *See* U.S. DEP'T OF HOUS. & URBAN DEV., MTW RENT REFORM ACTIVITIES BY AGENCY (2009) (listing the reforms undertaken by a variety of PHAs pursuant to the MTW program). A total of 35 PHAs are currently participating in MTW, but only some of the PHAs have enacted utility allowance policies. *See, e.g.*, *History of Moving to Work (MTW)*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/history (last visited Oct. 22, 2013).

⁹⁰ *See, e.g.*, *Moving to Work (MTW) – Promising Practices*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/promisingpractices (last visited Apr. 24, 2014) (listing a number of reports of successful implementation of the MTW program).

⁹¹ PHILA. HOUS. AUTH., MOVING TO WORK ANNUAL PLAN YEAR THIRTEEN 42 (2012).

Chapter 2: Utility Payments in Public Housing

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I. Introduction

As a part of a larger project to evaluate how HUD could promote greater energy efficiency in its subsidy programs, this chapter provides a comprehensive overview of the legal and regulatory frameworks that govern utility allowances in the Public Housing program. The federal government began to fund public housing developments with the Housing Act of 1937.¹ HUD currently subsidizes 1.1 million units of public housing that are operated by 3,088 Public Housing Authorities (PHAs) nationwide.² All households in public housing must have an income below 80 percent of area median income (AMI); however, some PHAs require a household income below 50 percent of AMI.

PHAs are government entities that rely on HUD for operating support;³ therefore they will react differently to energy cost incentives than a profit-maximizing for-profit owner. Public housing tends to be older, and, as a result, many properties are master-metered.⁴ In fact, 55 percent of public housing units have their utilities included in the rent, while the remainder receives utility allowances.⁵ On the one hand we can argue that federal budget constraints act as a strong incentive for all PHAs to retrofit properties and individually meter units to reduce costs; however, these same budget constraints limit the capital available to undertake such large-scale investments. In addition, PHAs may lose some of their budget allocation if utility costs go down.⁶ As a result, there are mixed incentives for owners to make the necessary repairs. The

¹ The Housing Act of 1937, 42 U.S.C. § 1437.

² U.S. DEP'T OF HOUS. & URBAN DEV., AFFORDABLE GREEN: RENEWING THE FEDERAL COMMITMENT TO ENERGY-EFFICIENT, HEALTHY HOUSING 6 (2012) [hereinafter HUD, AFFORDABLE GREEN].

³ See *Public Housing Agency (PHA) Plans*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/pha (last visited Aug. 4, 2014).

⁴ Evan White, *Utilities in Federal Subsidized Housing: A Report on Efficiency, Utility Savings, and Consistency* 11 (June 2012) (unpublished M.P.P. thesis, University of California, Berkeley) (available at http://aceee.org/files/pdf/resource/white_utilities_in_federally_subsidized_housing_2012.pdf).

⁵ HUD, AFFORDABLE GREEN., *supra* note 2, at 9.

⁶ See 24 C.F.R. § 990.110.

majority of tenants in public housing do not pay their own utilities, which means there is little incentive for tenant to moderate consumption. As a result, this program has poor conservation incentives for both PHAs and tenants.

II. Background on Utility Payments in Public Housing

The Brooke Amendment to the Housing Act of 1937 limits rents in federally subsidized housing to 30 percent of a household's adjusted monthly income.⁷ Traditionally, HUD interpreted this cap to include costs for reasonable consumption of basic utilities.⁸ In housing where utilities are paid by the PHA and included in the rent, the tenant is typically responsible for one total rent payment.⁹ The tenant does not receive a utility allowance, because the rent obligation is already subject to the 30 percent cap. Instead, the calculation process outlined in Part II of this chapter is used to determine a reasonable amount of utility consumption (a consumption allowance) above which the tenants may be surcharged for excessive use.¹⁰ However, when utilities are paid separately by the tenant, it becomes necessary to credit the utility expenses against the rent due from the tenant in order to ensure that the tenant's housing obligations do not exceed the 30 percent cap.¹¹ This credit is the utility allowance.

⁷ 42 U.S.C. § 1437a(a)(1)(A). The original Brooke Amendment limited rents to 25 percent of adjusted monthly income, but subsequent amendments increased this amount to 30 percent.

⁸ See 42 U.S.C. 1437f(c)(1) ("An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to made."). See also *Utility Allowances*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/phecc/allowances (last visited Oct. 24, 2013) ("In interpreting the federal housing law, HUD has defined the Total Resident Payment for "rent" to include both shelter and the costs for reasonable amounts of utilities. The amount that a PHA determines is necessary to cover the resident's reasonable utility costs is the utility allowance.").

⁹ See White, *supra* note 4, at 11 (explaining that, when utilities are provided by the PHA, they are included in the tenant's rent and passed on to HUD as a portion of the operating subsidy that HUD pays the PHA).

¹⁰ See *infra* Part III.

¹¹ See GAVIN THORNTON, LEGAL AID SOC'Y OF HI & JAMES R. GROW, NAT'L HOUS. LAW PROJECT, ADVOCATING FOR HIGHER UTILITY ALLOWANCES IN FEDERALLY SUBSIDIZED HOUSING: A PRACTICAL GUIDE 5 (2007) ("The

Metering systems play an important role in the implementation of HUD's utilities subsidy, as they determine whether a tenant receives a utility allowance, a consumption allowance enforced through surcharges, or no allowance at all.¹² In the case of master-metering, the utility company charges the PHA for the utilities consumed by the entire building and the PHA includes the costs in the rent charged to tenants.¹³ Because the rents are capped by the Brooke Amendment, these tenants receive no utility allowance and the PHA's utility costs are passed through to HUD.¹⁴

A PHA's budget for utilities is calculated based on its previous average utility costs.¹⁵ If a PHA's utility costs decrease, HUD reduces the PHA's utility funding by 25 percent of the decrease.¹⁶ This means the PHA keeps 75 percent of the cost saving. If utility costs increase, HUD increases a PHA's funding by 25 percent of the increase,¹⁷ which means the PHA must find some other funding to cover the operating funding shortfall. On its face, the reward for lower costs could create an incentive for a PHA to reduce costs because it would keep a majority of the cost savings. However, this incentive only holds if the PHA believes that costs will not increase in subsequent years. For example, if a PHA has lower costs in T1 than T0 they will have a lower operating budget for T2. If utility costs in T2 return to the same level as T0 then the PHA has a budget shortfall in T2, and it is also given a budget for T3 that is likely still below its

underlying theory of a utility allowance is that when a government-funded housing program is trying to provide tenants with an affordable rent, a tenant whose utilities are not included in the rent has a more costly housing burden than a tenant whose rent includes utilities . . .").

¹² U.S. DEP'T OF HOUS. & URBAN DEV., UTILITY ALLOWANCE GUIDEBOOK 49 (2008) [hereinafter HUD, UTILITY ALLOWANCE GUIDEBOOK].

¹³ *Id.*

¹⁴ *See id.* at 3 ("[I]f utilities are master-metered . . . and not individually check-metered, the PHA will not provide UAs or surcharge residents for excess usage [but] may charge a resident a reasonable amount for having an extra freezer or refrigerator."); White, *supra* note 4, at 11 (noting that HUD lacks detailed data on public housing utilities costs because PHAs often do not disaggregate them from the rent amount in the operating fund formula).

¹⁵ 24 CFR § 990.170 (b). *See also* 24 CFR § 990.180(a) (explaining the rolling base consumption level (RBCL)).

¹⁶ 24 CFR § 990.170 (c).

¹⁷ *Id.*

budget in T0. This then creates another budget shortfall if costs in T3 are at the T0 level. In most public housing projects, PHAs pay for utility costs directly, which means that tenants have little incentive to conserve utility usage. As a result, on any given year costs may increase or decrease for reasons outside of a PHA's control, and costs savings in one year can be followed by consecutive years of cost overruns. In theory, the penalty PHAs face for cost increases could act as an incentive for PHAs to ensure that utilities do not increase, but this incentive also functions within the context of constrained funding for PHAs, so it is more likely that such a penalty only places PHAs in a worse position that may compound over time. Finally, while this structure increases the incentive for PHAs to make improvements and invest in submetering their properties, it also reduces a PHA's ability to use all of the realized cost savings to repay the debt associated with making such investments. As noted in Appendix 1 of this section, HUD recently developed its Energy Performance Contract program to correct this system and incentivize PHAs to make energy efficient upgrades.

Buildings may also be check-metered, in which case the utility company still charges the PHA for the overall consumption but the PHA installs separate check-meters to monitor the usage of each individual unit.¹⁸ Tenants living in these units do not typically receive a utility allowance but may be surcharged for consumption above the allowance base calculated as described in Part III.¹⁹ Finally, some units are individually metered and tenants are billed directly by the utility company. These tenants receive a utility allowance deducted from the rent owed to

¹⁸ HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12, at 49.

¹⁹ 24 C.F.R. § 965.506(a).

the PHA.²⁰ In the case of tenants for whom the utility allowance itself is greater than 30 percent of their income, the PHA issues a utility reimbursement in the amount of the difference.²¹

Of these units, 55 percent have their utilities paid by the PHA and included in the rent, while the remainder receive utility allowances.²² By comparison, 66.7 percent of assisted housing units and 90 percent of housing choice voucher units receive utility allowances.²³ One reason for this discrepancy is that public housing buildings are older on average than those in other subsidy programs and as a result more of them are master-metered.²⁴ The table below shows how HUD's utility costs were incurred across these two categories from 2007 to 2011.²⁵

Table 1: PHA- and Tenant-Paid Utility Expenditures²⁶

	2007 (\$ millions)	2009 (\$ millions)	2011 (\$ millions)	Percent Increase over 2009
PHA-Paid Utilities	\$1,429	\$1,530	\$1,589	3.86%
Utility Allowances (Tenant-Paid Utilities)	\$421	\$471	\$487	3.40%

III. Calculation of Allowances

HUD regulations provide general standards for how a PHA must determine a reasonable level of utility consumption, as well as rules for permitted end uses that may be included in the allowance. The primary regulatory requirement is that PHAs must set the allowance to “approximate a reasonable consumption of utilities by an energy-conservative household of

²⁰ HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12, at 49.

²¹ 24 C.F.R. § 5.632. The PHA may issue the reimbursement directly to the tenant, or to the utility company on the tenant's behalf. *Id.*

²² HUD, Affordable Green, *supra* note 2, at 9..

²³ *Id.*

²⁴ See White, *supra* note 4, at 13, tbl.5 (As of 2003, 97.1 percent of public housing units were built before 1990).

²⁵ HUD provides PHAs with flexibility in determining their fiscal years for data reporting, so data collection lags. HUD, AFFORDABLE GREEN, *supra* note 2, at 4.

²⁶ *Id.*

modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”²⁷

The applicable regulations state that in determining a utility allowance, PHAs must consider nine factors: intended end uses, climatic location of the housing, unit size and number of occupants, type of unit construction, energy efficiency of PHA-supplied appliances and equipment, consumption requirements of end use equipment, physical condition of the building, necessary internal temperature requirements, and the temperature of domestic hot water.²⁸ In *Dorsey v. Housing Authority of Baltimore*,²⁹ the Fourth Circuit accepted tenant advocates’ argument, holding that PHAs must also consider the extent to which local custom and usage patterns characterize a given end use as a luxury or necessity.³⁰ Regulations further stipulate that allowances should include reasonable consumption for major equipment provided by the PHA (such as a furnace or hot water heater), essential equipment regardless of whether it is provided by the PHA (such as a range or refrigerator), and basic equipment provided by tenants (such as toasters or radios).³¹ The regulations prohibit PHAs from including air conditioning in allowances for public housing, regardless of the location of the housing.³²

HUD published guidance to further clarify factors that PHAs should consider when determining reasonable allowances. The Public Housing Occupancy Guidebook states that allowance amounts should “vary by residential demographic characteristics affecting home

²⁷ 24 C.F.R. § 965.505(a).

²⁸ 24 C.F.R. § 965.505(d).

²⁹ *Dorsey v. Housing Authority of Baltimore*, 984 F.2d 622, 629 (4th Cir. 1993).

³⁰ *Id.* at 629. This additional factor has been incorporated by HUD as guidance. See U.S. DEP’T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 138 (2003) [hereinafter HUD, OCCUPANCY GUIDEBOOK] (“In determining the level of consumption for an energy conscious household, the PHA should distinguish between necessary appliances and luxury appliances. This distinction should reflect local usage and custom patterns.”).

³¹ 24 C.F.R. § 965.505(b).

³² 24 C.F.R. § 965.505(e).

energy use”³³ and that “[e]xisting technical standards (i.e., local building codes) should be used where available in determining what is necessary to provide for safe, sanitary and healthful living.”³⁴ In addition, the Guidebook warns that excessive consumption on the part of substantial numbers of tenants is an indication that the allowances are insufficient.³⁵

Apart from these standards, however, HUD gives PHAs substantial autonomy and discretion in setting both utility allowances (for tenant-paid utilities) and consumption allowances (for PHA-provided utilities).³⁶ HUD suggests calculation methodologies and best practices through agency guidance documents,³⁷ but there have been no new substantial regulations governing PHAs’ calculation of allowances since 1985.³⁸

A. Methodologies

Most of HUD’s guidance on utility allowance calculation is contained in its Utility Allowance Guidebook, the most recent version of which was published in 2008.³⁹ The Guidebook details two recommended allowance calculation methodologies: the consumption

³³ HUD, OCCUPANCY GUIDEBOOK, *supra* note 30, at 138. HUD appears to have added this factor in response to comments pointing out that utility use often varies depending on whether occupants are employed or not. *See New HUD Public Housing Guidebook Should Help Rein in Utility Allowance Abuses*, FSC’S LAW & ECONOMIC INSIGHTS (Fisher, Sheehan & Colton, Belmont, M.A.), Nov./Dec. 2003, at 4.

³⁴ HUD, OCCUPANCY GUIDEBOOK, *supra* note 30, at 138.

³⁵ *Id.* at 170.

³⁶ *See* 24 C.F.R. § 965.505(c) (“The complexity and elaborateness of the methods chosen by the PHA, in its discretion . . . will depend upon the nature of the housing stock, data available to the PHA and the extent of the administrative resources reasonably available to the PHA to be devoted to the collection of such data, the formulation of methods of calculation, and actual calculation and monitoring of the allowances.”).

³⁷ Most of HUD’s guidance on utility allowance calculation has been through its Utility Allowance Guidebook, the most recent version of which was published in 2008. HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12.

³⁸ In 1979, HUD proposed regulations that would have required all allowances to be based on actual consumption data. 44 Fed. Reg. 1600 (1979). However, the proposal was met with strong criticism from PHAs and was eventually abandoned in favor of the current, hands-off approach. *See White, supra* note 4, at 47 (describing the development of the regulatory “compromise”); Steven Ferrey, *In From the Cold: Energy Efficiency and the Reform of HUD’s Utility Allowance System*, 32 HARV. J. ON LEGIS. 145, 170 (1995) (citing 47 Fed. Reg. 35251 (1982) (proposing “deregulating” utility allowances)) (“After these regulatory changes, the PHAs, rather than HUD, became totally responsible for data, methodologies, and calculations used to establish tenant utility allowances and surcharges.”).

³⁹ HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12, at 10.

method (also referred to as the actual/historical method) and the engineering method.⁴⁰ The objective for both of these methods is to determine the base utility consumption amount to which tenants should be entitled. The consumption method bases the allowance calculation on the actual, measured amount of utilities that residents living in similar units consumed within a specific prior billing period, whereas the engineering method is a projection of the amount of utilities such residents are expected to consume given characteristics such as building efficiency and local climate.⁴¹ Some PHAs may prefer the consumption method because it is relatively low cost and is likely a more accurate reflection of what utility consumption *actually* is.⁴² Others may prefer the engineering method (which is usually contracted out to a consulting firm⁴³) because it is arguably a more accurate reflection of what utility consumption *should* be.⁴⁴

According to the consumption method, the PHA should determine the average historical consumption by residents from various subcategories of similar units, with the goal of obtaining consumption data from all units in an allowance category.⁴⁵ However, HUD suggests that PHAs may deal with inadequate data by substituting data from previous years or by selecting a representative sample of units.⁴⁶ At a minimum, the PHA should differentiate by housing development, utility type, building type, and bedroom size.⁴⁷ The PHA then has the option of adjusting the consumption averages to account for future significant weather changes and to eliminate outlier users to better approximate reasonable use by energy-conservative

⁴⁰ *Id.* at 10.

⁴¹ *Id.*

⁴² *Id.* at 11. *See also* White, *supra* note 4, at 18 (suggesting that the consumption method likely predominates in public housing because of the low cost and the ease of collecting release forms from tenants who are centrally located in large buildings).

⁴³ HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12, at 38.

⁴⁴ *Id.* at 12.

⁴⁵ *Id.* at 22.

⁴⁶ *Id.* at 21.

⁴⁷ *Id.* at 27–28.

households.⁴⁸ If allowances are based on normalized consumption data, the PHA does not need to perform an actual consumption study each year in response to extreme weather changes.⁴⁹

According to the engineering method, the PHA (or the outside consultant) uses an engineering model that accounts for specific technical information and building characteristics to predict expected reasonable utility usage for similar units. The Guidebook notes that consumption allowances based on the engineering method should be compared to actual utility bills to determine whether the allowances are reasonable and accurate.⁵⁰

Both calculation methods result in a consumption allowance schedule, which shows the monthly allowances by housing development, bedroom size, and applicable utilities. In the case of PHA-paid utilities, these consumption allowances are a cap above which tenants may be charged for excessive use.⁵¹ In the case of tenant-paid utilities, they are multiplied by the current residential utility rates to determine the utility allowances that will be deducted from the rent the tenant owes to the PHA.⁵²

In applying the consumption allowances to the utility rates, PHAs are encouraged to account for differences in seasonal rates, particularly if the utility supplier does not offer tenants a uniform payment plan.⁵³ However, no variation is required, and many PHAs choose to provide uniform monthly utility allowances.⁵⁴ In this scenario, it seems likely that some tenants' housing

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 30.

⁵⁰ *Id.* at 12.

⁵¹ 24 C.F.R. § 965.506(a).

⁵² HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12, at 35.

⁵³ *Id.* at 52.

⁵⁴ *See id.* at 53 (“PHAs with individually metered utilities generally provide equal monthly utility allowances to their residents. . . . If the utility supplier does not offer residents a uniform payment plan, the PHA may provide for seasonal variations in its utility allowances.”).

costs would routinely exceed 30 percent of their income in seasons when the rate increases are not compensated by an increased allowance.⁵⁵

Once the PHA determines the allowances for each utility and each unit type, regulations dictate the processes by which the PHA must inform tenants of their allowance amounts. When a PHA establishes or makes changes to allowances or surcharges, regulations require it to post notice 60 days before the changes take effect, and give tenants the opportunity to comment on the changes.⁵⁶ Through guidance, however, HUD confirmed that while PHAs should review and answer tenants' comments, there is no requirement to change allowances in response to these comments.⁵⁷ In fact, regulations stipulate that the PHA's determinations are "final unless arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."⁵⁸

B. Criticism and Challenges

The wide discretion afforded to PHAs in calculating utility allowances can be problematic for both HUD and tenants.⁵⁹ On the one hand, PHAs are more familiar with the specific characteristics and needs of their own housing units, and their direct relationship with tenants makes them arguably best suited to determine reasonable allowances. However, PHAs

⁵⁵ See THORNTON & GROW, *supra* note 11, at 31 (expressing concern that the regulatory requirement of 24 C.F.R. § 965.507(b) for PHAs to re-calculate allowances when rates change by 10 percent or more may not be triggered in the case of seasonal variations).

⁵⁶ 24 C.F.R. § 965.502(c).

⁵⁷ See HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12, at 61 ("The PHA is not required to change allowances due to residents' complaints, but this comment period allows the PHA another opportunity to review its determinations.").

⁵⁸ 24 C.F.R. § 965.502(e).

⁵⁹ See Ferrey, *supra* note 38, at 48 ("... an underlying tension remains regarding what amount of [utility] usage ought to be subsidized by HUD. Rather than HUD making that decision, PHAs currently make that decision, yet HUD must live with the budgetary consequences."); THORNTON & GROW, *supra* note 11, at 2 (characterizing challenges to the PHA's base allowance calculation as the most difficult type of utility allowance advocacy because of the PHA's wide discretion).

may have different interests than HUD and will respond to incentive structures inherent in the utility allowance system.⁶⁰

As the Government Accountability Office (GAO) highlighted in a 1991 report to Congress, each time a PHA increases utility allowances, it will see a commensurate decrease in the rent received from tenants.⁶¹ While in theory these rent reductions would be compensated through a corresponding increase in the operating subsidy the PHA receives from HUD, in reality, the funds may not be available due to the unpredictability of congressional appropriations.⁶² As a result, if the risk that the operating fund will fall short is substantial, PHAs will have an incentive to keep allowances low.⁶³ However, when a PHA expects to receive full compensation from HUD, it does not have as strong an incentive to keep allowances low and in fact may prefer to keep them high in order to avoid surcharging tenants.⁶⁴

HUD has not provided sufficient guidance to PHAs on how best to calculate allowances, thus leading to significant variations in rent burdens between PHAs.⁶⁵ For example, it is unclear whether “reasonable consumption” means average consumption or something different, such as an amount above average that would cover most tenants’ usage.⁶⁶ Even if “reasonable” is

⁶⁰ See Ferrey, *supra* note 38, at 194 (“Because they rely on HUD for funding, PHAs are extremely sensitive to incentives inherent in the HUD-PHA relationship.”).

⁶¹ 1 GOV’T ACCOUNTABILITY OFFICE, UTILITY ALLOWANCES OFTEN FALL SHORT OF ACTUAL UTILITY EXPENSES 43 (1991) [hereinafter GAO, UTILITY ALLOWANCES].

⁶² See THORNTON & GROW, *supra* note 11, at 37 (pointing out that increases in the operating fund subsidy may not be available in the short or long term); GAO, UTILITY ALLOWANCES, *supra* note 61, at 43 (“... PHAs fear that the full operating subsidy may not be appropriated every year. . . . Further, critics have asserted that the formula used does not accurately determine some PHAs’ justifiable expenses.”).

⁶³ *Id.* at 43.

⁶⁴ See White, *supra* note 4, at 37 (suggesting that PHAs ultimately have the interests of tenants at heart and want to avoid setting unreasonably low allowances).

⁶⁵ See GAO, UTILITY ALLOWANCES, *supra* note 61, at 3–4 (reporting survey results showing a range in rent burdens for tenants in public housing from 12–74 percent of adjusted monthly income).

⁶⁶ See Ferrey, *supra* note 38, at 163 (“PHAs do not and cannot effectively evaluate the reasonableness or equity of their own utility allowances because there is no precise regulatory standard against which to measure performance.”); White, *supra* note 4, at 69 (citing GAO, UTILITY ALLOWANCES, *supra* note 61, at 40) (“Anecdotal evidence from prior reports and interviews seems to suggest that, while some PHAs use average consumption levels, others may set their UA threshold near the 80th or 90th percentile, while others use a number under 50 percent on the assumption that, if certain families can get by with low consumption, they all can.”).

interpreted to mean “average,” PHAs differ in whether they remove data from outlier units before calculating the average.⁶⁷ Despite this lack of clarity, the Supreme Court held that a tenant’s right to a reasonable utility allowance is judicially enforceable,⁶⁸ so PHAs face the possibility that their allowances could be challenged and struck down.⁶⁹

Finally, tenant advocates argue that existing calculation methodologies do not accurately reflect the reasonable consumption needs of many tenants. By definition, setting the allowance to represent average consumption means that a substantial percentage of tenants will likely consume above that level.⁷⁰ In addition, the fact that PHAs are not required to take the relative income and energy intensity of tenants into account when setting allowances means that allowances may systematically underestimate the consumption of units housing the very poor,⁷¹ the elderly and disabled,⁷² and families with multiple people per bedroom.⁷³

IV. Revision and Review of Utility Allowances

There are few regulations governing the process by which PHAs review or revise their allowances. The clearest is the requirement that PHAs immediately revise utility allowances

⁶⁷ GAO, UTILITY ALLOWANCES, *supra* note 61, at 40.

⁶⁸ See *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987) (“There is no merit to respondent’s argument that the provision for a ‘reasonable’ allowance for utilities is too vague and amorphous to confer on tenants an enforceable ‘right’ . . .”). See also *Dorsey*, 984 F.2d at 622 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 416 (1971)) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”).

⁶⁹ But see *White*, *supra* note 4, at 36–37 (noting that plaintiffs would face a high burden of proof in such challenges, given courts’ traditional deference to reasonableness standards).

⁷⁰ See *THORNTON & GROW*, *supra* note 11, at 10 (suggesting that even tenants with above average consumption levels could have grounds to challenge a utility allowance in court).

⁷¹ See *Ferrey*, *supra* note 38, at 25–26 (citing studies showing that low-income households tend to be less energy efficient than the general population, and pointing out that poor families rely more on allowances as a portion of their income).

⁷² See *id.* (pointing out that allowances only differentiate by the number of bedrooms in a unit, thus penalizing households with more than one individual per bedroom).

⁷³ See *id.* (arguing that residential energy intensity is higher for elderly and poor households). Most PHAs set limits on how many people may live in an apartment, but not all people living in a public housing unit are necessarily registered tenants.

whenever a rate change results in an increase or decrease of 10 percent or more from the rates on which the allowances were based.⁷⁴ PHAs are also required to review “at least annually the basis on which utility allowances have been established and, if reasonably required in order to continue adherence to the habitability standards stated in § 965.505, shall establish revised allowances.”⁷⁵ Finally, PHAs are directed to maintain a publically accessible record that documents the basis on which allowances and surcharges are derived.⁷⁶

HUD published guidance further clarifying these requirements. The *Utility Allowance Guidebook* recommends a consumption base review as a “best practice” when a PHA experiences significant changes (such as modernization or replacement of equipment), lacks sufficient supporting documentation for its current allowances, or has not recalculated allowances in the last five years.⁷⁷ In order to fulfill the requirements of § 965.502(b) (and protect against potential litigation),⁷⁸ HUD suggests that PHAs’ records include documentation of the calculation method, utility rates and software used, as well as key assumptions, building characteristics, and adjustments made.⁷⁹ The *Public Housing Occupancy Guidebook* further directs PHAs to increase their allowances “[w]hen the actual energy consumption by tenants routinely exceeds the utility allowance . . .” unless the PHA can demonstrate that the excess is due to unreasonable (“non-energy conservative”) consumption.⁸⁰ Notably, HUD adopts the holding from *Dorsey* that routine tenant consumption in excess of the allowance “is material

⁷⁴ 24 C.F.R. § 965.507(b). PHAs are not required to revise their allowances except when such rate changes occur. *Id.*

⁷⁵ 24 C.F.R. § 965.507(a). (“The review shall include all changes in circumstances . . . indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.”).

⁷⁶ 24 C.F.R. § 965.502(b).

⁷⁷ HUD, UTILITY ALLOWANCE GUIDEBOOK, *supra* note 12, at 7–8.

⁷⁸ *See id.* at 4 (“As this is an area in which there has been litigation, it is important that the PHA document and defend the method used to develop the UAs and perform an annual review of the UAs.”).

⁷⁹ *Id.* at 60.

⁸⁰ HUD, OCCUPANCY GUIDEBOOK, *supra* note 30, at 170.

evidence that the PHA allowance is insufficient or that excess consumption may be due to factors not within the control of the tenants.”⁸¹

Despite the regulations and guidance from HUD, a 1991 GAO survey indicates that at that time PHAs rarely review the consumption base for their allowances and, at most, tend to apply updated rates to the existing base.⁸² We are unsure if PHA’s changed their review of the consumption base since the 1991 GAO study; however,, there was litigation in 2005 in which tenants successfully challenged the failure of PHAs to revise allowances in response to a 10 percent utility rate change, as required by § 965.507(b), which indicates that at least some PHAs failed to review the consumption base.⁸³

HUD exercises minimal oversight over PHAs allowances, in keeping with the “deregulation” of utility allowances in the late 1980s.⁸⁴ According to 24 C.F.R. § 965.502(d), allowances are not subject to approval by HUD but may be reviewed in the course of periodic audits. However, full audits of PHA calculations are apparently rarely, if ever, conducted.⁸⁵ Even

⁸¹ *Id.* at 170. *See Dorsey*, 984 F.2d at 631 (“Evidence that tenant consumption is routinely in excess of a local housing authority’s proposed UA gives rise to an inference that allowances were inadequate to provide for reasonable consumption by an energy-conservative household of modest means.”). *See also Nelson v. Greater Gadsden Hous. Auth.*, 606 F. Supp. 948, 955 (N.D. Ala. 1985) (“The large number of tenants surcharged each month by GGHA demonstrates that GGHA’s allowances were insufficient to meet the needs of many of its tenants.”).

⁸² *See* GAO, *UTILITY ALLOWANCES*, *supra* note 61, at 53 (reporting survey results showing that fewer than half of all PHAs reviewed allowances annually, that reviews varied in thoroughness, and that many lacked sufficient documentation); White, *supra* note 4, at 44 (asserting that PHAs only update utility rates, not the consumption base, unless properties have undergone a significant retrofit). It is not entirely clear that PHAs must perform an annual review at all. *See id.* at 44 (citing HUD, *UTILITY ALLOWANCE GUIDEBOOK*, *supra* note 12, at 87) (arguing that recalculation of the consumption base may not be necessary as long as the PHA uses certain methodologies such as a fixed, weather-normalized database).

⁸³ *See McDowell v. Philadelphia Hous. Auth.*, 423 F.3d 233 (3rd Cir. 2005) (confirming details of a consent decree in a settlement of approximately \$2 million in retroactive payments for a PHA’s failure to raise utility allowances when gas rates increased); Letter from Stan Thornton, Wooten, Boyett, Thornton, Carpenter & O’Brien, to David Webster, Legal Serv. Corp. of AL (Dec. 21, 1983) (confirming details of a settlement agreement in which the Talladega housing authority agreed to calculate new allowances and partially reimburse tenants who were overcharged according to outdated allowances).

⁸⁴ *See* sources cited *supra* note 38 (describing the delegation of responsibility over utility allowances from HUD to PHAs in the 1980s).

⁸⁵ *See* White, *supra* note 4, at 21 (“HUD rarely, if ever, audits these UA calculations.”).

if audits were more frequent and thorough, the regulatory standards at issue are broad enough that PHAs' determinations would likely be upheld.⁸⁶

V. Tenant Payment

As explained in Part II, the metering system used in a given public housing building will determine how utility allowances are implemented and how financial obligations are allocated between HUD, PHAs, and tenants.⁸⁷ Master-metering is likely preferable from the tenants' perspective, because tenants do not bear the financial risk of insufficient utility allowances, nor do they face significant incentives to conserve.⁸⁸ Conversely, individual and check-metered systems benefit HUD and PHAs by allowing them to shift responsibility for excessive consumption onto tenants.⁸⁹

Converting public housing units to check-metering or individual metering has the potential to improve energy conservation.. Yet HUD regulations do not currently require PHAs to issue check-meter rebates or credits,⁹⁰ and a GAO 1991 survey found that 21 percent of PHAs responding did not,⁹¹ essentially using the savings resulting from tenants' conservation to cover the excess consumption costs of other tenants.

Finally, conversion efforts have not been very successful in the past. In response to concerns about energy conservation, HUD introduced regulations in 1975 that required PHAs to

⁸⁶ See *id.* (arguing that even if HUD had the expertise, desire, and resources to audit allowances, the most a reviewer could do would be to request supporting documentation for a PHA's decision).

⁸⁷ Ferrey, *supra* note 38, at 166.

⁸⁸ See White, *supra* note 4, at 71 (arguing that master-metering provides no incentives to tenants to reduce consumption, whereas check-metering "fixes this misaligned incentive").

⁸⁹ See *id.* However, individual metering can also benefit tenants to the extent that they may gain legal rights as individual customers according to state utility regulations. See Ferrey, *supra* note 38, at 166 n.142 (pointing out that many state utility regulatory commissions provide various due process rights to retail customers).

⁹⁰ See Ferrey, *supra* note 38, at 163.

⁹¹ GAO, UTILITY ALLOWANCES, *supra* note 61, at 46.

convert public housing to individual or check-meters “to the extent practicable.”⁹² As part of the process for deciding whether conversion was practicable, HUD required PHAs to conduct a cost-benefit analysis that presumed an automatic reduction in heating consumption of 25–35 percent.⁹³ This regulation was enjoined by the D.C. Circuit in 1981⁹⁴ on the grounds that HUD’s presumption of a 25–35 percent reduction was arbitrary and capricious.⁹⁵ Today, HUD regulations still technically require the conversion to check-metering,⁹⁶ but the regulations now contain enough exceptions that it is unclear whether the requirement has any effect.⁹⁷

⁹² 40 Fed. Reg. 44,159 (1975).

⁹³ See *Mass. Union of Pub. Hous. Tenants v. Pierce*, 755 F.2d 177, 178 (D.C. Cir. 1985) (explaining the result of *Mass. Union of Pub. Hous. Tenants v. Landrieu*, *infra* note 92).

⁹⁴ *Mass. Union of Pub. Hous. Tenants v. Landrieu*, 656 F.2d 899 (D.C. Cir. 1981).

⁹⁵ See *Mass. Union of Pub. Hous. Tenants v. Pierce*, 755 F.2d at 178.

⁹⁶ 24 C.F.R. § 965.401(a).

⁹⁷ See 24 C.F.R. § 965.401(a)–(c), .404, .406–07 (articulating numerous circumstances in which PHAs may be exempted from the requirement to convert to check-meters).

Appendix 1: Energy Performance Contracts

Pursuant to statutory authority,⁹⁸ HUD allows PHAs to retain some of the energy savings that it generates by implementing Energy Performance Contracts (EPCs).⁹⁹ A PHA can use the energy cost savings from improvements to their properties to pay for these retrofits and also retain some of those funds for other purposes.¹⁰⁰ Additionally, a PHA may be entitled to a subsidy add-on to pay off the loan.¹⁰¹ PHAs must receive HUD approval to implement energy conservation measures financed by a third party.¹⁰²

Under this program, A PHA can use 75 percent of cost savings from property upgrades to pay for the retrofits, and is allowed to use the remainder of the savings for other operating expenses.¹⁰³ Furthermore, there are “three-year rolling base procedures for computing the RBCL,” through which “three years of consumption data [. . .] after the end of the contract period shall be the yearly consumption levels for the final three years of the contract.”¹⁰⁴ In certain cases, the PHA may retain up to 50 percent of the savings and use it to pay for operating expenses.¹⁰⁵ A PHA freezes the utility allowances during the 3-year contract period, and then adjusts the utility allowance to take into account the energy efficient retrofits.¹⁰⁶

⁹⁸ 42 U.S.C. § 15842

⁹⁹ 24 C.F.R. § 990.185(a).

¹⁰⁰ *Energy Performance Contracting*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/phecc/eperformance (last visited Apr. 23, 2015).

¹⁰¹ § 990.185(a)(3).

¹⁰² § 990.185(a).

¹⁰³ § 990.185(a)(1)(ii).

¹⁰⁴ § 990.185(a)(1)(iii).

¹⁰⁵ § 990.185(b) (“If a PHA takes action beyond normal public participation in rate-making proceedings, such as well-head purchase of natural gas, administrative appeals, or legal action to reduce the rate it pays for utilities, then the PHA will be permitted to retain one half the annual savings realized from these actions.”).

¹⁰⁶ § 990.185(a)(2)(ii)–(iii).

Appendix 2: Rental Assistance Demonstration

Pursuant to the Rental Assistance Demonstration (RAD), PHAs are permitted to convert public housing units into either PBRA or PBV units under the Rental Assistance Demonstration (RAD).¹⁰⁷ Up to 60,000 public housing units are authorized to convert into PBV or PBRA under RAD.¹⁰⁸ In order to participate in RAD, PHAs must submit a RAD Application.¹⁰⁹ If a project is retrofitted through RAD, then the project must make energy efficiency upgrades.¹¹⁰ Projects that are converted into PBVs will be required to use PBV utility allowances and rent structures.¹¹¹ Similarly, if a project is converted to a PBRA contract, then the project must use PBRA utility allowances and rent structures.¹¹²

¹⁰⁷ U.S. DEP'T OF HOUS. & URBAN DEV., PIH-2012-32 (HA) REV-1: PROGRAM INSTRUCTIONS 18 (2013), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2012-32rev1.pdf>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 19.

¹¹⁰ *Id.* at 23. For example, buildings must be upgraded with energy-efficient appliances. *Id.*

¹¹¹ *Id.* at 36.

¹¹² *Id.* at 49; *see also id.* at 101 (providing examples of rent being calculated for both PBV and PBRA projects).

Appendix 3: Glossary of Terms

Family: can either mean a single person who is either elderly, displaced, disabled, near-elderly, or otherwise eligible for housing assistance, or a group of persons residing together, such as a family with or without children, an elderly family, a disabled family, a displaced family, or a remaining member of a tenant family.¹¹³

Individually Metered: utilities are metered per unit, and tenants are billed directly by the utility companies. Buildings with individual meters are those that are eligible to have utility allowances.

Master-Metered: utilities are metered for the whole building, and the property owner pays directly to the utility company. Tenants do not pay master-metered utilities directly, but rather have them factored into the total rental costs. There are no utility allowances for utilities that are master-metered.

Public Housing Agency (PHA): “any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under the [United States Housing Act of 1937].”¹¹⁴

Submetering: utility payment arrangement whereby the PHA pays the original utility bills but then charges each tenant according to his or her own usage. Utility allowances are permitted in housing with submetered utilities.

Tenant Rent: “The amount payable monthly by the family as rent to the unit owner (Section 8 owner or PHA in public housing).”¹¹⁵

Total Tenant Payment (TTP): the amount a family or tenant pays directly to the property owner [PHA in public housing] for rent, not to exceed 30 percent of adjusted household income; if unit has tenant-paid utilities, utility allowance is subtracted from the 30 percent cap.

Utility Allowance (UA): “If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”¹¹⁶

¹¹³ 24 C.F.R. § 5.403.

¹¹⁴ 24 C.F.R. § 5.100.

¹¹⁵ 24 C.F.R. § 5.603.

¹¹⁶ *Id.*

Utility Reimbursement: “The amount, if any, by which the utility allowance for a unit, if applicable, exceeds the total tenant payment for the family occupying the unit. (This definition is not used in the Section 8 voucher program, or for a public housing family that is paying a flat rent.)”¹¹⁷

¹¹⁷ *Id.*

Appendix 4: Summary of Legal Requirements

CALCULATION OF UTILITY ALLOWANCES	
Statutes	
Regulations	
24 C.F.R. § 965.501(b)	In units with PHA-furnished utilities but no check-meters, residents shall be subject to surcharges for excess consumption (see Section 965.506(a)) but no UA will be established.
24 C.F.R. § 965.502(a)	PHAs shall establish consumption allowances for PHA-furnished utilities for all check-metered utilities and UAs for resident-purchased utilities.
24 C.F.R. § 965.504(a)	PHA-furnished utilities: Consumption allowances will normally be established on a quarterly basis; however, residents may be surcharged on a monthly basis. The allowances established may provide for seasonal variations.
24 C.F.R. § 965.505(a)	PHA's objective in designing methods of establishing allowances shall be to approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.
24 C.F.R. § 965.505(b)	Allowances should include reasonable consumption for: • major equipment provided by PHA (e.g., heating furnace, hot water heater) • essential equipment whether or not furnished by PHA (e.g., range, refrigerator) • minor equipment provided by residents (e.g., toasters, radios).
24 C.F.R. § 965.505(c)	Complexity and elaborateness of methods chosen by PHA, in its discretion, to achieve the foregoing objective will depend upon the nature of the housing stock, data available to PHA and extent of the administrative resources reasonably available to PHA.
24 C.F.R. § 965.505(d)	In establishing allowances, PHA shall take into account relevant factors affecting consumption requirements, including: • Equipment and functions intended to be covered by allowances for which the utility will be used (end uses) • Climatic location of housing projects • Unit size and number of occupants • Type of unit construction and design of housing project • Energy-efficiency of PHA-supplied appliances and equipment • Consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered by total resident payment • Physical condition of building, including insulation and weatherization • Necessary internal temperature levels in day and night in cold and warm weather • Temperature of domestic hot water
24 C.F.R. § 965.505(e)	Air conditioning cannot be included in allowances. If PHA installs air conditioning, it should allow for resident control, to the maximum extent economically feasible, and should charge for resident usage (without reimbursement). If an AC system does not provide for resident option, residents shall not be charged, and these systems should be avoided whenever possible.
24 C.F.R. § 965.502(b)	PHA shall maintain a record that documents the basis on which allowances, scheduled surcharges and revisions are established and revised. The record shall be available for inspection by residents.

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24 C.F.R. § 965.502(c)	PHAs must post notice of proposed allowances, scheduled surcharges, and revisions 60 days in advance, describing the changes, and giving opportunity for tenants to comment during a period expiring not less than 30 days before the proposed effective date of the allowances or scheduled surcharges or revisions. Such written comments shall be retained by PHA and shall be available for inspection by residents.
24 C.F.R. § 965.503	PHAs must establish separate UAs for each utility and each reasonably comparable category of units.
24 C.F.R. § 965.504(b)	Resident-purchased utilities: Monthly allowances shall be established. The allowances established may provide for seasonal variations.
24 C.F.R. § 965.506(a)	Basis for calculating surcharges shall be described in PHA's schedule of allowances. Changes in dollar amounts of surcharges based directly on changes in PHA's average utility rate are not subject to the advance notice requirements of this section.
Guidance	
HUD, UTILITY ALLOWANCE GUIDEBOOK 2	Allowable utilities include: • electricity • natural gas/bottle gas/propane/fuel oil/wood/coal • water and sewer • trash and garbage
HUD, UTILITY ALLOWANCE GUIDEBOOK 2	Allowance end uses: PHAs should provide allowances for the following utility end-use categories: • Space heating • Cooking • Hot Water heating • Water and Sewer • Trash/Garbage collection • Lights and approved appliances/equipment
HUD, UTILITY ALLOWANCE GUIDEBOOK 17	Interior temperature standard for a healthy living environment is 68°F to 72°F.
HUD, UTILITY ALLOWANCE GUIDEBOOK 18	Non-allowable utility costs: • Air conditioning • Telephone service • Cable TV • Satellite TV subscription • Internet services
HUD, UTILITY ALLOWANCE GUIDEBOOK 23	PHA must gather and document all residential utility rates and charges currently in effect and those approved with future effective dates within the next year, paying special attention to applicable taxes.
HUD, UTILITY ALLOWANCE GUIDEBOOK 23	PHA should collect one actual billing record for each utility supplier to use in the verification of appropriate rates and utility supplier's calculation process. Many suppliers have complicated calculation methods, so a cross-check with a sample residential utility bill is a good Quality Control (QC) process.
HUD, UTILITY ALLOWANCE GUIDEBOOK 10	When calculating allowances according to the consumption-based methodology, PHA determines similarity of dwelling units by assessing building type, important architectural features, bedroom sizes, condition, maintenance and efficiency of installed heating/cooling equipment, and household appliances. These physical characteristics must be considered when determining reasonable (fair) amount of utilities consumed by residents.
HUD, UTILITY ALLOWANCE GUIDEBOOK 19	Removing Air Conditioning from UA Calculations: To remove air conditioning usage from actual/historical data for housing developments where only some of the dwelling units have window air conditioning units, PHA may simply delete from their data those dwelling units with window air

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	conditioners.
HUD, UTILITY ALLOWANCE GUIDEBOOK 21	Where data is limited due to comprehensive modernization, a new housing development, or other reasons, PHA may include data from earlier years or use an engineering-based method to determine the missing information.
HUD, UTILITY ALLOWANCE GUIDEBOOK 22	Goal of PHA should be to obtain consumption data for all dwelling units in an allowance category
HUD, UTILITY ALLOWANCE GUIDEBOOK 22	PHA must calculate average monthly consumption totals by bedroom size and development (or AMP) from collected utility consumption data. Calculations must include each utility type (e.g., electricity, natural gas, water, etc.) that is resident-paid or PHA-provided. PHA will use this calculated average consumption amount as the base on which it will calculate UAs using local utility supplier's current rates and charges. These utility consumption bases will also serve as Consumption Allowances for check-metered utilities paid by PHA.
HUD, UTILITY ALLOWANCE GUIDEBOOK 25	PHAs can categorize and calculate their allowances by grouping them as follows: • First by PHA housing development (site, housing project or AMP). The units have the same weather conditions, and generally have similar appliances and use the same fuels; • Second by utility type provided (e.g., electric, natural gas, water, etc.); • Third by building/structure type (e.g. row house, detached house, etc.). These have similar energy usage; • Fourth by each bedroom size (similar number of occupants). If a housing development has more than one building/structure, they should be grouped separately
HUD, UTILITY ALLOWANCE GUIDEBOOK 27–28	There are two basic reasons why PHA might not be able to use the data from all dwelling units for each UA category: inaccuracy due to error, or PHA does not have the resources to enter data from all units. • If PHA has a large sampling, it could reduce the amount of the study sampling by selecting a percentage of the dwelling units to calculate the consumption averages. • Recommend that sample meets 95 percent confidence interval with a +/- 5 confidence interval.
HUD, UTILITY ALLOWANCE GUIDEBOOK 30	PHA may adjust consumption data in order to account for future significant weather changes and reduce need to annually recalculate, and also to eliminate high and low consumers in order to better approximate reasonable use by energy-conservative households.
HUD, UTILITY ALLOWANCE GUIDEBOOK 34	Removing high and low users: PHAs should remove consumption averages for approximately 10-15 percent of high users, in order to meet regulatory requirements of “an estimate of a reasonable amount of utilities consumed by an energy-conservative household”, and 5-10 percent of low users.
HUD, UTILITY ALLOWANCE GUIDEBOOK 36	Allowance Schedule: PHA should prepare a UA Schedule showing individual monthly UAs for each utility type and total monthly UA amount (including all applicable utilities) for each bedroom size at each applicable housing development.
HUD, UTILITY ALLOWANCE GUIDEBOOK 12	Engineering-based allowances should be compared to actual utility bills to determine if projections measure up to reasonable allowance levels.
HUD, UTILITY ALLOWANCE GUIDEBOOK 40	Monthly requirements should not be determined by simply dividing the annual consumption requirement by 12 months. Many utilities rates vary seasonally. To compute appropriate consumption for each month, add heating load to base load consumption to each month, and then compute the UA for each month of the year. The average of these monthly estimated costs is used in the process of setting a uniform monthly UA.
HUD, UTILITY ALLOWANCE GUIDEBOOK 48–49	Deregulation of Utilities: If deregulated, and PHAs span multiple jurisdictions, they will have to deal with multiple utility suppliers with different rates. HUD

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	has no regulations on this yet. PHAs can pick highest or lowest utility, average, or calculate separately for each. PHAs should choose method that best fits their situation and that provides a satisfactory confidence level. PHAs should check with neighboring PHAs to see which method they are currently using.
HUD, UTILITY ALLOWANCE GUIDEBOOK 49	If a utility supplier's new rate is only under review or proposed, this rate should not be used to calculate UAs. If rate is approved but not implemented, transition date should be noted, and UAs computed for both current rate and future rate.
HUD, UTILITY ALLOWANCE GUIDEBOOK 52	If electric utility supplier has seasonal rates, PHA should multiply seasonal consumption amounts by appropriate seasonal rate. For example, if utility has one rate for September through May, and another rate for June through August, then consumption amounts in June, July, and August should be multiplied by summer rate, and consumption amounts in other months should be multiplied by off-season rate.
HUD, UTILITY ALLOWANCE GUIDEBOOK 52	Fixed fees and other fees should be prorated on a monthly basis and added to allowance.
HUD, UTILITY ALLOWANCE GUIDEBOOK 53	PHAs with individually metered utilities generally provide equal monthly UAs to their residents. Many PHAs round UAs up to nearest dollar to simplify rent calculations. If utility supplier does not offer residents a uniform payment plan, PHA may provide for seasonal variations in its UAs.
HUD, UTILITY ALLOWANCE GUIDEBOOK 18	Resident lease must state utilities, services and equipment that will be supplied by PHA without any additional cost, utilities and appliances that will be paid or directly supplied by resident, and UA for resident-paid or PHA-supplied utilities and appliances.
HUD, UTILITY ALLOWANCE GUIDEBOOK 54	PHA should prepare a UA Schedule to publish (post) and communicate with residents and Board of Commissioners. UA Schedule is public information and should be made available to anyone who requests a copy.
HUD, UTILITY ALLOWANCE GUIDEBOOK 61	PHAs should contact local utility providers or conduct research to determine if lower rates are available to their residents. Some electric and/or natural gas utility suppliers offer special lower rates for low-income families. Although not required by HUD regulations, notice may include information regarding availability of such special low-income rates or life-line rates.
HUD, UTILITY ALLOWANCE GUIDEBOOK 61	PHA should review residents' comments (received during 30-day comment period) and answer or address any questions that residents present. PHA is not required to change allowances due to residents' complaints, but this comment period allows PHA another opportunity to review its determinations.
HUD, UTILITY ALLOWANCE GUIDEBOOK 61	PHA should post (display) a copy of new UA Schedule(s) and/or Schedule of Surcharges in PHA's main office. Notification to residents shall be given in manner provided in lease agreement.
HUD, UTILITY ALLOWANCE GUIDEBOOK 63	Although not required by HUD regulations, proposed Consumption Allowances and/or UAs should be presented to PHA's Board of Commissioners for approval and adoption. PHA should then establish a date for which these UAs will be effective. Date must be at least 60 days after posting notice.
HUD, CALCULATING UTILITY ALLOWANCES, http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/phec/c/allowances2	If excess consumption by a sizeable percentage of residents is likely not wasteful or within the residents' ability to control, then PHA should consider establishing allowances at some level above average consumption amount.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 138	In determining level of consumption for an energy conscious household, PHA should distinguish between necessary appliances and luxury appliances. This distinction should reflect local usage and custom patterns.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 138	Utility allowance amounts will vary by residential demographic characteristics affecting home energy usage.

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HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 138	Existing technical standards (i.e., local building codes) should be used where available in determining what is necessary to provide for safe, sanitary and healthful living.
Case Law	
Dorsey v. Hous. Auth. of Baltimore, 984 F.2d 622 (4 th Cir. 1993) (citing <i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402, 416 (1971))	In calculating UAs, PHA must examine relevant data and articulate a satisfactory explanation for its action including a rational connection between facts found and choices made.
<i>Dorsey</i> , 984 F.2d at 629	Allowances shall cover energy consumption that is attributable to factors not within the ability of the tenant to control.
<i>Dorsey</i> , 984 F.2d at 629	Distinction between consumption generated by necessary and luxury appliances is expected to reflect local usage and custom patterns.
<i>Dorsey</i> , 984 F.2d at 631	Evidence that tenant consumption is routinely in excess of a local housing authority's proposed UA gives rise to inference that allowances were inadequate to provide for reasonable consumption by an energy-conservative household of modest means. Given this inference, PHA whose utility allowance is generally exceeded by tenant consumption must provide evidence of "non-energy conservative consumption" on the part of the tenants in order to rebut this inference.
<i>Dorsey</i> , 984 F.2d at 631	PHA must take into account the extent to which tenant consumption exceeds proffered allowance, since excessive consumption is material evidence that PHA standard is out-of-line with regulatory standard, or that excess consumption may be due to factors not within the control of the tenants.
Nelson v. Greater Gadsden Hous. Auth., 606 F. Supp. 948 (N.D. Ala. 1985)	Held that large number of tenants surcharged each month by GGHA demonstrated that PHA's allowances were insufficient to meet needs of many of its tenants.
Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418 (1987)	42 U.S.C. § 1983 provides remedial cause of action for state deprivation of a right secured by federal statute, unless state actor demonstrates by express provision or other specific evidence from statute itself that Congress intended to foreclose private enforcement.
<i>Wright</i> , 479 U.S. 418	Neither Housing Act nor Brooke Amendment manifests congressional intention that exclusive power to enforce benefits due housing project tenants belongs to HUD, foreclosing a private cause of action under 42 U.S.C. § 1983.
<i>Wright</i> , 479 U.S. 418	Regulatory provision for a "reasonable" allowance for utilities to be included in rent that PHA is allowed to charge is not too vague and amorphous to confer such right, nor is matter of utility allowances to be left exclusively to discretion of public housing authority, subject to supervision by HUD.

REVISION & REVIEW OF UTILITY ALLOWANCES	
Statutes	
Regulations	
24 C.F.R. § 965.502(b)	PHA shall maintain a record that documents basis on which allowances and scheduled surcharges, and revisions thereof, are established and revised. Such record shall be available for inspection by residents.
24 C.F.R. § 965.502(d)	Schedules of allowances and scheduled surcharges shall not be subject to approval by HUD before becoming effective, but will be reviewed in the course of audits or reviews of PHA operations.
24 C.F.R. § 965.502(e)	PHA's determinations are final unless arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
24 C.F.R. § 965.507(a)	Annual review: PHA shall review at least annually basis on which UAs have

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	been established and, if reasonably required in order to continue adherence to standards stated in Sec. 965.505, shall establish revised allowances. Review shall include all changes in circumstances (including of modernization and/or other energy conservation measures) indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.
24 C.F.R. § 965.507(b)	Revision as a result of rate changes: PHA may revise UAs between annual reviews if there is a rate change (including fuel adjustments) and shall be required to do so if such change, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more from the rates on which UAs were based.
24 C.F.R. § 965.507(b)	Adjustments to resident payments as a result of such changes shall be retroactive to the first day of the month following month in which last rate change taken into account in such revision became effective. Such rate changes shall not be subject to 60 day notice requirement of Sec. 965.502(c).
Guidance	
HUD, UTILITY ALLOWANCE GUIDEBOOK 4	As this is an area in which there has been litigation, it is important that PHA document and defend method used to develop UAs and perform an annual review of UAs.
HUD, UTILITY ALLOWANCE GUIDEBOOK 7–8	A consumption study is recommended if following conditions exist at PHA: • Significant Change (modernization, weatherization, replacement of equipment) • Significant Time Period (if allowance has not been recalculated in last 5 years, a study is highly recommended as best practice) • Lack of Support Documentation
HUD, UTILITY ALLOWANCE GUIDEBOOK 56	UAs that were established based on consumption data or engineering calculations should also include an annual review of any major changes to buildings, equipment, and appliances that would impact UA consumption requirements (e.g., modernization efforts and/or other energy conservation measures implemented by PHA).
HUD, UTILITY ALLOWANCE GUIDEBOOK 56	PHAs using engineering-based method must be aware of gradual changes in buildings, not just major changes.
HUD, UTILITY ALLOWANCE GUIDEBOOK 57	If consumption allowances have not been recalculated in the last 5 years it is highly recommended (as best practice) that consumptions be recalculated.
HUD, UTILITY ALLOWANCE GUIDEBOOK 58	Changes in utility rates due to passed-through costs (such as a fuel adjustment charge/rate, purchased gas adjustment charge/rate, or gas recovery charge/rate) by utility suppliers are considered a rate change as mentioned above. These type of rate changes are not subject to 60-day notice requirement of 24 C.F.R. 965.507(b).
HUD, UTILITY ALLOWANCE GUIDEBOOK 60	PHA must maintain a record of all support documents detailing basis upon which consumption and UAs were established. (24 C.F.R. 965.502(b)). Such documents may include, but are not limited to: • Complete documentation supporting method used for determining average consumptions; • Utility rates and charges used to calculate allowances; • Actual calculations of allowances; • Software utilized; • Assumptions made; • Building characteristics,; • Adjustments made; • Data utilized in developing total consumptions and UAs; • Any other documents used in the study.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 170	When actual energy consumption by tenants routinely exceeds a UA, PHA shall increase allowance unless PHA can provide evidence that excess can be

	attributed to lack of non-energy conservative consumption. Fact that tenant consumption is routinely in excess of UA is material evidence that UA is insufficient or that excess consumption may be due to factors not within the control of the tenants.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 170	Changes in costs passed through an automatic adjustment clause (such as, for example, a fuel adjustment clause, a purchase gas adjustment clause, or a gas recovery clause) shall be considered a 'rate change' for purposes of 24 C.F.R. §965.507(b), but is not subject to 60-day notice requirement of 24 C.F.R. §965.502(c).
Case Law	

METERING & TENANT PAYMENT	
Statutes	
42 U.S.C. § 1437a(a)(1)(A) [“ <i>Brooke Amendment</i> ”]	A family in publically assisted housing shall pay as rent highest of following two amounts, rounded to nearest dollar: A) 30 percent of family's monthly adjusted income; B) 10 percent of family's monthly income
Regulations	
24 C.F.R. § 965.502(a)	PHAs must establish UAs for all tenant-paid utilities.
24 CFR § 5.628(a)	Resident's share of rent and utilities should not exceed 30 percent of household's adjusted monthly income or 10 percent of family's monthly income.
24 CFR § 965.401(a)	All utility service shall be individually metered to residents, either through provision of retail service to residents by utility supplier or through use of check-meters, unless: 1. Individual metering is impractical, such as in case of a central heating system in an apartment building; 2. Change from a master-metering system to individual meters would not be financially justified based upon benefit/cost analysis; or 3. Check-metering is not permissible under State or local law, or under policies of particular utility supplier or public service commission.
24 CFR § 965.401(b)	If check-metering is not permissible, retail service shall be considered. Where check-metering is permissible, type of individual metering offering most savings to PHA shall be selected.
24 CFR § 965.402(a)	Benefit/cost analysis shall be made to determine whether a change from a master-metering system to individual meters will be cost effective, except as otherwise provided in § 965.405.
24 CFR § 965.402(b)	Proposed installation of check-meters shall be justified on basis that cost of debt service (interest and amortization) of estimated installation costs plus operating costs of check-meters will be more than offset by reduction in future utilities expenditures to PHA under master-meter system.
24 CFR § 965.402(c)	Proposed conversion to retail service shall be justified on basis of net savings to the PHA. This determination involves making comparison between reduction in utility expense obtained through eliminating expense to PHA for PHA-supplied utilities and resultant allowance for resident-supplied utilities, based on cost of utility service to residents after conversion.
24 CFR § 965.403	Funding: Cost to change master-meter systems to individual metering of resident consumption, including costs of benefit/cost analysis and complete installation of check-meters, shall be funded from operating funds of PHA to extent feasible. When sufficient operating funds are not available for this purpose, such costs are eligible for inclusion in a modernization project or for

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	funding from any available development funds.
24 CFR § 965.404	Conversions to individual metering shall be accomplished in following order unless PHA has a justifiable reason to do otherwise, which shall be documented in its files: a) In projects for which retail service is provided by utility supplier and PHA is paying all individual utility bills, no benefit/cost analysis is necessary, and residents shall be billed directly after PHA adopts revised payment schedules providing appropriate allowances for resident-supplied utilities. b) In projects for which check-meters have been installed but are not being utilized as basis for determining utility charges to residents, no benefit/cost analysis is necessary. Check-meters shall be used as basis for utility charges, and residents shall be surcharged for excess utility use. c) Projects for which meter loops have been installed for utilization of check-meters shall be analyzed both for installation of check-meters and for conversion to retail service. d) Low- or medium-rise family units with master-meter system should be analyzed for both check-metering and conversion to retail service, because of large potential for energy savings. e) Low- or medium-rise housing for elderly should next be analyzed for both check-metering and conversion to retail service, since potential for energy saving is less than for family units. f) Electric service under master-meters for high-rise buildings, including projects for elderly, should be analyzed for both use of retail service and of check-meters.
24 C.F.R. § 965.405(a)	Before making any conversion, PHA shall adopt revised payment schedules and provide UAs for new resident-supplied utilities.
24 C.F.R. § 965.405(b)	Before implementing any modifications to utility services arrangements, PHA shall make requisite changes in tenant leases in accordance with 24 CFR part 966.
24 C.F.R. § 965.405(c)	PHAs must work closely with resident organizations, to extent practicable, in making plans for conversion, explaining national policy objectives of energy conservation, changes in charges and rent structure that will result, and goals of achieving an equitable structure that will be advantageous to residents who conserve energy.
24 C.F.R. § 965.405(d)	Transition period of at least six months shall be provided in the case of initiation of check-meters, during which residents will be advised of charges but during which no surcharge will be made based on readings. This trial period will afford residents ample notice of effects check-metering system will have on their individual utility charges and also afford test period for adequacy of UAs established.
24 C.F.R. § 965.405(e)	During and after transition period, PHAs shall advise and assist residents with high utility consumption on methods for reducing their usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances, and corrective maintenance.
24 C.F.R. § 965.406	PHAs with more than one project of similar design and utilities service may prepare a benefit/cost analysis for a representative project. A finding that a change in metering is not cost effective for representative project is sufficient reason for PHA not to perform a benefit/cost analysis on remaining similar projects.
24 C.F.R. § 965.407	Because of changes in the cost of utility services and the periodic changes in utility regulations, PHAs with master-meter systems are required to reevaluate master-meter systems without check-meters by making benefit/cost analyses at least every 5 years. These analyses may be omitted under conditions specified

	in § 965.406.
24 C.F.R. § 5.632	For residents whose Total Tenant Payment (TTP) is less than utility allowance, PHA must make a monthly utility reimbursement equal to difference between TTP and UA. PHA may pay the utility reimbursement either to resident or directly to utility supplier as credit on resident's behalf.
Guidance	
HUD, UTILITY ALLOWANCE GUIDEBOOK at 22	PHAs with individual check-metered utilities should read the check-meters at regular intervals, preferably every month, although some PHAs choose to read check-meters bi-monthly or quarterly.
Case Law	
Massachusetts Union of Public Housing Tenants v. Landrieu, 656 F.2d 899 (D.C. Cir. 1981)	Struck down HUD's 1975 regulations (embodied in 24 C.F.R. § 865.404) requiring PHAs to convert to individual or check-metering based on a cost/benefit analysis that presumed consumption reductions of 25–35 percent of heating energy use. Court ruled that HUD had not demonstrated a factual or rational basis for the 25–35 percent reduction presumption.

SURCHARGES & INDIVIDUAL RELIEF	
Statutes	
Regulations	
24 C.F.R. § 965.506(a)	For dwelling units subject to allowances for PHA-furnished utilities where check-meters have been installed, PHA shall establish surcharges for utility consumption in excess of the allowances.
24 C.F.R. § 965.506(a)	Surcharges may be computed on a straight per unit of purchase basis (e.g., cents per kilowatt hour of electricity) or for stated blocks of excess consumption, and shall be based on PHA's average utility rate.
24 C.F.R. § 965.506(a)	Basis for calculating such surcharges shall be described in PHA's allowance schedule. Changes in dollar amounts of surcharges based directly on changes in PHA's average utility rate shall not be subject to advance notice requirements of this section.
24 C.F.R. § 965.506(b)	For units with PHA-furnished utilities where check-meters have not been installed, PHA shall establish surcharge schedules indicating additional amounts residents will be required to pay for estimated utility consumption attributable to resident-owned major appliances or to optional functions of PHA-furnished equipment. Surcharge schedules shall state equipment for which surcharges shall be made and amounts of such charges, which shall be based on cost to PHA of utility consumption estimated to be attributable to reasonable usage of such equipment.
24 C.F.R. § 965.508	Requests for relief from surcharges (for PHA-purchased utilities), or from payment of utility bills in excess of UAs (for tenant-purchased utilities), may be granted by PHA on reasonable grounds, such as special needs of elderly, ill or disabled residents, or special factors affecting utility usage not within control of the resident, as PHA deems appropriate.
24 C.F.R. § 965.508	PHA's criteria for granting such relief, and procedures for requesting such relief, shall be adopted at time PHA adopts methods and procedures for determining UAs.
24 C.F.R. § 965.508	Notice of availability of relief procedures (including identification of PHA representative with whom initial contact may be made by residents), and PHA's criteria for granting such relief, shall be included in each notice to residents given in accordance with Sec. 965.502(c) and in information given to new residents upon admission.

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Guidance	
HUD, UTILITY ALLOWANCE GUIDEBOOK 34	PHA Boards may adopt a “grace factor” usually between 5 and 10 percent above this base schedule in order not to penalize energy conservative residents during unusually high usage months beyond their control (e.g., very cold weather)
HUD, UTILITY ALLOWANCE GUIDEBOOK 50	In case of surcharges, cost of utility is computed by utility rate charged to PHA. PHA’s utility billing rates are usually not the same residential rates charged to residents. PHA may be charged a commercial rate or special rate.
HUD, UTILITY ALLOWANCE GUIDEBOOK 3	If utilities are master-metered (one utility meter for each building) and not individually check-metered, PHA will not provide UAs or surcharge residents for excess usage, although PHA may charge a resident a reasonable amount for having an extra freezer or refrigerator.
HUD, UTILITY ALLOWANCE GUIDEBOOK 62	PHAs should consider the following as valid criteria for granting individual relief: • Resident’s consumption was mistakenly portrayed as excessive due to defects in the meter or errors in meter reading. • Resident’s over consumption is caused by characteristic of dwelling unit or PHA-supplied equipment that is beyond resident’s control such as energy-deficient refrigerator or inadequate insulation. UA under these circumstances would have to be adjusted to reflect higher consumption associated with dwelling unit until situation is remedied. • Resident’s over consumption is due to special needs of resident household member and is not within resident’s ability to control. Special needs might include elderly, ill or disabled residents that have special needs requiring higher energy or water consumption. Allowance should be adjusted to reflect higher consumption needs associated with household’s special circumstances.
HUD, UTILITY ALLOWANCE GUIDEBOOK 62	Individual relief should only be granted when excessive consumption is beyond resident’s control. Should resident’s consumption be excessive and within ability of the resident to control, no individual relief would be granted.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 168	PHA must be mindful of any residents with disabilities who use greater than normal amounts of utilities because of their disability. Such residents must be provided with an adjusted allowance to account for higher usage.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 172	On request from a family that includes a disabled or elderly person, PHA must approve a utility allowance that is higher than applicable amount on utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation in accordance with 24 CFR Part 8 to make the program accessible to and usable by family with a disability.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 172	Residents with disabilities may not be charged for use of certain resident-supplied appliances if there is verified need for special equipment because of disability.
HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 169	Failure to retain utility service is grounds for eviction.
Letter from Steven B. Nesmith, Assistant Secretary for Congressional and Intergovernmental Relations, to Senator Jon Kyl (Aug. 29, 2005)	While 24 C.F.R § 965.505 does not allow UAs to include air conditioning, 24 C.F.R. §965.508 does allow for relief from surcharges for excessive consumption or payment of utility bills in excess of allowances for resident-purchased utilities – which may be granted by PHA as long as there are appropriate special needs or special factors not within control of resident. PHA may provide such relief to individuals, individual units, or projects. HUD approval is not required.
Case Law	
Amone v. Aveiro, 226 F.R.D. 677 (D. Haw. 2005)	Certifying a class of tenants in a challenge to the Housing and Community Development Corporation of Hawaii for the PHA’s refusal to increase the

	utility allowance for disabled tenants with special needs. The court ultimately granted an injunction and ordered the PHA to make individual adjustments to the allowances.
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HUD's Operating Fund Subsidy	
Statutes	
42 U.S.C. § 1437g(e)(1) (2006) [<i>Housing Act of 1937</i>]	HUD shall establish an Operating Fund for purpose of making assistance available to PHAs for operation and management of public housing, including: • Procedures and systems to maintain and ensure efficient management and operation of public housing units; • Activities to ensure a program of routine preventative maintenance; • Energy costs associated with public housing units, with an emphasis on energy conservation
42 U.S.C. § 1437g(e)(2)	HUD shall establish a formula for determining amount of assistance to PHAs under Operating Fund. Formula may take into account: • Standards for costs of operating and reasonable projections of income, taking into account characteristics and locations of housing projects and characteristics of families served (including incomes) • Number of dwelling units owned, assisted, or operated by PHA that are chronically vacant and amount of assistance appropriate for those units; • Any other factors that Secretary determines to be appropriate.
Regulations	
24 C.F.R. § 990.110(a)(2)	Operating subsidy shall be difference between formula expense and formula income. If PHA's formula expense is greater than its formula income, then PHA is eligible for an operating subsidy.
24 C.F.R. § 990.110(a)(3)	Formula expense is an estimate of PHA's operating expense and is determined by following three components: Project Expense Level (PEL), Utility Expense Level (UEL), and other formula expenses (add-ons).
24 C.F.R. § 990.115	• Utilities means electricity, gas, heating fuel, water, and sewerage service. • Utilities expense level (UEL) is product of utility rate multiplied by payable consumption level multiplied by utilities inflation factor expressed as a per unit per month (PUM) dollar amount. • Utility rate means actual average rate for any given utility for most recent 12-month period that ended June 30th prior to beginning of applicable funding period. • Yearly consumption level is actual amount of each utility consumed at a project during a 12-month period ending June 30th.
24 C.F.R. § 990.170(a)	Computation of Utilities Expense Level (UEL) Overview: UEL for a given funding period is product of utility rate multiplied by payable consumption level multiplied by inflation factor. UEL is expressed in terms of PUM costs.
24 C.F.R. § 990.170(b)	Utility Rate: UR is actual average rate from most recent 12-month period that ended June 30th prior to beginning of applicable funding period. UR is calculated by dividing actual utility cost by actual utility consumption, with consideration for pass-through costs (e.g., state and local utility taxes, tariffs).
24 C.F.R. § 990.170(c)	Payable consumption level: Based on current consumption level adjusted by utility consumption incentive. Incentive shall be computed by comparing current consumption levels of each utility to rolling base consumption level. If comparison reflects a decrease in consumption of a utility, PHA shall retain 75 percent of this decrease. If comparison reflects an increase in consumption of a utility, PHA shall absorb 75 percent of this increase.

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24 C.F.R. § 990.170(d)	Inflation factor for utilities: UEL shall be adjusted annually by an inflation/deflation factor based on fuels and utilities component of Bureau of Labor Statistics (BLS) Consumer Price Index for All Urban Consumers (CPI-U). Annual adjustment to UEL shall reflect most recently published and localized data available from BLS at time annual adjustment is calculated.
24 C.F.R. § 990.170(d)	Increases in tenant utility allowances: Increases in tenant UAs, as a component of formula income, shall result in commensurate increase of operating subsidy. Decreases in such UAs shall result in commensurate decrease in operating subsidy.
24 C.F.R. § 990.175	Current Consumption Level: The actual amount of each utility consumed during 12-month period ending June 30th that is 6 months prior to first day of applicable funding period.
24 C.F.R. § 990.180(a)(1)	Rolling base consumption level (RBCL): Equal to average of yearly consumption levels for 36-month period ending on June 30th that is 18 months prior to first day of applicable funding period.
24 C.F.R. § 990.180(a)(2)	Yearly consumption level: Actual amount of each utility consumed during 12-month period ending June 30th. For example, for funding period January 1, 2006, through December 31, 2006, RBCL will be average of following yearly consumption levels: • Year 1 = July 1, 2001, through June 30, 2002. • Year 2 = July 1, 2002, through June 30, 2003. • Year 3 = July 1, 2003, through June 30, 2004.
Guidance	
Case Law	

ENERGY CONSERVATION & EFFICIENCY INITIATIVES	
Statutes	
Energy Policy Act of 2005 § 154, 42 U.S.C.A § 15842 (2006)	HUD shall develop and implement integrated strategy to reduce utility expenses through cost-effective energy conservation and efficiency measures and energy-efficient design and construction of public and assisted housing and include development of energy reduction goals and incentives for PHAs.
Regulations	
24 C.F.R. § 990.185(a)	Incentives for Energy Performance Contracts: If PHA undertakes energy conservation measures that are financed by an entity other than HUD, PHA may qualify for incentives available under this section. PHA must enter into a contract to finance energy conservation measures, and must obtain HUD approval. Such approval shall be based on determination that payments under a contract can be funded from reasonably anticipated energy cost savings. Contract period shall not exceed 20 years. Energy conservation measures may include, but are not limited to: Physical improvements financed by a loan from bank, utility, or governmental entity; management of costs under performance contract; or shared savings agreement with private energy service company.
24 C.F.R. § 990.185(a)(1)(i)	Frozen Rolling Base: If PHA undertakes energy conservation measures that are approved by HUD, RBCL for project and utilities involved may be frozen during contract period. Before RBCL is frozen, it must be adjusted to reflect any energy savings resulting from use of any HUD funding. RBCL also may be adjusted to reflect systems repaired to meet applicable building and safety codes as well as to reflect adjustments for occupancy rates increased by rehabilitation. RBCL shall be frozen at level calculated for year during which conservation measures initially shall be implemented.

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24 C.F.R. § 990.185(a)(1)(ii)	PHA operating subsidy eligibility shall reflect retention of 100 percent of savings from decreased consumption until term of financing agreement is complete. PHA must use at least 75 percent of cost savings to pay off debt. PHA may use full amount of remaining cost savings for any eligible operating expense.
24 C.F.R. § 990.185(a)(1)(iii)	Annual 3-year rolling base procedures for computing RBCL shall be reactivated after PHA satisfies conditions of contract. Three years of consumption data to be used in calculating RBCL after end of contract period shall be yearly consumption levels for final 3 years of contract.
24 C.F.R. § 990.185(a)(2)	PHAs undertaking energy conservation measures financed by an entity other than HUD may include resident-paid utilities under consumption reduction incentive, using following methodology: • PHA reviews and updates all UAs to ascertain that residents are receiving proper allowances before energy savings measures are begun; • PHA makes future calculations of rental income based on these baseline allowances. In effect, HUD will freeze baseline allowances for duration of contract; • After implementation of energy conservation measures, PHA updates UAs in accordance with provisions in § 965, subpart E. New allowance should be lower than baseline allowances; • PHA uses at least 75 percent of savings for paying the cost of improvement (PHA will be permitted to retain 100 percent of difference between baseline allowances and revised allowances); • After completion of contract period, PHA begins using revised allowances in calculating its operating subsidy eligibility; and • PHA may exclude from its calculation of rental income increased rental income due to difference between baseline allowances and revised allowances of projects involved, for duration of contract period.
24 C.F.R. § 990.185(a)(3)(i)	Subsidy add-on: If PHA qualifies for this incentive, then it is eligible for additional operating subsidy each year of contract to amortize cost of loan for energy conservation measures and other direct costs related to energy project. PHA's operating subsidy for current funding year will continue to be calculated in accordance with paragraphs (a), (b), and (c) of § 990.170 (i.e., the rolling base is not frozen). PHA will be able to retain part of cost savings in accordance with § 990.170(c).
24 C.F.R. § 990.185(a)(3)(ii)	Actual cost of energy (of type affected by energy conservation measure) after implementation of energy conservation measure will be subtracted from expected energy cost, to produce the energy cost savings for the year.
24 C.F.R. § 990.185(a)(3)(iii)	If cost savings for any year during contract period are less than amount of operating subsidy to be made available under this paragraph to pay for energy conservation measure in that year, deficiency will be offset against PHA's operating subsidy eligibility for PHA's next fiscal year.
24 C.F.R. § 990.185(a)(3)(iv)	If energy cost savings are less than amount necessary to meet amortization payments specified in contract, contract term may be extended (up to 20-year limit) if HUD determines that shortfall is the result of changed circumstances, rather than a miscalculation or misrepresentation of projected energy savings by contractor or PHA. Contract term may be extended only to accommodate payment to the contractor and associated direct costs.
24 C.F.R. § 990.185(b)	Rate reduction: If PHA takes action beyond normal public participation in rate-making proceedings, such as well-head purchase of natural gas, administrative appeals, or legal action to reduce rate it pays for utilities, PHA will be permitted to retain one-half annual savings realized from these actions.
24 C.F.R. § 990.185(c)	Utility benchmarking: HUD will pursue benchmarking utility consumption at

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	project level as part of transition to asset management. HUD intends to establish benchmarks by collecting utility consumption and cost information on project-by-project basis. In 2009, after conducting a feasibility study, HUD will convene a meeting with representation of appropriate stakeholders to review utility benchmarking options so that HUD may determine whether or how to implement utility benchmarking to be effective in FY 2011. HUD study shall take into account typical levels of utilities consumption at public housing developments based upon factors such as building and unit type and size, temperature zones, age and construction of building, and other relevant factors.
24 C.F.R. § 990.301	Energy Audits: Regulations require an energy audit (EA) to be completed every five years for each property in PHA's portfolio, but an EA can be conducted any time to support comprehensive modernization or equipment purchases.
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I. Introduction

As a part of a larger project to evaluate how HUD could promote greater energy efficiency in its subsidy programs, this chapter provides a comprehensive overview of the legal and regulatory frameworks that govern utility payments in properties with project-based rental assistance (PBRA). The programs covered are the project-based programs administered by HUD's Office of Housing, namely Section 8 Housing Assistance Payments for New Construction¹ and Section 8 Housing Assistance Payments Program for Substantial Rehabilitation,² and also Section 202/811 Supportive Housing for the Elderly and Persons with Disabilities.³ This chapter omits the Project-based Voucher (PBV) program, which uses a different set of rules than other project-based housing programs and is discussed in the Housing Choice Voucher chapter.⁴ As of 2009, PBRA assists approximately 1.2 million households.⁵

Generally, the PBRA program distorts an owner's incentive to minimize utility costs by having tenants pay their own utilities. The PBRA program offers owners who pay for utilities several different reimbursements options for utility costs that can effectively shield owners from the concern of high utility costs due to tenant overconsumption. As a result, an owner of a PBRA property is financially indifferent between having a tenant pay for their utilities or paying for

¹ *Housing*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing (last visited Mar. 4, 2014); *Table of Contents*, U.S. DEP'T OF HOUS. & URBAN DEV., <http://portal.hud.gov/hudportal/HUD?src=/hudprograms/toc> (last visited Mar. 3, 2014) (providing a breakdown of which programs are administered by which HUD office). Housing Choice Vouchers (formerly known as Section 8), Public Housing, and Section 8 Moderate Rehabilitation are all administered through the Public and Indian Housing office. *Id.* Regulations for the New Construction program can be found at 24 C.F.R. § 880.

² 24 C.F.R. § 881.

³ 24 C.F.R. § 891.

⁴ PBV uses the same rules as are used in the Tenant-Based Rental Assistance (TBRA) program. See 24 C.F.R. § 983.301(f)(2)(ii). To have included the PBV program in this chapter would have required a thorough analysis of the TBRA program, which falls outside the scope of this chapter. See Housing Choice Voucher Chapter.

⁵ U.S. DEP'T OF HOUS. & URBAN DEV. PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2009, at 24 (2009).

tenant utilities directly and being reimbursed by HUD.⁶ In the later scenario, tenants might over-consume utilities, because they are not realizing the costs, and owners will push these costs onto HUD who agrees to reimburse them through rent adjustments that are justified based on these higher operating costs. Regardless of whether the tenant or owner pays utilities, there is little incentive for PBRA owners to make energy efficient upgrades to PBRA properties.⁷ In the case where a tenant pays their utilities, landlords do not have strong economic incentives to implement energy conservation measures, because each time that the utility allowance increases, the landlord can adjust the housing assistance payment (HAP)⁸ for the unit and collect the same amount of rent.⁹ In the case where owners pay for utilities, HUD covers some or all of the cost of inefficient systems through cost adjustments, depending on the type of rent adjustment permitted.¹⁰ There are limits to HUD's reimbursements, which means extremely inefficient properties may have costs that exceed HUD reimbursement limits; however, these limits are not well defined.¹¹ As in most other subsidized housing programs, owners of these properties are incentivized to have tenants pay for their utilities. Even in that scenario, however, the excessive costs are passed on to HUD through a high utility allowance or to tenants through high utility costs that are not covered by the utility allowance.

⁶ A factor in this decision will be the perceived or actual administrative cost of requesting a reimbursement from HUD, however, that cost is likely marginal whereas the cost of making the necessary modifications to a property so that tenants pay their own utilities are more substantial.

⁷ See Samuel Dastrup, Simon McDonnell & Vincent Reina, *Household Energy Bills and Subsidized Housing* 14 CITYSCAPE, no. 1, 2012 (arguing that regardless of the billing arrangement, either owners or tenants are disincentivized from reducing utility consumption in HUD-subsidized housing).

⁸ See 24 C.F.R. § 880.501(d)(1).

⁹ See 24 C.F.R. § 880.610. In the LIHTC program, for example, when utility allowances go up, the rent to the landlord decreases proportionally; therefore, the landlords have very strong incentives to keep utility allowances and, by extension, tenant consumption of utilities low. See Chapter on LIHTC Utility Allowances.

¹⁰ This is somewhat complicated by the variety of different ways contract rent is adjusted. In a budget-based rental adjustment, the landlord can cite the increased utility costs as a reason to increase the rent. However, in adjustment done using the operating cost adjustment factor (OCAF), increases in contract rents are limited by a regionally applicable factor. In the latter case, the owner likely has greater incentive to implement energy-saving measures. See *infra* Section IV of this chapter.

¹¹ HUD Handbook 4350.1 does not clearly define "reasonable" costs, which gives considerable leverage to field offices in the review process

II. Background on Utility Payments in PBRA

In project-based housing, the metering configuration of the building will determine whether the property owner or the tenant pays for utilities.¹² In buildings with individual meters (or sub-meters), tenants pay the utilities, while buildings with master-metering generally include utilities in the rent.¹³ Many buildings have some utilities master-metered, while other utilities are individually metered.¹⁴

How utility costs factor into HUD subsidies to property owners depends upon whether owners or tenants pay utilities. In both cases, a tenant family pays 30 percent of its adjusted income in rent and utilities, and HUD pays the owner the difference between the tenant's rent payment and the contract rent (the contract rent is the amount established in the HAP contract

¹² *Utility Allowances*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/phecc/allowances (last visited June 24, 2013) (describing system for calculating utility allowances in public housing, but information about metering probably also applies to project-based housing because without individual meters tenants would be hard-pressed to pay for their own utilities); Steven Ferrey, *In from the Cold: Energy Efficiency and the Reform of HUD's Utility Allowance System*, 35 HARV. J. ON LEGIS. 145, 199-200 (1995). Check-metering is a third option, in which the landlord pays utilities then bills the tenants; however, historically check-metering is seldom used in Section 8 housing. *Id.* at 7 (citing GENERAL ACCOUNTING OFFICE, ASSISTED HOUSING: UTILITY ALLOWANCES OFTEN FALL SHORT OF ACTUAL UTILITY EXPENSES VOL. 1, at 45 n.13 (1991)); *see also* U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 12-29 (1996), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4350.1. U.S. (stipulating that as long as HUD approves, master-metered projects can be converted to either submetered or individually metered properties); Evan White, *Utilities in Federal Subsidized Housing: A Report on Efficiency, Utility Savings, and Consistency* 5 (June 2012) (unpublished M.P.P. thesis, University of California, Berkeley) (available at http://aceee.org/files/pdf/resource/white_utilities_in_federally_subsidized_housing_2012.pdf).

¹³ *Id.* The only mastermetered buildings that would use utility allowance are those with checkmetering or submetering configurations.

¹⁴ *See* White, *supra* note 12, at 10. The Section 8 lease, form HUD-90105-A, allows the project owner to indicate which utilities are included in the rent and for which ones the tenant is responsible. *Lease for Subsidized Programs* (HUD-90105-A), U.S. DEP'T OF HOUS. & URBAN DEV. (Dec. 2007), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=90105a.pdf>. HUD regulation 24 C.F.R. § 245.416 permits property owners to convert their buildings from master-metered, project-paid utilities to individually metered or submetered, tenant-paid utilities. *See also* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 12, at 12-19–12-23 (providing comprehensive guidance for switching from project-paid to tenant-paid utilities). The HUD Handbook 4350.1, Chapter 12 (which is applicable only to projects assisted under Section 236 interest reduction program, 221(d)(3) Below-Market Interest Rate (BMIR) program, Rent Supplement program, certain projects built under Section 202, Section 8 projects converted from Section 236 Rental Assistance Payments Program or Rent Supplement program, and certain projects sold by HUD and subject to an agreement that the low and moderate income character would be preserved. *Id.* at 12-3) states that HUD would approve such a conversion based on the information submitted by the property owner, the recommended utility allowance, and on the tenant comments received. After the conversion is approved, the owner must prepare a new rent schedule, advise tenants of deposit requirements, request increases in utility allowances if necessary. *Id.* at 12-23.

between HUD and the property owner¹⁵).¹⁶ When tenants are responsible for utility payments, HUD credits the tenant with a utility allowance, which reduces the rent the tenant owes to the property owner; HUD then pays the difference between the tenant's payment and the contract rent, which does not include a utility allowance.¹⁷ If the landlord includes all the utilities in the rent, on the other hand, the tenant pays 30 percent of tenant's adjusted income to the landlord, and HUD then pays the landlord a HAP,¹⁸ which is the difference between the tenant's payment and the contract rent. In either case, tenants should be paying roughly the same total for rent and utilities.¹⁹

A PBRA contract is administered by a Contract Administrator (CA), which is either HUD, a Public Housing Agency (PHA), or any other "State or local government instrumentality that is authorized to engage in or assist in the development or operation of housing for low-income families."²⁰ In PBRA housing administered by a CA, the CA approves utility allowances

¹⁵ 24 C.F.R. § 880.201 ("Contract rent. The total amount of rent specified in the contract as payable to the owner for a unit.").

¹⁶ See 42 U.S.C. § 1437f(a).

¹⁷ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 12.

¹⁸ 24 C.F.R. § 880.501(d)(1).

¹⁹ See also HOUS. PRES. PROJECT & SARGENT SHRIVER NAT'L. CTR. ON POVERTY LAW, INCONSISTENT ADMINISTRATION OF PROJECT-BASED SECTION 8 UTILITY ALLOWANCES THREATENS LOW-INCOME FAMILIES 1 (2010) [hereinafter HPP] (arguing that Section 8 tenants often pay more than 30 percent of adjusted income because of insufficient utility allowance adjustments). See Samuel Dastrup, et al., *supra* note 7, at 127 (explaining that when tenants have a utility allowance, they have the option of using less energy and collecting the savings, thereby paying less than 30 percent of their adjusted income; in effect, utility allowances can be used as an incentive for tenants to conserve energy).

²⁰ *Section 8 Program Background Information*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/s8bkinfo (last visited June 24, 2013). Traditional Contract Administrators (TCA) were the primary state instrumentalities acting as CAs, but after 2000, Performance-Based Contract Administrators (PBCA) replaced most TCAs. "As of January 5, 2011, HUD administered an estimated 5,886 contracts, performance-based contract administrators administered an estimated 15,825 contracts, and traditional contract administrators administered an estimated 1,889 contracts." KELLY ANDERSON, HUD'S OVERSIGHT OF ITS MULTIFAMILY HOUSING SUBSIDY PAYMENT REVIEW PROCESS NEEDS IMPROVEMENT 5 (2011). See also *Performance Based Contract Administration Frequently Asked Questions*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14968.pdf (last visited June 24, 2013). Most project-based Section 8 contracts can be administered by PBCAs, with the following exceptions: Moderate Rehabilitation contracts, Project Assistance Contracts (PACs), HUD-owned projects, contracts in the foreclosure pipeline, Mortgagee-in-Possession (MIP) projects, contracts referred to the Departmental Enforcement Center (DEC), contracts referred to the Office of Multifamily Housing Assistance (OAHP), OAHP Watchlist contracts, contracts in which the owner has intent to opt-out, contracts expiring within 3 months of potential assignment, and projects identified by field office as troubled. *Id.*

and forwards the approvals to HUD, while in PBRA housing administered by HUD, the property owner sends utility allowance recommendations directly to HUD.²¹ As discussed below, certain CAs publish guidelines for conducting and reporting utility analyses, but even in the areas administered by those CAs, HUD or the PHA administers certain kinds of properties.²² In the sections that follow, PBCAs, Traditional Contract Administrators (TCAs),²³ and HUD administrators will collectively be called contract administrators, while the specific names will be used to refer to their respective unique functions and characteristics.

III. Tenant-paid Utilities

For PBRA properties where all or some of the utilities are paid by the tenant, HUD or a contract administrator sets a utility allowance so that the total amount tenants contribute to rent and utility costs does not exceed 30 percent of their adjusted income. The utility allowance is set at least annually when the Section 8 contract is renewed or when contract rents are adjusted.²⁴ It is based on the number of bedrooms in a unit, without regard to the number of tenants or to the age, sex, marital status, employment status, or other individual characteristics of the tenant residing in the unit.²⁵ The tenant must pay the property owner the tenant rent,²⁶ which is 30

²¹ Compare 24 C.F.R. § 880.610 (stating that project owner must advise contract administrator of changes in utility allowances), with 24 C.F.R. § 884.220 (stating that the project owner must advise the Secretary of changes in utility allowances). See also 24 C.F.R. § 880.505 (explaining the responsibilities of contract administrators and the differences between HUD as a contract administrator and a public housing agency as a contract administrator).

²² The projects administered by HUD, such as those in the foreclosure pipeline of on the OAHP Watchlist are not beholden to the local PBCA guidelines.

²³ Traditional Contract Administrators still exist, but their numbers have been declining since the introduction of PBCAs in the early 2000s. Some government instrumentalities function as both PBCAs and TCAs at the same time. For the intents and purposes of this chapter, contract administrators will be lumped into the PBCA category as the majority of contract administrators are now PBCAs.

²⁴ 24 C.F.R. § 880.610.

²⁵ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 12, at 7-24.

²⁶ 24 C.F.R. § 5.603 (tenant rent defined as “[t]he amount payable monthly by the family as rent to the unit owner (Section 8 owner or PHA in public housing).”).

percent of the tenant’s adjusted income minus the utility allowance.²⁷ HUD then pays the property owner an amount equal to the contract rent plus the utility allowance minus the total tenant payment (TTP).²⁸ If the utility allowance for a unit exceeds a tenant’s TTP, HUD pays a utility reimbursement to the tenant, equal to the utility allowance minus TTP.²⁹

HUD has significant flexibility in designing the process for setting tenant-paid utility allowances—the relevant statutes and regulations do not specify how utility allowances should be set, and most utility allowance policy is set by HUD through the *HUD Handbook 4350.1*. Section 8 of the Housing Act of 1937 stipulates that eligible, low-income families³⁰ receiving housing assistance from HUD are to pay no more than 30 percent of their adjusted income in rent.³¹ HUD has historically considered utilities to be a component of the rent, which means that

²⁷ 24 C.F.R. § 5.603 (“If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”). For more about the different utility allowances that can be charged for different kinds of units with the same number of bedrooms in the same project, *See generally* Ferrey, *supra* note 12, at 172 (proposing that the characteristics and number of residents per unit be incorporated into determining utility allowances). However, the *HUD Handbook 4350.1* requires that units with the same number of bedrooms but other differentiating characteristics (corner unit v. non-corner unit) have different utility allowances. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-24. Additionally, the data of utility allowances from HUD’s Multifamily Portfolio Datasets shows that different utility allowances are granted to units with the same number of bedrooms within the same building. *Contracts with Rent amt and Utility Allowance amt*, U.S. DEP’T OF HOUS. & URBAN DEV. (June, 4, 2013), <http://portal.hud.gov/huddoc/contractsrentutilityamt.exe>.

²⁸ U.S. DEP’T OF HOUS. & URBAN DEV., *HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 5-25* (2009), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf [hereinafter *HUD Handbook 4350.3*] (“The Total Tenant Payment (TTP) is the amount a tenant is expected to contribute for rent and utilities.”).

²⁹ The property owner can either pay the utility reimbursement directly to the family or, with the family’s consent, to the utility supplier, but if after a sufficient waiting period, the tenant does not cash the check, the owner must void the check and return the funds to HUD as an adjustment on the voucher. 24 C.F.R. § 5.603. For greater detail and examples of how TTP interacts with the Housing Assistance Payment, see *HUD HANDBOOK 4350.3*, *supra* note 28, at 5-26. *HUD Handbook 4350.3* applies to a greater breadth of programs than does *HUD Handbook 4350.1*; specifically, it applies to Section 221(d)(3), Section 236, Rental Assistance Payment (RAP), Rent Supplement, Section 8 Project-Based Assistance, and most Section 202 and 811. *Id.* at 1-2 fig. 1-1.

³⁰ ‘Family’ can refer to either an actual family or to a single person, if the single person is someone eligible for public housing assistance. *See* 42 U.S.C. § 1437a; 24 C.F.R. § 5.403. ‘Tenant’ and ‘family’ are used interchangeably, with both meaning a person or group of people eligible to receive housing assistance through HUD.

³¹ Thirty percent cap was enacted in the Omnibus Budget Reconciliation Act of 1981, sec. 322, § 3(a)(1), 95 Stat. 357 (codified as amended at 42 U.S.C. § 1437a(A)(1)). The requirement that families pay no more than 30 percent of income is mirrored in 24 C.F.R. § 5.628, which provides four options for “total tenant payment,” instructing the highest of the three be chosen: 30 percent of family’s adjusted income, 10 percent of family’s monthly income,

tenants should spend no more than 30 percent of their adjusted income for the sum of the rent paid to the property owner and utility costs paid to the various utility companies.³² Section 8 of the United States Housing Act of 1937 also states that the contract between the contract administrator and the property owner will set a maximum rent that includes utility costs.³³

HUD regulations prescribe some guidelines for utility allowances, but do not set a standard for how the utility allowances should be set for a building.³⁴ The regulations do not specify how much information should be included in the analysis, which utilities ought to be included in the analysis, how many units should be sampled, or whether to use engineering models or consumption models.³⁵ They do require that the property owner include “[s]uch data as changes in utility rates and other facts affecting utility consumption”³⁶ Further, they mandate that owners obtain HUD approval for utility allowances when utility rates cumulatively increase by 10 percent over the previous utility allowance.³⁷

whatever designated amount of welfare payments designated for housing costs, or a figure for minimum rent as per 24 C.F.R. § 5.630, which is set at either \$25 or \$50.

³² A tenant might pay more than 30 percent of income if the utility usage is excessive, which is, of course, a subjective standard. The utility allowance is meant to cover the costs of “an energy conscious resident.” U.S. DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING (1996), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4350.1. The 30 percent cap to tenant contribution provides a cause of action for tenants. (please be aware that in the citations, the numbers refer to the sections (i.e. section 7-4). *See, e.g.,* Wright v. City of Roanoke Redevelopment and Hous. Auth., 107 S.Ct. 766 (1987) (holding that tenants have a cause of action against PHAs if they are being overbilled for utilities).

³³ 42 U.S.C. § 1437f(c) (“An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made.”).

³⁴ Project owners used to be allowed to simply recommend utility allowances, so the initial utility allowances were probably just set at the project owners’ recommendations, and until 1985, were likely adjusted only when the project owner deemed it necessary. *See* Section 8 Housing Assistance Payments for New Construction, 44 Fed. Reg. 59,408, 59,428 (Oct. 15, 1979) (codified at 24 C.F.R. pt. 880.610).

³⁵ *Cf.* U.S. DEP’T OF HOUS. & URBAN DEV., UTILITY ALLOWANCE GUIDEBOOK (1998) (providing the guidelines for utility allowance calculation in public housing; offering two primary means by which utility allowances can be conducted: engineering model and historical consumption model). For public housing, there is significantly more information about how utility allowances should be calculated. However, as we shall see, project-based housing uses something akin to the historical consumption model, but with many fewer guidelines.

³⁶ *E.g.*, 24 C.F.R. § 880.610.

³⁷ *Id.*

Instead, the *HUD Handbook 4350.1*, Chapter 7, provides the most specific guidance for computing and submitting utility allowances.³⁸ It requires that property owners “recommend a utility allowance for each unit type,” which should be “the owner’s best estimate of the average monthly utility cost that an energy conscious resident will incur for the year.”³⁹ The *HUD Handbook 4350.1* requires the property owner to submit a summary with the following components in support of a change to the utility allowance: (1) the types of utilities covered by the allowance, (2) a statement of whether any utility rate increases or decreases were implemented during the past 12 months or are expected to be implemented during the next 12 months and the amount of those increases or decreases,” and (3) a statement of how energy conservation initiatives have or will impact consumption.⁴⁰

The *HUD Handbook 4350.1* then instructs the administrator⁴¹ to review the information that the owner submitted⁴² to determine: whether the property “owner’s comments on recent and proposed rate increases [are] consistent with any information you have obtained from other properties, utility suppliers, news report[s]”; whether “the owner appropriately adjusted for recent and planned rate increases”; and whether the savings from energy conservation efforts were factored in.⁴³ If the administrator’s analysis is substantially different from the owner’s, then the *HUD Handbook 4350.1* instructs the administrator to discuss the issue with the owner and

³⁸ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-24. The *HUD Handbook 4350.1* states that it is applicable to only certain kinds of projects and never states that it applies to all Section 8 housing. *Id.* at 7-2. However, *HUD Handbook 4350.3*, which explicitly applies to all Section 8 projects, states that contract administrators must follow “the submission requirements described in the following: 1. HUD Handbook 4350.1, *Multifamily Asset Management and Project Servicing*, for budget-based rent increases, annual adjustment factor increases, and utility allowance changes” HUD HANDBOOK 4350.3, *supra* note 28, at 7-18.

³⁹ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-24.

⁴⁰ *Id.* at 7-24(A).

⁴¹ The *HUD Handbook 4350.1* mentions Loan Management Branch Chiefs, thus we can assume that, as originally envisioned, staff at branch offices would be conducting this work; however, now that PBCAs are reviewing the utility allowances, it is possible that PBCA staff is applying this guidance to themselves.

⁴² *Id.* at 7-35(A).

⁴³ *Id.* at 7-35(B).

request additional information.⁴⁴ However, the *HUD Handbook 4350.1* states that administrators “should usually be able to set allowances at the levels recommended by the owner.”⁴⁵ If an administrator approves utility allowances that are different from those recommended by the property owner, then the administrator should document its reasons for doing so.⁴⁶ After all of these steps are completed, the *HUD Handbook 4350.1* requires the administrator to enter utility allowances on the Rent Computation Worksheet.⁴⁷

Because the *HUD Handbook 4350.1* guidelines afford wide discretion to CAs, there may be substantial variation in utility allowances for similarly situated units.⁴⁸ Regional offices and local CAs provide additional guidance about the proper way to conduct and submit a utility analysis, as section VI details.

Given the flexibility afforded by the relevant statutes and regulations, policymakers at HUD are able to clarify or set utility allowance policy through guidance documents such as handbooks and through memos. For example, the applicable regulations⁴⁹ require property owners to submit utility allowance analyses “[i]n connection with annual and special adjustments of contract rents.”⁵⁰ Prior to 2011, many CAs did not interpret this requirement to mandate annual utility

⁴⁴ *Id.* at 7-35(C).

⁴⁵ *Id.* at 7-35(D).

⁴⁶ *Id.*

⁴⁷ *Id.* at 7-35; *id.* at app. 5.

⁴⁸ See *Contracts with Rent amt and Utility Allowance amt*, *supra* note 27 (showing all PBRA utility allowances). For a demonstration of the possible differences in utility allowances that can be derived from the same rates of consumption, please refer to *infra* appendix 1.

⁴⁹ Sections 880-881, 883-884, and 886 cover different aspects of PBRA. This chapter mainly cites 24 C.F.R. § 880, because the same requirements are set forth in sections 881, 883-884, and 886. Slightly different rules exist in 24 C.F.R. § 891.

⁵⁰ 24 C.F.R. § 880.610. See also 24 C.F.R. § 881.601 (stating that regulations set forth in 24 C.F.R. § 880.610 apply to Section 8 Housing Assistance Payments Program for Substantial Rehabilitation); 24 C.F.R. § 884.20 (using the same language as 24 C.F.R. § 880.610 in setting forth requirements for Section 8 Housing Assistance Payments Program, New Construction Set-Aside for Section 515 Rural Rental Housing Projects, with the exception of the use of the word ‘Secretary’ rather than ‘Contract Administrator’); 24 C.F.R. § 886.126 (using the same language as 24 C.F.R. § 880.610 in setting forth requirements for Section 8 Housing Assistance Payments Program—Special Allocations). But see 24 C.F.R. § 891.440 (mandating that owners or borrowers must submit utility allowances where applicable, without any mention of an annual submission requirement).

As of 1979, Section 8 project owners were required only to provide recommendations for utility allowances and were not required to provide any utility analysis. Section 8 Housing Assistance Payments for New Construction, 44

analyses.⁵¹ On June 20, 2011, however, HUD’s Multifamily Program issued a memo (hereinafter referred to as the Galante Memo) clarifying that utility allowance analyses must be submitted at least annually, during each adjustment of contract rents.⁵² The memo authorizes the Project Manager or Contract Administrator to withhold any rent adjustments until utility analyses are submitted.⁵³

IV. Owner-Paid Utilities

For PBRA properties where the project owner pays for any utility costs, the utilities are factored into the building’s operating costs and included in rents.⁵⁴ Under this arrangement, the owner is able to pay for increases in operating costs by requesting a rent adjustment from HUD. Section 8 of the Housing Act of 1937 requires HUD to adjust contract rents in PBRA housing to reflect changes in fair market rentals for the area and to provide compensation for property taxes,

Fed. Reg. 59,408, 59,428 (Oct. 15, 1979) (codified at 24 C.F.R. pt. 880.610).. The requirement that utility analyses be conducted each time there is a request for a rent increase have been in place since 1985, when a final rule was passed by HUD that mandated that project owners submit utility analyses with information on rates and utility consumption, rather than just recommendation. Technical Amendments to Definition of Income, 50 Fed. Reg. 39,092-01 (Sept. 27, 1985) (codified at 24 C.F.R. pt. 880.610, 881.610, 883.711, and 884.220). Additionally, this final rule also specified “a time other than at rent increase approval when it is “appropriate” to recommend an adjustment: when a utility rate change would result in a cumulative increase of 10 percent or more in the previously approved utility allowances.” *Id.*

⁵¹ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12. See also *HUD/Performance Based Contract Administrator Call*, U.S. DEP’T OF HOUS. & URBAN DEV. (Mar. 31, 2005), <http://www.hud.gov/offices/hsg/mfh/rfp/docs/pbcacall3-31-05.pdf>. See *Rent Decrease and Lawsuit at the Village of Kaufman*, TEXAS TENANTS’ UNION (Fall 2009), available at <http://nhlp.org/files/greenbook4/Chapter5/FN%20181%20Texas%20Tenants%20Union%20Newsletter%20re%20Crowder%20settlement.PDF>; *Crowder et. al. v. The Village of Kaufman, LTD et. al.*, 3:09CV02181.

⁵² Memorandum from Carol J. Galante, Deputy Assistant Secretary for Multifamily Housing Programs to All Multifamily Hub directory, All Multifamily Program Center Directors, All Contract Administrators (June 20, 2011). (requiring that utility analyses be submitted every time contract rents are adjusted through the Annual Adjustment Factor (AAF), Operating Cost Adjustment Factor (OCAF), Budget Based Rental Adjustment (BBRA), and special adjustment).

⁵³ *Id.*

⁵⁴ See U.S. DEP’T OF HOUS. & URBAN DEV., SECTION 8 RENEWAL POLICY 9-9 (2008) [hereinafter Section 8 Renewal] (stating that appraisers must account for all project-paid utility costs and utility allowances in Section 8 renewals when conducting a rent comparability study(RCS)). The *Section 8 Renewal Policy* guidebook does not apply to “Moderate Rehabilitation projects, Section 8 project-based certificate contracts, Section 8 project based voucher contracts or former Section 23 projects administered by the Office of Public and Indian Housing or to any projects administered by the Office of Community Planning and Development.” *Id.* at 1-4.

utility rates, and other costs.⁵⁵ Specifically, Section 8 provides that HUD may allow adjustments in maximum monthly rents if “necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent.”⁵⁶ Depending on the contract with HUD, there are four ways owners can increase their rents to pay for increases in utility costs: through an annual adjustment factor increase, an operating cost adjustment factor increase, a budget-based rent increase, or through a special adjustment.

A. Annual Adjustment Factors

Traditionally, PBRA projects had to use the Annual Adjustment Factor to adjust rents. HUD determines how much utility costs have increased annually for each metropolitan statistical area (MSA), using the Consumer Price Index,⁵⁷ and publishes an Annual Adjustment Factor (AAF).⁵⁸ Owners of properties can adjust contract rents annually by this factor in the following subsidy programs: Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation; Section 8 Loan Management (LM) and Property Disposition (PD); and Section 8 Project-Based Certificates (PBC).⁵⁹ The AAF cannot be used for properties that have been renewed under Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA).

⁵⁵ 42 U.S.C. § 1437f(c)(2).

⁵⁶ *Id.*

⁵⁷ *Id.*; see CUSR0000SAH2, available at <http://research.stlouisfed.org/fred2/series/CUSR0000SAH2> (last visited July 8, 2013). Contract rents are determined by averaging all rents, both those with rent included and rent excluded; thus, the inflation of the rent in some way includes utility costs as well, and, by default, the rental cost would be slightly inflated.

⁵⁸ Section 8 Housing Assistance Payments Program-Annual Adjustment Factors, Fiscal Year 2013, 78 Fed. Reg. 99; http://www.huduser.org/portal/datasets/aaf/FY2013_tables.pdf (showing table 1 used to determine AAFs). Also note that if a region has a calculated AAF of less than 1, HUD instructs project owners to round it up to 1. *Id.* This means that in the annual adjustment, contract rents can never decrease.

⁵⁹ Section 8 Housing Assistance Payments Program-Annual Adjustment Factors, Fiscal Year 2013, 78 Fed. Reg. 99 (Dep’t of Hous. & Urban Dev. May 22, 2013).

Property owners must submit a utility allowance analysis in order to receive an AAF⁶⁰ and HUD or the CA will not adjust the contract rent until the property owner submits a utility allowance analysis.⁶¹ HUD publishes two AAFs for each MSA, one for properties whose billing arrangements include the highest cost utility (meaning the cost that comprises the largest share of utility costs) in the rent and another for the properties whose billing arrangements do not include the highest cost utility in the rent.⁶² At each annual adjustment, the property owner must determine whether the same family resides in the unit and whether the rent includes the highest cost utility.⁶³

B. Operating Cost Adjustment Factor

The Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) stipulated that expiring Section 8 properties are to be renewed pursuant to Section 524 of MAHRA, and that their contract rents are to be adjusted using the Operating Cost Adjustment Factor (OCAF) rather than the AAF.⁶⁴ MAHRA allowed HUD to determine what cost categories to include in formulating the OCAF.⁶⁵ HUD decided to incorporate nine cost categories, which

⁶⁰ *E.g.*, 24 C.F.R. § 880.610.

⁶¹ Galante Memo, *supra* note 52.

⁶² *Id.*

⁶³ *Id.* See also 24 C.F.R. § 888.203. If the most expensive utility for a unit (generally either electricity or heating) is included in the rent (i.e., not in the utility allowance), then one AAF is used. If the highest cost utility is not included, then a different utility is included to compensate for those costs. According to HUD, heating for units that use it is generally the highest cost utility, followed by air conditioning. Economic and Market Analysis Division, Office of Policy Development and Research, Department of Housing and Urban Development, *Section 8 Existing Housing Program: Contract Rent Annual Adjustment Factors and Fair Market Rent Indexation*, U.S. DEP'T OF HOUS. & URBAN DEV. (2007), www.huduser.org/datasets/aaf/aafmeth1_2007.doc.

⁶⁴ Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, 111 Stat 1384, § 524(c) (1997) (as amended in scattered sections of 12 U.S.C. and 42 U.S.C.). Section 524 of MAHRA applies exclusively to PBRA units. *OCAF Rent Adjustment Worksheet* (HUD-9625), U.S. DEP'T OF HOUS. & URBAN DEV. (Oct. 2007) [hereinafter HUD-9625], available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14525.pdf. The justification for passing MAHRA was that the previous way that Section 8 projects were renewed was very costly because many of them had contract rents that far exceeded fair market rents or comparable rents in the area.

⁶⁵ Notice of Certain Operating Cost Adjustment Factors for 2013, 77 Fed. Reg. 63,324, 63,325 (Oct. 16, 2012) (“MAHRA gives HUD broad discretion in setting OCAFs, referring, for example, in sections 524(a)(4)(C)(i), 524(b)(1)(A), 524(b)(3)(A) and 524(c)(1) simply to “an operating cost adjustment factor established by the Secretary.” The sole limitation to this grant of authority is a specific requirement in each of the foregoing provisions that application of an OCAF “shall not result in a negative adjustment.”).

include changes in the price of fuel oil, electricity, natural gas, and water and sewer, as recorded by the Consumer Price Index.⁶⁶ While the AAF is published for MSAs, HUD publishes an OCAF for each state.⁶⁷

According to the Galante Memo, property owners must submit utility allowance analyses along with the OCAF.⁶⁸ As with the AAF, failure to submit a utility analysis will result in HUD or the CA withholding the rent increase.⁶⁹ In March 2012, HUD launched the “Automatic (Auto) OCAF Rent Increase Process,” which allows OCAF-eligible property owners to submit an “OCAF Rent Adjustment Worksheet” to the local PBCA to obtain an OCAF rent increase.⁷⁰ Although the rent increase is now automatic, property owners must submit the utility analysis “to ensure timely processing of your Auto OCAF rent increase.”⁷¹

C. Budget-Based Adjustments

A budget-based rental adjustment (BBRA) is an adjustment of the rent that an owner can apply for, in order to cover increases in the property’s operating costs.⁷² Owners who renew their

⁶⁶ *Id.* Compare with AAF methodology which uses fewer factors for annual adjustments. OCAF uses the CPI when possible, but some of the factors are not recorded in the CPI, so alternative sources need to be used.

⁶⁷ *Id.* Unlike the AAF, OCAF does not have separate categories for rents that include utility costs and those that do not. *Id.*

⁶⁸ Galante Memo, *supra* note 52.

⁶⁹ *Id.*

⁷⁰ See, e.g., *Streamlined Amend Rents Process*, IOWA FIN. AUTH. (Mar. 1, 2012), <http://archive.constantcontact.com/fs058/1102712935862/archive/1109424449483.html>; *Automatic OCAF Rent Increase*, N. TAMPA HOUS. DEV. CORP. (May 19, 2011 1:15 PM), <http://www.nthdc.org/annDetails.asp?annGUID={EE3B68AD-79C8-4679-AB9D-BC2693C28016}>; *Auto OCAF is here*, KY. HOUS. CORP. (Mar. 1, 2012), http://www.kyhousing.org/uploadedFiles/Rental_Assistance/Project_Based_Rental_Administration/Auto%20OCAF%20is%20here.docx. Please note: I have not found the original document that allowed for Auto OCAF, but I found a number of PBCAs that have published similar memos in different regions. I am assuming that there was some internal memorandum to the PBCAs. Also note that there are additional sources that say much the same things, but I only provided citations to three above.

⁷¹ E.g., *Streamlined Amend Rents Process*, *supra* note 70.

⁷² U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-2 (listing projects subject to the requirements set forth in chapter 7: Section 231 and 221(d)(3) market rate projects, Section 231 projects that still have controlled rents or use alternate mechanisms, Section 202 projects that don’t use AAF, Section 213, Section 236, Rent Supplement, Section 22(d)(3) BMIR rental and cooperative projects, Section 810 and 908, Section 8 Loan Management Set- Aside, previously HUD-owned projects sold to nonprofits that use budget to compute rents, Section 207 and 231 projects with alternative rent mechanism, Section 220 and 221(d)(4) projects that are regulated, and 234 rentals).

Section 8 contract on buildings with rent levels that do not exceed comparable market rents for the market area are eligible to submit budget-based adjustments of their rents.⁷³ According the *HUD Handbook 4350.1*, owners should request a budget-based rent increase “[w]hen current rent levels are NOT sufficient to cover anticipated or unavoidable increases in operating costs.”⁷⁴ Owners traditionally apply for this form of adjustment when an AAF or OCAF does not allow them to fully cover their building’s upkeep and utility costs, or if increases in local market rents exceed the increase offered by an AAF or OCAF.

The requirements for a budget-based increase in rents are set forth in the *HUD Handbook 4350.1*, Chapter 7.⁷⁵ Property owners must submit, among other documents, a cover letter explaining why the increase in rent is needed, the owner’s explanation of budget items, (including costs of utilities), status report on Energy Conservation Plan,⁷⁶ and an adjusted rent schedule with rent and utility allowance increase.⁷⁷

As with an AAF or an OCAF, a utility allowance analysis is required in order for an owner to receive a budget-based rent increase.⁷⁸ This analysis helps HUD determine the amount spent annually on utilities for a given building and whether these costs warrant an increase in the

⁷³ Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, 111 Stat 1384, § 524(a)(4)(C) (1997).

⁷⁴ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-21.

⁷⁵ *Id.*

⁷⁶ *Id.* at 12-13 (“The ECP will focus on planning major capital improvements relating to energy efficiency (including those which are be identified in the Comprehensive Technical Energy Audit) and should include: a. Long range energy conservation goals; b. Description of work for each proposed improvement; c. Funding sources/mechanisms to be utilized; and d. The estimated payback time (in years) of each long range capital improvement.”).

⁷⁷ *Id.*; *Budget Worksheet* (HUD-92547A), U.S. DEP’T OF HOUS. & URBAN DEV. (Aug. 2000), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/hud9. *Compare Budget-Based Rent Increase Checklist*, SOUTHWEST HOUS. COMPLIANCE CTR., FIN. DEP’T, www.shccnet.org/resources/downloads/Budget%20Based%20Checklist%20Owner.dot (last visited June 18, 2013), with *North Carolina Quadel Budget-Based Rent Increase Submission Requirements*, N.C. HOUS. FIN. AGENCY, <http://www.nchfa.com/rental/mforms.aspx> (follow Budget Based Rent Increase Submission Requirements hyperlink) (last updated Dec. 14, 2012), and *Budget Based Rent Adjustment Checklist*, ARIZ PUB. HOUS. AUTH. (Aug. 13, 2008), <http://www.azhousing.gov/azcms/uploads/PHA/Budget%20Based%20Rent%20Adjustment%20Checklist.pdf> (demonstrating that the basic requirements for budget based increases are generally similar and include costs of utilities that the project owner pays for and the cost of utilities that the tenant is responsible for).

⁷⁸ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-24.

property's contract rent.⁷⁹ Property owners must include all of the costs of utilities paid by the project in its operating expenses, which presumably include the cost of utilities for common areas and the cost of master-metered utilities for individual units.⁸⁰ The property owner must determine reasonable consumption levels and provide justification, an energy conservation survey, and an energy conservation plan.⁸¹ The administrator must review the materials submitted by the property owner to determine whether the cost increases are appropriate.⁸² It is expected that the owner will use the utility rates most advantageous to the property (for example, some properties can save money if they are registered as commercial buildings).⁸³ If the building owner requested the most advantageous rates, then the administrator should allow the rate increase and document the rates and projections used.⁸⁴ Additionally, HUD administrators are instructed to “not project for increased consumption,” except in the cases of severe weather.⁸⁵

D. Special Adjustments

HUD regulations stipulate that PBRA housing that has not been renewed using MAHRA is also eligible for special adjustment in contract rents.⁸⁶ Owners must submit requests for special adjustments to the CA and HUD must approve all special adjustments.⁸⁷ These adjustments can be made when there is an increase in the expenses—including property taxes, assessments, utility rates, and other utility costs—associated with owning and maintaining project-based housing.⁸⁸ In order to receive one of these adjustments, “[t]he owner must submit

⁷⁹ *Id.* at 7-30(D).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 7-30(D)(1).

⁸³ *Id.* at 7-30(D)(1), (D)(2).

⁸⁴ *Id.* at 7-30(D)(2).

⁸⁵ *Id.* at 7-30(D)(3). Capitalization included in the original.

⁸⁶ 24 C.F.R. § 880.609.

⁸⁷ U.S. DEP'T OF HOUS. & URBAN DEV., PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACTS (ACC) (2011).

⁸⁸ 24 C.F.R. § 880.609(b).

to the contract administrator required supporting data, financial statements and certifications.”⁸⁹

Along with any request for a special adjustment in contract rent, the property owners must submit a utility allowance analysis.⁹⁰ The guidelines for special rent adjustments are set forth in *HUD Handbook 4350.1*, Chapter 34.⁹¹

V. Local Variations

HUD regional offices and CAs set different guidelines for the collection and submission of utility allowance analyses. HUD is aware of regional variations utility allowance calculation methodologies.⁹² As of September 2013, no uniform methodology for utility analyses exists.⁹³

Some HUD regional offices and CAs publish guidelines for submitting utility allowance analyses on their websites.⁹⁴ Prior to 2011, the New York Multifamily Hub and the San Juan

⁸⁹ *Id.*

⁹⁰ 24 C.F.R. § 880.610. *See also* 24 C.F.R. § 884.220 (mirroring language of § 880.610); 24 C.F.R. § 886.326 (stating that any adjustments require a utility allowance). The mandate to submit utility allowances along with special adjustments is reinforced by the Galante Memo. Galante Memo, *supra* note 52.

⁹¹ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 12, at 7-34. Project owners must submit form HUD-9833B in order to receive a special rent adjustment. *Id.* at 34-6. *Section 8 Annual Contract Rent Adjustment Worksheet* (HUD-9833-B), U.S. DEP'T OF HOUS. & URBAN DEV. (Nov. 1992), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35585.pdf. [hereinafter HUD-9833-B].

⁹² *Minutes of HUD/Performance Based Contract Administrator Call*, U.S. DEP'T OF HOUS. & URBAN DEV. (Dec. 8, 2004), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14979.pdf. (“Deborah Lear said she had heard from owners that different PBCAs are requiring different information from the owners in order to review the utility analysis submission. She asked whether the PBCAs could reach consensus on a single national standard. New York admitted they have stricter document requirements due to comments from a HUD compliance review.”). In the same HUD/PBCA conference call, Alan Sharkey of MassHousing volunteered to create a proposal for a nationwide utility allowance calculation methodology. *Id.* It is unclear if anything has come of this. The fact that there are still different methodologies for determining utility allowances implies that a nationwide standard has not been adopted. Indeed, a MassHousing memorandum with Alan Sharkey’s name states, “As yet, HUD has not identified a specific format or steps to be followed in your Utility Analysis.” Alan Sharkey, *Revised Section 8 Utility Allowance Policy*, MASSHOUSING (Dec. 2, 2011), https://www.masshousing.com/portal/server.pt/document/10090/section_8_utility_allowance_policy.

⁹³ A 2010 study by the Housing Preservation Project and the Sargent Shriver National Center on Poverty Law claimed that utility allowances were inconsistently administered by different PBCAs, which caused certain Section 8 tenants to pay more than the statutorily permitted 30 percent of adjusted income for housing. HPP, *supra* note 19. HPP might have overstated their cause as tenants might pay more than 30 percent of their income in rent and utilities if they engage in excessive use of utilities.

⁹⁴ The information below is gathered predominantly from PBCA websites. Some websites were significantly more helpful and thorough than others. For example, the North Carolina Housing Finance Agency, the PBCA for North Carolina, provides no information on the website about utility allowances for PBRA units, even though it does

Multifamily Program Center had released memos meant to remind CAs of the requirement that property owners submit utility allowances along with each request for a rent increase.⁹⁵

Following Carol Galante's June 20, 2011 memo, HUD Regions IX and X issued their own memos, which clarified the requirements set forth in the Galante Memo and added additional guidelines for utility allowance submissions.⁹⁶ The primary differences in requirements for utility allowance analyses fall into the following categories: minimum sample size, age of the cost or consumption data, and the choice between cost and consumption methodologies for determining utility allowances.⁹⁷

Minimum Sample Size

In order to arrive at a reasonable estimate for the average monthly cost an “energy conscious family”⁹⁸ will incur for the upcoming year, property owners average the previous year's utility costs or consumption data from a sample of tenants for each unit type. The most common difference among the policies of HUD regional offices and CAs concerns the minimum sample of units per unit type to be included in the utility analysis. Some CAs do not specify a minimum sample size,⁹⁹ but others specify a percentage of the units that must be included in the

provide information for LIHTC units. *Forms*, N.C. HOUS. FIN. AGENCY, <http://www.nchfa.com/Rental/Mforms.aspx> (last updated Dec. 12, 2012).

⁹⁵ Memorandum from Teresa M. Bainton, Director of New York Multifamily Hub for All Owners/Managing Agents and PHAs Operating Subsidized Housing Programs (Mar. 24, 2010), *available at* http://www.pbcanyc.com/UserFiles/Documents/NY/BookLetters/Bookletter_1_FY2010_Utility-Allowances.pdf; Memorandum from Sylvette A. Mendez, Director of San Juan Multifamily Program Center for Owners, Agents, and Contract Administrators for Insured and Subsidized Multifamily Properties in Puerto Rico and the U.S. Virgin Islands (July 16, 2008), *available at* <http://www.nthdc.org/media/CL%2008-05%20Utility%20Allowances%20Guidance.pdf>.

⁹⁶ Memorandum from Tom Azumbrado, Director, S.F. Multifamily Hub to Owners, Management Agents and Project Managers (July 20, 2011), *available at* <http://www.calhfa.ca.gov/multifamily/asset/SF-Utility.pdf>; Memorandum from HUD Region X (Apr. 12, 2012), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=r10utility.pdf>.

⁹⁷ Refer to Appendix 3 for a chart showing the differences among PBCA/HUD regional office requirements.

⁹⁸ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 12, at 7-24.

⁹⁹ For example, MassHousing requires that the property owner include enough units to “reasonably support the owner's recommendations.” Sharkey, *supra* note 92.

sample.¹⁰⁰ For example, the Wisconsin Housing and Economic Development Authority (WHEDA) requires that 100 percent of all units be included in the analysis.¹⁰¹

Choosing Representative Units from Sample

HUD Region IX, HUD Region X, and WHEDA all provide guidelines on choosing units that are representative of an average, energy-conscious tenant. HUD Region IX instructs CAs to instruct property owners to recognize anomalies in energy usage and to not include those units in the analysis, but it does not articulate what constitutes an anomaly.¹⁰² HUD Region X instructs property owners to exclude the units with the highest and lowest consumption from the samples.¹⁰³ WHEDA instructs property owners to exclude tenants using less than 75 percent or more than 125 percent of the whole sample's average utility usage from the sample.¹⁰⁴

Age of Utility Consumption Samples

Some HUD regional offices and CAs also have slightly different guidelines for how old the utility bills from sampled units can be. HUD Region IX requires that the utility data be no more than 18 months from the anniversary date,¹⁰⁵ while HUD Region X requires that the data

¹⁰⁰ The New York State Housing Trust Fund Corporation requires all units in small properties to be included in the sample, but requires 20 percent of units for properties of up to 100 units and 15 percent for properties with more than 100 units. *What must be included in the Utility Analysis?*, N.Y. HOUS. TRUST FUND, <http://www.pbcany.com/FAQDetails.aspx?f=90> (last visited June 23, 2013).

¹⁰¹ *Automatic OCAF Rent Increase*, WIS. HOUS. & ECON. DEV. AUTH., http://www.wheda.com/root/uploadedFiles/Website/Business_Partners/Property_Managers/HUD_Forms/Auto%20OCAF%20Rent%20Increase%20Steps.pdf (last visited June 19, 2013). See *infra* Appendix 1 for a case study utilizing the WHEDA utility allowance calculation schema.

¹⁰² *Guidance for Determining Utility Allowances* (Apr. 5, 2012), available at <http://www.cahi-oakland.org/NewsDetails.aspx?n=79>. (according to the website, the document was initially issued by the HUD Contract Administrator Oversight Monitor (CAOM) for Northern California).

¹⁰³ Memorandum from HUD Region X, *supra* note 96.

¹⁰⁴ *Automatic OCAF Rent Increase*, *supra* note 101.

¹⁰⁵ Memorandum from Tom Azumbrado, Director, *supra* note 96.

be less than 4 months old.¹⁰⁶ Southwest Housing Compliance Corporation (SHCC), a PBCA in Texas and Arkansas, requests that the data be from the previous 12-month period.¹⁰⁷

Choice between Consumption and Cost Approach

Most CAs require that property owners conduct a utility allowance analysis by using the cost approach and obtaining the monthly utility bills from the tenants or utility providers; however, Region IX requires that property owners use the consumption approach, meaning that the owners determine the average kilowatt hour usage per unit type and then multiply the average kilowatt hours by the current cost per unit.¹⁰⁸ MassHousing, however, permits property owners to choose between using the consumption approach or the cost approach.¹⁰⁹

Use of Third Party Contractors

At least two CAs, SHCC and the North Tampa Housing Development Corporation, expressly allow property owners to hire third parties to conduct the utility analysis, and the former provides references to third party analysts.¹¹⁰

VI. Notice Requirements

According to subchapter II of Title 12, Chapter 13 of the United States Code in order for a building owner to impose rent increases, conversion of residential units, and any physical conversion, the owner must ensure that “tenants have adequate notice of, reasonable access to

¹⁰⁶ Memorandum from HUD Region X, *supra* note 96.

¹⁰⁷ SW. HOUS. COMPLIANCE CORP., UTILITY ALLOWANCE ANALYSIS OWNER CERTIFICATION (2012).

¹⁰⁸ Memorandum from HUD Region X, *supra* note 96.

¹⁰⁹ Sharkey, *supra* note 102.

¹¹⁰ *Utility Allowance Analysis*, SW. HOUS. COMPLIANCE CORP., <http://www.shccnet.org/adjustments/utility-allowance.asp> (last visited June 19, 2013); *Utility Analysis*, N. TAMPA HOUS. DEV. CORP., <http://www.nthdc.org/UtilityAnalysis.asp> (last visited June 28, 2013).

relevant information about, and an opportunity to comment” on any changes; the building owner must also seek HUD’s approval of any changes.¹¹¹

According to HUD regulations, owners must notify tenants thirty days prior to the submission of a request to HUD for a decrease in utility allowances or for a change from project-paid to tenant-paid utilities.¹¹² A notice to tenants must state that they have the right to participate, that HUD will take tenant comments into account in approving or disapproving the change requested by the owner, and that the mortgager will notify the tenants of HUD’s decision, which will not take effect until no fewer than thirty days from the date of service of the notification.¹¹³ Tenants have the right to look over the material that the mortgager is required to submit to HUD, to submit written comments to either the mortgager or directly to HUD, and to comment on any changes in the material.¹¹⁴

If the mortgager requests a decrease in utility allowances, then the mortgager must submit the following materials to HUD: a copy of notice to the tenants, the type of utilities involved, the number of units in the property, information about utility consumption obtained from the utility supplier, estimated monthly cost of utilities, and a justification for the reduction of the utility allowances.¹¹⁵ If the mortgager requests to change from owner-paid utilities to tenant-paid utilities, then the mortgager must submit the aforementioned materials, along with the following additional ones: the monthly cost of utilities for the whole property and for each unit by type and size, the likely cost of conversion, “the source and terms of financing for the conversion,” and the likely change in cost to the tenants.¹¹⁶

¹¹¹ 12 U.S.C. § 1715z-1b(b)(1).

¹¹² 24 C.F.R. § 245.410.

¹¹³ *Id.* The word mortgager is likely used because the regulations were initially written for mortgage programs, such as Section 236. As far as we know, it should be used synonymously with project owner.

¹¹⁴ 24 C.F.R. § 245.420.

¹¹⁵ 24 C.F.R. § 245.416(a).

¹¹⁶ 24 C.F.R. § 245.416(b). This information is also presented in *supra* Section II: Background on Utility Payments in PBRA.

HUD regulations require the property owner to notify the tenants of the adjustment to the rent and “the amount of housing assistance payment for the unit” whenever the utility allowance is adjusted.¹¹⁷ The *HUD Handbook 4350.1* states that “[b]oth the proposed and the current allowance levels should be included in the notices to the tenants.”¹¹⁸ Furthermore, changes in rent or utility allowances cannot be implemented until the owners have served the tenants notice.¹¹⁹ New Construction Set-Aside for Section 515 Rural Rental Housing Projects and Section 202 and Section 811 also require the owner or borrower to give prompt notification to affected tenants.¹²⁰

VII. Other PBRA-Affiliated Programs

A. Section 202 and Section 811 Properties

Section 202 Supportive Housing for the Elderly was authorized by the Housing Act of 1959, which became codified in 12 U.S.C. § 1701q.¹²¹ The *HUD Handbook 4350.1* applies to all Section 202 properties with the exception of those that use the Annual Adjustment Factor (AAF).¹²² Section 202 properties are eligible for budget-based increases in rent potential.¹²³ Section 811 Supportive Housing for People with Disabilities was authorized by the National Affordable Housing Act of 1990, which is codified in 42 U.S.C. § 8013.¹²⁴ For Section 292 units with Project-based Rental Assistance Contracts (PRACs), the annual contract amount shall not exceed the HUD-approved operating budget for the property’s units and the initial utility

¹¹⁷ 24 C.F.R. § 880.610 (“Whenever a Utility Allowance for a unit is adjusted, the owner will promptly notify affected families and make a corresponding adjustment of the tenant rent and the amount of the housing assistance payment for the unit.”).

¹¹⁸ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-24

¹¹⁹ *Id.* 7-39.

¹²⁰ 24 C.F.R. § 891.440 (“Whenever a utility allowance for an assisted unit is adjusted, the Owner (or Borrower) will promptly notify affected households (or families, as applicable) and make a corresponding adjustment of the tenant payment (or rent, as applicable) and the amount of the project rental assistance payment (or housing or project assistance payment, as applicable).”).

¹²¹ 12 U.S.C. § 1701q.

¹²² U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 12, at 7-2.

¹²³ *Id.*

¹²⁴ 42 U.S.C. § 8013.

allowances.¹²⁵ Both Section 202 and Section 811 property owners have to report directly to HUD, rather than to contract administrators.¹²⁶ Similarly, utility allowance analyses, and any adjustment to them, must be approved directly by HUD.¹²⁷ The regulations do not prescribe how the utility analyses are to be conducted. For Section 202 utility analyses, we can use the *HUD Handbook 4350.1*.¹²⁸ Otherwise, the same basic regulations apply to Section 202 and Section 811 utility allowances as they do to Section 8 utility allowances.¹²⁹

Initially, for new construction Section 811 housing, the utility analyses are to be conducted in the same way as utility analyses are conducted for Public and Indian Housing; specifically, they are to be recorded on form HUD-51994 and in accordance to the guidelines of the *HUD Handbook 7418.1*, Life Cycle Utility Analysis.¹³⁰ Additionally, the property owner must list the utilities to be included in the Operating Expenses Estimate.¹³¹

The lease documents for all Section 202 and Section 811 programs allow for the utility costs to be split up between the landlord and the tenant.¹³² In contrast to HUD-90105-A, which is the standardized lease for most Section 8 contracts, each of the leases includes a line on which the initial utility allowance is to be recorded.¹³³

¹²⁵ U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4571.3, REV-1, at 1-8 (1991) [hereinafter HUD 4571.2]. It is unclear what happens when there is an increase in utility allowances.

¹²⁶ See 24 C.F.R. § 891.400.

¹²⁷ 24 C.F.R. § 891.440.

¹²⁸ U.S. Dep't of Hous. & Urban Dev., *supra* note 12, at 7-2.

¹²⁹ 24 C.F.R. § 891.440.

¹³⁰ U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4571.4, REV-1, at 1-8 (1994) [hereinafter HUD 4571.4]; *Life-Cycle Cost Analysis of Utility Combinations* (HUD-51994), U.S. DEP'T OF HOUS. & URBAN DEV., available at http://www.nelrod.com/resourcelibrary/content/forms/Public%20Housing/HUD_51994%20lifecycle%20cost%20analysis.pdf (last visited July 15, 2013). Although there were plenty of mentions of this form, it appears to have been taken off the HUD website. See *HUD Forms 5 through 597*, U.S. DEP'T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/adm/hudclips/forms/hud5.cfm> (last updated June 6, 2013).

¹³¹ *Id.* at 1-10.

¹³² *Lease for Section 202/8 of Section 202 PAC* (HUD-90105-B), U.S. DEP'T OF HOUS. & URBAN DEV. (Dec. 2007), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=90105b.pdf> [hereinafter HUD-90105-B]; *Lease for Section 202 PRAC* (HUD-90105-C), U.S. DEP'T OF HOUS. & URBAN DEV. (Dec. 2007), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=90105c.pdf> [hereinafter HUD-90105-C]; *Lease for Section 811 PRAC* (HUD-90105-D), U.S. DEP'T OF HOUS. & URBAN DEV. (Dec. 2007), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=90105d.pdf> [hereinafter HUD-90105-D].

¹³³ HUD-90105-B; HUD-90105-C; HUD-90105-D.

B. Section 236 and RAD Conversion

Section 236 program is authorized by the Housing and Urban Development Act of 1968 and is codified in 12 U.S.C. § 1715z-1. A HUD guidance document provides the following information about utility allowances in Section 236 properties: “[a] Utility Allowance is approved by HUD when the cost of all or a portion of the utilities (except telephone) is not included in the unit rent and payment for the utilities is the responsibility of the family occupying the unit.”¹³⁴ As with utility allowances generally, it “is not meant to pay all actual utility costs, but rather is an allowance provided to the family to assist them in payment of their utility expenses.”¹³⁵ Section 236 properties can use the *HUD Handbook 4350.1*, Chapter 7 budget based rent adjustments.

When a tenant is responsible for utility payments, HUD can “permit the basic rental charge and the fair market rental charge to be determined on the basis of operating the property without the payment of the cost of utility services used by such dwelling units; and . . . permit the charging of a rental for such dwelling units at such an amount less than 30 percent of a tenant’s income as the Secretary determines represents a proportionate decrease for the utility charged to be paid by such tenant, but in no case shall rental be lower than 25 percent of a tenant’s adjusted income.”¹³⁶ Additionally, HUD is authorized to make additional payments for rent and utilities for those tenants whose income is too low to afford such rent and utilities with 30 percent of adjusted income.¹³⁷

¹³⁴ *Fact Sheet for HUD Assisted Residents: Section 236*, U.S. DEP’T OF HOUS. & URBAN DEV. (June 2007), <http://www.hud.gov/offices/hsg/mfh/gendocs/facts236.pdf>.

¹³⁵ *Id.*

¹³⁶ 12 U.S.C. § 1715z-1(f)(1)(C).

¹³⁷ 12 U.S.C. § 1715z-1(f)(2).

Before the introduction of Section 8 housing, Section 236 properties received rental assistance through the Rental Housing Assistance Payments (RAP) program.; however, with the advent of Section 8, HUD ceased to issue new RAP contracts, but was bound by statute to amend the existing ones.¹³⁸ Section 236 RAP contracts are expiring, and as a result, HUD developed the Rental Assistance Demonstration (RAD) program,¹³⁹ in which most Section 236 properties will be eligible to voluntarily convert to Project-Based Voucher properties by their respective property owners. These properties will use the utility allowance guidelines for PBV properties.¹⁴⁰ Additionally, RAD will use the operating cost adjustment factor (OCAF) to adjust rents.¹⁴¹ The final notice authorizing RAD also stipulates that the *HUD Handbook 4350.1*, will still be applicable to the program.¹⁴²

C. Section 8 Moderate Rehabilitation and RAD Conversion

Despite its similar name, the Section 8 Moderate Rehabilitation program is substantially different from the Section 8 New Construction and Substantial Rehabilitation Programs¹⁴³ and is administered by the HUD's Public and Indian Housing office rather than by the Office of Housing.¹⁴⁴ While the program was repealed in 1991, the administering PHA can still renew

¹³⁸ *Housing Rental Housing Assistance Program (Section 236): 2014 Summary Statement and Initiatives*, U.S. DEP'T OF HOUS. & URBAN DEV., <http://portal.hud.gov/hudportal/documents/huddoc?id=RENTHSGASSTPROG.pdf> (last visited July 5, 2013).

¹³⁹ *Id.*; Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55 (2011).

¹⁴⁰ <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2012-32.pdf> Project Based Vouchers are not covered in this chapter as they use the rules of the Tenant-Based Rental Assistance program (TBRA)

¹⁴¹ *Housing Rental Housing Assistance Program (Section 236): 2014 Summary Statement and Initiatives*, *supra* note 138.

¹⁴² Notice from Sandra B. Henriquez and Carol J. Galante to Public Housing Agencies, Public Housing Hub Office Directors, Public Housing Program Center Directors, Multifamily HUB Directors, Multifamily Program Center Directors, Regional and Field Office Directors, Regional Administrators, and Performance Based Contract Administrators (July, 26, 2012), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2012-32.pdf>.

¹⁴³ This is excluding the Section 8 Moderate Rehabilitation Single Room Occupancy for Homeless Individuals, which has a different set of rules.

¹⁴⁴ *See Table of Contents*, *supra* note 1 (last visited Mar. 3, 2014).

contracts.¹⁴⁵ Similar to the Substantial Rehabilitation and New Construction programs, Moderate Rehabilitation properties can use either the AAF or special adjustments to adjust contract rents.¹⁴⁶ However, properties renewed under MAHRA must use OCAF.¹⁴⁷

Generally, Moderate Rehabilitation units use a schedule of allowances set by the PHA, which may be adjusted annually “on the grounds of changes in utility rates or other change of general applicability to all units in the Program.”¹⁴⁸ The PHA administering the property may establish a separate utility schedule for any Moderate Rehabilitation building of twenty or more units, based upon a year’s worth of actual utility consumption data.¹⁴⁹ Like the other Section 8 programs, property owners must submit a utility allowance analysis at least annually; however, there is no provision for the need to request a new utility allowance when utility costs increase by 10 percent.¹⁵⁰ Additionally, families participating in this program must be briefed prior to moving in on the PHA’s schedule of utility allowances.¹⁵¹

Section 8 Moderate Rehabilitation property owners will be permitted to convert their units into either PBRA or PBV units under the Rental Assistance Demonstration (RAD).¹⁵² HUD hopes to convert about 5 percent of all Moderate Rehabilitation units to either PBRA or PBV units.¹⁵³ Moderate Rehabilitation buildings with energy efficient or green certification will have slightly higher priority in becoming admitted into the RAD program.¹⁵⁴ For units that will

¹⁴⁵ Notice from Gloria Cousar to Has with Section 8 Moderate Rehabilitation, Secretary’s Representatives, State and Area Coordinators, and Directors of Public Housing (Apr. 6, 2001), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2001-13.pdf>.

¹⁴⁶ 24 C.F.R. § 882.410.

¹⁴⁷ Notice from Gloria Cousar, *supra* note 145.

¹⁴⁸ 24 C.F.R. § 882.510.

¹⁴⁹ *Id.*

¹⁵⁰ Compare 24 C.F.R. § 880.610, with 24 C.F.R. § 882.510.

¹⁵¹ 24 C.F.R. § 882.514(d).

¹⁵² Notice from Sandra B. Henriquez and Carol J. Galante, *supra* note 142. The Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) program is not eligible for conversion under RAD. *Id.* at 82 n.66.

¹⁵³ *Id.* at 1, 98.

¹⁵⁴ *Id.* at 102 (stipulating that any industry-recognized green building standard could potentially qualify).

be converted to PBV, all the PBV regulations will apply,¹⁵⁵ and utility costs and allowances will be calculated just as they are for the Housing Choice Voucher program.¹⁵⁶ However, properties converted to PBRA will use a modified version of 24 C.F.R. § 880.¹⁵⁷ RAD legislation formally waived 24 C.F.R. § 880.609, because the converted units will be using OCAF pursuant to Section 524 of MAHRA; ‘special adjustments’ are removed from 24 C.F.R. § 880.610 for the same reason.¹⁵⁸

¹⁵⁵ See 24 C.F.R. § 983.

¹⁵⁶ See 24 C.F.R. § 983.301(f)(2)(ii) (“The PHA may not establish or apply different utility allowance amounts for the PBV program. The same PHA utility allowance schedule applies to both the tenant-based and PBV programs.”). Units converted to PBV under RAD would therefore use 24 C.F.R. § 982.517 to determine utility allowances.

¹⁵⁷ Notice from Sandra B. Henriquez and Carol J. Galante, *supra* note 142, at 91.

¹⁵⁸ *Id.*

Appendix 1: Case Studies

Case Study: Region IX

The following case study seeks to demonstrate the effects of the discretion afforded to PBRA property owners in calculating utility allowances in different regions. This case study will conduct a utility analysis of Tower Flats, a fictional property in Northern California. The utility costs for each of the fictional units are based on actual California Section 8 utility allowances (chosen somewhat at random), with some variation added for the demonstrative purposes of this case study.¹⁵⁹ The process for calculating the utility allowance is found in the Region IX memo from Tom Azumbrado and in a subsequent memo issued by the Northern California CAOM.¹⁶⁰

An actual utility analysis would be conducted by obtaining supporting documentation from the tenants or from the utility company. The fictional utility costs included are the sums of all the separate utilities. A property owner would have to contact each utility company to get the costs for each utility and then add the total cost of each together. In this case study, we assume that this step has already been completed. We also assume that the tenants are responsible for paying for electricity and heating.¹⁶¹

Tower Flats is a fifty unit building with twenty-five one-bedroom units, fifteen efficiency units, and ten two-bedroom units. All units in Tower Flats have been occupied for the past year. The property owner would generally receive the monthly utility costs from the utility company and then would calculate the average the monthly utility costs per unit. The average monthly utility costs for each of the units are recorded in the table below:

TABLE 1:

Unit Number	Efficiency	One Bedroom	Two Bedroom
1	\$38.00	\$41.00	\$68.00

¹⁵⁹ *Contracts with Rent amt and Utility Allowance amt*, supra note 27.

¹⁶⁰ Memorandum from Tom Azumbrado, supra note 92.

¹⁶¹ If these two utilities were not included, the utility costs would likely be much lower in our imaginary units.

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2	\$63.00	\$36.00	\$55.00
3	\$60.00	\$90.00	\$31.00
4	\$36.00	\$56.00	\$45.00
5	\$37.00	\$111.00	\$67.00
6	\$20.00	\$45.00	\$71.00
7	\$80.00	\$40.00	\$120.00
8	\$31.00	\$41.00	\$99.00
9	\$24.00	\$67.00	\$54.00
10	\$37.00	\$30.00	\$63.00
11	\$25.00	\$31.00	
12	\$29.00	\$40.00	
13	\$78.00	\$40.00	
14	\$24.00	\$59.00	
15	\$25.00	\$55.00	
16		\$39.00	
17		\$27.00	
18		\$37.00	
19		\$43.00	
20		\$55.00	
21		\$51.00	
22		\$71.00	
23		\$33.00	
24		\$36.00	
25		\$72.00	

The average monthly utility cost for each of the unit types is: \$40.47 for efficiency units, \$49.84 for one-bedroom units and \$67.30 for two-bedroom units. The averages will be used for comparative purposes once the utility analysis is conducted.

The Region IX memo instructs property owners to include 10 percent of each unit type in the utility analysis sample, or at least three units per unit type and no more than 20 units per unit type. In this case, 10 percent of any of the unit types would be less than three units, so we will have to choose at least three units from each of the three categories. The CAOM memo instructs the property owner to *only* use three units if there is veritable hardship in obtaining the data. In our case, all of the utility data are present, so we would presumably use more than three units per unit type. However, it is not clear how many units more than three would be acceptable. The CAOM guidance allows small properties such as Tower Flats to submit only three unit samples

so long as different unit samples are submitted each year. As a result, for the sake of this case study, we will conduct a utility analysis using both three units and five units per type.

At this point, we can choose five units for our analysis. The CAOM memo also tells the PBCAs to instruct property owners not to include anomalous units in the analysis. However, the memo provides no guidance for determining what amount of variation constitutes an anomaly.¹⁶² For the sake of this example, we will choose the five utility cost samples closest to the averages that were calculated above.

TABLE 2:

Unit Number	Efficiency	One Bedroom	Two Bedroom
1	\$38.00	\$51.00	\$67.00
2	\$37.00	\$45.00	\$68.00
3	\$37.00	\$55.00	\$63.00
4	\$36.00	\$55.00	\$71.00
5	\$31.00	\$56.00	\$55.00

Next, in order to obtain a good estimate of average monthly utility cost, we average the utility costs of the five representative units. The following table shows the averages for the first three units and for all five units.

TABLE 3:

Sample Size	Efficiency Average	One Bedroom Average	Two Bedroom Average
3	\$37.33	\$50.33	\$66.00
5	\$35.80	\$52.40	\$64.80

At this point, the owner can submit this utility analysis to the PBCA, which will review the material. If the averages for this year are higher or lower than those of the previous year, they will be adjusted. Utility allowances are always rounded to the nearest dollar.

TABLE 4:

Sample Size	Efficiency Rounded	One Bedroom	Two Bedroom
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¹⁶² WHEDA, on the contrary, provides clear guidance on eliminating anomalous units.

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		Rounded	Rounded
3	\$37.00	\$50.00	\$66.00
5	\$36.00	\$52.00	\$65.00

Alternatively, in order to demonstrate the variability of utility allowances, we could use a less systematic approach to choosing our utility samples. In this case, we will just choose the first five utility samples from TABLE 1 that do not immediately appear to be anomalous.

TABLE 5:

Unit Number	Efficiency	One Bedroom	Two Bedroom
1	\$38.00	\$41.00	\$68.00
2	\$63.00	\$36.00	\$55.00
3	\$60.00	\$56.00	\$45.00
4	\$36.00	\$45.00	\$67.00
5	\$37.00	\$40.00	\$71.00

Next, in order to get a good estimate of average monthly utility cost, we average the utility costs of the five representative units. The following table will show the averages for the first three units and for all five units.

TABLE 6:

Sample Size	Efficiency Average	One Bedroom Average	Two Bedroom Average
3	\$53.66	\$44.33	\$56.00
5	\$46.80	\$43.60	\$61.20

We then round those averages, as seen in Table 7.

TABLE 7:

Sample Size	Efficiency Rounded	One Bedroom Rounded	Two Bedroom Rounded
3	\$54.00	\$44.00	\$56.00
5	\$47.00	\$44.00	\$61.00

In this case, the efficiency unit utility samples end up being higher than those of the one-bedroom unit, whether or not we use a three or five unit sample. Additionally, both the one and two bedroom averages are lower here than they were in Table 3 where a slightly more systematic

method was used. We chose to not consider \$63.00 and \$60.00 as anomalies, even though they are respectively 1.56 and 1.48 times greater than the average for all fifteen units (\$40.47).¹⁶³

Case Study: WHEDA

The Wisconsin Housing and Economic Development Authority WHEDA is the contract administrator for Wisconsin. In order to demonstrate the variability of utility allowance calculations, we will take the utility rates for Tower Flats and conduct the utility allowance analysis using the model from Wisconsin. Guidance about utility allowance calculation was provided along with a memo on OCAF rent increases.¹⁶⁴ We will just use the same steps as used in the memo:

Step 1.

*Do not include in the analysis any unit that was occupied for less than 11 months.*¹⁶⁵

- Because we are assuming that all the units in Tower Flats have been occupied for the past year, we can proceed.

Step 2.

Obtain a statement from the utility company as to what the monthly budget billings would be for each unit for the next year if each tenant were on a budget plan.

- We are assuming that the numbers above would satisfy this requirement.

Step 3.

Add up the budget amounts and divide the total by the number of units to arrive at an average budget amount.

- \$40.47 for efficiency, \$49.84 for one-bedroom, and \$67.30 for two-bedroom

Step 4.

¹⁶³ Using the WHEDA formula, we would have eliminated these numbers as all numbers 125 percent or greater than the average are eliminated.

¹⁶⁴ *Automatic OCAF Rent Increase*, *supra* note 101.

¹⁶⁵ All italicized text is copied directly from the WHEDA guidance.

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Multiply the average budget amount determined in Step 3 by 75%. Remove from your list of budget amounts any amount less than the amount you just computed.

TABLE 8:

Unit Type	Efficiency	One Bedroom	Two Bedroom
Multiplied by .75	\$30.35	\$37.88	\$50.48

Removed following efficiency units for TABLE 1: 6, 11, 12, 14, and 15.

Removed following one-bedroom units from TABLE 1: 2,10, 11, 17, 18, 23, and 24.

Removed following two-bedroom units from TABLE 1: 3 and 4.

Step 5.

Multiply the average budget amount determined in Step 3 by 125%. Remove from your list of budget amounts any amount more than the amount you just computed.

TABLE 9:

Unit Type	Efficiency	One Bedroom	Two Bedroom
Multiplied by 1.25	\$50.59	\$62.30	\$84.13

Removed following efficiency units for TABLE 1: 2, 3, 7, and 13.

Removed following one-bedroom units from TABLE 1: 3, 5, 9, 22, and 25.

Removed following two-bedroom units from TABLE 1: 7 and 8.

Step 6.

Add the remaining budget amounts and divide the total by the remaining number of units in the sample to arrive at an FINAL AVERAGE BUDGET AMOUNT. Round this amount to the nearest whole dollar: this is the MONTHLY UTILITY ALLOWANCE.

- After removing the aforementioned numbers, we are left with the following utility costs for each unit size.

TABLE 10:

Unit Number	Efficiency	One Bedroom	Two Bedroom
1	\$38.00	\$41.00	\$68.00

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2	\$36.00	\$56.00	\$55.00
3	\$37.00	\$45.00	\$67.00
4	\$31.00	\$40.00	\$71.00
5	\$37.00	\$41.00	\$54.00
6		\$40.00	\$63.00
7		\$40.00	
8		\$59.00	
9		\$55.00	
10		\$39.00	
11		\$37.00	
12		\$43.00	
13		\$55.00	
14		\$51.00	

Now we can average each of the columns to get the final average budget amount:

TABLE 11:

Unit Type	Efficiency	One Bedroom	Two Bedroom
Average Budget Amount	\$35.80	\$46.54	\$63.00

Next, the average budget amounts will be rounded to get the utility allowances per unit type:

TABLE 12:

Unit Type	Efficiency	One Bedroom	Two Bedroom
Utility Allowance	\$36.00	\$47.00	\$63.00

Comparison

When we look at Tables 4, 7 and 12 we find that there is variation in the utility amount calculated based on two different sample sizes under the California method as well as variation between the California and Wisconsin method. Specifically:

1. The range for efficiency units is by far the greatest, from a low of \$36.00 using the Wisconsin method to a high of \$54.00 using the three-unit California method.
2. The range for one-bedroom units is from \$44.00 using one California method (Table 7) and to \$52.00 (Table 4) using the other California method, but it is \$47.00 in Wisconsin.

3. The range for two-bedroom units is from \$56.00 in the second California three-unit method (Table 7) to \$63.00 in Wisconsin, but goes as high as \$66.00 using the first California three-bedroom method (Table 4).

These per unit ranges highlight a significant variation in the per unit utility expenditures calculated by using different methods for the same property. This variation increases when we multiply these average utility costs by the number of units in the property and months in the year, as seen in Table 13

TABLE 13:

Unit Type	15 Efficiency Units	25 One Bedroom Units	10 Two- Bedroom Units	Total
Wisconsin Average Utility Allowance	\$36.00	\$47.00	\$63.00	
Wisconsin Utility Allowance per month	\$540.00	\$1,175.00	\$630.00	
Wisconsin Utility Allowance per year	\$6,480.00	\$14,100.00	\$7,560.00	\$28,140.00
California 3-unit Average Utility Allowance (Method 1: see Table 4)	\$37.00	\$50.00	\$66.00	
California 3-unit Allowance per month	\$555.00	\$1,250.00	\$660.00	
California 3-unit Allowance per year	\$6,660.00	\$15,000.00	\$7,920.00	\$29,580.00
California 5-unit Average Utility Allowance (Method 1: see Table 4)	\$36.00	\$52.00	\$65.00	
California 5-unit Allowance per month	\$540.00	\$1,300.00	\$650.00	
California 5-unit Allowance per year	\$6,480.00	\$15,600.00	\$7,800.00	\$29,880.00
California 3-unit Average Utility Allowance (Method 2: see Table 7)	\$54.00	\$44.00	\$56.00	
California 3-unit Allowance per month	\$810.00	\$1,100.00	\$560.00	
California 3-unit Allowance per year	\$9,720.00	\$13,200.00	\$6,720.00	\$29,640.00
California 5-unit Average Utility Allowance (Method 2: see Table 7)	\$47.00	\$44.00	\$61.00	
California 5-unit Allowance per month	\$705.00	\$1,100.00	\$610.00	
California 5-unit Allowance per year	\$8,460.00	\$13,200.00	\$7,320.00	\$28,980.00

Appendix 2: Variations in PBCA Guidelines for Utility Allowance Submission

This chart illustrates variations among PBCAs (guidelines in *HUD Handbook 4350.1* apply to all PBCAs). This is not meant to be an exhaustive list of all variations.

HUD Region/PBCA	HUD published Guidance	Percentage of Units required in analysis	How old can the data be?	Additional Differences
Region I - Maine State Housing Authority - MassHousing		<u>MA</u> : no minimum sample size	<u>MA</u> : most recent 12 months of usage	<u>ME</u> : incorporated utility allowance requirements into state regulations <u>MA</u> : allows property owners to use cost or consumption approaches <u>MA</u> : don't use units with less than 12 months of data
Region II - New York State Housing Trust Fund Corporation	- New York Multifamily Hub - 03/24/10	<u>NY</u> : 1-10 units total (all in sample), 10-50 (10-15 units), 50-100 (20%), 100+ (15%)		
Region III - Pennsylvania Multifamily Asset Managers		<u>PA</u> : n/a		
Region IV - NTHDC - Kentucky Housing Corporation - Tennessee Housing Development Corporation - North Carolina Housing Finance Agency	- San Juan Multifamily Hub- 07/16/08 - Jacksonville Multifamily Hub- 07/11/11	<u>PR & VI</u> : 1-10 units total (5 in sample), 11-50 (5 + (n/10)), 51-100 (10 + (n/50)), 101+, 15 + (n/50)) <u>FL</u> : 10% or at least 5 units <u>TN</u> : 1-25 (100%), 26-50 (50%), 51+ (10%)		- NTHDC: three methods for obtaining UA: utility provider, tenants, or 3 rd party contractor. <u>TN</u> : exclude units not occupied for 12 months
Region V - WHEDA	- HUD Milwaukee Utility Allowance	<u>WI</u> : 100% of units <u>WI</u> : exclude units less than 75% and more than 125% of average		- exclude units that have been occupied for less than 11 months
Region VI - Southwest Housing Compliance Corporation - New Mexico Mortgage Finance Agency		<u>SHCC</u> : >100 units (5 + 1 for each 10 units over 50), <9 per type (50%), 101-600 (10 + for each 50 or part of 50 over 100) <u>NM</u> : same as above ¹⁶⁶	<u>SHCC</u> : data should be previous 12 months.	<u>SHCC</u> : owners hire third party <u>SHCC</u> : analysis from "median sample of energy conscious residents"
Region VII				
Region VIII				
Region IX - California Affordable Housing Initiatives - LA LOMOD - Arizona Department of Housing	- SFC Multifamily Hub- 07/20/11 - HUD CAOM for Northern California- 04/06/12 guidance	- At least 10%; no fewer than 3, but no more than 20 - LOMOD <u>recommends</u> 20% of units	- Data must be no more than 18 months away from anniversary date	
Region X - Idaho Housing & Finance Association - Oregon Housing & Community Services Dep't.	- Region X memo effective 04/12/12	- 100% of all unit types - highest and lowest users of utilities eliminated from sample <u>ID</u> : recommends 33% ¹⁶⁷	- Consumption data must be less than 4 months old	- Requires the submission of total kWh - Omit vacant units from analysis

¹⁶⁶ *Utility Allowance Analysis Owner's Checklist and Certification*, N.M. MORTG. FIN. AGENCY, http://www.housingnm.org/files/forms/documents/frmMultSect8_UtilAllowChklst.pdf (last visited Aug. 7, 2013).

Appendix 3: Glossary of Terms

Annual Adjustment Factor (AAF): an annually published, regional specific factor used to adjust contract rents in certain kinds of Section 8 housing that has not been renewed using MAHRA. AAF uses local changes in utility costs and rent to determine the amount by which rent should be increased in assisted units.¹⁶⁸

Budget-Based Rent Adjustment (BBRA): an adjustment in rent that must be requested by the property owner when the operating costs of the property increase. BBRAs are only allowed for eligible properties. BBRAs are governed by the *HUD Handbook 4350.1*, Chapter 7.

Contract Administrator: the entity that enters into a HAP contract with the owner of project-based housing and monitors performance of the property owner; contract administrator can be a PBCA, a TCA, or HUD. Private-owner/PHA properties use the PHA (which might mean either a PBCA or a TCA), while private-owner/HUD or PHA-owner/HUD properties use HUD as the contract administrator.¹⁶⁹

Contract Rent: “The total amount of rent specified in the contract as payable to the owner for a unit.”¹⁷⁰

Family: can either mean a single person who is either elderly, displaced, disabled, near-elderly, or otherwise eligible for housing assistance, or a group of persons residing together, such as a family with or without children, an elderly family, a disabled family, a displaced family, or a remaining member of a tenant family.¹⁷¹

Gross Rent: “The gross rent for a unit equals the contract rent plus the utility allowance, if the property has a utility allowance. For Section 202 PRAC and Section 811 PRAC, the gross rent is referred to as the operating rent.”¹⁷²

Housing Assistance Payments (HAP): “The payment made by the contract administrator to the owner of an assisted unit as provided in the contract. Where the unit is leased to an eligible family, the payment is the difference between the contract rent and the tenant rent. An additional payment is made to the family when the utility allowance is greater than the total tenant

¹⁶⁷ *Utility Allowance Requirements and Suggestions*, IDAHO HOUS. & FIN. ASS’N.
<http://www.rentalcompliance.org/portals/3/media/compliance/utility%20allowance%20requirements%20and%20suggestions.pdf> (last visited Aug. 7, 2013).

¹⁶⁸ Section 8 Housing Assistance Payments Program-Annual Adjustment Factors, 78 Fed. Reg. 99.

¹⁶⁹ 24 C.F.R. § 880.201.

¹⁷⁰ *Id.*

¹⁷¹ 24 C.F.R. § 5.403.

¹⁷² HUD HANDBOOK 4350.3, *supra* note 28, at ‘Glossary’.

payment. A housing assistance payment, known as a ‘vacancy payment,’ may be made to the owner when an assisted unit is vacant, in accordance with the terms of the contract.”¹⁷³

Individually Metered: utilities are metered per unit, and tenants are billed directly by the utility companies. Buildings with individual meters are those that are eligible to have utility allowances.

Master-Metered: utilities are metered for the whole building, and the property owner pays directly to the utility company. Tenants do not pay master-metered utilities directly, but rather have them factored into the total rental costs. There are no utility allowances for utilities that are master-metered.

Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA or MAHRAA): a bill passed that became codified as statute as 42 U.S.C. § 1437f note. MAHRA authorizes the use of the Operating Cost Adjustment Factor to calculate yearly adjustments in rent potential.

Operating Cost Adjustment Factor (OCAF): an annually published, regional specific factor used to adjust contract rents in certain kinds of Section 8 housing that are renewed pursuant to Section 514(e)(2) MAHRA. OCAF uses local changes in labor costs; property taxes; cost of goods; supplies, and equipment; insurance; fuel oil; electricity; water and sewer; and natural gas to determine the amount by which rent should be increased in assisted units.

Owner (Project Owner or Owner/Agent (O/A)): “Any private person or entity (including a cooperative) or a public entity which qualifies as a PHA, having the legal right to lease or sublease newly constructed dwelling units assisted under this part. The term owner also includes the person or entity submitting a proposal under this part.”¹⁷⁴ Many PBCAs refer to owners as owner/agents, for the intents and purposes of this paper this distinction is not particularly relevant. HUD regulations sometimes refer to the project owner as the mortgager.

Performance Based Contract Administrator (PBCA): contract administrators for most Section 8 Substantial Rehabilitation and New Construction; a PBCA can be a Public Housing Agency (PHA) or any other instrumentality to which it contracts out its contract administration duties. A PBCA ensures owner compliance with the HAP contract, and, of particular interest to utilities, the PBCA receives owner recommendations for utility allowances and has the ability to approve, reject, or reset the utility allowances.¹⁷⁵

Public Housing Agency (PHA): “any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under the [United States Housing

¹⁷³ 24 C.F.R. § 880.201.

¹⁷⁴ 24 C.F.R. § 880.201.

¹⁷⁵ *Section 8 Program Background Information*, supra note 20.

Act of 1937].”¹⁷⁶ Generally, PBCAs are not PHAs in the literal sense, but are rather other kinds of state instrumentalities.

Project-Based Rental Assistance (PBRA): Section 8 New Construction, Section 8 Substantial Rehabilitation, and/or Section 8 Loan Management Set-Aside programs. Other programs are project-based, but only the aforementioned fall under PBRA proper.¹⁷⁷

Project-Based Voucher (PBV): a component of a public housing agencies (PHAs) housing choice voucher program. A PHA can attach up to 20 percent of its voucher assistance to specific housing units if the owner agrees to either rehabilitate or construct the units, or the owner agrees to set-aside a portion of the units in an existing development.¹⁷⁸

Maximum Allowable Monthly Rent Potential: the maximum amount a property owner can charge for rent for a given unit. Figure for Maximum Allowance Monthly Rent Potential is determined using form HUD-92458.¹⁷⁹

Rent Comparability Study (RCS): a rent comparability study is purchased and submitted by the property owner before a Section 8 Contract Renewal. It is conducted by an appraiser hired by HUD. The purpose of the RCS is to determine what are the rents charged in comparable units in the area in order to determine what rents the owner should be allowed to charge.¹⁸⁰

Special Adjustment: an additional adjustment that can be requested by the owner and is made when there is an increase in expenses from property taxes, assessments, utility rates, and other utility costs.¹⁸¹

Submetering: utility payment arrangement whereby “the owner pays the original utility bills but then charges each tenant according to his or her own usage.”¹⁸² This metering configuration is seldom seen in PBRA housing. Utility allowances are permitted in housing with submetered utilities.

Tenant: when tenant is used in this chapter it means the same thing as family (see: Family).

¹⁷⁶ 24 C.F.R. § 5.100.

¹⁷⁷ *Policy Basics: Section 8 Project-Based Rental Assistance*, CTR. ON BUDGET AND POLICY PRIORITIES (Jan. 25, 2013), <http://www.cbpp.org/cms/?fa=view&id=3891>.

¹⁷⁸ *Project Based Vouchers*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/project (last visited Aug. 8, 2013).

¹⁷⁹ *Lease for Subsidized Programs (HUD-90105-A)*, U.S. DEP'T OF HOUS. & URBAN DEV. (Dec. 2007), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=90105a.pdf>; *Rent Schedule Low Rent Housing (HUD-92458)*, U.S. DEP'T OF HOUS. & URBAN DEV. (Nov. 2005), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_20701.pdf.

¹⁸⁰ Section 8 Renewal, *supra* note 54, at 9-4, 9-7.

¹⁸¹ 24 C.F.R. § 880.609(b).

¹⁸² White, *supra* note 12.

Tenant-Based Rental Assistance (TBRA): a rental subsidy program that provides money directly to low-income households to rent eligible housing on the open market; unlike in PBRA, which attaches to a property, tenant-based rental assistance stays ‘follows’ the tenant.¹⁸³

Tenant Rent: “The amount payable monthly by the family as rent to the unit owner (Section 8 owner or PHA in public housing).”¹⁸⁴

Total Tenant Payment (TTP): the amount a family or tenant pays directly to the property owner for rent, not to exceed 30% of adjusted household income; if unit has tenant-paid utilities, utility allowance is subtracted from the 30% cap. “Total tenant payment is the highest of the following amounts, rounded to the nearest dollar: (1) 30 percent of the family's monthly adjusted income; (2) 10 percent of the family's monthly income; (3) If the family is receiving payments for welfare assistance from a public agency and a part of those payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of those payments which is so designated; or (4) The minimum rent, as determined in accordance with § 5.630.”¹⁸⁵

Traditional Contract Administrator (TCA): contract administrators that have been and continue to be phased out in favor of Performance Based Contract Administrators.¹⁸⁶

Utility Allowance (UA): “If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”¹⁸⁷

Utility Analysis: the analysis that must be conducted by the owner of the average utility use for each unit type prior to the submission of a recommended utility allowance.

Utility Reimbursement: “The amount, if any, by which the utility allowance for a unit, if applicable, exceeds the total tenant payment for the family occupying the unit. (This definition is not used in the Section 8 voucher program, or for a public housing family that is paying a flat rent.)”¹⁸⁸

¹⁸³ See *Tenant-based Rental Assistance*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/abc/activities/tenantassist (last visited July 8, 2013).

¹⁸⁴ 24 C.F.R. § 5.603.

¹⁸⁵ 24 C.F.R. § 5.628.

¹⁸⁶ ANDERSON, *supra* note 20.

¹⁸⁷ 24 C.F.R. § 5.603.

¹⁸⁸ *Id.*

Appendix 4: Summary of Legal Requirements

CALCULATION OF UTILITY ALLOWANCES	
Statutes	
42 U.S.C. § 1437a(A)(1)	Limiting maximum tenant payment for rent to 30 percent of adjusted gross income, 10 percent of family's monthly income, or welfare rent.
42 U.S.C. § 1437f(c)(1)	An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made.
Regulations	
24 C.F.R. § 880.610	Each year (or along with any contract adjustments), building owners must submit analyses of their buildings' utility allowances.
24 C.F.R. § 880.610	Building owners should provide information on changes on utility rates and on the factors affecting utility consumption in the analysis.
Guidance	
U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-24 (1996)	Building owner must recommend a utility allowance for each unit type, which is the "best estimate of the average monthly utility cost that an energy conscious resident will incur for the year."
U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-24 (1996)	Building owner must submit the following information to the contract administrator: (1) the types of utilities covered by the allowance, (2) a statement of whether any utility rate increases or decreases were implemented during the past 12 months or are expected to be implemented during the next 12 months and the amount of those increases or decreases," and (3) a statement of how energy conservation initiatives have or will impact consumption
U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-35 (1996)	Generally, contract administrators can set utility allowances at the amount suggested by the building owner.
Memorandum from Carol J. Galante, Deputy Assistant Secretary for Multifamily Housing Programs to All Multifamily Hub directory, All Multifamily Program Center Directors, All Contract Administrators (June 20, 2011).	Building owners are required to adjust utility allowances at least once annually and are unable to get adjustments in rent without the submissions of necessary utility allowance analyses.
Case Law	
Crowder et. al. v. The Village of Kaufman, LTD et. al., 3:09CV02181	Holding that a PBRA landlord violated the law by not updating utility allowances for as much as ten years.

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24 C.F.R. § 880.610	If utility rates increase cumulatively by 10 percent from the most recently approved utility allowances, the building owner must request new utility allowances.
24 C.F.R. § 880.610	Whenever utility allowances are adjusted, the building owner must notify the tenants.
24 C.F.R. § 245.410	Building owners must notify tenants thirty days prior to the submission of a request to HUD for a decrease in utility allowances or for a change from project-paid to tenant-paid utilities.
24 C.F.R. § 245.420	Tenants have the right to look over the material that the building owner is required to submit to HUD. They are also permitted to submit comments directly to HUD and to comment on the any changes in the material.
24 C.F.R. § 245.416(a)	If the mortgager requests a decrease in utility allowances, then the mortgager must submit the following materials to HUD: a copy of notice to the tenants, the type of utilities involved, the number of units in the property, information about utility consumption obtained from the utility supplier, estimated monthly cost of utilities, and a justification for the reduction of the utility allowances.
24 C.F.R. § 245.416(b)	If the mortgager requests to change from owner-paid utilities to tenant-paid utilities, then the mortgager must submit the aforementioned materials, along with the following additional ones: the monthly cost of utilities for the whole property and for each unit by type and size, the likely cost of conversion, “the source and terms of financing for the conversion,” and the likely change in cost to the tenants.
Guidance	
U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-35 (1996)	Contract administrators must review the owner-submitted information to determine whether the owners estimates are consistent with current utility rates and whether the building owners successfully
U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-35 (1996)	If the building owner submits substantially different information that what the contract administrator believes to be correct, then the contract administrator can request that the owner submit additional information.
U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-24 (1996)	<i>Both the proposed and the current allowance levels should be included in the notices to the tenants.</i>
Memorandum from Carol J. Galante, Deputy Assistant Secretary for Multifamily Housing Programs to All Multifamily Hub directory, All Multifamily Program Center Directors, All Contract Administrators (June 20, 2011).	Building owners are required to adjust utility allowances at least once annually (during the AAF or OCAF adjustment) and are unable to get adjustments in rent without the submissions of necessary utility allowance analyses.
Case Law	

METERING & TENANT PAYMENT	
Statutes	
REGULATIONS	
24 C.F.R. § 5.603	<i>If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the</i>

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	<i>family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.</i>
Guidance	
U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING 7-24 (1996)	When tenants are responsible for utility payments, HUD credits the tenant with a utility allowance, which reduces the rent the tenant owes to the property owner; HUD then pays the difference between the tenant's payment and the contract rent, which does not include a utility allowance.
Case Law	

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I. Introduction

As a part of a larger project to evaluate how HUD could promote greater energy efficiency in its subsidy programs, this chapter provides a comprehensive overview of the legal and regulatory frameworks that govern utility allowances in the Housing Choice Voucher (HCV) program, which is administered by HUD's office of Public and Indian Housing (PIH).¹ The Housing Choice Voucher program is the largest of HUD's housing subsidy programs.² More is spent per unit on tenant utilities in the Housing Choice Voucher program than in any other HUD program.³ HUD generally leaves the determination of utility allowances to each of the 2,437 Public Housing Authorities (PHA) that administers the Housing Choice Voucher program, or to some other instrumentality (such as a Performance Based Contract Administrator in the Project-Based Section 8 Program).⁴

There is a strong incentive in the voucher program for owners to have tenant pay their own utilities. First, owners are not affected by a tenant's utility consumption level if tenants pay

¹ *Table of Contents*, U.S. DEP'T OF HOUS. & URBAN DEV., <http://portal.hud.gov/hudportal/HUD?src=/hudprograms/toc> (last visited Mar. 3, 2014) (providing a breakdown of which programs are administered by which HUD office). Project-Based Rental Assistance (PBRA) is administered by the Office of Housing, which oversees the Federal Housing Administration (FHA). *Id.*; *Housing*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing (last visited Mar. 4, 2014).

² U.S. DEP'T OF HOUS. & URBAN DEV., FY 2013 BUDGET (2013) ("HUD's Section 8 Tenant-Based Rental Assistance [HCV] . . . is the Nation's largest rental assistance program for low-income families . . . HUD expects to assist approximately 2.2 million families . . .").

³ See Evan White, *Utilities in Federal Subsidized Housing: A Report on Efficiency, Utility Savings, and Consistency* 14 (June 2012) (unpublished M.P.P. thesis, University of California, Berkeley) (available at http://aceee.org/files/pdf/resource/white_utilities_in_federally_subsidized_housing_2012.pdf)

⁴ In the United States, there are 4,106 PHAs, of which 2,437 administer Housing Choice Vouchers. *PHA Contact Information*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/pha/contacts (last visited Nov. 20, 2013) (listing the contact information for all PHAs in the United States and territories). Furthermore, different agencies sometimes administer the Housing Choice Voucher program in the same area. For example, in New York City, the New York City Housing Authority and the New York City Department of Housing Preservation and Development administer different Section 8 Housing Choice Voucher Programs. *Section 8 Information – Tenants*, N.Y.C. DEP'T OF HOUS. PRES. & DEV., <http://www.nyc.gov/html/hpd/html/section8/section8-tenants.shtml#StickyVouchers> (last visited Nov. 1, 2013) ("While HPD operates a targeted Section 8 program specially designed to help needy New Yorkers faced with particular housing situations, NYCHA has historically operated a much larger program with a broader focus.").

their own utilities. Under the voucher program, tenants pay thirty percent of their income in rent and HUD pays the difference between that tenant payment and the actual rent.⁵ When tenants pay for their own utilities, the tenants' payments to the owner are discounted by the amount of their utility allowances, and the owner receives a higher payment from HUD in the amount of the utility allowance.⁶ Not only do property owners have a greater certainty of payment from HUD than they do from HCV tenants, but they also are insulated from fluctuating utility prices and increased utility consumption on the part of the tenants. Owners appear to respond to these incentives as 90 percent of housing choice voucher units receives utility allowances.⁷

The only way that owners are incentivized to retrofit properties to reduce energy costs when the tenant pays utilities is when owners are competing for HCV tenants and tenants are aware of utility costs prior to moving in. There is no system in place to inform voucher tenants about the utility costs of the property where they are moving. There is also research that suggests voucher recipients face barriers when searching for a unit with this subsidy, and thus even with perfect information about utility costs, households may not be able to factor these costs into their unit selection.⁸ This ultimately creates a dynamic where most voucher tenants pay their own utilities, but there is no incentive for owners to ensure buildings are efficient. The lack of owner incentives to retrofit properties and the utility allowances set by average use in the community

⁵ See 42 U.S.C. § 1437f(o)(2)(A).

⁶ See 24 C.F.R. § 982.517.

⁷ U.S. DEP'T OF HOUS. & URBAN DEV., AFFORDABLE GREEN: RENEWING THE FEDERAL COMMITMENT TO ENERGY-EFFICIENT, HEALTHY HOUSING 9 (2012) [hereinafter HUD, AFFORDABLE GREEN].

⁸ See generally U.S. DEP'T OF HOUS. & URBAN DEV., STUDY ON SECTION 8 VOUCHER SUCCESS RATES: VOLUME I QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS (2001); MARTHA M. GALVEZ, WHAT DO WE KNOW ABOUT HOUSING CHOICE VOUCHER PROGRAM LOCATION OUTCOMES? A RECENT REVIEW OF LITERATURE (2010); SUSAN J. POPKIN & MARY K. CUNNINGHAM, CHAC SECTION 8 PROGRAM: BARRIERS TO SUCCESSFUL LEASING UP (1999).

contributes to the HCV program having the highest utility expenditures per unit and in total of HUD's subsidized housing programs.⁹

A. Introduction to Rent and Utility Allowances in HCV

As in HUD's other core housing programs, HCV landlords can choose to include utilities in the rent or have the utility companies bill the tenants directly for utility expenses.¹⁰ The housing type and the metering system used strongly influence the landlord's and tenant's energy-efficiency incentives.¹¹ Unlike the other core housing programs, however, many HCV units are single-family homes or small multifamily properties with individual metered units. As a result, a higher percentage of HCV recipients are responsible for paying at least some of their utility bills than tenants in HUD's other core programs.¹²

When an HCV tenant directly pay utilities, HUD reimburses tenants for their expenditures with a utility allowance, which is a monthly amount set by PHAs deducted from the tenants' contribution to rent.¹³ The United States Housing Act of 1937, as amended in 1983,¹⁴

⁹ *Id.*

¹⁰ See 24 C.F.R. § 982.308(d)(5) (indicating that the lease must specify "what utilities and appliances are to be supplied by the owner, and what utilities and appliances are to be supplied by the family."); see, e.g., MIAMI-DADE CNTY. PUB. HOUS. & CMTY. DEV., MODEL LEASE AGREEMENT 3-4, available at <http://www.miamidade.gov/housing/library/forms/lease-agreement.pdf> (illustrating that landlord can, in the lease, designate who pays which utilities). The Miami-Dade County website also indicates that "If a different lease is used, it must contain the distribution of utilities (that is, who will be responsible for utility service: gas, electricity, water, etc.)." *Housing Choice Voucher Program*, MIAMI-DADE CNTY. PUB. HOUS. & CMTY. DEV., <http://www.miamidade.gov/housing/housing-choice-voucher.asp> (last updated Oct. 21, 2013).

¹¹ If the landlords pay for utility bills, then tenants have no financial incentive to conserve energy.

¹² See AFFORDABLE GREEN, *supra* note 7, at 9 (reporting that "90 percent of Housing Choice Voucher (HCV) recipients (1.9 million households)" have utility allowances). Furthermore, HCV residents are "more likely to be responsible for all utilities – both space heating or cooling as well as lighting and appliances – than in public or assisted housing. As a result, the average HCV per household annual utility allowance (\$1,632) is significantly higher than the average utility allowance in public housing (\$1,008) or almost twice that in multifamily assisted housing (\$864), where a significant share of units are master-metered and utility allowances may only cover tenant-paid utilities for cooking, lighting, or appliances, with central heating or cooling paid for by the owner and included in the rent." *Id.*

¹³ 24 C.F.R. § 5.603 ("If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other

specifies that the monthly assistance payment for families receiving HCVs “shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds” the amount that the tenant pays to the landlord for rent.¹⁵ Generally, the HAP is the contract rent subtracted from total tenant payment (TTP), defined as the “minimum amount a family must contribute toward rent and utilities regardless of the unit selected,” which is the highest of either 30 percent of monthly adjusted income, 10 percent of monthly gross income, welfare rent, or PHA minimum rent.¹⁶ While HCV tenants may choose a unit for which they would pay up to 40 percent in rent and utilities,¹⁷ HUD aims for tenants to pay no more than 30 percent of their adjusted income on shelter and utilities. To achieve this goal, tenants who are billed directly for their utility costs are credited with a utility allowance (see discussion below for how the amount is determined), which reduces the rent the tenant pays the property owner.¹⁸ The utility

services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”).

¹⁴ An Act making supplemental appropriations for the fiscal year ending September 30, 1984, and for other purposes, Pub L. No. 98-181, 97 Stat. 1153 (1983) (codified as amended at 42 U.S.C. §1437f (2008)) (enacting the Housing Choice Voucher program and for the first time explicitly including utility allowances in the assistance payments).

¹⁵ 42 U.S.C. § 1437f(o)(2)(A) (stating that HUD pays a monthly assistance payment to the landlord on behalf of the HCV tenant). Cf. 42 U.S.C. § 1437f(c)(1) (stipulating that rent will include utilities when owners pay utility costs). See also U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, at 6-1 (2001), available at

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook.

¹⁶ 24 C.F.R. § 5.628; U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 6-1.

¹⁷ 42 U.S.C. § 1437f(o)(3) (“At the time a family initially receives tenant-based assistance under this section with respect to any dwelling unit, the total amount that a family may be required to pay for rent may not exceed 40 percent of the monthly adjusted income of the family.”). Tenants will pay more than 30 percent of their adjusted incomes if the gross rent exceeds the payment standard. See *infra* notes 19–20. See also *Johnson v. Hous. Auth. of Jefferson Parish* 442 F.3d 356, 358 (5th Cir. 2006) (“unlike earlier tenant-based programs, which featured a statutory cap that limited a family’s permissible housing costs to 30 percent of adjusted monthly income, the current voucher program contains no such cap. It gives participants even greater flexibility in the housing market as well as access to more expensive units that better meet their needs. Under the current program, participating families *must* contribute at least 30 percent of their adjusted monthly incomes to housing costs, and they *may*—but need not—spend more. Therefore, the choice of renting a costlier unit is entirely theirs.”).

¹⁸ Neither the tenant nor the landlord can opt to not pay for utilities in the Housing Choice Voucher Program without violating the HAP contract. Tenants are contractually obligated to pay their utility bills, and PHAs should include provisions in their administrative plans that would terminate assistance to families who fail to pay for utilities or services. 24 C.F.R. § 982.404(a)(4) (“the PHA may terminate assistance to a family because of HQS breach caused by the family.”); U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 6-1. Each PHA is obligated, pursuant to HUD regulations, to create an administrative plan that would address contingencies. 24 C.F.R. § 982.54(a) (“The

allowance cannot exceed the utility allowance for the family unit size, rather than the size of the unit rented by the family.¹⁹ The PHA then pays the landlord a “housing assistance payment” (HAP),²⁰ which is the lesser of (1) the payment standard (“[t]he maximum monthly assistance payment for a family assisted in the voucher program”)²¹ minus the TTP or (2) the gross rent (“[t]he sum of the rent to owner plus any utility allowance”)²² minus the TTP.²³ The ‘rent to owner’ is the “total monthly rent payable to the owner,”²⁴ which combines the HAP payment with the ‘family rent to owner,’ which is the amount that the tenant is required to contribute to the rent.²⁵ The PHA sets payment standards for each housing unit type in its jurisdiction, to fall between 90 to 110 percent of the Fair Market Rent (FMR)²⁶ for such units.²⁷ One important point

administrative plan states PHA policy on matters for which the PHA has discretion to establish local policies.”). *E.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., VOUCHER: FORM HUD-5246 (2000) (“Pay utility bills and provide and maintain any appliances that the owner is not required to provide under the lease.”). Similarly, HUD regulations provide that if the owners of HCV housing are responsible for utility payments, they are contractually obligated to make payments for those utilities. *See* 24 C.F.R. § 982.452(b)(7) (“The owner is responsible for: . . . Paying for utilities and services (unless paid by the family under the lease).”); 24 C.F.R. § 982.453(a)(1) (“Any of the following actions by the owner (including a principal or other interested party) is a breach of the HAP contract by the owner: If the owner has violated any obligation under the HAP contract for the dwelling unit, including the owner’s obligation to maintain the unit in accordance with the HQS.”).

¹⁹ 42 U.S.C. § 1437f(o)(2)(D)(i) (“General In determining the monthly assistance payment for a family under subparagraphs (A) and (B), the amount allowed for tenant-paid utilities shall not exceed the appropriate utility allowance for the family unit size as determined by the public housing agency regardless of the size of the dwelling unit leased by the family.”). *But see* 24 C.F.R. § 982.517(d)(1) (“The PHA must use the appropriate utility allowance for the size of dwelling unit actually leased by the family (rather than the family unit size as determined under the PHA subsidy standards).”). The statute and the regulation appear to be at odds as to what the utility allowance would be in the situation when the actual unit size of leased apartment is larger than the allotted family unit size. *See* 24 C.F.R. § 982.402(d)(2). While it is probably true that HUD and PHAs abide more by the regulation than they do by the statute, as the regulation’s standard is reiterated in HUD guidance and implied on Form HUD-52667, we would suggest that HUD clarify this issue to eliminate any possible confusion about which standard applies.

²⁰ 24 C.F.R. § 982.4 (“A payment to the owner for rent to the owner under the family’s lease.”).

²¹ *Id.*

²² *Id.*

²³ 24 C.F.R. § 982.505(b).

²⁴ 24 C.F.R. § 982.4.

²⁵ *See id.*

²⁶ “In general, the FMR for an area is the amount that would be needed to pay the gross rent (shelter rent plus utilities) of privately owned, decent, and safe rental housing of a modest (non-luxury) nature with suitable amenities.” Final Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2013, 77 Fed. Reg. 61,158 (Oct 5, 2012).

²⁷ 24 C.F.R. § 982.503(a)(3) (“The PHA voucher payment standard schedule shall establish a single payment standard amount for each unit size.”). *See, e.g., Section 8 Assistance: What are Voucher Payment Standards (VPS)?*,

is that a tenant may spend less on utilities than the allowance, in which case the tenant keeps the difference between the utility allowance and actual utility costs. This acts as an incentive for tenants to consume less energy and probably focuses attention on limiting consumption only up to the utility allowance amount.

For example, suppose a Section 8 tenant has an adjusted monthly income of \$1,000. This tenant is responsible for paying \$300 (for shelter and utilities). If the tenant rents a unit that costs \$1,000, for which the utility allowance is \$100, the gross rent for this unit is \$1,100 (let's assume that this is the same amount as the area's payment standard). The tenant will be credited with the \$100 utility allowance, and will pay \$200 in "family rent to owner"; the HAP will then be the difference between \$1,000 and \$200, or \$800.²⁸ Again, if a tenant's utility costs are less than the utility allowance, in this case \$100, then the tenant gets to keep the difference between the utility costs and utility allowance. For example, if the tenant in table 1 had a monthly utility cost of \$70, the tenant receives a \$30 bonus (\$100 allowance - \$70 utility bill). In aggregate the tenant paid \$270 (\$200 rent to owner + \$70 actual utility costs) for rent and utilities, which means the TTP was only 27 percent of their income.

Table 1:

Adjusted Gross Income= \$1,000 Payment Standard (PS)= \$1,100	Utility Allowance	Rent	Gross Rent (GR)	Total Tenant Payment (TTP)	Housing Assistance Payment (HAP)	Family Rent to Owner (FRTTO)
(Hypothetical)			Rent+UA	See note 15.	HAP=Lesser of GR-TTP or PS-TTP	FRTTO= Rent - HAP

N.Y.C. HOUS. AUTH., http://www.nyc.gov/html/nycha/html/section8/voucher_payment.shtml (last visited Oct. 16, 2013) (displaying the payment standards are for most bedroom sizes in New York City).

²⁸ See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 15, at Chapter 6 (explaining how HAPs, payment standards, and TTPs are calculated).

Tenant 1	\$100	\$1,000	\$1,100	\$300	\$800	\$200
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If a utility allowance for a unit is greater than a tenant's monthly contribution of 30 percent of adjusted income, the tenant receives a portion of the HAP payment to ensure the family spends no more than 30 percent of their income on rent and utilities. In some cases this payment is provided directly to utility suppliers.²⁹ In the HCV program, this payment is called either a utility reimbursement³⁰ or a Utility Assistance Payment (UAP).³¹ The UAP ensures that that the tenant can pay utilities without the tenant's monthly contribution exceeding 30%.

If the owner of an HCV unit decides not to use individual metering, then the owner is solely responsible for the utility payments.³² HUD regulations state that the rent to owner should cover "payment for any housing services, maintenance and utilities that the owner is required to provide and pay for."³³ This means that the tenant pays 30 percent of their income in rent directly to the owner and does not incur any costs for rent or utilities beyond that.

²⁹ 24 C.F.R. § 982.514(b). The PHA usually indicates in the Housing Choice Voucher Administrative Plan which of these options it will apply. *See, e.g.*, CONN. DEP'T OF SOC. SERVS., ADMINISTRATIVE PLAN FOR THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAMS 6-17 (2011) ("The check will be made out directly to the tenant: unless the tenant has agreed, in writing, to payment directly to utility companies, in which case the check will be made out directly to the utility companies.").

³⁰ 24 C.F.R. § 982.4.

³¹ *See, e.g.*, SEATTLE HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 8-16 (2013) ("Where the calculation on HUD Form 50058 results in a utility assistance payment due the family [24 CFR 982.514(b)], SHA will provide a utility assistance payment for the family each month."); *Frequently Asked Questions*, WILMINGTON HOUS. AUTH., http://www.wha.net/housing_programs/hcvp/program_eligibility/how_to_apply/FAQ.htm (last visited Oct. 16, 2013). The words "Utility Assistance Payment" are not found anywhere in the HUD regulations, but seem to be found in at least some PHAs' websites. It seems as though other PHAs call this a "Utility Allowance Payment." *See, e.g.*, *Section 8 Housing: Frequently Asked Questions*, CITY OF MARIETTA, GA, <http://www.marietta.ga.gov/city/cityhall/section8/faq> (last visited Oct. 16, 2013).

³² Landlords will likely take utility costs upon themselves only if their buildings are master-metered (or more specifically when certain utilities are master-metered) or when landlords have units in low-demand markets in which including utilities in the rent might serve as an incentive for low-income tenants to move in. *See generally* Eva Rosen, *The Rules of the Game: Landlords and the Geographic Sorting of Voucher Holders* (unpublished dissertation, Harvard University) (on file with author) (arguing that landlords in Baltimore adopt different business models to attract tenants to Section 8 housing in a market with a surplus of available housing).

³³ 24 C.F.R. § 982.4.

B. Utility Allowance Schedule Calculation in HCV Program

PHAs are responsible for calculating and setting utility allowance schedules for each unit size and building type.³⁴ HUD regulations specify that the schedule must include allowances for utilities that are necessary in a given “locality to provide housing that complies with the housing quality standards.”³⁵ The regulations specify that PHAs must add an allowance for air-conditioning to the schedule “if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air conditioners.”³⁶ HUD regulations prohibit PHAs from including telephone, cable, and satellite television in the utility allowances.³⁷

HUD regulations require that PHAs calculate their utility allowance schedules using actual, and preferably local, consumption data to estimate “the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality.”³⁸ HUD forbids PHAs from using patterns of consumption of above- or below-average income families in creating the utility allowance schedule.³⁹ HUD also advises

³⁴ See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for Houston, Texas) (2012), available at <http://www.housingforhouston.com/media/34481/utility%20allowance%202013.pdf>.

³⁵ 24 C.F.R. § 982.517(b)(2)(i). See also U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-1 (“The utility allowance schedule must include the utilities and services necessary to provide housing that complies with HQS.”). Housing Quality Standards establish “the minimum quality criteria necessary for the health and safety of program participants.”

³⁶ 24 C.F.R. § 982.517(b)(2)(ii). Conversely, PHAs in states with warm climates allocate very little money to heating, even though there are no explicit regulations mandating this. See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for Honolulu, Hawaii) (2012), available at <http://www1.honolulu.gov/dcs/paymentstandardandutilityallowanceschedule.htm>.

³⁷ 24 C.F.R. § 982.517(a)(1) (“The PHA must maintain a utility allowance schedule for all tenant-paid utilities (except telephone), for cost of tenant-supplied refrigerators and ranges, and for other tenant-paid housing services (e.g., trash collection (disposal of waste and refuse)).”); 24 C.F.R. § 982.517(b)(2)(i) (“the PHA may not provide any allowance for non-essential utility costs, such as costs of cable or satellite television.”).

³⁸ 24 C.F.R. § 982.517(b)(1). HUD suggests that families with high utility costs that complain about their utility allowances “should be counseled about reasonable conservation measures.” U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-1.

³⁹ U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES 2 (1997), available at <http://www.hud.gov/offices/adm/hudclips/forms/files/52667.pdf> [hereinafter HUD-52667].

PHAs to set utility allowances that would cover the expected average utility costs for one year.⁴⁰

The *Housing Choice Voucher Program Guidebook* [hereinafter “Guidebook”] expresses a preference for information about utility consumption from local sources,⁴¹ but HUD will permit the use of national average consumption data to calculate the utility allowance if no local data is available.⁴²

Once a PHA calculates its utility allowances, it must publish a utility allowance schedule, using Form HUD-52667, which lists the utility allowance for each utility and housing service (e.g., waste disposal),⁴³ each unit size, and each housing type.⁴⁴ A PHA provides the form to tenants to assist them in calculating their particular utility allowances prior to the PHA’s tenancy approval.⁴⁵

⁴⁰ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-4. The utility allowance is a uniform monthly deduction from the rent and does not deduct different amounts on a seasonal basis, which is the basis for a common complaint against utility allowances. See, e.g., Steven Ferrey, *In from the Cold: Energy Efficiency and the Reform of HUD’s Utility Allowance System*, 35 HARV. J. ON LEGIS. 145, 152 (1995) (positing that calculating utility allowances based on average yearly utility burden could lead to tenants being overcompensated some months and undercompensated in other months without the necessary disposable income to make payments).

⁴¹ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-4. The local sources listed are: “Electric utility suppliers, Natural gas utility suppliers, Water and sewer suppliers, Fuel oil and bottled gas suppliers, Public utility commissions, Real estate and property management firms, State and local agencies, Appliance sales and leasing firms, Neighboring PHAs.” *Id.*

⁴² *Id.* Specifically, HUD field offices are those “delegated responsibility for day-to-day administration” of the HCV program. 24 C.F.R. § 982.3. See *infra* Section III.a.

⁴³ The schedule must include allowance for the following categories of utilities and housing services: “space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services.” 24 C.F.R. § 982.517(b)(2)(ii).

⁴⁴ 24 C.F.R. § 982.517(b)(3). HUD defines unit type as the kind of building in which the subsidized unit is located (e.g., high-rise apartment, semi-detached, or single-family). See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-2. HUD defines unit size by the number of bedrooms in the unit. *Id.* (“the PHA must use the allowance for the unit size actually leased by the family, rather than the family unit size determined under the PHA’s subsidy standards.”). PHAs are given some leeway in categorizing and pricing the different kinds of utility fuels that they can list on the schedules. *Id.* (“The utility allowance schedule should include allowances for each type of utility or fuel commonly used in the community. If the utility or fuel is available from more than one supplier, the PHA can determine an average cost across all suppliers, or can use different allowances for utilities or fuels purchased from different suppliers.”).

⁴⁵ 24 C.F.R. § 982.517(b)(4) (“The utility allowance schedule must be prepared and submitted in accordance with HUD requirements on the form prescribed by HUD.”); HUD-52667, note 35. Each PHA will likely have a different version of this form for different kinds of housing units. See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for Bedford County, Tennessee) (2013), available at <http://www.thda.org/DocumentCenter/View/4000>. Form HUD-52667 allows PHAs to set different rates

C. Changes to Utility Allowance Schedule

PHAs must review utility allowance schedules annually and revise the schedules prior to then if the cost of a given utility category (e.g., electricity, gas-heating, bottled gas for cooking) has increased by 10 percent or more since the last revision.⁴⁶ However, a PHA may review its utility allowance schedule more often if its staff believes utility allowances are too high.⁴⁷ HUD guidance advises that the utility allowance changes be effected immediately, “but not later than the next regularly scheduled reexamination of family income.”⁴⁸ Additionally, the Fifth Circuit has ruled in *Johnson v. Housing Authority of Jefferson Parish* that tenants have a cause of action against the PHA if they believe that utility allowances were not updated sufficiently often.⁴⁹

Changing the utility allowance in HCV units can affect other aspects of HCV payments. If the gross rent for a unit exceeds the payment standard, then the tenant will have to pay more than 30 percent of adjusted income in rent.⁵⁰ Thus, if a PHA raises utility allowances (which would raise the gross rent as well), but does not increase the payment standard, which limits the size of the HAP that the PHA is authorized to disburse to a HCV landlord, the increase could cause the family to pay more than 30 percent of its adjusted income or even jeopardize its tenure

for the types of fuel used for heating, cooking, and water heating, meaning that the tenant would have to correctly determine which fuel source is used in the building prior to getting tenancy approval. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-17 (explaining that a PHA approves the UA for a unit after having received information about the fuel sources).

⁴⁶ 24 C.F.R. § 982.517(c)(1). *Cf.* 24 C.F.R. § 880.610 (requiring that contract administrators review utility allowance annually *and* that utility rates be adjusted whenever there has been a 10 percent increase in utility prices in utility allowance adjustment in Project-Based Rental Assistance housing). Note that there is a drafting error in this part of the regulation “. . . if there PHAs been a change of 10 percent or more . . .” should probably read ‘if there *has* been a change of 10 percent or more.’ 24 C.F.R. § 982.517(c)(1).

⁴⁷ Notice PIH 2011-28 (HA) from U.S. Department of Housing and Urban Development to Section 8 Public Housing Agencies, HUD Office of Public Housing Directors, and Section 8 Financial Management Center (May 27, 2011).

⁴⁸ *Id.*

⁴⁹ 442 F.3d 356 (5th Cir. 2006) (holding that Congress had intended to grant Housing Choice Voucher recipients rights enforceable under 42 U.S.C. § 1983). The decision in *Johnson* was predicated upon the decision in *Wright v. City of Roanoke Redevelopment & Housing Authority*, which conferred § 1983 rights upon Public Housing tenants who were being overbilled for utilities. 107 S.Ct. 766, 769 n.3 (1987) (“The dissent may have a different view, but to us it is clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute.”).

⁵⁰ 24 C.F.R. § 982.505(b).

in a given unit.⁵¹ Table 2 provides an illustration of the interplay of utility allowances with gross rent, family share, rent to owner, TTP, the payment standard, and HAP.

Table 2:⁵²

Adjusted Income = \$1,000 Payment Standard (PS) = \$1,000	Utility Allowance (UA)	Rent	Gross Rent (GR)	Total Tenant Payment (TTP)	Housing Assistance Payment (HAP)	Family rent to owner (FRT0)	Family Share (FS)	Family Share as percent of Adjusted Income
			RTO+ UA	See supra note 16	HAP=Lesser of: GR-TTP or PS- TTP	FRT0= RTO - HAP	FS= FRT0+UA = GR-HAP	FS/ adjusted income
Case 1	\$85	\$900	\$985	\$300	\$685 (GR- TTP)	\$215	\$300	30%
Case 2	\$100	\$900	\$1,000	\$300	\$700 (GR or PS- TTP)	\$200	\$300	30%
Case 3	\$160	\$900	\$1,060	\$300	\$700 (PS-TTP)	\$200	\$360	36%
Case 3	\$205	\$900	\$1,105	\$300	\$700 (PS-TTP)	\$200	\$405	40.5%

HUD regulations forbid the use of PHA funds to pay any part of the family share of rent,⁵³ so the family would be responsible for paying anything in excess of 30 percent of adjusted gross income. In addition, statutes and HUD regulations mandate that the amount a family can be required to pay for rent and utilities cannot exceed 40 percent of family adjusted income.⁵⁴ Accordingly, if the family share of the payment increases because the utility allowance is increased but the payment standard is not, and exceeds the 40 percent cap, the increase could endanger the family's tenure at that unit. A unit with gross rent sufficiently in excess of the payment standard would result in a family share of the gross rent that would make it ineligible for initial occupancy.⁵⁵

⁵¹ 24 C.F.R. § 982.503(a)(2) ("The payment standard amounts on the PHA schedule are used to calculate the monthly housing assistance payment for a family."). See also MICHAEL HANLEY, EFFECT OF UTILITY ALLOWANCE INCREASES ON SECTION 8 HOUSING CHOICE VOUCHER PARTICIPANTS (2005), *available at* <http://www.nhlp.org/files/Hanley%20&%20Empire%20Justice,%20Effect%20of%20Utility%20Allowance%20Increases%20on%20Section%208%20Vouchers%20%28rev%20JG%20Feb%2010%29.pdf>.

⁵² This table is based almost entirely on Michael Hanley's table from EFFECT OF UTILITY ALLOWANCE INCREASES ON SECTION 8 HOUSING CHOICE VOUCHER PARTICIPANTS. See Hanley, *supra* note 51.

⁵³ 24 C.F.R. § 982.515(c) ("The PHA may not use housing assistance payments or other program funds (including any administrative fee reserve) to pay any part of the family share, including the family rent to owner. Payment of the whole family share is the responsibility of the family.").

⁵⁴ 42 U.S.C. § 1437f(o)(3); 24 C.F.R. § 982.305(a)(5).

⁵⁵ 24 C.F.R. § 982.508 ("where the gross rent of the unit exceeds the applicable payment standard for the family, the family share must not exceed 40 percent of the family's adjusted monthly income."); 24 C.F.R. § 982.305(a)(5) ("At

However, rising utility allowances can initiate an increase in the payment standard. If utility rate increases cause gross rents to exceed payment standards, and HUD determines that 40 percent or more of families occupying units of a certain unit size are paying more than 30 percent of their adjusted monthly income as the family share, then HUD can require that the PHA modify its payment standard.⁵⁶

A PHA must give a family receiving HCV assistance an opportunity for an informal hearing about “[a] determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule.”⁵⁷ However, HUD does not give tenants the opportunity to comment on the creation of the schedule that would apply to the whole PHA.⁵⁸

D. Additional HCV Utility Allowance Calculation Methods

In addition to the directions described above, HUD provides two other methodologies for PHAs to use to create utility allowance schedules. The first approach, the National Average Data Consumption Approach, can only be used when local utility data does not exist or is otherwise difficult to obtain. The second approach, the HUD Utility Schedule Model, can be used by any PHA that opts to use it; however, its use is not mandatory.

the time a family initially receives tenant-based assistance for occupancy of a dwelling unit, and where the gross rent of the unit exceeds the applicable payment standard for the family, the family share does not exceed 40 percent of the family's monthly adjusted income.”).

⁵⁶ 24 C.F.R. § 982.503(g)(1). Furthermore, HUD field offices can increase the payment standard to 120 percent of the published FMR. 24 C.F.R. § 982.503(c)(2). HUD can also approve an exception amount above 120 percent of published FMR if such an approval is “necessary to prevent financial hardship for families.” 24 C.F.R. § 982.503(c)(3)(A).

⁵⁷ 24 C.F.R. § 982.555(a)(ii).

⁵⁸ 24 C.F.R. § 982.555(b)(3).

i. National Average Data Consumption Approach

HUD permits a PHA to use national average consumption data only if the PHA cannot obtain adequate local utility consumption information.⁵⁹ The national average consumption data provides the average consumption “for an ‘average’ 2 ½ bedroom unit in a locality that has approximately 4,000 heating degree days and an average local water temperature of 50 degrees.”⁶⁰ The PHA must adjust the national consumption figures for the unit size and for climate variations.⁶¹

ii. HUD Utility Schedule Model⁶²

HUD developed the HUD Utility Schedule Model (HUSM), a Microsoft Excel spreadsheet model, “to provide a consistent basis for determining utility schedules, using form HUD-52667.”⁶³ HUSM allows PHAs to calculate utility allowance schedules by plugging in utility rate information and local climate information.⁶⁴ HUSM incorporates data on utility

⁵⁹ See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-4.

⁶⁰ *Id.*

⁶¹ *Id.* The average consumption data are listed in the instructions for HUD-52667, *supra* note 39, at 3.

⁶² The *Housing Choice Voucher Guidebook* makes no mention of the HUSM, because it was published one year prior to the creation the first HUSM and unfortunately, has not been updated. See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15. The HUSM, though designed for Section 8, is also used for LIHTC utility allowances. 26 C.F.R. § 1.42-10(b)(4)(ii)(D) (“A building owner may calculate a utility estimate using the “HUD Utility Schedule Model” that can be found on the Low-Income Housing Tax Credits page at . . .”).

⁶³ U.S. DEP’T OF HOUS. & URBAN DEV., HUD UTILITY MODEL INSTRUCTIONS 1, [hereinafter HUSM Instructions] available at http://www.huduser.org/portal/resources/UtilityModel/Instructions_HUDUtilityModel_Rev3.doc (describing how to use 2007 version of the HUSM). The HUSM model can be downloaded directly from the HUD website. U.S. DEP’T OF HOUS. & URBAN DEV., HUD UTILITY SCHEDULE MODEL (2013) [hereinafter HUSM], available at http://www.huduser.org/portal/resources/UtilityModel/HUD_Utility_Schedule_Model_Rev2.zip. An older version of the HUD Utility Schedule Model is posted on other parts of the HUD website. U.S. DEP’T OF HOUS. & URBAN DEV., HUD UTILITY SCHEDULE MODEL (2007), [hereinafter HUSM 2007] available at <http://www.huduser.org/resources/UtilityModel%5CHUD%20Utility%20Schedule%20Model.zip>. This older model is helpful in that the calculations and regressions used in it are unhidden, and the HUSM instructions actually refer to the older model. That said, the model computes utility allowances in much the same way. For example, the newer model has fewer variations amongst housing types, hides the calculations, has fewer tabs, and does not require that the PHA import the climate data from elsewhere. Compare HUSM, *supra* note 63, with HUSM 2007, *supra* note 63.

⁶⁴ *Utility Allowances*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.huduser.org/portal/resources/utilallowance.html> (last visited Oct. 9, 2013).

consumption from the Department of Energy’s Residential Energy Consumption Survey (RECS).⁶⁵

In order to determine a utility allowance using the HUSM, a PHA enters its location, housing type,⁶⁶ whether the unit has an ENERGY STAR rating, and utility rates (“Tariffs”) into the spreadsheet model tool. The model automatically determines the climate characteristics, which include heating days and cooling days.⁶⁷ In order to effectively use the HUSM, the PHA must find current utility tariffs (rates) per tariff block⁶⁸ as well as those from the last time that utility allowances were updated, and HUSM will automatically tell the PHA whether the allowances need to be updated (i.e., whether the utility rates rose by 10 percent or more).⁶⁹ The HUSM will generate a HUD-52667 form with utility allowances for each kind of utility.⁷⁰

HUD determined the consumption estimates by performing a regression analysis of RECS survey cases.⁷¹ The consumption estimates are then multiplied by the utility costs and are

⁶⁵ *Id. See, e.g., 2009 RECS Survey Data*, U.S. ENERGY INFO. ADMIN. (May 6, 2013), <http://www.eia.gov/consumption/residential/data/2009/>. The first version of the HUSM was completed in 2002 with the help of GARD Analytics; it used a regression approach to determine most of the end-uses (utility-specific allowances), based on the RECS data. *See GARD ANALYTICS & U.S. DEP’T OF HOUS. & URBAN DEV., UTILITY ALLOWANCE MODEL FINAL REPORT* (2003) (reporting on study results and explaining how model should have been revised); JASON GLAZER & U.S. DEP’T OF HOUS. & URBAN DEV., *SUMMARY REPORT: ENERGY STAR ADJUSTMENT FOR HUD-52667 SPREADSHEET MODEL 2* (2012) (summarizing history of the HUSM and explaining the changes that have been made to it). HUD uses RECS data, even though it has its limitations, because it is “[t]he best and effectively only detailed national data” on energy consumption in different kinds of housing units. RILEY & ASSOCS. & U.S. DEP’T OF HOUS. & URBAN DEV., *HUD UTILITY MODEL (HUSM) REBENCHMARKING 10* (2012).

⁶⁶ Included unit types include: Single Family House, Single Family Attached, Low-rise Apartment, High-rise Apartment, and Manufactured Home. HUSM, *supra* note 63.

⁶⁷ *See* HUSM, *supra* note 63; HUSM Instructions, *supra* note 63, at 2 (instructing PHAs to “select the site that is closest to the population served by the housing authority or the most well known monitoring location.”).

⁶⁸ Utility rates sometimes change for a consumer after a certain amount has been used or after a certain block has been exhausted. Block rates for utilities can vary by season, but sometimes there is just another tariff for summer. HUSM Instructions, at 3. Some tariffs have stepped blocks, which charge “a certain amount for each kWh in the first group of kWh, and different charges for greater use.” *Id.* at 4. For example, the first 500 kWh might cost \$1 for each kWh, while the next 500 kWh would cost only \$0.75.

⁶⁹ *See* HUSM, *supra* note 63; HUSM Instructions, *supra* note 63, at 2-3 (reminding PHAs that “Most utilities allow you to download a tariff or rate book from their web site. After you do this, get a bill to use as an example and determine all of the components that make up the bill. At times the tariff is broken into a main tariff and many riders. Some utilities describe taxes in the rate book and some do not, so check the example bill.”). The instructions also instruct users how to calculate utility tariffs for deregulated utilities. *Id.* at 3.

⁷⁰ *See* HUSM, *supra* note 63; HUSM Instructions, *supra* note 63, at 1.

⁷¹ *See* HUSM Instructions, *supra* note 63, at 13.

adjusted for the number of bedrooms in the unit.⁷² Units with an ENERGY STAR rating will generate a different utility allowance schedule.⁷³ HUD commissioned GARD Analytics (GARD) to develop “an estimate of the percentage by which new ENERGY STAR rated residential construction reduces energy consumption.”⁷⁴ After examining a number of studies about the energy efficiency of homes with ENERGY STAR ratings, GARD recommended that the HUSM adjust down the electric usage of home in southern climates by 4 percent and adjust gas usage by 5 percent.⁷⁵ In northern cities, GARD recommended that electric usage should be adjusted by 6 percent and gas usage by 9 percent.⁷⁶ GARD suggested that future studies should be undertaken to more accurately determine actual energy savings.⁷⁷

We do not know what percentage of PHAs use the HUSM to calculate utility allowances.⁷⁸ Neither HUD regulations nor HUD-52667 require that PHAs use HUSM.⁷⁹ HUD is planning to conduct further research to refine the HUSM “to more accurately disburse funds

⁷² *Id.* at 14.

⁷³ HUSM, *supra* note 63.

⁷⁴ JASON GLAZER & U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 65, at 2 (quoting the language used by HUD in commissioning the report and methodology for ENERGY STAR buildings). HUD’s Public & Indian Housing has a policy of promoting “the benefits of using ENERGY STAR equipment to minimize consumption and lifecycle costs.” *PIH Energy Goals Support HUD’s Energy Action Plan*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/pih/programs/ph/phecc/resources/egoals.cfm> (last visited Oct. 23, 2013).

⁷⁵ *Id.* at 20.

⁷⁶ *Id.*

⁷⁷ *Id.* at 21. However, in the actual HUSM, it seems as though the savings are higher when we chose the ENERGY STAR option, the utility allowance of \$126 decreased to \$104. HUSM. Furthermore, it is not clear what relation the ENERGY STAR utility allowance has with the Energy Efficiency-Based Utility Allowance (EEBUA), initiated in California in the early 2000s. *See infra* Appendix III. The PHA of the City of Nacogdoches, Texas recently released ENERGY STAR certified utility allowance schedules for each of its housing types, but it is not immediately clear whether it used the HUSM. *See, e.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., *ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES* (for Nacogdoches, Texas) (2013), *available at* <http://www.nacogdoches-ha.org/FormsAndDocumentation.html>.

⁷⁸ HUD reports that “an update to the existing HUD Utility Schedule Model (HUSM) will provide more accurate, standardized local utility schedules used by many HUD public and assisted housing developments.” U.S. DEP’T OF HOUS. & URBAN DEV., *HUD RESEARCH ROADMAP FY 2014-FY 2018*, at 87 (2013) [hereinafter *Research Roadmap*]. In the *Research Roadmap*, HUD reports that while it has not developed a unified approach, it has tried to move towards standardization with the creation of the HUSM. *Id.* at 88. In 2011, HUD made it a priority to promote the HUSM in order to generate consistency in utility allowance calculation. U.S. DEP’T OF HOUS. & URBAN DEV., *CUSTOMER SERVICE PLAN 2* (2011).

⁷⁹ *See supra* Section II.

for utilities that are actually consumed”⁸⁰ HUD has not indicated that it plans to mandate the use of HUSM.

E. HUD Review of Utility Allowances

Each PHA must submit its utility allowance schedule to HUD and, at HUD’s request, notify HUD of the procedures and data used in determining its utility allowance schedule.⁸¹ If HUD believes there is an error or miscalculation, it can direct a PHA to revise its utility allowance schedule.⁸² The Guidebook requires a PHA to keep “copies of all supporting documentation used in determining both the initial allowances and revisions,”⁸³ such as consumption estimates, “letters of rate schedules from local utility companies . . . [and] worksheets used to develop the schedule.”⁸⁴

II. Program Variations

Although HUD maintains a consistent regulatory scheme for most HCV housing, some parts of the program have different regulations. For instance, the Project-Based Voucher program has a slightly different regulatory scheme. Also, PHAs can change the regulatory scheme to accommodate tenants with disabilities. HUD regulations also recognize different housing types that are subject to specific utility allowance rules (“Special Housing Types”).⁸⁵

Project-Based Vouchers

⁸⁰ Research Roadmap, *supra* note 78, at 89. Specifically, this plan discusses incorporating energy efficiency into the HUSM, but it appears that this was already done. See JASON GLAZER & U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 65.

⁸¹ 24 C.F.R. § 982.517(a)(2).

⁸² 24 C.F.R. § 982.517(c)(2).

⁸³ See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-4.

⁸⁴ *Id.*

⁸⁵ 24 C.F.R. § 982.601.

HUD allows PHAs to allocate up to 20 percent of their annual contribution contracts (ACC) to ‘project-base’ the allocations from housing choice vouchers.⁸⁶ Project-based vouchers (PBV) differ from Housing Choice Vouchers in that the voucher stays with the unit, not with the family. A family may not keep its entitlement for a PBV after it moves out of the PBV unit, but the family may be able to receive a normal Section 8 voucher at that time.⁸⁷ Also, under the PBV, the PHA enters directly into an assistance contract with the building owner and does not require that tenants seek out the units prior to the creation of a contract.⁸⁸ Utility allowances in the PBV program work in much the same way as they do in the normal HCV program: when the PHA determines the initial rent to the owner for the project based units, it must set the utility allowance from the schedule in effect at the beginning of the HAP contract.⁸⁹ Similarly, when the PHA redetermines the rent to the owner, it uses the utility allowance schedule in use at the time of redetermination.⁹⁰ PBV rents are redetermined at either the owner’s request or “when there is a 5 percent or greater decrease in the published FMR.”⁹¹ HUD regulations make clear that a “PHA may not establish or apply different utility allowance amounts for the PBV program” than it applies for the tenant-based programs.⁹² Although the HCV utility schedule would be changed each time there is a 10 percent or greater increase in utility costs, the regulations do not make clear whether the increase would apply immediately to PBV or if it would be applied to the PBV utility allowances only as part of a redetermination.⁹³

⁸⁶ U.S. DEP’T OF HOUS. & URBAN DEV., PROJECT BASED VOUCHERS – FREQUENTLY ASKED QUESTIONS, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9157.pdf.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 24 C.F.R. § 983.301(f)(1)(i).

⁹⁰ 24 C.F.R. § 983.301(f)(2)(ii). However, “[a]t its discretion, the PHA may use the amounts in effect at any time during the 30-day period immediately before the redetermination date.” *Id.*

⁹¹ 24 C.F.R. § 983.301(a)(3).

⁹² 24 C.F.R. § 983.301(f)(2).

⁹³ *See* 24 C.F.R. § 982.517(c) (“a PHA . . . must revise its allowance for a utility category if there [has] been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised....”).

Tenants with Disabilities

The United States Housing Act required that families with disabled members are entitled to higher utility allowances upon request.⁹⁴ HUD regulations further clarify the conditions in which a family may request a higher utility allowance.⁹⁵ “[I]f a higher utility allowance is needed as a reasonable accommodation” for the disabled family member, then the PHA must approve the higher utility allowance.⁹⁶ For example, a family could get an allowance for air conditioning in a locality where it is not included in the schedule.⁹⁷ HUD determines whether an increase in the utility allowance is a reasonable accommodation in accordance with Part 8 of Title 24 of the Code of Federal Regulations.⁹⁸

SRO Units

⁹⁴ 42 U.S.C. § 1437f(o)(2)(D)(ii) (“Exception for families in including persons with disabilities Notwithstanding subparagraph (A), upon request by a family that includes a person with disabilities, the public housing agency shall approve a utility allowance that is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation to make the program accessible to and usable by the family member with a disability.”). We have not found any litigation that specifically addressed increased utility allowances for disabled HCV tenants. In one case, disabled Section 8 tenants failed to establish a class alleging a violation of Section 504 of the Rehabilitation Act in a lawsuit alleging lack of accommodation for disabilities; however, the accommodations did not involve utility allowances. *Taylor ex rel. Wazyluk v. Hous. Auth. of New Haven*, 645 F.3d 152 (2d. Cir. 2011) (holding that Section 504 cannot be privately enforced through a 42 U.S.C. § 1983 claim; however, the claims in this case were not about utility allowance accommodations). However, disabled public housing tenants have succeeded in creating a class when alleging insufficient utility allowances that failed to accommodate the tenants’ disabilities. *Amone v. Aviero*, 226 F.R.D. 677 (D. Haw. 2005) (certifying a class of disabled public housing tenants who filed a Section 504 claim seeking declaratory and injunctive relief directing the housing authorities to notify tenants of their rights to request increased utility allowances to accommodate for disabilities). It is not, however, clear what constitutes a reasonable accommodation or how this is determined by PHAs.

⁹⁵ 24 C.F.R. § 982.517(e). *Cf.* Section 42 Utility Allowance Regulations Update, 73 Fed. Reg. 43,863-02 (July 29, 2008) (stipulating that it would be inconvenient for LIHTC building owners to have calculate utility allowances per each unit separately; also, the IRS expressed concern that this would allow disabled people to be indifferent toward their energy consumption, which would lead to cost overruns).

⁹⁶ *Id.* HUD has claimed that it establishes these special higher utility allowances on a case-by-case basis. Section 8 Certificate and Voucher Programs Conforming Rule, 63 Fed. Reg. 23,826, 23,846 (Apr. 30, 1998) (codified at 24 C.F.R. § 982.517(e)).

⁹⁷ *See* U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 18-19.

⁹⁸ Section 8 Certificate and Voucher Programs Conforming Rule, 63 Fed. Reg. at 23,846. *See also* 24 C.F.R. § 8.28.

Tenants in Section 8 Single Resident Occupancy housing receive a utility allowance that is 75 percent of the zero bedroom (i.e. efficiency or studio) utility allowance set for the PHA.⁹⁹

Group Homes

Each Section 8-subsidized tenant residing in a group home pays a “pro-rata portion of the utility allowance for the group home unit size.”¹⁰⁰

Shared Housing

A shared housing unit is either a house or apartment in which the assisted family shares the unit with a live-in aide,¹⁰¹ “[o]ther persons who are assisted under the tenant-based program, or other persons who are not assisted under the tenant-based program,”¹⁰² or “[t]he owner of a shared housing unit.”¹⁰³ The assisted family in a shared housing arrangement pays a “pro-rata portion of the utility allowance for the shared housing unit.”¹⁰⁴

Cooperative Housing

Even though cooperative housing is technically a form of homeownership, HUD generally treats co-ops as rental housing.¹⁰⁵ In cooperative housing, the gross rent for a unit is the

⁹⁹ 24 C.F.R. § 982.604(b).

¹⁰⁰ 24 C.F.R. § 982.613(d).

¹⁰¹ 24 C.F.R. § 982.615(b)(1).

¹⁰² 24 C.F.R. § 982.615(b)(2).

¹⁰³ 24 C.F.R. § 982.615(b)(3).

¹⁰⁴ 24 C.F.R. § 982.617(d).

¹⁰⁵ HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW § 3:140 (2012). HUD’s HCV regulations define a cooperative as “Housing owned by a corporation or association, and where a member of the corporation or association has the right to reside in a particular unit, and to participate in management of the housing.” 24 C.F.R. § 982.4. A cooperative member is a “family of which one or more members owns membership shares in a cooperative.” *Id.*

carrying charge (i.e. rent to owner)¹⁰⁶ plus the utility allowance.¹⁰⁷ Aside from mentioning utility allowances, the regulations do not specify how these allowances would be calculated.¹⁰⁸

Manufactured Homes

Of all the special housing types, HUD's regulations pertaining to manufactured homes are the most idiosyncratic. Specifically, the "[r]ent to owner [of the manufactured home space] does not include the costs of utilities and trash collection," but "the owner may charge the family a separate fee for the cost of utilities of trash collection provided by the owner."¹⁰⁹ Additionally, the utility allowance for the first year of the initial lease term of a manufactured home space rental "must include a reasonable amount for utility hook-up charges [...] if the family actually incurs the expenses because of a move."¹¹⁰ Furthermore, families cannot receive a utility allowance for the digging of a well or installation of a septic tank.¹¹¹

¹⁰⁶ 24 C.F.R. § 982.619(b)(1).

¹⁰⁷ 24 C.F.R. § 982.619(b)(3).

¹⁰⁸ 24 C.F.R. § 982.619(b)(3).

¹⁰⁹ 24 C.F.R. § 982.622(a)(2).

¹¹⁰ 24 C.F.R. § 982.624.

¹¹¹ *Id.*

Appendix 1: Alternatives: Moving to Work Demonstrations

The Moving to Work (MTW) program allows some, congressionally approved PHAs to seek exemptions from many Public Housing and Housing Choice Voucher regulations in order to test new ideas for reducing cost and increasing effectiveness, incentivizing self-sufficiency, and increasing housing choice for low-income families.¹¹² Congress authorized the program in an appropriations bill in 1996.¹¹³ Several PHAs have used MTW as an opportunity to revise their utility allowance guidelines.¹¹⁴

Lincoln Housing Authority (Nebraska)

As a result of the flexibility afforded by MTW, in 1999, the Lincoln Housing Authority (LHA) implemented a flat utility allowance for which LHA “calculated the resident utility

¹¹² *Moving to Work (MTW) FAQ*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/faq (last visited Oct. 18, 2013).

¹¹³ See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 204, 110 Stat. 1321 (1996) (stating that one of the many purposes of the bill is to “reduce cost and achieve greater cost effectiveness in Federal expenditures.”). The fact that the Moving to Work program was initiated by statute limits its greater applicability, but the program was created for the purposes of fostering local innovation for the purpose of wide-scale implementation by HUD. See, e.g., *id.* (“conduct detailed evaluations of up to 15 such agencies in an effort to identify replicable program models promoting the purpose of the demonstration.”). PHAs are free to implement whichever policies they want so long as they fall into the guidelines and conform to the three statutory objectives: reducing cost and achieving greater cost effectiveness, giving incentives to families with children to seek work or better work, and to increase housing choices for low-income families. See *id.*; *Moving to Work (MTW) FAQ*, *supra* note 112 (“While MTW agencies have considerable flexibility, they must still abide by all other federal rules and regulations, including the Fair Housing Act, the Civil Rights Act, labor standards, environmental rules, procurement guidelines, demolition and disposition procedures and relocation regulations.”). While Congress has added five more PHAs to the MTW program, it is unlikely that the program will be expanded much past its current point. See, e.g., Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 230, 121 Stat. 1844 (2007) (adding two additional PHAs to the MTW program). It is unclear how the reforms discovered via MTW to Section 8, and namely to the system of utility allowances, would have to be implemented (i.e. would Congress have to pass a statute, or could HUD initiate reforms through notice and comment rulemaking).

¹¹⁴ See U.S. DEP’T OF HOUS. & URBAN DEV., MTW RENT REFORM ACTIVITIES BY AGENCY (2009) (listing the reforms undertaken by a variety of PHAs pursuant to the MTW program). A total of 35 PHAs are currently participating in MTW, but only some of the PHAs have enacted utility allowance policies. See, e.g., *History of Moving to Work (MTW)*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/history (last visited Oct. 22, 2013).

allowance based on average utility spending.”¹¹⁵ Essentially, the flat utility allowance means all housing types and all fuel types have the same utility allowance applied to them, and the number of bedrooms is the only differentiating factor.¹¹⁶ The LHA claims that the program was well-received because it gave tenants “greater autonomy in budgeting their spending, and... was much easier to understand and tenants could know how much rental assistance they were going to receive before they started looking for housing.”¹¹⁷ According to the LHA, the flat utility allowances also better incentivize tenants to seek energy efficient units or those in which the landlords pay the utilities.¹¹⁸ The LHA reports that it saved \$50,400 by not issuing utility reimbursements anymore.¹¹⁹ Further, the LHA reports that significant amounts of staff time has been saved because its staff no longer has to explain complicated utility allowances to tenants, and the average utility allowance schedule has led to a decrease in utility allowance calculation errors from 15 percent to under 3 percent.¹²⁰

San Diego Housing Commission (California)

In 2010, the San Diego Housing Commission (SDHC) initiated a flat utility schedule similar to the one implemented in Lincoln, Nebraska¹²¹ in order to decrease administrative costs

¹¹⁵ U.S. DEP’T OF HOUS. & URBAN DEV., PROMISING PRACTICES REPORT FOR LINCOLN HOUSING AUTHORITY 1, 2 (LHA) (2009). The Lincoln Housing Authority has also executed another MTW agreement with HUD to extend the demonstration to March 31, 2018. *Id.* at 1.

¹¹⁶ *Id.*; See LINCOLN HOUS. AUTH., SECTION 8 PAYMENT STANDARD, TARGET RENT AND UTILITY ALLOWANCE (2010) (listing the utility allowances for Lincoln’s Section 8 housing).

¹¹⁷ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 115, at 2.

¹¹⁸ *Id.*

¹¹⁹ LINCOLN HOUS. AUTH., MOVING TO WORK ANNUAL PLAN FISCAL YEAR 2014-2015, at 35 (2014).

¹²⁰ *Id.* at 36.

¹²¹ See SAN DIEGO HOUS. COMM’N, MOVING FORWARD MOVING TO WORK PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2010, at 23 (2010); U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for San Diego, California) (2013) (showing the simplified San Diego utility allowance schedule), available at http://www.sdhc.org/uploadedFiles/Real_Estate/SDHC%20UA-April%202013.pdf. The SDHC had originally joined the MTW program in 1998, but exited it in 2003 and then rejoined again in 2009. *San Diego Housing Commission*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/sandiego (last visited Jan. 16, 2014).

and reduce administrative errors.¹²² The San Diego version of standardized utility allowances differentiates between units with sewer and water included and among different unit sizes.¹²³ While the SDHC does have a hardship exemption, no families requested it during the 2011 fiscal year.¹²⁴ Furthermore, the SDHC reports that the annual staff time in hours used to determine utility allowance certifications decreased from 1,057 hours in 2009 to 198 hours in 2011.¹²⁵ In the same time, its utility allowance calculation error rate also decreased from 11 percent to 5 percent.¹²⁶

Philadelphia Housing Authority (Pennsylvania)

The Philadelphia Housing Authority is planning to implement a number of utility allowance modifications, pursuant to MTW. First, the Philadelphia Housing Authority will mandate that all eligible Housing Choice Voucher tenants with utility allowances for gas heating participate in the Philadelphia Gas Works Customer Responsibility Program (CRP), which will have gas utility allowances calculated according to an alternate methodology.¹²⁷ Participation in the CRP will place a cap on the amount of money tenants will have to pay for gas, based on household income, rather than consumption.¹²⁸ The CRP amount will be used as the utility allowance for gas unless it is higher than the normal utility allowance.¹²⁹ More radically, the Philadelphia Housing Authority is planning to phase out utility allowances altogether for

¹²² See SAN DIEGO HOUS. COMM'N, MOVING TO WORK PROGRAM ANNUAL PLAN 25 (2009).

¹²³ *Id.*

¹²⁴ SAN DIEGO HOUS. COMM'N, MOVING FORWARD MOVING TO WORK PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2011, at 36-37(2011).

¹²⁵ *Id.* at 37.

¹²⁶ *Id.*

¹²⁷ PHILA. HOUS. AUTH., MOVING TO WORK ANNUAL PLAN YEAR THIRTEEN 42 (2012). It seems as though this plan was implemented in 2013 for the Housing Choice Voucher program. *Id.* at 43.

¹²⁸ *Id.* at 42.

¹²⁹ *Id.*

residents with incomes greater than 80 percent of Area Median Income.¹³⁰ Additionally, the Philadelphia Housing Authority will establish “a minimum threshold of \$20 for payment of utility allowance payments.”¹³¹ Finally, the Philadelphia Housing Authority is authorized, but has not yet implemented, a plan that would require tenants with utility allowances to enroll in reduced rate programs, energy usage grants, or other financial incentives offered by utilities such as the Philadelphia Electric Company (PECO).¹³² In the FY 2009 MTW plan, the Philadelphia Housing Authority approved a plan to make changes in utility allowance schedules contingent not only on changes in actual utility costs, but also on the HUD operating subsidy amounts it receives.¹³³

Tulare County Housing Authority (California)

The Tulare County Housing Authority implemented the most radical step of eliminating utility allowances for newly enrolled Housing Choice Voucher tenants and for those who opt into the MTW program: instead of utility allowances being a credit against rent due, Tulare County provides a fixed subsidy (a lump sum for each kind of bedroom size) for rent and utilities that is lower than the FMR and is also significantly smaller than the payment standard.¹³⁴ Furthermore,

¹³⁰ *Id.*

¹³¹ *Id.* at 43. It appears that a minimum threshold for utility payments would mean that tenants who would have a schedule lower than \$20.00 would not receive the utility payment. This would generally mean that electricity and heating are not included in the utility allowance.

¹³² *Id.* The programs that can be used to offer reduced rates, energy usage grants, or other financial help to low-income households include the PECO Customer Assistance Plan, and LIHEAP, but the Annual Plan implies that other programs exist as well. *Id.*

¹³³ PHILA. HOUS. AUTH., MOVING TO WORK ANNUAL PLAN YEAR EIGHT 31 (2008) (“Each year, PHA will update the utility allowance schedules to reflect then current actual cost data. PHA will subsequently apply the HUD-established operating subsidy pro-ration factor to determine the actual utility allowance schedules.”).

¹³⁴ See JENNIFER TURNHAM & CLAUDIA SOLARI, TULARE COUNTY’S MOVING TO WORK DEMONSTRATION 1 (2002). The stated purpose of this reduced subsidy and elimination of utility allowances was to increase self-sufficiency in assisted families and to save time and money in calculating UAP pay-outs: “The fixed rents and subsidies were an incentive toward self-sufficiency, but also greatly streamlined the rent-calculation process of the traditional HUD programs.” HOUS. AUTH. OF THE CNTY. OF TULARE, FISCAL YEAR 2012 MOVING TO WORK 13 (2012).

the tenants are not subject to the 40 percent cap on family income for rent contribution on newly executed leases.¹³⁵

Vancouver Housing Authority (Washington)

In 2009,¹³⁶ the Vancouver Housing Authority (VHA) also implemented a utility allowance system that “simplifies rent calculations” and “encourages reduced energy consumption.”¹³⁷ Specifically, VHA adopted a single utility schedule for all units based on the “estimated utility cost for a new or weatherized unit”¹³⁸ in order to provide greater predictability in projected rental costs, decrease the rejections of Requests for Tenancy Approval, and encourage energy efficiency.¹³⁹ Furthermore, the VHA plans to save money by paying the lesser of the unit bedroom size or the voucher bedroom size¹⁴⁰ for tenants who choose to rent a unit with more bedrooms than their voucher allows.¹⁴¹ HUD regulations mandate that the utility allowance be assigned based on the bedroom size rather than the bedrooms allowed by the voucher, so many tenants are getting larger utility allowances than their vouchers would justify.¹⁴² Furthermore, the VHA only allows tenants to receive the UAP for six months before it

¹³⁵ *Id.* at 2. Removing the 40 percent cap on income solves part of the problem posed on *supra* p. 11–12, because it allows units to remain eligible for Section 8 tenants even if the total rent burden would be greater than 40 percent. See *supra* Section II.

¹³⁶ VANCOUVER HOUS. AUTH., MOVING TO WORK ANNUAL REPORT FISCAL YEAR 2009, at 27 (2010).

¹³⁷ VANCOUVER HOUS. AUTH., MOVING TO WORK 2014 ANNUAL PLAN 31 (2013). From 2009 to 2014, the VHA MTW plan included a component by which the UAPs were limited to only six months to encourage self-sufficiency, but this program “will likely be concluded in 2014” because it was deemed unnecessary because of other measures taken. *Id.* at 32.

¹³⁸ VANCOUVER HOUS. AUTH., MOVING TO WORK 2009 ANNUAL PLAN 20 (2009).

¹³⁹ *Id.*

¹⁴⁰ A tenant can have a voucher for a two bedroom apartment (voucher size), but get approved for the rental of three bedroom apartment (unit bedroom size). HUD regulations mandate that the tenant receives the utility allowance for the actual unit size. See 24 C.F.R. § 982.517(d)(1).

¹⁴¹ VANCOUVER HOUS. AUTH., *supra* note 137, at 16. Tenants receiving Housing Choice Vouchers are able to rent a unit with more or less bedrooms than allowed on their voucher.

¹⁴² *Id.* The VHA estimates that 225 households will be affected by this change in policy, which will cause their HAP payments to decline by \$21.00 on average. *Id.* The VHA projects that effecting this change in policy will lead to no less than \$55,000 of annual savings. *Id.*

either stops the payments or continues them on condition that the family participates in a self-sufficiency program.¹⁴³

¹⁴³ VANCOUVER HOUS. AUTH., MOVING TO WORK ANNUAL REPORT FISCAL YEAR 2009, at 28 (2010).

Appendix 2: Section Eight Management Assessment Program (SEMAP)

Section Eight Management Assessment Program (SEMAP) is HUD's performance measurement system, created to ensure that HCV programs "operate to help eligible families afford decent rental units at the correct subsidy cost."¹⁴⁴ SEMAP applies to both HCV and to PBV.¹⁴⁵ Although SEMAP includes a number of indicators, SEMAP's utility allowance indicator is the most relevant to this chapter.¹⁴⁶ PHAs can be awarded a maximum of 135 points in SEMAP.¹⁴⁷ If a PHA correctly reviewed and adjusted the utility allowances in the past year, then the PHA receives five points in the SEMAP score, but if it had failed to do so, it gets zero points.¹⁴⁸ An additional twenty points are given if the PHA uses "appropriate utility allowances to determine gross rent."¹⁴⁹ SEMAP points are potentially important because PHAs receiving high scores are rewarded with "national recognition" and "may be given competitive advantage under notices of fund availability."¹⁵⁰ If the PHA gets a very low score and is deemed to be troubled, then HUD must conduct "on-site review of PHA program management to assess the magnitude and seriousness of the PHA's noncompliance with performance requirements."¹⁵¹ Subsequently, HUD must write a report about the deficiencies and their causes;¹⁵² then, the PHA must put together a corrective plan¹⁵³ and submit to HUD monitoring of the plan.¹⁵⁴ PHAs therefore have a strong incentive to maintain accurate utility allowance schedules. The HUD Office of the Inspector General (OIG) found in an audit that "HUD had not developed adequate

¹⁴⁴ 24 C.F.R. § 985.1(a).

¹⁴⁵ 24 C.F.R. § 985.1(b).

¹⁴⁶ 24 C.F.R. § 985.3.

¹⁴⁷ U.S. DEP'T OF HOUS. & URBAN DEV., UNDERSTANDING THE SEMAP RATING PROCESS 60 (2000).

¹⁴⁸ 24 C.F.R. § 985.3(d)(3).

¹⁴⁹ 24 C.F.R. § 985.3(c)(3)(i)(C). If the PHA uses appropriate utility allowances for 80% to 89% of families, then it only receives fifteen points. 24 C.F.R. § 985.3(c)(3)(ii).

¹⁵⁰ 24 C.F.R. § 985.103(a).

¹⁵¹ 24 C.F.R. § 985.107(a).

¹⁵² 24 C.F.R. § 985.107(b).

¹⁵³ 24 C.F.R. § 985.107(c).

¹⁵⁴ 24 C.F.R. § 985.107(d).

controls to ensure that SEMAP would be effective in identifying underperforming agencies.”¹⁵⁵

Further, the OIG found that, as a result of insufficient intra-agency coordination, some PHAs might have been improperly awarded passing scores.¹⁵⁶

¹⁵⁵ OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF HOUS. AND URBAN DEV., THE SECTION EIGHT MANAGEMENT ASSESSMENT PROGRAM LACKED ADEQUATE CONTROLS TO ACCOMPLISH ITS OBJECTIVE 1 (2012).

¹⁵⁶ *Id.* at 5.

Appendix 3: Energy Efficiency-Based Utility Allowance (EEBUA)

In 2002, the California Public Utilities Commission initiated the Efficient Affordable Housing Program (EAH), whose primary purpose was to develop the Energy Efficiency-Based Utility Allowance (EEBUA) to encourage energy efficient retrofits and new construction by allowing PHAs to create separate utility allowance schedules for energy efficient buildings.¹⁵⁷ While an EEBUA allows LIHTC building owners to keep a larger portion of the rent because less of it goes to the utility allowance, HCV landlords would not be able to receive similar benefits because a lower utility allowance would result in a lower HAP to the owner from the PHA and an equally sized increase in rent paid by the tenant to the owner.¹⁵⁸ The EEBUA creates a two-tier utility allowance schedule; the energy efficient schedule is based on reductions from the PHA's original utility allowance schedule,¹⁵⁹ which is still "used as the representation for energy use of the *average* of all subject units in the jurisdiction."¹⁶⁰ Although the EEBUA is mostly used by LIHTC developers who seek to use lower utility allowances to increase rent

¹⁵⁷ See KEMA, INC., EVALUATION OF 2004-2005 DESIGNED FOR COMFORT: EFFICIENT AFFORDABLE HOUSING PROGRAM 2-1 (2006); *California Local Governments Lead the War to Saving Energy by Offering A Utility Allowance Category for Energy Efficient Projects and Projects with Photovoltaic/Solar Energy Systems*, LOCAL GOV. COMM'N. (March/April 2005), http://www.lgc.org/freepub/energy/newsletter/mar_apr2005/page02.html (last visited January 17, 2014).

¹⁵⁸ See *Id.* at 2-1 (2006) ("If their local public housing authority adopts the EEBUA, owners or developers who achieve certain levels of energy efficiency in their new or existing affordable multifamily properties can collect higher rents. These higher rents are possible because the EEBUA has reduced the tenant's utility allowance to correspond with the reduction in utility costs that have been achieved by the energy-efficiency measures installed in the property."); NEHEMIAH STONE, ET. AL., ENERGY EFFICIENCY-BASED UTILITY ALLOWANCES: A DRIVER FOR MORE EFFICIENT AFFORDABLE HOUSING 4 (2004). EEBUA began as a regional, pilot program in 2002, but was expanded to be statewide in 2004. *Id.* For an example of an EEBUA compared to a normal utility allowance, see ANAHEIM HOUS. AUTH., UTILITY ALLOWANCE SCHEDULE (2012), *available at* http://www.anaheim.net/com_dev/aRT/UtilityAllow10-2012.pdf. Interestingly, the Anaheim utility allowance schedule does not distinguish among different kinds of buildings, similar to some of the schedules of the PHAs involved in the Moving To Work program, as described in Appendix III.

¹⁵⁹ NEHEMIAH STONE, ET. AL., *supra* note 158, at 4.

¹⁶⁰ *Id.*

revenue, owners of HCV buildings who happen to own buildings that are already energy-efficient or buildings that will be retrofitted can also avail themselves of the EEUBA.¹⁶¹

In order to adopt an EEUBA, a PHA must establish at least one of the following thresholds for what counts as an energy efficient building: new construction exceeding energy code by 15 percent, retrofit buildings improving efficiency by at least 20 percent, and achieving “ENERGY STAR New Homes, LEED, Enterprise Green Communities, or other green program that contains energy-efficiency requirements.”¹⁶² In order to test buildings, PHAs must rely on either a home energy rater (HERS) or a home performance professional.¹⁶³ HERS raters provide the necessary documentation to PHAs to show that the buildings seeking energy efficient utility allowances meet the EEUBA requirements.¹⁶⁴

While some PHAs declared that they will use EEUBAs, other PHAs sought waivers from HUD to allow them to implement the two-tier utility allowance system.¹⁶⁵ Enterprise Community Partners suggests that PHAs could adopt the EEUBA by either receiving approval

¹⁶¹ LIHTC financed buildings with units housing HCV tenants must use the HCV allowance. 26 C.F.R. § 1.42-10(b)(4)(i). Thus energy efficient buildings would be able to use the EEUBA in such cases.

¹⁶² ENTER. GREEN CMTYS., UTILITY ALLOWANCE OPTIONS FOR INVESTMENTS IN ENERGY EFFICIENCY: RESOURCE GUIDE 23 (2011). *Cf.* HUSM (including only ENERGY STAR in calculation for energy efficient utility allowances). The new construction is required to surpass 2005 Title 24 energy code standards by at least 15 percent. *Energy Efficient Units-How to Get Rated*, HOUS. AUTH. OF THE CNTY. OF RIVERSIDE, <http://www.harivco.org/Developer/EnergyEfficientUnitsHowtoGetRated/tabid/112/Default.aspx> (last visited Oct. 23, 2013). For retrofitted structures the “energy efficiency rating [. . . must have . . .] surpassed 2005 Title 24 energy code standards by at least 15 [percent] . . .” *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* In order to prove that a project is compliant, the developer will have to provide “a form summarizing the results of a building simulation (i.e., energy model), plans, and a HERS verification document.” *Id.* at 25. If a HUD audit reveals that EEUBAs are granted to buildings that lack documentation, HUD can penalize the PHA. JAMES S. HOBBS, THE ANAHEIM HOUSING AUTHORITY, ANAHEIM CALIFORNIA, DID NOT ALWAYS OPERATE ITS SECTION 8 HOUSING CHOICE VOUCHER PROGRAM EFFECTIVELY 5–6 (2008) (“the authority used the “energy efficient” utility allowance without any supporting documentation as to how the unit qualified as “energy efficient,” which further affected the housing assistance payment amounts. The “energy efficient” utility allowance schedule provides a lower utility allowance in light of the energy-efficient appliances and setup of the unit.”). The California Energy Commission has its own HERS program pursuant to Public Resources Code Section 25942. ENTER. GREEN CMTYS., *supra* note 162, at 24.

¹⁶⁵ See KEMA, INC., *supra* note 157, at 4-2 (“two of the PHAs – the San Francisco Housing Authority and the San Joaquin Housing Authority – made the issuance of a HUD waiver for the use of the EEUBA as a precondition for adoption.”). The waiver was granted in January 2006. *Id.* at 4-8.

from the PHA board, declaring that the PHA will accept an EEBUA, or obtaining HUD approval by requesting a waiver.¹⁶⁶ Enterprise also provides a sample waiver letter that the PHA can adapt and use in its request.¹⁶⁷ Advocates of EEBUA point to a laudatory comment in the Public Housing Energy Conservation Clearinghouse News as effective HUD approval of the EEBUA.¹⁶⁸ Although HUD has not explicitly authorized the program, the fact that it has granted waivers, not interfered with the California program, and allowed it to exist for about a decade implies that there is at least tacit approval.

While an EEBUA has the same effect on rent and utility bills as a lower utility allowance, an EEBUA can lead to a PHA paying a smaller HAP or can cause a tenant's family share to remain at acceptable levels.

Table 3:

Payment Standard (PS) = \$700 Adjusted Gross Income = \$667	Utility Allowance	Rent to Owner (RTO)	Gross Rent	Total Tenant Payment (TTP)	Housing Assistance Payment (HAP)	Family Rent to Owner (FTRO)
(Hypothetical)		HAP + FTRO = RTO	RTO+UA	See supra note 16	HAP=Lesser of GR-TTP or PS-TTP	FTRO= RTO - HAP

¹⁶⁶ ENTER. GREEN CMTYS., *supra* note 162, at 25.

¹⁶⁷ *Id.* at 49-50 (quoting former HUD secretary Alphonso Jackson's "notice to every public housing authority to make energy efficiency a reality" and explaining why the change to a EEBUA is necessary).

¹⁶⁸ *Success Stories: Housing Authority of the City of Riverside*, PUB. HOUS. ENERGY CONSERVATION CLEARINGHOUSE NEWS (U.S. Dep't of Hous. & Urban Dev., D.C.), Mar.-Apr. 2004, at 4 ("Property owners and tenants alike are benefiting from an energy-efficient utility allowance schedule developed by the Housing Authority of the City of Riverside, California. The new allowance schedule encourages multifamily owners to increase the energy efficiency of their units. By doing so, owners can increase the value and marketability of their properties while reducing utility bills. And, taking lower subsidies into account, the potential cost savings to a housing authority can be substantial. There are advantages to residents, as well, including lower energy costs and increased comfort."); *see, e.g.*, ENTER. GREEN CMTYS., *supra* note 162, at 39 ("The federal Department of Housing and Urban Development (HUD) has recognized the effectiveness of the Energy Efficiency-Based Utility Allowance schedule, and identified it as a "best practice" in its March-April edition of the online newsletter...."); KEMA, INC., *supra* note 157, at 4-2 ("The DfC Program had hoped that an article in a HUD newsletter that described the DfC Program as a "best practice" would serve as a de facto endorsement of the EEBUA.").

Chapter 4: Utility Payments in the Housing Choice Voucher Program

Standard UA	\$75	\$625	\$700	\$200	\$500	\$125
EEBUA	\$50	\$625	\$675	\$200	\$475	\$150

In Table 3, the tenant pays exactly the same amount of money in the TTP with the EEBUA or the standard utility allowance, but the EEBUA results in the PHA having to pay out a smaller HAP, so long as the gross rent is lower than the payment standard.

Table 4:

Payment Standard= \$550 Adjusted Gross Income= \$200	Utility Allowance	Rent to Owner	Gross Rent	TTP	HAP	Family Rent to Owner	Family Share	Family Share as percent of Adjusted Income
(Hypothetical)		RTO= HAP+ FTRO	RTO+UA	See supra note 16	HAP= Lesser of GR- TTP or PS- TTP	FRTO= RTO - HAP	FS= FRTO+UA = GR- HAP	FS/adjusted income
Standard UA	\$75	\$500	\$575	\$60	\$490	\$10	\$85	42.5%
EEBUA	\$50	\$500	\$550	\$60	\$490	\$10	\$60	30%

The scenario in Table 4 changed some of the variables around. Namely, the difference between the payment standard and the adjusted gross income is much greater. Here, with the standard utility allowance, the family share is 42.5 percent, but with a \$25 smaller utility allowance, the EEBUA, the family share decreases to 30 percent.

Appendix 4: Glossary of Terms

Fair Market Rent (FMR): “The rent, including the cost of utilities (except telephone), as established by HUD for units of varying sizes (by number of bedrooms), that must be paid in the housing market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities.”¹⁶⁹

Family: a person or group of persons approved to reside in HCV housing.¹⁷⁰ See also “Tenant.”

Family Rent to Owner (FRTTO): the portion of the rent to owner paid by the family.¹⁷¹ Rent to owner minus the HAP.¹⁷²

Family Share (FS): the HAP subtracted from the gross rent.¹⁷³

Gross Rent (GR): “the sum of the rent to owner plus any utility allowance.”¹⁷⁴

Housing Assistance Payment (HAP): the monthly assistance paid to the owner for rent and, if necessary, an “additional payment to the family if the total assistance exceeds the rent to the owner.”¹⁷⁵ HAP is calculated by taking the lesser of the payment standard minus the TTP or the gross rent minus the TTP.¹⁷⁶

¹⁶⁹ 24 C.F.R. § 982.4.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 24 C.F.R. § 982.515(b).

¹⁷³ 24 C.F.R. § 982.515(a).

¹⁷⁴ 24 C.F.R. § 982.4.

¹⁷⁵ *Id.*

¹⁷⁶ 24 C.F.R. § 982.505(b).

Payment Standard: “maximum monthly subsidy payment.”¹⁷⁷ It is used to calculate the monthly HAP payment. It is generally set between 90 percent and 110 percent of the FMR,¹⁷⁸ unless HUD approves an exception payment standard amount.¹⁷⁹

Rent: “The total monthly rent payable to the owner under the lease for the unit. Rent to owner covers payment for any housing services, maintenance and utilities that the owner is required to provide and pay for.”¹⁸⁰ The rent to owner is the HAP (assuming no reimbursement) added to the Family Rent to Owner.

Tenant: officially, it is the person or persons who execute the lease for a dwelling unit;¹⁸¹ however, in this chapter “tenant” is used synonymously with “family.”

Total Tenant Payment (TTP): the “minimum amount a family must contribute toward rent and utilities regardless of the unit selected,”¹⁸² which is the lesser of 30 percent of adjusted income, 10 percent of gross income, welfare rent, or PHA minimum rent.¹⁸³

Utility Reimbursement: “In the voucher program, the portion of the housing assistance payment which exceeds the amount of the rent to owner.”¹⁸⁴

¹⁷⁷ 24 C.F.R. § 982.505(a)

¹⁷⁸ 24 C.F.R. § 982.503(b)(1)(i).

¹⁷⁹ 24 C.F.R. § 982.503(c).

¹⁸⁰ 24 C.F.R. § 982.4.

¹⁸¹ *Id.*

¹⁸² U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 15, at 6-1

¹⁸³ 24 C.F.R. § 5.628.

¹⁸⁴ 24 C.F.R. § 982.4.

Appendix 5: Summary of Legal Requirements

CALCULATION OF UTILITY ALLOWANCES	
Statutes	
42 U.S.C. § 1437f(o)(2)(A)	<i>if the rent for the family (including the amount allowed for tenant-paid utilities) does not exceed the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts....</i>
Regulations	
24 C.F.R. § 982.517(a)(1)	<i>PHA must maintain a utility allowance schedule for all tenant-paid utilities (except telephone), for cost of tenant-supplied refrigerators and ranges, and for other tenant-paid housing services (e.g., trash collection (disposal of waste and refuse)).</i>
24 C.F.R. § 982.517(b)(1)	<i>The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates.</i>
24 C.F.R. § 982.517(b)(2)	<i>(i) a PHA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with the housing quality standards... the PHA may not provide any allowance for non-essential utility costs (ii) the PHA must classify utilities and other housing services according to... general categories; additionally, in areas where air-conditioning is common, there must be a category on the schedule for air conditioning.</i>
24 C.F.R. § 982.517(b)(3)	<i>The cost of each utility and housing service category must be stated separately. For each of these categories, the utility allowance schedule must take into consideration unit size (by number of bedrooms), and unit types</i>
24 C.F.R. § 982.517(b)(4)	<i>Utility allowance schedule must be prepared and submitted on HUD Form-52667</i>
24 C.F.R. § 982.517(d)	<i>The PHA must use the appropriate utility allowance for the size of dwelling unit actually leased by the family</i>
24 C.F.R. § 982.517(e)	<i>On request from a family that includes a person with disabilities, the PHA must approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation in accordance with 24 CFR part 8 to make the program accessible to and usable by the family member with a</i>

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	<i>disability.</i>
24 C.F.R. § 5.628	<i>The definition of total payment as the greatest of 30 percent of adjusted gross income, 10 percent of total income, welfare rent, or PHA minimum rent.</i>
24 C.F.R. § 983.301(f)(1)(i)	Project-Based Vouchers use the same utility allowance schedules as do normal Housing Choice Vouchers.
24 C.F.R. § 983.301(f)(2)(ii)	When the PHA redetermines the rent to the owner, it uses the utility allowance schedule in use at the time of redetermination.
24 C.F.R. § 983.301(f)(2)	PHAs are not permitted to set a different utility allowance schedule for Project-Based Vouchers
Guidance	
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G	This Guidebook reiterates the requirements set forth in HUD regulations (24 C.F.R. § 982.517)
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, AT 18-2	Each PHA must classify utilities into the following categories: • Space heating • Air conditioning • Cooking • Water heating • Water • Sewer • Trash collection • Other electric • (Tenant-provided) refrigerator • (Tenant-provided) range • Other specified housing services
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, AT 18-2	In the schedule, a PHA must state the cost of each utility separately.
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, AT 18-2	Utility allowance schedules must be categorized according to unit types (i.e., building type or location of a unit within a building), unit size (i.e., number of bedrooms), and type of utility
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, AT 18-4	Local costs of utilities could be found in the following sources: • Electric utility suppliers • Natural gas utility suppliers • Water and sewer suppliers • Fuel oil and bottled gas suppliers • Public utility commissions • Real estate and property management firms • State and local agencies • Appliance sales and leasing firms • Neighboring PHAs
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK	If possible, utility information should be gathered from local sources. If PHAs cannot obtain local information, they can use the

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7420.10G, AT 18-4	national averages.
U.S. DEP'T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES [HUD-52667]	PHAs may not base their utility allowance calculations on the consumption habits of above- or below- average households' consumption habits.
U.S. DEP'T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES [HUD-52667]	Explaining how to conduct national average utility allowance calculation if local information is not available.
Case Law	

REVISION & REVIEW OF UTILITY ALLOWANCES	
Statutes	
Regulations	
24 C.F.R. § 982.517(a)(2)	<i>The PHA must give HUD a copy of the utility allowance schedule. At HUD's request, the PHA also must provide any information or procedures used in preparation of the schedule.</i>
24 C.F.R. § 982.517(c)(1)	<i>a PHA must review its schedule of utility allowances each year, and must revise its allowance for a utility category if there PHAs been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised. The PHA must maintain information supporting its annual review of utility allowances and any revisions made in its utility allowance schedule.</i>
24 C.F.R. § 982.517(c)(2)	<i>At HUD's direction, the PHA must revise the utility allowance schedule to correct any errors, or as necessary to update the schedule.</i>
24 C.F.R. § 982.505(b)	If the gross rent for a unit exceeds the payment standard, then the tenant will have to pay more than 30 percent of adjusted income in rent.
24 C.F.R. § 982.515(c)	A PHA cannot pay any part of a tenant's family share
Guidance	
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, AT 18-1	If the landlord changes the responsibility for utility payments, both the owner and the tenant must report that change to the local PHA.
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, AT 18-9	Any utility allowance schedule adjustments should be calculated in the same way as the original allowance.

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Notice PIH 2011-28 (HA) from U.S. Department of Housing and Urban Development to Section 8 Public Housing Agencies, HUD Office of Public Housing Directors, and Section 8 Financial Management Center (May 27, 2011)	A PHA may review its utility allowance schedules more often if it believes that the utility allowances are too high.
HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, AT 18-4	A PHA must keep “copies of all supporting documentation used in determining both the initial allowances and revisions.”
Case Law	
Johnson v. Housing Authority of Jefferson Parish, 442 F.3d 356 (5th Cir. 2006)	Holding that tenants have a right of action if their utility allowances were improperly calculated or insufficiently updated to correspond to present utility prices.

METERING & TENANT PAYMENT	
Statutes	
42 U.S.C. § 1437f(o)(3)	Stipulating that tenants cannot pay more than 40 percent of their adjusted gross income for gross rent (combined utility allowance and tenant rent to owner).
Regulations	
24 C.F.R. § 982.308(d)(5)	The lease must specify “what utilities and appliances are to be supplied by the owner, and what utilities and appliances are to be supplied by the family.”
24 C.F.R. § 5.603	<i>If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.</i>
24 C.F.R. § 982.4	Tenants can receive a utility reimbursement if their tenant’s monthly contribution to rent is lower than the utility allowance. The reimbursement will be the utility allowance minus the tenant’s contribution.
Guidance	
HOUSING CHOICE VOUCHER	If the landlord changes the responsibility for utility payments,

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PROGRAM GUIDEBOOK 7420.10G, AT 18-1	both the owner and the tenant must report that change to the local PHA.
U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, at 6- 1	Stipulating the tenants will pay the greatest of either 30 percent of adjusted gross income, 10 percent of total income, welfare rent, or minimum rent.
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I. Introduction

As a part of a larger project to evaluate how HUD could promote greater energy efficiency in its subsidy programs, this chapter provides a comprehensive overview of the legal and regulatory frameworks that govern utility allowances in the Low Income Housing Tax Credit (LIHTC) program. The LIHTC program is a federal affordable housing program that is regulated by the Internal Revenue Service (IRS). Between 1987 and 2011, developers placed in service 2,318,000 units of LIHTC-financed housing throughout the United States.¹ Local or state housing credit agencies (usually state Housing Finance Agencies (HFAs))² allocate tax credits to qualified developers who then sell the credits to investors to raise capital for affordable housing projects.³ The proceeds from the sale of tax credits are used to lower the debt of the project, which then allows developers to charge lower rents.⁴ As stipulated by the program either 20 percent of the units in LIHTC properties must be rented to households with incomes lower than 50 percent of area median gross income (AMGI) or 40 percent of residents must make less than 60 percent of AMGI.⁵

¹ *Low-Income Housing Tax Credits*, U.S. Dep't of Hous. & Urban Dev.
<http://www.huduser.org/portal/datasets/lihtc.html> (last updated Sept. 5, 2013).

² For the purposes of this chapter, we will refer to local or state housing credit agencies as HFAs. In New York, the New York State Housing Finance Agency (part of New York State Homes and Community Renewal) allocates housing credits, while in New York City, the Department of Housing Preservation & Development allocates housing credits. See *New York State Housing Finance Agency*, N.Y. HOMES & CMTY. RENEWAL, <http://www.nyshcr.org/Agencies/HFA/> (last visited Jan. 31, 2014); *Housing Finance Programs*, N.Y.C. DEP'T OF HOUS. PRESERVATION & DEV., http://www.nyc.gov/html/hpd/html/developers/low_income.shtml (last visited Jan. 31, 2014).

³ *Id.*

⁴ *How Do Housing Tax Credits Work?*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics/work (last visited Nov. 15, 2013).

⁵ 26 U.S.C. § 42(g)(1) (2012); 26 U.S.C. § 142(d)(1) (2012). This rule does not apply in New York City where only 25 percent of units must be affordable for tenants whose income is 60 percent of AMI. § 142(d)(6) ("In the case of a project located in a city having 5 boroughs and a population in excess of 5,000,000, subparagraph (B) of paragraph (1) shall be applied by substituting "25 percent" for "40 percent").

Of all of the federal housing subsidy programs, the LIHTC program has the strongest incentives for owners to implement utility-conserving measures. First, there is a strong incentive to ensure tenants pay their own utilities because any utility costs not paid by tenants will be paid by the operating income for that property, which is limited by LIHTC rent caps. Second, owners have a strong incentive for buildings to be as efficient as possible, because individual building characteristics can be taken into account in setting utility allowances. Tenants who pay their own utilities are given a utility allowance, which is then subtracted from the rent due to the owner. A higher tenant utility allowance means lowers rental income. As a result, an owner is incentivized to ensure that utility allowances are as low as possible to maximize the rental income received. One way to do that is to make a property as energy efficient as possible. Another way to do that is to advocate for the utility allowance calculation system that minimizes the allowance amount. As a result, it is important for the federal government to ensure that LIHTC utility allowance calculations are accurate and tenants are being adequately reimbursed for the appropriate usage. Similarly, tenants have a strong incentive to conserve utility usage if they pay their own utilities and owners are selecting an allowance calculation method that minimizes tenants' allowances. As a result, LIHTC arguably has the most efficient incentive system for owners and tenants to conserve utility usage assuming the methods used to calculate allowances do not underestimate the allowance and place additional financial burdens on tenants.

II. Background on Utility Allowances in LIHTC Properties

Utility allowances in the LIHTC program are governed by Section 42 of Title 26 of the U.S. Code and by IRS regulations. Unlike tenants in most HUD-subsidized programs, who pay 30 percent of adjusted income for rent and utilities, tenants in LIHTC buildings pay a fixed,

gross rent, which is a percentage of AMGI adjusted for bedroom size.⁶ The gross rent is the sum of the rent to the owner and the utility allowance,⁷ excluding any additional housing subsidy.⁸ IRS regulations state that utility allowances are included in the gross rent whenever “the cost of any utility (other than telephone, cable television, or Internet) for a residential rental unit is paid directly by the tenant(s), and not by or through the owner of the building.”⁹

Before delving into the details of utility allowance calculation, it would be useful to understand the effect of utility allowances on the rent building owners are allowed to charge. In order for a project to qualify for LIHTCs, either the developer must rent at least 20 percent of the project’s units to households whose incomes are 50 percent or less of HUD’s calculated AMI or the developer must rent 40 percent of the units to households whose incomes are 60 percent or less of the AMI.¹⁰ Developers must offer these units at rents no higher than 30 percent of the monthly income of the target group, with annual adjustments thereafter.¹¹ Gross rents for LIHTC units include utility allowances.¹² Therefore, the larger the utility allowance, the smaller the building owner’s share of the gross rent. For example, if the maximum allowable gross rent in an

⁶ 26 U.S.C. § 42(g)(2)(A) (“a residential unit is rent-restricted if the gross rent with respect to such unit does not exceed 30 percent of the imputed income limitation applicable to such unit.”). See also *Eligibility*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics/eligibility (last visited Nov. 13, 2013); *How Are LIHTC Rents Determined*, DANTER CO., <http://www.danter.com/taxcredit/rents.htm> (last visited Nov. 13, 2013) (“Maximum rents are based on tenants at maximum income paying no more than 30% of their income for housing.”). If tenants living in LIHTC units receive separate subsidies, such as Housing Choice Vouchers, then the rent that those tenants pay is subject to the limitations of their respective programs.

⁷ 26 U.S.C. § 42(g)(2)(B)(ii).

⁸ It “does not include any payment under section 8 of the United States Housing Act of 1937 or any comparable rental assistance program,” “any fee for a supportive service which is paid to the owner of the unit . . . by any governmental program of assistance . . . provides assistance for rent,” or “any rental payment to the owner of the unit to the extent such owner pays an equivalent amount to the Farmers Home Administration under section 515 of the Housing Act of 1949.” 26 U.S.C. § 42(g)(2)(B)(i)–(iv).

⁹ 26 C.F.R. § 1.42-10(a) (2014).

¹⁰ 26 U.S.C. § 42(g)(1)(A)–(B).

¹¹ 26 U.S.C. § 42(g)(2)(A).

¹² 26 U.S.C. § 42(g)(2)(B)(ii) (“includes any utility allowance determined by the Secretary after taking into account such determinations under section 8 of the United States Housing Act of 1937”); 26 C.F.R. § 1.42-10(a) (“the gross rent for that unit includes the applicable utility allowance determined under this section.”).

area is \$1000, and a unit has a utility allowance of \$100, then the owner could charge the tenant only \$900 rent for the unit.¹³ However, “when utilities are included in the rent, the owner receives the normal LIHTC rent from the assisted tenant and utility costs are part of landlord operating expenses. In this scenario, fluctuations in utility costs directly affect the landlord’s bottom line.”¹⁴

IRS regulations give developers the option to choose among a variety of utility allowance calculation methodologies, with some exceptions.¹⁵ A few exceptions are relevant here. (1) If a LIHTC building is assisted by the Rural Housing Service (RHS) or houses any RHS tenants, then the RHS utility allowance will be applied to all rent-restricted units.¹⁶ (2) Buildings regulated by HUD (i.e., have their rents and utility allowance reviewed annually) that do not receive any RHS assistance shall use the applicable HUD utility allowance for all rent-restricted units in the building.¹⁷ (3) If tenants in the building receive housing assistance through the Housing Choice Voucher program, then those tenants’ units will use the utility allowance established by the local Public Housing Authority (PHA).¹⁸

Until 2008, a building owner had to either request a utility allowance from the utility company¹⁹ or use the PHA Utility Allowance Schedule, which is created for determining utility

¹³ This example applies primarily to LIHTC rent-regulated units that do not have additional Rural Housing Service (RHS) or HUD subsidies or house tenants receiving rental assistance. For example, gross rent “does not include any payment under Section 8 of the United States Housing Act of 1937 or any comparable rental assistance program....” 26 U.S.C. § 42(g)(2)(B)(i).

¹⁴ Samuel Dastrup, Simon McDonnell & Vincent Reina, *Household Energy Bills and Subsidized Housing*, 14 CITYSCAPE, no. 1, 2012, at 132.

¹⁵ 26 C.F.R. § 1.42-10(b).

¹⁶ 26 C.F.R. § 1.42-10(b)(1)–(2).

¹⁷ 26 C.F.R. § 1.42-10(b)(3). HUD utility allowances vary for different subsidized housing programs. Presumably, this provision applies mostly to buildings with place-based subsidies, such as Project-based Section 8, Section 202, and Section 811 buildings. Generally these buildings use a consumption-based utility allowance, meaning that the project-owner collects past records of utility usage and determines what is the average energy cost incurred in each unit type. See Chapter 3 of this paper on PBRA.

¹⁸ 26 C.F.R. § 1.42-10(b)(4)(i). See Chapter 4 of this paper on HCV.

¹⁹ See 26 C.F.R. § 1.42-10(b)(4)(ii)(B) (current form of the regulation). See also WASH. STATE HOUS. FIN. COMM’N, TAX CREDIT COMPLIANCE PROCEDURES MANUAL, at O-2 (2009) (discussing the previous versions of the utility

allowances for Housing Choice Voucher tenants.²⁰ LIHTC developers can still use the utility company estimate and the PHA utility allowance to set utility allowances.²¹ However, as of a 2008 rulemaking,²² the IRS permits LIHTC developers and building owners to use a variety of utility allowance calculation methodologies and even allows different utility allowance calculation methods for different utilities.²³ Additionally, HFAs or other state administrators of LIHTC can “require certain information before a method can be used, or they may disapprove use of a method.”²⁴

III. Calculating LIHTC Utility Allowances

The following sections describe each way that an LIHTC utility allowance can be calculated. Sections A, B, C, D, and E describe the methods that LIHTC developers can choose to use. Sections G and H describe how utility allowances are set in LIHTC properties with RHS or HUD assistance.

allowance regulation and its shortcomings). The old approach was disfavored by LIHTC developers and building owners because the PHA utility allowances were generally higher than the actual usage in the building, and the utility company estimates were difficult to obtain. *See, e.g.,* MICH. STATE HOUS. DEV. AUTH., MSHDA UTILITY ALLOWANCE POLICY AND PROCEDURES FOR LIHTC DEVELOPMENTS: PREAMBLE 1 (2010); *IRS Hearing on Proposed Rules (Reg-128274-03_ Providing Additional Methods of Calculating Utility Allowances Related to Low-Income Housing Credit)* (2007) (statement of Michele Norris, president, National Affordable Housing Management Association) (supporting the inclusion of HUSM and agency estimates into the regulation and requesting that energy consumption models be permitted as well). *Id.* (statement of David Cardwell, vice president, National Multi Housing Council) (stating that utility allowances in the pre-2008 regulatory scheme overstated utility use by as much as 100 percent); Letter from Stockton Williams, Senior Vice President/Managing Dir. At Enter. Comty. Partners to Internal Revenue Service (Sept. 17, 2007), *available at* http://www.novoco.com/low_income_housing/resource_files/advocacy/enterprise_utility_091707.pdf (arguing that providing more options for calculating utility allowances can help promote energy efficient renovation and construction).

²⁰ Section 42 Utility Allowance Regulations Update, 72 Fed. Reg. 33,703 (proposed June 19, 2007) (to be codified at 26 C.F.R. pt. 1) (explaining why IRS has decided to change policies and allow alternative means of determining utility allowances). Developers urged that rules be changed because “PHA utility schedules are designed for Section 8 properties, which generally are older buildings with higher utility costs, whereas low income housing projects require measurements that are appropriate for new construction.” *Id.* at 33,704.

²¹ 26 C.F.R. § 1.42-10(b)(4)(ii)(A).

²² Section 42 Utility Allowance Regulations Update, 73 Fed. Reg. 43,863 (July 29, 2008) (to be codified at 26 C.F.R. pt. 1).

²³ I.R.S., GUIDE FOR COMPLETING FORM 8823 LOW-INCOME HOUSING CREDIT AGENCIES REPORT OF NONCOMPLIANCE OF BUILDING DISPOSITION 18-6 (2011).

²⁴ Utility Allowances Submetering, 77 Fed. Reg. 46,987, 46,988 (Aug. 7, 2012).

A. PHA Utility Allowances

Each PHA that administers the Housing Choice Voucher Program (formerly called Section 8) creates a utility allowance schedule that can be used by LIHTC developers to set utility allowances.²⁵ Prior to 2007, LIHTC buildings were obligated to use either the PHA utility allowance schedule or the local utility company estimate in setting their utility allowances.²⁶ Many developers felt that the PHA Utility Allowance Schedule set the allowance higher than it should be for their newer, more energy efficient buildings, because the “utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality.”²⁷ HUD forbids PHAs from using patterns of consumption of above- or below-average income families as a standard for utility allowances.²⁸ The utility schedule must include allowances for utilities that are necessary in a given “locality to provide housing that complies with the housing quality standards.”²⁹ Additionally, a PHA must add an allowance for air-conditioning to the schedule “if the majority of housing units in the market provide centrally air-conditioned units or

²⁵ See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for Houston, Texas) (2012), available at <http://www.housingforhouston.com/media/34481/utility%20allowance%202013.pdf> (displaying a typical example of a utility allowance schedule).

²⁶ See *supra* note 19.

²⁷ See, e.g., *Providing Additional Methods of Calculating Utility Allowances Related to Low-Income Housing Credit: IRS Hearing on Proposed Rules (REG-128274-03)* (2007) (statement of Paul Emrath, assistant staff vice president, Housing Policy Research); 24 C.F.R. § 982.517(b)(1). Families that are extravagant in their utility usage do not have those costs compensated, and HUD suggests that families that complain about their utility allowances “should be counseled about reasonable conservation measures.” U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, at 18-1 (2001) “Housing of similar size and type” generally refers to categories of housing like single-family detached, low-rise apartment, and high-rise apartment.

²⁸ U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES 2 (1997), available at <http://www.hud.gov/offices/adm/hudclips/forms/files/52667.pdf> [hereinafter HUD-52667].

²⁹ 24 C.F.R. § 982.517(b)(2)(i); U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, at 18-1 (2001), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook. (“The utility allowance schedule must include the utilities and services necessary to provide housing that complies with HQS.”). Housing Quality Standards establish “the minimum quality criteria necessary for the health and safety of program participants.”

there is appropriate wiring for tenant-installed air conditioners.”³⁰ Each PHA must publish a schedule that separately lists the utility allowance for each utility and housing service (e.g., waste disposal),³¹ each unit size, and each housing type.³² A PHA publishes its schedules on Form HUD-52667,³³ which is made available to tenants to calculate their utility allowances.³⁴ However, the PHA makes the final utility allowance calculation after the tenant has requested tenancy approval.³⁵

HUD advises PHAs to “base the allowances on actual rates and average consumption estimates that will be adequate to cover expected average utility costs” for a year.³⁶ HUD guidance asserts that information about utility consumption in an area should usually be

³⁰ 24 C.F.R. § 982.517(b)(2)(ii). Conversely, PHAs in states with warm climates allocate very little money to heating, even though there are no explicit regulations mandating this. *See, e.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for Honolulu, Hawaii) (2012), available at <http://www1.honolulu.gov/dcs/paymentstandardandutilityallowanceschedule.htm>.

³¹ The schedule must include allowance for the following categories of utilities and housing services: “space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services.” 24 C.F.R. § 982.517(b)(2)(ii).

³² 24 C.F.R. § 982.517(b)(3). HUD defines unit type as the kind of building in which the subsidized unit is located (e.g., high-rise apartment, semi-detached, or single-family). *See* U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 29, at 18-2. HUD defines unit size by the number of bedrooms in the unit. *Id.* (“the PHA must use the allowance for the unit size actually leased by the family, rather than the family unit size determined under the PHA’s subsidy standards.”). PHAs are given some leeway in categorizing and pricing the different kinds of utility fuels that they can list on the schedules. *Id.* (“The utility allowance schedule should include allowances for each type of utility or fuel commonly used in the community. If the utility or fuel is available from more than one supplier, the PHA can determine an average cost across all suppliers, or can use different allowances for utilities or fuels purchased from different suppliers.”).

³³ Form HUD-52667 allows PHAs to set different rates for the types of fuel used for heating, cooking, and water heating, meaning that the tenant would have to correctly determine which fuel source is used in the building prior to getting tenancy approval. HUD-52667.

³⁴ 24 C.F.R. § 982.517(b)(4) (“The utility allowance schedule must be prepared and submitted in accordance with HUD requirements on the form prescribed by HUD.”); HUD-52667. Each PHA will likely have a different versions of this form for different kinds of housing units. *See, e.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for Bedford County, Tennessee) (2013), available at <http://www.thda.org/DocumentCenter/View/4000>. Tenants can also use HUD-52667 “to compare gross rents for various units with local payment standards and personal affordability limits.” U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 29, at 18-17.

³⁵ U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 29, at 18-17.

³⁶ *Id.* at 18-4. The utility allowance is a uniform monthly deduction from the rent and does not deduct different amounts on a seasonal basis, which is the basis for a common complaint against utility allowances. *See, e.g.*, Steven Ferrey, *In from the Cold: Energy Efficiency and the Reform of HUD’s Utility Allowance System*, 35 HARV. J. ON LEGIS. 145, 152 (1995) (positing that calculating utility allowances based on average yearly utility burden could lead to tenants being overcompensated some months and undercompensated in other months without the necessary disposable income to make payments).

available from local sources.³⁷ However, if, for whatever reason, a PHA is unable to use local information, “HUD will approve use of national average consumption data” to calculate the utility allowance.³⁸

B. Utility Company Estimate

The IRS allows any interested party (such as a low-income tenant, building owner, or HFA) to obtain a utility company estimate of utility allowances for a given unit.³⁹ The utility would determine the estimated utility expenses of the unit by estimating the utility expenditures of a similarly sized and constructed unit in the same geographic area as the unit for which the request was made.⁴⁰ Unless the parties agree to an alternative distribution of costs, the initiating party will bear the costs of obtaining the estimate.⁴¹ The interested party must retain the documentation and provide it to the housing finance agency and to the owner, who must subsequently provide it to the tenants.⁴²

C. Agency Estimate

The agency estimate is sometimes called the actual consumption method because the utility allowances are calculated based on the unit’s prior consumption history.⁴³ A building owner can request a utility allowance estimate for each unit in a building from a HFA, so long as

³⁷ *Id.* The local sources listed are: “Electric utility suppliers, Natural gas utility suppliers, Water and sewer suppliers, Fuel oil and bottled gas suppliers, Public utility commissions, Real estate and property management firms, State and local agencies, Appliance sales and leasing firms, Neighboring PHAs.” *Id.*

³⁸ *Id.* Specifically, HUD field offices are those “delegated responsibility for day-to-day administration” of the TBRA program. 24 C.F.R. § 982.3. *See infra* Section III.a.

³⁹ 26 C.F.R. § 1.42-10(b)(4)(ii)(B).

⁴⁰ *Id.* If the building requesting the utility company estimate is in a de-regulated utility market, then the interested party needs to ask only one utility company for an estimate, but that company must offer utilities to the building in order to be eligible to make an estimate. *Id.*

⁴¹ *Id.* Therefore, it is unlikely that low-income tenants will be able to procure an estimate through these methods.

⁴² *Id.*

⁴³ *See, e.g.,* United States Tax Reporter P 424.60 Qualified Buildings and Projects for Low-Income Housing Credit (2014); MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY, *supra* note 19, at 3. The agency estimate is, therefore, similar to the consumption model of utility allowance calculation used by RHS and HUD regulated buildings. *See supra* Sections III.F–G.

the HFA has jurisdiction over the building, and it agrees to provide such an estimate.⁴⁴ The building owner is responsible for the costs of obtaining a utility allowance estimate.⁴⁵ The HFA makes the estimate by providing the building owner with either the “estimated per-unit cost of the utilities for units of similar size and construction for the geographic area in which the building containing the units is located” or with an estimate based on the building’s actual utility usage and rates.⁴⁶ Additionally, in making the estimate, the HFA must “take into account, among other things, local utility rates, property type, climate and degree-day variables by region in the State, taxes and fees on utility charges, building materials, and mechanical systems.”⁴⁷ The HFA may hire a third-party contractor to complete undertake the agency estimate.⁴⁸

D. Energy Consumption Model

As of July 2008, the IRS permits state or local housing credit agencies to approve of the use of the energy consumption model (ECM) to determine utility allowances.⁴⁹ IRS regulations set minimum requirements for what an ECM must include.⁵⁰ Specifically, the model must take into account “unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of building location.”⁵¹ Only a properly licensed engineer or qualified professional approved by the allocating agency can create utility allowance estimates

⁴⁴ 26 C.F.R. § 1.42-10(b)(4)(ii)(C).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Section 42 Utility Allowance Regulations Update, 72 Fed. Reg. 33,703 (proposed June 19, 2007) (to be codified at 26 C.F.R. pt. 1). Section 42 Utility Allowance Regulations Update, 73 Fed. Reg. 43,863, 43,866 (July 29, 2008) (“The IRS expects that the ECM will be the most popular utility allowance calculation method. “It is expected that this more accurate model will be the model most commonly used by most building owners, particularly those with buildings that are not very old.”).

⁵⁰ 26 C.F.R. § 1.42-10(b)(4)(ii)(E).

⁵¹ *Id.*

using the ECM.⁵² Those making estimates of utility allowances through the ECM must use the building's consumption data from a 12 month period that ended "no earlier than 60 days prior to the beginning of the 90-day period"⁵³ before the changes in the utility allowance must effect a change in the gross rent.⁵⁴ Similarly, the utility rates used in the ECM must have been in place 60 days prior to the beginning of the 90-day period.⁵⁵ Additionally, if a building is newly constructed or if it does not yet have 12 months of consumption data, the engineer or qualified professional "may use consumption data for the 12-month period of units of similar size and construction" in the same area.⁵⁶ Some states restrict the use of the ECM to only new construction or complete renovations.⁵⁷

E. HUD Utility Schedule Model

HUD developed the HUD Utility Schedule Model (HUSM), a Microsoft Excel spreadsheet model, "to provide a consistent basis for determining utility schedules, using form HUD-52667."⁵⁸ HUSM allows PHAs or building owners to easily calculate utility allowance schedules by simply plugging in utility rate information and local climate information.⁵⁹ HUSM incorporates data on utility consumption from the U.S. Department of Energy's Residential

⁵² *Id.* Further, the qualified professional cannot be related to the building owner, as defined in 26 U.S.C. § 267(b) and 26 U.S.C. § 707(b). *Id.*

⁵³ *Id.* The "90-day period" means that "the new utility allowance must be used to compute gross rents of the units due 90 days after the change." 26 C.F.R. § 1.42-10(c)(1).

⁵⁴ 26 C.F.R. § 1.42-10(c)(1).

⁵⁵ 26 C.F.R. § 1.42-10(b)(4)(ii)(E).

⁵⁶ *Id.*

⁵⁷ *See, e.g.,* Memorandum from The California Tax Credit Allocation Committee to Housing Credit Property Owners and Managers (Dec. 18, 2009), at 2.

⁵⁸ U.S. DEP'T OF HOUS. & URBAN DEV., HUD UTILITY MODEL INSTRUCTIONS 1, [hereinafter HUSM Instructions] available at http://www.huduser.org/portal/resources/UtilityModel/Instructions_HUDUtilityModel_Rev3.doc (describing how to use 2007 version of the HUSM). The HUSM model can be downloaded directly from the HUD website. U.S. DEP'T OF HOUS. & URBAN DEV., HUD UTILITY SCHEDULE MODEL (2013) [hereinafter HUSM], available at http://www.huduser.org/portal/resources/UtilityModel/HUD_Utility_Schedule_Model_Rev2.zip. An older version of the HUD Utility Schedule Model is posted on other parts of the HUD website. U.S. DEP'T OF HOUS. & URBAN DEV., HUD UTILITY SCHEDULE MODEL (2007), [hereinafter HUSM 2007] available at <http://www.huduser.org/resources/UtilityModel%5CHUD%20Utility%20Schedule%20Model.zip>.

⁵⁹ *Utility Allowances*, U.S. Dep't of Hous. & Urban Dev., <http://www.huduser.org/portal/resources/utilallowance.html> (last visited Oct. 9, 2013).

Energy Consumption Survey (RECS).⁶⁰ In 2008, the HUSM was endorsed for use by individual LIHTC developers (previously, it could only be used indirectly if a PHA was using it to come up with the PHA Utility Allowance Schedule).⁶¹

In order to determine a utility allowance using the HUSM, a PHA enters its location, housing type,⁶² the building's ENERGY STAR rating, and utility rates ("Tariffs") into the spreadsheet model tool. The model will automatically determine the climate characteristics, which include heating days and cooling days.⁶³ In order to effectively use the HUSM, the PHA must find current utility tariffs (rates) per tariff block⁶⁴ as well as those from the last time that utility allowances were updated, and HUSM will automatically indicate whether the allowances need to be updated (i.e., whether the utility rates rose by 10 percent or more).⁶⁵ HUSM will generate a HUD-52667 form with utility allowances for each kind of utility.⁶⁶

⁶⁰ *Id.*; see, e.g., 2009 RECS Survey Data, U.S. ENERGY INFO. ADMIN. (May 6, 2013), <http://www.eia.gov/consumption/residential/data/2009/>. The first version of the HUSM was completed in 2002 with the help of GARD Analytics; it used a regression approach to determine most of the end-uses (utility-specific allowances), based on the RECS data. See GARD ANALYTICS & U.S. DEP'T OF HOUS. & URBAN DEV., UTILITY ALLOWANCE MODEL FINAL REPORT (2003) (reporting on study results and explaining how model should have been revised); JASON GLAZER & U.S. DEP'T OF HOUS. & URBAN DEV., SUMMARY REPORT: ENERGY STAR ADJUSTMENT FOR HUD-52667 SPREADSHEET MODEL 2 (2012) (summarizing history of the HUSM and explaining the changes that have been made to it). HUD uses RECS data, even though it has its limitations, because it is "[t]he best and effectively only detailed national data" on energy consumption in different kinds of housing units. RILEY & ASSOCS. & U.S. DEP'T OF HOUS. & URBAN DEV., HUD UTILITY MODEL (HUSM) REBENCHMARKING 10 (2012).

⁶¹ See Section 42 Utility Allowance Regulations Update, 72 Fed. Reg. at 33,704.

⁶² Included unit types include: Single Family House, Single Family Attached, Low-rise Apartment, High-rise Apartment, and Manufactured Home. HUSM, *supra* note 58.

⁶³ See HUSM, *supra* note 58; HUSM Instructions, *supra* note 58, at 2 (instructing PHAs to "select the site that is closest to the population served by the housing authority or the most well known monitoring location.").

⁶⁴ Utility rates sometimes change for a consumer after a certain amount has been used or after a certain block has been exhausted. Block rates for utilities can vary by season, but sometimes there is just another tariff for summer. HUSM Instructions, at 3. Some tariffs have stepped blocks, which charge "a certain amount for each kWh in the first group of kWh, and different charges for greater use." *Id.* at 4. For example, the first 500 kWh might cost \$1 for each kWh, while the next 500 kWh would cost only \$0.75.

⁶⁵ See HUSM, *supra* note 58; HUSM Instructions, *supra* note 58, at 2-3 (reminding PHAs that "Most utilities allow you to download a tariff or rate book from their web site. After you do this, get a bill to use as an example and determine all of the components that make up the bill. At times the tariff is broken into a main tariff and many riders. Some utilities describe taxes in the rate book and some do not, so check the example bill."). The instructions also instruct users how to calculate utility tariffs for deregulated utilities. *Id.* at 3.

⁶⁶ See HUSM, *supra* note 58; HUSM Instructions, *supra* note 58, at 1; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 28.

HUD determined the consumption estimates by performing a regression analysis of RECS survey cases.⁶⁷ The consumption estimates are then multiplied by the utility costs and are adjusted for the number of bedrooms in the unit.⁶⁸ Units with an ENERGY STAR rating will generate a different utility allowance schedule.⁶⁹ HUD commissioned GARD Analytics (GARD) to develop “an estimate of the percentage by which new ENERGY STAR rated residential construction reduces energy consumption.”⁷⁰ GARD suggested that future studies should be undertaken to more accurately determine actual energy savings.⁷¹ HUD is planning to conduct further research to refine the HUSM “to more accurately disburse funds for utilities that are actually consumed.”⁷²

F. RHS Utility Allowances

RHS utility allowances are determined pursuant to USDA regulations,⁷³ which stipulate that the borrower must set both the rents and utility allowance in RHS housing.⁷⁴ Before a utility

⁶⁷ See HUSM Instructions, *supra* note 58, at 13.

⁶⁸ *Id.* at 14.

⁶⁹ HUSM, *supra* note 58.

⁷⁰ JASON GLAZER & U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 60, at 2 (quoting the language used by HUD in commissioning the report and methodology for ENERGY STAR buildings). HUD’s Public & Indian Housing has a policy of promoting “the benefits of using ENERGY STAR equipment to minimize consumption and lifecycle costs.” *PIH Energy Goals Support HUD’s Energy Action Plan*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/pih/programs/ph/phecc/resources/egoals.cfm> (last visited Oct. 23, 2013). After examining a number of studies about the energy efficiency of homes with ENERGY STAR ratings, GARD recommended that the HUSM adjust the electric usage of home in southern climates by 4 percent and adjust the gas usage by 5 percent. *Id.* at 20. In northern cities, GARD recommended that electric usage should be adjusted by 6 percent and gas usage should be adjusted by 9 percent. *Id.*

⁷¹ *Id.* at 21. However, in the actual HUSM, it seems as though the savings are higher when we chose the ENERGY STAR option, the utility allowance of \$126 decreased to \$104. HUSM. Furthermore, it is not clear what relation the ENERGY STAR utility allowance has with the Energy Efficiency-Based Utility Allowance (EEBUA), initiated in California in the early 2000s. See *infra* Appendix III. The PHA of the City of Nacogdoches, Texas recently released ENERGY STAR certified utility allowance schedules for each of its housing types, but it is not immediately clear whether it used the HUSM. See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., ALLOWANCES FOR TENANT-FURNISHED UTILITIES AND OTHER SERVICES (for Nacogdoches, Texas) (2013), available at <http://www.nacogdoches-ha.org/FormsAndDocumentation.html>.

⁷² U.S. DEP’T OF HOUS. & URBAN DEV., HUD RESEARCH ROADMAP FY 2014-FY 2018, at 89 (2013). Specifically, this plan discusses incorporating energy efficiency into the HUSM, but it appears that this was already done. See JASON GLAZER & U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 60.

⁷³ 7 C.F.R. § 3560.202 (2012).

⁷⁴ 7 C.F.R. § 3560.202(a).

allowance goes into effect, the USDA must approve it.⁷⁵ In RHS housing, the borrower “must establish utility allowances for each size and type of rental unit in the housing project based on estimated utility cost.”⁷⁶ The regulations also stipulate that borrowers must review the utility allowances annually, adjust them for accuracy, and maintain documentation.⁷⁷ A USDA guidebook provides more details about what is required from the borrower. If utility costs have changed by 15 percent or more, then the borrower must document the utility changes, along with a “significant sampling of tenant utility usage from the utility company.”⁷⁸ If there was a change of 15 percent or less in utility costs, then the borrower need only provide “[i]nformation regarding rate changes” and a smaller sample of tenant utility usage.⁷⁹ If there is no change in the utility rates, then the borrower needs only obtain documentation, if obtainable, that rates have not changed and a public release from the utility stating that utility rates have not changed.⁸⁰ The annual review occurs in conjunction with the annual budget process, during which time the borrower submits the requisite documentation.⁸¹ Additionally, landlords can include the costs of third party contracts for utility allowance calculation in their eligible project expenses.⁸² Because RHS buildings use the consumption model,⁸³ meaning that utility allowances are determined by historical energy usage, these energy conservation measures would likely lead to lower utility allowances.⁸⁴

⁷⁵ 7 C.F.R. § 3560.202(b).

⁷⁶ 7 C.F.R. § 3560.202(d).

⁷⁷ *Id.*

⁷⁸ U.S. DEP’T OF AGRIC., HB-2-3560 MFH ASSET MANAGEMENT HANDBOOK 4-29 (2005).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 7-3.

⁸² *Id.* at ch. 4, attachment 4-A, p. 2.

⁸³ Consumption model here does not mean the same thing as Energy Consumption Model (ECM) (see *infra* Section III.G), it is rather a generic term for calculating utility allowances using average, historical energy consumption of a development’s tenants.

⁸⁴ See MICHAEL J. NOVOGRADAC, 2010 LIHTC PROPERTY MANAGEMENT BOOK: REFERENCE MATERIAL AND DOCUMENTATION FOR TAX CREDIT PROPERTY MANAGERS 37 (2010) (“If a... building... receives subsidies under the RHS Section 515... and has Section 8 rental assistance tenants, then the RHS regulations will apply. This rule is

The USDA requires that RHS-regulated buildings implement energy conservation measures, such as “energy-efficient lighting, water-saving fixtures, low-flow toilets, energy-efficient appliances, insulation, caulking and weather-stripping, storm doors and windows, and regular cleaning and replacement of filters and other equipment.”⁸⁵

G. HUD-regulated Utility Allowances

HUD-regulated buildings are those that combine project-based rental assistance with LIHTC financing.⁸⁶ Section 8 New Construction and Substantial Rehabilitation (Project-Based Rental Assistance or PBRA) comprise the largest part of HUD-regulated buildings, but other programs include Section 202/811 Supportive Housing for the Elderly and Disabled and Section 236.⁸⁷

In HUD-regulated buildings where all or some of the utility costs are paid by the tenant, a Contract Administrator⁸⁸ sets a utility allowance so that the total that tenants contribute to rent

favorable for the building because RHS regulations allow for lower utility allowances due to every efficient techniques, whereas HUD guidelines do not.”).

⁸⁵ *Id.* at 5-3.

⁸⁶ See MICH. STATE HOUS. DEV. AUTH., UTILITY ALLOWANCES FOR LIHTC DEVELOPMENTS 2 (2010). The Washington D.C. Department of Housing and Community Development lists project-based Section 8 and Section 236 units as HUD-regulated, but it also states that the rule does not apply for buildings that just have FHA-insured mortgages. D.C. DEP’T OF HOUS. & CMTY. DEC., LOW-INCOME HOUSING TAX CREDIT AND HOME INVESTMENT PARTNERSHIPS PROGRAM OWNER’S COMPLIANCE MANUAL 13 (2012).

⁸⁷ Even though the Section 236 has not produced new units since 1973, some buildings with Section 236 loans possibly also have LIHTC financing. See *Directory of New York City Affordable Housing Programs*, FURMAN CTR. FOR REAL ESTATE AND URBAN POLICY, <http://furmancenter.org/institute/directory/entry/section-236> (last visited Feb. 2, 2014). Similarly, Section 8 Project-Based Rental Assistance (Section 8 New Construction and Substantial Rehabilitation) buildings ceased to be built in 1983, but some buildings also share LIHTC subsidies. See *Subsidized Housing Information Project (SHIP)*, FURMAN CTR. FOR REAL ESTATE AND URBAN POLICY, <http://furmancenter.org/data/search> (last visited Feb. 2, 2014) (indicating that some properties in New York City combine LIHTC financing with Project-Based Section 8); *Directory of New York City Affordable Housing Programs*, FURMAN CTR. FOR REAL ESTATE AND URBAN POLICY, <http://furmancenter.org/institute/directory/entry/section-8-new-construction-and-substantial-rehabilitation> (last visited Feb. 2, 2014). However, Section 202 and Section 811 buildings continue to be built and can be combined with LIHTC financing. See Scott E. Fireison & Sheldon L. Schreiber, *Section 202 Mixed-Finance Redevelopment*, PEPPER HAMILTON, LLP (Aug. 10, 2007).

⁸⁸ A PBRA contract is administered by a Contract Administrator (CA), which is either HUD, a Public Housing Agency (PHA), or any other “State or local government instrumentality that is authorized to engage in or assist in the development or operation of housing for low-income families.” *Section 8 Program Background Information*,

and utility costs does not exceed 30 percent of their adjusted income.⁸⁹ The utility allowance is set annually when the Project-based Section 8 contract is renewed or when contract rents are adjusted.⁹⁰ The tenant must pay the property owner the tenant rent,⁹¹ which is 30 percent of the tenant's adjusted income minus the utility allowance.⁹² HUD then pays the property owner an amount equal to the contract rent plus the utility allowance minus the total tenant payment (TTP).⁹³ If the utility allowance for a unit exceeds a tenant's TTP, HUD pays a utility reimbursement to the tenant, equal to the utility allowance minus TTP.⁹⁴

HUD regulations prescribe some guidelines for utility allowances, but do not prescribe how utility allowances should be set for a building.⁹⁵ HUD regulations require that the property

U.S. DEP'T OF HOUS. & URBAN DEV.,

http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/s8bkinfo (last visited June 24, 2013).

⁸⁹ Thirty percent cap was enacted in the Omnibus Budget Reconciliation Act of 1981, sec. 322, § 3(a)(1), 95 Stat. 357 (codified as amended at 42 U.S.C. § 1437a(A)(1)). See U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.1 MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING (1996), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsg/4350.1.

⁹⁰ Memorandum from Carol J. Galante, Deputy Assistant Secretary for Multifamily Housing Programs to All Multifamily Hub directory, All Multifamily Program Center Directors, All Contract Administrators (June 20, 2011), (requiring that utility analyses be submitted every time contract rents are adjusted through the Annual Adjustment Factor (AAF), Operating Cost Adjustment Factor (OCAF), Budget Based Rental Adjustment (BBRA), and special adjustment).

⁹¹ 24 C.F.R. § 5.603 (tenant rent defined as “[t]he amount payable monthly by the family as rent to the unit owner (Section 8 owner or PHA in public housing).”).

⁹² 24 C.F.R. § 5.603 (“If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”). See also *Contracts with Rent amt and Utility Allowance amt*, U.S. DEP'T OF HOUS. & URBAN DEV. (June, 4, 2013), <http://portal.hud.gov/huddoc/contractsrentutilityamt.exe> (providing a list of all recorded utility allowances).

⁹³ U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 5-25 (2009), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf [hereinafter HUD HANDBOOK 4350.3] (“The Total Tenant Payment (TTP) is the amount a tenant is expected to contribute for rent and utilities.”).

⁹⁴ The property owner can either pay the utility reimbursement directly to the family or, with the family's consent, to the utility supplier, but if after a sufficient waiting period, the tenant, for whatever reason, does not cash the check, the owner must void the check and return the funds to HUD as an adjustment on the voucher. 24 C.F.R. § 5.603. For greater detail and examples of how TTP interacts with the Housing Assistance Payment, see HUD HANDBOOK 4350.3, *supra* note 93, at 5-26.

⁹⁵ Project owners used to be allowed to simply recommend utility allowances, so the initial utility allowances were probably just set at the project owners' recommendations, and until 1985, were likely adjusted only when the project owner deemed it necessary. See Section 8 Housing Assistance Payments for New Construction, 44 Fed. Reg. 59,408, 59,428 (Oct. 15, 1979) (codified at 24 C.F.R. pt. 880.610).

owner include “[s]uch data as changes in utility rates and other facts affecting utility consumption....”⁹⁶ Further, they mandate that owners must obtain HUD approval for utility allowances when utility rates cumulatively increase by 10 percent over the previous utility allowance.⁹⁷ The chapter authorizes the Project Manager or Contract Administrator to withhold any rent adjustments until utility analyses are submitted.⁹⁸

The *HUD Handbook 4350.1: Multifamily Asset Management and Project Servicing* (“*HUD Handbook*”) requires that property owners “recommend a utility allowance for each unit type,” which should be “the owner’s best estimate of the average monthly utility cost that an energy conscious resident will incur for the year.”⁹⁹ The *HUD Handbook* requires property owners to submit a summary with the following components in support of a change to the utility allowance: “(1) the utilities covered by the allowance, (2) a statement of whether any utility rate increases or decreases were implemented during the past 12 months or are expected to be implemented during the next 12 months,” and (3) a statement of how energy conservation initiatives have or will impact consumption.”¹⁰⁰

Because the *HUD Handbook* guidelines are vague and afford wide discretion to PHAs and other contract administrators, there may be substantial variation in utility allowances for similarly situated units.¹⁰¹ HUD Regional offices and local Contract Administrators have in the past provided additional guidance about the proper way to conduct and submit a utility analysis.

⁹⁶ *E.g.*, 24 C.F.R. § 880.610.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 93, at 7-24.

¹⁰⁰ *Id.* at 7-24(A). The *HUD Handbook* instructs the administrator to review the information that the owner submitted. If the administrator’s analysis is substantially different from the owner’s, then the administrator should discuss the issue with the project owner and request additional information. *Id.* at 7-35(C). However, the *HUD Handbook* states that administrators “should usually be able to set allowances at the levels recommended by the owner.” *Id.* at 7-35(D).

¹⁰¹ Unfortunately, the only utility allowance data that we have available to us simply lists the utility allowances for each respective unit in each building. This leaves us with many unknowns, such as: the square footage of the apartment, which utilities are included in the rent and which ones are not, what rates is the landlord paying for the

IV. Submetering

Submetering is a utility configuration in which the building owner pays the utility bill, but then charges each tenant for that tenant's actual utility usage.¹⁰² For the IRS's purposes, utility costs paid by the tenant to the landlord based on consumption in a submetered unit are treated the same as individually metered tenant-paid utilities.¹⁰³ Building owners must charge tenants in sub-metered units the same utility company rates incurred by the building owner.¹⁰⁴ The building owners can charge an administrative fee of no more than \$5.00 a month for the costs of submetering.¹⁰⁵ The above rules only apply if applicable RHS or HUD rules do not apply.¹⁰⁶

A. Ratio Utility Billing Systems

After the IRS issued Notice 2009-44, which formally allowed sub-metering, at least one commentator on the notice requested that the IRS also formally allow ratio utility billing systems (RUBS).¹⁰⁷ Under RUBS, the owner bills tenants not on actual consumption of utilities but on a predetermined ratio of the building's total energy use to bedroom size, number of tenants, or square footage.¹⁰⁸ The IRS explicitly forbade the use of RUBS to compute utility allowances, because RUBS based its computations on factors other than the actual consumption of tenants.¹⁰⁹

utilities, whether the usage in the particular building is uncharacteristically low or high, and whether air conditioners are a common fixture in the building. *Contracts with Rent amt and Utility Allowance amt, supra* note 92.

¹⁰² I.R.S., Notice 2009-44, (May 5, 2009) (indicating that submetering rates must be based on a tenant's actual consumption).

¹⁰³ *Id.* at 1. This notice was supposed to be incorporated into the utility allowance regulations, but, as of today, the change in the rules have only been proposed. *See id.* at 5; Utility Allowances Submetering, 77 Fed. Reg. 46,987, 46,988 (Aug. 7, 2012).

¹⁰⁴ *Id.* at 4. The proposed rule eliminates the \$5.00 cap. Utility Allowances Submetering, 77 Fed. Reg. at 46,989.

¹⁰⁵ *Id.* These \$5.00 are not include in the gross rent. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Utility Allowances Submetering, 77 Fed. Reg. at 46,988.

¹⁰⁸ *Id.*; NOVOGRADAC, *supra* note 84, at 38.

¹⁰⁹ *See* Utility Allowances Submetering, 77 Fed. Reg. at 46,988.

However, some state agencies allow the RUBS to be used, so long as the cost paid by the tenant is considered a non-optional fee that must be included in the gross rent.¹¹⁰

V. Changes in Utility Allowances

A. Utility Allowance Updates

IRS regulations require that whenever a utility allowance for a unit changes the new utility allowance be used to compute gross rents due 90 days after the change.¹¹¹ In order to change the utility allowance using either the utility company estimate or the HUSM, building owners “must submit copies of the utility estimates to the Agency that has jurisdiction over the building and make the estimates available to all tenants in the building at the beginning of the 90-day period before the utility allowances can be used in determining the gross rent....”¹¹²

Similarly, building owners using the agency estimate must make the utility estimates available to tenants at the beginning of the 90-day period.¹¹³ Building owners seeking to set or change utility allowances using the utility company estimate, agency estimate, HUSM, or the ECM are responsible for all costs incurred in obtaining the estimates.¹¹⁴ In the jurisdictions of certain HFAs, building owners might have to pay administrative or processing fees to the HFA if they opt for a particular methodology.¹¹⁵

¹¹⁰ Compare Memorandum from Jennifer Marchand, LIHTC and Lead Compliance Technical Advisor, to LIHTC Owners and Management Agents (Jan. 8, 2013) (allowing the use of RUBS so long as it is called a non-optional fee rather than a utility allowance), with COLO. HOUS. FIN. AUTH., LOW INCOME HOUSING TAX CREDIT PROGRAM COMPLIANCE MANUAL 15 (2012) (stating that the use of RUBS is never permissible). In effect, using RUBS as a non-optional fee makes it function like a utility allowance, but without any regulations that go along with it.

¹¹¹ 26 C.F.R. § 1.42-10(c)(1).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *infra* Section VII.

B. Annual Review of Utility Allowances

The IRS requires that building owners review the basis upon which the utility allowances were established at least once a year and update the utility allowances if need be.¹¹⁶ The annual review must “take into account any changes to the building such as any energy conservation measures that affect energy consumption and changes in utility rates.”¹¹⁷ Generally, building owners review their utility allowances when HUD issues updates of the AMGI, which may change allowable gross rent.¹¹⁸ The IRS does not require building owners to review utility allowances or implement new utility allowances until the building is 90 percent occupied for no fewer than 90 consecutive days or until “the end of the first year of the credit period.”¹¹⁹

VI. LIHTC Compliance

The IRS assigns responsibility for ensuring compliance with IRS statutes and regulations to the HFAs.¹²⁰ Specifically, HFAs must include the “procedure that the agency . . . will follow in monitoring for noncompliance . . . and in notifying the Internal Revenue Service . . . and in monitoring for noncompliance with habitability standards through regular visits” in their Qualified Allocation Plans.¹²¹ Failure to properly calculate utility allowances results in a building falling out of compliance, and the HFA must report such lack of compliance to the

¹¹⁶ 26 C.F.R. § 1.42-10(c)(2). *But see* ARIZ. DEP’T OF HOUS., STATE OF ARIZONA UTILITY ALLOWANCE GUIDELINES FOR LOW-INCOME HOUSING TAX CREDIT PROPERTIES 3 (2011), *available at* <http://www.azhousing.gov/azcms/uploads/COMPLIANCE/LIHTC%20Utility%20Allowance%20Guidelines%202011.pdf> (stating that in Arizona, “in no event may an owner change the utility allowance for a unit more than once in a twelve-month period.”).

¹¹⁷ 26 C.F.R. § 1.42-10(c)(2).

¹¹⁸ NOVOGRADAC, *supra* note 84, at 82.

¹¹⁹ 26 C.F.R. § 1.42-10(c)(1).

¹²⁰ 26 U.S.C. § 42(m)(1)(B)(iii).

¹²¹ *Id.* If an HFA becomes aware of a builder’s or building owner’s noncompliance, it must file “form 8823 to fulfill their responsibility under section 42(m)(1)(B)(iii).” I.R.S., LOW-INCOME HOUSING CREDIT AGENCIES REPORT OF NONCOMPLIANCE OF BUILDING DISPOSITION 2 (2011) (IRS Form 8823).

IRS.¹²² In addition to Qualified Allocation Plans, HFAs also publish Affordable Housing Tax Credit Program Compliance Manuals to address most compliance issues.¹²³

After an HFA determines that a building is non-compliant, the HFA can give the building owner no more than 90 days to correct the noncompliance, before the HFA must send a report of the non-compliance to the IRS.¹²⁴ Unlike a variety of other compliance issues that require on the ground verification, an HFA can verify compliance with utility allowance regulations by examining the owner-submitted documentation. Accordingly, IRS regulations mandate that owners maintain all records of utility consumption estimates and other supporting data.¹²⁵

If a building owner is noncompliant with IRS regulations and the HFA has sent the IRS a report of the noncompliance, the IRS can recapture “the accelerated portion of the credit, with interest, for all prior years.”¹²⁶ If a project experiences a decrease in qualified basis, the IRS recaptures the credit on the “accelerated amount claimed for all the previous years on the amount of the reduction in qualified basis.”¹²⁷ If the project owner succeeds in remedying the noncompliance in a reasonable time, there should be no recapture of the credits.¹²⁸ Furthermore,

¹²² I.R.S., *supra* note 121, at 1.

¹²³ See, e.g., WISC. HOUS. & ECON. DEV. AUTH., AFFORDABLE HOUSING TAX CREDIT PROGRAM COMPLIANCE MANUAL (2013).

¹²⁴ See, e.g., *id.* at 56 (providing 30 days to submit missing or corrected documentation and providing 90 days to reach a state of compliance with the regulations); MINN. HOUS. FIN. AGENCY, HOUSING TAX CREDIT PROGRAM COMPLIANCE MANUAL 15 (2013). “The time to correct the noncompliance may be extended up to a total of 6 months with state agency approval.” I.R.S., GUIDE FOR COMPLETING FORM 8823 LOW-INCOME HOUSING CREDIT AGENCIES REPORT OF NONCOMPLIANCE OF BUILDING DISPOSITION 1-1 (2011). The HFA must send the I.R.S. a Form 8823 even if the owner has returned to compliance. *Id.*

¹²⁵ 26 C.F.R. § 1.42-10(d) (“The building owner must retain any utility consumption estimates and supporting data as part of the taxpayer’s records . . .”).

¹²⁶ Tax Reform Act of 1986. Pub. L. No. 99-514 (1986), *reprinted in* Joint Comm. on Taxation, 99th Cong., General Explanation of the Tax Reform Act of 1986, at 166 (1987). “The qualified basis is used to determine the amount of tax credit allowed per building in the project. The qualified basis of a building is determined by multiplying its eligible basis by its applicable fraction. The annual tax credit amount is computed by multiplying a building’s qualified basis by the applicable tax credit percentage (approximately 4% or 9%) for that building.” WISC. HOUS. & ECON. DEV. AUTH., *supra* note 123, at 20. See 26 U.S.C. § 42(j).

¹²⁷ *Id.* at 167.

¹²⁸ *Id.*

project owners can request that the IRS waive the recapture penalty if the errors in the applicable fraction of qualified basis were small.¹²⁹

IRS guidance specifies which errors could constitute noncompliance. These include: the failure to use an appropriate utility allowance, failure to properly calculate the utility allowance, failure to update rents for a revised utility allowance within the 90 day period, failure to reduce rents for utility allowances (even if the rent is below the maximum gross rent), failure to “review the basis on which the utility allowance is established at least during both the prior and current calendar year,” and failure to maintain records of utility allowance computation.¹³⁰

VII. Regional Variations in Utility Allowance Methodology

The following section is meant to provide a sampling of some of the variations among states in dealing with LIHTC utility allowances. The sample is not exhaustive.

Arizona Department of Housing

The Arizona Department of Housing (ADOH) allows for the use of any kind of utility allowance estimate except for the agency estimate, because its budget does not allow for it.¹³¹ While LIHTC developers in Arizona must submit their utility allowance estimates for approval, ADOH claims that it does not review the accuracy of utility allowance estimates reached using the HUSM, so long as the estimate was certified by an engineer, qualified energy rater, or auditor.¹³² After an owner chooses one particular method of utility allowance estimation, the owner may not switch methodologies until the annual review for the following year.¹³³

¹²⁹ Omnibus Budget Reconciliation Act of 1993 § 13142, 26 U.S.C. § 42(g)(8)(A); WISCONSIN HOUSING AND ECONOMIC DEVELOPMENT AUTHORITY, *supra* note 122, at 58.

¹³⁰ I.R.S., *supra* note 124, at 18-9-18-11. This is not necessarily an exhaustive list of possible violations.

¹³¹ ARIZONA DEPARTMENT OF HOUSING, *supra* note 116, at 1.

¹³² *Id.* at 1-2.

¹³³ *Id.* at 3.

California Tax Credit Allocation Committee

LIHTC developers in California have two options for implementing novel utility allowances that are unique to the state. First, pursuant to revisions in the LIHTC regulations that allowed for use of an energy consumption model to determine utility allowances in LIHTC units,¹³⁴ CTCAC created its own Energy Consumption Model (ECM), the California Utility Allowance Calculator (CUAC). Second, some jurisdictions in California permit the use of the Energy Efficiency Building Utility Allowance (EEBUA), which allows for energy efficient building types to be treated as different building types on the PHA-created utility allowance schedule, so long as the local PHA creates an energy-efficient utility allowance schedule.

California Utility Allowance Calculator:

For new construction developments, CTCAC prefers that LIHTC developers use the CUAC to perform ECM utility allowance calculations.¹³⁵ The CUAC provides accurate utility consumption estimates for energy efficient buildings (built according CTCAC's Energy Efficient Standards from 2005 or later)¹³⁶ and provides lower utility allowances than does the PHA utility allowance.¹³⁷ The CUAC is the only acceptable tool for conducting the ECM utility allowance calculations in California.¹³⁸ CTCAC requires that the engineer or qualified professional using the CUAC be "either a certified [Home Energy Rating System] HERS Rater or a California licensed mechanical engineer or electrical engineer," and CTCAC has compiled a list of

¹³⁴ 26 C.F.R. § 1.42-10(b)(4)(ii)(e).

¹³⁵ Memorandum from The California Tax Credit Allocation Committee to Housing Credit Property Owners and Managers, *supra* note 134.

¹³⁶ CAL. TAX CREDIT ALLOCATION COMM., 2009 CALIFORNIA UTILITY ALLOWANCE CALCULATOR (CUAC) ESTIMATE SUBMISSION REQUIREMENTS 1 (2009). For information about what constitutes energy efficient buildings in California, see *Sustainable Building Method and Minimum Construction Standards for Energy Efficiency*, CAL. TAX CREDIT ALLOCATION COMM., <http://www.treasurer.ca.gov/ctcac/2013/sustainable.asp> (last visited January 26, 2014). See also *California Utility Allowance Calculator (CUAC) For the New Solar Homes Partnership*, GO SOLAR CALIFORNIA, <http://www.gosolarcalifornia.org/affordable/cuac/index.php> (last visited May 22, 2015).

¹³⁷ NEHEMIAH STONE, CUAC TRAINING.

¹³⁸ Memorandum from The California Tax Credit Allocation Committee to Low Income Housing Tax Credit Property Owners and Managers, *supra* note 134, at 2.

professionals it considers to be qualified raters.¹³⁹ At present, only new construction projects can use the CUAC to set utility allowances.

Some projects in California have already used the CUAC to set utility allowances.¹⁴⁰ Enterprise Green Communities reports that CUAC helped prevent a gap in financing in a project that would have otherwise occurred had the building used the PHA-set utility allowance.¹⁴¹ Another project, while still in development used CUAC to “show an additional cash flow of \$520,000.”¹⁴²

On August 27, 2014, CTCAC issued a guidance document that allowed for existing buildings with photovoltaic installations (installed through the California Solar Initiative MASH Program) to use the CUAC.¹⁴³ This was the first departure from the standing policy of only allowing the use of the CUAC for new construction and adaptive reuse projects. In order to be allowed to use the CUAC, owners with solar panels attached to their buildings must submit a request to CTCAC, financial statements, projected rent increases, and documented proof that the solar panels “offset tenant area loads.”¹⁴⁴ Additionally, a quality control firm must verify the CUAC used by the project owner.¹⁴⁵

Energy Efficient Building Utility Allowance:

¹³⁹ *Id.* Aside of having a HERS rater evaluate the energy efficiency of the project, there are a number of other submission requirements to use CUAC, such as bills of lading for all appliances, architectural drawings of the project, and various other pieces of documentation. See Memorandum from Anthony Zeto, Dev. Program Manager, to California Utility Allowance Calculator (CUAC) Users (Apr. 20, 2013). For more information about CUAC requirements, see CALIFORNIA TAX CREDIT ALLOCATION COMMITTEE, *supra* note 134.

¹⁴⁰ ENTER. GREEN CMTYS., UTILITY ALLOWANCE OPTIONS FOR INVESTMENTS IN ENERGY EFFICIENCY: RESOURCE GUIDE 15 (2011).

¹⁴¹ *Id.* (The standard utility allowance (UA) increased during the time that the project was constructed. This would have resulted in a gap in financing, if the developer had used the standard UA. Using the true UA determined with the CUAC, the developer was able to avoid losing \$90,000 in loans.”).

¹⁴² *Id.*

¹⁴³ Memorandum from the California Tax Credit Allocation Committee to Low Income Housing Tax Credit Owners Participating in Multifamily Affordable Solar Housing and Interested Stakeholders (Aug. 27, 2014).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

In 2002, the California Public Utilities Commission initiated the Efficient Affordable Housing Program (EAH), whose primary purpose was to develop the EEBUA to encourage energy efficient retrofits and new construction by allowing PHAs to create separate utility allowance schedules for energy efficient buildings.¹⁴⁶ Although an EEBUA must be set by a PHA, it was developed primarily for the benefit of LIHTC developers to allow LIHTC building owners to keep a larger portion of the gross rent because less of the gross rent is allocated to the utility allowance (see Figures 1 and 2).¹⁴⁷ Tenants could plausibly save money on utilities if their actual utility expenditures in the energy-efficient buildings are below the utility allowance.¹⁴⁸

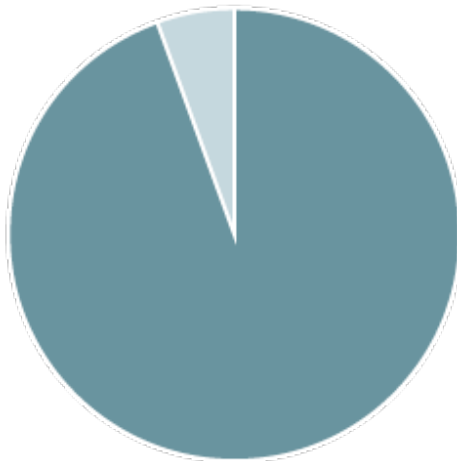
¹⁴⁶ See KEMA, INC., EVALUATION OF 2004-2005 DESIGNED FOR COMFORT: EFFICIENT AFFORDABLE HOUSING PROGRAM 2-1 (2006); *California Local Governments Lead the War to Saving Energy by Offering A Utility Allowance Category for Energy Efficient Projects and Projects with Photovoltaic/Solar Energy Systems*, LOCAL GOV. COMM'N. (March/April 2005), http://www.lgc.org/freepub/energy/newsletter/mar_apr2005/page02.html (last visited January 17, 2014).

¹⁴⁷ See *Id.* at 2-1 (2006) (“If their local public housing authority adopts the EEBUA, owners or developers who achieve certain levels of energy efficiency in their new or existing affordable multifamily properties can collect higher rents. These higher rents are possible because the EEBUA has reduced the tenant’s utility allowance to correspond with the reduction in utility costs that have been achieved by the energy-efficiency measures installed in the property.”); NEHEMIAH STONE, ET. AL., ENERGY EFFICIENCY-BASED UTILITY ALLOWANCES: A DRIVER FOR MORE EFFICIENT AFFORDABLE HOUSING 4 (2004). EEBUA began as a regional, pilot program in 2002, but was expanded to be statewide in 2004. *Id.* For an example of an EEBUA compared to a normal utility allowance, see ANAHEIM HOUS. AUTH., UTILITY ALLOWANCE SCHEDULE (2012), *available at* http://www.anaheim.net/com_dev/aRT/UtilityAllow10-2012.pdf. Interestingly, the Anaheim utility allowance schedule does not distinguish among different kinds of buildings, similar to some of the schedules of the PHAs involved in the Moving To Work program, as described in Appendix III. For example, a reduction in the utility allowance by \$25 will result in additional income of \$300 a year for the building owner per unit, and a development with 100 units will increase its income by \$30,000 with the same reduction.

¹⁴⁸ ENTERPRISE GREEN COMMUNITIES, *supra* note 140, at 30.

FIGURE 1.

**TRADITIONAL SECTION 8
UTILITY ALLOWANCES**

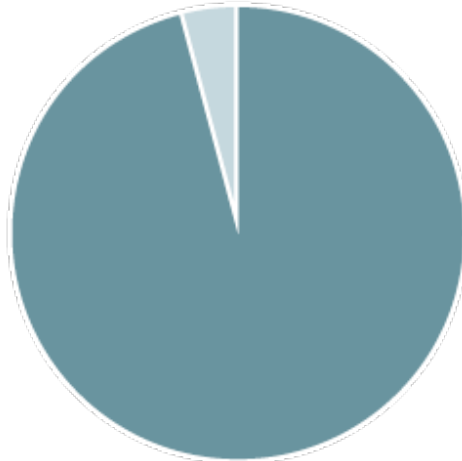


■ Rent to Owner = **\$800**
 ■ Utility Allowance = **\$100**

Gross Rent = **\$900**

FIGURE 2.

**ENERGY EFFICIENCY-BASED
UTILITY ALLOWANCES**



■ Rent to Owner = **\$825**
 ■ Utility Allowance = **\$75**

Gross Rent = **\$900**

The EEBUA creates a two-tier utility allowance schedule; the energy efficient schedule is based on reductions from the PHA’s original utility allowance schedule,¹⁴⁹ which is still “used as the representation for energy use of the *average* of all subject units in the jurisdiction.”¹⁵⁰

Although the EEBUA is mostly used by LIHTC developers who seek to use lower utility allowances to increase rent revenue, owners of TBRA buildings who happen to own buildings that are already energy-efficient or buildings that will be retrofitted can also use the EEBUA.¹⁵¹

In order to adopt an EEBUA, a PHA must establish at least one of the following thresholds for what counts as an energy efficient building: new construction exceeding energy

¹⁴⁹ NEHEMIAH STONE, ET. AL., *supra* note 144, at 4. In effect, the utility allowance for energy efficient buildings functions the same as a utility allowance for another building type (e.g. townhouse, high-rise apartment). ENTERPRISE GREEN COMMUNITIES, *supra* note 140, at 22 (2011).

¹⁵⁰ *Id.*

¹⁵¹ LIHTC financed buildings with units housing HCV tenants must use the HCV allowance. 26 C.F.R. § 1.42-10(b)(4)(i). Thus energy efficient buildings would be able to use the EEBUA in such cases.

code by 15 percent, retrofit buildings improving efficiency by at least 20 percent, and achieving “ENERGY STAR New Homes, LEED, Enterprise Green Communities, or other green program that contains energy-efficiency requirements.”¹⁵² In order to test buildings, PHAs must rely on either a HERS rater or a home performance professional.¹⁵³ HERS raters provide the necessary documentation to PHAs to show that the buildings seeking energy efficient utility allowances meet the EEUBA requirements.¹⁵⁴

While some PHAs simply declared that they will use EEBUAs, other PHAs were more cautious and sought waivers from HUD to allow them to implement the EEBUA.¹⁵⁵ Enterprise Community Partners suggests that PHAs could adopt the EEBUA by either getting approval from the PHA board, declaring that the PHA will accept an EEBUA, or by obtaining HUD approval by requesting a waiver.¹⁵⁶ Enterprise also provides a sample waiver letter that a PHA can adapt and use in its request.¹⁵⁷ Advocates of EEBUA point to a laudatory comment in the Public Housing Energy Conservation Clearinghouse News as effective HUD approval of the

¹⁵² ENTERPRISE GREEN COMMUNITIES, *supra* note 140, at 23. *Cf.* HUSM, *supra* note 58 (including only ENERGY STAR in calculation for energy efficient utility allowances). The new construction is required to surpass 2005 Title 24 energy code standards by at least 15 percent. *Energy Efficient Units-How to Get Rated*, HOUS. AUTH. OF THE CNTY. OF RIVERSIDE, <http://www.harivco.org/Developer/EnergyEfficientUnitsHowtoGetRated/tabid/112/Default.aspx> (last visited Oct. 23, 2013). For retrofitted structures the “energy efficiency rating [. . . must have . . .] surpassed 2005 Title 24 energy code standards by at least 15 [percent]” *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* In order to prove that a project is compliant, the developer will have to provide “a form summarizing the results of a building simulation (i.e., energy model), plans, and a HERS verification document.” *Id.* at 25. If a HUD audit reveals that EEBUAs are granted to buildings that lack documentation, HUD can penalize the PHA. James S. Hobbs, *The Anaheim Housing Authority, Anaheim California, Did Not Always Operate Its Section 8 Housing Choice Voucher Program Effectively 5-6* (2008) (“the authority used the “energy efficient” utility allowance without any supporting documentation as to how the unit qualified as “energy efficient,” which further affected the housing assistance payment amounts. The “energy efficient” utility allowance schedule provides a lower utility allowance in light of the energy-efficient appliances and setup of the unit.”). The California Energy Commission has its own HERS program pursuant to Public Resources Code Section 25942. ENTERPRISE GREEN COMMUNITIES, *supra* note 140, at 24.

¹⁵⁵ See KEMA, Inc., *supra* note 143, at 4-2 (“two of the PHAs – the San Francisco Housing Authority and the San Joaquin Housing Authority – made the issuance of a HUD waiver for the use of the EEBUA as a precondition for adoption.”). The waiver was granted in January 2006. *Id.* at 4–8.

¹⁵⁶ ENTERPRISE GREEN COMMUNITIES, *supra* note 140, at 25.

¹⁵⁷ *Id.* at 49-50 (quoting former HUD secretary Alphonso Jackson’s “notice to every public housing authority to make energy efficiency a reality” and explaining why the change to a EEBUA is necessary).

EEBUA.¹⁵⁸ Although neither the IRS nor HUD have explicitly authorized the program, the fact that HUD has granted waivers, has not interfered with the California program, and has allowed it to exist for about a decade implies that there is at least tacit approval.

Enterprise Green Communities reports that a number of housing developments in California in jurisdictions that use the EEBUA managed to secure additional financing as a result of the EEBUA.¹⁵⁹

Colorado Housing Finance Agency (CHFA)

LIHTC building owners in Colorado can opt for any utility allowance calculation method, including the agency estimate method.¹⁶⁰ CHFA requires that building owners collect utility consumption information for all units, so long as there are 50 or fewer units of a unit type, but if there are more than 50 units of a unit type, then the owner must collect only 50 percent of the units' consumption data.¹⁶¹ Further, owners must submit an explanation if there was a change of \$5.00 or more from the previous year's calculation.¹⁶² To use the agency estimate, building owners must also pay an administrative fee of \$2.00 for each unit, with a minimum of \$50.00.¹⁶³

Washington, D.C. Department of Housing and Community Development

¹⁵⁸ *Success Stories: Housing Authority of the City of Riverside*, PUB. HOUS. ENERGY CONSERVATION CLEARINGHOUSE NEWS (U.S. Dep't of Hous. & Urban Dev., D.C.), Mar.-Apr. 2004, at 4 ("Property owners and tenants alike are benefiting from an energy-efficient utility allowance schedule developed by the Housing Authority of the City of Riverside, California. The new allowance schedule encourages multifamily owners to increase the energy efficiency of their units. By doing so, owners can increase the value and marketability of their properties while reducing utility bills. And, taking lower subsidies into account, the potential cost savings to a housing authority can be substantial. There are advantages to residents, as well, including lower energy costs and increased comfort."); *see, e.g.*, ENTER. GREEN CMTYS., *supra* note 140, at 39 ("The federal Department of Housing and Urban Development (HUD) has recognized the effectiveness of the Energy Efficiency-Based Utility Allowance schedule, and identified it as a 'best practice' in its March-April edition of the online newsletter...."); KEMA, INC., *supra* note 143, at 4-2 ("The DfC Program had hoped that an article in a HUD newsletter that described the DfC Program as a 'best practice' would serve as a de facto endorsement of the EEBUA.").

¹⁵⁹ ENTERPRISE GREEN COMMUNITIES, *supra* note 140, at 32-33.

¹⁶⁰ COLORADO HOUSING FINANCE AUTHORITY, *supra* note 110, at 13-14.

¹⁶¹ *Id.* at 14.

¹⁶² *Id.*

¹⁶³ *Id.*

The D.C. Department of Housing and Community Development (DC DCHR) allows building owners to use all utility allowance calculation methods except for the agency estimate method.¹⁶⁴ In what appears to be a misreading of the IRS's Notice 2009-44, the DC DCHR does not allow submetered utilities to receive utility allowances.¹⁶⁵

Michigan State Housing Development Authority

The Michigan State Housing Development Authority (MSHDA) allows for the use of all methods of utility allowance estimation except for the Energy Consumption Model, because it does not yet have a list of approved engineers or qualified professionals.¹⁶⁶ In order to receive an agency estimate for MSHDA financed projects, the building owner must submit the actual consumption data to the Asset Manager for the building.¹⁶⁷ However, owners of non-MSHDA financed buildings can calculate the utility allowances using actual utility consumption data.¹⁶⁸ MSHDA requires that owners collect utility consumption data from no fewer than 25 percent of units of each unit type, with a minimum of five units for each unit type, unless there are fewer than five units of that unit type, in which case a 100 percent sample is required.¹⁶⁹ Owners of newly constructed units in Michigan cannot opt to use any utility allowance other than the PHA HCV utility allowance schedule.¹⁷⁰

¹⁶⁴ D.C. DEP'T OF HOUS. & CMTY. DEC., LOW-INCOME HOUSING TAX CREDIT AND HOME INVESTMENT PARTNERSHIPS PROGRAM OWNER'S COMPLIANCE MANUAL 13–14 (2012).

¹⁶⁵ *Id.* at 14 (“The new revisions also state that submetering and RUBS will no longer entitle an owner to create/claim a utility allowance.”). *But see*, Utility Allowances Submetering, 77 Fed. Reg. 46,987, 46,988 (Aug. 7, 2012) (stating that submetering is permissible).

¹⁶⁶ MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY, *supra* note 19, at 2. MSHDA has implied that the ECM will eventually be allowed: “When implemented, this method will require owners to....” *Id.* at 4.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.* Prior to implementation, MSHDA Compliance approves the estimates. *Id.* 4.

¹⁶⁹ MICH. STATE HOUS. DEV. AUTH., INSTRUCTIONS FOR CALCULATING UTILITY ALLOWANCES FOR LIHTC DEVELOPMENTS ACTUAL CONSUMPTION METHOD (AGENCY ESTIMATE) 2 (2010).

¹⁷⁰ MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY, *supra* note 19, at 4.

MSHDA charges fees for certain utility allowance estimate methodologies. Those seeking to use agency estimate must pay \$3 per unit with a minimum of \$50.00 and a maximum of \$300.00.¹⁷¹ MSHDA also charges \$150.00 per project for the use of the HUSM.¹⁷²

Oregon Housing and Community Services

Oregon Housing and Community Services (OHCS) allows building owners to use any IRS-approved method for calculating utility allowances, except for the agency estimate.¹⁷³ Even though OHCS does not have a list of qualified professionals or approved engineers for conducting the ECM, it allows the use of the ECM on a case-by-case basis.¹⁷⁴ Further, OHCS allows owners to change the method for calculating utility allowances, so long as the owner provides OHCS with notice.¹⁷⁵ OHCS also allows the use of RUBS, so long as it is not used to determine utility allowances, but is instead charged to the tenant as a non-optional fee included in the gross rent.¹⁷⁶

¹⁷¹ *Id.* at 5.

¹⁷² *Id.*

¹⁷³ Memorandum from Jennifer Marchand, *supra* note 110, at 2.

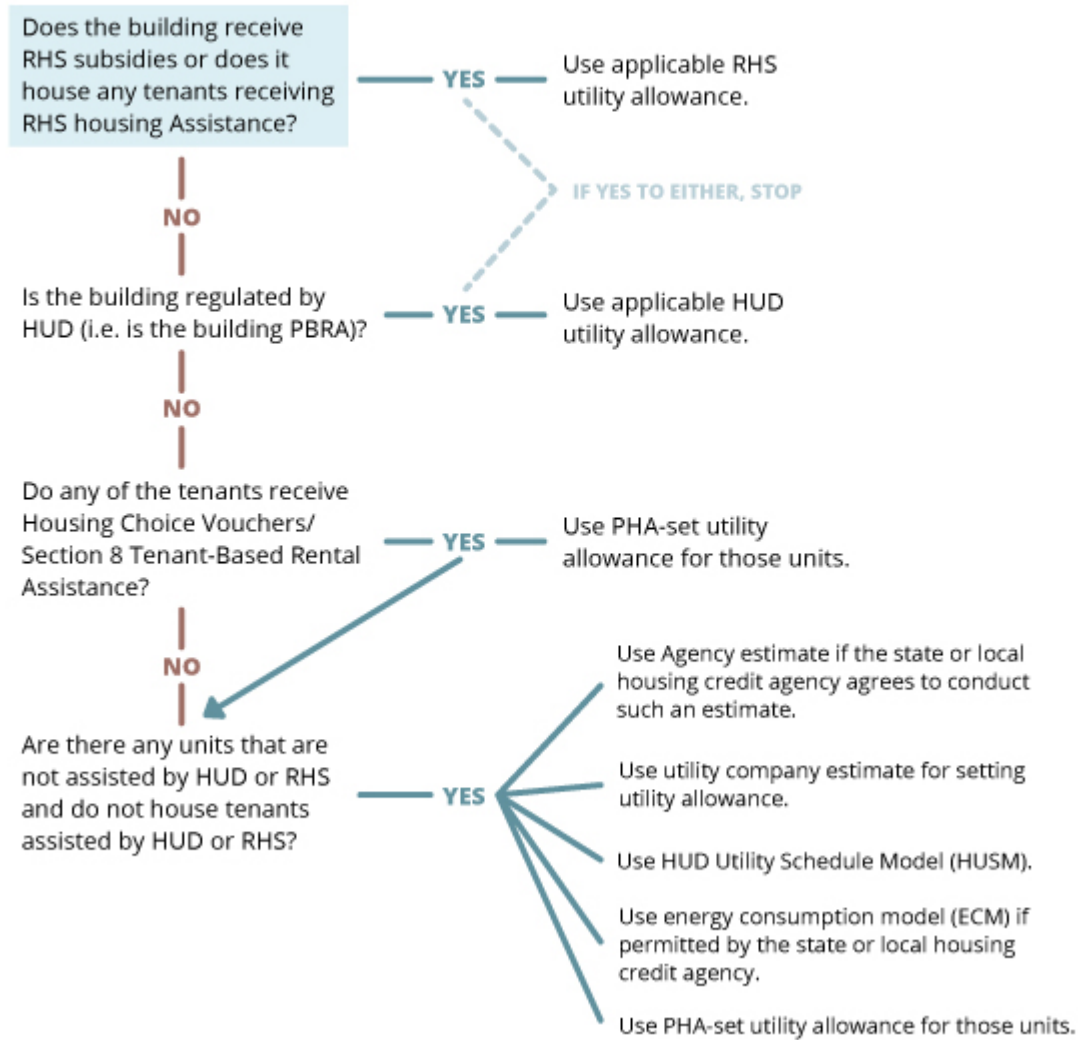
¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.* at 4.

¹⁷⁶ *Id.* at 3.

Appendix 1: Utility Allowance Calculation Decision Tree

Figure 3: 26 C.F.R. § 1.42-10 Decision Tree



Appendix 2: Glossary of Terms

Area Median Gross Income (AMGI): for the purposes of the LIHTC program, AMGI is determined by “the Secretary in a manner consistent with determinations of lower income families and area median gross income under section 8 of the United States Housing Act of 1937....”¹⁷⁷ The AMGI is used to determine the maximum gross rent that can be charged in a given area.¹⁷⁸

Agency Estimate: A state or local housing credit agency may agree to conduct a utility allowance estimate for a building owner, as long as the agency takes into account the local utility rates, type of property, climate, taxes and fees on utility charges, the building materials used, and the building’s mechanical systems.¹⁷⁹ Additionally, the HFA may make an estimate by using actual consumption data.¹⁸⁰

Gross Rent: the sum of the utility allowance and the rent (including any non-optional fees paid by the tenant).¹⁸¹ The gross rent does not include any rental assistance payment, supportive service fee, or rental payment “to the extent that the owner pays an equivalent amount to the Farmers’ Home Administration....”¹⁸²

Housing Finance Agency (HFA): for the purposes of this chapter, Housing Finance Agency refers to any state or local housing credit agency

¹⁷⁷ 26 U.S.C. § 42(d)(2)(B).

¹⁷⁸ See, e.g., N.Y.C. HOUS. PRESERVATION & DEV., LOW INCOME HOUSING TAX CREDIT – RENT AND INCOME LIMITS FOR NEW YORK CITY FOR 2013 (2012) (listing NYC’s gross rent for a two-bedroom was \$1,160, based on 60 percent of the AMGI, \$46,440).

¹⁷⁹ 26 C.F.R. § 1.42-10(b)(4)(ii)(C).

¹⁸⁰ *Id.*

¹⁸¹ 26 U.S.C. § 42(g)(2)(B)(ii).

¹⁸² 26 U.S.C. § 42(g)(2)(B)(i)–(iv).

HUD Utility Schedule Model (HUSM): The HUD Utility Schedule Model is a Microsoft Excel Spreadsheet model created to assist PHAs in creating utility allowance schedules for the Housing Choice Voucher Program/Section 8. The HUSM can also be used by an individual LIHTC building owner to create a utility allowance estimate.¹⁸³

Maximum Gross Rent: The maximum gross rent is the highest gross rent that can be charged in a certain jurisdiction.¹⁸⁴ The maximum gross rent is set at 30 percent of the “imputed income limitation applicable to such a unit” (that is, either 50 percent or 60 percent of area median gross income).¹⁸⁵

Public Housing Agency/Authority (PHA): A public housing agency or authority is generally a local instrumentality responsible for administering the public housing program and the Housing Choice Voucher Program within its jurisdiction. Public housing agencies or authorities can be either county-wide or city-wide.¹⁸⁶

PHA Utility Allowance: The PHA utility allowance is set by each PHA that administers the Housing Choice Voucher Program.¹⁸⁷ Each PHA creates a utility allowance schedule, which is used to set utility allowances for all Housing Choice Voucher tenants in the jurisdiction.¹⁸⁸

Qualified Allocation Plan (QAP): A qualified allocation plan “sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions, which also gives preference in allocated housing credit dollar amounts among

¹⁸³ 26 C.F.R. § 1.42-10(b)(4)(ii)(D).

¹⁸⁴ 26 U.S.C. § 42(g)(2)(A)

¹⁸⁵ 26 U.S.C. § 42(g)(1)–(2).

¹⁸⁶ See *PHA Contact Information*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/pha/contacts (last visited Feb. 1 2014) (providing contact information for all PHAs in the United States).

¹⁸⁷ 24 C.F.R. § 982.517.

¹⁸⁸ *Id.*

selected projects... which provides a procedure that the agency... will follow in monitoring for noncompliance with the provision of this section and in notifying the Internal Revenue Service of such noncompliance....”¹⁸⁹

Qualified Basis: The qualified basis of any qualified low-income building for any taxable year is an amount equal to the applicable fraction (determined as of the close of such taxable year) of the eligible basis of such building...

Rent: The rent is the portion of the gross rent that the building owner receives from the tenant.¹⁹⁰ This amount does not include any additional rental assistance from a government agency.¹⁹¹

State or local housing credit agency: a state or local housing credit agency is any organization, usually a state Housing Finance Agency, that is “authorized to carry out” the LIHTC program.¹⁹²

Submetering: Submetering in the context of the LIHTC program is limited to the metering configuration in which a building owner pays the utilities directly, but then bills individual tenants based on their consumption.¹⁹³

Utility Company Estimate: A utility company estimate occurs when any interested party requests a utility allowance estimate from a utility company that provides a given utility to the unit.¹⁹⁴

Appendix 3: Summary of Legal Requirements

¹⁸⁹ 26 U.S.C. § 42(m)(1)(B).

¹⁹⁰ 26 U.S.C. § 42(g)(2)(B)(ii).

¹⁹¹ 26 U.S.C. § 42(g)(2)(B)(i)–(iv).

¹⁹² 26 U.S.C. § 42(h)(8)(A).

¹⁹³ I.R.S., Notice 2009-44, (May 5, 2009).

¹⁹⁴ 26 C.F.R. § 1.42-10(b)(4)(ii)(B).

CALCULATION OF UTILITY ALLOWANCES	
Statutes	
Regulations	
26 C.F.R. § 1.42-10(b)(1)-(2)	If a building either receives RHS for any of its units or houses any tenants who receive RHS subsidies, then the whole building will use the applicable RHS utility allowance.
26 C.F.R. § 1.42-10(b)(3)	<i>If neither a building nor any tenant in the building receives RHS housing assistance, and the rents and utility allowances of the building are reviewed by HUD on an annual basis (HUD-regulated building), the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance.</i>
26 C.F.R. § 1.42-10(b)(4)(i)	If a tenant receives HUD subsidies (generally Housing Choice Vouchers), the n that unit shall use the PHA utility allowance schedule
26 C.F.R. § 1.42-10(b)(4)(ii)(A)	If a building is not receiving either HUD or RHS subsidies or the tenants are not receiving HUD or RHS rental assistance, then the building or the units should use the applicable PHA utility allowance
26 C.F.R. § 1.42-10(b)(4)(ii)(B)	During a building's extended use period, an interested party may obtain a utility allowance estimate from a willing utility company, so long as the utility company provides utility services to the building. Prior to the utility allowances going into effect, the owner must provide the utility company estimate to the building's tenants.
26 C.F.R. § 1.42-10(b)(4)(ii)(C)	A building owner may contact the Housing Finance Agency that has jurisdiction over the building in order to obtain a utility allowance estimate, so long as the HFA agrees to provide such an estimate. The HFA must take into account: • <i>Local utility rates</i> • <i>Property type</i> • <i>Climate and degree-day variables</i> • <i>Taxes and fees on utility charges</i> • <i>Building materials</i> • <i>Mechanical systems</i> The HFA may also use actual utility company usage data and rates for the building, so long as much information is current.
26 C.F.R. § 1.42-10(b)(4)(ii)(D)	Building owners may use the HUD Utility Schedule Model (HUSM) to calculate a utility allowance for their buildings.
26 C.F.R. § 1.42-10(b)(4)(ii)(E)	A building owner may use an energy consumption model to calculate a utility allowance for a building. An energy consumption model must take into account, at least the following: • Unit size • Building orientation • Design and materials • Mechanical systems • Appliances • Characteristics of the building location An energy consumption model must be completed by either a properly licensed engineer or an Agency-approved qualified professional. Past energy consumption data can be used so long as it is from a twelve month period ending no earlier than 60 days before the beginning of the 90-day period.
Guidance	
Case Law	

Chapter 5: Utility Payments in the Low-Income Housing Tax Credit Program

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REVISION & REVIEW OF UTILITY ALLOWANCES	
Statutes	
Regulations	
26 C.F.R. § 1.42-10(c)(1)	<i>If, at any time during the building's extended use period . . . , the applicable utility allowance for units changes, the new utility allowance must be used to compute gross rents of the units due 90 days after the change (the 90-day period).</i> A building owner is responsible for all costs of calculating a new utility allowance. A building owner does not need to implement new utility allowances until a building has reached 90 percent occupancy or until the end of the first year of the credit period.
26 C.F.R. § 1.42-10(c)(2)	A building owner must review utility allowances at least once annually and update the utility allowance, if necessary.
Guidance	
Case Law	

METERING & TENANT PAYMENT	
Statutes	
Regulations	
26 C.F.R. § 1.42-10(a)	<i>If the cost of any utility (other than telephone, cable television, or Internet) for a residential rental unit is paid directly by the tenant(s), and not by or through the owner of the building, the gross rent for that unit includes the applicable utility allowance determined under this section. This section only applies for purposes of determining gross rent under section 42(g)(2)(B)(ii) as to rent-restricted units.</i>
Guidance	
I.R.S., Notice 2009-44, (May 5, 2009)	So long as HUD or RHS rules do not apply, LIHTC building owners are allowed to implement submetering configurations in order to bill tenants on their actual utility use as a fraction of total utility usage in the building.
I.R.S., Notice 2009-44, (May 5, 2009)	Tenants must be charged the same rates that building owner pays to the utility company.
I.R.S., Notice 2009-44, (May 5, 2009)	Building owners may charge a maximum administrative fee of \$5.00 a month for the costs of submetering.
Utility Allowances Submetering, 77 Fed. Reg. at 46,988	Building owners may not implement a Ratio Utility Billing System (RUBS), which would not base submetering charges on actual consumption, but rather on a ratio of building's total energy use to bedroom size, number of tenants, or square footage.
Case Law	

COMPLIANCE & MONITORING

Chapter 5: Utility Payments in the Low-Income Housing Tax Credit Program

Statutes	
26 U.S.C. § 42(m)(1)(B)(iii)	HFA's are responsible for ensuring compliance with IRS statutes and regulations.
26 U.S.C. § 42(m)(1)(B)(iii)	Each HFA must outline how it plans to notify the IRS or noncompliance in its Qualified Allocation Plan (QAP)
Tax Reform Act of 1986. Pub. L. No. 99-514 (1986)	The IRS can recapture tax credits from non-compliant buildings.
Tax Reform Act of 1986. Pub. L. No. 99-514 (1986)	Failure to remain in compliance leads to a decrease in qualified basis, which can cause the IRS to recapture credit "on the accelerated amount claimed for all the previous years on the amount of the reduction in qualified basis."
Omnibus Budget Reconciliation Act of 1993§ 13142, 26 U.S.C. § 42(g)(8)(A)	
Regulations	
26 C.F.R. § 1.42-10(d)	Building owners must retain records of utility consumption estimates and any supporting data.
Guidance	
Forms	
I.R.S., LOW-INCOME HOUSING CREDIT AGENCIES REPORT OF NONCOMPLIANCE OF BUILDING DISPOSITION 2 (2011)	If an HFA becomes aware of a builder's or building owner's noncompliance, it must file "form 8823 to fulfill their responsibility under section 42(m)(1)(B)(iii)."

Appendix 4: Table of Authorities

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26 U.S.C. § 42	passim
26 U.S.C. § 707	178
42 U.S.C. § 1437a.....	183

Other Authorities

<i>2009 RECS Survey Data</i> , U.S. ENERGY INFO. ADMIN. (May 6, 2013), http://www.eia.gov/consumption/residential/data/2009/	179
<i>California Local Governments Lead the War to Saving Energy by Offering A Utility Allowance Category for Energy Efficient Projects and Projects with Photovoltaic/Solar Energy Systems</i> , LOCAL GOV. COMM’N. (March/April 2005), http://www.lgc.org/freepub/energy/newsletter/mar_apr2005/page02.html	192
<i>California Utility Allowance Calculator (CUAC) For the New Solar Homes Partnership</i> , GO SOLAR CALIFORNIA, http://www.gosolarcalifornia.org/affordable/cuac/index.php	190
<i>Contracts with Rent amt and Utility Allowance amt.</i> , U.S. DEP’T OF HOUS. & URBAN DEV. (June, 4, 2013), http://portal.hud.gov/huddoc/contractsrentutilityamt.exe	183, 185
<i>Directory of New York City Affordable Housing Programs</i> , FURMAN CTR. FOR REAL ESTATE AND URBAN POLICY, http://furmancenter.org/institute/directory/entry/section-236	182
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