

January 22, 2013

Office of General Counsel  
Regulations Division  
Department of Housing and Urban Development  
451 Seventh Street SW., Room 10276  
Washington, DC 20410-0001

Re: Docket No. FR-5597-N-01. Comments Adopting Smoke-Free Policies in PHAs and Multifamily Housing, 60712-60714 [2012-24430]

Thank you for the opportunity to comment on HUD's important effort to reduce smoking and exposure to secondhand smoke. We submit the below comments on behalf of the American Society of Home Inspectors, Enterprise Community Partners, and the National Center for Healthy Housing.

In summary, the most effective smoke-free housing program will be achieved by balanced and comprehensive policies that are implemented and enforced in a way that is protective and respectful of all tenants. The key elements will provide tenants who smoke with a generous period of time to adjust and prepare for the new policy, provide them with access to resources that will help them to quit, and ensure that those who do not comply are protected from automatic eviction or unfair treatment.

### **Benefits, Risks, and Costs of Implementing a Smoke-Free Housing Policy**

The lifelong benefits of living smoke-free are well-documented and not disputed. Smoking, radon exposure, and secondhand smoke exposure are the first, second and third leading causes of death caused by lung cancer; and radon is the number-one cause of lung cancer death among nonsmokers. In terms of health benefits, a smoke-free housing policy will support the health of all residents when no resident smokes, no resident is exposed to secondhand smoke, and no resident has been displaced by policies pertaining to smoking. Further, because marijuana and crack cocaine smoke, and other illegal drug use and sales are very high priority concerns for tenants, it is imperative that HUD, housing authorities, and property owners/managers strive to eliminate these problems as vigorously as secondhand tobacco smoke.

Well-designed smoke-free housing policies are an important tool for ensuring the health of tenants but the precise language of smoke-free policies or laws is important. When a landlord/community decides to enact a smoke-free housing policy, it is important that that policy be attentive to the rights of tenants who smoke and those who don't smoke alike. Smoking and secondhand exposure to smoke both occur at higher rates in low-income communities and consequently, low-income individuals and families experience a disproportionately high burden of tobacco-related diseases. All low-income families lack choice in the housing market and limited resources for ready relocation. Both the nonsmoker (seeking housing that is free of drifting secondhand smoke) and the smoker (seeking housing where smoking is permitted) lack mobility. HUD must guard against the possibility that a smoker becomes homeless following a termination of tenancy due to inability to comply with a smoke-free policy.

Housing authorities should document both the benefits and the unintended consequences that may have emerged as a result of the policy. Factors should include lease terminations following evictions and voluntary departures, the procedure that preceded the termination, referrals to smoke cessation services and results, efforts to help transition persons with mental and physical disabilities, and resultant increased need for shelters and mental health services.

## **Initial Policy Development and Implementation**

An important strategy for protecting tenants from eviction as a result of a smoke-free housing policy is to provide appropriate information and notice to tenants. For example, policies that provide notice to tenants upon move-in about the location of smoking and nonsmoking units on a property can make smoke-free housing work better for landlords and tenants—both those who smoke and those who do not—by establishing common expectations and understandings about the potential proximity of smoking and non-smoking units. Some states (e.g., Oregon and California) and several local jurisdictions already have similar provisions in their laws.

Smoke-free policies that prohibit smoking inside the rental units and common areas should factor in alternatives for smokers who may not quit immediately. Property-wide bans could exempt smoking in cars parked in a parking lot or other land owned by the PHA. Policies can permit smoking outside in areas a reasonable number of feet away from a door, window, or other opening. The layout of dwellings in the property may warrant a custom approach rather than applying one-size-fits-all formulae (e.g., 25 feet) that have been devised for office buildings with a very limited number of entrances.

Unilateral application of a distance standard can result in increasing the likelihood that residents will smoke inside their rental units. For example, where a large PHA complex has multiple separate buildings and grass and trees around each building, the designation of areas somewhat near the buildings should be considered, as opposed to expecting a smoker to walk off-campus to smoke.

A western U.S. public housing authority (PHA) instituted a broad smoking ban on all property owned by the PHA, including all common areas, yards, and parking lots. This broad ban may have had the unintended consequence of increasing exposure to secondhand smoke within the apartment. The following anecdote describes what happened to one family:

*Jo had a small baby, and didn't want to hold the baby while she smoked, and didn't want to leave the baby alone in the apartment while she walked far away to have a cigarette. Before the enactment of a smoke-free policy, Jo would walk just outside her apartment door to smoke—which kept the smoke away from her child and didn't affect any of the other neighbors. After the policy, Jo would sometimes smoke inside her apartment, since she knew she was not likely to be caught. A child-advocacy worker in her community became very concerned about children's health after the smoking ban was implemented, because many parent/residents were much more likely to smoke inside their units and the children were more exposed to smoke than they had been before the smoking ban.*

A hard deadline for a smoke-free policy may be impractical unless sufficient cessation support is available. In developing and implementing a smoke-free policy, it is extremely helpful for a public housing authority and property owner/manager to commit to providing tenants who smoke with ready access to resources to help them quit (nicotine replacement therapy, support groups, counseling, et cetera) during the phase-in period, during the implementation period, and as a potential means of addressing a violation of the policy.

Persons with disabilities are a target population for public housing and other subsidized housing developments. Public housing may be the primary source of housing accessible to persons in wheelchairs. Communities striving to reduce and prevent homelessness among veterans, mentally ill persons, and other vulnerable populations have relied on federally assisted housing. The needs of smokers with fragile physical and mental health merit thoughtful attention in smoke-free policies. Mental health status can deter some residents to succeed with smoking cessation. Some smokers use nicotine to self-medicate for depression, post-traumatic stress disorder, or another disabling condition, since nicotine releases dopamine and serves as an antidepressant. The policy should ensure the availability of appropriate, culturally competent assessments, referrals and interventions, including community-based mental health professional services, for residents with disabilities to protect them from unintended consequences. Because persons with disabilities may not be able to adhere to a policy that requires smoking in a designated area or outside, reasonable accommodations should be offered, including alternative suitable housing in another location.

For all residents addicted to smoking, transition from nicotine use causes unpleasant health effects. A smoke-free policy should aim to support the well-being of tenants who smoke by encouraging cessation of their smoking through streamlined access to smoke cessation resources. For example, access to onsite groups or classes is superior to an assumption that tenants have the child care resources, transportation, and wherewithal to regularly attend a program at a remote location. Since some residents may be uninsured, the policy should ensure that smokers have access to no-cost smoke cessation (and clinical resources as mentioned above) regardless of health insurance status.

## **Policy Enforcement**

Individuals who smoke have the same rights as other individuals to be free from discriminatory policies or practices. Smoke-free housing practices should not be enforced in a way that discriminates against people on account of their race, color, national origin, et cetera. Smoke-free housing policies must not be used as a pretext to evict tenants for these impermissible reasons. Here are some examples of provisions that may put tenants at risk of greater abuse by some landlords, while not being critical to give effect to the smoke-free housing policy:

*Immediate termination of tenancy clause:* Smoke-free housing policies should not create a “fast track” to eviction, but they should be structured to put smoking on par with other violations of the terms of a tenancy, such as creating a nuisance (e.g., loud noises or foul odors). As with any other lease term, it is crucial to have a robust interactive process for handling lease violations in order to protect tenants as much as possible from abusive or summary evictions. Tenants should be given ample opportunities to comply.

***Blanket disqualification of smokers:*** Smoke-free policies should never deny people who smoke access to housing. Instead, such policies should be structured to require people who smoke to do so off the premises, in a designated smoking area, or reside in designated units for persons who smoke. Smoke-free housing policies should always be designed to prohibit specific behavior in certain locations on the premises, not to prohibit specific people from the premises. There should be symmetry in terminations of tenancy, so that a tenant whose lease is terminated for repeated violations of a smoke-free policy is treated like another tenant who ends the lease early in issues like breach of contract.

***“Whistleblower” requirements:*** Requiring one tenant to report smoking behavior of another tenant to management can create an uncomfortable living situation for residents and place an unfair burden on tenants who would not otherwise be in violation of any lease term. While the policy should specify an effective avenue for making complaints about drifting tobacco smoke (and other hazardous conditions) and be responsive to these complaints, tenants should not be required to report on neighbors at the risk of violation of their leases and eviction.

***Unnecessary duplicative provisions:*** Smoke-free housing policies that include terms that are unnecessary, repetitive, or superfluous can result in tenants being in violation of the lease without actually advancing the goals of the policy. For example, a policy that includes a provision making tenants responsible for ensuring that their guests don’t smoke in locations where smoking is prohibited need not also include a provision requiring that tenants inform all of their guests about the smoke-free policy. This latter requirement creates the possibility of penalties to tenants who fail to inform even nonsmoking guests of the smoke-free housing policy.

One of the most important things that can be done in the implementation of a smoke-free housing law or policy is to provide a phase-in period for existing tenancies of at least one year, to give existing tenants time to adjust and prepare for the time when they will no longer be able to smoke in locations where smoking is prohibited. In some circumstances, it may make sense for to allow a small percentage (10% to 20%) of existing tenancies to remain smoking-optional for the duration of the tenancy if these tenants reside in a separate building or in an otherwise isolated group of units. Another option is the creation of an outdoor designated smoking area (located far enough away from windows and doors so that other tenants are not exposed to the drifting smoke).

## **Summary**

Drifting secondhand tobacco smoke can cause or magnify a wide range of serious health conditions, for example, cancer, heart disease, COPD, asthma, and other respiratory illnesses. So smoke-free housing policies are an important tool for ensuring the health of families living in multi-unit housing. Stable, affordable housing is also critically linked with health outcomes, and individuals and families who lack such housing are also at risk of severe physical and mental health consequences, and reduced school performance and job readiness. Accordingly, smoke-free housing policies should place a premium on preserving housing for all residents, and ensuring no one is deprived of this critical resource without the protections of due process.