



Council for Affordable and Rural Housing

Serving the Affordable Housing Needs of Rural America

March 15, 2021

VIA E-MAIL: www.regulations.gov

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing
And Urban Development
451 Seventh Street, S.W.
Room 10276
Washington, D.C. 20410-001

Re: Comments to HUD Proposed Rules, issued January 13, 2021
Implementation of National Standards of the Physical Inspection of Real Estate
("NSPIRE")
Docket No. FR-6086-P-01 / RIN 2577-AD05

To Whom It May Concern:

The Council for Affordable and Rural Housing ("CARH") provides these comments, as requested in Docket No. FR-6086-P-01 / RIN 2577-AD05, regarding the Proposed Rules on the Implementation of National Standards of the Physical Inspection of Real Estate (NSPIRE) under the Economic Growth Regulatory Relief and Consumer Protection Act (the "PR").

CARH represents for-profit and non-profit companies providing affordable rural rental housing throughout America. For 40 years, CARH has served as the nation's premier association for participants in the affordable rural housing profession, including builders, owners, developers, managers, non-profits, housing authorities, syndicators, accountants, architects, attorneys, bankers, and companies that supply goods and services to the industry. CARH is the only association that solely represents the needs of the entire rural rental affordable housing industry.

We support HUD's efforts to modernize and standardize its physical inspection protocols, but submit these comments so the Department has a full context of how rural housing owners and operators may be affected. Our comments focus on how the PR affects private owners, developers, and managers of rural rental affordable housing. We want to applaud the Department for the PR effort to modernize and standardize the physical inspection protocols applicable to HUD housing, in general. The preamble to the PR demonstrates a good understanding of the private industry's concerns with the existing inspection protocols. For example, the PR seeks to focus on the condition of the unit, which is a problem of the existing protocols, which disproportionately lowers scores based on common area issues. Also, HUD's commitment of continuously engaging with the public addresses the industry's experience of the difficulties with

existing inflexibility on technical, mechanical, engineering issues that have limited impact on the safety and habitability of existing structures, but absorb a disproportionate amount of time and difficulty on sites.

Our comments are limited to (i) seeking clarification of certain provisions that have been troublesome to the private owners and managers in the past; (ii) weigh in on certain comments, as requested by HUD in the PR; (iii) express some concerns around tenant participation in the new protocols; and (iv) propose revisions to the appeal provisions which, as written, are confusing and make, what we believe to be, unintended changes to the appeal protocol which, in our estimation, works quite well. Our comments should be read in the context of the costs and burdens of affordable housing operation in rural areas. Rural America has fewer credit options than urban America, making construction and rehabilitation in rural areas particularly challenging, all else equal. To the extent that the PR increases the costs of operating HUD assisted or insured housing in rural America, our owners, developers and managers will be adversely affected.

1. Response to Question for Comment #14: Question #14 asks for comments regarding the proposed change in the range of years on inspections. Increasing the number of years in between inspections should be looked at in the context of the annual self inspection and how burdensome that process will be as well as the triggers for reinspection. We comment regarding the annual self inspection and the self-reporting in Comment #3 below. Currently, the PR is not clear around the reinspection procedures. The PR indicates, only, that HUD may determine a reinspection is advisable. The PR should make clear that only an owner or manager of HUD housing may request a reinspection and HUD may determine whether it is advisable. The PR should set forth the grounds on which HUD will make this determination.

2. Response to Question for Comment #15: Question #15 asks for comments regarding a proposal for tenant's rating of units 1 to 5 or recommending their unit for inspection. We do not support this. Rating units or recommending unit for inspection is less ripe for abuse than giving tenants a right to trigger a re-inspection or lodge a complaint to trigger a re-inspection, but it still portends a difficult dynamic between landlord and tenant. Tenants are already protected by local landlord tenant laws, by the REAC process generally and by the residents' relationship with the HUD Account Executive. We would advise that the Department proceed cautiously when it overlays additional tenant protections to a dynamic that already has adequate protections. At the very least, the Department should provide more context around these ideas so that the industry can engage in a more productive way.

3. Response to Question for Comment #16: Question #16 asks for comments regarding self reporting 100 percent of units in an annual self inspection, pursuant to the proposed Section 5.707. Though owners should be self inspecting all units annually, Section 5.707 converts this general obligation into a protocol. The creation of protocols around self inspection and self-reporting will, invariably, create more work for owner and managers as they familiarize themselves with yet another protocol of inspection and reporting and this will be burdensome. As we do not yet understand the parameters of the self-inspection or self-reporting requirements, it is difficult to assess the magnitude of the burden. We would urge the self-inspection protocol, the

“paperwork” and the electronic submissions to be as simple and intuitive as possible. Generally, self-reporting annual inspections will be a burden on staff, may have to be outsourced (which is an additional expense that can’t be attributed to the project) and may be a burden on residents. We recommend safe harbor guidelines around unit inspections, since common area inspections are not as difficult as unit inspections, along the creation of mitigating circumstances, such as tenants not allowing access and other issues that come up.

4. Response to Question for Comment #17: Question #17 asks for comments regarding alternatives to self-inspection protocol. We recommend not so much an alternative to a self-inspection protocol, so much as working to create a self-inspection protocol that is the least burdensome possible. We understand there will be notice and comment, but we urge you to limit the categories of the self-inspection to no more than three categories, less than 5 sub-categories, each and to allow paper or electronic submissions.

5. Response to Question for Comment # 19: Question #19 asks for comments regarding tenant induced damage. Tenant induced damage has been an ongoing issue in HUD programs, not so much because tenants might cause damage but because HUD has penalized owners for tenant damage. Tenant damage creates increase site costs and, eventually, may reach a point beyond what rents can repair. In most HUD programs the rents are capped, even if there is more room in the marketplace to increase rents to cover such costs. In the normal course, though, the owner is able to make timely repairs. It would seem best for HUD to provide guidance on what are tenant caused repairs (for example, a hole created in an interior wall), whether that damage is being repaired in a commercially reasonable manner and timely, and what legal consequences the owner is pursuing (penalty, eviction). As long as the owner can articulate these things the owner should not be sanctioned or see score reductions through the NSPIRE process.

6. Comment regarding inspections records. Consistent with this notion of fairness to parties not responsible for adverse conditions, third party management companies should be rated based on the performance of their duties in the context of the resources provided. Where possible, if there is a negative score or fact, management companies with no identity-of-interest relationship to the owner should be able to note their performance in the context of resources made available to them by the ownership. At the same time, while decent, safe and sanitary housing must be provided, administrative conclusions, sanctions and “flags” under the 2530 process should be sensitive to the owner’s performance based on the possible available funding and recapitalization alternatives where all funds were efficiently spent on operations.

7. Comments to Section 5.703: We have specific language suggestions in this section for clarification, in subsection (a), to the definitions in subsections (b) and (c), and to impose some limitations that are currently problematic in subsections (b) and (c) regarding common areas that are not accessible to residents.

§ 5.703 National Standards for the Condition of HUD housing

(a) General. To ensure that all residents live in safe, habitable dwellings, the items and components located inside the building, outside the building (**and on the building site**), and within the units of HUD housing must be functionally adequate, operable, and free of health and safety

hazards. The standards under this section apply to all HUD housing. HUD housing under the HCV and PBV programs shall be subject to these standards only for:

(b) Inside common areas. “Inside common areas” of HUD housing refer to the common areas and building systems that can be generally found within the building interior and are not inside a unit. Examples of “inside” common areas may include, basements, interior or attached garages, enclosed carports, restrooms, closets, ~~mechanical rooms, utility rooms~~, community rooms, day care rooms, halls, corridors, stairs, shared kitchens, laundry rooms, offices, enclosed porches, enclosed patios, enclosed balconies, and trash collection areas, so long as such inside common areas are accessible to residents. Examples of building systems include those components that provide domestic water, electricity, elevators, emergency power, fire protection, HVAC, and sanitary services.

(c) Outside areas. “Outside areas” of HUD housing refers to the building site, building exterior components, and any building systems located outside of the building or unit. Examples of “outside area” components may include fencing, retaining walls, grounds, lighting, mailboxes, project signs, parking lots, detached garage or carport, driveways, play areas and equipment, refuse disposal, roads, storm drainage, non-dwelling buildings, and walkways, so long as such “outside area” is accessible to residents. Components found on the exterior of the building are also considered outside areas, and examples may include doors, attached porches, attached patios, balconies, car ports, fire escapes, foundations, lighting, roofs, walls, and windows, but only so long as such exterior building component is accessible to residents.

8. Comments to Section 5.705: Section 5.705 should be modified, per the below. Section 5.705(c)(6) has a dangling participle that should be corrected to improve readability. The goal of “preservation” needs to be limited to the “physical integrity of the project.” Section 5.705(d) should be revised to give more specific detail regarding the “reinspection penalty.” We make a suggestion below. The re-inspection penalty, as currently written, is too expansive. We make suggested limitations below. Section 5.705(e) should be revised to provide advance notice protections to the owner.

§ 5.705 Inspection requirements.

(c)(6) FHA insured mortgages section 232 facilities. HUD may exempt assisted-living facilities, board and care facilities, and intermediate care facilities from physical inspections under this part if HUD determines that the State or local government has a reliable and adequate inspection system in place, with the results of the inspection being readily and timely available to HUD. For any other Section 232 facilities, the inspection will be conducted only when and if HUD determines, on a case-by-case basis, on the basis of information received (such as through a ~~complaint~~, site inspection or referral by a State agency), that inspection of a particular facility is needed to assure protection of the residents or the adequate preservation of the physical integrity of the project.

(d) Inspection Costs. The cost of an inspection shall be the responsibility of the entity responsible for the inspection as identified in paragraph (a) of this section, except that a reasonable penalty of not more than \$500 in total may be required of the owner of a property for a reinspection if an owner notifies the entity responsible for the inspection that a repair has been made ~~or the allotted time for repairs has elapsed~~ and a reinspection reveals that ~~any such~~ deficiency cited in the previous inspection that the owner is responsible for repairing was not corrected. No fee may be passed along to the household residing in the unit or units, unless the tenant caused the damage.

(e) Access to property for inspection—(1) HUD Inspections. Nothing in this subpart shall restrict the right of HUD, or an entity contracted by HUD, to inspect HUD housing, so long as reasonable

advance notice of the desired access to the property for inspection is provided to the owner.

9. Comments to Section 5.709: Section 5.709 should be modified, per the below, to give owners an opportunity to understand the guidelines and prepare for compliance.

§ 5.709 Administrative Process for Defining and Revising Inspection Criteria.

(a) Inspection standards and scoring methodology. The Secretary will publish in the Federal Register, following notice and the opportunity to comment, a list of deficiencies and methodologies to use for scoring and ranking HUD housing. The Federal Register notice will include the factors for determining if an HCV unit passes or fails the inspection in addition to the scoring and ranking of other HUD housing. After considering the public comments received on the Federal Register notice, HUD will publish a notice announcing the new inspections procedures, and the date on which the new procedures becomes effective, with at least a 30 days' notice prior to the new procedures becoming effective.

10. Comments to Section 5.711(c)(2): Section 5.711(c)(2) should be modified to remove the extra post-inspection 100 percent inspection. This is now a second 100 percent self-inspection and a REAC inspection in one year. Three inspections in one year is burdensome to owners and managers.

§ 5.711 Scoring, Ranking Criteria, and Appeals.

(c)(2) Post-report inspection. The owner or PHA must carefully review the inspection report ~~and is responsible for conducting its own survey of the total property based on the inspecting entity's inspection findings.~~ Non-severe health or safety deficiencies must be corrected expeditiously, and electronic evidence provided of correction.

11. Comments re "Significant Improvement": In Section 5.711(c)(3) and Section 5.711(d)(2), and other instances, appeals should not be limited to "significant" improvement in score. There is no intent to waste the Department's time with appeals. To make an appeal takes time and resources from the owner or manager appellant. That is a sufficient bar to frivolous appeals. Under the current scoring system, it is not simple to ascertain whether different appeals will result in improvements to the score. Furthermore, going from a 29 score to a score of 32 may not be "significant" in terms of scoring, but is significant enough to withdraw a trigger for DEC referral. Similarly, increasing your score from a 59 to a 61, while not being a "significant" improvement in score, does take an owner or manager from "failing" to "passing." This is a global comment and pertains to any other instance referencing "significant improvement" to the score.

(3) Identification of material errors or adverse conditions. If, after reviewing the inspection results, the owner or PHA reasonably believes that either an objectively verifiable and material error occurred in the inspection or that adverse conditions beyond the owner's or PHA's control negatively impacted the score, and that the error or adverse condition, if corrected or accounted for, would result in an significant improvement in the property's overall score, the owner or PHA may electronically submit a request for a technical review.

(2) Request for technical review. The request must be accompanied by the owner's or PHA's relevant evidence that an objectively verifiable and material error occurred or adverse conditions

beyond the owner or PHA's control occurred, which if corrected will result in an significant improvement in the overall score of the owner's property. A technical review of the inspection results will not be conducted based on conditions that were corrected subsequent to the inspection. Upon receipt of this request from the owner or PHA, the REAC will review the inspection and the evidence. If the REAC review determines that an objectively verifiable and material error (or errors) or adverse condition(s) beyond the owner or PHA's control has been documented and that it is likely to result in an significant improvement in the property's overall score, the REAC will take one or a combination of the following actions:

12. Comments to Section 5.711(d)(2): It is not clear how the REAC will determine the context for each of these actions, or a combination thereof. Currently, the REAC can issue a new physical condition score or keep the same physical condition score. Why does that not work? In order to fully comment on this part of the PR, we need to understand the parameters pursuant to which REAC will make these determinations, as it is not self-evident. Furthermore, as we have already mentioned, REAC should only undertake a new inspection if the owner requests it.

- (i) Undertake a new inspection;
- (ii) Correct the original inspection; or
- (iii) Issue a new physical condition score.

13. Comments to Section 5.711(c)(4): The language in 5.711(c)(4) needs to be clarified. The language references "four sources of error" but there appears to be only three sources. If the "fourth source of error" is the currently entitled "database adjustment", we would support that. In which case, Section ___ should be moved to this section.

(4) Basis for Technical Review. There are **four sources of error** that are associated with an inspection score. After review of each type of error, the property's score may be adjusted or other action taken.

(i) Material errors. An objectively verifiable material error must be present to allow for a technical review of inspection results. Material errors are those that were not due to the fault of the owner and exhibit specific characteristics and meet specific thresholds. The three types of material errors are as follows:

14. Comments to Section 5.711(c)(4)(ii): Regarding "building data errors", provision needs to be made for owners who demonstrably request HUD correct errors but are unable to bring it to fruition through no fault of their own.

(ii) Building data error. A building data error occurs if the inspector inspected the wrong building or a building that was not owned by the property, including common or site areas that were not a part of the property. Incorrect data due to the failure of an owner to notify HUD and request updating of HUD's systems of records are updated cannot form the basis of a review. Incorrect building data that does not affect the score, such as the address, building name, year built, etc., would not be considered material.

15. Comments to Section 5.711(c)(5) through (7): In subsection (5), we propose all references to "significant improvement" be deleted, for reasons already set forth above. In

subsection (6) We are opposed to HUD determining whether a reinspection is appropriate or not. Subsection 7 is punitive and we suggest the following revisions. Triple point deduction will bar earnest owners and managers from appealing or requesting reinspection.

~~(5) Significant improvement. Significant improvement in the project's overall score refers to an increase in a score for the owner or PHA such that the new score crosses an administratively significant threshold.~~

(6) Reinspection. If HUD determines, upon request from an owner or manager, that a reinspection is appropriate, it will arrange for a complete reinspection of the project(s) in question, not just the deficiencies previously identified, within thirty (30) days of owner's request. The reinspection will constitute the final inspection for the project, and HUD will issue a new inspection report (the final inspection report).

(7) Deficiencies. If any of the previously identified SHS deficiencies that the owner certified were corrected, remedied, or acted upon to abate are found during the reinspection not to have been corrected, remedied, or acted upon to abate, ~~the score in the final inspection report will reflect a point deduction of triple the value of the original deduction, up to the maximum possible points for the unit or area, and~~ the owner must reimburse HUD for the cost of the reinspection.

16. Comments to Section 5.711(e): We respectfully request additional context for the PR's removal of the "database adjustment" to be initiated by an owner or manager and granted to HUD. We do not support this change from existing practice, which practice works very well. It is unclear why this could not be the "fourth source of error" and moved to the above paragraph and treated within a Technical Review. Furthermore, the grounds of "modernization work in progress," which is an oft used and very important grounds for appeal for a universe of properties that, in many cases, exceed 40 years in age and are undergoing moderate through substantial rehabilitations.

(e) Independent HUD review. Under certain circumstances, an owner or manager may request that HUD ~~may find it appropriate absent a PHA request for technical review to~~ review the results of an inspection which are anomalous or have an incorrect result due to facts and circumstances affecting the inspected property which are not reflected in the inspection or reflected inappropriately in the inspection. These circumstances include, but are not necessarily limited to, inconsistencies between local code requirements and the inspection standards in paragraph (a); conditions which are permitted by variance or license or which are preexisting physical features non-conformities and are inconsistent with the inspection standards in paragraph (a); modernization work in progress, or cases where the owner has been scored for elements (e.g., roads, sidewalks, mail boxes, resident owned appliances, etc.) that it does not own and is not responsible for maintaining.

17. Comments to Section 5.711(f): The PR should provide additional clarity around reinspections. There should be no reinspections mandated by HUD outside of the 2-5 year range or as required by the Statutes. Only ownership should be able to request reinspections and HUD should have clear guidelines around when/how it will grant reinspections to requesting parties. The last bolded line below is acceptable only if only the ownership/management can request reinspections.

(f) Responsibility for the cost of a new inspection. If a new inspection is undertaken by the inspecting party and the new inspection score results in a significant improvement in the property's overall score, then the entity responsible for the inspection shall bear the expense of the new inspection. If no significant improvement occurs, then the owner or PHA responsible for the property must bear the expense of the new inspection. The inspection cost of a new inspection, if paid by the owner, is not a valid project operating expense. **The new inspection score will be considered the final score.**

18. Comments to Section 5.711(g): It is unclear whether posting of the final score will be publicly available or not. HUD must maintain confidentiality in terms of providing access to reports or ownership information and this should be clarified.

(2) HUD will make public the final scores of the owners through posting on HUD's internet site, or other appropriate and confidential means.

19. Comments to Section 5.711(h): Notification to residents must be done in accordance with the resident lease.

(h) Responsibility to notify residents of inspection; and availability of documents to residents—(1) Notification to residents. An owner must notify its residents of any planned inspections of their units or the housing development generally; in accordance with the resident lease.

20. Comments to Section 5.711(h)(3): Please provide more details regarding the required date on which the notice must be posted and the duration of the posting.

(3) The owner must post a notice to the residents in the owner's management office and on any bulletin boards in all common areas that advises residents of the availability of the materials described in this section. The notice should include, where applicable, the name, address, and telephone number of the HUD Project Manager.

21. Comments to Section 5.711(h)(4). We support this as opposed to tenant rating's or complaints automatically triggering inspections or reinspections.

(4) Residents are encouraged to comment on this information provided by the owner and submit any comments directly to the applicable HUD Field Office or responsible entity. Should residents discover the owner provided HUD with a false certification during the review they are encouraged to notify the applicable HUD Field Office where appropriate inquiry and action will be taken.

22. Comments to Section 5.711(i)(2): Ownership and management need advance written notice of DEC evaluation site visits.

(2) Evaluation of the property. During the evaluation period, the DEC will perform an analysis of the property, which may include input from tenants, HUD officials, elected officials, and others as may be appropriate. Although program offices will assist with the evaluation, the DEC will have primary responsibility for the conclusion of the evaluation of the property after taking into consideration the input of interested parties as described in this paragraph. The DEC's evaluation may include a site visit to the owner's property, with at least 2 weeks advance written notice.

U.S. Department of Housing and Urban Development

March 15, 2021

Page 9

We appreciate the opportunity to submit these comments, and we hope the above-noted comments will be considered along with other comments from the public. Should you require any additional information, please contact me, Colleen Fisher, at (703) 837-9001 or (703) 837-9001.

Sincerely,



Colleen M. Fisher

Executive Director