

June 25, 2021

The Honorable Marcia L. Fudge
Secretary
US Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, DC 20410

Re: [Docket No. FR-5246-N-04] “Housing Trust Fund: Request for Public Comment on Prior Interim Rule”

Dear Secretary Fudge,

The Council of Large Public Housing Authorities (“CLPHA”) and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments to HUD’s request for public comment entitled “Housing Trust Fund: Request for Public Comment on Prior Interim Rule” (the “Notice”).

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. We support the nation’s largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. Our members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing, and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

On October 29, 2010, HUD published proposed regulations for the administration of the Housing Trust Fund (“HTF”). CLPHA expressed several concerns with the proposed regulations in comments submitted to HUD on December 17, 2010, including that HTF should include public housing as an eligible use and that PHAs should be eligible recipients for HTF. In HUD’s interim rule, published on January 30, 2015 (the “Interim Rule”), HUD reversed course by allowing HTF funds to be used for certain public housing projects and listing PHAs as eligible HTF recipients. We appreciate these revisions that HUD made in the Interim Rule. However, we believe that more can be done to improve the HTF program for PHAs, who are among the nation’s leading providers of rental housing for low-income residents. The Interim Rule still maintains unnecessary

restrictions on HTF resources for PHAs and public housing projects, and these limitations impede PHAs from promoting the very purpose of the HTF program—to expand and preserve the supply of rental housing for low income families. Our following comments on the Interim Rule are designed to strengthen the HTF program by removing unnecessary regulatory restrictions and further enhancing the ability of PHAs and public housing projects to benefit from these funds.

All Public Housing Should Be Eligible to Receive HTF

The Interim Rule allows HTF funds to be used for certain public housing projects, but not all public housing is eligible. Specifically, under 24 C.F.R. § 93.203, HTF funds can only be used in connection with public housing when funds are used for (i) the construction of new units to replace public housing properties in connection with the Choice Neighborhoods Initiative (“Choice”) program or Low Income Housing Tax Credit (“LIHTC”) program; and (ii) the rehabilitation of existing public housing pursuant to the Rental Assistance Demonstration (“RAD”), Choice, and LIHTC programs. We disagree with HUD’s position in support of the Interim Rule that suggests these are the only programs through which PHAs will rehabilitate or replace public housing properties and further disagree with HUD’s assertion that the expansion of public housing can be achieved through other funding sources.¹ While we appreciate HUD’s inclusion of some public housing projects in the Interim Rule, we believe that the Interim Rule still unnecessarily limits the types of public housing projects that can access HTF funds.

The public housing program serves some of the nation’s neediest residents and complements the HTF program’s goal of expanding and preserving rental units for extremely low-income families. However, Congress has failed to adequately fund public housing for decades, leading to an estimated \$70 billion backlog in capital repairs.² In order to maintain and rehabilitate the existing public housing portfolio, additional investments are needed, and the HTF program can provide PHAs with the funding necessary to make projects financially viable. By limiting HTF funds to public housing projects that also receive Choice, LIHTC, or RAD assistance, HUD unnecessarily limits the ability of the public housing program to benefit from available HTF funds. While Choice, LIHTC, and RAD provide helpful resources to PHAs, not all public housing revitalization projects utilize assistance through the Choice, LIHTC, or RAD programs, and these projects, which may include smaller developments, would substantially benefit from HTF funding. PHAs redeveloping public housing with resources from programs other than Choice, LIHTC, or RAD should not be excluded from accessing HTF funds.

In addition, HUD should remove the limitation in 24 C.F.R. § 93.203(b) that HTF funds can only be used to replace existing public housing units through Choice or mixed-finance under Section 35 of the Housing Act of 1937. HUD should also remove the limitation that the number of replacement units developed cannot exceed the number of units removed from a PHA’s public housing inventory.³ Through Faircloth authority, it is estimated that PHAs have the ability to

¹ 80 Fed Reg. 5199, 5211.

² Housing is Infrastructure Act of 2019, H.R. 5187, 116th Cong. § 2 (2019).

³ 24 C.F.R. § 93.203(b).

develop over 227,000 new units of public housing. However, funding to support new public housing is often limited, making its development difficult. The ability to couple HTF funds with other funds to support new units of public housing would further the goals of the HTF program.

Given the shared mission of the HTF and public housing programs to serve the nation's neediest tenants, HUD should seek to expand, not restrict, the ways in which PHAs can access HTF funds for public housing construction and revitalization projects. We therefore urge HUD to remove the current limitations in the Interim Rule and allow all forms of public housing projects to access HTF funds.

PHAs Should be Eligible to Serve as Subgrantees under the HTF Program

HUD should revise the Interim Rule to allow PHAs to serve as subgrantees. The Interim Rule provides that HTF funds may be distributed through grantees or, if the grantee elects, through one or more subgrantees.⁴ The Interim Rule, however, provides that in order for a local government entity to be a subgrantee, the entity “must have an approved consolidated plan submitted in accordance with 24 C.F.R. part 91.”⁵ This requirement in effect prohibits PHAs from being selected as subgrantees as many PHAs do not submit consolidated plans on behalf of their jurisdictions. Instead, we would encourage HUD to adopt the definition of local government contained in 2 C.F.R. § 200.0, which includes “any unit of government within a state, including a ... local public authority, including any public housing agency under the United States Housing Act of 1937.”⁶ Requiring subgrantees to submit consolidated plans is neither mandated by Housing and Economic Recovery Act of 2008 (HERA)⁷ nor is it necessary as each state is required to submit a consolidated plan and HTF allocation plan which informs and guides their distribution of HTF funds.⁸ As long as the subgrantee is utilizing the HTF funds in accordance with their state's consolidated plan and HTF allocation plan, HUD should allow PHAs and others to serve as subgrantees. Doing so will increase flexibility given to grantees while still ensuring that HTF funds are distributed in accordance with the state's housing needs and priorities.

Expand Prohibition of Rejecting HTF Tenants to All Forms of Tenant-Based Assistance

The Interim Rule, at 24 C.F.R. § 93.303(d)(4), prohibits owners of HTF projects from rejecting applicants for tenancy because that applicant receives vouchers through the Section 8 Housing Choice Voucher (“HCV”) program or a HOME tenant-based rental assistance program. We support this as a way to protect tenants receiving voucher assistance from source of income

⁴ 24 C.F.R. § 93.101(c).

⁵ 24 C.F.R. § 93.2.

⁶ 2 C.F.R. § 200.0.

⁷ Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, sec. 1338, 122 Stat. 2654, 2712 (codified as amended at 42 U.S.C. § 1437).

⁸ 24 C.F.R. § 93.100-.101.

discrimination and would like to see it expanded to include tenants receiving all forms of housing vouchers, not just vouchers under the Section 8 HCV or HOME programs.

In recent years, there has been a significant increase in state and local tenant-based assistance, including but not limited to Emergency Rental Assistance provided by the U.S. Treasury Department. These programs, which often target the lowest income tenants in a given area, provide vital rental subsidies to tenants. Many CLPHA members rely on these programs to serve additional tenants and ensure access to housing for those most in need. As currently drafted, the Interim Rule would not protect tenants receiving other housing subsidies. This would needlessly subject tenants to potential source of income discrimination based on the program under which their housing subsidy is provided. HUD should avoid creating this unjust result by expanding this protection to all recipients of tenant-based assistance, regardless of what program the voucher is provided under.

Encourage Grantees to Incorporate Preferences and/or Additional Points in HTF Allocation Plans for Applicants Coupling HTF with Section 8 Project-Based Vouchers (“PBVs”)

The HTF program seeks to produce and preserve affordable housing for extremely low- and very low-income households. However, without an ongoing operating subsidy, it can be challenging for project owners to ensure that deep, long-term affordability can be maintained in projects receiving HTF assistance. The Section 8 project-based voucher (“PBV”) program offers such an operating subsidy and is one of the last-remaining HUD programs to allow new units to be added to the nation’s subsidized affordable housing stock. By using a project-based voucher commitment to underwrite the financing of a project, the PBV program enables PHAs to contribute to the creation and preservation of affordable housing in high-opportunity areas. Accordingly, we encourage HUD to work with state HTF funding recipients to incorporate preferences and/or additional points in the HTF Allocation Plans for applicants that seek to couple the receipt of HTF funds with Section 8 project-based vouchers.

Maintain Existing Limitations of Use of HTF Funding for Operating Costs

We want to express our support for the limitation in 24 C.F.R. § 93.200(a)(1) that limits the amount of HTF funds that may be used for ongoing operating costs and operating cost reserves to one-third of available funds. While we acknowledge the need for operating assistance in affordable housing projects is significant, there is limited funding available under the HTF program, and we believe that HTF funds can be utilized more efficiently as capital assistance. We hope HUD maintains this limitation in the final version of the regulations.

Streamline HTF Requirements With Existing HUD Program Requirements

In most projects, HTF funding will not be the only source of funds and may be coupled with other Federal funds, including other funding from HUD. Accordingly, we encourage HUD to align the

HTF requirements with other existing HUD programs wherever possible. With that end in mind, we have highlighted two areas below—environmental reviews and subsidy layering reviews—where we believe HUD has authority to streamline existing requirements. However, we would also encourage HUD to review all existing HTF requirements in order to better align HTF requirements with existing public housing, PBVs, and other HUD requirements.

- *Environmental Reviews* – HUD should better align the environmental review requirements that apply to projects receiving HTF subsidy with the environmental review requirements that apply to public housing, PBV, and other HUD-funded projects at 24 C.F.R. part 50/58. Unlike some other HUD statutes, the HTF statute does not include a provision for environmental review.⁹ Accordingly, this is an area in which we believe HUD has considerable flexibility. While some of the environmental review information needed to comply with HTF requirements and 24 C.F.R. part 50/58 overlaps, there are many distinctions between the HTF and part 50/58 environmental review requirements.¹⁰ One key distinction is that the HTF program requires the state, state-designated entity, or subgrantee administering HTF to maintain documentation demonstrating that each project complies with environmental provisions. HUD will not allow HEROS or environmental reviews under 24 C.F.R. part 58 to document environmental compliance for projects funded by HTF.¹¹ This often results in the need for projects receiving HTF and PBV, public housing, or other funding to undergo to separate and duplicative environmental reviews. We encourage HUD to permit a single environmental review to satisfy the requirements for both HTF and part 50/58.
- *Subsidy Layering Review* – HUD should seek to streamline HTF subsidy layering review (“SLR”) requirements with existing SLR requirements under other HUD programs. This is again an area where HUD has considerable leeway as SLR requirements are not mandated by the HTF statute.¹² In the preamble of the Interim Rule, HUD explained that while an HTF grantee may use the subsidy layering reviews conducted by other project funders, such would not satisfy the HTF requirements in 24 C.F.R. § 93.300(b) unless the review was also completed in accordance with the HTF grantee's standards.¹³ Units receiving PBV, public housing, and other types of HUD assistance, however, are already subject to HUD’s subsidy layering regulations in 24 C.F.R. § 4.13.¹⁴ Such subsidy layering reviews, when conducted by HUD or other agencies authorized by HUD, should also satisfy the HTF requirements to avoid the need for projects to undergo separate and duplicative SLRs.

⁹ Notice CPD-16-14 (Aug. 8, 2016).

¹⁰ HTF Environmental Provisions, DEP’T OF HOUSING AND URBAN DEV., <https://www.hudexchange.info/programs/environmental-review/htf/> (last visited Jan. 6, 2021).

¹¹ 42 Notice CPD-16-14 (Aug. 8, 2016).

¹² Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, sec. 1338, 122 Stat. 2654, 2712 (codified as amended at 42 U.S.C. § 1437).

¹³ 80 Fed. Reg. 5199, 5213.

¹⁴ 24 C.F.R. § 983.55(a).

Thank you for the opportunity to submit these comments.

Sincerely,



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Executive Director
CLPHA



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