June 10, 2024

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

RE: [Docket No. FR-6362-P-01] Reducing Barriers to HUD-Assisted Housing

Dear Danielle,

The Council of Large Public Housing Authorities ("CLPHA"), the MTW Collaborative, and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments to HUD's proposed rule entitled "Reducing Barriers to HUD-Assisted Housing" published on April 10, 2024 (the "Proposed Rule"), which reflect the views of CLPHA and MTW Collaborative members.

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.

The MTW Collaborative represents public housing authorities ("PHAs") participating in HUD's Moving to Work Demonstration program ("MTW"). The MTW Collaborative monitors and advocates on behalf of MTW agencies' interests and facilitates the sharing of information, best practices, and innovations between MTW agencies. Our membership includes the initial 39 PHA agencies participating in the MTW program, as well as PHAs newly designated as MTW pursuant to the expansion of the MTW program as authorized by Congress.

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.

CLPHA's focus, from its inception, has been to address the inequities of the housing market for low-income households. Building on CLPHA's ongoing commitment to maintain a diverse board of directors and membership based on race and gender, the board of directors formed a Racial Equity and Inclusion ("REI") Committee, to integrate a racial equity analytic lens with CLPHA's policy agenda and membership services and supports, by engaging in a racial equity planning process. To guide CLPHA's work, the board of directors developed the following mission statement to guide CLPHA's racial equity work:

> *CLPHA recognizes and acknowledges the history of government sponsored barriers in systemically disenfranchising Black, indigenous, people of color (BIPOC) communities, from fair housing access. CLPHA strives to promote housing equity for all residents served so that race no longer predicts housing access, quality or ownership. This work is intentionally led through a lens of race because of the deeply entrenched and persistent nature of racial disparities in systems across the U.S. To counter this past, CLPHA is committed to promoting justice, authentic resident engagement, and centering the voices of BIPOC residents in decisions about their lives and communities. CLPHA's goal is to identify, advocate and support data driven solutions that are equitably funded in order to counter historical disinvestment, and provide real opportunities for wealth building, financial security, and quality of life for all residents.*

One of the top priorities for CLPHA's REI work is to "find consensus on addressing housing needs of the formerly incarcerated that aligns with restorative justice approaches, and accompanying training supports needed by staff." CLPHA and its members firmly believe that everyone deserves to be considered as the individual they are, and everyone needs a safe and affordable place to live. We also acknowledge the need for balanced admissions practices that ensure residents can safely and peacefully enjoy life in their communities.

To that end, CLPHA conducted a survey of member PHAs and held a listening session to gather input on the Proposed Rule. PHAs recognize that individuals with criminal records often face discriminatory barriers to accessing housing, and these barriers disproportionately hinder BIPOC residents due to well-documented biases in the criminal justice system.[1] [2] Even prior to the publication of the Proposed Rule, several of our members proactively adopted new screening policies meant to reduce undue denials, while other members conducted surveys of their own residents to center tenant voices in the policymaking process.

Our commitment to racial equity and increasing access to housing, however, is tempered by the need for PHAs to have the flexibility to respond to local needs, priorities, and

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[1] Schneider, V. (2018). The prison to homelessness pipeline: Criminal record checks, race, and disparate impact. *Indiana Law Journal 93(2)*, 421-455.
[2] HUD. (2016). *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.*

requirements without unduly burdensome and unnecessarily prescriptive mandates from HUD. Our comments on the Proposed Rule therefore not only reflect the racial equity lens through which we approach screening and admissions policies and the feedback we gathered from our members but are informed by the heavily regulated and under-financed environment PHAs must operate within.

As a preliminary matter, we applaud HUD's effort to "provide clearer common sense rules and standards to help HUD-subsidized housing providers and PHAs carry out the legitimate and important ends of maintaining the safety of their properties and the surrounding communities" through the Proposed Rule. However, as explained in more detail in response to HUD's specific questions below, proposals such as adding a 15-day notice period before a PHA may issue a denial decision and implementing revised tenant selection plans within six months underscores that HUD must take into account the broader operational implications of the Proposed Rule on PHAs.

Specific responses to the questions posed by HUD in the Proposed Rule

Question 1: "Currently Engaging in or Engaged in"
The proposed rule would provide that, for purposes of determining whether criminal activity that may be the basis for termination or eviction is "current," a PHA or owner may not rely solely on criminal activity that occurred 12 months ago or longer to establish that behavior is "current." Should HUD establish such a rule and, if so, is less than 12 months an appropriate timeframe?

Response to Question 1: As a preliminary matter, HUD must first clarify what "criminal activity" triggers the 12-month time frame. Does this mean the date of the alleged criminal activity, the date of the arrest for such criminal activity, the date of the conviction, the date of the incarceration, or the date the individual is released from incarceration? Further, crimes and criminal behavior vary, so imposing such a limit would necessarily limit the flexibility of PHAs to substantively undertake the individualized assessment process. For example, more severe, violent crimes may have more sporadic occurrence while less severe crimes may be undertaken with more regularity. A 12-month time period may be sufficient to capture the latter, but not the former. We therefore recommend that HUD not establish such a rule. If HUD does adopt such a rule, we encourage HUD to adopt a sliding scale time frame that corresponds to the severity of the criminal activity.

Question 2: Lookback period for criminal activity
The proposed rule would provide that it is presumptively unreasonable for PHAs and owners to consider convictions that occurred more than three years ago in making admissions decisions. This is based in part on research on recidivism that indicates that people's risk of committing a crime drops precipitously after the person has not reoffended for a period of three years. The proposed rule would provide, however, that this presumption can be overcome based on evidence that, with respect to specific crimes, older convictions are relevant to individualized assessments of current suitability for tenancy.

2a: Is three years the appropriate time period for this presumption?
Is three years the appropriate time period for this presumption? Are there specific crimes for which a longer lookback period should be considered? If so, what are those crimes, how long of a lookback period would be recommended, and what is the supporting rationale? In general, what should HUD consider to be adequate "empirical evidence" that, for a specified crime of conviction, would overcome the presumption that a lookback period of longer than three years is unreasonable?

2b: Certain offenses for which a lookback period that exceeds 3 years may be presumptively unreasonable?
Are there certain offenses for which a lookback period that exceeds three years may be presumptively unreasonable? HUD seeks specific comment on all aspects of the proposal to presumptively but not conclusively cap the lookback period for any given offense at three years.

Response to Question 2, 2a, and 2b: We ask that HUD make available the research on recidivism used as the basis for this proposed policy. Similar to our response to Question 1, we are concerned with how HUD proposes to define "criminal activity" for the lookback period. While HUD does not clarify what activity triggers the 12-month period under Question 1, HUD here specifies the date of conviction as the criminal activity implicated in the lookback period. Theoretically, this means that in the case of an individual who was convicted of a serious violent crime 3 years and 1 month ago, who is sentenced and serves a 3-year incarceration period, consideration of the serious violent crime would be deemed "presumptively unreasonable." Such a limitation is overly prescriptive as it does not allow for the flexibility of an individualized assessment, which may reasonably dictate a longer lookback period. This standard effectively puts the onus on PHAs to justify their individualized assessments. Moreover, this effectively sets up the now no longer incarcerated individual for failure because sufficient time has not passed to demonstrate rehabilitation outside of incarceration, nor has there been sufficient time to access the necessary supportive services to ensure success.

We encourage HUD to amend the "presumptively unreasonable" standard to a sliding scale time frame that corresponds to the severity of the criminal activity. In other words, the more violent the crime, the longer the lookback period PHAs may reasonably apply. This does not mean, of course, that mitigating circumstances will not be considered. PHA's will still implement individualized assessments for every applicant and individual.

Question 3: Opportunity to dispute criminal records relied upon by PHA or owner (Denials)
The proposed rule would provide that PHAs and owners provide applicants with relevant criminal records no fewer than 15 days prior to notification of a denial of admission, as well as an opportunity to dispute the accuracy and relevance of the records relied upon. Is 15 days prior to notification of a denial of admission an appropriate timeframe? Do the processes described in §§ 5.855(c), 882.518, 960.204, and 982.553 adequately balance the needs of applicants and housing providers? If not, what additional processes or measures would be helpful?

Response to Question 3: If HUD requires an additional notice period, the additional administrative burden, costs, and delays in processing applicants should be accounted for in HUD's policies, regulations, and performance measures. The notice requirement could result in extended delays in filling units given any additional days outside of this 15-day period during which the provider considers any additional mitigating information provided by the applicant in response to the notice.

Given that a PHA's performance is assessed by, among other things, their ability to fill units and maintain occupancy rates, this 15-day notice period may have a negative impact on the ability of PHAs to effectively meet this performance point. HUD should therefore consider corresponding changes in its performance criteria for PHAs to account for these mandatory additional notice periods.

Question 4: Mitigating factors.
The proposed rule would provide that PHAs and owners consider the following set of mitigating factors when a decision to deny or terminate assistance or to evict is predicated on consideration of a criminal record:

- *the facts or circumstances surrounding the criminal conduct;*
- *the age of the individual at the time of the conduct;*
- *evidence that the individual has maintained a good tenant history before and/or after the criminal conviction or the criminal conduct; and*
- *evidence of rehabilitation efforts.*

Are there other mitigating factors that should be considered? Should HUD define these mitigating factors in greater detail in regulation or guidance? Please provide suggested definitions or standards.

Response to Question 4: In addition to the identified mitigating factors, HUD should include and provide additional guidance regarding the consideration of "changed circumstances." Such "changed circumstances" would include the consideration of disabling conditions and the treatment or rehabilitation of such conditions. Additionally, HUD should provide implementation tools for PHAs to assist in consideration of these "changed circumstances," e.g. trauma-informed, person-centered decision tools to aid in the individualized assessment process.

Question 5: Justifying denial of admissions
The proposed rule would provide that criminal activity in the past can be the basis for denying admission only if it would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA/property employees. Should HUD provide additional specificity in the rule or in subsequent guidance on this requirement, and if so, on what aspects.

Response to Question 5: Limiting the ability of PHAs to conduct individual assessments of applicants to just that criminal activity which "threaten the health, safety, or rights to peaceful enjoyment of the premises" is too narrow. It is concerning to note that nowhere in the Proposed Rule does HUD consider an activity that implicates the ability of applicants and participants to provide accurate and truthful information. For example, under the Proposed Rule, instances of fraud may not be the basis of a denial as

fraud does not meet the standard of a "threat to the health, safety, or right to peaceful enjoyment." As HUD is aware, the integrity of assisted housing programs relies heavily on accurate and truthful disclosures from applicants and participants for processing individuals for eligibility. It is therefore important that HUD include as a basis for denial situations that involve fraud, misrepresentation, or other such circumstances.

Question 6: Ensuring consistency of tenant selection plan
The proposed rule would amend 24 CFR part 5 to add a new section, § 5.906. Proposed § 5.906(a) would require an owner of federally assisted housing as defined at § 5.100, other than an owner of a property receiving tenant-based assistance and project-based voucher and moderate rehabilitation owners, to amend the tenant selection plan required by § 5.655 within six months after the effective date of the final rule to ensure its consistency with §§ 5.851 through 5.905. HUD seeks comment on whether the six months proposed for amendment of the tenant selection plan is reasonable.

Response to Question 6: As HUD is aware, PHAs are heavily regulated entities and implementation of any substantive amendments or changes to PHA policies often triggers a public comment period as well as formal board approval. The proposed six-month time frame is therefore insufficient. Additionally, implementation of the changes contemplated in the Proposed Rule is not solely restricted to amending the tenant selection plan. Such changes will necessarily include updates to related forms, notice to tenants, as well as substantive trainings for staff. Further, as HUD is aware, PHAs are severely constrained financially and need additional time given staffing challenges. We therefore recommend that HUD consider the timeline to amend tenant selection plans to be either twelve months from the effective date of the final rule, or the next applicable annual planning process cycle, whichever is later.

Question *7: Evidence relating to exclusions*
The proposed rule would require housing providers who exclude a household member to apply a "preponderance of the evidence" standard when determining whether the household member participated in or was culpable for an action or failure to act that warrants denial or termination. This proposal would address the need for housing providers to have a uniform standard with which to evaluate evidence underlying decisions that affect a tenant's or prospective tenant's future housing opportunities. What makes evidence generally reliable in this context? Should HUD provide further guidance as to the use of evidence in this regulation or in sub-regulatory guidance?

Response to Question 7: To allow PHAs the full flexibility of the individualized assessment process, it would be helpful for HUD to provide guidance as to what evidence is strictly prohibited in denial or termination decisions. Anything further would be overly prescriptive and infringe upon the ability of PHAs to develop the policies and protocols that meet their community's needs.

Question 8: Rescreening of tenants for criminal activity
At §§ 982.301 and 982.355, HUD proposes to prohibit the receiving PHA from rescreening a family that moves under the portability procedures of the HCV program (including for criminal activity). HUD is aware that there are other circumstances under which a PHA or an owner might rescreen a tenant for criminal activity, and HUD

would like to consider the issue of rescreening for criminal activity in a comprehensive manner. As such, HUD specifically seeks comment from PHAs and owners on whether there are circumstances under which rescreening a tenant for criminal activity is appropriate, and if so, an explanation of the precise circumstances and reasons therefore. Specifically, for those PHAs and owners who rescreen, under what circumstances do you rescreen after an initial screening, how often do you conduct such rescreening, how long have you been conducting such rescreening, on approximately how many tenants/participants, and what has been the results of your rescreening? Specifically, has your rescreening then led to any evictions or terminations? If so, how many, what were the specific offenses for which they were evicted, what was the case outcome for those offenses, and when did the offense occur in relation to the eviction or termination? Other than the offense in question, were there other concerning factors raised by the tenant/participant? Do you believe your rescreening serves a legitimate purpose? For all members of the public, how, if at all, should HUD address comments about rescreening in the final rule?

Response to Question 8: Few CLPHA and MTW Collaborative members rescreen a family that moves under their portability procedures. However, for those that do, it would appear consistent with both current requirements and the Proposed Rule that any such rescreenings be limited to those crimes that render ineligibility mandatory i.e. lifetime sex registry and controlled substance convictions.

Question 9: Owner responses to tenant comments on tenant selection plans.
Proposed revisions to 24 CFR 245.115(b)(3) would give tenants the right to comment on proposed changes to the tenant selection plan, with or without the help of tenant representatives, and submit them to the owner and to the local HUD office. Should owners be required to respond to comments received from tenants on proposed changes to the tenant selection plan prior to finalizing those changes? If so, what is a reasonable time frame for an owner to respond?

Response to Question 9: In general, we support tenant involvement in major policy changes such as those contemplated in the Proposed Rule. However, PHAs have the burden of operating under various unfunded mandates issued by HUD. We are concerned that imposing such an unfunded mandate on owners presents undue administrative burdens which will eventually lead to owners exiting HUD programs. We would therefore suggest that rather than such a mandate, HUD clarify that owners are encouraged to carefully review and consider such tenant feedback but that ultimately any changes responsive to such tenant feedback are at the owners' discretion.

Question 10: Screening Requirements for HCV and PBV Owners.
HUD is requesting comments on owner screening requirements for the HCV and PBV programs with respect to criminal records and criminal activity. Specifically, should HUD establish the same or similar requirements for HCV and/or PBV owners as proposed for owners under part 5? If not, what, if any, requirements should be established for denials on the basis of criminal records, current or recent criminal activity, illegal drug use, or alcohol abuse?

10a: HCV Owners Screening Requirements
HCV Owners: Should an owner participating in or considering participating in the HCV program be required, as opposed to encouraged, to conduct an individualized assessment before refusing to rent their unit to an HCV family based on criminal activity? Likewise, should there be restrictions on an owner's screening in terms of a lookback period for criminal activity? How would such restrictions apply, and what would be the mechanism and the enforcement action, if any, that a PHA would be responsible for taking in such instances? Would any additional requirements adversely impact owner participation in the HCV program and to what extent? Are there other approaches short of regulatory requirements that would encourage HCV owners or potential HCV owners to adopt such practices voluntarily?

10b: PBV Owners Screening Requirements
PBV Owners: Should the criminal activity screening requirements be more extensive for or exclusively applied to PBV owners as opposed to HCV owners? For example, what aspects of the PBV program, which are generally similar to other HUD project-based assistance, should HUD consider to either continue to treat it more like HCV or rather, apply the requirements proposed in this rule.

Response to questions 10, 10a, and 10b: Consistency in policies and standards is important, especially to eliminate disparate treatment of applicants and residents according to the assistance program. At the same time, the chilling effect on private landlords is a stark reality in affordable housing. HUD should therefore provide PHAs with additional tools and resources to incentivize continued private landlord participation without mandating it. CLPHA supports expanding PHA flexibilities and funding to encourage owners to apply these screening requirements without a mandate.

Additionally, we ask that HUD apply the rule consistently across programs. HUD's Office of Fair Housing and Equal Opportunity has taken the position that any landlord or management company that participates in any of the HUD assistance programs are subject to the same fair housing standards as PHAs. In fact, FHEO has taken enforcement actions regarding criminal record screenings against both PBV and HCV owners even before the Proposed Rule was published.

Question 11: Continued use of the term "alcohol abuse"
This proposed rule continues the use of the statutory term "alcohol abuse" when describing the relevant potential disqualifying circumstances related to alcohol. HUD seeks public comment on the continued use of the term and whether there are alternative, less pejorative, and/or more current terms that could replace "alcohol abuse".

Response to Question 11: We agree that alternative, less pejorative terms should be used and proposed HUD consider "alcohol addiction," "alcohol dependence," and "alcohol use disorder" to reflect the spectrum of alcohol-related behaviors that may be implicated in addressing barriers to housing.

Conclusion

Thank you for the opportunity to comment on the Proposed Rule and its impact on the residents our PHA members serve. CLPHA, Reno & Cavanaugh, and the MTW Collaborative look forward to working with HUD on this and future rulemaking.

Sincerely,

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