December 9, 2019

SUBMITTED ELECTRONICALLY

HUD Desk Officer
Officer of Management and Budget
New Executive Office Building
Washington, DC 20503
Fax No. 202-395-5806
E-mail: OIRA_Submission@omb.eop.gov

Re: Docket No. FR-7011-N-50; OMB Approval Number 2577-0075
30-Day Notice of Proposed Information Collection: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds: 30-Day Notice of Proposed Information Collection: Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments on the Department of Housing and Urban Development's ("HUD") 30-day notice of proposed information collection regarding the Public Housing Annual Contributions Contract for Capital and Operating Grant Funds (the "2019 PRA 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. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They 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.

The mission of PHAs across the country is to serve low-income families in our communities by providing decent, safe, and affordable housing. PHAs have continued to work to foster a cooperative and successful working relationship with HUD to serve this mission. We therefore continue to be extremely concerned that HUD is unwavering in its attempts to substantively change the relationship between PHAs and HUD by amending the Public Housing Annual Contributions Contract ("ACC") through the Paperwork Reduction Act ("PRA") process.

As explained in further detail below, the amended ACC published in the 2019 PRA Notice (the "2019 ACC") is simply the latest example of HUD's continued attempts to circumvent the Administrative Procedure Act ("APA"), unilaterally change the contractual relationship between HUD and PHAs, and strip PHAs of their ability to challenge HUD's breach of contract actions.

A. In 2018, HUD attempted to unlawfully bind PHAs to new, substantive terms and conditions through a revised ACC.

To understand our continued concerns regarding the 2019 PRA Notice and 2019 ACC, it is necessary to review HUD's previous attempts to bind PHAs to a revised Annual Contributions Contract ("ACC") form.

On May 1, 2018, HUD issued a Capital Fund Processing Guidance for FFY 2018 Grant Awards notice proclaiming that "[w]hen a PHA draws down funds from an FFY 2018 Capital Fund formula grant, it will become bound to the requirements of the New ACC." Without providing prior notice and without citing legal authority, HUD conditioned 2018 Capital Funds on a PHA's blind acceptance of an amended ACC.

HUD's ultimatum was simple: PHAs must either accept an amended ACC without negotiation or forego critical funding and potentially jeopardize PHA operations. HUD issued this ultimatum despite the fact that the ACCs which are currently in place between HUD and PHAs requires that any changes to the ACC be by mutual written agreement, which would require signing by both parties.[1] Further, HUD issued this ultimatum fully aware that any action that purported to bind a PHA to substantive terms and requirements necessarily required review and approval by the PHA board of directors and/or executive staff. Declaring that PHAs would be "bound" upon the drawing down of Capital Funds put PHAs in the position of potentially violating local and state law, as well as their own organizational bylaws. We raised our concerns with HUD, noting that HUD had no authority to preempt or force PHAs to violate such requirements.

Beyond the process through which HUD purported to bind PHAs to the terms and conditions of the amended ACC, CLPHA and Reno & Cavanaugh raised a number of substantive concerns regarding problematic and legally questionable terms and conditions contained in the amended ACC. We engaged HUD in discussions to address these concerns in the hopes of maintaining a cooperative and successful working relationship with HUD and received assurances, in turn, that HUD would consider these concerns in good faith.

[1] Section 23 of the ACC currently in place provides, in pertinent part, that "by mutual agreement of the parties to this ACC, this contract may be amended in writing."

On December 27, 2018, HUD issued a 60-day Notice of Proposed Information Collection (the "2018 PRA Notice") and published a form ACC (the "2018 ACC"). The 2018 ACC was substantively the same as the form issued on May 1, 2018.

B. ***In 2019, HUD has continued to fail to address many of our fundamental concerns regarding the revised ACC.***

On February 25, 2019, CLPHA and Reno & Cavanaugh submitted substantive comments to the 2018 PRA Notice. *See* Attachment 1. We continued to engage HUD regarding our concerns, despite HUD's failure to substantively act on our previous engagement efforts. We also raised these concerns with members of Congress. It is only after these concerted efforts that HUD now appears to retreat from some of its attempts to impose new substantive and legally questionable terms and conditions upon PHAs through an amended ACC.

In the 2019 PRA Notice, HUD admits that the amended ACC "deletes or revises" several terms that CLPHA and Reno & Cavanaugh found objectionable. As explained in further detail below, however, HUD's efforts fall short.

1. *Administrative Procedure Act notice and comment rulemaking, rather than the Paperwork Reduction Act process, is the appropriate vehicle for promulgating revisions to the Annual Contributions Contract.*

HUD's continued efforts to use the PRA process rather than notice and comment rulemaking violates the APA. The substantive changes proposed in the 2019 ACC create obligations, grant HUD new and expanded rights, produce significant effects on private interests, and establish new methods for determining certain PHA obligations, all of which trigger APA notice and comment rulemaking.[2] HUD did not publish these substantive changes in the Federal Register for formal notice and comment rulemaking in satisfaction of the requirements of Section 552 of the APA. As such, any implementation of the substantive changes contained in the 2019 ACC is unlawful and "not in accordance with law."[3]

Furthermore, it is questionable why HUD would avail itself of the PRA process in the first place. The PRA process is used to "minimize the paperwork burden … resulting from the collection of information by or for the Federal Government" and to "maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government."[4] In the 2018 PRA Notice, HUD's stated goal was to provide "PHAs with sufficient notice of changes to

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[2] 5 U.S.C. § 553(a)(3)(A); *Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112 (D.D.C. 2008). The D.C. District court continued in Steinhorst to differentiate a legislative rule from and interpretive rule: On the other hand, a legislative rule "'does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy'" (internal citations omitted). A legislative rule is one that "'grant(s) rights, impose(s) obligation(s) or produce(s) significant effects on private interests.'" (internal citations omitted). "Agency actions (that) establish new methods for determining the obligations of the regulated parties….are subject to notice and comment rulemaking." *Committee for Fairness v. Kemp*, 791 F. Supp. 888, 895 (*citing Battrton v. Marshall, 648 F.2d 694, 706 (D.C. Cir. 1980); Cabais v. Egger, 690 F.2d 234, 238 (D.C. Cir. 1982); Nat'l Senior Citizens Law Center, Inc. v. Legal Servs. Corp*., 581 F. Supp. 1362, 1369 (D.D.C. 1984).

[3] 5 U.S.C. § 706.

[4] 44 U.S.C. § 3501.

the New ACC." In the 2019 PRA Notice, HUD's goal was again to "provide[] PHAs with notice of revisions to the current ACC." HUD further submitted that the 2019 PRA Notice was "in response to public comments received." Clearly, neither notice had anything to do with minimizing paperwork burden or maximizing information utility.

It seems that HUD is attempting to use the PRA process to accomplish a pseudo-notice-and-comment process without triggering the APA standard of review. Indeed, HUD's ever-evolving and often contradictory actions in this ACC process arguably rise to the level of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of the APA:[5]

i. HUD's replacement of "HUD Requirements" in the 2018 ACC with "Public Housing Requirements" in the 2019 ACC is illusory at best.

The 2018 ACC included the definition of "HUD Requirements," which expanded PHA compliance requirements beyond properly promulgated laws and regulations related to public housing and, contrary to 24 C.F.R. § 905.108, included compliance with any and all HUD-issued notices, forms, and agreements. In the 2019 ACC, HUD appears to temper this expanded compliance requirement by removing the definition of "HUD Requirements" and replacing it with "Public Housing Requirements." We fear that this replacement, however, is illusory. HUD does not provide a finite list of compliance requirements but rather states that "Public Housing Requirements include **but are not limited to**" (emphasis added) the statutes and regulations provided in the ACC. Clearly, HUD continues to provide itself the opportunity to unilaterally expand PHA compliance requirements beyond properly promulgated laws and regulations through the 2019 ACC. This is arbitrary, capricious, and not in accordance with law.

ii. HUD's elimination of the definition of "Operating Receipts" and "Program Receipts" in the 2019 ACC is an acknowledgment of HUD's past arbitrary action.

As originally provided in the 2018 ACC, the definitions of "Operating Receipts" and "Program Receipts" appeared to recapture de-federalized funds and restrict all program and operating funds to public housing expenditures through contract, rather than revisions to existing regulations and program requirements. In the 2019 ACC, HUD attempts to correct this arbitrary and illegal action by eliminating these terms and acknowledging that "HUD cannot regulate PHA activity outside of the public housing program." HUD further clarified that it "has no intention of changing statutory funding obligations" through the ACC.

iii. HUD's addition of requiring the PHA and HUD to execute the 2019 ACC still falls short of the "mutual agreement" requirement under the prevailing ACC.

Under the ACC currently in place between PHAs and HUD, any amendments must be made in writing "by mutual agreement of the parties." Thus far, the entire process by which HUD is attempting to amend the ACC violates this requirement.

[5] 5 U.S.C. § 706.

In 2018, HUD purported to bind PHAs to the amended ACC vis-à-vis the drawing down of Capital Funds. There was no mutual agreement signed in writing by both parties. HUD had no authority to bind PHAs in such a manner. Further, such "contract by drawing funds" ignored the fact that PHAs are local government agencies bound by established state and local laws governing, among other things, authorization to contract and that such contracts required review and approval by the PHA board consistent with internal governance and policy requirements.

In the 2019 PRA Notice, HUD appears to correct these arbitrary and illegal acts by acknowledging "that entering into the ACC requires Board and Executive Review" and adding signature lines for HUD and the PHA in the 2019 ACC. These corrective actions are illusory, at best, as HUD has added "PHA Acceptance" language that provides in pertinent part:

> *The PHA hereby accepts this agreement … and agrees to comply with the terms and conditions of this agreement, applicable Public Housing Requirements, and* ***other requirements of HUD now or hereafter in effect****.*

(emphasis added). Again, HUD is attempting to use the ACC to unilaterally bind PHAs to any policies, procedures, notices, and other guidance that HUD requires now and in the future without notice and comment rulemaking.[6] This is arbitrary, capricious, and not in accordance with law.

2. HUD cannot change the contractual relationship it has with PHAs by changing the title of the Annual Contributions Contract to the "Annual Contributions Terms and Conditions for the Public Housing Program."

Under HUD regulations, the "Annual contributions contract (ACC) is a contract … whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of its public housing projects."[7] In the 2018 PRA Notice, HUD purported to rechristen the ACC an "annual grant agreement for the HA's public housing program." In the 2019 PRA Notice, HUD retitled the ACC as "Annual Contributions Terms and Conditions for the Public Housing Program." These attempts by HUD to change the contractual nature of the ACC necessarily fail absent notice and comment rulemaking to change the underlying regulatory definition of the ACC under 24 C.F.R. § 990.115.

Furthermore, HUD's own actions acknowledge that the ACC is a contract. In *Public Housing Authorities Directors Association, et al. v. United States,* 130 Fed. Cl. 522 (2017) (the "PHADA Litigation"), plaintiffs brought a breach of contract suit against HUD in the United States Court of Federal Claims based on the ACC. HUD did not challenge the court's jurisdiction over the breach of contract suit and in fact used the absence of an ACC between HUD and two association plaintiffs to have the association plaintiffs dismissed from the suit. Nothing in the law, programs, or relationship between HUD and PHAs has changed since the PHADA Litigation to support HUD's attempts since 2018 to transform the ACC into anything other than a contract.

[6] We note further that while HUD states in the 2019 PRA Notice that the "terms and conditions of the ACC published in this notice do not override or amend prior versions of the ACC," it is concerning that the 2019 ACC contradicts this assurance from HUD and states that the ACC "supersedes any previous ACC."
[7] 24 C.F.R. § 990.115.

3. HUD does not have authority to foreclose future litigation efforts through a PRA notice.

Section 10 in the 2018 ACC included language that gave HUD broad authority to reduce, offset, terminate, recapture, withhold, suspend, reduce, or take any other action it wished regarding PHA grant funding. In addition to the APA implications of HUD bestowing upon itself through a PRA notice such broad authority, CLPHA and Reno & Cavanaugh noted in our comments to the 2018 ACC that this Section 10 was a clear attempt by HUD to foreclose future breach of contract litigation in the United States Court of Federal Claims. While HUD eliminated this language in the 2019 ACC, it is significant that HUD noted in the 2019 PRA Notice that:

> *While addressing past litigation outcomes is not a principal purpose for HUD's revisions to the ACC, HUD makes clear in the [2019] version that HUD has never contemplated money damages for action or inaction by HUD with respect to the ACC.*

New Section 11 of the 2019 ACC provides that "[t]his agreement does not contemplate money damages as a remedy for a breach of the agreement by HUD."

This is yet another attempt by HUD to foreclose future breach of contract litigation in the United States Court of Federal Claims. Under the Tucker Act, the United States Court of Federal Claims has exclusive jurisdiction to adjudicate breach of contract claims against the United States so long as there is a "substantive right for money damages against the United States."[8] Outside of Tucker Act jurisdiction, HUD has sovereign immunity against breach of contract claims. By explicitly providing that the ACC does not contemplate money damages, HUD is attempting to foreclose PHAs from challenging any action by HUD that breaches the terms of the ACC.

Finally, any changes to the form ACC under the guise of "streamlining," an attempt not to "repeat statutory and regulatory requirements," or otherwise "minimize the scope of the requirements contained in the ACC" are suspect as a general matter. Given HUD's explicit attempts to unilaterally impose new, substantive terms and conditions upon PHAs while simultaneously shielding itself from APA and breach of contract liability in this ACC process, we are concerned about the following changes contained in the 2019 ACC:

- Elimination of the "Mission of HUD"

  Both the ACC currently in place and the 2018 ACC contained language regarding the "Mission of HUD," which acknowledges and contractually obligates HUD to administer the Public Housing Program and provide annual contributions to PHAs "consistent with "all applicable statutes, executive orders, and regulations." By eliminating this language in the 2019 ACC, HUD seems to relieve itself of its obligation to provide annual contributions to PHAs consistent with the prevailing law.

[8] *See Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right to money damages against the United States").

- Elimination of specific incorporation of HUD regulations

  The ACC currently in place specifically incorporates by reference "regulations promulgated by HUD at Title 24 of the Code of Federal Regulations." While the 2019 ACC contains passing references to regulations at 24 CFR, HUD has eliminated any language that specifically incorporates Title 24 into the agreement thereby eliminating HUD's contractual obligation to comply with those regulations.[9]

Until HUD has resolved the above issues, we urge HUD to rescind and withdraw the 2019 ACC.

Thank you for the opportunity to comment on the 2019 PRA Notice. We would also like to take the opportunity to adopt the comments submitted by the MTW Collaborative regarding HUD's Moving to Work Amendment to Consolidated Annual Contributions Contract Notice, Docket No. FR-7011-N-49, (the "2019 MTW ACC Amendment Notice"). CLPHA and Reno & Cavanaugh fully endorse and adopt the MTW Collaborative's comments to the 2019 MTW ACC Amendment Notice and thank HUD for its consideration of both sets of comments.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Sunia Zaterman
Executive Director
CLPHA

Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC

[9] *See PHADA Litigation* at 532:

> *It is well established that "[t]o incorporate material by reference, a contract must use clear and express language of incorporation, which unambiguously communicates that the purpose is to incorporate the referenced material, rather than merely acknowledge that the referenced material is relevant to the contract."* Precision Pine & Timber, Inc. v. United States, *596 F.3d 817, 826 (Fed. Cir. 2010)*
> …
>
> *In this case, the ACCs contain language expressly incorporating HUD's regulations at Title 24 into the contracts.*
> …
> *These express statements of intent that HUD's Title 24 regulations, as amended, are incorporated into the contract, are sufficient to establish that the parties undertook a contractual obligation to comply with the terms of those regulations.*

Attachment 1

February 25, 2019

SUBMITTED ELECTRONICALLY

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-7006-N-15:
60-Day Notice of Proposed Information Collection: Comment Request:
Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments on the Department of Housing and Urban Development's ("HUD") notice of proposed information collection regarding the Public Housing Annual Contributions Contract for Capital and Operating Grant Funds (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. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households.

Reno & Cavanaugh has represented hundreds of PHAs and their affiliates throughout the country and has been working with clients on fair housing issues throughout the years. Reno & Cavanaugh 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 our practice.

The mission of PHAs across the country is to serve low-income families in our communities by providing decent, safe, and affordable housing. PHAs have continued to work to foster a

cooperative and successful working relationship with HUD to serve this mission. Therefore, we are extremely concerned that HUD is proposing substantive changes to the relationship between PHAs and HUD generally and the operational capabilities of PHAs specifically through a Paperwork Reduction Act ("PRA") notice for information and collection on revisions to the Annual Contributions Contract issued on December 27, 2018 (the "New ACC"). Below are our detailed comments on the Notice.

1. Lack of Notice and Comment Rulemaking in Promulgating the New ACC

As a preliminary matter, we believe implementation of the New ACC through the PRA process rather than through the notice and comment rulemaking process violates the Administrative Procedure Act ("APA"). The New ACC creates substantive changes to various HUD policies, procedures, and regulations that would normally trigger APA rulemaking. For example, the restrictions on the use of disposition proceeds discussed in Paragraph 3, below, conflict with 24 C.F.R. Parts 970 and Part 990 and as such present substantive regulatory changes that trigger notice and comment rulemaking. Additionally, as discussed in greater detail below regarding Section 3.d., HUD is attempting to preemptively circumvent all APA rulemaking through contract by requiring PHAs to comply with all HUD notices, forms, and agreements without the benefit of notice and comment rulemaking. Such substantive changes would benefit from an open comment period to allow PHAs and HUD to work cooperatively in understanding and evaluating the impact of such proposed changes and to minimize disruption to the mission they share with HUD of serving low-income communities throughout the country. The PRA process does not allow for such an open, interactive, and substantive comment process.

2. HUD Cannot Change the Contractual Relationship it has with PHAs by Calling the ACC a Grant Agreement

Under 24 C.F.R. § 990.115, the annual contributions contract (the "ACC") is the contract that governs the contractual relationship between PHAs and HUD "whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of its public housing projects." In the New ACC, HUD attempts to change the nature of the ACC by defining it as a "grant agreement" rather than a "contract." HUD cannot change the regulatory definition of the ACC through contract. Rather, HUD must go through notice and comment rulemaking to change the regulatory definition of the ACC.

Additionally, the use of a grant agreement to govern the contractual relationship between HUD and PHAs in light of HUD's attempts to expand its authority, control, and involvement in PHA operations is suspect at best. Under 31 U.S.C. § 6304, a "grant agreement" shall be used when "substantial involvement is **not** expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement" (emphasis added). "Substantial involvement" is not only expected between HUD and PHAs under the New ACC, but it is required (see *infra* Paragraph 7 regarding discussion of HUD's capacity).

Lastly, we remind HUD that its past attempts to change its contractual relationships by simply calling a document by a different name, *see PHADA, et al. v. United States* (the "PHADA Case")[1]

[1] *Public Housing Authorities Directors Association, et al. v. United States*, 130 Fed. Cl. 522 (2017).

and *CMS Contract Management Services, et al. v. United States* (the "CMS Case"),[2] have failed to persuade the federal courts. While it is unclear what HUD ultimately wishes to accomplish by changing the name of the document, it is clear as a legal matter that a document being a grant agreement or a contract triggers different legal recourse and damages upon breach or default. Therefore, we are concerned about HUD's lack of transparency regarding its intent and the timing of this change.

3. "Operating Receipts" and "Program Receipts" as Newly Defined Would Capture Non-Federal Funds

Under Section 1 of the New ACC, "Operating Receipts" is defined as:

> *All rents, revenues, income, and receipts accruing from, out of, generated by, or in connection with the ownership or operation of public housing, including grant funds received pursuant to HUD Requirements and is not limited to income from fees for services performed, the use or rental of real or personal property acquired with grant funds, the sale of commodities or items fabricated under the grant, license fees and royalties on patents and copyrights, and principal and interest on loans made with grant funds. Operating Receipts shall not include any funds received for the development or modernization of a Project, annual contributions pledged for payment of bonds or notes, or proceeds from the disposition of real property or rebates, credits, discounts and interest earned on any of them. Interest on the Operating Receipts (including the investment of Operating Receipts), constitutes Operating Receipts.*

This broad definition of what constitutes "Operating Receipts" seemingly includes fees which HUD has acknowledged previously are defederalized consistent with the Operating Fund regulations, *see* 24 C.F.R. Part 990, and HUD's implementation of asset management. HUD cannot use a contract to implement revisions to existing regulations and program requirements in this manner.

Under Section 1 of the New ACC, "Program Receipts" is defined as:

> *Operating Receipts and any other funds received by the HA for the development, modernization, sale or transfer of public housing projects. Subject to HUD Requirements, as defined in Paragraph 3, interest on the program receipts (including the investment of program receipts) constitutes program receipts. Program receipts shall only be used to pay for public housing expenditures, unless otherwise allowed by HUD Requirements.*

Further, under Section 11 of the New ACC, HUD restricts the use of Program Receipts to:

[2] *CMS Contract Management Services, et al. v. Massachusetts Housing Finance Agency v. United States*, 745 F.3d 1379 (2016).

(1) The payment of the costs of development and operations of the Projects under the CACC with HUD; (2) the purchase of investment securities as approved by HUD; and (3) such other purposes as may be specifically approved by HUD.

Taken together, these definitions appear to restrict the use of all program and operating funds to public housing expenditures. For example, while the definition of Operating Receipts excludes funds for development or modernization of a project and proceeds from disposition of real property, the definition of Program Receipts includes all funds received for development, modernization, or disposition of public housing projects. We are not aware of any authority that would allow HUD to exercise such broad control over all PHAs funds, both federal and non-federal.

4. Compliance with HUD-Issued Notices, Forms, and Agreements Without APA Rulemaking

The New ACC in Section 3.d requires PHAs to comply with certain "HUD Requirements." In doing so, HUD is attempting to expand these requirements from properly promulgated laws and regulations, which is the case under the existing ACC, to also include "HUD-issued notices, and HUD-required forms, or agreements" now in existence and as may be amended from time to time. Such notices, forms, and agreements are not law or regulation, but rather agency guidance and interpretation of properly promulgated laws and regulations. Any substantive changes to regulations and program requirements must be promulgated in accordance with APA notice-and-comment rulemaking, rather than by contract through the New ACC. This is a further example of HUD attempting to circumvent its obligations under the APA.

Further, the new definition of HUD Requirements unduly burdens PHAs with the internal capacity and consistency issues systemic within HUD. For example, the revised Mixed Finance ACC Amendment form released in 2014 still contained citations to regulations that were obsolete. PHAs using that revised form sought clarification from HUD regarding the citations as signing the forms would bind the PHA to regulations that no longer existed and therefore did not properly bind the PHA and the project to the appropriate regulations. In response to this clarification, HUD directed some PHAs to use the form with the obsolete language as is and allowed other PHAs to revise the form to include the correct citations. Incorrect citations is a benign example, but nevertheless highlights the variable advice HUD staff provide to PHAs on how to address inconsistencies or mistakes in HUD forms. When HUD staff vary in their advice on how to interpret or apply HUD notice and guidance materials regarding substantive program requirements, the stakes are much higher. It is unduly burdensome to require strict compliance with HUD notices, forms, or agreements without providing PHAs the benefit of a notice period to review such notices, forms, or agreements and seek clarification where terms or language may be ambiguous, confusing, or conflict with law, regulation, or previous guidance.

5. Broad Authority to Reduce, Offset, Terminate, Recapture, Withhold, Suspend, and Reduce Grant Funding

Under Section 10.a. of the New ACC,

> *Grant funding is subject to each year's annual appropriations act … Appropriations may be reduced by HUD as directed by Congress in an appropriations act. Grant funding may be reduced by an offset of a HA's funding, pursuant to a formula prescribed by Congress in an appropriations act. Grant funding may also be reduced or offset pursuant to a formula devised by HUD if Congress has invested HUD with the discretion to devise and implement a funding formula in the appropriations act. Grant funding may also be terminated, recaptured, withheld, suspended, reduced or such other actions taken in accordance with HUD Requirements.*

It is clear that HUD is attempting to contract around the decision in PHADA Case. The court in that case held that HUD breached its obligations under the existing Annual Contributions Contracts ("ACCs") when it offset 2012 operating subsidy payments to PHAs. The court found that "the language of the ACCs reflects an intent to incorporate by reference into the contract the provisions of Title 24 of the C.F.R. [including the pro rata reductions prescribed by 24 C.F.R. § 990.210(c)], but [demonstrates] no intent to incorporate by reference future statutory provisions like the 2012 Appropriations Act, 2012." Under the New ACC, HUD is attempting to require PHAs to agree through contract that HUD has the authority to reduce or offset grant funding according to an appropriations act.

The last sentence of Section 10.a. is also troubling. Coupled with the broadened definition of "HUD Requirements" under Section 3.d. previously discussed herein, HUD conceivably has unrestricted authority to terminate, recapture, withhold, suspend, reduce, or take any other action regarding grant funding so long as HUD issues a notice. This is clearly beyond the scope of HUD's authority.

6. Broad Authority to Request PHA Records

Under the New ACC, HUD is attempting to give itself unrestricted access to PHA records. Section 9(b) of the New ACC provides that PHAs provide any and all "financial and program data, reports, records, statements, and documents at such times, in such form, and accompanied by such supporting data **as required by HUD.**" Section 9(e) extends such access to "any records and/or any facilities operated and maintained by an agent or independent contractor for the HA that assists in fulfilling any obligation under this CACC." This is an unreasonable expansion of HUD's access to PHA records.

Further, we are concerned that under Section 9(e) HUD attempts to make PHAs liable for the actions of independent contractors.

> *Any such agent or independent contractor that denies or unduly limits HUD or its duly authorized representatives from reviewing records or denies or unduly limits HUD or its duly authorized representative entry to an office or facility, or prevents access to any office or facility,* ***is a denial by the HA***.

(emphasis added). PHAs do not have the same authority and control over its independent contractors as it does over its employees. As such, it is unreasonable for HUD to not only impute

actions that could be deemed as a PHA's violation of the New ACC to the PHA but to do so without the opportunity for PHAs to work with such independent contracts to correct such actions.

7. HUD Lacks the Capacity to Undertake the Review and Submission Activity it Proposes Under the New ACC

HUD proposes to involve itself in certain PHA operations despite the demonstrable lack of capacity and administrative resources to handle such operations. Under Section 7 of the New ACC, HUD is requiring PHAs' insurance providers to send certificates of insurance to HUD. As PHAs typically have more than one insurance provider, HUD is purporting to monitor thousands of insurance certificates on an annual basis. New Section 7(b)(1) requires PHAs to carry "adequate" fidelity bond coverage with no guidance as to what is "adequate" coverage. Is HUD then proposing to review such coverage on an individualized basis to determine adequacy? As currently proposed, Section 9 of the New ACC seems to create a new obligation for PHAs to obtain HUD approval prior to any release of records that the PHA is required to submit to HUD's system of records. Such records under the New ACC include "any financial and program data, reports, records, statements, and documents" and corresponding supporting data that HUD requires the PHA to furnish to HUD in the first place. PHAs receive several record requests annually. We question whether HUD has the capacity to track and approve such submissions and requests without unduly stalling or disrupting PHA operations. Further, as state agencies, PHAs are subject not only to Freedom of Information Act requests but to requests made under the corresponding state or local open records or "sunshine" laws. HUD does not have the authority to interfere with PHA compliance with state and local law via contract, as it is attempting to do through the New ACC.

8. Conflict of Interest

The New ACC requires PHAs to comply with a new conflict of interest standard for PHA board members. We are unaware of any law that authorizes HUD to impose such requirements on PHAs. Furthermore, PHAs are subject to existing state and local conflict of interest requirements. HUD's new conflict of interest standard not only requires PHAs to reconcile their existing conflict of interest policies but also potentially exposes PHAs to compliance issues if HUD's new standards conflict or otherwise cannot be reconciled with the state and local requirements. HUD cannot require PHAs to violate state and local law through contract.

9. Authority to Bind PHAs

Lastly, we note that when HUD initially proposed a revised ACC through a similar PRA notice issued on May 1, 2018, HUD also issued a Capital Fund Processing Guidance for FFY 2018 Grant Awards notice proclaiming that, "[w]hen a PHA draws down funds from an FFY 2018 Capital Fund formula grant, it will become bound to the requirements of the New ACC." As we previously communicated to HUD, this is problematic for a number of reasons. First, it is questionable, at best, whether the PHA employee who draws down the funds electronically actually has the authority to bind the PHA to a new contract with HUD. This "contract by drawing funds" ignored the fact that PHAs are local government agencies bound by established state and local law governing, among other things, authorization to contract. Additionally, entering into such

contracts requires review and approval by the PHA board of directors under internal governance and policy requirements. We raised our concerns with HUD, noting that HUD had no authority to preempt or force PHAs to violate such requirements. While HUD did not issue a similar notice with the New ACC issued on December 27, 2018, we are concerned that HUD may attempt a similar "contract by drawing funds" approach to implement the New ACC.

Thank you for the opportunity to comment on the Notice. We would also like to take the opportunity to adopt the comments submitted by the designated Steering Committee of the thirty-nine (39) Moving to Work PHAs (the "MTW Steering Committee") regarding HUD's Moving to Work Amendment to Consolidated Annual Contributions Contract Notice, Docket No. FR-7006-N-20, (the "MTW ACC Amendment Notice"). CLPHA and Reno & Cavanaugh fully endorse and adopt the MTW Steering Committee's comments to the MTW ACC Amendment Notice and thank HUD for its consideration of both sets of comments.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Sunia Zaterman
Executive Director
CLPHA

Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC