



June 14, 2017

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-6030-N-01] Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777

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 U.S. Department of Housing and Urban Development (“HUD”)’s notice, *“Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda under Executive Order 13777.”*

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 represents more than one hundred PHAs throughout the country and has been working with our clients on public housing development and operations issues since its inception. 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 everything we do.

On behalf of CLPHA and Reno & Cavanaugh, we thank HUD for the opportunity to provide feedback on the Notice through the below written comments.

General Comments

As HUD is aware, PHAs across the country have endured historically low funding levels and pro-rations for their rental assistance programs and this trend is likely to continue or worsen. This insufficient funding has already detrimentally affected affordable rental housing programs like public housing and the Housing Choice Voucher program. Low-income individuals across the nation have borne the brunt of these changes as PHAs have been forced to reduce the size of their programs, resulting in fewer families served and fewer critical resources provided to those in need of housing assistance. Put simply, the ability to carry out the core mission of providing affordable rental housing to the nation's most vulnerable populations is in jeopardy.

Even as funding for housing decreases, HUD has imposed increasing administrative and regulatory burdens on PHAs, often without full consideration of the relative costs and benefits of this regulation. In addition to unnecessary financial cost, such regulations impede the ability of PHAs to make the choices that most effectively serve their local communities. These burdens become apparent in several contexts. For example, PHAs often spend inordinate amounts of time producing reports and information for HUD simply for the sake of HUD's required data collection, where HUD does not then use the data for any more meaningful policy analysis. Similarly, these administrative and regulatory provisions often constrain PHAs in making appropriate choices for the communities that they serve on a wide range of topics, ranging from site selection to rent setting to disposition of obsolete assets. Finally, these regulations often constrain the ability of PHAs to participate with private partners, many of whom are unwilling to navigate the complex HUD regulations for labor standards, income verification, tenant screening, and other requirements that are opaque and vary tremendously between different HUD programs.

HUD's one-size-fits-all regulatory approach often inhibits PHAs from effectively tailoring federal programs to local community needs. PHAs have been successful when they are able to tailor their policies according to their agency's individual local goals, housing market conditions, and community priorities. This flexibility provides housing authorities the necessary tools to best serve their low-income residents. HUD should allow housing authorities to focus on innovation, championing local decision-making and local flexibility. Rigid adherence to narrow program rules and unnecessary oversight prevents the responsiveness and adaptability needed to use resources in the most effective way possible.

With this in mind, we believe HUD should focus its limited resources more carefully and reconsider its approach to regulation by providing increased local control and focusing on outcomes rather than technical compliance. This would ensure more effective affordable rental housing programs that are better able to serve low-income people in the communities that they live in. At a time when public-private partnerships are increasingly important, this changed approach would also allow PHAs greater options for working with private partners to access private funds and to better serve the needs of the local community. CLPHA and Reno & Cavanaugh are supportive of efforts to reduce unnecessary regulatory requirements that create barriers to PHAs in their affordable housing missions. We see this as an opportunity for HUD to provide PHAs with greater flexibility to better serve families in their own communities.

Procedural Comments

Our comments contain many examples of specific waivers which HUD could grant to PHAs to enable them to serve low-income households more effectively and efficiently in times of historic budget constraints. Yet, at least equal in importance to these specific requests is the regulatory process itself. Pursuant to 24 CFR §5.110, the Secretary or his/her authorized designee, subject to statutory limitations, may waive any provision of HUD's regulations at Title 24 for "good cause". As we understand it, HUD will also grant a waiver request only in instances where applying a regulation would cause undue hardship.

Generally, the experience of our PHA members and clients is that HUD interprets its waiver authority very narrowly so that waivers are hard to obtain. In our view, the term "good cause" could be interpreted much more broadly, particularly in an era where public housing Operating Funds are consistently well below the established need for them based on HUD's own formula, the chronic under-funding of Capital Funds has led to an unprecedented level of backlog capital improvement needs, and housing choice voucher administrative funds are insufficient to permit proper functioning of the program.

The only way for PHAs to survive and continue serving low-income households in their communities is to innovate, experiment, and find new ways of doing more with less. HUD should encourage those activities as well, which may identify models for other PHAs to adopt as well. Further, where a potential waiver is broadly applicable, HUD should grant blanket waivers for certain activities for qualified PHAs and activities in order to reduce the burden on PHAs and HUD of multiple waiver requests on the same matter. Therefore, we urge HUD to take a new approach to the waiver process to achieve these goals. While we believe that the changes outlined below can be accommodated through waivers and regulatory changes, we also encourage HUD to pursue statutory changes to the extent that HUD believes that such changes are necessary to accomplish this regulatory relief.

We urge HUD to consider significantly revising the regulations and policies discussed below. The rescission or modification of some or all of these overly burdensome requirements is not only in the best interest of the low-income residents that PHAs serve, but is also, we believe, in the best interest of HUD. Eliminating these burdensome requirements and unnecessary federal regulations does not undermine HUD's obligation to provide oversight of its program. Furthermore, many PHAs have reported instances of regulatory misinterpretations by Field Office staff that deterred time- and cost-saving measures to brief applicants and deliver orientations. We urge HUD to assure consistency in the implementation of its regulations by working more closely with local Field Offices. These proposed changes instead simply ensure that PHAs are subject to appropriate obligations and requirements, rather than imposing additional unreasonable burdens. We would also note CLPHA and Reno & Cavanaugh's interest in ensuring that HUD's Regulatory Task Force is comprised of a diverse, industry-wide membership that includes PHAs, industry groups and private partners as well as HUD staff. Such diversity will strengthen the Task Force's effectiveness and ability to develop solutions that accommodate both HUD's needs as well as those of PHAs, their residents and their partners.

Below are our specific recommendations, organized into three sections: (1) changes that will improve administration, operations and efficiency of HUD's programs, particularly programs administered by PHAs, (2) waivers that will allow PHAs and their partners to more effectively position their assets to improve long-term stability and (3) regulatory streamlining that will improve ease of use between different HUD programs.

Given the breadth of HUD's request for comments and the short, 30-day timeframe that HUD has allowed for comments, we have provided short summaries of our key regulatory concerns but have generally not provided extensive discussion of most issues. We would welcome the opportunity to submit more detailed comments to the appropriate HUD program office, or to discuss any of these comments with HUD as well. We have additionally included copies of our prior comments on certain of these topics to facilitate HUD's review.

Thank you for the opportunity to comment on in response to HUD's Reducing Regulatory Burden Notice. If you have any questions, please do not hesitate to contact us.

Sincerely,



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Table of Contents

Contents

I	Administration, Operations, and Efficiency	7
a.	Smoke-Free Policy.....	7
b.	Section 3.....	7
c.	Environmental Review Requirements	8
d.	Davis-Bacon.....	9
e.	Assessment of Fair Housing Tool.....	10
f.	Income Calculations.....	11
g.	Rent Reasonableness and Payment Standard Requirements.....	11
h.	PBV/HOTMA Implementation.....	11
i.	Criminal Record Screenings	12
j.	Examples of Need to Recognize Technological Advances.....	13
II	Strategic Positioning of Assets, Portfolio Maintenance, Sustainability.....	14
b.	Site and Neighborhood Standards.....	16
c.	RAD Relocation.....	18
d.	Moving to Work (MTW)	18
e.	Voluntary Conversion to HCV	18
III	Consistency Across HUD Programs: Single “Affordable Housing Policy”	19
a.	Age Limits	20
b.	Income Eligibility and Verification	20
c.	Application Denial and Due Process	21
d.	Lease Terminations and Due Process	21
e.	Over-Income Residents/Termination of Assistance.....	22
f.	Rent Increases	22

f. Rent Increases	22
g. Utility Payment Schedules	22
h. Inspections/HQS/REAC.....	22
i. PHAS/SEMAP	23
Exhibit A Section 3 Comments.....	24
Exhibit B PHA Tool Comments	45
Exhibit C Streamlining Administrative Regulations Comments	51
Exhibit D HOTMA Implementation Notice Comments	59
Exhibit E Proposed Demolition/Disposition Rule Comments	69
Exhibit F Operations Notice for the Expansion of the Moving To Work Demonstration Program	106

I Administration, Operations, and Efficiency

HUD should update its regulations for smoke-free housing, Section 3 hiring, environmental review, Davis Bacon monitoring, Affirmatively Furthering Fair Housing, RAD relocation, rent calculations, and PBV/HOTMA to reduce unnecessary administrative burdens associated with these regulations. Many of these requirements are unique to public housing and are not imposed on other HUD programs, while others are of limited benefit but complicate program administration without a clear benefit. We also encourage HUD to streamline its criminal screening policies and to upgrade its informational technology systems to avoid duplicative reporting of the same information.

a. Smoke-Free Policy

On December 5, 2015, HUD published a final rule (81 FR 87430) that requires all PHAs to implement a policy banning the use of prohibited tobacco products in all public housing living units, indoor common areas in public housing, and in PHA administrative office buildings. The smoke-free policy must also extend to all outdoor areas up to 25 feet from the public housing and administrative office buildings. On February 15, 2017, HUD then issued PIH Notice 2017-03 to implement the final rule.

We encourage HUD to repeal both the final rule and PIH Notice 2017-03. PHAs and their residents, and not HUD, are in the best position to determine their own policies with respect to smoking. Significantly, HUD has not imposed this rule on multifamily owners or FHA properties, and should not impose this additional burden on PHAs or their residents either.

b. Section 3

Section 3 of the Housing and Urban Development Act of 1968 (“Section 3”) requires that that HUD-funded jobs, training, and contracts are provided to local low-income residents, particularly those that reside in public housing, and businesses that substantially employ them. The current regulations suggest that PHAs must prioritize direct hiring of low-income residents by contractors and businesses.

However, directly hiring low-income residents under the current Section 3 regulations is often inefficient because contractors and businesses often have difficulty finding low-income workers with the necessary skills. We encourage HUD to explicitly allow PHAs to instead require contractors and businesses to make a contribution to a dedicated Section 3 fund controlled by the PHA. PHAs can then use this fund to provide training and equipment to their residents, or can use the funds to work with local organizations to provide training and opportunities to low-income residents. PHAs and their partners have found that this approach is much more effective in providing their residents with skills

and opportunities that extend into the future as well. While some PHAs already use such funds, HUD should clarify the Section 3 regulations to explicitly authorize Section 3 funds. [24 CFR Part 135, Subpart B].

In addition to authorizing the use of a Section 3 fund, we suggest that HUD withdraw its proposed Section 3 rule published at 80 FR 16519 for the reasons explained in CLPHA and R&C's detailed comments to that rule. Our prior comments are attached at Exhibit A.

c. Environmental Review Requirements

As discussed in greater detail below, we encourage HUD to (1) streamline its environmental review regulations to simplify the process for allowing exempt or excluded projects to document that they have complied with HUD's environmental review requirements, (2) repeal PIH Notice 2016-22, (3) end the practice of using environmental review as an indirect mechanism for programmatic review, and (4) end duplicative reviews of a single project.

1. We encourage HUD to review its environmental review regulations at 24 CFR Part 50 and 24 CFR Part 58 to simplify the process by which projects can document environmental compliance. This is particularly important for activities that would be "categorically excluded" under 24 CFR 58.35 or "exempt" under 24 CFR Part 58. HUD's current regulations have caused widespread confusion among both HUD Field Offices and PHAs about the type of documentation that is necessary to receive these exemptions. If a project is categorically excluded or exempt, we encourage HUD to instead allow the participating jurisdiction ("PJ") or PHA to certify to that fact, without the need for extensive documentation.

In addition to the general concerns described above, if a project receives supplemental federal funds after it has already received approval project under 24 CFR Part 58, the project must undergo a new environmental review process even if the project's scope has not changed. A project can formally request an exception to this review under 24 CFR 58.35(b)(7), but the reviewing entity must then formally approve the request. Many reviewers are unfamiliar with this exception and so deny the request. HUD should update its Part 58 regulations so that supplemental assistance alone does not trigger a new environmental review.

2. HUD's recent PIH Notice 2016-22 suggests that a number of routine activities funded by the Public Housing Operating Fund and Capital Fund are subject to environmental review. This PIH Notice ignores many of the exceptions found at 24 CFR Part 50 and 24 CFR Part 58 and should be repealed. This Notice also imposes a requirement that projects be re-reviewed every five years, which is both impractical and not derived from the Part 50 or Part 58 regulations. We further endorse the comments that the Oakland Housing Authority has submitted on this topic.
3. HUD should HUD's environmental review regulations are a framework for implementing the National Environmental Policy Act ("NEPA"), which focuses on

procedural compliance but which was not designed to provide the federal government with a direct role in project site selection decisions. In practice, however, HUD has used its environmental review regulations and guidance as a means to for HUD to insert itself into programmatic decision-making that has very little relationship to environmental compliance. For example, once a Request for Release of Funds (the “RROF”) has been submitted by a PJ on behalf of a PHA, HUD Headquarters should not be involved in re-evaluating the substance of the RROF or the information that the PJ reviewed and approved. Similarly, when a project involves both Community Planning and Development (“CPD”) funds (HOME, CDBG, etc) and public housing funds, a project should not be required to seek final RROFs approvals from the Offices of both CPD and PIH. To the extent that CPD and PIH wish to impose programmatic restrictions on the funds, those restrictions should not be made through the RROF, which only relates to environmental review.

4. HUD’s environmental regulations should be streamlined so that a single project is not subjected to multiple environmental reviews by HUD merely because the project receives multiple sources of HUD funding. This duplicative review commonly occurs in several situations but HUD could easily remove the requirement for these repetitive reviews of the same information.

For example, if a single project receives funding from different offices within HUD, the project can be subject to multiple, nearly identical environmental reviews that create delays without the possibility of substantive benefit. For example, where HUD provides an FHA loan or certain other funds, HUD is the “responsible entity” and the project is reviewed under 24 CFR Part 50. If the same project also receives HUD funding from a source such as PHA or a city, the project generally must undergo a nearly identical environmental review under 24 CFR Part 58. This additional review provides no public benefit, but instead is an additional administrative task that consumes scarce public funds and unnecessarily delays the project’s approval.

Pursuant to a process described at 24 CFR 58.11, HUD has the ability to remove this duplicative review by formally re-assigning the Part 58 review to itself. However, a PHA or city must affirmatively request this re-assignment, and HUD can still decline to make the reassignment. Developers and others unfamiliar with HUD’s environmental regulations are often unaware that they can even make this request. We suggest that HUD modify 24 CFR 58.11 to say that when HUD is already conducting an environmental review under 24 CFR Part 50, any projects that would otherwise also require review under 24 CFR Part 58 are automatically transferred to HUD for review under Part 50 instead.

d. Davis-Bacon

HUD currently requires each funding agency to monitor for Davis Bacon compliance, even when multiple agencies are funding a single project. Davis Bacon monitoring is labor-intensive and costly, and often requires the use of expensive software to analyze

wage reports. There is not a good policy reason why two public agencies should monitor a single project for compliance with the same regulation. The effect is to burden not only public agencies but project owners and developers, who must submit identical wage data to multiple public agencies for no clear public benefit.

For example, if a PHA awards PBVs to a project, then the PHA is required to monitor for Davis Bacon compliance under 24 CFR 983.154(b)(3). If the local municipality then awards HOME funds to the same project, the municipality then must monitor for Davis Bacon compliance under 24 CFR 92.354(a)(3). The regulations do not clearly permit this obligation to be delegated to a different public agency. We encourage HUD to review its Davis Bacon regulations in each of its programs and to allow public agencies to determine which agency will review Davis Bacon compliance on a project with multiple sources that require Davis Bacon compliance.

In addition to the changes discussed above, we encourage HUD to work with Congress to increase the dollar threshold of work that triggers Davis Bacon to \$25,000 to simplify the administration of smaller contracts.

e. Assessment of Fair Housing Tool

Like HUD, PHAs are committed to furthering fair housing and pursuing the goals of deconcentrating of poverty and increased integration of housing opportunities. We support HUD's goal to promote fair housing and appreciate that HUD has published regulations (80 FR 5173) and the proposed PHA tool (the "PHA Tool") to provide better guidance to grantees regarding their obligation to affirmatively further fair housing ("AFFH"). We also appreciate HUD's efforts to clarify and standardize the criteria by which PHAs' fulfillment of their obligation to affirmatively further fair housing is assessed under the AFFH regulations. However, HUD's AFFH regulations and the PHA Tool are methodologically overly burdensome and of limited use to local agencies in addressing fair housing issues.

Among other things, the PHA Tool requires agencies nationwide to spend hundreds of thousands of hours annually addressing the barriers facing resident's access to good schools, job opportunities and mass transit, even though housing professionals have virtually no control over these barriers in local communities. While HUD has made some efforts to revise the PHA Tool, the PHA Tool remains deeply flawed and has input requirements that exceed the staff capacities of both HUD and PHAs. We encourage HUD to rescind the current AFFH regulations and to withdraw the PHA Tool, as we discussed in our comments to the PHA Tool on October 20, 2016, which are attached at Exhibit B.

f. Income Calculations

We urge HUD to renew its support for its proposals within HUD's FY 2016 budget to 1) enact three-year recertification of income for fixed -income families, 2) increase the threshold deduction of medical and related care expenses, 3) increase the minimum tenant rent, 4) limit from income calculations the inclusion of assets over \$50,000, and 5) standardize utility payments.

In addition, as we noted in our comments to HUD's Streamlining Administrative Regulations notice (80 FR 423), which are attached here as Exhibit C, CLPHA strongly supports an increase to the maximum amount of assets that can be self-certified to \$10,000. Despite HUD's reasoning in the final Streamlining Administrative Regulations notice that the \$5,000 threshold is consistent with other policies and that existing regulations require housing providers to calculate the imputed assets over \$5,000, CLPHA maintains that increasing the threshold will reduce errors in reporting and improved operational efficiency. We also urge HUD to align the rules applying to HCV self-certification of assets with those of the Multifamily Housing program.

g. Rent Reasonableness and Payment Standard Requirements

CLPHA supports efforts to maximize cost effectiveness and prevent undue cost burdens to tenants and agencies alike. We urge HUD, however, to eliminate the rent reasonableness requirement (24 CFR 982.507) given that HUD's interests here are already addressed by HUD's payment standard requirements (24 CFR 982.503). We encourage HUD to pursue any statutory change as may be necessary to accomplish this as well.

The rent reasonableness requirement, in concert with payment standard requirements, is a duplicative cost control mechanism that creates excessive administrative burdens for PHAs. Payment standard requirements suffice and more accurately reflect rent variations among neighborhoods in PHA's jurisdiction. Furthermore, eliminating rent reasonableness as a standard would also remove associated administrative burdens in reporting if and when unit rents increase, or if and when HUD lowers the FMR by five percent, while also eliminating errors in reporting associated with rent reasonableness.

h. PBV/HOTMA Implementation

We urge HUD to review our comments to the HOTMA Implementation Notice (82 FR 5458) submitted through regulations.gov on March 20, 2017. These comments are attached at Exhibit D for reference.

In those prior comments, we identified a number of areas that should be streamlined and simplified. Additionally, we wish to emphasize the importance of having HUD fully

implement all provisions under Section 106 of HOTMA, particularly those provisions related to: (1) entering a PBV HAP Contract for any unit that does not qualify as existing housing and is under construction or recently has been constructed regardless of whether the PHA and owner executed an AHAP; (2) providing rent adjustments using an operating cost factor; (3) establishing and utilizing procedures for owner-maintained site-based waiting lists; and (4) concerning the environmental review requirements for existing housing. Furthermore, we urge HUD to implement provisions under Sections 102 and 104 of HOTMA that in effect eliminate the Earned Income Disregard (EID) requirement, which PHAs report places unnecessary administrative burdens without evidence of improving self-sufficiency.

While we appreciate the progress that HUD has made in implementing several of the provisions of HOTMA, we would urge HUD not to stray from the statute and allow PHAs the flexibility that Congress intended. Further, any delay in implementing the provisions of HOTMA creates challenges for PHAs and owners in their efforts to advance affordable housing through the PBV program.

i. Criminal Record Screenings

The use of criminal records in housing decisions has been complicated by recent HUD guidance that conflicts with or otherwise contradicts the regulatory framework already in place. CLPHA encourages HUD to review current regulations regarding tenant screening and the use of criminal records with an eye to both streamlining the policy across HUD programs and resolving the apparent conflict with HUD guidance.

On November 2, 2015, HUD issued Notice PIH 2015-19/H 2015-10 titled “Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions” (the “Criminal Records Notice”). The Criminal Records Notice stated, in pertinent part, that “the fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting denial of admission, termination of assistance, or eviction.”

On April 4, 2016, HUD’s Office of General Counsel issued a document entitled “Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” (the “OGC Criminal Records Guidance”). While the OGC Criminal Records Guidance addressed the use of criminal records in the disparate impact context, it did echo the issue of arrests versus convictions expressed in the Criminal Records Notice, stating in pertinent part that “the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual.”

Under the Public Housing Program, a PHA receives points under the Public Housing Assessment System when they have adopted, implemented, and can document that the PHA successfully screens and denies admission “to certain applicants with unfavorable

criminal histories.” 24 C.F.R. § 960.203(b). In screening tenants, a PHA may consider “criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants.” 24 C.F.R. § 960.203(c)(3). The PHA must, however, consider “the time, nature, and extent of the applicant’s conduct (including the seriousness of the offense.” 24 C.F.R. § 960.203(d).

Under the Section 8 Program, an owner may similarly consider “criminal activity that is a threat to the health, safety, or property of others” when screening tenants. 24 C.F.R. § 982.307(a)(iv). Unlike in the Public Housing Program, however, there is not a similar requirement under the Section 8 Program for the owner to consider the time, nature, and extent of the applicant’s criminal activity in question.

An owner under the Section 8 Program may terminate tenancy if the owner determines that the tenant or a covered person has engaged in criminal activity, regardless of whether there has been an arrest or conviction and “without satisfying the standard of proof used for criminal conviction.” 24 C.F.R. § 982.310(c)(3). Further, a PHA under the Section 8 Program may terminate assistance if the PHA determines “based on preponderance of the evidence” that a household member has engaged in criminal activity regardless of whether there has been an arrest or conviction for the criminal activity. 24 C.F.R. § 982.553(c). This conflicts with HUD’s guidance contained in the Criminal Records Notice and the OGC Criminal Records Guidance regarding arrests.

Under 24 C.F.R. § 982.553(a)(2)(ii)(A), a PHA may prohibit admission if the PHA determines that a household member “is currently engaged in, or has engaged in during a reasonable time before the admission,” “criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.” The PHA determines what is a “reasonable time” wherein the applicant must not have engaged in the criminal activity in question. Missing here is the consideration of “the time, nature, and extent of the applicant’s conduct” that is required under the Public Housing Program.

j. Examples of Need to Recognize Technological Advances

Many HUD regulations, guidance, and procedures are based on the longstanding model of face to face meetings and closing, 3 inch binders containing submission documents, and paper records. In today’s world, commercial real estate closings occur via email, meetings can include a video component, and travel is rarer. This results in efficiencies for all. Two examples follow:

- Virtually all FHA closing require traveling to the HUD field office with more than 5 identical stacks of paper to sign documents. Private closings of the same scale occur by email and mail.
- HUD requires that HUD and third parties counter-sign the same physical piece of paper instead of permitting counterpart signature pages (i.e., in which each party

signs at their convenience and sends original executed signature pages in escrow to a central party who assembles the final documents).

Even as we encourage HUD to allow PHAs to exercise local control and implement their own IT systems as appropriate, we urge HUD to also work to repair and streamline its own technologies and systems. For example, many PHAs have experienced challenges with the Section 3 SPEARS system, LOCCS, PIC, VMS, HEROs, and others. In addition, PHAs endure significant duplicative reporting within HUD's software systems like PIC and VMS. In addition, Field Office staff will routinely request data and reporting from PHAs that is already available in HUD's software systems, but which HUD staff does not know how to access. These inefficient systems create unnecessary duplication, and are not consistent with modern, private business practices.

II Strategic Positioning of Assets, Portfolio Maintenance, Sustainability

As HUD is aware, the public housing portfolio has a growing nationwide backlog of deferred maintenance, estimated at \$26 billion in 2010. Each year, roughly 10,000 units of public housing are lost due to disrepair. As a result, PHAs are faced with an urgent need to stabilize or otherwise reposition their public housing assets to avoid the permanent loss of these units. While the lack of additional HUD funds for these units is the primary cause of this capital needs backlog, HUD's own regulations and centralized control also diminish the ability of PHAs to reposition their assets in a way that makes sense for their local communities. We urge HUD to move quickly to revise its demolition and disposition regulations and site and neighborhood standards to facilitate this repositioning. Similarly, we ask that HUD extend MTW flexibility to a greater number of PHAs, and that HUD streamline the process for voluntary conversions to Housing Choice Vouchers outside of the Rental Assistance Demonstration context.

a. Demolition/Disposition Process – 24 CFR part 970

Over the past five years there have been steady increases in the regulatory hurdles to disposing of public housing projects to the point that disposition approvals are increasingly difficult to obtain – even to develop new affordable housing. The current requirements go far beyond the statutory requirements, which direct HUD to approve an application if it meets the stated criteria. These hurdles keep PHAs from positioning their housing portfolios based on local needs and funding options.

Essentially, HUD has used informal, often unpublished guidance to establish requirements that essentially require replacement of 100% of the disposed of units unless the units meet a strict definition of “obsolescence”. For example, PIH Notice 2012-7 sets out an obsolescence standard that examines only on the most minimal and basic repairs, then weighs the cost of these against replacement of the entire project. Most importantly, this notice requires any request to disposition to meet both the obsolescence standard for demolitions (which standard is guidance under the regulation) and the “best interests of the residents” standards for disposition because a laundry list of other (sometimes illusory) development options are conceivable. However, Congress eliminated a 1-for-1

replacement requirement in 1996 because it had the unintended impact of PHAs leaving deteriorating properties vacant because they could not afford to replace the units.

This creeping overregulation stifles a PHA's ability to adapt its housing portfolio to tenant needs and access private financing. A 2014 proposed rule (79 FR 62249) would go even further—among other things it establishes a development review process in which disposition staff review development timeline, budget, financing commitments on top of reviews conducted by headquarters staff with development training and an understanding of the markets. Please see Exhibit E for the previously submitted joint comments of CLPHA and Reno & Cavanaugh along with the National Association of Housing and Redevelopment Officials (NAHRO) and the Public Housing Authority Directors Association (PHADA).

Three examples illustrate how HUD's demolition/disposition process impedes rational asset repositioning by PHAs and their communities.

- A PHA owns 100+ single family homes scattered over a large county. Because of the distances and non-uniformity in systems, they are prohibitively expensive to maintain. The units do not meet the obsolescence test because they are in adequate shape. The fair market value of the units is far below costs to develop replacement units, so sales proceeds cannot support 1-for-1 replacement. The PHA has no choice to but to continue to manage the units.
- A PHA developed a portfolio wide asset repositioning plan that recommends “right sizing” the portfolio by disposing of one project. The long term goal is to replace the units. Because of the multi-year time frame to obtain developers and financing, the first replacement units would be available in about five years. In order to receive disposition approval, the PHA had to commit – word-by-word – to specific provisions relating to a marketing plan and tenant tracking. Such actions might be admirable practices, but are not required by the demolition regulation or any other regulation. FHEO made no citation to regulations requiring such actions, merely required them.
- A PHA received approval to dispose of long-term vacant and distressed public housing units to the City for \$1.00 (i.e., meeting the obsolescence test). HUD's approval was conditioned on the PHA providing: (1) quarterly unfunded reporting on the City's actions (demolition, remediation, construction, accessible features, etc.) to FHEO far in excess of the existing requirements to comply with fair housing and civil rights law AND (2) 30 years of unfunded monitoring of the City's compliance with the use restriction required by the Notice.

Proposed Actions:

- **Rescind PIH Notice 2012-7** which imposed substantive, burdensome requirements far beyond the scope of the statute and the implementing regulations.
- **Withdraw 2014 proposed rule from consideration.** Among other things, it imposes specific redevelopment requirements and timing as well as review processes that duplicate long-standing and functional procedures at 24 CFR part 905, subpart F and de facto imposes one-for-one replacement standards eliminated by Congress in 1998.

b. Site and Neighborhood Standards

Despite the same statutory underpinnings rooted in the Fair Housing Act, the public housing program, Section 8 PBV program, RAD PBV program, and multifamily programs all have different requirements for site and neighborhood standards. As a threshold matter, we encourage HUD to standardize these requirements across its various programs.

In addition, these reviews were historically conducted by the PHA itself or with minimal HUD involvement, but increasingly, both HUD Headquarters and local Field Offices have become involved in these decisions. The result has been to add additional reviews and criteria that vary widely between projects, resulting in a lack of transparency. Constant involvement from Headquarters in individual reviews has also resulted in a loss of critical local decision-making about the types of projects that the community would like to facilitate. Private partners are also routinely discouraged from working with PHAs to site build new, off-site developments because of the difficulty of coordinating these reviews with different HUD offices, and between programs (i.e., where a new construction project receives both public housing and PBV subsidy). We encourage HUD to align these requirements across programs and to place primary responsibility for these reviews at the local level, without extensive involvement from HUD Headquarters.

We also encourage HUD to revisit the requirements for site and neighborhood standards as they relate to the RAD program. As a starting point, we ask that HUD to review our comments to the Comments related to H 2016-17/PIH 2016-17 (HA): Rental Assistance Demonstration (“RAD”) Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component – Public Housing Conversions submitted on December 9, 2016. We have previously expressed our concern that under RAD, HUD seemed to be redefining and narrowing the two allowed site and neighborhood standards exceptions in ways that do not align with current practice in PBV and PBRA. Additionally, please see several of our concerns regarding site and neighborhood standards as they relate to RAD below.

- Overriding Housing Need Exception Analysis: The Overriding Housing Needs exception applies: (1) when a municipality has an established revitalization plan for the immediate neighborhood and is working toward it, which provides reasons to believe living conditions at a site will change, or (2) a site is located in a “revitalizing area,” which requires proof of an “organic” shift in community but not a governmental action, as in (1).

In our recent RAD experiences, offices have applied varied measures relative to the types and levels of investment required to show that a project is located in a neighborhood’s revitalizing area—whether this involves wholly private investment or private and public investment. Similarly, varied measures have been applied to the level(s) of investment that are deemed “significant” as well as whether the RAD site ought to be located within such areas or whether the RAD site had been indicated as a specific activity within a neighborhood revitalization effort. In other instances, information was requested and judgments made as to the pace and progress of re-investments as an indicator of actual revitalization activity (e.g., whether work on a multi-billion dollar, multi-year construction of a new light rail line has sufficiently progressed). Further, in a few cases, the location of a RAD site in a HUD-designated CNI Implementation Grant, Planning Grant or Promise Zone area was not accepted as evidence of underway revitalization activity.

Because not all worthy new construction and transfer of assistance transactions may readily qualify for either of the two allowed exceptions, we offer the following recommendations:

- ***Allow Safe Harbors.*** Establish “safe harbor” exceptions enabling projects to proceed with substantial amounts of state- or locally allocated-resources such as 9% LIHTCs or housing trust fund resources in deference to local revitalization priorities.
- ***Accommodate Current Sites.*** 100% replacement/new construction housing should be allowed on current or adjacent public housing sites in deference to RAD’s 1-for-1 replacement requirement and to promote project feasibility and financial reasonableness (e.g., reducing unnecessary site acquisition and improvement costs).
- ***Extend to Neighborhoods of Opportunity.*** Exempt transfers of assistance for public housing replacement housing to be located in defined “neighborhoods of opportunity”, including neighborhoods with CNI awards or Promise Zones.
- ***Consider Lack of Feasible Sites.*** As other HUD program notices acknowledge, the lack of availability of feasible alternative sites outside of areas of minority concentration is problematic and should be considered as an overriding housing needs exception.

c. RAD Relocation

HUD's RAD relocation requirements grow increasingly complex and are not clearly tied to any particular statutory or regulatory scheme. While we appreciate that the RAD statute provides all residents with a right to return, the RAD statute's short description of this right has led to the development of an 80-page HUD notice (PIH 2016-17) that has generated significant ambiguity as to what HUD requires for RAD-related relocations. This ambiguity continues to increase project costs as PHAs and owners must dedicate increasing amounts of staff time and resources to determining how HUD's evolving guidance might apply to their project. In addition, HUD has indicated that RAD also requires compliance with the Uniform Relocation Act ("URA"), but the provisions of PIH 2016-17 often conflict with the URA, or are sometimes insufficient for compliance with the URA.

We encourage HUD to repeal PIH 2016-17 and simply allow projects to comply with the URA provided that they also preserve residents' rights to return. The URA is well-understood by PHAs, tenants and developers alike, and represents a standard that is relatively straightforward to administer. In the alternative, we suggest that HUD clarify that the URA is not applicable and has been superseded by RAD, and that PHAs and their partners must simply comply with PIH 2016-17. This solution is particularly appropriate because HUD has concluded that public housing relocations themselves are not subject to the URA.

d. Moving to Work (MTW)

We have commented separately on various HUD notices regarding administration and expansion of the MTW program. Please see [Exhibit F](#) for our comments to HUD's most recent MTW expansion notice.

Overall, we are deeply concerned that HUD sees MTW as a danger it needs to control rather than an opportunity to identify and test new approaches to providing low-income housing and related supportive services, as Congress intended and which was confirmed by legislation extending the existing MTW agreements in 2015. Again, with respect to the MTW expansion, we urge HUD to take a new approach and allow these high-performing PHAs to lead the way in designing and implementing programs that best match scarce federal resources with local needs. Further, consistent with our comments on the waiver process, above, HUD could, of its own volition, pursue an MTW inspired initiative to grant blanket regulatory waivers to all PHAs which meet certain performance criteria. We would be glad to work with HUD on the design of such an initiative.

e. Voluntary Conversion to HCV

Long before the Rental Assistance Demonstration (RAD), Congress enacted a mechanism to convert public housing to Section 8 voucher assistance through what is

known as “Voluntary Conversion” (Sec. 22 of the U.S. Housing Act of 1937). The statute includes extensive requirements for planning and carrying out such a conversion. However, whether a PHA may use this program tool basically comes down to a single economic analysis of whether converting to vouchers will not be more expensive than continuing to operate a project as public housing. Yet, the statute provides little guidance on how that analysis is to be done. Instead, HUD’s regulations contain a very detailed cost test for determining whether public housing or Section 8 vouchers would be cheaper. We urge HUD to reconsider whether elements of that cost test should be changed or waived since it was codified almost 20 years ago to reflect current conditions. In addition, the Voluntary Conversion statute includes certain statutory waiver authority which HUD should use, as appropriate, to facilitate PHAs’ ability to convert public housing to a Section 8 platform, especially in cases where RAD is unavailable or would not work for a PHA.

III Consistency Across HUD Programs: Single “Affordable Housing Policy”

HUD oversees multiple of programs with varying standards through three offices. The Office of Public and Indian Housing (“PIH”) administers Housing Choice Vouchers (“HCV”), Project Based Vouchers (“PBV”), and public housing. The Office of Housing administers FHA-insured projects, a variety of Section 8 Project Based Rental Assistance Programs, programs for elderly (202) and disabled (118), and orphan programs such as 236, flexible subsidy, and others (collectively we refer to these as “Multifamily” or “PBRA”). The Office of Community Planning and Development (“CPD”) administers HOME, CDBG, and HOPWA, among others. The programs were developed at different times and for different purposes, but the three administering entities have issued guidance (notices, handbooks, etc.) on the same topics, often approaching them differently.

The “alignment” process moved forward with issuance of streamlining regulations in March 2016 (80 FR 423) (the “Streamlining Rule”). The Streamlining Rule declined to make a number of alignments that would be of great benefit to many of HUD partners, and many of those changes are highlighted below for reconsideration. CLPHA’s comments to the draft rule are attached as Exhibit C. It is also worth noting that alignment of PIH requirements with Multifamily Requirements would be largely deregulatory (i.e., could be accomplished through repeals of existing regulations rather than by creating new regulations) and would support the RAD conversion program as well.

Despite this alignment, the accumulation of history, varying guidance issued in programs, and related inertia result in varying standards and implementation that increase bureaucracy, compliance costs, and red tape without adding value to programs and consuming HUD and HUD partner resources.

The following sections pinpoint several areas for which minor differences across programs cause disproportionate difficulty using programs together or the same staff for different programs. For

these areas, if HUD establishes identical standards across programs at the level of notices and Handbooks, it would reduce the need for waivers, accidental non-compliance, and expensive consultants.

a. Age Limits

HUD has many different standards for imposing age restrictions on HUD-assisted properties, and the conflicts and inconsistencies between these requirements have created significant operational challenges when using the programs together.

Under the Fair Housing Act, property owners that wish to restrict their housing to a senior population must have a project that qualifies as “senior” or “elderly” under the Fair Housing Act. Otherwise, such age restrictions may violate the Fair Housing Act. The privately owned senior communities blossoming across the country use this standard, as do the state housing finance agencies in allocating low income housing tax credits.

However, when a “senior” project receives multiple HUD subsidies, it is unnecessarily difficult (and sometimes impossible) to reconcile the competing definitions of “senior” housing within each program. There is no public benefit to these inconsistent definitions, but resolving these issues can significantly increase a project’s transaction costs and creates operational challenges.

For example, public housing (50+ for near elderly and 62+), PBV (62+), and multifamily (62+), FHA (62+), and the Fair Housing Act (at least one member 55+ and/or all members are 62+) also provide different age limits for restriction of housing to seniors. Figures 3-5 and 3-6 in HUD Handbook 4350.3 REV-1 (HUD Occupancy Handbook) provide a “quick” 6-page of overview of how various definitions of elderly apply to Office of Housing Programs.

We encourage HUD to standardize its program-specific regulations and to clarify that any senior property that meets the requirements of 24 CFR 100.303 or 24 CFR 100.304 of HUD’s Fair Housing Act regulations shall be deemed compliant with HUD’s program-specific regulations as well. We would encourage HUD to pursue any statutory change that would be necessary to implement this as well.

b. Income Eligibility and Verification

Regulations establish Department-wide eligibility standards in areas such as impact of a criminal record, restrictions on assistance to non-citizens, and calculating annual income. This is great – but implementing guidance and required verification procedures are issued separately by PIH and for Multifamily Housing. (See 24 CFR Part 5).

The Streamlining Rule permitted PHAs to allow tenants to self-certify that they have assets less than \$5,000 on re-examinations. This is helpful, but it still requires a PHA to

verify the assets up front and re-verify every three years. Public comments posted before the deadline for these comments include several comments from PHA staff indicating that the verification process is time consuming and rarely results in a material change to income or any change to a tenant's rent.

Again, this introduces variations that work against alignment of the programs. A unified standard, with one form, and joint guidance would eliminate this confusing and expensive duplication.

c. Application Denial and Due Process

Screening and tenant selection between different HUD programs takes on many forms to achieve the same function. For example, an applicant denied admission to a subsidized program – whether due to ineligibility or failure to pass screening criteria - to one of the following, depending on the program:

- for Tenant Choice Vouchers, an “informal review” by the PHA for denial of participation in the program [24 CFR 982.554], but no review rights for denial of admission by a landlord [24 CFR 982.307]
- for PBV, the same informal review from the PHA and written notification from the landlord of the grounds for rejection. 24 CFR 983.253]
- for PBRA, “written notice and an opportunity to meet with” the owner or agent, [Occupancy Handbook Section 4-10] except that applicants to RAD PBRA and PHA –owned projects have a right to request an “informal hearing” per public housing standards [24 CFR 880.603(b)(2)]
- for public housing, an “informal hearing”. [24 CFR 960.208(a)]

As noted above, the “informal hearing”, “informal review”, and “opportunity to meet with” have varying time timeframes, exceptions, and procedures despite being functionally the same.

Again, one set of standards and unified guidance should be implemented except where there is a supportable reason to provide otherwise and statutory changes requested as needed.

d. Lease Terminations and Due Process

A similar situation arises for grounds for terminating tenant leases (generally good cause, variously defined) and tenant due process rights (hearing, except public housing has grievance), where similar standards, such as good cause for termination, differ in the

details and in implementation. By contrast, the exacting detail in the public housing grievance procedure contrasts strikingly with the less detailed (but still varying) rights to a hearing in other programs.

e. Over-Income Residents/Termination of Assistance

Many of HUD's programs have separate requirements for determining whether and how assistance continues who families whose income is over the maximum. As discussed in the prior sections, some deviations meet statutory goals, while others are artifacts of time and different administration. Rather than having a hodgepodge of requirements that vary from program to program, we encourage HUD to align its program-specific regulations regarding continued income eligibility except where differences support a programmatic goal. We would encourage HUD to pursue any statutory change that would be necessary to implement this as well.

f. Rent Increases

Each HUD program involves the determination of a tenant's income and periodic reevaluation. However, the timing to implement rent increases resulting from re-examination varies by program – following month, after six months, phased in over time. Programs should align exception where required to achieve programmatic goals

g. Utility Payment Schedules

Utility allowance calculations also vary from program to program. We encourage HUD to create one set utility allowance calculations and procedures that are uniform between and among the various HUD programs. We would encourage HUD to pursue any statutory change that would be necessary to implement this as well.

For example, under the PBV program, the utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates (24 CFR 982.517). The same PHA utility allowance schedule applies to both the tenant-based and PBV programs (24 CFR 983.301) and typically cannot vary by property.

In contrast to the PBV program, PHAs establish public housing utility allowances for each unit size, and these allowances can vary by property. the PHA should approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances and should take into account all relevant factors affecting consumption (24 CFR 965.505(a)). In contrast to public housing and PBV, the Multifamily program uses a baseline utility analysis that is updated every three years. These programs all serve

similar tenant populations and often use similar housing stock, and so HUD should adopt a single utility allowance process that can be used across all of these programs.

h. Inspections/HQS/REAC

Despite having uniform physical inspection standards across all programs, REAC (Real Estate Assessment Center) has substantially different programs and goals for public housing and for Multifamily housing. To the extent feasible, they should be integrated so that procedures, reporting, etc. are uniform across projects

In addition, the scoring systems for public housing and for Multifamily are widely viewed as arbitrary because they deduct significant points for minor matters or matters outside the landlord's control. A number of vivid examples are included in the other public comments and we urge HUD to consider restructuring its scoring system accordingly.

i. PHAS/SEMAP

It is our view that these systems are inefficient and often penalize housing authorities based on criteria outside of their control – such as budget appropriations. Cuts to operating and capital funding have severely impacted the ability of housing authorities to adequately maintain their public housing stock, which has negatively impacted PHAS scores. Given the limitations of PHAS and SEMAP, we strongly encourage HUD to consider an accreditation model as an alternative.

As applied to hospitals and other sectors, accreditation provides an effective and appropriate method of peer review that assures industry standards and expertise are used to evaluate internal operations. Fellow practitioners have the unique and special experience and insights required to evaluate similarly-situated organizations, ensuring that they meet meaningful performance standards that measure outcomes, not process, and offering best practices and advice on how to improve performance. Accreditation would not replace HUD oversight of public housing agency compliance, but would supplement it in order to advance the congressional goals of the program. We particularly note that the Affordable Housing Accreditation Board (AHAB) has already been created as a 501(c)(3) corporation by the public housing industry and is in the process of developing accreditation standards for PHAs.

Exhibit A
Section 3 Comments



May 26, 2015
Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: [Docket No. FR-4893-P-01] Creating Economic Opportunities for Low- and Very Low-Income persons and Eligible Businesses Through Strengthened "Section 3" Requirements (the "Proposed Rule")

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 Proposed Rule.

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.

Reno & Cavanaugh represents more than one hundred PHAs throughout the country and has been working with our clients on affordable housing issues since its inception. 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.

Like the U.S. Department of Housing and Urban Development ("HUD"), PHAs are committed to expanding economic opportunities for low- and very-low income persons and businesses. We applaud HUD's efforts in advocating for such economic opportunities and appreciate the importance of better guidance to recipients regarding their obligations to facilitate access to these economic opportunities. We also appreciate HUD's efforts to clarify the criteria by which HUD judges PHAs' fulfillment of their obligations to use their best efforts to direct employment and other economic opportunities toward low- and very low-income persons.

Generally, our comments follow three overarching concerns, which are evident in many sections throughout the Proposed Rule. More specifically, we are concerned that the Proposed Rule imposes an unnecessarily restrictive compliance standard on PHAs, imposes costly new obligations without a funding source to pay for these requirements, and ignores the practical

realities confronting PHAs that wish to hire Section 3 residents and businesses. Our comments first highlight these general concerns and then identify specific provisions of the Proposed Rule that we encourage HUD to revisit.

1. General Comments on Proposed Rule

- a. The Proposed Rule exceeds the scope of the governing statute by imposing an unnecessarily restrictive compliance standard. PHAs and HUD share a mission of serving the nation's most vulnerable, low-income families, and have accomplished some of their greatest achievements through strong partnerships with each other. We ask that the Proposed Rule recognize the numerous efforts that PHAs already make to promote Section 3 hiring by treating PHAs as valued partners who are afforded the flexibility and discretion they need to develop and operate thoughtful, innovative Section 3 programs for their own communities.**

PHAs and HUD share a mission of serving the nation's most vulnerable, low-income families, and have accomplished some of their greatest achievements through strong partnerships with each other. Even in a climate of scarce financial resources, PHAs and HUD continue to work together to promote affordable housing and economic opportunities for public housing residents. PHAs across the country operate many innovative Section 3 programs, often by identifying needs in their communities and by locating partners and resources to promote Section 3 opportunities for local residents and businesses. These opportunities range from employment opportunities at construction sites to apprenticeship programs run by PHAs and their partners to provision of business and legal clinics to help residents create their own businesses. We ask that the Proposed Rule recognize the creativity and dedication that PHAs exercise in promoting Section 3 hiring by allowing PHAs the flexibility and discretion they need to develop and operate thoughtful, innovative Section 3 programs for their own communities. We are concerned, however, that the Proposed Rule instead attempts to tightly regulate every aspect of PHAs' programs, threatening the ability of PHAs to respond to the needs of their own communities.

These restrictions are perhaps most evident in HUD's new requirement that PHAs comply with Section 3 to "greatest extent feasible", rather than allowing PHAs to use their own judgment and "best efforts". For example, Section 3 of the Housing and Urban Development Act of 1968, as amended, (codified at 12 USC 1701u)(the "Section 3 Act") applies to recipients of HUD funds, including PHAs, states, counties and municipalities. The Section 3 Act generally requires recipients to direct employment and other economic opportunities generated by federal financial assistance to low- and very-low income persons "to the greatest extent feasible."¹ However, the Section 3 Act specifically explains how these requirements apply to PHAs, and provides that PHAs must simply "make their best efforts" to comply with their employment and contracting obligations under the Section 3 Act.² In the introduction to the Proposed Rule, HUD explained that HUD views these standards as essentially the same, and so deleted the "best efforts"

¹ 12 USC 1701u(b)

² 12 USC 1701u(c)(1)(A) and 12 USC 1701u(d)(1)(A)

standard and replaced it with the requirement that PHAs and their contractors and subcontractors meet their obligations “to the greatest extent feasible”.³ As discussed in greater detail below, however, the “greatest extent feasible” standard is much more rigid and prescriptive than the “best efforts” standard and so we ask that HUD restore the statutory “best efforts” standard to allow PHAs to retain the flexibility that Congress provided to PHAs in the Section 3 Act.

Despite HUD’s assertion, we believe that the “greatest extent feasible” and “best efforts” standards are in fact distinct. Accordingly, HUD should not require PHAs and their partners to meet the more rigorous “greatest extent feasible” standard when Congress clearly provided more flexibility to these entities through a “best efforts” requirement. For example, courts interpreting the “greatest extent feasible” standard under the Section 3 Act have found that this standard requires a “maximum” effort and that it requires “every affirmative action” that can be properly taken.⁴ In contrast, the “best effort” standard has been found not to create an absolute, objective compliance standard. Instead, courts have found that the “best efforts” requirement “specifically avoids creating a mandatory obligation on the part of the agencies the statute affects”.⁵ This “best efforts” standard likewise “does not call for perfect compliance”.⁶ As a result, while HUD may consider these two standards to be equivalent, Congress and the federal courts have not reached the same conclusion.

Congress clearly distinguished between these two standards, and provided PHAs and their partners not with the absolute compliance obligation described by the “greatest extent feasible” standard but allowed PHAs to meet the more subjective, flexible standard of “best efforts”. We therefore encourage HUD to recognize that flexibility in the Proposed Rule, not only by using the “best efforts” standard, but also allowing PHAs to retain greater discretion over the development of their own Section 3 program. In many instances throughout the Proposed Rule, for example, HUD attempts to strictly quantify PHAs’ obligation, seemingly without recognition that “best efforts” can take many forms depending on the experiences of particular PHAs and their communities. The risk of overly detailed rulemaking is again apparent in HUD’s conclusion that PHAs and their partners “may” give priority to Section 3 residents or businesses “when they are minimally qualified”.⁷ Given HUD’s requirement that PHAs provide Section 3 employment opportunities under the “greatest extent feasible” standard, providing express permission to PHAs to hire minimally qualified Section 3 residents or contractors could therefore be construed to require PHAs to give preference to Section 3 residents or businesses that are minimally qualified rather than to a non-Section 3 contractor that is the most responsive and responsible. We ask that HUD reconsider this approach throughout the Proposed Rule to accommodate a wider range of PHA experiences and individual circumstances by allowing PHAs and their partners to use their “best efforts” to meet these requirements rather than requiring compliance “to the greatest extent feasible”. In many instances, this means providing general requirements without the detailed, prescriptive benchmarks provided in the Proposed Rule. Providing PHAs with the flexibility and discretion to best operate their Section 3 programs

³ Proposed Rule page 16520

⁴ See, e.g., *Ramirez, Leal & Co. v City Demonstration Agency*, 549 F.2d 97 (1976) at 105

⁵ *Miller v Chicago Housing Authority*, 2012 WL 2116190 (2012) at 4; *Bardney v Chicago Housing Authority*, 2013 WL 1278526 (2013) at 2

⁶ *Conway v Chicago Housing Authority*, 2013 WL 1200612 (2013) at 7

⁷ Proposed Rule page 16527

will allow them to continue operating innovative, thoughtful programs that best respond to the needs of their own communities and residents.

b. The Proposed Rule imposes an unfunded mandate on PHAs, with its extensive new monitoring, reporting and enforcement requirements without providing funding for these new responsibilities.

The Proposed Rule imposes a number of new monitoring, reporting and enforcement requirements but does not provide any mechanism for PHAs to cover these new costs. We encourage HUD to revisit these costly new requirements and impose a more realistic monitoring and reporting regime that can be accommodated with existing resources rather than effectively requiring PHAs to find a new source of funds to pay for these costs. For example, the Proposed Rule requires that PHAs monitor the payroll data of developers, contractors and subcontractors throughout the project or activity for projects that are subject to Davis Bacon wage requirements.⁸ However, HUD's Davis Bacon requirements do not themselves require this level of monitoring. In the Davis Bacon context, PHAs are simply required to perform "spot checks" of contractor compliance, and monitoring is primarily focused on willful violations, such as falsification of payroll data.⁹ In contrast, the Proposed Rule's monitoring and verification procedures are much more extensive, often requiring PHAs to engage in complex reviews of individual hiring decisions by contractors and subcontractors.

The Proposed Rule likewise requires PHAs to develop and implement sanctions for non-compliant contractors but does not provide PHAs with realistic benchmarks for sanctions or alternatives to sanctions. Developing these processes and defending proposed sanctions are likely to create further administrative and fiscal burdens for PHAs that are already operating in an environment of scarce financial resources. By imposing significant new monitoring, reporting and sanctions requirements without providing the funding for PHAs to implement these requirements, HUD is requiring PHAs to divert their scarce resources to new costly administrative obligations, detracting from their broader missions of serving low income families.

c. By creating a complex new regulatory regime without acknowledgment of the practical limitations faced by PHAs that wish to hire Section 3 residents and businesses, HUD risks undermining PHAs' abilities to focus on their core missions of providing affordable housing to low income families.

In addition to the costs discussed in the prior sections, the Proposed Rule may significantly reduce the number of private sector partners willing to work with PHAs, harming both PHAs and their low income residents. For example, many of CLHPA's members report that contractors already find the existing Section 3 requirements too detailed and confusing; when combined with the threat of sanctions for non-compliance, these partners may simply decide that working with PHAs is not worth the cost given the enhanced administrative requirements or risk of sanctions. We are concerned that this loss of potential bidders and partners for PHAs may be exacerbated by the fact that the Proposed Rule removes many of the safe harbor standards and alternative

⁸ Proposed Rule page 16536

⁹ See, e.g., HUD Handbook 1344.1, Rev. 2, Section 5-2(A)(6) and Section 5-8

compliance measures in the current Section 3 regulations while making compliance with the core Section 3 requirements more difficult. PHAs rely on local businesses and contractors to provide services to their property, and by imposing significant regulatory burdens on third parties while removing safe harbor standards that mitigate the risk of inadvertent noncompliance, the Proposed Rule threatens to significantly diminish the number and quality of contractors willing to bid on PHA-sponsored projects. This diminished competition is not in the best interests of PHAs or the communities they serve. Among other things, we encourage HUD to retain the safe harbor provisions in the current rule and allow contractors to receive notice and an opportunity to cure before mandatory sanctions for non-compliance are imposed.

The Proposed Rule also ignores a very real problem faced by PHAs and contractors across the country—in many communities, contractors cannot locate enough skilled Section 3 businesses or individuals to fill their Section 3 hiring needs. HUD’s emphasis on sanctions for failure to meet hiring targets, rather than on clear safe harbor standards, suggests a significant misunderstanding of the realities of hiring Section 3 residents and businesses. It also disregards the fact that the Section 3 Act does not require absolute compliance, but rather “best efforts”. Furthermore, the current rule and the Proposed Rule do allow contractors to also satisfy their requirements by providing on-the-job training or registered apprenticeship programs, but this alternative is often costly and requires a significant investment of time and resources from the contractor’s staff. Because Congress and HUD are not providing additional funds for contractors to provide these trainings or apprenticeship programs, contractors and PHAs become responsible for finding funding sources to cover these training programs. As a practical matter, many PHAs have found that contractors simply inflate their prices to cover these Section 3 costs rather than reducing their own profits, effectively requiring PHAs to finance the cost of Section 3 trainings and apprenticeships. Like HUD’s proposed monitoring and reporting requirements that create new costs for PHAs without new funding to implement these requirements, HUD’s enhanced requirements for contractors appears to be a cost-shifting exercise where PHAs, rather than HUD, bear the expense of these new requirements.

We are concerned that contractors will choose not to assume these new costs and will simply decline to provide their services to PHAs, resulting in a smaller pool of qualified contractors for PHA projects. Similarly, by drastically raising the Section 3 threshold from 3 percent to 10 percent of all non-construction contracts, the Proposed Rule may discourage contractors that provide professional services (i.e., architects, engineers, lawyers, accountants, etc.) from providing services to PHAs. As the current regulations appropriately recognize, it is difficult to hire Section 3 individuals and businesses to provide these types of professional services, which require highly skilled employees who are typically not Section 3 eligible. As a result, professional service providers may be particularly disinclined to provide their services to PHAs knowing that they cannot meet the 10 percent hiring requirement and knowing that the risk of non-compliance is significantly higher given the increased sanctions and the removal of critical safe harbor standards under the Proposed Rule.

Instead of improving PHAs’ abilities to develop high quality housing in an affordable manner, the changes to the Section 3 rule are likely to have a detrimental impact on the ability of PHAs to serve low income families by providing high quality, affordable housing. Those partners who remain committed to working with PHAs may simply pass the new compliance costs on to PHAs

in the form of higher project costs, thus reducing the funds available for PHAs to serve low-income families. We strongly encourage HUD to reconsider its approach with respect to Section 3 by making the program more flexible and administratively simpler to improve the ability of PHAs to solicit and retain the most responsible and responsive contractors to further PHAs' missions of provide high quality, affordable housing to low income families. The remainder of this letter discusses our specific concerns in greater detail.

2. Detailed Comments on Proposed Rule

a. General Provisions—Subpart A

24 CFR 135.5, “Public housing financial assistance”

Subsection (1): This subsection provides that Section 3 requirements apply to projects funded under Section 5 of the U.S. Housing Act of 1937 (the “1937 Act”). However, no funds are appropriated under Section 5 and so this reference is unnecessary. Public housing funds are already covered by the remaining definitions in this section and so we ask that HUD delete the reference to Section 5, which is overly inclusive.

Subsection (5): This subsection provides that Section 3 applies to “emergency funds” authorized for emergency capital repairs of public housing. However, PHAs may receive emergency funding from a number of sources that may not be public housing sources and which may not be subject to the Section 3 Act. We ask that this Subsection be deleted to allow the type of funding to continue to determine whether Section 3 applies.

Subsection (6): This subsection provides that Section 3 applies to financial assistance “made available under an appropriations act...” While this Subsection provides Choice Neighborhood funding as an example, the general reference to appropriations is excessively broad and seeming covers all funds appropriated by Congress. We ask that this Subsection be deleted, particularly since Subsection (7) already provides HUD with a mechanism for determining that Section 3 applies to particular funding sources.

24 CFR 135.5, “Section 3 business”

Please retain the current definition of “Section 3 business” that includes a business that provides evidence of a commitment to subcontract in excess of 25 percent of the dollar award of all subcontracts to be awarded to an eligible Section 3 business. Many PHAs successfully use this definition on large construction contracts, particularly for complex projects where a Section 3 business could not successfully perform the entire prime contract, but is well-equipped to serve as a subcontractor on a portion of the project. Eliminating this category of business will have a detrimental impact on the inclusion of Section 3 businesses in large, complex construction projects. If HUD feels the need to clarify this definition, we suggest adding a requirement that the prime contractor must make this hiring commitment for each project in which it wishes to receive a Section 3 preference.

135.7, Compliance to the greatest extent feasible

Subsection (a): As discussed above, we encourage HUD to recognize that PHAs and their contractors and subcontractors may use their “best efforts” to award contracts to eligible individuals and businesses. Likewise, we encourage HUD to re-incorporate the statutory language of the Section 3 Act that requires such effort “consistent with existing Federal, State, and local laws and regulations” to make it clear that PHAs and others are not required to violate other laws or regulations in order to meet the Section 3 compliance requirements in the Proposed Rule.¹⁰ For example, in addition to Section 3 requirements, PHAs are subject to many other federal laws and regulations regarding civil rights and non-discrimination and must continue to award Section 3 contracts in compliance with these federal civil rights and non-discrimination requirements. Similarly, many PHAs are subject to state and local procurement laws that require the award of construction contracts to the lowest bidder through a sealed bid process. The Proposed Rule should acknowledge that the Proposed Rule is not intended to preempt other existing federal, state and local laws and regulations, except as specified below with respect to local hiring preferences.

Subsection (b): We agree that it is important to require recipients of HUD funds to establish policies and procedures. We also understand that HUD requires written justifications when a recipient or contractor does not meet HUD’s Section 3 numerical goals. However, we encourage HUD to retain the “safe harbor” standards in the current Section 3 rule. More specifically, under the current 24 CFR 135.31(d)(1) and (2), recipients who cannot meet the numerical targets for employment and hiring may also demonstrate that they have met the applicable Section 3 requirements by providing other economic opportunities, such as those listed in the current 24 CFR 135.40 and by showing that they took some or all of the actions listed in the Appendix to the current regulations. These supplemental compliance opportunities are critical for PHAs and their partners, who may not otherwise be able to document that they used their best efforts to comply with the Section 3 hiring requirements if they could not locate or retain sufficient numbers of qualified Section 3 individuals and businesses.

Subsection (c): While we appreciate the importance of Section 3 enforcement, we encourage HUD to combine enforcement measures with the alternate compliance measures contained in the current Section 3 regulations. Sanctions are a very serious penalty, and without clear safe harbor standards, PHAs and their partners lack a meaningful way to mitigate their risk of sanctions if they are not able to meet the Section 3 hiring requirements. While we appreciate that HUD will take various “justifications” by PHAs and their partners into consideration when reviewing a failure to meet hiring targets, we ask that HUD provide examples of acceptable justifications so that PHAs and their partners may appropriately evaluate those alternatives if they are confronted by an insufficient number of Section 3 hiring opportunities. Additionally, we also encourage HUD to allow recipients to receive notice and an opportunity to cure before mandatory sanctions for non-compliance are imposed.

¹⁰ 12 USC 1701u(c)(1)(A) and 12 USC 1701u(d)(1)(A)

135.9, Official Section 3 policies and procedures

Subsection (a), subsection (2): This section provides very detailed descriptions of what Section 3 recipients must include in their official Section 3 policies and procedures. After this description, the second sentence of Subsection (2) says that this list “is not inclusive of all elements that recipients should include”. However, if there are key elements that HUD has not included on this detailed list, we encourage HUD to add those elements before publication of a final rule so that PHAs and their partners may review these elements. If this list is not missing key elements, then we ask HUD to delete this reference to unlisted requirements. As discussed above in the context of safe harbor standards for justifications for non-compliance, we are concerned that the Proposed Rule implies a number of unstated requirements. Given HUD’s emphasis on sanctions for non-compliance in the Proposed Rule, we ask that HUD clearly state what will be required of PHAs and their partners so that they do not face sanctions without clear knowledge of how to avoid these sanctions.

Subsection (a), subsection (3): The first sentence of this section requires that “official” Section 3 policies and procedures be incorporated into “any strategic and annual plans required by recipients” of HUD assistance. However, this change is overly prescriptive and seemingly requires PHAs to incorporate their full Section 3 policies and procedures into all of their strategic plans and annual plans. However, PHAs typically have extensive stand-alone Section 3 policies that cannot be easily incorporated into the various plans submitted to HUD. In addition to official Section 3 policies, many PHAs have developed secondary materials, including procedures and internal procurement guidance related to Section 3, and it is not clear how the full text of these procedures could be readily incorporated into all strategic plans and annual plans submitted to HUD. Attempting to do so may cause PHAs to overly simplify their policies and procedures in a way that is not beneficial to compliance with the applicable Section 3 requirements. We believe that HUD did not intend this outcome, and so request that HUD either delete this requirement or clarify that recipients must simply agree to comply with applicable Section 3 requirements in their strategic and annual plans.

Subsection (a), subsection (3)(i): This subsection is both overly broad and vague and so we ask that it be deleted. This subsection requires that recipients include a general description of their Section 3 policies and procedures “in required recipient plans, such as public housing plans required by HUD regulation in 24 CFR Part 903, strategic and annual action plans required by HUD regulations in 24 CFR parts 91 and 570, or other similar plans that may be required under other covered HUD programs.” As discussed above, as a general matter, we ask that recipients simply be required to agree to comply with Section 3 in their strategic and annual plans rather than being required to incorporate their policies and procedures. Additionally, this subsection is ambiguous—it is not clear what HUD means by “required recipient plans”, since this is not a defined term. The reference to “other similar plans” is also overly broad since it is not clear which plans HUD might be referring to. The Proposed Rule allows HUD to impose sanctions for failing to satisfy these requirements (see, e.g., 24 CFR 135.7(c)(2)) and so it is critical that the obligations of PHAs be clearly defined so that PHAs are not confronted with sanctions for non-compliance with unstated requirements.

135.11, Recipient responsibilities

Generally: We encourage HUD to review the level of detail provided in Section 135.11 and remove unnecessarily prescriptive requirements to allow PHAs greater flexibility in discharging their Section 3 obligations. We encourage HUD to look to its Davis Bacon guidance as a model for ensuring compliance while allowing PHAs to retain the flexibility necessary to administer their own programs. In the Davis Bacon context, for example, HUD has noted that contract administrators are responsible for ensuring that the bid solicitation and applicable contract contain the necessary wage decision and appropriate labor standards. HUD explained that “HUD does not prescribe specific actions for [contract administrators] to achieve these results, only that the [contract administrator] successfully carry out its responsibilities.”¹¹ Davis Bacon compliance is often seen as similar to Section 3 compliance, yet HUD and the Department of Labor allow PHAs significantly more flexibility in discharging their responsibilities with respect to Davis Bacon wages. We encourage HUD to follow that approach here as well.

Subsection (b)(5): We are concerned by the administrative burden and costs associated with this requirement and ask that HUD delete this subsection. This subsection provides that recipients must “monitor the payroll data of developers, contractors, and subcontractors throughout the project or activity, to ensure that new employment opportunities are made available consistent with the requirements of this parts. This requirement only applies to projects or activities that are subject to wage rates determined under the Davis Bacon Act”.

This requirement is problematic for two reasons. First, HUD is not providing any additional funding for the heightened Section 3 requirements in the Proposed Rule, but this change is likely to require significant amounts of PHA staff time to review payroll data. The Proposed Rule only imposes this requirement on projects subject to Davis Bacon wages, but HUD does not require PHAs to conduct this level of review even for projects paying Davis Bacon wages. For example, in the Davis Bacon context, PHAs are simply required to perform “spot checks” of contractor payroll data, and monitoring is primarily focused on willful violations, such as falsification of payroll data.¹² Once the initial spot check has been performed for a Davis Bacon project, HUD permits PHAs to conduct less frequent and invasive monitoring. This Davis Bacon monitoring is usually limited to a desk review of Davis Bacon wage reports.¹³ Furthermore, most PHAs do not have the staff capacity or technology to conduct Section 3 payroll monitoring for large construction projects, since PHAs would have to review not only wage reports by prime contractors, but also by their subcontractors. While we are aware of one technology company that sells software to facilitate this type of review for large construction projects, the cost of the software is prohibitive for most PHAs, who would instead have to manually review hundreds or thousands of pages of Davis Bacon payroll data. The Proposed Rule’s requirement that PHAs monitor payroll data throughout the project therefore imposes a costly administrative burden on PHAs that are already struggling with fewer resources, and we ask that this requirement be removed.

¹¹ HUD Handbook 1344.1, Rev. 2, Section 5-3(B)

¹² See, e.g., HUD Handbook 1344.1, Rev. 2, Section 5-2(A)(6) and Section 5-8

¹³ HUD Handbook 1344.1, Rev. 2, Section 5-8(A)

Equally important, this additional payroll monitoring will not accomplish HUD's objectives of improving Section 3 compliance. In the Davis Bacon context, PHAs can quickly review contractors' payrolls to determine what wages the contractors are paying, and can therefore determine whether the contractors are in fact paying Davis Bacon wages. In the Section 3 context, however, the relationship between payroll wages and Section 3 compliance is not clear, since Section 3 eligibility is not apparent from payroll data. Furthermore, only a small portion of a contractor's employees are typically Section 3 employees, and it is not efficient to require PHAs to review large volumes of payroll data where most of the data relates to non-Section 3 hires. In contrast, in the Davis Bacon context, all of the Davis Bacon wage reports are relevant to whether a contractor is complying with Davis Bacon requirements, since typically the entire project is subject to Davis Bacon wage requirements. As a result, having incurred the cost of monitoring Davis Bacon payments to comply with the Section 3 Proposed Rule, PHAs would still need to conduct site visits or other established forms of Section 3 monitoring to actually determine Section 3 compliance. Monitoring Davis Bacon wages is not an effective means of monitoring for Section 3 compliance, and we therefore ask that HUD remove this costly new administrative requirement that does not align with the desired outcome.

Subsection (b)(8): This subsection requires PHAs to ensure that notices are posted that advertise Section 3 opportunities, and provides extensive details about what the notices should include. We ask that HUD delete this list and allow PHAs to exercise their discretion in order to disseminate information to Section 3 applicants in a cost-effective and easily understood manner.

Among other things, the Proposed Rule requires that notices include anticipated dates that work will begin and end; anticipated number and type of job vacancies available; anticipated number and type of registered apprenticeship or training opportunities offered; anticipated dollar amount and type of subcontracting opportunities; application and bidding procedures; required employment and subcontracting qualifications; and the name and contact information for the person(s) accepting application.

This level of detail is not appropriate for a public sign, particularly when the objective is communication with Section 3 residents who may be interested in employment. PHAs have developed communication tools that are most effective for outreach to low-income families in their communities, and we are concerned that the level of detail in the Proposed Rule will impede effective communication with Section 3 individuals and businesses by providing an overwhelming and confusing amount of detail for people who are not accustomed to reviewing and interpreting government notices.

Subsection (b)(9): Please clarify that in connection with Section 3 procurements, PHAs may provide local preferences for Section 3 hiring, which will ease the selection of Section 3 residents and businesses. HUD's current procurement regulations at 2 CFR 200.319 prohibit the use of statutorily or administratively imposed state or local preferences in the evaluation of bids or proposals. We believe that the Section 3 Act and the regulations at 2 CFR Part 200 provides HUD with the authority to allow local preferences for Section 3 hiring. Accordingly, we ask HUD to clarify that the Section 3 requirements preempt the prohibition on local hiring in 2 CFR 200.319. Finally, we would also ask that HUD update the references in the Proposed Rule to reflect that 2 CFR Part 200 has replaced 24 CFR Part 85.

Subsection (b)(10): Please delete the second sentence in this subsection. This subsection requires that collective bargaining agreements, project labor agreements or other agreements between labor unions or recipients must ensure that covered Section 3 projects comply with the applicable Section 3 requirements. However, we believe that project-specific contracts (i.e., for construction services, etc.) are the more appropriate place for recitals about Section 3 requirements since not all labor agreements relate solely to Section 3 covered work.

Subsection (c), Responsibilities specific to PHAs: Generally, we ask that HUD revise this section and Subsection (d) below so that PHAs and other recipients are subject to the same responsibilities. The distinctions between public housing agencies and other recipients are also redundant and confusing here given the additional provisions for public housing discussed in Subpart B of the Proposed Rule. In addition, Subpart (c) does not meaningfully clarify the obligations of PHAs under the Proposed Rule. Subpart (c)(1) already provides an extensive discussion of recipient responsibilities and it is not clear what additional monitoring HUD is requiring at Subpart (c)(1) nor is it clear how this is different from the obligations of PHAs discussed in Subpart (c)(1). We also ask that HUD delete the requirements in Subparts (c)(2) and (c)(3) that obligate PHAs to develop procedures to comply with “earned income disregard requirements” and set-aside requirements for resident owned business. Inclusion of these requirement is both unnecessary and confusing given that the earned income disregard and resident owned business provisions are not addressed by the Section 3 Act and are already the subject of separate regulations issued by HUD at 24 CFR Part 963 and 24 CFR Part 5, respectively. We find the mention of set-asides particularly confusing since that the definition of “numerical goals” in Section 135.5 explicitly says that these goals “are not construed as quotas, set-asides, or a cap...”. Given these concerns, we encourage HUD to delete this Subpart (c).

135.13, General minimum numerical goals

We encourage HUD to delete this subpart, which simply reiterates that recipients of public housing and community development financial assistance must meet the minimum numerical goals provided in other subparts. This subpart does not provide any new information but simply recites requirements that are already fully provided in other subparts, including Section 135.35 and 135.55 and 135.7, and so may cause confusion. We discuss the requirements of those other sections in more detail below.

135.15, Verification of Section 3 resident and Section 3 business status.

Subpart (a): Please clarify that recipients may rely on certifications or other documentation by contractors and subcontractors regarding the Section 3 eligibility of the individuals or businesses hired by the contractor or subcontractor. Please also clarify that compliance with the verification procedures in subsections (b) and (c) satisfy the verification obligations of recipients with respect to individuals or businesses hired by the recipient. As explained in our general comments to the Proposed Rule, these kinds of safe harbor standards are important to allow PHAs to appropriately develop their compliance measures given the enhanced opportunities for sanctions under the Proposed Rule.

Subpart (b)(2) and (b)(3): It appears that a phrase is missing after the word “HUD”. As drafted, it is not clear what kind of designation the neighborhood, zip code or other area needs to receive from HUD.

Subpart (b)(4): Please make the imposition of sanctions discretionary rather than mandatory by revising this subpart to say that recipients “may” impose sanctions and “may” refer such individuals to the OIG. This will allow PHAs to exercise their discretion when individuals make claims that are erroneous or inaccurate but not intentionally deceptive.

Subpart (c)(2): It appears that a phrase is missing after the word “HUD”. As drafted, it is not clear what kind of designation the neighborhood, zip code or other area needs to receive from HUD. Likewise, please delete or revise the phrase that says that recipients may presume that a business meets the eligibility criteria if the business provides evidence that it “substantially” employs residents from a designated area. This phrase is confusing given the definition of Section 3 business in 24 CFR 135.5 that requires specific percentages of employees to be Section 3 residents. While we understand that the Section 3 Act also uses the term “substantially”, HUD has exercised its rulemaking authority to define Section 3 business elsewhere, and that definition should be sufficient. The presumption in the first part of Subpart (c)(2) does not cause the same confusion because that presumption does not relate to documentation of a specific percentage of employees.

Subpart (c)(3): We ask that HUD delete the provision allowing recipients to require federal tax returns for workers and to require evidence that employees received housing or other federal subsidies. This authorization raises significant privacy concerns on behalf of possible Section 3 residents, who should not be subjected to automatic, additional scrutiny by their employers simply because those employees may be low-income. This concern also supports the need for the less-intrusive safe harbor provision described in Subpart (c)(2), which allows recipients to presume that a business meets the Section 3 eligibility criteria as long as it is located in a low-income area. Any other required documentation should be provided directly by the employer and should disclose private information about the employer rather than its employees.

Subpart (c)(4): Please make the imposition of sanctions discretionary rather than mandatory by revising this subpart to say that recipients “may” impose sanctions and “may” refer such businesses to the OIG. This will allow PHAs to exercise their discretion when businesses make claims that are erroneous or inaccurate but not intentionally deceptive.

135.17, Written Agreements

Subpart (e), generally: As we have noted in a number of other sections, this proposed change is overly prescriptive. We encourage HUD to make the simplifying changes described below to allow PHAs and their partners to adopt a more streamlined approach to Section 3 compliance

Subpart (e)(1): Please clarify that the PHA’s or subrecipient’s plan may instead be incorporated by reference into the written agreement. Otherwise, this provision of the Proposed Rule seemingly requires subrecipients to incorporate their full Section 3 plans into their written agreements with recipients, but many subrecipients have extensive stand-alone Section 3 policies

that cannot be easily incorporated into the written agreement with the recipients. In addition to official Section 3 plans, many subrecipients have developed secondary materials, including procedures and internal procurement guidance related to Section 3, and it is not clear how the full text of these procedures could be readily incorporated into the written agreement. Attempting to do so may cause subrecipients to overly simplify their policies and procedures in a way that is not beneficial to compliance with the applicable Section 3 requirements. We believe that HUD did not intend this outcome, and so request that HUD either delete this requirement or clarify that subrecipients may alternatively incorporate their Section 3 plans and procedures by reference.

Subpart (e)(4): Please delete the reference to “contractor” compliance since contractors are not parties to the written agreements between recipients and subrecipients described in 135.17.

135.19, Contracts and Section 3 clause

Subparts (c) and (d): Please clarify that the form of this Section 3 Clause may be modified to fit the type of contract that it is attached to. For example, when the Section 3 Clause is attached to an agreement between a contractor and subcontractor, the references to “contractor” will need to be updated to refer to the “subcontractor.”

Subpart (e), generally: We ask that HUD revise this form to reflect our other comments to the Proposed Rule.

Subpart (e), Item F of Section 3 Clause: Please delete the phrase “to the recipient” since in many instances this Section 3 Clause will be attached to an agreement between a contractor and a subcontractor. In that situation, the subcontractor would initially provide its justifications to the contractor, not to the recipient. This change is particularly important because there would not be privity of contract between the subcontractor and the recipient.

Subpart (e), Item M of Section 3 Clause: Please delete this section. We encourage HUD to consider which entities will have enforcement power under the Proposed Rule and to clarify this throughout the Proposed Rule. In this subpart, for example, HUD is obligating the contractor to impose sanctions on its subcontractors. Section 135.11(b)(12), however, suggests that recipients have this obligation instead. To avoid confusion and situations where multiple entities attempt to sanction a contractor for the same violation, we encourage HUD to consider which entities should have the obligation to impose sanctions and to enforce Section 3 more generally.

Subpart (e), Item O of Section 3 Clause: Please delete this section. Contractors often have agreements with labor organizations but rarely have the power to negotiate these agreements. In addition, these agreements often address significant amount of work that is not covered by Section 3. Furthermore, these labor agreements may cover multiple regions or multiple employers within a region, many of whom may have their own Section 3 requirements for the particular contract. As a result, it is more appropriate for these requirements to be incorporated into project-specific contracts, which are then subject to the Section 3 Clause described in 24 CFR 135.19(e).

Subpart (e), Item O of Section 3 Clause: Please delete this section. Contractors should receive notice and an opportunity to cure before sanctions are imposed, particularly before a contract is terminated.

135.23, Reporting requirements

Generally: We encourage HUD to remove many of the details from this section. This level of detail is not necessary or appropriate for a regulation, particularly given that HUD's online Section 3 reporting system is still in the test phase and is not yet operational. For example, we suggest removing most of the details of this section and simply requiring recipients to report those items described in Subpart (a) in the format approved by HUD. This will allow HUD the discretion to require use of a paper HUD form or an online form depending on HUD's needs at a particular time.

b. Additional Provisions for Public Housing Financial Assistance—Subpart B

135.35, Minimum numerical goals

Subpart (a), generally: We strongly encourage HUD to retain the requirement in the current rule that requires that 3 percent of the total dollar amount of non-construction contracts be awarded to Section 3 businesses. HUD's introductory comments note that "there was no statutory reason to make a distinction between construction and nonconstruction contracts."¹⁴ However, the Section 3 Act also provides HUD with broad rulemaking authority, which HUD has exercised in order to require contractors to use best efforts to award at least 10 percent of the total dollar amount of covered contracts to Section 3 businesses.¹⁵ As a result, we ask that HUD exercise the same rulemaking authority to retain the 3 percent threshold for non-construction contracts and to eliminate these requirements entirely for certain types of professional services contracts and materials-only contracts. As we discussed in our introductory comments, it is already difficult to award at least 10 percent of the dollar amount of construction contracts to Section 3 businesses; it is even more difficult to award at least 10 percent of the dollar amount of non-construction contracts to Section 3 businesses. Rather than creating a requirement that PHAs and their partners cannot realistically meet, we suggest that HUD set a target that better aligns with what PHAs and their partners can reasonably achieve using their best efforts. As discussed in our general comments, professional service providers may be disinclined to provide their services to PHAs knowing that they cannot meet the 10 percent contracting requirement and those who continue in this role are likely to charge higher fees to account for the heightened risk of sanctions under the Proposed Rule. This outcome is likely to increase the costs of obtaining professional services without any clear benefit to PHAs or their residents in return.

We also encourage HUD to clarify that certain categories of professional services and products are exempt from Section 3 hiring requirements given that Section 3 hiring is not typically

¹⁴ Proposed Rule at page 16525

¹⁵ In *Price v Housing Authority of New Orleans*, 2010 WL 1930076 (2010) (page 4), for example, the court noted that "the Secretary of HUD has institutional competence to determine the feasibility of providing economic opportunities in connection with the revitalization projects that it funds".

feasible for those providers. For example, engagement of firms to provide legal, accounting, and financial services rarely directly generates any new hiring needs. When such hiring needs exist, they typically require selection of highly skilled, highly educated employees who rarely qualify as Section 3 residents. Furthermore, even if such qualified residents exist, professional service companies are often national or regional firms and are rarely located in the same geographic area as the PHA purchasing the services. As a result, any Section 3 hires by the professional services company would not typically be within the Section 3 service area of a given PHA and so still would not qualify as a Section 3 hire under the Proposed Rule. For example, a national financial consulting firm may represent many PHAs across the country but may only have a few offices. Thus, as a practical matter, these firms cannot operate physical offices in all of the markets that they serve, and so cannot hire Section 3 employees in places where they do not have physical locations even if they could find qualified employees. As a result, we encourage HUD to create an exception for professional services since they rarely generate any Section 3 hiring in the Section 3 service area of the PHAs they serve.

CLPHA also endorses the comments of the HAI Group, which has requested that HUD revise the Proposed Rule to acknowledge that (1) it is not feasible to require Section 3 hiring with respect to certain categories of services such as the provision of insurance services and to create a hiring exemption for such services, and (2) Section 3 compliance is only required to the extent consistent with existing federal, state and local laws and requirements as provided in the Section 3 Act and therefore is not required for insurance providers. As discussed above, we believe that the Section 3 Act provides HUD with the discretion and rulemaking authority to make these changes.

Finally, we ask that HUD create an exemption for providers of materials-only contracts for similar reasons. These contracts typically do not directly generate employment opportunities of any type, and when such opportunities are created, they are rarely in the Section 3 service area of the PHA. The administrative burden of requiring these suppliers to justify their failure to meet the Section 3 hiring requirements far outweighs the occasional Section 3 resident or business that these suppliers might hire.

Subpart (a)(1): At the end of the first sentence, please add “to the extent that the employment opportunity arises from the expenditure of public housing financial assistance.” This addition is important because many PHAs also have non-public housing revenue and may use this revenue to hire employees and conduct activities not related to the expenditure of public housing funds. For example, many PHAs develop Low Income Housing Tax Credit projects that are not additionally public housing, and internal hiring related to those developments is not subject to Section 3 requirements. Please also clarify that these numerical goals only apply to projects that generate “new hires”. It is otherwise not clear how projects without hiring needs could meet these requirements. If the expenditure of public housing assistance does not result in the need for new hiring, third-party contractors should not be required to expend significant time and money to document why they did not hire Section 3 residents or businesses.

Subpart (a)(3): Please delete this requirement, which provides that a Section 3 resident must work a minimum of 50 percent of the average staff hours worked for the category of work for which they were hired. This conflicts with the definition of “new hire” provided in Section

135.5. That section provides that a “new hire” means full time employees or part time employees for permanent, temporary, or seasonal employment. The conflict in these definitions occurs if an employer has long-term employees who are not Section 3 eligible and also has a smaller number of temporary needs for the same employment class. If the employer hires Section 3 eligible residents to fill its temporary needs, then the temporary nature of this work may mean that the Section 3 residents do not work at least 50 percent of the average staff hours of the permanent workers. If HUD believes that the definition of “new hire” in Section 135.5 is not sufficient, we encourage HUD to revise that definition rather than attempting to provide an additional, conflicting definition in 135.35(a)(3).

The requirement that Section 3 residents work at least 50 percent of the average hours also puts Section 3 residents at a significant disadvantage, and is likely to result in fewer Section 3 job applicants. First, many Section 3 residents cannot commit to full-time employment, often because they have school-aged children or because they take care of elderly or disabled relatives who need part-time assistance. As a result, many Section 3 residents strongly prefer reduced work schedules or work that only occurs during school hours to accommodate their childcare or other family obligations. Requiring them to work at least 50 percent of the hours of other employees may discourage these residents from even applying to these jobs. Similarly, many PHAs and residents support these reduced-work arrangements because they provide greater job training opportunities for a greater number of residents. For example, if a contractor can hire two part-time Section 3 residents for a given position rather than hiring one full-time resident, then the contractor has doubled the number of Section 3 residents who can acquire the job skills related to that job. As a result, we strongly encourage HUD to remove the requirement that Section 3 residents work at least 50 percent of the hours of an “average” employee.

Subpart (b): As discussed above, we strongly encourage HUD to retain the 3 percent threshold for non-construction contracts and to create an exception to these requirements for certain professional services contracts.

Section 135.37, Orders of priority consideration for employment and contracting opportunities

Subpart (a), generally, and subparts (1) through (5): This section creates heightened hiring requirements while making the compliance obligations of PHAs less clear. We ask that HUD delete this subpart (a) and instead retain the provisions of the current Section 3 rule. We believe that PHAs should not be required to hire Section 3 residents and businesses that are only “minimally” qualified as described in HUD’s introductory comments to the Proposed Rule, nor should PHAs be required to hire Section 3 residents who have the “same” qualification as the general pool of other “applicants”.¹⁶ PHAs are committed to providing high quality affordable housing to low-income families despite chronic under-funding, and must be allowed the flexibility to meet this mission by selecting employees or contractors who are capable of carrying out the scope of work effectively as determined by the PHA during the PHA’s procurement process. Accordingly, we strongly encourage HUD to delete the new Section 135.37 and retain the current Section 135.34 and 135.36 and Appendix to Part 135. These current sections provide PHAs with the necessary flexibility to hire the most responsible and

¹⁶ Proposed Rule, page 16527

responsive bidder while also providing important safeguards for the interests of Section 3 residents and businesses. As discussed in our general introductory comments, HUD has concluded that a PHA must provide Section 3 employment opportunities under the “greatest extent feasible” standard. This suggests that the PHA may therefore be required to give preference to Section 3 residents or businesses that are minimally qualified or only have average qualifications rather than to a non-Section 3 contractor that is the most responsive and responsible. If PHAs do not provide these preferences to minimally qualified Section 3 employees, we are concerned that HUD or the OIG might construe selection of any other contractor as non-compliant with the “greatest extent feasible” standards. PHAs are not sufficiently protected by the requirement that a Section 3 resident possess the same qualifications as other “applicants” as provided in subpart (a)(2), since nothing requires the PHA or contractor to hire those applicants. Subpart (a)(3) is likewise not helpful in resolving this ambiguity, since the procurement requirements of 24 CFR Part 85 require that contracts be awarded to the lowest bidder or most responsive and responsible bidder.¹⁷ It is therefore not clear how this subpart (a)(3) will help PHAs in determining that they are not required to hire unqualified Section 3 businesses as a result of their procurements.

HUD’s current Appendix to Part 135 provides a number of helpful examples of when PHAs must select Section 3 businesses that are not the lowest bidder or the most responsive bidder.¹⁸ We therefore strongly encourage HUD to delete the new Section 135.37 and retain the procurement requirements in the current Section 3 rule, including those examples in the current Appendix to Part 135. Otherwise, HUD is imposing ambiguous new requirements without providing clear safe harbor standards for Section 3 procurement and hiring.

c. Additional Provisions for Housing and Community Development Financial Assistance—Subpart C

Because many of the provisions in Subpart C are identical to those in Subpart B, we ask that HUD consider our comments to Subpart B to also apply to the analogous provisions in Subpart C.

d. Additional Provisions for Recipients of HUD Competitive Grant Financial Assistance—Subpart D

135.73, Application selection criteria

Please delete the new language saying that consideration will be given “to the extent to which an applicant has described in their application their plans to train and employ Section 3 residents...”

¹⁷ On December 26, 2014, the Office of Management and Budget published final guidance that removed 24 CFR Part 85 and replaced it with the requirements of 2 CFR Part 200. However, HUD’s Section 3 Proposed Rule continues to refer to Part 85 rather than to 2 CFR Part 200. We encourage HUD to update this reference in the Proposed Rule before a final Section 3 rule is issued.

¹⁸ Appendix A to Part 135, Section III: Examples of Procurement Procedures that Provide Preference for Section 3 Business Concerns.

Instead, please continue to use the current Section 3 language at 135.9(c), which focuses on the extent to which an applicant “has demonstrated that it will train and employ Section 3 residents...” We believe that HUD’s emphasis should be on what applicants will do, rather than the amount of detail that they provide in their applications. The current rule better accomplishes this focus on results.

135.77, Resolution of outstanding Section 3 matters

We understand that HUD believes it is important to exclude non-compliant applicants from future competitive HUD funding rounds but are concerned that the language in this section is overly broad. For example, this section says that various categories of applicants will be prohibited from applying for future competitive HUD funding rounds. Excluded groups include (i) prospective applicants that have received a letter of finding from HUD identifying noncompliance with Section 3 and (ii) applicants with sanctions that have not been resolved to HUD’s satisfaction. However, the prohibition in item (i) above would also exclude applicants who receive a letter from HUD shortly before competitive funding applications are due, and who have not yet been required to respond to HUD, or who are in the process of challenging the findings or are resolving the findings but have not yet finished. Likewise, item (ii) above would exclude some applicants that have long-term voluntary compliance agreements with HUD and who may be fully compliant with their voluntary compliance agreements but are still subject to the terms of the voluntary compliance agreement. If the voluntary compliance agreement was in effect, however, those applicants would be ineligible to apply for the funding. Rather than excluding applicants with open findings, we encourage HUD to simply note that HUD retains the discretion to determine that applicants with open Section 3 findings that are not being resolved may be ineligible for funding. HUD has adopted this approach with respect to other civil rights matters such as Fair Housing, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. We believe that HUD’s approach taken with respect to such civil rights matters in many of HUD’s General Sections for NOFAs would also work well with respect to Section 3.

e. Enforcement—Subpart E

135.93, Conduct of Investigations

Subpart (g): Please delete the new language saying that HUD may provide assistance in drafting a complaint, which appears to create a significant conflict of interest. Subparts (j) through (n) provide that HUD will also investigate the complaint and may accept or reject the complaint and take various enforcement actions based on the complaint. As a result, it appears inappropriate for HUD to also provide assistance in drafting the complaint, since doing so is likely to prejudice HUD in favor of the complaint when it is then submitted to HUD.

Subpart (h): While we appreciate that complaints may sometimes need to be revised, we ask that HUD limit any substantial, non-technical amendments to a period that does not exceed 90 days after the complaint is filed. Otherwise, PHAs and their partners may be required to dedicate significant resources to defending themselves against shifting allegations without knowing the final form that these allegations may take. By imposing a deadline for amending complaints, the

Proposed Rule will encourage the parties to investigate and resolve the complaint in a more focused manner.

Subpart (l), first paragraph: Rather than requiring HUD to issue a letter of finding for “a” failure to comply with Section 3, we ask that the Proposed Rule be modified to say that a letter of finding will be issued for “significant” or “material” failure to comply with Section 3 in a manner that caused actual harm to the complainant. These revisions will prevent situations where an investigation reveals either minor non-compliance (such as typographical errors in Section 3 reports) or non-compliance that did not affect the complainant.

Subpart (l)(4): To allow recipients sufficient time to correct non-compliance without also requesting a regulatory waiver, we ask that a sentence be added to this subpart allowing the Secretary to exercise the Secretary’s discretion to extend the time for recipients to resolve or remedy findings of noncompliance.

Subpart (n): Under the Proposed Rule, this subpart requires that sanctions be imposed if a matter cannot be resolved in 30 days. We ask that HUD delete the new 30-day timeline and instead provide that HUD may impose sanctions if a recipient fails to make acceptable progress under the terms of the voluntary compliance agreement. Many voluntary compliance agreements cover a number of activities, include measures to ensure hiring beyond the numerical targets in the Proposed Rule and are often most beneficial to Section 3 residents and businesses when they address long-term plans. For example, a typical voluntary compliance agreement might address not only immediate hiring needs but also cover multiphase projects that a PHA is developing over several years. By requiring HUD to impose sanctions if a matter cannot be resolved in 30 days, the Proposed Rule denies Section 3 residents, businesses and PHAs the option of using voluntary compliance agreements where it makes sense to do so. As a result, we ask that HUD instead impose sanctions only if the recipient is not complying with the terms of its voluntary compliance agreement.

In light of our substantial comments and other unsettled issues, we ask that HUD consider our comments and those from other interested parties, release a revised version of the proposed Section 3 rule and allow for a second round of comments before finalizing the rule.

Thank you for the opportunity to comment on the Proposed Rule. If you have any questions, please do not hesitate to contact us.

Sincerely,



Sunia Zatterman
Executive Director
CLPHA



Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC

Exhibit B
PHA Tool Comments



Strengthening Neighborhoods.
Improving Lives.

RENO & CAVANAUGH PLLC

October 20, 2016
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-5173-N-09-B] Affirmatively Furthering Fair Housing Assessment Tool for Public Housing – Information Collection: Solicitation of Comment 30-Day Notice (the “Notice”)

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 Affirmatively Furthering Fair Housing (“AFFH”) Assessment of Fair Housing Tool for Public Housing Agencies (the “PHA Tool”).

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 represents more than one hundred PHAs throughout the country and has been working with our 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 everything we do.

Our previous comments to HUD on the PHA Tool emphasized our concerns that: (1) the PHA Tool will impose costly and burdensome requirements on PHAs, and (2) the PHA Tool fails to offer adequate protections to PHAs that make good faith, reasonable efforts to satisfy the obligations HUD has described in the Notice. As we and other commenters have noted, and as HUD has acknowledged in the Notice, there remain unanswered questions about how PHAs can efficiently and effectively use the PHA tool to collect and interpret data to yield a meaningful fair housing analysis.

Like HUD, PHAs are committed to furthering fair housing, deconcentrating poverty, and increasing integrated housing opportunities for low-income households. PHAs also share HUD's hope that, upon completion, the PHA Tool will assist PHAs and others in their efforts to take meaningful actions to affirmatively further fair housing. However, given the significant questions and uncertainty that still exists around the current PHA Tool, **we urge HUD to first create a working group comprised of a limited number of PHAs to test and refine the PHA Tool prior to nationwide implementation.**

Such a working group should consist of a small, but meaningful, sample of housing authorities and would allow HUD to ensure that the PHA Tool adequately responds to the unique needs of PHAs. In contrast to municipal governments that often have access to readily available data and resources, PHAs typically lack the geographic scope and power of municipalities, making completion of the PHA tool more challenging for PHAs than for their municipal counterparts. The additional effort to develop and test the PHA Tool in a working group setting would help answer the many important questions that PHAs, public housing industry groups, HUD, and others have raised around cost, data collection, and analysis. By testing the PHA Tool in a more limited setting, HUD could also more effectively identify the contents and delivery mechanism for the technical assistance that HUD has already committed to providing in the Notice. The HOPE VI program, the Rental Assistance Demonstration Program and many of HUD's most successful and transformative public housing initiatives have begun as demonstration programs, and we encourage HUD to replicate that approach here as well. If HUD proceeds forward with such a working group, CLPHA offers its assistance to help in these efforts.

Below we offer additional comments on the PHA Tool.

HUD should provide PHAs with funding and additional resources to support the expanded data collection and assessment activities required under AFFH.

HUD has repeatedly emphasized its commitment to providing PHAs with guidance, technical assistance, and training as they work to complete the PHA Tool. We strongly support this position and recognize that this will be of special importance to PHAs, who will now be required to describe and analyze data that may be both difficult to obtain and beyond the scope of PHAs' normal operations or experience. Without HUD-provided, readily available training and technical assistance support, PHAs would likely have to rely on expensive consultants to extract and analyze the relevant HUD-provided data and obtain the additional local data and knowledge that is required to meet their full obligations of the fair housing assessment. Accordingly, we encourage HUD to ensure that HUD's staff and consultants who will provide this guidance, training, and technical assistance have sufficient experience and expertise in assisting and undertaking these complex analyses. In addition, we anticipate that HUD will provide PHAs with increased administrative funding to support the expanded data collection and other obligations PHAs must engage in to fulfill their obligations through the PHA Tool.

The scope of the data collection and analysis required under the PHA Tool is likely to create uncertainty for PHAs and their communities as to whether the PHAs' submission of the PHA Tool has satisfied HUD's requirements. We repeat our prior request that HUD create safe harbors for PHAs that make good faith efforts to comply with the requirements of the PHA

Tool. Additionally, we ask that HUD clarify that HUD's approval of a PHA's Annual Plan or Five-Year Plan is also an approval of the PHA Tool.

We remain concerned that the PHA Tool does not provide explicit safe harbor standards for PHAs that make good faith efforts to comply with the requirements of the PHA Tool. Among other things, some PHAs may not be able to complete either the data collection or analysis required by the PHA Tool, while others may prepare a complete submission that HUD believes does not sufficiently address the PHA's obligation to affirmatively further fair housing. Similarly, there are many instances where the PHA Tool asks the PHA to provide and analyze data that may not yet be readily available or accessible.

For example, the PHA Tool requires that PHAs analyze trends and patterns of segregation and integration across jurisdictions and regions, even though HUD has not yet provided the relevant data to do so. The PHA Tool also requires PHAs to describe disparities in the entire region across program categories, including LIHTC and other multifamily assisted projects, which are typically developed by private developers – yet, even PHAs who have LIHTC and multifamily stock have no reasonable way to assess the availability of this housing outside of their service area. Furthermore, because housing authorities have no jurisdiction over government agencies or other local municipalities, they have no leverage to require production of this data or the rationale behind other jurisdictions' decisions and practices around education, health, environmental factors, or housing. Although HUD states in its response to our previous comments that “program participants must use reasonable judgment in deciding what supplemental information from among the numerous sources available would be most relevant to their analysis,” HUD still offers PHAs no assurance on whether or when such judgments will be acceptable to HUD. This in turn creates the risk that PHAs and their communities lack certainty about whether HUD wants the PHA to rely on the analysis in the PHA Tool in formulating the PHA's strategies for furthering fair housing.

To remove this uncertainty, we urge HUD to create a safe harbor within the PHA Tool. This safe harbor standard would provide that PHAs will not be subject to liability for their inability to obtain third-party local knowledge or data as long as those PHAs make good faith, reasonable efforts to identify relevant local knowledge or data and note this lack of available information in the PHA Tool submission. Additionally, in recognition of the many PHAs operating in jurisdictions that are not equivalent to Metropolitan Statistical Areas or city/county borders, we also urge HUD to create a safe harbor standard for PHAs that use good faith, reasonable efforts in determining the most relevant one (or two or three) data sets or political boundaries for use in completing the PHA Tool.

In addition to the safe harbor standard described above, we encourage HUD to clarify that HUD's approval of a PHA's Annual Plan or Five-Year Plan is also an approval of the PHA Tool. We believe that this approval is already included in the existing PHA plan regulations at 24 CFR Part 903, which provide the process for HUD approval of PHA plans. As noted in 24 CFR 903.23(a), HUD's approval of the PHA Plan includes a review of whether the PHA Plan is consistent with the data available to HUD, which data would include the PHA Tool. However, because these regulations do not explicitly address approval of the submission of the PHA Tool, we ask that HUD clarify that approval of the PHA Plan includes approval of the PHA Tool. This

explicit approval process would serve two purposes. First, it would provide PHAs with the assurance to know that their certified PHA Tool meets HUD's standards and fulfills the PHA's duty under the AFFH. Second, it will provide HUD with a formal mechanism to document its assessment, review, and approval of a PHA's completion of the PHA Tool obligation. HUD's implementation of the safe harbor provision and the approval process described above will help transform what is currently a very uncertain process into one that provides PHAs with the knowledge and certainty that they are in full compliance with their PHA Tool obligations.

HUD should not disregard HUD's and PHAs' commitments to preserving safe, decent, affordable housing in existing communities.

In the final AFFH rule, HUD recognizes that strategies for affirmatively furthering fair housing may include removing barriers to high opportunity areas, as well as investing in the revitalization of existing neighborhoods. However, though the final AFFH rule encourages a balanced approach to fair housing planning, the PHA Tool lacks preservation-related questions and guidance, suggesting that development in non-impacted areas is simply a more legitimate goal than the preservation of existing housing that is not within an "area of opportunity". The PHA Tool contains neither questions that directly assess the preference of residents to remain in their own neighborhoods nor any direct questions to help a PHA document that preservation and rehabilitation of these existing communities is the most appropriate way for the PHA to further fair housing while also respecting the rights of residents to remain in their homes and communities. It also fails to account for the need to preserve housing in gentrifying neighborhoods that may rapidly become "areas of opportunity".

In our previous comments, we requested that HUD: (1) modify the PHA Tool to include questions about housing preservation strategies, and (2) include a statement in the PHA Tool instructions noting that preservation is an equally appropriate means of affirmatively furthering fair housing. In its response, HUD said that it would consider adding questions on how to evaluate tenant viewpoints on relocation and mobility from neighborhoods of concentration to more integrated areas and that it would consider giving instructions to PHAs on using community participation to solicit feedback on the preservation of properties, among others. However, we would encourage HUD to more explicitly state that preservation is an equally valid strategy for furthering fair housing. Similarly, we ask that HUD also consider adding questions about community reinvestment and/or any site-specific projects underway to restore deteriorated housing. As a result, we encourage HUD to include a stronger and more explicit focus on preservation of affordable housing in the final PHA Tool.

Finally, in addition to our comments described above, we wish to re-emphasize our recommendation that HUD create a working group comprised of a limited number of PHAs to test and refine the PHA Tool *before* the PHA Tool is implemented. Such a working group would provide HUD with practical information about the strengths and limitations of the PHA Tool. The smaller scale of the working group would also allow HUD and to resolve some of the administrative challenges associated with the PHA Tool before the PHA Tool is released on a national level. Some of HUD's most successful public housing initiatives began as small-scale demonstration programs, and we encourage HUD to adopt this approach for the PHA Tool as well. Both CLPHA and Reno & Cavanaugh share HUD's goal of creating a PHA Tool that

most effectively and affirmatively furthers fair housing, and we look forward to the opportunity to collaborate with HUD on a working group that tests and refines the PHA Tool so that it can most effectively be used by PHAs to affirmatively further fair housing.

Thank you for the opportunity to comment on the PHA Tool. If you have any questions, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, reading "Sunia Zatterman". The signature is fluid and cursive, with a long horizontal flourish at the end.

Sunia Zatterman
Executive Director
CLPHA

A handwritten signature in blue ink, reading "Stephen I. Holmquist". The signature is cursive and stylized, with a prominent initial "S".

Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC

Exhibit C
Streamlining Administrative Regulations Comments



**Strengthening Neighborhoods.
Improving Lives.**

Council of Large Public Housing Authorities

455 Massachusetts Avenue, NW, Suite 425
Washington, DC 20001-2621

Executive Director: Sunia Zaterman

phone: 202.638.1300 | **fax:** 202.638.2364

web: www.clpha.org

March 9, 2015

Regulations Division
Office of General Counsel
US Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-7000

Re: [Docket No. FR-5743-P-01] Streamlining Administrative Regulations for Public Housing, Housing Choice Voucher, Multifamily Housing, and Community Planning and Development Programs

To Whom It May Concern:

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 own and manage nearly half of the nation's public housing program, administer a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. We are pleased to submit comments on changes to streamline regulatory requirements pertaining to certain elements of HUD's programs in an effort to reduce regulatory burden on those who carry out these critical programs. This streamlining rule is well over due and represents only a small fraction of needed regulatory reform at HUD.

Across-the-board administrative relief is more than just a goal that CLPHA pursues as an association representing large housing authorities; it is widely acknowledged to be imperative. In recent years, Congress has repeatedly urged HUD to work to reduce all PHAs' administrative burden. The FY14 Senate Appropriations Committee Report states that "[i]n recent years, PHAs have faced serious funding constraints and it is imperative that HUD work to ensure scarce administrative dollars are directed toward requirements that will ensure housing safety standards, protect residents, and save taxpayer dollars." The FY15 House Appropriations Committee Report indicates that "[t]he Committee is fully supportive of any reforms that relieve administrative burdens....The Committee also strongly encourages HUD to pursue regulatory and administrative reforms that do not require new authorizations, but that relieve the administrative burdens on PHAs." In addition, the Senate Appropriations Committee requested that HUD provide a regulatory relief agenda that was due in July 2014 –now over 7 months late. We urge HUD to move swiftly to propose major administrative changes in its rental programs and on a larger scale, to enact major streamlining changes to its assessment tools, namely PHAS and SEMAP.

We welcome the opportunity to comment on these proposed changes.

A. Proposed Changes to HCV, MFH, and PH Program Regulations

1. Verification of Social Security Numbers

CLPHA is skeptical that this proposal to align the requirements across applicant and participant households with respect to new household members under the age of 6 who lack a social security number (SSN) represents a streamlining measure. In fact, a number of PHAs have indicated that tracking households that have not provided the SSN would create an administrative burden and that obtaining a SSN and timely submission of this documentation has not been a problem. However, if a PHA is persuaded that such a change is beneficial, we would argue that it should be allowed to adopt the proposal on an optional basis. Thus, we request that the proposed change be optional, allowing PHAs the ability to implement either requirement as long as it is consistent and stated in the Admissions and Continued Occupancy Plan (ACOP), Tenant Selection Plan (TSP), and Administrative Plan.

2. Definition of Extremely Low Income Families

CLPHA supports re-defining “extremely low income families” consistent with the 2014 HUD Appropriations Act definition of a “very low income family” as long as this change does not exclude households from meeting the eligibility who are between 30% and 50% of area median income (previously defined as “very low income”).

3. Use of Actual Past Income

CLPHA recommends allowing PHAs the authority and discretion to define annual income as either actual past income or projected income based on the household’s income source. This would be defined in the Administrative Plan and ACOP and should be applied consistently across income sources.

4. Exclusion of Mandatory Education Fees From Income

CLPHA supports the exclusion of education fees. This change would streamline rent calculations and benefit residents.

5. Streamlined Annual Reexaminations for Families on Fixed Incomes

CLPHA supports this change and would broaden the proposal to include 3-year re-certifications for fixed income families. We also support a change from “100 percent of the family’s income consists of fixed income sources” to 90 percent of the family’s income from fixed income sources.

B. Changes to HCV and PH Programs

1. Utility Reimbursements

CLPHA supports the recommendation to make utility reimbursements of \$20 or less on a quarterly basis. We also support options such as the Relia-Card, a debit card system for utility reimbursement.

2. Earned Income Disregard

CLPHA supports the proposed change in the EID to 24 consecutive months. This will streamline program monitoring, reduce errors, reduce administrative burden and be less confusing to both residents and staff. However, the provision appears to institute lifetime eligibility for participants. Language in the preamble suggests that EID benefits expire after a 24 month period of continual employment (or sooner if continual employment is not maintained), but language in the proposed regulation clearly establishes lifetime eligibility of EID benefits, even after the 24 month period. We recommend that HUD take a second look at the proposed regulation and confirm that it does in fact institute the improvements in the preamble.

3. Family Declaration of Assets under \$5000

CLPHA strongly supports this proposal and would support increasing the amount to \$10,000.

C. PH Program Regulations

1. Flat Rents

CLPHA urges HUD to issue an updated proposed rule to reflect the revisions to flat rents made by the FY 2015 Omnibus Consolidated and Further Continuing Appropriations Act. CLPHA was pleased to see that the Congress recognized the critical importance of market conditions on setting flat rents. We look forward to a revised rule.

2. Tenant Self Certification for Community Service

CLPHA strongly supports tenant self-certification of community service. We agree that the effort to obtain third-party verification of compliance consumes an inordinate amount of time, far exceeding the benefits of such staff time. Using self-certification would allow staff to better use their time to assist residents in far more productive endeavors. CLPHA has long supported this proposed change.

3. Public Housing Grievance Procedures

CLPHA fully supports streamlining the repetitive and overly prescriptive grievance regulations as offered in this proposed rule. These include: informal settlements (sec. 966.54); grievance procedures for failure to request a hearing and required escrow deposits

(sec 966.55); and matters relating to transcripts, copies, and the conduct of the hearing (sec 966.56, 57) and the proposed merger of (sections 966.55 and 966.56) We also support the proposal to permit PHAs to establish expedited grievance procedures and eliminate a separate category of hearing panel by redefining “hearing officer” to include the option of more than one person hearing a complaint. This will provide much needed relief and we urge HUD to expand this proposal to the HCV program as well.

4. Limited Vacancies

CLPHA fully supports the proposal to clarify that the number of vacant units eligible for operating subsidy shall be not more than 3% of the total units, on a project-by-project basis.

D. HCV Program Regulations

1. Start of Assisted Tenancy

CLPHA supports limiting move-ins to the first day of the month. This will eliminate the pro-rated HAP payments and thereby reduce administrative burden. We do, however, believe that this option should be at the discretion of the PHA, thus allowing any transition issues, market issues, or landlord concerns to be accommodated.

2. Biennial Inspections and the Use of Alternative Inspection Methods

CLPHA fully supports biennial and alternative inspections. This will significantly reduce administrative time. In addition, we support allowing third party inspections from other programs (LIHTC) or investors to satisfy HUD requirements.

3. Housing Quality Standards

CLPHA supports the proposal to allow PHAs the option of charging a reasonable fee to an owner if the owner indicates that an HQS violation is fixed, but a re-inspection proves that the violation has not yet been fixed. We anticipate a reduction in the number of units that fail the first inspection.

4. Exception Payment Standards for Providing Reasonable Accommodations

CLPHA supports the proposal to allow PHAs to approve a payment standard of not more than 120% of the FMR without HUD approval if required as a reasonable accommodation for a family that includes a person with a disability.

5. Family Income and Composition: Regular and Interim Examinations

CLPHA support this proposal that gives the PHA more discretion to set interim policies and it also aligns the voucher language with public housing language.

6. Utility Payment Schedules

CLPHA supports the streamlining of utility allowance requirements for the HCV program by reducing the unit type designations to “attached” or “detached.”

Section II- Specific Issues for Comment

1. Use of Actual Past Income (sec. 5.609) Does this provision provide a clear streamlining benefit to PHAs? If not, what additional specific changes should HUD consider? The general consensus among the CLPHA members is that using the EIV to project income may not be accurate, given that it is 6 months behind. Utilizing past income works best for individuals and families with consistent fixed incomes. We recommend using tax forms at least for residents who are employed at the same job the previous year. We also recommend that if past income is used to define annual income, that the data in the EIV system be permitted to be used without an additional requirement for third party verifications. An additional suggestion is that HUD assist the industry in procuring the Work Number to reduce costs so that PHAs could continue to utilize this useful tool for resident wages. Greatly reduced administrative fees prevent using the Work Number. An additional suggestion is to expand the EIV match to add sources in addition to earned income and Social Security, including a wider range of income sources available through State Wage and Information Collection Agencies (SWICA). The expanded sources could also include federal or state pensions, retirement disability, and public assistance, as well as state child support orders, veterans pay, worker’s compensation, and other government-source payments. (See comment below.)

1a) For PHAs that choose to use past income to determine annual income, does requiring the same time frame for all sources of income and expenses still provide for streamlining, or does this make the information collection and verification process too complex? Yes, this process is complex because PHAs will need to require residents to get information for the same time frame from child support—which is a difficult verification to obtain. If PHAs were given access to SWICA, Child Support, and Unemployment, then they could do their own verifications to obtain correct information.

1b) Should PHAs be permitted to use past income for only some sources, rather than the entire program? If PHAs were to use past income, it would be best to allow it as an option and allow PHAs to determine the situations in which it works. As we have said, if a family has continual employment in the same job, past income is accurate. For other families, past income is not accurate.

1c) What other types of income documentation should HUD permit? These would include pension deposit statements, bank accounts that show pension deposits, social security, child support, W2, and income tax (1040) and (1099).

2. No additional comments on EID.
3. Streamlined Annual Reexamination for Families on Fixed Incomes. A number of PHAs reported that they have residents sign a summary of their income to self-certify. They also verify the EIV at each annual certification to check for additional unreported income.
4. No additional comments on utility reimbursements.
5. No additional comments on start of tenancy.
6. Biennial Inspections and the Use of Alternate Inspection Method. Where an inspection conducted under an alternative method results in a finding that a property is out of compliance, should HUD still require PHAs inspect units using HQS, or should HUD allow PHAs to rely upon remedial actions taken to bring the property into compliance with the standards under the alternative inspection protocol? We believe that there should be consistency in these inspections. Therefore, if an alternative inspection was used, it would make sense to allow the alternative method to be used to bring the unit into compliance. Landlords or the alternative inspector could self-certify that items have been fixed by providing time stamped photos of the repairs.

Section III-Other Recommendations

- Coordinate eligibility and reporting requirements and forms for all programs on a national level including: LIHTC, USDA, RD, HOME, HCV, PIH, and MF. These programs should require the same data collection and reporting.
- Standardize forms and procedures. Eliminate duplication by merging the 50059 and 50058 forms.
- Stop the review of the EIV new move-in report and the EIV new hire report. They are unnecessary. PHAs already “pull” EIVs for all annuals and interims, so fraud would be caught at that time.
- Streamline medical deductions.
- Make SEMAP advisory or eliminate it entirely.
- Expand MTW.

In conclusion, CLPHA appreciates the opportunity to comment on these proposed changes. As HUD knows, for the last several years housing authorities have operated under diminished operating and capital funds, as well as reduced administrative fees. Prorations, underfunding, and capital backlog are now the new “normal.” But despite this reality, HUD requires housing authorities to continue to do more with less and nowhere is this more apparent than in the expectation that PHAs continue to comply with outdated systems, and burdensome and unnecessary regulatory requirements. The Congress has spoken. CLPHA and our industry partners have repeatedly called on HUD for regulatory reform. This proposed streamlining rule goes in the right direction, but much more needs to be done. We urge HUD to reduce regulatory costs by adopting a rigorous risk-based approach in determining the efficacy of its regulations. We urge HUD to implement cost-benefit analysis in evaluating its current regulations and in the design of new ones. In this way, we urge HUD to

carefully review its assessment of PHAs and to balance and “right-size” its monitoring and oversight with fewer, but targeted and more thoughtful regulatory requirements.

Sincerely,

A handwritten signature in black ink, reading "Sunia Zatterman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Sunia Zatterman
Executive Director

Exhibit D
HOTMA Implementation Notice Comments

March 20, 2017
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-5976-N-03: Housing Opportunity Through Modernization Act of 2016: Implementation of Various Section 8 Voucher Provisions

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 Housing Opportunity Through Modernization Act of 2016: Implementation of Various Section 8 Voucher Provisions Notice (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 represents more than one hundred PHAs throughout the country and has been working with our clients on public housing development and operations issues since its inception. 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 everything we do.

On behalf of CLPHA and Reno & Cavanaugh, we thank you for the opportunity to comment on the Notice. In a House vote of 427-0 and by Unanimous Consent in the Senate, the Housing Opportunity Through Modernization Act (“HOTMA”) was passed and signed into law on July 29, 2016. While we appreciate and applaud HUD’s efforts to simplify the various Section 8 voucher provisions as required by HOTMA, we remind HUD of Congress’ legislative intent – streamline, simplify, and modify programs to “improve their effectiveness and provide enhanced

opportunity for program beneficiaries and the organizations that serve such individuals.”¹ As such, while the Notice remains a significant first step, it is important that HUD promptly and fully implement all of the provisions contained in HOTMA as Congress intended to enhance the tenant-based and project-based voucher programs, reduce unnecessary cost, and increase flexibility.

Below we offer additional comments on the Notice as requested by HUD.

Inspection of Dwelling Units (Notice II.A):

Several PHAs have reached out to us voicing concerns with the following provisions of the Notice: (1) the proposed definition of life-threatening conditions, and (2) the limited timeframe within which PHAs have to conduct an inspection of a unit under the alternative inspections provision.

First, though we recognize HUD’s list of life-threatening conditions is based on the definition currently used by the UPCS-V demonstration, we encourage HUD to also consider the various definitions of “life-threatening conditions” and “non-life-threatening conditions” that PHAs may have adopted, especially by many larger PHAs with code enforcement divisions which have already defined those terms. HUD ought to consider these preexisting definitions in creating one of its own. Furthermore, as long as such definitions are reasonably similar to those promulgated by HUD, PHAs should retain the authority to continue using their pre-existing definitions in lieu of those proposed by HUD.

Second, the alternative inspection requirement that PHAs must complete an initial inspection within fifteen (15) days of receiving the RFTA, regardless of the size of a PHA’s tenant-based program, is neither statutorily required under HOTMA nor is it practicable for larger housing authorities to implement. Adopting a one-size-fits-all approach places larger housing authorities at a distinct disadvantage as such a requirement will be practically impossible to achieve. We believe that the current program regulations at 24 CFR 982.305(b)(2) sufficiently recognize and account for this distinction. Under 24 CFR 982.305(b)(2), PHAs with 1,250 or fewer budgeted units in their tenant-based program have fifteen (15) days to complete the initial inspection, while PHAs with more than 1,250 budgeted units are required to complete the initial inspection within a reasonable time of receiving the RFTA. We urge HUD to continue allowing larger

¹ H.R. REP. NO. 114-397, at 18 (2016) (“Introduced by Representative Luetkemeyer on October 7, 2015, H.R. 3700, the Housing Opportunity Through Modernization Act of 2015, reforms certain Department of Housing and Urban Development (HUD) and Rural Housing Service programs in order to improve their effectiveness and provide enhanced opportunity for program beneficiaries and the organizations that serve such individuals.”).

PHAs with over 1,250 budgeted units in their tenant-based programs to have a reasonable time to complete their initial inspections.

Units Owned by a PHA (Notice II.B):

We recognize that the pre-HOTMA definition of units “owned by a public housing agency” created much confusion among PHAs and appreciate Congress’ effort to clarify and simplify this definition. However, we fear that in implementing the HOTMA-definition of “owned by a public housing agency” HUD has over-defined this term in a way that is unlikely to resolve much of the previous consternation. Neither the statute nor the legislative history requires HUD to further define this term; therefore, it should be self-implementing.² The definition simply provides that units located in a project “owned by the PHA, by an entity wholly controlled by the PHA, or by a limited liability company (“LLC”) or limited partnership (“LP”) where the PHA holds a controlling interest” will be considered “owned by a public housing agency.” As such, we believe the definition of “owned by a public housing agency” employed by HUD should simply allow the statutory text to stand on its own.

If HUD is unwilling to limit the “owned by a public housing agency” definition to the statutory text, then HUD should at least focus its definition on the issue of control rather than mere ownership. For example, a PHA may have 51% ownership of the general partner entity for purposes of obtaining additional points on a low-income housing tax credit application, but may not exercise any control over the day-to-day operations or management of the owner entity. While the statutory definition would not consider such units “owned by the public housing agency” as they are neither owned by the PHA, by an entity wholly controlled by the PHA, nor by an LLC or LP where the PHA holds a controlling interest, the definition presently proposed by HUD would result in a different outcome. When defining a “controlling interest,” we encourage HUD to focus on the entity or entities providing day-to-day control, rather than those simply holding an arbitrary percentage of ownership, much like it does in the newly-revised 2530 Previous Participation guidance³.

Project-Based Vouchers (Notice II.C):

² H.R. REP. NO. 114-397, at 37 (2016) (“This provision defines the types of units owned by a PHA to be any dwelling unit that is located in a project that is owned by the PHA, by an entity wholly controlled by the PHA, or by a limited liability company or limited partnership where the PHA holds a controlling interest. Units will not be considered owned by a PHA if the agency only holds an interest in the ground lease, holds a security interest under a mortgage or deed of trust on the unit or holds a non-controlling interest in an entity that owns the unit.”).

³ 24 C.F.R. Part 200, subpart H and Housing Notice H 2016-15, issued October 20, 2016

Changing the Maximum Amount of PBVs Permitted in the PHA HCV Program (Notice II.C.2) –

- 1) Should HUD allow PHAs that were administering PBV units that would qualify under the additional 10 percent exception categories but were placed under HAP contract prior to the effective date of this notice count those units as excepted?*

HUD ought to allow PBV units that qualify under the additional ten percent (10%) exception categories to qualify for the exception, regardless of when such units were placed under HAP contract. The legislative history and the statutory text are clear: Congress did not intend for any time limits to be placed upon when units may or may not fall within the additional ten percent (10%) exception categories.⁴ To create such a time limit would run counter to Congress' intent by increasing, rather than decreasing, administrative burdens, as doing so would force PHAs to differentiate and categorize otherwise "like" units separately. Additionally, in keeping with the broader goals of the HOTMA legislation, Congress has made clear its intent for there to be programmatic flexibility to help preserve and maintain affordable housing units. Those goals are best accomplished by incorporating as many units as possible under the PBV cap. Furthermore, on a practical note, there are many housing authorities that have already fully utilized the original twenty percent (20%) authority for projects that would otherwise qualify under the exception categories and might now be interested in using vouchers for "traditional" PBV purposes. By disallowing such projects from falling within the additional ten percent (10%) exception, merely because of the date of their HAP contract, HUD essentially penalizes those housing authorities that were at the forefront of providing permanent supportive housing and other PBV-based supportive services by eliminating their ability to now use the expanded authority for traditional voucher allocations.

- 2) The new (o)(13)(B) further provides that the additional 10 percent exception may be applied to units that are difficult to use, as determined by the Secretary, and with respect to census tracts with a poverty rate of 20 percent or less. This document, for now, only applies the statutory exception provision to those units located in a census tract with poverty rates of 20 percent or less. What criteria should HUD use to define or determine the areas where vouchers are "difficult to use" for this exception category?*

⁴ H.R. REP. NO. 114-397, at 37 (2016) ("This section authorizes a PHA to attach vouchers to an apartment, rather than a tenant, a.k.a. project base voucher (PBV), up to a limit of 20 percent of its authorized voucher allocation. It also enables a PHA to provide up to an additional 10 percent of its authorized vouchers to create units targeting homeless individuals and families, veterans, elderly households or households with persons with disabilities, or units in areas where vouchers are difficult to use due to market conditions.").

Instead of prescribing situations in which a voucher may qualify as “difficult to use,” HUD should allow PHAs to self-define the various situations, unique to local circumstances, which may make a voucher “difficult to use.” The legislative history indicates that Congress intended the “difficult to use” exception to be provided when “vouchers are difficult to use due to market conditions.”⁵ Because market conditions may vary widely from one locality to the next, PHAs ought to be afforded the flexibility to define this term as it best responds to their individual jurisdiction’s needs. Additionally, HUD should add three additional criteria that can determine where vouchers are difficult to use: (1) in areas experiencing rapid rent appreciation as shown by increases in fair market rent, (2) areas with low vacancy rates, and (3) areas undergoing revitalization. Adding these categories will allow PHAs to preserve affordability in areas that are rapidly changing and allow residents opportunities and choice to move into or remain in areas that are gentrifying when they may otherwise be priced out.

- 3) *The statute allows the Secretary to issue regulations to create additional exception categories from the normally applicable PBV program limit, which could apply to the additional 10 percent authority or that could be exempted from the program limit entirely. What additional exception categories that should be included in the 10 percent authority? What other types of units should be exempted from the PBV program limit entirely?*

With respect to units that are “previously subject to federally required rent restrictions or receiving another type of long-term housing subsidy provided by the Secretary,” HUD should allow the statutory language to stand on its own as self-implementing in order to comply with the statutory mandate. As currently proposed, the list articulated by HUD is too narrow and fails to include a wide variety of rent-restricted programs that we believe Congress intended to include in the PBV program limit exemption. Such programs that HUD fails to include under the current implementation language include, but are not limited to, low-income housing tax credit properties subject to a Land Use Restrictive Covenant as well as housing provided through the HOME program, programs under the McKinney-Vento Homeless Assistance Act⁶, and Neighborhood Stabilization Program (“NSP”) grants. As such, in deciding whether a property falls within the PBV exemption, HUD need look no further than the statute itself. As long as a PHA is able to demonstrate that a property was previously subject to either “federally required

⁵ H.R. REP. NO. 114-397, at 37 (2016) (“[This section] also enables a PHA to provide up to an additional 10 percent of its authorized vouchers to create units targeting ... areas where vouchers are difficult to use due to market conditions.”).

⁶ 42 U.S.C. 11302

rent restrictions” or another type of “long-term housing subsidy provided by the Secretary,” such units ought to qualify.

Additionally, HUD should delete the text that incorrectly states that supportive services must be available “to all families receiving PBV assistance in the project” in order for the property to qualify for an exception to the project cap. There is nothing in the statute or legislative history that would require *all* units to receive or be qualified for supportive services in order to utilize this exception to the cap. Rather it should be clarified that supportive services only need to be available to units designated as supportive housing.

Additionally, we believe HUD should give PHAs the opportunity to determine additional exception categories that should be included in the ten percent (10%) authority. Such exception categories may be spelled out in the PHA’s Annual Plan and subject to public comment and HUD approval and may include, but are not limited to, targeted groups such as: intergenerational families, youth aging out of foster care, emancipated youth, and single member households.

4) *This document sets out certain conditions that a PBV new construction unit must meet in order to be considered replacement housing and eligible for the exception to the PHA PBV program limitation. Are those conditions appropriate or should they be changed or expanded?*

We believe the conditions are appropriate. However, as described above, we note that the as long as a PHA is able to demonstrate that a property was previously subject to either “federally required rent restrictions” or another type of “long-term housing subsidy provided by the Secretary,” such units ought to qualify for the exception as replacement housing.

5) *In light of the impact that additional exceptions and exemptions from the program limit will have on the number of vouchers available for tenant-based assistance under the HCV program, should HUD establish additional categories at all? What limits or requirements on project-basing, if any, should be placed on the use of this exception authority to ensure that the PHA has sufficient tenant-based assistance available for families to exercise their statutory right to move from the PBV project with tenant-based assistance after one year of occupancy at the PBV project?*

We strongly object to the idea that there should be additional limits or requirements placed on the PHA’s ability to project-base its vouchers. The HOTMA statute was designed to provide PHAs with the flexibility and ease of use needed to reduce costs and increase effectiveness. To best achieve these goals, HUD ought to allow and encourage PHAs to make decisions in light of their individual local needs.

Changes to Income-Mixing Requirements for a Project (Project Cap) (Notice II.C.3) –

1) What other standards should HUD require for supportive services under B.2, above?

HUD should continue to allow PHAs to define “supportive services” on a case-by-case basis in their Administrative Plans and through their local processes. This would allow the PHA to retain flexibility to design programs based on their individual, local needs. Additionally, HUD should delete the text that incorrectly states that supportive services must be available “to all families receiving PBV assistance in the project” in order for the property to qualify for an exception to the project cap. This is incorrect given the ability under the current regulations to layer types of exceptions within the same property, or only utilize exceptions for the portion of the units over the cap. There is nothing in the statute or legislative history that would require *all* units to receive or be qualified for supportive services in order to utilize this exception to the cap.

2) The Secretary has authority to define areas where tenant-based vouchers are “difficult to use.” This document, for now, only applies the statutory provision of census tracts with poverty rates of 20 percent or less. What are some other criteria that HUD should include?

Instead of prescribing situations in which a voucher may qualify as “difficult to use,” HUD should allow PHAs to self-define the various situations, unique to local circumstances, which may make a voucher “difficult to use.” The legislative history indicates that Congress intended the “difficult to use” exception to be provided when “vouchers are difficult to use due to market conditions.”⁷ Because market conditions may vary widely from one locality to the next, PHAs ought to be afforded the flexibility to define this term as its best responds to their individual jurisdiction’s needs. Additionally, HUD should add three additional criteria that can determine where vouchers are difficult to use: (1) areas experiencing rapid rent appreciation as shown by increases in fair market rent, (2) areas with low vacancy rates, and areas undergoing revitalization. Adding these categories will allow PHAs to preserve affordability in areas that are rapidly changing and allow residents opportunities and choice to move into or remain in areas that are gentrifying when they may otherwise be priced out.

3) Are there additional properties formerly subject to federal rent restrictions or receiving rental assistance from HUD that should be exempted from a project cap?

⁷ H.R. REP. NO. 114-397, at 37 (2016) (“[This section] also enables a PHA to provide up to an additional 10 percent of its authorized vouchers to create units targeting ... areas where vouchers are difficult to use due to market conditions.”).

Again, as outlined above, when determining the types of units that ought to be exempted from the PBV program limit entirely, we believe that HUD should follow Congress' statutory mandate that any units of project-based assistance attached to units "previously subject to federally required rent restrictions or receiving other project-based assistance provided by the Secretary" shall qualify, regardless of the type of rent restriction or project-based assistance. As currently proposed, the list articulated by HUD is too narrow and fails to include a wide variety of rent-restricted programs that we believe Congress intended to include in the project cap exception. In deciding whether a property falls within the PBV exemption, HUD need look no further than the statute itself. If a PHA is able to demonstrate that a property was previously subject to "federally required rent restrictions" or another type of "project-based assistance provided by the Secretary," such units ought to qualify.

- 4) *The statute allows HUD to impose additional monitoring and requirements on projects that project-base assistance for more than 40 percent of the units. How can PHAs ensure that this increase in PBV units will not hamper mobility efforts and moves to opportunity areas?*

This question presupposes that an increase in the number of available PBV units will hamper mobility efforts and moves to opportunity areas. On the contrary, we believe that the use of project-based vouchers helps improve the communities where voucher-holders already live and can be an integral part of large-scale redevelopment plans that can create neighborhoods of choice and opportunity. The PBV program is one of the last-remaining HUD programs that allow a PHA to add to the availability of affordable housing stock by using the voucher commitment in underwriting the financing of a project.

PBV Contract Terms (Notice II.C.4) –

We ask that HUD revise paragraph D. Additional Units Without Competition with respect to situations where owners and PHAs are restoring units up to the number originally under a HAP Contract. When HUD last issued regulations on the Project Based Voucher program, a requirement was added that project owners must remove units from a Housing Assistance Payments ("HAP") contract if the unit's residents were either over-income for a period of six months or were wrong-sized and refused to move. In the commentary to the Housing and Economic Recovery Act of 2008 (HERA): Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs Final Rule⁸, HUD responded to concerns over a shrinking HAP Contract that owners could add these units back to the HAP Contract when the

⁸ The Housing and Economic Recovery Act of 2008 (HERA): Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs, 79 Fed. Reg. 122 (June 25, 2014).

over-income or wrong-sized households moved from the project. However, the existing regulations at 24 CFR 983.211(c) and 24 CFR 983.207(b) only allow units to be added back to an existing HAP contract within the first three years after execution of the HAP Contract. Therefore, if a unit was removed after year three of the HAP contract due to over-housing or over-income tenants, there is no remedy available to the owner to increase the HAP Contract to the originally-intended number of units. This creates an underwriting problem for the owner and its lenders and investors, not to mention can jeopardize the long-term stability of the project. Given the commentary in the Final Rule, we believe that the three-year limitation was not intentional and the statutory language in HOTMA was, in part, intended to fix this issue. Accordingly, we believe that HUD's implementation of this provision of HOTMA is overly complicated for this purpose – adding units back up to the original number under the HAP Contract should not need HUD approval or additional explanation in the Annual or Administrative Plan as such requirement would be overly burdensome when the purpose is simply to achieve the original agreement under the HAP Contract. We urge HUD to create an exemption to these requirements for units being restored to a HAP contract that previously covered them. Additionally, on its face, we believe that this provision is overly burdensome to the Field Offices, PHAs, and Owners. We would suggest that PHAs be given more flexibility to add units to an existing HAP Contract without seeking Field Office approval. Field Office approval is not required to enter into the original HAP Contract and should not be needed to add units to an existing HAP Contract so long as the addition of units otherwise complies with PBV requirements.

Additionally, we ask that HUD revise the language regarding contract extensions to be consistent with the statutory language that allows for multiple renewal terms of 20 years. The language within the notice continues the error in the current regulations that limits PHAs and owner to one renewal term. However the statute clearly provides that the PHA may renew the contract for the period that the agency determines to be appropriate to achieve affordability and expand housing opportunities and speaks to “terms” of “20 years each”. Congress clearly intended to allow multiple renewal terms and we ask that HUD correct this error and conform the notice to the statute.

1) Are there additional parameters HUD should consider placing on PHAs and owners when amending HAP contract terms related to continuation, termination or expiration?

No, the regulations already sufficiently cover this. Additional efforts to place parameters on PHAs and owners when amending HAP contracts would be unnecessary and administratively burdensome. However, HUD should clarify that this provision allows the PHAs and owners to add terms to the HUD form contract.

Attaching PBVs to Structures Owned by PHAs (Notice II.C.6) –

1) Is the \$25,000 per unit threshold appropriate for this exception from the competitive process?

No, the \$25,000 per unit threshold, or any other monetary threshold, is not required under the statute. Furthermore, the limitation that the units be placed on the same site goes beyond what the HOTMA statute requires and should be removed. The statute allows assistance to be attached to an “existing...structure in which the agency has an ownership interest or which the agency has control of without following a competitive process.” Replacement housing should not be required to be on the same site or contiguous to it. By requiring PHAs to expend at least \$25,000 per unit in hard costs on units on the site of the public housing project, HUD would essentially eliminate the ability of a PHA to replace units with off-site existing housing absent a competitive selection process. We believe HUD should instead eliminate the per unit threshold and site requirement. These limitations severely limit Congress’ intent to grant PHAs flexibility when attempting to redevelop public housing properties and serve its residents. So long as the PHA designates the units as replacement units and allows former residents a preference, HUD should not dictate further conditions upon which PHAs may use this flexibility.

2) The law provides that this section is applicable to a PHA that has a ownership interest in or has control of the project. Are there examples or cases where a PHA may have control of a project but would not have any ownership interest in the project that HUD should address in future implementing guidance or when conforming the regulation to these provisions?

By returning to the previously-used definition of PHA-owned units, HUD would reintroduce the confusion that led to the need for a statutory definition of PHA-owned units. We agree that the PHA’s interest should not need to rise to “PHA-owned” as defined in the statute; however, we believe that the statutory language could stand on its own without further definition. However, in any event, if the additional definition remains, it needs to be clarified and should definitely include situations where the PHA is the ground lessor, participates in the owner entity in any capacity, meets the requirements of “PHA-owned,” and provides a loan and holds a security interest in the project.

Preference for Families Who Qualify for Voluntary Services

We thank HUD for implementing this change, however, we believe that the HUD has needlessly complicated a straightforward statutory provision with a burdensome and impractical review process that will impede PHAs from serving those with disabilities. We urge HUD to simply this section to relieve the administrative burdens on HUD and PHAs.

Finally, in addition to our comments described above, we wish to emphasize the importance of HUD fully implementing all provisions under Section 106 of HOTMA, particularly those provisions related to: (1) entering a PBV HAP Contract for any unit that does not qualify as existing housing and is under construction or recently has been constructed regardless of whether the PHA and owner executed an AHAP; (2) providing rent adjustments using an operating cost factor; (3) establishing and utilizing procedures for owner-maintained site-based waiting lists; and (4) concerning the environmental review requirements for existing housing. While we appreciate the progress that HUD has made in implementing several of the provisions of HOTMA, we would urge HUD not to stray from the statute and allow PHAs the flexibility that Congress intended. Further, any delay in implementing the provisions of HOTMA creates challenges for PHAs and owners in their efforts to advance affordable housing through the PBV program.

Thank you for the opportunity to comment on the Notice. If you have any questions, please do not hesitate to contact us.

Sincerely,



Sunia Zatterman
Executive Director
CLPHA



Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC



Sarah Molseed
Member
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Exhibit E
Proposed Demolition/Disposition Rule Comments



Comments on HUD's Demolition/Disposition Proposed Rule

Submitted By

Council of Large Public Housing Authorities (CLPHA)
National Association of Housing and Redevelopment Officials (NAHRO)
Public Housing Authority Directors Association (PHADA)
Reno & Cavanaugh, PLLC

December 15, 2014

We appreciate the opportunity to comment on the Federal Register notice entitled "Public Housing Program: Demolition or Disposition of Public Housing Projects, and Conversion of Public Housing to Tenant-Based Assistance; Proposed Rule," published on October 16, 2014, at Docket No. FR-5399-P-01 (the "Proposed Rule"), which would revised the existing regulations governing the demolition and disposition of public housing projects at 24 CFR Part 970 (the "Existing Rule"). We also appreciate that considerable time and effort have gone into this process and acknowledge that the Proposed Rule makes some important improvements. Nevertheless, we also have some significant criticisms of the Proposed Rule and believe that HUD has departed significantly from the governing statute in a number of areas, circumvented express Congressional intent to repeal the one-for-one replacement requirement, and added requirements which are unnecessarily burdensome or which actually interfere with the mutual goal of public housing authorities ("PHAs") and HUD of improving affordable housing opportunities for low-income families and seniors.

1. Statutory Basis for Proposed Rule

Section 18¹ of the U.S. Housing Act of 1937 (the "1937 Act") provides as follows:

"(a) Applications for demolition and disposition

Except as provided in subsection (b) of this section, upon receiving an application by a public housing agency for authorization, with or without financial assistance under this subchapter, to demolish or dispose of a public housing project or a portion of a public housing project (including any transfer to a resident-supported nonprofit entity), *the Secretary shall approve the application, if the public housing agency certifies--*

¹ 42 U.S.C. 1437p.

(1) in the case of--

(A) an application proposing demolition of a public housing project or a portion of a public housing project, that--

(i) the project or portion of the public housing project is obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes; and

(ii) no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life . . .

(2) in the case of an application proposing disposition by sale or other transfer of a public housing project or other real property subject to this subchapter--

(A) the retention of the property is not in the best interests of the residents or the public housing agency because—

(i) conditions in the area surrounding the public housing project adversely affect the health or safety of the residents or the feasible operation of the project by the public housing agency; or

(ii) disposition allows the acquisition, development, or rehabilitation of other properties that will be more efficiently or effectively operated as low-income housing;

(B) the public housing agency has otherwise determined the disposition to be appropriate for reasons that are -

(i) in the best interests of the residents and the public housing agency;

(ii) consistent with the goals of the public housing agency and the public housing agency plan; and

(iii) otherwise consistent with this subchapter . . .” (emphasis added).

2. General Comments on Proposed Rule

The provisions of Section 18 indicate a clear Congressional intent to defer to the judgment of a local PHA to determine whether an existing public housing project should be removed from the inventory through demolition or disposition. The language says that HUD “shall” approve such an application if the PHA certifies certain things and provides only narrow circumstances for HUD to disapprove an application. It is important to point out that the context in which these provisions were enacted was the Quality Housing and Work Responsibility Act of 1998² (“QHWRA”), a bipartisan piece of legislation that also streamlined the public housing and Section 8 programs in various ways and granted deference in planning and program implementation decisions in many other areas to PHAs, subject to a local consultation and review process. The PHA Plan required under Section 5A of the 1937 Act substituted a

² Veterans Affairs and HUD Appropriations Act, PL 105–276, Oct. 21, 1998, 112 Stat 2461.

local planning and review process through public hearings and consultation with residents, the community and local government, in place of detailed HUD oversight of most PHA decisions. The importance of the PHA Plan process is reflected in the reference to it, above, in Section 18. It is also consistent with Section 2 of the 1937 Act, as added by QHWRA, which provides as follows:

“(a) Declaration of Policy.--It is the policy of the United States--

(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this Act . . .

(C) consistent with the objectives of this title, to vest in public housing agencies that perform well, *the maximum amount of responsibility and flexibility in program administration*, with appropriate accountability to public housing residents, localities, and the general public . . .”

Yet, in implementing Section 18 in recent years and in this Proposed Rule, HUD has taken steps that are inconsistent with that Congressional intent, placing additional burdens on PHAs to justify their choices beyond what the statute requires, and leaving PHAs with fewer tools to improve their affordable housing stock. In a number of places, the Proposed Rule seems to imply that PHAs have inappropriate motives to simply reduce or eliminate their public housing projects or to wring value out of them and use the proceeds for unauthorized purposes. Of course, nothing could be further from the truth. Section 18 and the demo/diso regulations are simply a process that PHAs use to manage their assets with the goal of preserving and recapitalizing affordable housing. PHAs, as creatures of state law, have a statutory mission to provide affordable housing and other opportunities to low income families and seniors. For many years now, given federal budget constraints, HUD has encouraged PHAs to carry out their mission by being more entrepreneurial, adopting asset management practices used in the private sector, and partnering with developers, lenders, and investors to raise funds for public housing redevelopment projects. These partnerships often require the demolition and/or disposition of existing projects so that new affordable housing can be developed to serve PHA residents. This Proposed Rule does not seem to be designed to encourage such practices and is therefore inconsistent with HUD’s own policy direction. Instead, throughout the discussion in the preamble to the Proposed Rule, there is a theme that, notwithstanding the statute’s clear deference to PHAs, PHA decisions must be second-guessed and that the problem with the Existing Rule is an insufficient amount of information submitted, consultation with residents, public process, and HUD review.

Further, HUD itself is promoting as one of its very highest legislative and policy priorities, the Rental Assistance Demonstration (“RAD”) program through which existing public housing projects are converted to Section 8 assistance. The conversion of a public housing project through RAD is explicitly exempt from demo/diso requirements, regardless of whether it involves a transfer of the project to a new, private owner or the complete demolition and reconstruction of the project on the same or another site. Another flagship program, the Choice Neighborhoods Initiative (“CNI”), as HOPE VI before it, also is not subject to demolition rules. Similarly, the Mandatory Conversion and Voluntary Conversion programs, which also promote the conversion of public housing to Section 8, are exempt. Interestingly,

however, the Proposed Rule seeks to impose the demo/dispo regulations on mixed-finance projects, despite the current exemption afforded to mixed-finance projects under the Existing Rule and the exemptions provided to these other redevelopment programs.

In many other ways as well, HUD and Congress have shown a clear policy preference for Section 8 vouchers over public housing through the federal budget and appropriations process. Even in the depths of the recent budget sequester, all tenant-based vouchers in use were renewed, while public housing funding was cut severely. Further, over the years, HUD has not requested and Congress has not funded public housing operating and capital needs at a level that even comes close to the levels called for by HUD's own funding formulas. The public housing capital backlog approaches \$30 billion, as HUD knows and recites in its efforts to promote RAD. While RAD has received vigorous support from a large segment of the public housing community, we all know that the number of authorized RAD slots is limited and also that RAD as currently enacted will not work everywhere, largely due to the rent cap imposed by the RAD statute. RAD is an important tool for PHAs, but we also need to be able to continue with the mixed-finance and other types of redevelopment efforts which have done so much for almost twenty years now to transform the nation's public housing stock.

We raise these points about the longstanding trend of converting from public housing to Section 8, including through RAD, because they stand in contrast to the Proposed Rule. Despite all of these other policies promoting creativity in redeveloping public housing and converting a substantial portion of it to Section 8, the Proposed Rule in some ways actually makes it more difficult to address the redevelopment needs of properties which remain in the traditional public housing program, in whole or in part. In our view, HUD is on the wrong track in that way. If funding for public housing operations, repair, or redevelopment were more plentiful, as it once was, then we strongly suspect that HUD would not be attempting to so narrowly interpret the statute and add procedural requirements and layers of review which will discourage PHAs from pursuing demolition or disposition. This Proposed Rule and HUD's notices and policies which precede it appear to be a response to the extreme public housing funding cuts and Section 8 voucher caps that PHAs have experienced in recent years and embody a policy shift from redeveloping and replacing inadequate public housing projects, with Section 8 vouchers as a lubricant, to keeping those projects up and in the inventory for as long as possible, even after their useful life has expired. We think it is misguided for HUD to narrow and slow down the redevelopment pipeline and that HUD should, instead, partner with PHAs to advocate for the necessary funding and identify new resources to carry out our joint mission. Additional meetings, PHA certifications, and HUD review will not improve housing conditions for the low-income families and seniors we serve. Only adequate funding and flexibility for PHAs consistent with the statute will do that.

3. HUD's Current Demo/Dispo Policies and the Proposed Rule

For the Proposed Rule, and these comments, to be understood in context, and as they relate to PHAs' "real world" experiences in seeking to redevelop our country's aging public housing stock, the discussion must begin with HUD's current policies and practices that govern demolition and disposition applications. Those policies and practices are set out in Notice PIH 2012-7 (HA) issued February 2, 2012 (the "Notice").

The Notice contains several provisions that have constricted, limited and/or outright prohibited demolition or disposition activities by PHAs, and which we believe are contrary to either the plain language or clear legislative intent of the Congress as reflected in Section 18 and in the Existing Rule. These provisions have blocked demolition and/or disposition activities by many PHAs seeking to improve, modernize and replace their public housing inventory

Unfortunately, the Proposed Rule appears to leave intact several of these provisions or, in some respects, make them worse. The Proposed Rule also fails to address certain requirements set forth in the Notice, thereby leaving in question the applicability of those requirements.

It is important to point out that the Notice was adopted without prior publication of notice and opportunity for comment in the Federal Register. We fear that if the Proposed Rule is adopted without addressing the concerns detailed below that HUD may repeat its earlier actions and simply adopt a notice outside the rulemaking process to impose additional, and perhaps even more restrictive, requirements on PHAs seeking demolition or disposition, as was the case with the Notice.

Thus, a discussion and understanding of the Notice and HUD's policies surrounding it is an essential foundation for these comments and to vocalize our concerns for future HUD action on this topic.

a. Legal and Policy Problems with the Notice

We have identified the following specific aspects of the Notice that are inconsistent with the specific language and/or the intent of Section 18 and HUD's published regulations, as well as the rulemaking requirements of the Administrative Procedures Act³ ("APA"):

- Elimination of Case-by-Case Evaluation of Disposition Applications. The Notice eliminates the individual, case-by-case consideration of disposition applications required by Section 18 and the Existing Rule, and instead establishes a categorical, policy-based standard for rejection of certain types of disposition applications.
- Categorical Denial of Disposition Applications Citing Insufficiency of Public Housing Funds. The Notice requires disapproval of all disposition applications that cite insufficiency of public housing funds as the basis for the requested disposition, explaining that these applications will be categorically denied because HUD has determined that "alternative resources" are available that offset any such insufficiency.
- One-For-One Replacement of Public Housing Units in Dispositions. Despite clear Congressional intent to the contrary, HUD's current policy in implementing the Notice is to deny any application for disposition unless the application contemplates replacement of the public housing units on a one-for-one basis unless the application can establish obsolescence (which is not a standard for disposition).

³ 5 U.S.C. § 553

- Rigid and Unreasonable Standards for Obsolescence and Modification Costs in Demolitions. The Notice sets out an obsolescence standard for modification costs that focuses only on the most minimal and basic repairs, and weighs the cost of these against replacement of the entire project for determining whether to approve a demolition.
- Notice Adopted Without APA-Required Rulemaking. The foregoing substantive restrictions and requirements imposed by the Secretary on demo/dispo applications for the past, nearly three years, constitute legislative rules within the meaning of the APA, and should have been adopted pursuant to agency rulemaking consistent with the 1937 Act.

Each of these problem provisions, and HUD's failure to correct them in the Proposed Rule as discussed below, has combined to eviscerate the demo/dispo authority created by Congress.

1) Categorical Denial of Certain Disposition Applications

Two intricately related substantive questions are raised by this aspect of the Notice. First, was it lawful for HUD to change the disposition application process from an individual, case-by-case approval analysis as contemplated by the Congress to a categorical denial of applications without any individual assessment? Second, even if HUD may have had this authority, was the Notice a proper means of implementing it? We answer both in the negative.

The starting point of this inquiry is Section 18 itself and the question of whether Congress "has spoken to the issue;" indeed, it has. The relevant provisions of Section 18 are included at Section 1 of these comments and describe the implementation method for the statute—individual applications—the standard for their approval and a parallel standard for their disapproval.

Indeed, the language of the statute on this point is so clear, and apparently unequivocal, that HUD adopted it nearly *verbatim* in 24 CFR 970.17, which states that HUD "**will** approve an application for disposition . . . if the PHA certifies that retention of the property is not in the best interests of the residents or the PHA for at least one of the following reasons . . . " (emphasis added). Even the Notice itself acknowledges, in Section 10, the case-by-case analysis requirement of Section 18 and the Existing Rule, stating that "HUD reviews PHAs' certifications and narratives, along with other information that is available or requested by HUD, **on a case-by-case basis** to determine if the certifications meet the criteria of Section 18 of the 1937 Act and 24 CFR part 970." (emphasis added).

Taken together, the statute, the Existing Rule, and the Notice itself all consistently and uniformly require analysis of the PHA's certifications, and any other information available to or requested by HUD as it may pertain to the particular application, on an individual, case-by-case basis. However, this is not how HUD has applied these provisions in the case of disposition applications on the basis of insufficient public housing funding.

The language of Section 18 provides the basis for approval of disposition applications. While Congress

could have directed HUD to issue regulations containing additional substantive standards for approval of a disposition application, or to determine categorically which kinds of applications HUD would approve or not, but it did not. Rather, it instructed HUD to make a decision on each application based on the merits of the application, applying the standards of the 1937 Act to the certifications of the PHA.

Parallel to the approval standard, HUD is authorized under the 1937 Act to disapprove an application **only** if it determines that any of the required certifications made by the PHA are “clearly inconsistent with information and data available to the Secretary,” or if the application fails in some other way to satisfy the procedural requirements of the law. Section 10 of the Notice preempts this individual merits consideration of an application when the PHA rests its certifications upon insufficient funding and, instead, instructs that HUD will arbitrarily issue a uniform disapproval of any application based on such certifications. This is contrary to Congress’s direction in Section 18.

When HUD published the Notice, no explanation was included of why the case-by-case analysis was eliminated, other than the cryptic, conclusory comment in Section 10(A) of the Notice that approval of **any** disposition application on the basis of insufficient funding would be “inconsistent with the 1937 Act in light of alternative resources.” And, although the Notice refers to several programs or sources that are supposedly “alternative resources,” it does not articulate any basis or reason for why, how, or in what measure those programs excuse or modify the statutory mandate for case-by-case analysis disposition approval. Indeed, some HUD officials have stated publicly, though not in writing, that the Rental Assistance Demonstration (“RAD”) program is not intended to close off the ability of PHAs to obtain HUD approval of disposition applications.

More specifically, nothing in the Notice addresses how these supposed alternative resources could, and would, **in every single application** rise to the level of meeting the disapproval standard set out in 24 CFR 970.29:

“HUD will disapprove an application if HUD determines that:

(a) **Any certification** made by the PHA under this part **is clearly inconsistent** with:

...

(2) Any information and data available to HUD related to the requirements of this part, such as failure to meet the requirements for the justification for demolition or disposition as found in Sec. 970.15 or Sec. 970.17; or

(3) Information or data requested by HUD.” (emphasis added).

The statute and published regulation are thus clear on both the case-by-case procedure and the standard for disapproval. The Notice essentially eviscerates both without explanation or identification of the factors considered by HUD or its rationale when the Notice was adopted. The Proposed Rule does not address this fundamental problem created by Section 10(A) of the Notice. This “categorical”

standard for rejection of all such applications, without an analysis of the applications on a case-by-case basis relative to the facts and impacts of underfunding in the specific instance, violates the requirements of the 1937 Act and the Existing Rule as discussed in the following sections.

2) “Alternative Resources” Rule

We refer to the language in Section 10 of the Notice as a “rule” because HUD essentially adopted this as a legislative rule without the formalities of notice and comment rulemaking, and has substituted that rule for the case-by-case analysis contemplated by Section 18 and the Existing Rule.

Section 18 describes the case-by-case application review and determination and instructs HUD to approve demo/dispo applications supported by the required certifications **unless** those certifications are “clearly inconsistent” with “information and data” available to or requested by HUD, the latter presumably requested from the PHA applicant. The statute requires that any consideration by HUD of such “information and data” must be carried out in the context of a review and decision on an individual application. So, while HUD does have explicit authority under the statute to consider “alternative resources” within this broad description of “information and data available to HUD”, the question turns to **how** HUD may consider it.

Under the Notice policy, HUD exercised the authority to consider “information and data” available to him by adopting an arbitrarily applicable rule that, in **every** case of a disposition application, the information and data “available” to him regarding so-called “alternative resources” would be “clearly inconsistent” with any certification made by an applicant PHA based upon insufficiency of funding. This “rule,” became the rationale for HUD’s elimination of a case-by-case analysis of whether any alternative resources are actually available to a particular applicant in connection with a specific disposition application. In other words, HUD has concluded that, whether the disposition is in Los Angeles or Boston, involves 50 units of public housing or 500, and irrespective of the magnitude of the local funding shortfall or the scope of the repair needs, there are, in every case and in every location in the country, adequate “alternative resources” available to offset any shortfall in public housing funding. This defies both experience and logic within the public funding arena.

HUD’s position also ignores the reality of what PHAs requesting disposition approval are trying to achieve. Generally, such requests are part of a redevelopment plan by which the original public housing units will be replaced by a mix of public housing units or project-based voucher units, along with Low-Income Housing Tax Credit units and perhaps market units in order to create an improved and sustainable community for low-income families. Thus, PHAs are attempting to carry out redevelopment plans that HUD has promoted through programs such as HOPE VI, Choice Neighborhoods, and mixed-finance public housing. In this way, PHAs are attempting to fulfill their affordable housing missions under their state enabling acts and under the 1937 Act. Yet, the Notice is frustrating those goals, and the Proposed Rule threatens to perpetuate the problem.

3) Imposition of Obsolescence Criteria and Standards for Demolition Applications on Disposition Application

The Notice also imposes, in Section 10(B), an additional “overlay” of both HUD’s demolition regulations and the narrow demolition standards of Section 14 of the Notice on dispositions “supported by obsolescence criteria.” Although the statute and HUD’s regulations both segregate the conditions of approval and reasons for denial for dispositions and demolitions, the Notice “merges” the requirements in the case of a disposition involving the elements of obsolescence. This, in turn, invokes the very narrow and restrictive requirements of Section 14 of the Notice (discussed in Section D, below) in these cases, turning a disposition application into one that must satisfy two, separate statutory and regulatory tests plus the dual tests of the Notice. The Proposed Rule continues this “merger” policy, although with some variations as discussed in the following sections. Again, to understand this interplay in the Proposed Rule, one must understand HUD’s current policies embodied in the Notice.

While HUD presents the obsolescence criterion as an additional avenue for PHAs to pursue disposition, it effectively becomes a requirement for disposition approval because the Notice shuts off other possible justifications that may be permitted by the broad language of the statute. Although it is not stated in the Notice, HUD has also adopted an *ad hoc* policy requirement of one-for-one public housing replacement on SAC approvals of disposition requests as a condition for meeting the obsolescence test. This requirement is not contained in the statute or in HUD’s published regulations.

Prior to 1996, Section 18⁴ did require one-for-one replacement of public housing units for any demolition or disposition for which approval was requested from HUD. The one-for-one replacement requirement was eliminated in 1995 with the passage of the FY1996 HUD appropriations act, and permanently repealed 1998 when Congress passed QHWRA. Despite these clear expressions of Congressional intent to abolish the requirement, HUD has revived the one-for-one replacement requirement, currently as an informal, unpublished policy and, as evidenced by the Proposed Rule, in regulatory form.

Further, HUD’s current policy position on one-for-one replacement is even narrower than the earlier version of Section 18, since the latter permitted a PHA to fulfill its replacement requirements by providing forms of assistance other than public housing to families rather than having to provide hard units. QHWRA also shifted the focus of the demo/dispo evaluation to the certification from the PHA and away from HUD’s determination in the first instance. The one-for-one requirement of the Notice, which it appears may be continued as HUD policy in the Proposed Rule as described below, is inconsistent with the underlying legislation, and is not supported in the Notice or in the Proposed Rule with any statement or citation of HUD’s authority to merge these statutory provisions in his policies and regulations.

The current iteration of Section 18 contains several sections or subsections that apply to **both** demolition and disposition applications and others that apply to only one or the other. For example, the

⁴ 42 U.S.C. § 1437p(b)(3) (1992)

beginning of Section (a) of Section 18 applies to both demolitions and dispositions and, as we discussed in Section A above, states that HUD “shall” approve applications for either demolition or disposition if the PHA submits the proper certifications, subject to disapproval criteria set out in Section (b), which section also applies to both. Both of these sections are generic, that is, they do not address any particular aspect of application or disapproval that would apply only to a demolition or disposition application. However, Subsections (1) and (2) of Section (a) each apply only to demolition ((a)(1)) or disposition ((a)(2)) and contain specific requirements for each.

The statutory standards for approval of a **disposition**, as set out in Section 18(a)(2) , focus on a range of reasons for disposition that support a determination by the PHA that the proposed disposition would be “in the best interest of” either the residents or the PHA. These include considerations of how the areas surrounding a project affect the health and safety of the residents or the feasibility of operation of the project, and how a disposition would allow the agency to replace the project with property that would be more “efficient” or “effective” for its mission. The section also includes much broader language that would allow a disposition if in the best interest of the residents and the PHA, and that is consistent with the goals of the PHA, its plans, and the 1937 Act. The section also authorizes approval of disposition in the case of property that is excess to the needs of the PHA, or incidental to its operation. In short, these standards are broad, are cast within the discretion of the PHA and its judgment, and, most significantly, say nothing about a requirement of obsolescence or an interplay or overlap of sections (a)(1) and (a)(2). HUD’s regulations track this standard, yet the Notice and Section 970.17 of the Proposed Rule insist on the “merger.”

Section (a)(2), on the other hand, which applies to **demolition** requests, contains a specific requirement that any demolition must be supported by a certification of the PHA that the project is “obsolete” as to physical condition, location, or other factors and, as a result, is “unsuitable for housing purposes.” While the method of application is the same—a certification from the PHA that these factors exist—the required showing for demolition is much more specific than for a disposition and cannot rest solely on a judgment of the PHA that it would be in its or its residents’ best interests to demolish the property. Again, 24 CFR 970.15 and Section 970.15 of the Proposed Rule track the statute.

One could conclude from reading these two sections that **any** certification that supported a demolition could also, by definition, support a disposition as well under its broader terms of “not in the best interest.” The inverse, however, does not follow since the demolition section does not grant broad, judgmental discretion to the PHA to determine what is in its or its residents’ “best interest.” Thus, it appears from the very different language and standards adopted by Congress in these sections that it intended a clear separation of the standards in application. And, although the “disapproval” standards in subsection (b) are applicable to both dispositions and demolitions, those standards are functionally generic in the demo/dispo situation and do not contain any specific provisions that apply more to one or the other, except in respect to a disposition. In that case, the language contains certain requirements regarding possible purchase of the property by residents or a resident organization.

Since Congress used very specific, and different, language to describe the criteria and standards for

approval of a demolition, as opposed to a disposition, and imposed an obviously higher standard and required showing for demolitions, HUD's "overlay" or "merger" of the statutory demolition standards to disposition requests that happen to involve obsolescence appears to be a significant "rewrite" of the legislation by HUD, and imposition of unauthorized legislative conditions on disposition requests. This policy started in the Notice would be continued in the Proposed Rule, where it will be just as offensive to Section 18.

Federal courts have held that they will look only to contemporaneous rationale provided by an executive agency at the time of implementation of a regulation to determine if the agency has properly explained the basis and purpose of the rule. They have also held that the agency must "adequately discuss" the relationship between its interpretation and the goals of the statute.⁵ HUD did not offer any such "discussion" when it adopted the Notice, nor any agency explanation, findings, expertise, or other basis to explain the connection between the Notice and the goals of the underlying statutory provisions. Without any such explanation, the "merger" or "overlay" of the demolition standards to disposition requests appears is simply unsupported by the legislation, particularly in light of the agency's adoption of the Notice without notice and comment rulemaking under the APA.

4) Rigid and Unreasonable Obsolescence Standard

Section 14 of the Notice, "Demolition Review Criteria for Cost Ineffectiveness," imposes a narrow and restrictive standard on determinations of obsolescence, limiting a PHA's "modification" budget to very narrow categories over short periods of time to determine if there is a "reasonable" and "cost effective" means of "returning" the project to "useful life." Section 14 limits consideration of work and costs solely to those necessary for "immediate needs (up to three years)", work that will restore the project only to "average" quality, costs only for "necessary repair" (not including anything new except air conditioners and items required for code compliance), and work limited to the inside of dwellings or within five feet of the exterior wall. Site improvements, parking lots, security cameras, playgrounds, and community centers are specifically prohibited from consideration in the rehabilitation calculus. The provisions of Section 14 have the effect of essentially prohibiting demolition of otherwise hopelessly obsolete projects that are unsuitable for occupancy and which cannot be made suitable by current standards within these restrictive guidelines.

These requirements greatly exceed those of the statute. The demolition standard adopted by Congress requires (among other things) a certification of the PHA proposing demolition that:

- (i) the project (or portion) is obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes; and (ii) no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life[.]

The Notice sets out an obsolescence standard for modification costs that focuses only on the most

⁵ *Id.*

minimal and basic repairs, and weighs the cost of these against replacement of the entire project for determining whether to approve a demolition.

The Proposed Rule changes this standard for approval of a demolition application by inserting both a new standard and required methodology for demonstrating obsolescence as to the physical condition of the project. Proposed Section 970.15 (a)(1) requires the PHA to submit evidence from an independent architect or engineer that structural deficiencies, outstanding capital needs or other design or site problems exist such that “no reasonable program of modification is cost-effective” to return the project to its useful life. The standard for cost-effectiveness is that, if the cost of the “program” of modifications exceeds “Housing Construction Cost” as defined in 24 CFR Part 905 in effect at the time the application is submitted to HUD, the property will be deemed obsolete.

While this new standard appears to replace the “patch-it-up” formula set out in Section 14 of the Notice, it results in a counterpart requirement that HUD will require rehabilitation through “modifications” in *lieu* of demolition, even if those “modifications” cost nearly or exactly the same as would demolition and new construction. While this outcome may make sense in some situations, an absolute rule containing this standard is not reasonable given the huge disparity between the end-products (modernization versus new construction) in terms of design, materials, efficiency, environmental impact, etc.

In addition, the Proposed Rule would also impose a requirement that a PHA must support its finding and declaration of obsolescence under this standard with cost estimates and analysis prepared by at least one “independent” architect or engineer, defined as one not in the employ of the PHA. This adds a significant cost and time burden on every application for demolition, and categorically rejects the judgment and expertise of a PHA without any apparent findings or rationale for doing so.

5) No Rulemaking

Finally, as noted above, HUD adopted the Notice without complying with APA rulemaking requirements. The central rulemaking question under the APA and governing case law is whether a challenged agency rule is “interpretive” or “legislative.” If the rule is merely interpretive, notice and comment rulemaking is not required. If it is legislative, rulemaking procedures must be followed by the agency. Sections 10 and 14 of the Notice contain legislative rules. Those sections are not merely statements of HUD’s interpretation of Section 18, nor are they just a restatement of standards in the Existing Rule. Rather, both Sections produce “significant effects on private parties” and “new methods for determining the obligations of the regulated parties,” the hallmark of a legislative rule according to the courts. Since both the procedure **and** the standards for obtaining an approval of the statutory authority for Demolition or Disposition granted in Section 18 are significantly affected by the Notice, HUD adopted legislative rules when it issued the Notice.

The same can also be said since the Notice eliminates the opportunity for an individual, case-by-case determination on a disposition application, by legislatively proclaiming that HUD’s “data and

information” concerning “alternative resources” has conclusively, precluded the possibility of certifying that sufficient public funds do not exist to carry on with the property and that no adequate or sufficient “alternative resource” exists, by imposing a one-for-one public housing replacement requirement on disposition requests, by applying statutory and regulatory demolition standards to disposition requests and by adopting a substantive standards and definitions of the various statutory terms used in the demolition section of Title 18. Together and individually these are agency actions that establish new methods for determining the obligations of PHAs in connection with demolition and disposition applications.

As noted above, and as will be discussed in greater detail in the sections that follow, the Proposed Rule fails to correct and could make the problems of the Notice worse. To the extent HUD continues to apply and enforce the unlawful policies of the Notice, rulemaking now will not cure the absence of proper rulemaking three years ago, nor will it correct the substantive impropriety of the Notice provisions that are continued in the language or policies of the Proposed Rule. We believe that HUD needs to address in the Proposed Rule what its intentions are with respect to the Notice and the policies in it.

4. Specific Criteria for Approval of Disposition Applications (970.17 and 970.19)

a. Disposition in the Best Interests of PHA and Residents

Perhaps the most critical issue in the Proposed Rule is the criteria under which a PHA may dispose of a public housing project and what becomes of the project thereafter, which is addressed in Sections 970.17 and 970.19. HUD and the public housing redevelopment community have been at odds over these policies for several years. As the statute states, and the Proposed Rule recites, HUD must approve a disposition application if a PHA provides certain certifications that are not clearly inconsistent with other information and data. However, in the Notice, HUD tightened its approval standards considerably and chose to apply to *disposition* applications the “obsolescence” criteria, which the statute and Existing Rule apply only to *demolition* applications. Also, in an unannounced and unpublished companion policy which only became apparent during HUD’s review of an application, HUD also said that if a disposition application did not meet the obsolescence standard, then the PHA would be required to replace public housing units on a one-for-one basis.

PHAs strongly objected to these policies, arguing that not only was HUD prohibited from imposing such requirements without rulemaking, but that even with rulemaking, those requirements have no basis in the statute. Further, PHAs pointed out, in 1996 Congress expressly repealed the one-for-one public housing replacement requirement. Nevertheless, it appears that HUD has now included both the obsolescence standard for dispositions and a de facto one-for-one replacement requirement in the Proposed Rule without any discussion of the statutory basis for them.

Further, even in this Proposed Rule, HUD has not actually addressed the heart of the matter, which is the standard of review when a PHA certifies that disposition is in the best interests of the PHA and the residents. Instead, the Proposed Rule leaves broad discretion to HUD through a vague reference to “other reasons” as determined by HUD. Pursuant to Section 970.17(c) of the Proposed Rule, if a

disposition application does not meet the obsolescence standard for demolition under subsection (c)(1), and is not a mixed-finance rehabilitation project providing one-for-one public housing replacement under subsection (c)(2), then the only avenue for approval is subsection (c)(3), which states merely that HUD may approve the applications for “[o]ther reasons determined by HUD to meet the criteria of sec. 970.17(c).” Yet, that circular reference simply leads back to the obsolescence and one-for-one replacement requirements or to some other unarticulated standard and essentially preserves the status quo under the Notice, although in the regulations itself. We feel strongly that is not a sufficient outcome for the many applications which need to be approved but that do not comply with subsections (c)(1) or (c)(2).

The purpose of HUD’s rulemaking through this Proposed Rule should be to bring this issue out in the open so that it can be debated and a reasonable outcome, consistent with the statute, can be achieved. Therefore, we call on HUD to withdraw and reissue at least this aspect of the Proposed Rule and open a dialogue with PHAs regarding it. Further, it leaves the door open for HUD to impose by notice or otherwise the policies described above in the discussion of Notice 2012.

In addition, we strongly object to the opening paragraph of Section 970.17(c) of the Proposed Rule, in which HUD asserts that if HUD finds that the PHA’s disposition application meets the criteria for disposition under a different provision of federal law, such as voluntary or mandatory conversion under Sections 22 and 33 of the 1937 Act, respectively, then HUD may of its own accord simply re-characterize the application as an application under that other section. Congress has enacted various statutory provisions regarding public housing which may overlap, but they coexist and are available for a PHA to pursue them in accordance with their own terms. Congress has not granted to HUD authority to direct a PHA as to which provisions of law under which it may submit a discretionary application.

b. Additional Comments on Disposition Criteria (Section 970.17)

There are other problems with 970.17, as well. For example, Subsection 970.17(b)(1) implements the statutory provision which permits disposition to allow for the acquisition, development, or rehabilitation of other properties to be used as affordable housing. HUD has added substantial additional provisions to the Existing Rule that require the PHA to demonstrate “to the satisfaction of HUD” exactly what will be developed in place of the existing project. This includes a requirement that replacement units (in the form of hard public housing units or other affordable units) must be developed for at least 75 percent of the units disposed of. Further, (1) the replacement units cannot not be developed on the existing public housing site, (2) the PHA must have identified all of the replacement units or all of the land on which they will be built in advance, (3) the PHA must provide its financing plan for the replacement units to HUD for evaluation as part of disposition application review, and (4) the disposition itself must be an arms-length transaction at fair market value (FMV) with 100 percent of the proceeds going to development of the replacement units. Each of these requirements is problematic.

First, while it is reasonable to interpret the relevant section of the statute as requiring the acquisition, development, or rehabilitation of some off-site properties for low-income housing, it does not necessarily follow that the existing public housing site may not be used for any replacement housing,

either now or in the future. In fact, that provision directly conflicts with the authorization in Section 970.19(b) to develop affordable housing on a site disposed of for commensurate public benefits.

Second, it is not reasonable to require identification - together with supporting documents - of all replacement units or land at the early stage of the redevelopment process at which submission of a demo/dispo application takes place. That process is a fluid one and is dependent on many variables, including opportunistic acquisitions, requirement of financing partners, and local government approvals. In a typical example, it may be that a PHA and/or its development partner is able to identify a primary off-site redevelopment location which does not accommodate all of the replacement units, but is unable to find a new site for every replacement unit at this stage. It would be unlikely to have site control or financing to purchase the sites. The PHA might, of course have ideas and plans, but not necessarily site control, environmental approval, and site and neighborhoods standards approvals. No backup documentation should be required.

Third, it is not statutorily required or workable from a development perspective for HUD to require a development financing plan as part of a disposition application. Much of the required information will not be available at that point or will be subject to numerous contingencies and conditions, rendering it functionally meaningless in the long run. As you know, HUD already has processes to review and approve development of public housing (24 CFR Part 905, Subpart F) and project-based vouchers (24 CFR Part 983). Adding development related requirements to the disposition processes merely adds duplication and time to the disposition approval process – which already approaches a year in some cases. In addition, the HUD staff responsible for reviewing a disposition application do not currently have the required expertise to review the financing plan. If HUD were interested in moving to a system where a PHA first submits a development application (via existing processes) and then the disposition is approved as a matter of course upon development approval, then that is something the public industry would consider. However, we believe that the approach laid out in the Proposed Rule is not practical.

Fourth, while the question of FMV is a legitimate one, the requirement of an arms-length sale is not if, as we argue above, the site will be used for replacement affordable housing. Presumably, the arms-length requirement means that the PHA itself could not participate in the ownership entity for the on-site replacement units. We strongly disagree with that result, as PHA involvement in the development and ownership of the project provides public control and is a source of PHA revenue. Further, typically the value of the underlying land is needed as a development source for the affordable housing project and therefore cannot be paid out to the PHA at transfer.

Fifth, the requirement to “receive sufficient compensation from the disposition to replace not less than 75 percent of the public housing units” (Section 970.17(b)(2)) directly contradicts the permitted disposition for less than FMV (Section 970.19(b)). It is unlikely that a FMV disposition would produce sufficient funds to replace more than a small percentage of the existing public housing units. It is even less likely that a disposition for commensurate public benefits would produce sufficient funds. The statute requires disposition proceeds to be used for eligible uses under the 1937 Act; it does not require a particular replacement standard.

Finally, this 75 percent replacement standard creates a situation in which HUD wants to have both ways. A PHA seeking disposition under this standard intends to create new affordable housing on the public housing site, which, as described above, is consistent with the housing policies issued by HUD and Congress in recent years. As HUD is aware, these affordable transactions typically require multiple funding streams, including subsidies from the PHA and the local, state and Federal government in order to make the deal work and even then rarely generate cash flow. Despite these financial realities, in addition to the new low-income housing that is to be constructed on the transferred property, HUD would also require the PHA to construct replacement public housing; however, without a dedicated site or funding source. As described in the previous paragraph, the transferred property is being disposed of at less than FMV, generating disposition proceeds (if any) that would perhaps not even cover the site acquisition costs for the new off-site development, let alone construction and other development costs.

c. Additional Requirements for Disposition Applications (970.19)

Section 970.19 contains numerous additional requirements for disposition applications, including a provision at 970.19(a) which, as in the Existing Rule, requires that dispositions must be made at FMV unless HUD finds that a “commensurate public benefit” will result. For the first time, however, HUD has defined that term. We refer you to Exhibit A, Item #1 for our comments on HUD’s proposed definition.

Even where HUD does find a commensurate public benefit exists and permits a below-FMV disposition, Section 970.19(c) of the Proposed Rule would require a 30-year use restriction as a first priority lien requiring that the property be used for the purpose identified in the commensurate public benefit finding. We disagree with HUD’s departure from its longstanding policy and practice of releasing its use restrictions once a disposition application is approved. We also question whether the 1937 Act permits such a HUD lien once the property is no longer used for public housing purposes and we are very concerned that through this new requirement, HUD will continue to exert essentially perpetual control over property even after it has supposedly been released from the restrictions authorized by statute. Without reconciliation of the two provisions, HUD would require a use restriction on housing built on the transferred site *and* a Declaration of Trust on any off-site developed public housing or project-based vouchers (required in 970.17(b)) for land disposed of “in the best interests of the residents” at less than FMV. Finally, under state law, PHAs are required to use their assets to carry out their public mission; HUD should continue to defer to the local process in determining the future use of such property and how any proceeds are used.

Section 970.19(d) of the Proposed Rule provides that if a PHA is unable to dispose of obsolete public housing units in their “as is” condition after diligent efforts to do so, then HUD may permit demolition of the project so that the PHA may then convey only the vacant land. We think this provision is not consistent with how a typical transaction works. In nearly all cases, the existing, obsolete public housing units have no market value, although the land does. Therefore, it is not realistic to expect a PHA to realize any disposition proceeds for the units in “as is” condition and the requirement that they try to do so simply amounts to an expensive and unnecessary procedural burden. In addition, the value of the land itself is typically required as a contribution the PHA makes in order to make the affordable housing deal financially feasible. Almost always, the existing public housing units must be demolished. If the PHA

has resources available to demolish the units first, before conveyance of the land to the developer, it can do so. Otherwise, the entire project – land and buildings – are conveyed to the developer and the demolition can be a project cost. That flexible treatment should continue, so this section should be deleted. See Exhibit A, Item #4 for additional discussion of this topic.

5. Specific Criteria for Approval of Demolition Applications (970.15)

In general, HUD's reorganization of Section 970.15 makes sense and is closer to the way the statute reads. Our concerns with respect to this section mostly have to do with the way it has been implemented in the past through HUD notices and SAC practices, since there is no indication in the Proposed Rule that will change. In particular, we call your attention to the interplay between: (1) the criteria for obsolescence in 970.15(a)(1), particularly as to physical condition (such as structural deficiencies, serious outstanding capital needs, and design or site problems) and as to "other factors" (conditions that have seriously affected the marketability, usefulness, or management of the project); and (2) the finding that no reasonable program of modifications is cost-effective to return the project to its useful life. In recent years, HUD has read these provisions together in a way which downplays obsolescence criteria such as original design flaws, high density, and changes in community norms for decent, marketable affordable housing, while also applying a very narrow, rigid "cost test" regarding the "reasonable program of modifications."

For example, there are still many public housing developments in the country which were developed in the 1940's, 1950's, or even later, which were not designed and built to contemporary standards for which have never had comprehensive rehabilitation. Those projects were built to standards in terms of density, unit size and configuration, building systems, and site design that would never be acceptable today. In many cases, in order to provide modern, decent affordable housing to low-income families today, only demolition and new construction will suffice. However, in applying the cost test to such projects, under HUD's notices and practices, HUD is essentially willing only to consider repair costs which will continue to make those units habitable, and not the substantial costs which must be incurred to bring those units into compliance with standards which HUD and affordable housing advocates have otherwise promoted in, for example, the HOPE VI and CNI programs, where the public housing units are indistinguishable from other affordable or market units in a development and neighborhood. We think HUD needs to broaden its interpretation of the cost test in the Proposed Rule. Otherwise, public housing projects which should be redeveloped will not be and PHAs will be forced to use scarce Capital Funds to make short-sighted repairs rather than invest in more sustainable housing for the long term.

Also with respect to the cost test in Section 970.15(a)(2), we do not disagree with HUD's decision to switch from using a percentage of TDC to using HCC (by which we assume HUD means "Housing Construction Cost" rather than the term which appears), since it might allow for a more comparable analysis. However, before finalizing that decision, we think HUD should share with PHAs its analysis, with representative examples from actual applications, of the impact of the proposed change. In addition, rather than setting the standard at full HCC to the dollar, we suggest HUD use a somewhat lesser standard, such as 90 percent of HCC. If the cost of new construction is only slightly higher than the

cost of major rehabilitation, then it makes more sense from an economic and public policy point of view to demolish and build new.

Under Section 970.15(c) of the Proposed Rule, unless a PHA also submits a disposition application with its demolition application, the PHA must certify that the vacant land comprising the project will be used for low-income housing purposes, as permitted by the ACC, which may include land banking. First, we do not understand why such a certification would be needed since, as a technical matter, if the PHA receives only demolition approval, it would still have to come back to HUD for disposition approval and the Declaration of Trust would still govern the property. Further, the PHA may not have determined yet what the best future use of the property is and should not be locked into a particular use at this time. We think HUD should leave it to the PHA to exercise its authority and discretion under state law to use the property in the way which in the best way to achieve its mission within existing parameters. Finally, if such a certification is required, then we do not believe that the reference to housing purposes “permitted by the ACC” is appropriate, since it would only permit the development of public housing. Any such certification should also permit the use of the property for Section 8, LIHTC, and other forms of affordable housing in addition to public housing.

Finally, we object to the provision in 970.15(a)(2) requiring that determinations of obsolescence be made by an independent third party rather than by PHA staff, as they are now. This is an unnecessary expense at a time when scarce public housing resources must be conserved. Further, PHA personnel are most familiar with their properties and will continue to provide reliable, accurate information to HUD about their capital needs, as they have in the past and as they do under HUD’s regulations governing the Capital Fund Program planning and reporting process.

6. General Requirements for Demolition, Disposition, and Retention Applications (970.7 and 970.45)

HUD has added a requirement at 970.7(c)(3) and 970.45(c)(3) requiring a narrative explanation of the reason for any vacancies at the project. We are unclear how that information is relevant to a demo/dispo application. Vacancy rates are a key component of HUD’s Public Housing Assessment System and will be addressed by HUD along with other occupancy and management issues prior to submission of any such application. Including this in the demo/dispo rule suggests that HUD may disapprove an application if it is not satisfied with the reasons for vacant units at the project. This section should be removed.

Sections 970.7(c)(4)(iii)-(iv) and 970.45(c)(4)-(7), respectively, require a PHA to explain the anticipated future use of the project after demolition, disposition, or retention including any anticipated subsidies (e.g., LIHTCs or PBVs) that the PHA expects will be used for future low-income housing on the site, and to describe plans for replacement of housing demolished or disposed of, if any. Similarly, Section 970.7(c)(13) requires, for dispositions at less than FMV, a level of detail regarding future low-income housing use which nearly amounts to a full development proposal, including identification of the legal documents to be used. We are concerned about this and similar requirements elsewhere in the Proposed Rule which bring issues regarding potential replacement housing into the review and approval

of demo/dispo applications. Section 18 does not contemplate such a review, instead focusing solely on issues pertaining to the viability of the existing project and we believe HUD must adhere to that. The continued use and operation of a PHA asset for public housing has to be evaluated on its own merits under the criteria established by the statute. As mentioned earlier, the PHA's ability to finance and develop replacement units is a separate matter which, if HUD subsidies are available and used, is the subject of one or more entirely different HUD review processes.

HUD should remember that it has been tacit HUD policy for many years to encourage or even require the removal of public housing projects from the inventory through Section 18, or Voluntary or Mandatory Conversion, and now RAD, and replacement of those public housing units with Section 8 assistance. During that time, PHAs have struggled to develop what replacement units they can with the limited resources available, but it has often been the case that providing a combination of vouchers and hard replacement units, whether ACC or PBVs, has been the best, most achievable outcome for both the PHA and residents. HUD scrutiny of replacement housing possibilities suggested by the Proposed Rule would be an abrupt departure from that long-standing policy. Further, it is likely to be counterproductive, since HUD review of preliminary replacement housing ideas at the demo/dispo stage will not provide any greater assurance that replacement housing can or will be built. Instead, it will simply slow down the redevelopment process and potentially have HUD lock in redevelopment choices that must be modified later when planning, financing, and other details are better known.

Sections 970.7(c)(19)(i) and 970.45(c)(15)(i) of the Proposed Rule require, as part of an extensive new civil rights certification, that the PHA discuss "how it will make its best efforts to offer each displaced resident at least one unit of comparable housing that is located in a non-minority area with access to public transportation, employment, education, child care, medical services, shopping, and other amenities." Fair housing and equal opportunity are a critical aspect of PHAs' mission. Yet, the affordable housing opportunities which the Proposed Rule describes exist in far too few communities in our nation, whether in public housing, other HUD-assisted housing, or the private rental market. Imposing on PHAs who are trying to redevelop and improve public housing conditions with scarce resources the burden and expense of locating affordable housing which meets all of the above criteria for the relocation of every resident threatens to divert resources from and slow down the process of creating additional affordable housing units. The primary relocation resource that PHAs have under their control are other vacant public housing units or housing choice vouchers, which allow residents, with counseling, to identify housing with at least some of the characteristics HUD recites. The regulations should acknowledge that and provide a safe harbor for these relocation outcomes. Indeed, the regulation should use the long-used and widely-understood definition of "comparable housing" found in 24 CFR Part 24 rather than imposing different, and higher standards for comparable housing, particularly in the discussion of "a site not less desirable than the location of the displaced person's dwelling" than the Uniform Relocation Act does.

Section 970.7(c)(13)(iii), along with 970.21(d), would mandate for the first time a resident right to return to an existing public housing site undergoing redevelopment where a below-FMV disposition for commensurate public benefit is approved. HUD would likely argue that because its approval is required for a below-FMV transfer, it can attach conditions to that approval. However, the statute certainly does

not authorize a national right to return policy, and we believe HUD is exceeding its authority in mandating it – particularly as such on-site development would be in excess of the 75 percent replacement housing required by Section 970.17(b). In nearly all cases, a PHA needs to transfer the land to a developer entity below-FMV in order to make the redevelopment financing work. That financing also depends on density, building and unit configurations that may or may not match those of the existing project or the housing needs of families on the waiting list or in the community. Driving project planning and design, and therefore financing, through a right to return policy in the relocation plan places another substantial obstacle in the way of PHAs’ ability to redevelop public housing properties.

Further, we must note the inconsistency between the last two provisions on which we have commented. On the one hand, HUD is directing PHAs to encourage residents to move away from their existing communities to communities with more favorable amenities. On the other hand, HUD is mandating that residents be permitted to return to the communities they are coming from. In this, and in other ways, PHAs have felt caught between competing HUD policy priorities. In fact, PHAs’ experience has shown that the best way to provide housing of opportunity in mixed-income, deconcentrated settings is to demolish, dispose of, and recapitalize existing public housing sites in mixed-income settings with various forms of subsidy, while some original residents use vouchers to relocate to other neighborhoods of opportunity. Layering on additional requirements such as those above, ironically, interferes with PHAs’ ability to do that.

Another example of this point is at Sections 970.7(c)(19)(ii) and 970.45(c)(15)(ii) of the Proposed Rule, which provides that in addition to the civil rights certification, HUD may require additional information from the PHA showing that “the proposed demolition and/or disposition will not maintain or increase segregation on the basis of race, ethnicity, or disability and will not otherwise violate applicable nondiscrimination or equal opportunity requirements, including a description of any affirmative efforts to prevent discriminatory effects.” What HUD fails to consider is that PHAs have been left alone to deal with decades-old decisions, in which HUD was involved, regarding the location and design of public housing developments. As HUD well knows, a principal reason for the demolition, disposition, and redevelopment of existing public housing projects in addition to simply improving living conditions, is to create mixed-income, deconcentrated social environments which provide a platform for opportunity for families who have been isolated from the economic mainstream. Further, it represents an important financial investment of public and private funds in historically-disadvantaged neighborhoods. It is axiomatic that redeveloping such properties in this way, which often requires going through the demo/dispo process, promotes civil rights goals. To ensure that, the civil rights certification already required by the existing regulation is sufficient.

Both Sections 970.7(d) and 970.45(c)(17)) set forth a troubling provision that to the extent a PHA as part of the approval process includes “documentation, certifications, assurances, or legal opinions in its application that go above and beyond the requirements of section 18 or this part, HUD may include these as additional requirements in its approval.” The statute sets forth the criteria for demo/dispo approval and the purpose of the regulation is to implement the statute. If the PHA meets the statutory criteria, then its application must be approved. This provision sets up a dynamic where HUD may raise the bar and impose potentially escalating requirements what the statute requires, which we find

unacceptable. This is particularly problematic in the context of HUD's desire to review, as part of the demo/dispo process, preliminary future redevelopment plans, as discussed above.

7. Application of Dispo Regulations to Mixed-Finance Development

The Proposed Rule removes the broad exception from the disposition regulations afforded to mixed-finance development. Currently, the "[d]isposition of public housing property for development pursuant to the mixed-finance development method . . ." is not subject to the Existing Rule.

HUD added the current mixed-finance exemption to the Existing Rule as part of the 2006 revisions to the demo/dispo regulations,⁶ writing that ". . . HUD agrees with the commenters that section 18 of the 1937 Act and this regulation do not apply to public housing property to be used for mixed-finance developments."⁷ (emphasis added). HUD's response was prompted by concerns that imposing disposition requirements on mixed-finance development would duplicate an approval process that is already heavily-regulated, costly and time-consuming.

The Proposed Rule seeks to limit the regulatory exemption to only vacant land that is to be disposed of for mixed-finance development, thereby imposing dispo regulations on the transfer of existing public housing units. The Proposed Rule would also subject the transfer of vacant land to an unspecified HUD approval process to ensure compliance with Section 18. HUD has offered no rationale for this significant policy change.

We are concerned that this Proposed Rule would burden mixed-finance development sited for existing public housing projects with a burdensome and duplicative approval process without HUD even articulating why an additional layer of oversight is necessary. Also we are concerned that by HUD is creating an opening through which it could impose the dispo regulations on vacant land being transferred for mixed-finance development by requiring that the PHA submit "an application in the form prescribed by HUD" to demonstrate compliance with Section 18. It is unclear how the application required for vacant land in mixed-finance development would differ from the disposition requirements at 970.17 and 970.19, which would essentially make this exemption moot.

We urge HUD to retain the existing exemption provided to the transfer of public housing property (both vacant land and existing units) for mixed-finance development to avoid overwhelming these transactions with even more regulation and procedure.

8. Additional Procedural and Certification Requirements

The Proposed Rule adds various other requirements to the Existing Rule regarding PHA consultations, certifications, and submission of additional information. We believe that the Existing Rule has more than

⁶ Demolition or Disposition of Public Housing Projects; Final Rule, 71 FR 62354-01.

⁷ Id.

adequate requirements in this regard and strongly object to the notion that additional notices, meetings, consultations, certifications and submissions are what is needed to promote the recapitalization and preservation of public housing assets. More detail on these items is provided below:

- a. **HUD Review of Activities Excepted from Regulation.** It is helpful that a number of new items are added to the list of activities excluded from the Proposed Rule; however, several impose unexplained HUD requirements for review and approval such as (1) cell towers, solar installations, and parking facilities, (2) ground leases of less than one year, (3) easements and right of way permitted in the ACC; (4) disposition of vacant land for mixed-finance development, (5) de minimis development, (6) corrections to legal descriptions, deeds etc. The Proposed Rule should **identify** what part of HUD does the review, and what the review standards are. Items 1, 2, 3, 5 and 6 do not currently require SAC approval. If SAC conducts these reviews, it must create an EXTREMELY streamlined approval method, approval will add a great administrative burden and slow down a PHA's ordinary activities – such as providing a simple utility easement over a corner of property covered by a DOT or a church to lease a vacant lot for parking for a year. Finally, the regulation does not address what HUD approval is required for Item 4. Based on a similar current exception, HUD requires a PHA to comply with the entire regulation, but permits it to certify to backup documentation. That is not exception and should not be instituted under the Proposed Rule. Section 970.3. Please define more clearly what “approved by HUD in writing” means in these contexts.
- b. **Resident Consultation (970.9(a)).** Like many of the other requirements discussed in this section, the resident consultation process set forth in the Proposed Rule adds layers of documentation and certifications, but in this area, the bloated process also comes at the expense of offering residents a more meaningful role. For example, Section 18 requires that the PHA develop its application in consultation with the affected groups, which encourages a collaborative process. In contrast, the Proposed Rule would require consultation on the final application submitted to HUD, at which point the application is complete and such consultation would have little, if any, impact. This requirement would essentially exclude residents' opportunity to shape the application, unless the PHA elects to undertake a lengthy and burdensome two-step process, engaging residents first during the formulation of the application and then once the application is finalized. It is also unclear how the PHA would solicit comments on its final application since, under Section 970.7(a)(8) of the Proposed Rule, that application is supposed to include supporting evidence of the PHA's resident consultation. Finally, this section requires that the PHA communicate the required information with residents in a manner that is effective for persons with disabilities. We urge HUD to add a qualification to this requirement that such communications be provided “as appropriate” or “as needed” so that the PHA can tailor the materials to the specific needs of its resident community.

- c. **Relocation Notices and Information (970.7(c)(7) and 970.21).** The Proposed Rule also weighs down the relocation process with additional documentation, notices and certifications, in some cases requiring detailed information that does not inform this process in a meaningful way. For example, as described above, the proposed definition of “comparable housing” does not take into account a PHA’s scarce resources and the limited housing opportunities in a particular community that may meet this definition. Accordingly, PHAs will generally offer placements in existing public housing projects or projects with project-based Section 8 contracts. Therefore, it is unclear how submitting census tract information for these projects would enhance the review process. It is also unclear why HUD is requiring that the PHA include information about whether the comparable housing is located in a special flood hazard area, a requirement that is already imposed on most subsidized properties. Also if location outside of a special flood hazard area is a requirement of “comparable housing,” it should be included in the regulatory definition of the term, not slipped into a notice provision. Similarly, the PHA would be required to certify that its actions are consistent with Federal civil rights laws, to which, as described below, the PHA is already required to certify under multiple sections of this same rule and other regulations.
- d. **Civil Rights Requirements (970.7(c)(19)).** The civil rights certification described in this section is in many cases irrelevant and immaterial to a PHA’s proposed demolition or disposition. While it may make sense for HUD to require that the PHA certify that the proposed demolition or disposition does not violate any civil rights order or agreement, it is unclear why the PHA’s involvement in other civil rights cases or investigations unrelated to the proposed demolition or disposition would be relevant. In no event should a PHA’s involvement in civil rights cases or investigations unrelated to the proposed demolition or disposition preclude it from receiving approval for a demolition or disposition application. The certification regarding a PHA’s deconcentration efforts duplicates the certification required under Section 970.7(c)(1). Furthermore, HUD should postpone any rulemaking related to a PHA’s obligation to “overcome discriminatory effects” until after the Supreme Court publishes its decision in *Inclusive Communities v. Texas Department of Housing and Community Affairs*. While the Fair Housing Act plainly requires PHAs undertake their activities in a manner that affirmatively furthers fair housing, this requirement is predicated on the notion that the Fair Housing Act implicitly prohibits discriminatory effects. The Court will answer this question and action to institutionalize the discriminatory effects standard should await the court’s decision.
- e. **PHA Plan (970.7(c)(1)).** While the first part of the proposed certification described in Section 970.7(c)(1) is consistent with language of Section 18, the second part of the proposed certification is unnecessary and duplicative. The PHA already certifies that it will carry out its PHA Plan, including any proposed demolition or disposition, in compliance with the Federal civil rights laws, including the obligation to affirmatively further fair housing, pursuant to 24 CFR 903.7(o). Furthermore, the certification required under 24 CFR 903.7(o) also covers

compliance with the PHA's deconcentration plan, as further described at 24 CFR 903.2(d)(3).

- f. **Supporting Information (970.7(c)(8)).** The Proposed Rule also expands the amount of supporting information required for the application. For example, the Proposed Rule requires that the PHA prepare a summary of its consultation process, including the meeting dates and the issues raised. In addition to this summary, the Proposed Rule also requires that the PHA evidence that summary with meeting sign-in sheets and copies of written comments submitted. In essence, the Proposed Rule requires that PHAs submit supporting information for its supporting information. Similarly, as described above, the PHA should only be required to offer different forms of communications for persons with disabilities on an as-needed basis. It is excessive to then require that the PHA provide evidence that it provided such forms of communication, which is not a requirement otherwise imposed by 24 CFR 8.6, the source for this requirement.
- g. **Aggregated Effect.** The overall effect of these additional requirements is a notable increase in both regulatory burden and cost of demolitions and dispositions, in a time of decreased funding. See 79 FR 62270 (Costs and Benefits).
1. Increased Administrative and Regulatory Burdens. HUD estimates the burden increase on HAs from this rule to increase by an additional *162 hours per application, per PHA.*
 2. Increased Cost. The Executive Summary notes states that the Proposed Rule may result in up to \$2.23 million in additional compliance costs to agencies related to the need for consultants to complete the application, including, architects, engineers, lawyers and accountants. HUD's baseline for these costs estimated that the average cost for the additional hours is approximately \$30 per hour (staff salary) on one page and \$70 per hour on another. Although this may be a good estimate in regards to staff time, it does not take into account the cost to pay consultants to assist in the application process. It would be safe to assume that consultant hourly rates are *significantly* higher than \$30 per hour and higher than \$70 per hour; as a result, this estimation of additional compliance cost seems to be significantly lower than the likely actual costs.
 3. Burden. Despite this, the Executive Summary opines that the Proposed Rule would "marginally add administrative burden" and would not have "any significant financial or cost incidence on stakeholders." This may count as not significant in the OMB regulatory approval process, but for PHAs in the current budgetary climate, four weeks of additional administrative costs related to demolition and/or disposition, as underfunded and under staffed agencies struggle to house families, could be the difference between preserving affordable units for low-income families and losing them forever.

4. Delays. Unless significant additional staffing is budgeted, HUD processing of demolition and disposition applications will slow dramatically – and they already take up to a year. We are also concerned that without hiring staff with development expertise, the many development related requirements about future use will be problematic for both PHAs and HUD.

9. **Disposition Proceeds (970.20)**.

- a. **Benefit PHA Residents (970.20(a)(4))**. The Proposed Rule makes some revisions to Section 970.19 regarding the use of disposition proceeds. However, HUD has not taken advantage of the opportunity to broaden its current interpretation so that it is more consistent with the statute, which provides simply that disposition proceeds may be used to “benefit residents of the PHA.” In practice, HUD has interpreted this to be limited to “public housing” residents”, an interpretation which is repeated in the preamble of the Proposed Rule. By contrast, HUD does permit the use of disposition proceeds for the development of Section 8 housing and even to supplement operation of the voucher program, but does not allow such proceeds to be used to benefit those residents through providing supportive services or in other ways. This is striking because the statute states that such proceeds may be used for “the provision of low-income housing or to benefit the residents of the public housing agency.” Thus, while HUD acknowledges that “low-income housing” includes Section 8 housing, it somehow does not deem residents of Section 8 property who are assisted by the PHA to be “residents of the PHA.” Based on the statute, we think HUD must broaden its interpretation.
- b. **Significantly Increased Restrictions on Disposition Proceeds**. The Proposed Rule essentially superimposes Capital Fund requirements onto funds that, by regulation, are to be used for “low income housing”:
 - i. PHAs must begin spending disposition proceeds within two years of disposition approval and fully expend proceeds within four years.
 - ii. Expenditure of disposition proceeds would take on the requirements of federal funds. Proceeds used to modernize or development public housing would be subject to all public housing requirements, such as environmental requirements, labor standards, and Section 3.
 - iii. Proceeds would be required to be kept in an account subject to HUD's General Depository Agreement and/or an escrow agreement.
- c. **Expenditure and Recapture**. There is no rational basis for requiring disposition proceeds to be spent on essentially the same timeline as capital funds – disposition

proceeds are not appropriated and have no statutory expenditure deadlines. While PHAs should not hoard proceeds, they should have sufficient time to expend them as wisely as possible – which may mean the funds are not fully expended in four years. In this context, recapture is a draconian response.

10. Retention of Projects under Part 85 (Part 970, Subpart B). While we welcome clarity on methods for removing federal restrictions from PHA-owned property without requiring a legal transfer of the property, this seems a procedurally awkward methodology on two levels, first it creates a parallel bureaucracy to the Subpart A demolition and disposition requirements, which it almost, but not completely, parallels, and second, it cites Part 85 rather than the authorizing legislation.

- a. **Combine with Part A for Single Application.** We propose the requirements applicable to retention applications be added to the demolition disposition section, with notations regarding the few demo/dispo requirements not applicable. This would achieve the purpose of the rule without duplicating bureaucracy. For example, the following subsections from 970.7(c) are repeated word for word in 970.44(c) unless indicated otherwise: Items 1 through 8, and 15-19 (Note: The Retention provisions are streamlined for Item 17). In fact, Section 970.45(c) is the only portion of the Retention Application that is not found in 970. The special requirements could be contained in a new 970.18 and the application requirements merged with 970.7.
- b. **Rely on Existing Legislative Authority.** Instead of citing Part 85 to authorize a PHA to retain a project after removing it from the public housing program, HUD should rely directly on the portion of Section 18 stating: “to demolish or dispose of a public housing project or a portion of a public housing project.” Section 3 of the 1937 Act defines “project” as “housing developed, acquired, or assisted by a public housing agency under this Act... and the improvement of such housing.” Because a project is defined as the HOUSING not the LAND, nothing in the 1937 Act requires a legal transfer to a third party; removal from the public housing program constitutes disposition of the Project (assisted) from the PHA.

We are concerned that reliance on two authorizing sources for essentially the same actions may lead to divergence over time. For example, the Proposed Rule cites 24 CFR 85.31 and 85.3 as authority for the retention provisions. As you know, Part 85 will be eliminated soon after these comments are submitted, to be replaced by 2 CFR Part 200. Part 200 is a government-wide streamlining of grants management regulations and OMB circulars, and we have yet to see how it changes requirements at the agency and program level. Our fear is that reliance on this Part 200, which addresses every situation from research contracts, to housing, to entitlement benefits, could distort the “retention” process simply because of its vast scope.

- c. **Permit Partial Retention.** The Proposed Rule contemplates disposition of a project, but not a portion of a project. I can see several instances where a PHA might rightly retain a portion of a project. For example, if a large project, or AMP, is to be redeveloped in phases as affordable, but not public, housing, a PHA might wish to defederalize in phases, perhaps as vouchers become available. Second, is where non-dwelling structures form a portion of a public housing project and the PHA wishes to sever from the “project” – such as a central office or a community building. We suggest adding “or portion thereof” after “project” throughout Part B, if it is retained.

11. Technical Comments.

- a. **Closing Contracts (970.7(c)(5)).** We understand HUD’s desire to review contracts of sale or ground leases; however, given the long-time frame involved in review and approval under the current lighter review, it is not feasible for a PHA to fully negotiate a contract, then have purchasers wait months for review and approval. Typically, the two activities go in parallel, or if the PHA intends to conduct a request for proposals type process, the legal documents would be developed after disposition approval. In addition, no standards are provided for such review.
- b. **Relocation Plans (970.7(c)(7) and 970.21).** The new relocation requirements, particularly those identified in Section 8(c) above should be memorialized in model documents prior to issuance of the final rule, for PHAs to use as templates and adapt to their current circumstances.
- c. **Board Resolutions (970.7(c)(16)).** HUD should drop the current requirement to have a board resolution authorizing the demolition /disposition application. PHA Boards are not micromanagers – their job to approve activities, not applications. Thus, a Board resolution authorizing a demolition, disposition or retention ACTION should also be accepted. Certainly, it makes no sense to require Boards to approve revisions to the application as suggested Exhibit A, Item #3. Also, note that the discussion of Board Resolutions submitted in the application discusses de minimis activities, which are excluded from the regulation.
- d. **Government Consultation (970.7(c)(16)).** HUD has long required PHAs to submit a letter of support from the applicable jurisdiction. The new provision at Section 970.3(c)(16)(i) is a triumph of process over action – summaries of meetings, issues raised and responses. HUD’s interest is that the jurisdiction supports the action, not the minutiae of discussions.
- e. **Current Residents (970.7(c)(20)).** The Proposed Rule requires a description and data of the “race, color, religion, sex, marital status, national origin, familial status, and disability status” of potential displaced residents and the waiting list. These are

protected classes and PHAs have agreed not to discriminate against the protect classes. However, PHAs collect information on race, sex, age, and disability status, but do not collect the others. Thus, we are concerned that the Proposed Rule could require an overhaul of the software used to track residents and applicants, either by the big vendors, or by individual PHAs at disproportionate expense for a one-time action.

- f. **Approval Documents (970.7(d)(2)).** This is simply too broad. It gives HUD has a right to ask for essentially unlimited documentation, much of which is unrelated to the disposition action, then incorporate it in to the closing documents. In addition to the other changes, we request that Section 970.7(d)(2) be revised to add a reasonableness provision related to “clarification” of the application rather than “support.”
- g. **Section 3 Assistance (970.14).** We think the text should read “disposition proceeds constitute covered assistance” or “if disposition proceeds are used for a covered activity” not “if disposition proceeds are used for covered assistance.”
- h. **Partial Demolitions (970.15(b)).** Subsection b states that applications for partial demolitions must “certify that the demolition will help ensure the viability of the project, except that this requirement shall not apply for applications where buildings are scattered non-contiguous sites.” Many project numbers, or AMPs, other than scattered site housing multiple sites combined into one project for management purposes. Should this say “scattered sites or non-contiguous sites” for clarity, or is it intended to apply only to scattered sites? In addition, if a demolition is performed in the context of redevelopment of a portion of the site, it arguably helps insure viability of the remainder, but is different enough that it should be a separate justification.
- i. **Fair Market Value (970.19).** Section 970.19(h) suggests that to estimate FMV “before the project is advertised for bid”, the PHA needs an independent appraisal. Note that there is no requirement to advertise for bid, so the language should add “if applicable” after the quoted text. In addition, the section implies that that HUD reviews the appraisal methodology before the PHA advertises a project for bid. Logistically, does that mean a PHA that selects advertising for bid would get disposition approval prior to soliciting bids?
- j. **Use of Disposition Proceeds.** Use of disposition proceeds is discussed more globally above at Section 8. In Section 970.20(a)(2), add “on the project” after “of CFFP debt” to clarify that the entire debt does not need to be retired. In Section 970.20(a)(2), add authorization for disposition proceeds to be expended on voucher recipients, who are also residents of the PHA, though they are not eligible for services under the Operating Fund.

- k. **Uniform Relocation Act.** The term “URA” is used without defining the term or citing to law, regulation or handbook.
- l. **Legal Opinions.** The Proposed Rule requests legal opinions three times. Opinions are expensive and the types of opinions requested will be heavily conditioned. This is not the most cost effective or best method of determining a PHA’s compliance.

Exhibit A

Specific Questions for Public Comment

1. *Question re: the proposed definition of “commensurate public benefit” in proposed § 970.5.*

Comment: The examples in this definition are far narrower than the regulatory definition, which requires “commensurate public benefit” to residents of the PHA, the community, and/or the federal government. However, the examples are limited to rental units under a 30-year use restriction and subject to public housing requirements, homeownership units, nondwelling structures or facilities to serve low income families, and “other additional benefits as approved but HUD,” particularly Section 3 activities. This definition and example activities are too narrowly focused on public housing activities. Certainly, some reasonable nexus is required between a PHA’s residents and the public benefit, but the public benefit could, by definition, be directed generally toward the community or the federal government, which should include activities of the following sort as well:

- Transfer to a PHA-controlled owner for development of affordable housing, whether or not subsidized.
- Conveyance to a city or county for a park located near a project-based voucher, moderate rehab, or public housing project;
- Community and supportive services for voucher holders;
- Relocation planning and benefits;
- Land swaps;
- Conveyance to the federal government for a post office, which would serve the nearby PHA residents and other community members;
- Conveyance to a city or county, which would use the property for road widening and add signage and stoplights; and
- Transfer to a consortium of social service agencies that will serve PHA residents and other community members.

2. *Question re: whether or not the definition of “disposition” in proposed § 970.5 should include a PHA’s transfer to the PHA’s own nonprofit instrumentality.*

Comment: We agree that a PHA should not have to submit a disposition application when the PHA intends to dispose of the property to its instrumentality since the 1937 Act itself includes an instrumentality within the definition of “public housing agency.” However, we are concerned by statements in the Proposed Rule that suggest that a PHA may not, *in any case*, actually dispose of public housing property to an instrumentality. For example, Section 970.7(c)(10) of the Proposed Rule requires the PHA to provide a legal opinion that the acquiring entity is a “separate legal entity (i.e., an affiliate or fully independent entity rather than an instrumentality of the PHA) under applicable state law.” While HUD regulatorily treats an instrumentality as part of the PHA, under corporate law, they are separate entities having separate assets. A PHA should be able to transfer property to an instrumentality either

without approval, or with streamlined approval. Please clarify that an actual transfer of real estate to an instrumentality is acceptable, and under what conditions, if any.

In addition, the Proposed Rule arguably restricts PHA self-development (where a PHA instrumentality is the general partner or managing member of the owner). Typically, such owner entities have another member – an investor partner – which makes the owner not fully controlled by the PHA. However, use of single member LLCs (in which the only member is the managing member) is growing. In that case, a PHA would transfer a public housing property to an entity in which a PHA instrumentality is the only member. If transfers to instrumentalities are prohibited, conceivably so could transfers to single member LLCs. If these types of transactions are prohibited, then PHAs are essentially required to develop mixed-finance public housing for ownership by a private developer. This would be inconsistent with other aspects of the Proposed Rule, which goes to great lengths to keep public housing assets under HUD control. It is important for HUD to clarify this position.

Finally, the opinion required at Section 970.7(c)(10) requests a legal opinion on state law using a the HUD-developed distinction between instrumentalities and affiliates. Any entity organized under state law is a separate legal entity under state law. A PHA's ability to control such an entity may play into a lawsuit where someone seeks to pierce the corporate veil to reach past this entity to its alter ego. This makes the opinion required at 970.7(c)(10) inappropriate.

3. *Question re: the requirements for a PHA to amend an existing approval under proposed §970.7(e). For example, should the PHA be required to get a board resolution approving the amendment request? Should the PHA be required to consult residents and local government officials on the amendment request? Should it depend on whether the change is minor or significant?*

Comment: As discussed in the main response, the Proposed Rule essentially establishes second development approval process, but one that is approved so early as to be meaningless. Unless HUD sets a low threshold for review, PHAs will waste time (and money) and HUD will waste time (and money) preparing, reviewing, and approving multiple iterations as the development plan takes shape. Even in mixed-finance transactions, where disposition is closely tied to an already planned project, technical amendments and revisions are common. The Proposed Rule would escalate that. We propose, instead, that HUD require amendments only if: (1) the proposed use will no longer include public housing or project-based voucher housing; (2) the number of proposed HUD-subsidized units has been reduced by 20 percent or more; (3) if the transferee identified in the application changes; or (4) if the transfer becomes a sale at less than FMV requiring HUD approval of a commensurate public benefit. We see no need for requiring additional consultations or board resolutions unless the proposed use no longer includes public housing or project-based voucher housing. PHAs, of course, have the discretion to conduct consultations and request amendments more frequently if dictated by local practice.

4. *Question re: the circumstances under which a PHA would want to only demolish structures on public housing property under proposed § 970.15 without also proceeding with a disposition of the vacant land after demolition (considering the land would remain under the conventional ACC and DOT and could only be used for public housing purposes, e.g., to construct new public housing units), and there is limited funding for such purposes.*

Comment: A PHA's decision to demolish dwelling buildings and other structures on a property is distinct from its decision on future use of the underlying land, including whether to retain or sell it. For example, where a public housing property is obsolete due to the condition of the buildings or on a location unsuitable for new affordable housing, the PHA may have good reason to demolish the structures to reduce liability, prevent vandalism, and remove blight. This demolition may be necessary while the PHA develops a redevelopment plan for the property, for which the planning and financing process can take considerable time. It is in HUD's interest, as well as the PHA's, to demolish the obsolete buildings in the interim. In fact, HOPE VI was the solution to obsolete and vacant properties that PHAs could not otherwise demolish because of the prior one-for-one replacement requirement.

5. *Question re: in those instances where PHAs seek to both demolish and dispose of public housing projects as part of the same request, when would it be appropriate for HUD to allow a PHA to demolish obsolete structures (with HUD funds) only to immediately seek to dispose of the underlying vacant land, and whether HUD should instead require the PHA to dispose of the obsolete structures in their "as-is" obsolete condition and have the acquiring entity agree to demolish or otherwise dispose of or use that property?*

Comment: Most importantly, the traditional mixed-finance structure works because the PHA is able to demolish the units prior to closing on financing (and transferring property to an owner entity). These parties are financing new construction and expect a site ready for construction to start. Transferring obsolete buildings when lenders and investors are involved heightens their scrutiny of what should be an independent process – review of demolition draws, imposition of added guaranties, lien waivers, etc. These increase the time and cost of developing a public housing project without tangible benefit.

Also, for sales to third parties, imagine a public housing property that is largely vacant because it does not meet HUD property standards. The property becomes a liability, inviting vandalism, which can range from broken windows and graffiti to much more extensive damage, theft of copper pipes and wiring and fixtures, water damage, fire, squatters, and drug dealers. In such cases, a PHA is better off demolishing the units than using its limited resources to patrol, secure and maintain the property while the PHA plans a FMV sale or on-site redevelopment. Similarly, a property with public housing structures in place is likely worth less than the FMV of clean land less the cost of demolition for the same reason that homebuyers prefer a new kitchen to an old one they'd have to renovate themselves. The potential pool of purchasers with interest and skill to perform demolition is smaller than the potential pool of purchasers with the ability to purchase ready-to build property, especially to small purchasers like buyers of single family lots.

6. *Question re: the criteria HUD should use in determining if a project is obsolete as to location under § 970.15(a)(1)(ii) and whether HUD should require the PHA to simultaneously submit a disposition application in these instances;*

Comment: Please see our responses to Questions 5 and 6.

7. *Question re: for HUD to approve disposition under proposed § 970.17(b) for acquisition of other properties that will more efficiently or effectively operate as low-income housing, this rulemaking proposes that the minimum replacement amount be 75 percent of the units (all units housing families displaced by the action must be replaced). HUD would also consider a minimum of 50 percent, and would be interested in public comment on this issue;*

Comment: Please see the discussion in section 4.B of the comments.

8. *Question re: are there any additional factors HUD should consider when approving a disposition for less than FMV under § 970.19(b)? Should the definition of commensurate public benefit under § 970.5 be amended?*

Comment: We addressed our concerns with the definition of commensurate public benefit in item #1 above. We understand that HUD has a legitimate interest in making sure that promised public benefit does occur and preventing parties from “flipping” a disposed of property for profit. However, the requirement for a non-foreclosable use restriction goes too far. It is not based on, or even suggested by, the statute.

HUD should accept any use restriction imposed by funders of the replacement housing as sufficient, foreclosable or not, such as a low income tax credit land use restriction agreement (which has a minimum 30 year term but can be eliminated by foreclosure), HUD Declaration of Restrictive Covenants (long-term use restriction on public housing units) and HOME Funds Use restriction (which has a 20-year use requirement for new construction). Especially for mixed-finance, requiring another use restriction is duplicative. HUD should have one set of use restrictions coming out of the Office of Public Housing Investments, not two.

We are glad that the Proposed Rule does not require a reverter if the property ceases to be used for the approved purpose. Land ownership with such reverter is essentially unfinanceable; investors and lenders simply won’t accept them. We hope that the current trend to require reverters via the disposition approval letters disappears and is not layered on top of the multiple new requirements found in the Proposed Rule.

9. *Question re: in what extent of planning should a PHA engage under § 970.25 without receiving HUD approval under section 18? For instance, should a PHA issue RFQs or RFPs that assume HUD will approve a full or partial demolition and/or disposition of the project?*

Comment: We find the current level of permitted actions to be sufficient as is. Looking to approve actions earlier in the process than already proposed would merely exacerbate the double development approval concerns discussed elsewhere.

As you know, planning for development involves juggling unknowns and constantly adapting to circumstances. For the example, it is unclear how HUD would approve a disposition (for which a PHA must produce evidence of a redevelopment plan) before a PHA has procured a developer and even less clear how a PHA could procure a developer and close within the proposed two years without having started the process prior to receiving disposition approval. More globally, this question demonstrates how the Proposed Rule's extensive requests for detailed information about future use is implicitly turning the disposition regulation into a duplicative, second development regulation.

10. *Question re: in order to preserve and make most efficient use of appropriated funds, should HUD limit tenant protection vouchers (TPVs) to fewer than the number of occupied units being replaced in cases where the PHA can provide assistance from funds already allocated to it?*

Comment: We are aware that the annual appropriation for TPVs is limited and in some fiscal years is not sufficient to cover all requests made in that year. However, we believe it is inappropriate to explicitly link demo/dispo approvals with TPV availability under the Proposed Rule. As we stated in the General Comments section, it appears that HUD demo/dispo policy in recent years, particularly in Notice PIH 2012-7, is being driven by budget considerations rather than the best plan for a property pursuant to the local planning and consultation process. As HUD is aware, and as we have referenced in these comments, chronic underfunding of public housing, especially in the Capital Fund, has led to the current capital needs backlog which approaches \$30 billion. Thus, ironically, it is this federal under-investment in public housing assets that results in properties becoming obsolete and otherwise in need of demo/dispo approval so that a PHA can pursue redevelopment strategies with private and other funds or remove units from the inventory and replace them with other hard affordable units or vouchers or a combination of both. Whether it comes to PHAs in the form of Capital Funds, vouchers, or another form, PHAs need substantial increases in funding in order to preserve and/or replace public housing assets. We recognize the need to allocate scarce resources among competing needs and we are open to discussing with HUD how TPVs can be used strategically to ensure that replacement housing projects have sufficient cash flow to attract private financing. However, we do not believe that the Proposed Rule should introduce eligibility for TPVs as a factor in demo/dispo approvals.

Exhibit F
Operations Notice for the Expansion of the Moving To Work Demonstration Program

June 5, 2017
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-5994-N-01: Operations Notice for the Expansion of the Moving To Work Demonstration Program Solicitation of Comment

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 Operations Notice for the Expansion of the Moving To Work Demonstration Program Solicitation of Comment (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 represents more than one hundred PHAs throughout the country and has been working with our clients on public housing development and operations issues since its inception. 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 everything we do.

On behalf of CLPHA and Reno & Cavanaugh, we applaud HUD for conducting outreach to stakeholders, industry groups, and housing authorities through a number of listening sessions to obtain feedback on the Notice and thank HUD for the opportunity to provide further feedback on the Notice through the below written comments. We encourage HUD to continue its effort to conduct outreach and obtain feedback from the existing thirty-nine MTW agencies, stakeholders, advocacy groups, and other PHAs. We endorse the comments submitted to HUD by the Steering Committee of the thirty-nine existing MTW agencies and urge HUD to provide those comments with additional consideration in its review process as they reflect the opinions of PHAs already engaged in MTW activities.

We also encourage HUD to revisit and revise the applications process. An earlier draft of the applications notice that was unofficially released showed a complicated, data heavy, administratively burdensome application that also restricted the first cohort to small agencies only. First, we strongly encourage HUD not to restrict any cohorts by size. Studying the flexibilities of MTW, for example, is just as an important evaluation goal for medium and larger sized housing authorities. Secondly, we also understand that HUD will be considering many factors when determining the constitution of the cohorts, such as geographic location and the need for comparative PHAs. We are concerned that housing authorities, who are already operating with limited resources, will undergo the significant application process only to be later rejected. In addition to simplifying the application itself, we propose a 2-tiered application process. Under this process housing authorities can submit a statement of interest for a particular cohort, after which HUD can invite select agencies to submit a full application. The statement of interest can include the basic eligibility information, such as number of units, PHAS or SEMAP scores to indicate high performing status, as well as additional information that may be useful, such as geographic location. This will give HUD both a sense of how many agencies are interested in a cohort and allow HUD to selectively choose which agencies it invites to submit full applications based on the mix of agencies that HUD intends for that cohort. A two-tiered process will also ensure that PHAs are not unnecessarily using staff time and funding to submit a full application that would not have been considered.

We appreciate HUD's efforts to expand Moving To Work ("MTW") and provide additional flexibility to PHAs in their efforts to achieve cost-effectiveness, enhance self-sufficiency, and increase housing choice. However, we remain concerned that though HUD did not intend to provide the new MTW agencies with any less flexibility than the current MTW agencies, the published Notice does exactly that by calling for new requirements, mandates, and processes that do not apply to current MTW agencies. Consistent with the statutory authorization for the expansion, all MTW agencies, whether newly-added or existing, ought to be subject to the same set of requirements outlined in the existing Standard Agreement.

Below we offer additional comments on the Notice as requested by HUD.

Waivers

HUD's stated goal for the Notice was to streamline and simplify the MTW program, including the approval process for waivers. While we appreciate HUD's intent to provide a streamlined "menu" of waivers that housing authorities can choose from, we feel the waiver list as proposed is both too prescriptive and overly complicated. The Notice proposes a new set of waivers distinct from the existing MTW demonstration. By contrast, under the current Standard Agreement agencies can choose from a list of "General" waivers, as well as propose additional waivers that are incorporated into Appendix D of their standard agreement contract. We believe

the Standard Agreement waivers, and related authorizations, strike the correct balance between providing MTW PHAs the flexibility and local decision-making Congress envisioned for MTW, with the Department's need to be certain that MTW PHAs are proposing and implementing permitted activities. Additionally, approach proposed in the Notice does not reflect the intent of Congress. Where Congress has not specifically spoken through the 2016 Appropriations Act, agencies added through the MTW expansion are to be treated no differently than the other "Moving to Work agencies authorized under section 204, title II, of the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321)."¹ There is nothing in the statutory language that mandates or suggests the level of oversight, regulations, and changes that HUD has proposed with regard to waivers.

Under the proposed MTW program, waivers are divided into "General", "Conditional" and "Cohort-Specific", with additional restrictive "Available Activities" and "Parameters" layered on. Many of the waivers in the existing Standard Agreement are not listed in Appendix A/B of the Notice, and in some cases HUD has explicitly removed a waiver that is available to current MTW agencies. While the Notice states that housing authorities will be able to request additional waivers not available in Appendix A/B, the proposed list represents a "retail" approach to waivers; offering housing authorities a seemingly limited selection of flexibilities to choose from. This does not allow for or encourage the kind of ground-up innovation that is a hallmark of the MTW program. Per Congressional intent, incoming MTW agencies should have the same flexibilities as offered to the current 39 MTWs, as laid out in the existing Standard Agreement. If HUD wants to provide a list of potential activities or parameters for waivers, which may be helpful as housing authorities are considering their initial activities, the agency should do so in the form of guidance or FAQs.

- 1) Does the list of general waivers, MTW activities, and parameters in Appendix A and Appendix B contain the needed flexibility to achieve the three MTW statutory objectives? If not, what waivers, activities, and/or parameters are missing?*

No. The Notice explicitly removes certain waiver flexibilities that are available to the existing MTW agencies without reason. For example, the Standard Agreement for the existing 39 agencies includes a waiver allowing an agency to "establish its own portability policies with other MTW and non-MTW housing authorities." In the proposed Notice, HUD states that "Section 8(r)(1) of the 1937 Act on HCV portability shall continue to apply unless provided as a cohort-specific waiver." This means that unless an agency uses portability as part of its cohort-specific evaluation or activities, HUD will not permit the agency the waiver flexibility to establish its own portability policy. The department gives no explanation for this change.

¹ HR 2029

Additionally, the “Available Activities” and “Parameters” for each waiver listed in Appendix A/B impose unnecessary restrictions on new MTW agencies that do not apply to the current MTWs and are not supported by statute. We encourage HUD to review the comments submitted by the Steering Committee of the 39 MTW agencies, which list ten specific examples where the activities and parameters of waivers listed in the Notice are overly restrictive, create unnecessary administrative and reporting burdens on PHAs and/or HUD, or conflict with current regulations and/or the existing Standard Agreement.

As stated previously, where Congress has not specifically spoken through the 2016 Appropriations Act, agencies added through the MTW expansion are to be treated no differently than the other “Moving to Work agencies authorized under section 204, title II, of the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321).”² HUD should provide the same list of waivers to incoming agencies as outlined in the existing Standard Agreement.

- 2) *Are there any MTW activities and/or waivers that should not be included as general waivers, available to all TMW agencies without prior HUD approval?*

No.

- 3) *Are there any MTW activities and/or waivers that should not be included as general waivers, available to all MTW agencies without prior HUD approval?*

Incoming MTW agencies should be given the same waivers and flexibilities as the current agencies, without restrictive “available activities” or “parameters”. This was the intent of Congress and the statutory language. If HUD wants to include a list of potential activities for PHAs as an initial starting point, it should do so in the form of guidance or FAQs.

- 4) *Are there any MTW activities and/or waivers that should not be included as conditional waivers but rather should be included as general waivers, or not included at all?*

Incoming MTW agencies should be given the same waivers and flexibilities as the current agencies, without restrictive “available activities” or “parameters”. This was the intent of Congress and the statutory language. If HUD wants to include a list of potential activities for PHAs as an initial starting point, it should do so in the form of guidance or FAQs.

² HR 2029

- 5) *Does the list of conditional waivers, MTW activities, and parameters in Appendix B contain the needed flexibility to implement any alternative income-based rent model? If not, what waivers, activities, and/or parameters are missing?*

See comment above. Incoming MTW agencies should be given the same waivers and flexibilities as the current agencies, without restrictive “available activities” or “parameters”. This was the intent of Congress and the statutory language. If HUD wants to include a list of potential activities for PHAs as an initial starting point, it should do so in the form of guidance or FAQs.

Term of Participation

- 1) *Assuming all cohorts are selected between 2017 and 2020, is the end of each MTW agency’s Fiscal Year 2028 an appropriate timeframe for MTW participation, and understanding that HUD may extend cohort-specific waivers to accommodate evaluation of MTW activities that require additional time?*

While we recognize HUD’s efforts to subject new MTW agencies to the same timing constraints and expiration date as current MTW agencies, Congress was clear that the Fiscal Year 2028 expiration is to apply only to “the current Moving to Work agreements of previously designated participating agencies.”³ Because the expansion MTW agencies will neither be a “previously designated participating agenc[y]” nor do such agencies have “current Moving to Work agreements,” the 2028 term of participation ought not to apply to new agencies brought into the MTW program under this expansion.⁴ Instead, new MTW agencies added through the expansion should retain their MTW status in perpetuity or until such time as Congress or the agency itself affirmatively declares otherwise.

- 2) *Is there a preferable length or structure for the term of MTW participation?*

As indicated above, the ten-year MTW extension authorized by Congress applies solely to “the current Moving to Work agreements of previously designated participating agencies.”⁵ Therefore, unlike the existing MTW agencies that are bound by Congress’ ten-year extension, the newly-added MTW expansion agencies are not restricted in the same manner. Congress has remained silent with respect to any such term of participation. Accordingly, until such time as Congress or the agency itself affirmatively declares otherwise, new MTW agencies added through the expansion ought to retain their MTW status in perpetuity.

³ HR 2029

⁴ HR 2029

⁵ HR 2029

3) *What elements of the MTW agency's transition plan should be mandatory?*

Because Congress has remained silent with respect to the term of participation for newly-added MTW agencies, such agencies should not be restricted to a set term of participation and, therefore, ought not to be required to submit a transition plan. However, to the extent that HUD will require agencies submit a transition plan, HUD should require both existing MTW agencies and newly-added MTW agencies to adhere to the same transition plan requirements, except where Congress clearly states otherwise, because such agencies added through the MTW expansion should be treated no differently than the other “Moving to Work agencies authorized under section 204, title II, of the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321).”⁶ This means that, per the existing Standard Agreement:

“Not later than one year prior to expiration of this Restated Agreement, the Agency shall submit a transition plan to HUD. It is the Agency’s responsibility to plan in such a manner that it will be able to end all features of the MTW Plan upon expiration of the Agreement, as HUD cannot guarantee that it will be able to extend any features of the Plan. The transition plan shall describe plans for phasing out of such authorizations/features. The plan shall also include any proposals of authorizations/features of the Restated Agreement that the Agency wishes to continue beyond the expiration of the Restated Agreement. The Agency shall specify the proposed duration, and shall provide justification for extension of such authorization/features. HUD will respond to the Agency in writing in a timely manner. Only authorizations/features specifically approved for extension shall continue beyond the term of the MTW Restated Agreement. The extended features shall remain in effect only for the duration and in the manner specified in the approved transition plan.

HUD will review and respond to timely-submitted transition plans within 75 days or they are deemed approved. To the extent that HUD has questions or feedback within this 75-day period, HUD will transmit such information within a sufficient time period for the Agency to respond and for HUD to approve a transition plan within 75 days of submission of the plan.”⁷

Requiring the same transition plan information of existing and newly-added MTW agencies will also serve to streamline the review process and ease any administrative burden that may result if HUD were instead required to enforce two different sets of transition plan requirements – one set

⁶ HR 2029

⁷ https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10240.pdf

of requirements for existing MTW agencies and one set of requirements for newly-added MTW expansion agencies.

- 4) *What elements of the transition process should HUD require in order to protect residents from potential harm and minimize disruptions to agency operations?*

As indicated above, should HUD require newly-added MTW agencies to submit transition plans, HUD ought to only require agencies to submit the transition plan components that are already required of existing MTW agencies. Existing MTW Plan and Report requirements are sufficient to protect residents from harm.

- 5) *In order to be eligible for MTW status, may an agency be considered high performing in either PHAS or SEMAP?*

Yes. Through the various Listening Sessions that HUD has held to discuss the Notice, it has come to our attention that HUD is interpreting the statutory requirement that PHAs be “designated as high performing agencies under the Public Housing Assessment System (PHAS) or the Section Eight Management Assessment Program (SEMAP)” to require that housing authorities be designated as high-performing in both public housing and Section 8 housing, meaning the PHA would be required to be high-performing in both PHAS and SEMAP. Such an interpretation is not only unsupported but is clearly in direct violation of the plain language of the 2016 Appropriations Act.

The Supreme Court stated in dicta that, “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then...‘judicial inquiry is complete.’”⁸ Put simply, when Congress has directly spoken to the precise question at issue, the agency must give effect to the unambiguously expressed intent of Congress.⁹ The statute states that HUD shall “add to the program 100 public housing agencies that are designated as high performing agencies under the Public Housing Assessment System (PHAS) or the Section Eight Management Assessment Program (SEMAP).”¹⁰ There is no ambiguity in the language Congress chose to implement this requirement, and, therefore, HUD is required to give effect to Congress’ intent that high performing agencies under either PHAS “or” SEMAP be eligible to participate in the MTW expansion.

⁸ Connection Nat’l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (internal citations omitted).

⁹ See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

¹⁰ HR 2029

While we understand that HUD is required to use PHAS or SEMAP scores as a measure of high performance per the 2016 Appropriations Act, it is our view that these systems are inefficient and often penalize housing authorities based on criteria outside of their control – such as budget appropriations. Cuts to operating and capital funding have severely impacted the ability of housing authorities to adequately maintain their public housing stock, which has negatively impacted PHAS scores. Additionally, many housing authorities have a mix of housing that leans heavily toward public housing or Section 8 and should not be excluded from MTW for not being a high performing what may amount to a small portion of their overall housing programs. Given the unambiguously expressed intent of Congress, as well as the problematic status of PHAS and SEMAP, HUD should be using the broadest possible definition of eligibility by allowing housing authorities to apply for MTW that are designated as high performing under either system, not both.

Funding, Single Fund Budget, and Financial Reporting

1) Is a 90 percent HAP budget utilization requirement the appropriate amount?

No. MTW agencies added through the Congressionally-mandated expansion should not be obligated to achieve a 90 percent HAP budget utilization requirement as such obligation marks an unauthorized expansion of administrative authority, is arbitrary and capricious, and exceeds the scope of Congressional delegation to HUD. With respect to funding, in its authorizing statute, Congress simply stated that, “No public housing agency granted [MTW] designation through this section shall receive more funding under sections 8 or 9 of the United States Housing Act of 1937 than it otherwise would have received absent this designation.”¹¹ Where Congress has not specifically spoken through the 2016 Appropriations Act, such agencies added through the MTW expansion are to be treated no differently than the other “Moving to Work agencies authorized under section 204, title II, of the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321).”¹² Because existing MTW agencies are not subject to such a requirement, MTW agencies added through the expansion ought not to be either. Furthermore, absent clear Congressional intent, HUD has offered no justification, research, or other support for its proposed 90 percent HAP budget utilization requirement, making such requirement both arbitrary and capricious. This provision would reduce the funding flexibility provided by the MTW block grant, which is a hallmark of the program, and is particularly desirable to non-MTW agencies who are considering applying to the MTW program. To the extent that HUD seeks to impose these type of restrictions anyway, HUD should instead base the requirement on voucher utilization, rather than budget utilization which would disproportionately affect and may even

¹¹ HR 2029

¹² HR 2029

disincentivize housing authorities from adopting innovative, cost-saving rent reform policies. The ability of PHAs under MTW to choose the forms of housing assistance and related services is fundamental to MTW and for HUD to set arbitrary standards such as this would frustrate Congressional intent.

- 2) *What sanctions or restrictions should HUD consider using should an MTW agency continue to fail to meet the budget utilization requirement?*

HUD should not impose sanctions or restrictions because a 90% HAP budget utilization requirement is not appropriate. MTW agencies use funding fungibility to further their local goals and respond to local rental housing market demands. Such a requirement would prohibit or discourage MTW agencies from developing bold and innovative activities that respond to these local needs and deter agencies from looking for experimental ways to meet MTW obligations like encouraging family self-sufficiency and increasing housing choice. Incoming MTW PHAs should be given the same full funding fungibility that exists for current MTW agencies.

- 3) *Are there other methods for calculating HCV funding that HUD should consider?*

Any method for calculating HCV funding in MTW ought to provide the PHA with a predictable, reliable, and stable funding stream while allowing and not penalizing MTWs which innovate and explore new approaches to providing housing assistance. We would welcome the opportunity to discuss options with you further.

- 4) *Are there other factors HUD should consider in the calculation of funding?*

HUD should consider that the use of MTW flexibilities could decrease or increase the per-unit cost. While decreases in per-unit cost could allow more families to be served, HUD should tread lightly on making downward adjustments to counteract fewer units being leased, which may well reflect local markets and other local goals, such as mobility initiatives, rather than MTW flexibilities related to combining funds.

- 5) *Are there any comments or clarifications needed in relation to funding, the MTW Block Grant, or financial reporting?*

The Notice indicates that no funds provided in the HCV renewal formula may be used to fund “a total number or unit months under lease which exceeds the MTW agency’s authorized level of unit months available under the MTW agency’s ACC, in accordance with the funding formula used for non-MTW agencies.” However, once admitted into the expansion as a new MTW agency, these housing authorities ought to achieve full MTW status. Where Congress has not specifically spoken through the 2016 Appropriations Act, agencies added through the MTW expansion are to be treated no differently than the other “Moving to Work agencies authorized under section 204, title II, of the Department of Veterans Affairs and Housing and Urban

Development and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321).”¹³ This means that, like their existing MTW agency counterparts, newly-added MTW agencies ought to also have the flexibility to exceed current authorized ACC levels, provided the MTW agency stays within their funding allocations. Rather than eliminating the flexibility to exceed ACC levels on a per unit basis, HUD should set a funding cap that provides no more than 100% of authorized funding. This would ensure that HUD is not obligated to provide excess funding to agencies, while allowing PHAs who implement cost-savings or other efficiency measures the flexibility to serve more families.

Evaluation

We support HUD’s efforts to document and share the full impact of MTW improvements. MTW agencies throughout the country are making significant changes, both large and small, throughout their communities and to the benefit of their residents. We understand that HUD will be taking on much of these data collection responsibilities. To the extent that new MTW agencies will be expected to significantly increase their **existing data collection practices**, we encourage HUD to provide this information **clearly** to the agencies at the **time of application or sooner** and to provide agencies with the appropriate supports to implement relevant data collection practices.

Furthermore, we strongly urge HUD to utilize the experience of the Research Advisory Committee members and those in the field, including housing policy experts and Congressional staff involved in MTW expansion, to revisit and reevaluate many of the questions below regarding the evaluation process. Before HUD can accurately determine what data it should be capturing, HUD must first clarify the scope and purpose of its evaluation, both collectively with respect to all MTW agencies and with respect to each individual cohort. For example, while HUD hopes to study whether the program has been successful in the three statutory objectives, HUD, in consultation with the Research Advisory Committee, PHAs, and other stakeholders, must determine how it plans to **define success and effectiveness**. In addition, HUD should consult with its Research Advisory Committee and local PHAs, especially existing MTW agencies, to determine what already-obtained metrics can be studied nationally and which metrics may need to be controlled for variations in local conditions before any statistically significant findings may be reached. Also, because information collection practices may not be consistent between PHAs, to the extent HUD plans to rely on self-reported data, HUD will need to control for these variations, and others, as well.

Ultimately, we would encourage HUD to reach out to existing MTW agencies to determine what information MTW agencies have found beneficial in evaluating the success of their initiatives, especially as it relates to the cohort-specific evaluations. We suggest holding at least one

¹³ HR 2029

additional day-long session with the Research Advisory Committee, PHAs including current MTW agencies, policy experts, and Congressional staff to further refine the goals and metrics of the cohort-specific evaluations.

CLPHA and Reno & Cavanaugh would be happy to work with HUD and facilitate dialogue with PHAs, both those that are presently MTW and those that are considering applying to become MTW, regarding the evaluation component.

- 1) Is there any information not captured in HUD administrative data systems that would provide informative data points or performance metrics for evaluating the MTW demonstration?*

We encourage HUD to consider tracking the following data points in a centralized manner and recognize that much of this data may already be available for HUD to use in its evaluation:

- The number of MTW families that successfully graduate or otherwise move out of federally-assisted housing, thereby achieving self-sufficiency (as the term self-sufficiency is defined at the local level).
- The number of units preserved.
- Changes in the number of households served over time.
- Changes in household income, households receiving supportive services, housing stability, and other related factors.
- Units preserved.
- Leverage ratios with respect to federal dollars expended and long-term cost savings realized.
- Leverage ratios with respect to federal dollars expended on development and private capital raised.

We would encourage HUD to consider the above factors as they may relate to the agency's operations pre- and post-MTW. Such data points ought to only be evaluated in light of each agency's individual local circumstances. With that said, to the extent HUD wishes to extrapolate this data for use on a national scale, we would encourage HUD to control for the wide variety of local factors and influences that, for reasons completely unrelated to the MTW program, may affect the quality or the representative nature of the data being reported.

- 2) What are measures of activities that "reduce cost and achieve greater cost effectiveness in Federal expenditures" that can apply to and are either being reported in existing HUD systems or can be reported by every MTW agency?*

Some factors that HUD may find helpful to consider when evaluating cost reductions and effectiveness may include:

- Number of families served.
- Per unit cost of providing housing and related services.
- Changes in administrative costs and overhead expenses.
- Types of services being offered.
- Cost efficiencies at the program level.
- Reinvestment of cost-savings into improved resident services, development/increased housing options, or agency operations.

Again, we would encourage HUD to consider the above factors as they may relate to the agency's operations pre- and post-MTW. Such data points ought to only be evaluated in light of each agency's individual local goals, market conditions, and community priorities. With that said, to the extent HUD wishes to extrapolate this data for use on a national scale, we would encourage HUD to control for the wide variety of local factors and influences that, for reasons completely unrelated to the MTW program, may affect the quality or the representative nature of the data being reported.

- 3) *What are measures of activities that “give incentives to families with children where the head of household is working, seeking work, or is preparing for work by participating in job training, educational programs, or programs that assist people to obtain employment and become economically self-sufficient” that can apply to and are either being reported in existing HUD systems or can be reported by every MTW agency?*

In addition to metrics measuring increases in work and income, HUD should consider less traditional measures of self-sufficiency including educational attainment, increased savings or assets, and homeownership.

- 4) *Should HUD standardize a definition of “self-sufficient”? If so, what elements of self-sufficiency should be included in HUD's definition?*

HUD should not standardize a definition of self-sufficient and should instead rely upon local definitions of self-sufficiency as each jurisdiction may choose to define the term. Self-sufficiency and the qualities that may make someone “self-sufficient” ought to be determined at the local level in light of local conditions.

- 5) *What are measures of MTW activities that “increase housing choices for low-income families” that can apply to and are either being reported in existing HUD systems or can be reported by every MTW agency?*

Flexibilities authorized under the existing MTW program have allowed agencies to preserve and revitalize their public housing stock, and provide increased housing options for residents in three substantial ways: rehabilitation of existing housing, preservation in emerging opportunity neighborhoods, and providing new housing options in existing opportunity neighborhoods. We

would encourage HUD to use these metrics to evaluate the statutory goal of “*increase housing choices for low-income families.*”

First, housing authorities have used MTW flexibility to improve existing stock in need of rehabilitation. In Atlanta, the housing authority undertook a portfolio transformation by recapitalizing and converting its public housing stock to mixed-income, mixed-financed developments. Financial flexibilities under MTW, such as the single agency fund and the exemption to HUD’s Total Development Cost limits allowed the Atlanta Housing Authority take an active “developer” role in the preservation and improvement of its housing stock.

Second, housing authorities have used MTW flexibility to preserve affordable units in emerging opportunity neighborhoods, such as King County Housing Authority in Washington. HUD has increasingly focused on providing affordable housing in areas of opportunity. However, many public housing units are already located in, or adjacent to, potential opportunity neighborhoods. In these cases, agencies have used their MTW authority to preserve existing housing in neighborhoods they may have been priced out of just a few years later.

And finally, housing authorities have used MTW flexibility to create new housing options in existing opportunity neighborhoods where affordable housing has been historically absent. Many housing authorities have developed mobility strategies to assist residents in moving to higher opportunity neighborhoods. The San Diego Housing Commission created the Choice Communities program aimed at helping move families into more affluent communities with better employment and education opportunities. The housing authority used its MTW authority to create more flexible rent limits, increase payment standards, and offer no-interest loans to assist families in paying higher security deposits. In Baltimore, low-income residents are given mobility counseling to support their transitions into new communities.

In each of the examples listed above, the housing authorities were able to tailor their policies according to local housing needs and set goals based on their local conditions and markets. Again, we would encourage HUD to consider the above factors as they may relate to the agency’s operations pre- and post-MTW. Such data points ought to only be evaluated in light of each agency’s individual local circumstances. With that said, to the extent HUD wishes to extrapolate this data for use on a national scale, we would encourage HUD to control for the wide variety of local factors and influences that, for reasons completely unrelated to the MTW program, may affect the quality or the representative nature of the data being reported.

- 6) *What is the best way to capture and report exit data on families exiting the Public Housing, HCV, and local non-traditional housing programs? What are the appropriate exit reasons to capture?*

HUD should revise existing data forms to include questions that capture and report exit data.

- 7) *Is there any information not captured in HUD administrative data systems that would be informative data points or performance metrics in terms of evaluating the MTW demonstration?*

See prior answer to Question 1 in this Evaluation section.

- 8) *In the list of performance metrics provided above, should any be clarified or removed?*

The list of potential performance metrics appears sufficient as is. Again, we would encourage HUD to only consider the list of performance metrics and related factors as they may relate to the agency's operations pre- and post-MTW. Such data points ought to only be evaluated in light of each agency's individual local circumstances. With that said, to the extent HUD wishes to extrapolate this data for use on a national scale, we would encourage HUD to control for the wide variety of local factors and influences that, for reasons completely unrelated to the MTW program, may affect the quality or the representative nature of the data being reported.

- 9) *Are there any alternative or additional metrics that would enhance performance evaluation on the MTW demonstration?*

There has been minimal research on MTW and its impact on partnerships. However, MTW housing authorities are in a unique position to leverage partnerships with local service providers, as well as develop partnerships across sectors. Many MTW housing authorities are already engaging in these innovative collaborations, including partnering with education, health, and financial institutions to provide more housing choices and better opportunities and outcomes for their residents. HUD should consider metrics that evaluate an MTW PHA's ability to form and sustain innovative partnerships.

HUD should also consider metrics for evaluating the impact of MTW on health and education outcomes for residents. Existing MTW housing authorities have been deeply engaged in building partnerships between housing and school systems to improve educational outcomes for children living in public housing. In Tacoma, WA, the housing authority created the McCarver School Initiative. Through the initiative, THA offers homeless or at-risk families housing vouchers with annual rent increases over a five year period, until the families pay 80 percent of the city's fair housing market rent. Parents in the program commit to keeping their children enrolled at McCarver Elementary School, as well as completing their own education and work-related goals as a condition of receiving their housing voucher. Housing authorities have also done innovative work around health outcomes for residents, particularly for seniors aging in place. In Cambridge Massachusetts, the housing authority used its MTW funding flexibility to subsidize housing and services costs in an assisted-living facility, in combination with funding from the Massachusetts Medicaid Group Adult Foster Care Program and PACE (Program of All-Inclusive Care for the Elderly).

Program Administration and Oversight

- 1) *Is the MTW Supplement to the Annual Plan, as described, an appropriate mechanism for HUD to track MTW agencies' activities and use of waivers? Are there specific elements that should be included in the MTW Supplement to the Annual Plan?*

No. HUD ought to hold existing MTW agencies and newly-added MTW agencies to the same standards. This means that both existing and newly-added MTW agencies should only be required to submit an Annual MTW Plan and an Annual MTW Report. Except where Congress has expressly indicated otherwise, the Congressionally-mandated MTW expansion is authorized pursuant to section 204, title II, of the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321) by “adding to the program 100 public housing agencies”.¹⁴ Agencies designated as MTW under the expansion should be held to the same standards as all other MTW agencies. Per HUD’s Standard Agreement, for MTW agencies with “ten percent or more of its housing stock in MTW, the Agency [may only be required to] prepare and submit an Annual MTW Plan...in lieu of the Five (5) year and Annual Plans required by Section 5A of the 1937 Act” in keeping with the current Standard Agreement requirements.¹⁵ The standard Annual- and Five-year PHA Plans required of the majority of non-MTW PHAs are highly technical documents that fail to account for the innovative nature of MTW agencies. Therefore, to the extent the Department seeks to revise the Annual MTW Plan and Annual MTW Report required of current MTW agencies, the Department should work with existing and new MTW agencies to ensure that the Annual MTW Plan is better streamlined, so it can serve as a useful administrative tool for HUD that can easily be understood at the Field Office level and to ensure that such a document also remains useful for the PHAs’ and their local stakeholders.

- 2) *Should MTW agencies with a combined unit total of 550 or less public housing units and Section 8 vouchers be exempt from the requirement to submit the Annual Plan? If so, how should HUD collect information on the activities and waivers implemented over the course of the demonstration?*

Regardless of size, all MTW agencies, whether existing or newly-added, should be exempt from the requirement to submit a PHA Annual and Five-year Plan. In keeping with the existing Standard Agreements for existing MTW agencies, all incoming agencies should be exempt from the standard Annual- and Five-year PHA Plans for the reasons listed in Question 1 above and, instead, should submit an Annual MTW Plan and an MTW Report.

¹⁴ HR 2029

¹⁵ https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10240.pdf

- 3) *Do you have suggestions for how HUD can strengthen the public engagement process to ensure that residents have an opportunity to offer meaningful input in the selection and implementation of MTW activities?*

PHAs selected to participate in the MTW program must already be considered high-performing. Thus, they have documented their ability to conduct extensive engagement with their residents and the public during their planning processes and HUD does not need to take any additional steps in this regard. Furthermore, we support the comments submitted by the Steering Committee of the thirty-nine current MTW agencies, which call for HUD to improve the format of the MTW Annual Plan and MTW Annual Report to increase accessibility and understanding by residents, HCV participants, and other interested stakeholders. Simplifying the Form 50900 will be an essential part of that improvement.

- 4) *How could HUD measure public housing and voucher program performance for MTW agencies and incorporate those measures into PHAS and SEMAP?*

The Annual MTW Plan and Annual MTW Reports already require MTW agencies to provide the information necessary for HUD to assess the Agency's activities, in both regular operations and in activities authorized by MTW. HUD should not require agencies to also provide this duplicative information through PHAS or SEMAP as such efforts are unnecessarily burdensome.

- 5) *Are there MTW-specific indicators that should be included in a revised PHAS and SEMAP assessment?*

No. As indicated above, the Annual MTW Plan and Annual MTW Reports already require MTW agencies to provide the information necessary for residents, the public, and HUD to assess the Agency's activities, in both regular operations and in activities authorized by MTW.

Given the limitations of PHAS and SEMAP, especially with respect to applying them to MTW agencies, we strongly encourage HUD to consider an accreditation model as an alternative. As applied to hospitals and other sectors, accreditation provides an effective and appropriate method of peer review that assures industry standards and expertise are used to evaluate internal operations. Fellow practitioners have the unique and special experience and insights required to evaluate similarly-situated organizations, ensuring that they meet meaningful performance standards that measure outcomes, not process, and offering best practices and advice on how to improve performance. Accreditation would not replace HUD oversight of MTW agency compliance, but would supplement it in order to advance the congressional goals of the program. We particularly note that the Affordable Housing Accreditation Board (AHAB) has already been created as a 501(c)(3) corporation by the public housing industry and is in the process of developing accreditation standards for PHAs. AHAB has offered to work with the MTW agencies and HUD to explore this initiative and we urge HUD to join that effort.

- 6) *Should an MTW agency retain its high-performer status in PHAS or SEMAP until MTW specific indicators are developed?*

Yes. Furthermore, like their existing MTW agency counterparts, new MTW expansion agencies should not be required to receive a score through either PHAS or SEMAP. Unless the MTW agency defaults or is otherwise in noncompliance with their MTW Agreement, the agency should retain its high-performer status in PHAS and/or SEMAP throughout the duration of its MTW participation.

- 7) *What are the specific areas of risk that should be considered for MTW agencies?*

Through successful integration of the newly-added MTW agencies into the existing MTW program, there should be no increased areas of risk for HUD to consider. These MTW agencies are high performers who have successfully applied for and been accepted by HUD into MTW based on their documented experience and capacity to meet program requirements and provide high-quality housing in their communities.

- 8) *Are there additional areas that should be monitored for MTW agencies?*

No. The monitoring that HUD already performs of MTW agencies is sufficient. Please refer to our response in question 7, above, with respect to the fact that these MTW agencies will have already successfully applied for and been accepted by HUD into MTW based on their documented experience and capacity to meet program requirements and provide high-quality housing in their communities.

Regionalization

- 1) *How should “adjacent” be defined for the purposes of identifying which PHAs should be allowed to be part of an MTW agency’s regional agency designation? Should regional MTW agencies extend across state borders?*

Instead of prescribing rigid rules for when a PHA may or may not be “adjacent,” HUD should allow PHAs to self-define the regional housing market in which they operate and who their other PHA partners are. This definition is unique to local circumstances, and whether a PHA is considered “adjacent” for purposes of an MTW agency’s regional agency designation depends as much on whether they are addressing common housing issues as on geography. Furthermore, regional MTW agencies should be allowed to extend across state borders if such expansion is the best way to address regional housing issues faced by the PHAs involved and consistent with each State’s individual enabling act.

- 2) *What flexibilities should the regional MTW agency be able to administer on behalf of its regional partners? Should the partner PHAs have full flexibility in the use of funds?*

Regional MTW agencies should have any and all flexibilities that the participating agencies deem appropriate among themselves consistent with State and local law. The participating PHAs should be permitted to develop their agreement between the existing MTW agency and its partner PHAs describing their relationship and how obligations and responsibilities are to be allocated. If the existing MTW agency decides that it wishes to grant partner PHAs full flexibility in the use of funds, HUD should honor this.

- 3) What form of governance structure, if any, should be formed between the regional MTW agency and its partner PHAs?*

Rather than prescribing one specific form of authorized governance structure or a set of approved governance structures, HUD should allow PHAs to determine the appropriate regional governance structure that would best meet their needs and achieve the proposed regionalization goals. As long as the proposed governance structure is legally permissible under the relevant State enabling acts, HUD should leave it to PHAs to determine the governance structure that would work best to achieve their individual, specific needs. MTW is intended to be a laboratory for addressing critical issues in public housing and Section 8 that have not been adequately addressed by existing HUD programs and rules. The manner in which PHAs choose to provide housing assistance and related services across jurisdictions is a critical matter and HUD should defer to these high performing MTW agencies to develop a range of models to explore it.

- 4) What form should the agreement (i.e., contract, memorandum of understanding, partnership agreement, etc.) take between the regional MTW agency and its PHA partners?*

A regional MTW agency and its PHA partners should be permitted to enter into whatever form of agreement makes the most sense for them to address their regional housing, which may be any of the forms of agreement above or an Intergovernmental Agreement or other similar document. Such an agreement would outline the terms of regional participation, the shared goals of the agencies, and how they will meet those goals.

- 5) Should the criteria for regionalization be the same for current MTW agencies and PHAs that join under the expansion?*

With the few exceptions where Congress has specifically indicated otherwise, all MTW agencies, whether admitted prior to the 2016 MTW Expansion Statute or newly admitted under the 2016 MTW Expansion Statute should be subject to the same set of requirements. Therefore, yes, the criteria for regionalization should be the same whether applied for by a current MTW agency or a PHA that joins under the expansion and, as stated above, those criteria should provide the needed flexibility to adapt to local circumstances.

- 6) *Should HUD issue a revised Public Housing and Voucher Consortia Rule to further the regionalization concept?*

No. We strongly support allowing regionalization and encourage HUD to revisit the Consortia Rule and take other steps to promote voluntary regionalization. However, the Public Housing and Voucher Consortia Rule and the regionalization concept authorized by Congress for MTW agencies should be implemented separately.

MTW Agencies Admitted Prior to 2016 MTW Expansion Statute

- 1) *Is it appropriate to permit existing MTW agencies to come under the framework of this Operations Notice and associated MTW agreement?*

No. The Expansion Statute does not authorize HUD to create an entirely new MTW program through the Operations Notice, but, instead, authorizes HUD to add an additional 100 agencies to the existing MTW program authorized under section 204, title II, of the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321). Therefore, no MTW agencies, existing or new, should be required to come under this Operations Notice. Instead, new agencies should be offered an MTW Agreement consistent with the existing MTW Agreements and the 2016 Appropriations Act authorizing the expansion.

- 2) *Should these existing PHAs be subject to any different or supplemental requirements?*

With the few exceptions where Congress has specifically indicated otherwise, all MTW agencies, whether admitted prior to the 2016 MTW Expansion Statute or newly admitted under the 2016 MTW Expansion Statute should be subject to the same set of requirements.

Thank you for the opportunity to comment on the Notice. If you have any questions, please do not hesitate to contact us.

Sincerely,



Sunia Zatterman
Executive Director
CLPHA



Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC