December 9, 2019

SUBMITTED ELECTRONICALLY

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

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments on the Department of Housing and Urban Development's ("HUD") 30-day notice of proposed information collection regarding the Public Housing Annual Contributions Contract for Capital and Operating Grant Funds (the "2019 PRA Notice").

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households.

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

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

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

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

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

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

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

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

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

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

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

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

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

HUD's continued efforts to use the PRA process rather than notice and comment rulemaking violates the APA. The substantive changes proposed in the 2019 ACC create obligations, grant HUD new and expanded rights, produce significant effects on private interests, and establish new methods for determining certain PHA obligations, all of which trigger APA notice and comment rulemaking.[1] HUD did not publish these substantive changes in the Federal Register for formal notice and comment rulemaking in satisfaction of the requirements of Section 552 of the APA. As such, any implementation of the substantive changes contained in the 2019 ACC is unlawful and "not in accordance with law."[2]

Furthermore, it is questionable why HUD would avail itself of the PRA process in the first place. The PRA process is used to "minimize the paperwork burden … resulting from the collection of information by or for the Federal Government" and to "maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government."[3] In the 2018 PRA Notice, HUD's stated goal was to provide "PHAs with sufficient notice of changes to the New ACC." In the 2019 PRA Notice, HUD's goal was again to "provide[] PHAs with notice of revisions to the current ACC." HUD further submitted that the 2019 PRA Notice was "in

[1] 5 U.S.C. § 553(a)(3)(A); Steinhorst Assocs. v. Preston, 572 F. Supp. 2d 112 (D.D.C. 2008). The D.C. District court continued in Steinhorst to differentiate a legislative rule from and interpretive rule: On the other hand, a legislative rule "'does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy'" (internal citations omitted). A legislative rule is one that "grant(s) rights, impose(s) obligation(s) or produce(s) significant effects on private interests.'" *Id*. "Agency actions (that) establish new methods for determining the obligations of the regulated parties….are subject to notice and comment rulemaking." Committee for Fairness, 791 F. Supp. at 895 (citing Battrton v. Marshall, 648 F.2d 694, 706 (D.C. Cir. 1980); Cabais v. Egger, 690 F.2d 234, 238 (D.C. Cir. 1982); Nat'l Senior Citizens Law Center, Inc. v. Legal Servs. Corp., 581 F. Supp. 1362, 1369 (D.D.C. 1984).

[2] 5 U.S.C. § 706.

[3] 44 U.S.C. § 3501.

response to public comments received." Clearly, neither notice had anything to do with minimizing paperwork burden or maximizing information utility.

It seems that HUD is attempting to use the PRA process to accomplish a pseudo-notice-and-comment process without triggering the APA standard of review. Indeed, HUD's ever-evolving and often contradictory actions in this ACC process arguably rise to the level of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of the APA:[4]

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

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

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

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

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

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

In 2018, HUD purported to bind PHAs to the amended ACC vis-à-vis the drawing down of Capital Funds. There was no mutual agreement signed in writing by both parties. HUD had no authority to bind PHAs in such a manner. Further, such "contract by drawing funds" ignored the fact that

[4] 5 U.S.C. § 706.

PHAs are local government agencies bound by established state and local laws governing, among other things, authorization to contract and that such contracts required review and approval by the PHA board consistent with internal governance and policy requirements.

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

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

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

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

Under HUD regulations, the "Annual contributions contract (ACC) is a contract … whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of its public housing projects."[5] In the 2018 PRA Notice, HUD purported to rechristen the ACC an "annual grant agreement for the HA's public housing program." In the 2019 PRA Notice, HUD retitled the ACC as "Annual Contributions Terms and Conditions for the Public Housing Program." These attempts by HUD to change the contractual nature of the ACC necessarily fail absent notice and comment rulemaking to change the underlying regulatory definition of the ACC under 24 C.F.R. § 990.115.

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

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

Section 10 in the 2018 ACC included language that gave HUD broad authority to reduce, offset, terminate, recapture, withhold, suspend, reduce, or take any other action it wished regarding PHA grant funding. In addition to the APA implications of HUD bestowing upon itself through a PRA notice such broad authority, CLPHA and Reno & Cavanaugh noted in our comments to the 2018

[5] 24 C.F.R. § 990.115.

ACC that this Section 10 was a clear attempt by HUD to foreclose future breach of contract litigation in the United States Court of Federal Claims. While HUD eliminated this language in the 2019 ACC, it is significant that HUD noted in the 2019 PRA Notice that:

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

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

This is yet another attempt by HUD to foreclose future breach of contract litigation in the United States Court of Federal Claims. Under the Tucker Act, the United States Court of Federal Claims has exclusive jurisdiction to adjudicate breach of contract claims against the United States so long as there is a "substantive right for money damages against the United States."[6] Outside of Tucker Act jurisdiction, HUD has sovereign immunity against breach of contract claims. By explicitly providing that the ACC does not contemplate money damages, HUD is attempting to foreclose PHAs from challenging any action by HUD that breaches the terms of the ACC.

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

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

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

Sincerely,

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

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Attachment 1

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