

December 29, 2020

Office of General Counsel
Regulations Division, Room 10276
U.S. Department of Housing and Urban Development
451 7th St SW, Room 4100
Washington, DC 20410-0500

Re: Housing Opportunity Through Modernization Act of 2016 – Housing Choice
Voucher (HCV) and Project-Based Voucher Implementation; Additional
Streamlining Changes
Docket No. FR-6092-P-01

To whom it may concern:

Thank you for the opportunity to provide comments to the proposed rule regarding the Housing Opportunity Through Modernization Act of 2016 – Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes, as set forth in the Federal Register, Docket No. FR-6092-01. We the undersigned national associations represent for-profit and non-profit owners, developers, managers, lenders and housing agencies involved in providing affordable rental and cooperative housing to millions of American families.

Our associations and members are committed to the availability and affordability of housing nationwide and applaud the Department of Housing and Urban Development (HUD) for publishing this proposed rule to implement important HOTMA provisions and additional streamlining changes.

The country is facing a nationwide housing affordability challenge and a historic demand for new rental housing at all price points. Beginning in the mid-2000s, the nation experienced the greatest renter wave in its history, as the number of households who rent rose by more than 7 million.¹ The breadth and magnitude of this affordability challenge makes tools such as Section 8 all the more important.

Section 8, including the tenant-based Housing Choice Voucher and Project-Based Voucher programs covered by this proposed rule, is a powerful tool to extend affordability and increase housing opportunities for low-income households. We support the Department's efforts to streamline and strengthen these programs so as to eliminate unnecessary administrative burdens and maximize the programs' effectiveness. We offer the following comments to those ends:

1. Davis Bacon requirements

In recent years, the uncertainty of Davis Bacon wage requirements and the seemingly haphazard approach to their application has increased unnecessary obstacles and delays in the preservation of affordable housing and the expansion of housing opportunities. The changes that were made to Davis Bacon applicability in PBV projects in 2014 lacked clarity, were difficult to enforce, and failed to adhere to the plain language of the underlying statutory authority, all of which led to difficulties in implementation and an unnecessary waste of HUD and private sector resources in seeking greater clarity and direction. The proposed rule includes several provisions that affect the

¹ "The State of the Nation's Housing 2018," *Joint Center for Housing Studies for Harvard University*, p. 13.

applicability of Davis Bacon wage rate requirements. In general, we support these changes and offer a few suggestions for strengthening these rules further. The Department's approach to Davis Bacon requirements in this proposed rule is rational, balanced and well thought out.

In particular, we applaud the Department for reverting back to the long-standing, pre-2014 PBV requirements for Davis Bacon. The effect of the proposed rule is to limit Davis Bacon applicability to projects in which an Agreement to enter into a HAP Contract (AHAP) is executed and excludes existing housing from Davis Bacon applicability. We support this change because it adds necessary clarity and aligns with both the express language and the spirit of the 1937 Act. Several revisions to the regulations implement this change, as discussed in Section 44 of the preamble to the proposed rule.

- The cross reference to Labor Standards in 24 CFR 983.4 is revised to reinsert the statutory reference to the Agreement, "pertaining to labor standards applicable to an Agreement," which had been removed in 2014.
- The owner certification required by 24 CFR 983.210 is revised to remove paragraph (j), which paragraph applied Davis Bacon to repair work done on existing housing that was deemed to be development activity.
- 24 CFR 983.153(c), "Development requirements," is revised to clarify that Davis Bacon applies only for new construction or rehabilitation projects, when an AHAP is entered into. Existing housing is excluded from this requirement. The revisions to this section also clarify that labor standards do not apply if the PHA does not require an AHAP, pursuant to other revised sections in conformance with HOTMA.

These are welcome and much-needed changes that allow owners of existing housing to engage in rehabilitation of Section 8 assisted housing without triggering Davis Bacon requirements. This has previously been HUD's long-standing practice, as the preamble to the proposed rule acknowledges.

The proposed rule also acknowledges that the definition of "existing housing," requires greater specificity. The proposed rule revises the definition of existing housing in 24 CFR 983.3 to account for the revised inspection requirements set forth in 24 CFR 983.103(b) and (c), and clarify that only deficiencies requiring minor repairs that can be expected to be completed in 48 hours may exist. We support the Department's attempt to add specificity to this definition and offer the following suggestions to improve the definition:

- The definition's reliance on the proposal selection date is impractical, and should be revised to reference the HAP execution date. In practice, determining whether a project substantially complies with Housing Quality Standards (HQS) by this standard requires an HQS inspection, and the HQS inspection occurs prior to the HAP execution, not the proposal selection date. There can be a significant time gap between proposal selection and HAP execution. The proper time period to inspect should be at or just before HAP execution.
- The 48 hours for deficiency correction is clear and a facially reasonable standard, but may be impractical for large projects, or in situations such as a national emergency or pandemic. There should be an additional provision that provides

PHAs with discretion to create an additional alternative standard tied to a reasonable cost of repair for each unit, which could be set forth in the PHA's Section 8 Administrative Plan. For example, if the necessary repairs could be accomplished either in 48 hours or at an expense that the PHA determines is minimal, the unit could be determined to be in substantial compliance with HQS.

- The standard should not be revised, as mentioned in Question 13 of the preamble to the proposed rule, to exclude any units in which planned rehabilitation work over the next year exceeds \$1,000 per unit. This is an excessively low threshold for potential maintenance in a year. For example, in many parts of the country, it can easily cost over \$1,000 to paint an apartment. The better standard is if the apartment is occupied or available for occupancy. To do otherwise would create a disincentive for maintenance.

The proposed regulations, at 24 CFR 983.154, also implement section 106(a)(4) of HOTMA, giving PHAs discretion to enter into a HAP contract for units that are under construction or have been newly constructed without first entering into an AHAP. The regulations specify that Davis Bacon requirements do not apply in such scenario. Recognizing that Davis Bacon requirements do not apply in such circumstances is a reasonable and well-thought out policy. From a practical and fair housing perspective, such new developments are being created without the guarantee or the underwriting benefits that come from PBV assistance. Most often, in projects that will receive PBV assistance, the project's development depends on the provision of PBV assistance in order for its financial underwriting to pencil out. In those cases, an AHAP is necessary to assure lenders and investment partners that the PBVs are contractually obligated. In those cases, it is fair to tie additional requirements to the provision of PBVs. But where a project's development does not depend on the provision of PBVs, as few obstacles as possible should be provided to expanding affordability to such properties. These are developments that do not need PBV assistance to be built. These are often the most desirable, best located, most advantageous developments. If a PHA can provide access to its residents to such properties and such communities, this is a great advancement of affordable housing opportunities.

The proposed rule also replaces the 2014 definition of "development" with a new definition of "development activity" in 24 CFR 983.3. This revised definition is still too broad. As the 2014 definition of "development" did, this definition would capture any work that has "a substantial improvement in the quality or kind of equipment and materials." It is unclear what this standard means or why is it applied to this definition. Could this broad definition could be seen to include replacement of obsolete appliances with models using current technologies or making repairs with modern building materials? It's unclear what interest of HUD's this serves. Development activity should be limited to instances of new construction, adaptive reuse or substantial rehabilitation of housing that does substantially comply with HQS.

In sum, the changes in the proposed rule and the additional changes we suggest eliminate unnecessary disincentives to proper maintenance, rehabilitation and upkeep of existing Section 8 assisted housing and remove unnecessary obstacles to the expansion affordable housing opportunities and preservation of existing affordable housing.

2. Environmental Review

The proposed regulations revise environmental review requirements for existing housing at 24 CFR 983.56 (revising regulations formerly set forth at 24 CFR 983.58), in furtherance of HOTMA

Section 106(a)(8). These revisions, while a step in the right direction, do not go far enough to implement Congressional intent. These revisions should adhere to Congress's clear and repeated attempts to exempt existing housing from environmental review when the only federal assistance is housing assistance payments.

As the Department discusses in Section 25 of the preamble to the proposed rule, HOTMA was Congress' second attempt to exempt existing housing from environmental review when the only federal assistance is a HAP contract. It is clear that Congress means to exempt existing housing from environmental review. We applaud HUD for seeking to give meaning to the statutory language by interpreting that PHAs "shall not be required to undertake any environmental review" as taking away the requirement that the PHA ensure that the review has been conducted by HUD or the Responsible Entity. This interpretation is reasonable and consistent with Congress' two attempts to reach this goal.

However, HUD's interpretation of "existing housing" as housing that has previously been subject to an environmental review is strained and unnecessarily burdensome. There is no such limitation in the statutory language. All existing housing should be exempt from environmental review if the HAP contract is the only funding that would otherwise trigger a statutory or regulatory requirement for environmental review. Whether or not such housing previously underwent an environmental review, such housing already exists. Where federal subsidy is used to create housing, such housing is subject to Congressional environmental review requirements. But where such housing already exists, and where there is a market for such housing and where such housing does not require additional federal financing, it should be preserved. It is quite reasonable to say that, as we face an unprecedented affordability challenge across the country, we should eliminate unnecessary barriers to the preservation of affordable housing and allow PBV assistance to be attached to housing without a costly and lengthy environmental review if it otherwise meets the requirements for existing housing.

HUD asks in Question 19 how HUD should ensure that projects that have been formerly federally assisted were subject to an environmental review. We believe this question is off-base. As expressed above, we do not believe HOTMA's statutory exemption should be limited to existing housing that has previously undergone environmental review. However, if HUD continues to impose this standard, HUD should assume that the predecessor stewards of federal resources acted correctly and ensured that any required environmental review was properly conducted.

HUD asks in Question 20 whether it would be administratively burdensome for owners of projects to demonstrate that environmental review was previously conducted. Yes, putting the onus on the project owner or applicant would be administratively burdensome. We believe Congress set forth an easily implementable, bright line standard – existing housing – and all existing housing should be subject to this exemption. If HUD continues to impose the distinction of housing that has been previously federally assisted, it should be a rebuttable presumption that such housing did receive a proper environmental review unless HUD has evidence that the project did not receive environmental review.

HUD asks in Question 21 whether a time limit should be imposed. No, we do not support a time limit. As stated above, if HUD continues to impose the distinction of housing that has been previously federally assisted, it should be a rebuttable presumption that such housing did receive a proper environmental review unless HUD has evidence that the project did not receive environmental review.

HUD asks in Question 22 whether there is an alternative approach that can properly strike the balance between Congress's intent to exempt existing housing from environmental review and Congress's intent that HUD-assisted housing comply with federal environmental review requirements. We believe the appropriate balance is to subject new construction, adaptive reuse and substantial rehabilitation projects to environmental review and exempt existing housing. Where new construction, adaptive reuse and substantial rehabilitation apply, the provision of federal assistance encourages the creation of housing where it does not currently exist. The federal government should ensure that it only incentivizes this new housing generation after properly considering the environmental impacts. However, where a local PHA is attempting to provide housing opportunities for its residents, it should be allowed to utilize all readily available resources.

3. Rent-setting

The proposed rule includes several provisions that affect rent-setting protocols. In general, these revisions help to more closely align PBV practices to the market, incentivize PBV use and strengthen PBVs as a tool to expand housing opportunities. We support the provisions that advance these goals and provide some additional suggestions toward these goals.

a. Rent floor

The proposed rule revises 24 CFR 983.302(c) to allow a PHA at any time during the HAP contract to elect not to reduce rents below the initial rent to owner for the remaining term of the contract. We support this change. However, we urge HUD revise this section further. HUD should remove the restriction against making this election when rents have already fallen below the initial level. It is often not until the rents fall below the initial level that the PHA and the owner realize the negative consequences of this change. HUD should give PHAs this tool to rectify any unintended negative consequences.

Moreover, we urge HUD to go further in this regard. HUD should establish such "floor rents" across the board and prohibit PBV rents from falling below their initial rents. PBV contracts are often used in the development of affordable housing where lenders underwrite loans to the income the PBV contract will provide. Initial underwriting is often very challenging due to limited financial resources for such developments. The lender underwriting often depends on the PBV contract income, and in such cases, a drop in PBV rents is not anticipated. Establishing a floor rent across the board would remove one more potential hurdle from the obstacles to affordable housing development.

b. Automatic annual operating cost adjustment factor (OCAF) increases

The proposed rule revises 24 CFR 983.302 to implement the HOTMA provisions authorizing an owner and PHA to agree to annual OCAF adjustments. We support this streamlining of process that will allow rents to grow at modest, HUD-determined inflation adjustments without additional administrative steps. We also support implementation of the HOTMA provisions that allow the owner to request additional changes up to the statutory maximum if the OCAF is insufficient and that require requested adjustments up to the PHA cap at the time of contract extension. In response to Question 39, we would also support a revision that would allow adjustments up to the statutory maximum without regard to the PHA's cap. These changes will help make PBV projects more nimble and competitive in the rental market.

c. Changes to the payment standard

Proposed changes to 24 CFR 982.503 would grant PHAs greater discretion to establish higher exception standards without HUD approval. We support this change. In response to Question 7, we believe that HUD should provide greater flexibility to PHAs to establish exception payment standards without HUD approval in order to reduce administrative burden and allow the PHA to respond more quickly to rapidly changing rental markets. HUD should allow PHAs to set even higher limits on exception payment standards and allow exception payment standards for individual projects rather than require PHAs to apply exception payment standards to every project in the same zip code. This increases the PHA's nimbleness in areas of opportunity where projects within the same zip code can vary greatly in quality and access to services. Since PHAs must manage their own budget authority, they are already limited in their rent setting ability. HUD should remove as many limitations as possible on the PHA's ability to respond to its rental market and provide housing opportunities for its residents.

4. Eliminating unnecessary administrative burdens and delays

In addition to the comments above, we voice our support to the other proposed regulations aimed at reducing unnecessary administrative burdens. The proposed rule contained several additional regulations advancing this goal, some of which had been implemented in previous HOTMA notices, but also some new proposals. We encourage HUD to take even further steps to increase flexibility and decrease the administrative steps and HUD approvals required with respect to these measures. Some examples of such measures include:

- Increasing flexibility in initial housing quality inspections;
- Codifying requirements for PHAs adding PBV units to a HAP contract without additional competition;
- Allowing owners to maintain waiting lists for their properties rather than requiring the PHAs to refer families to the owner (24 CFR 983.253(c)); and
- Allowing a PHA to request a project-specific utility allowance that more closely reflects that project's actual costs rather than use the same utility allowance for all projects (24 CFR 983.301)

In response to Question 42, we would also support further revisions allowing transfer of assistance from one PBV contract to another. The project based rental assistance program (PBRA) currently permits moving subsidy under HUD Notice H-2015-03, and has been highly successful, preserving scarce rental subsidy resources while locating contracts in areas that are more cost effective and/or provide greater opportunities for residents. There is no administrative or program reason why one Section 8 project based rent subsidy should have this ability and another does not.

Any such transfer would be a voluntary agreement between the PHA and the project owner, we believe minimal parameters should restrict this right. As for standards HUD should employ, HUD should look to general principals in Notice 2015-03 but should vastly simplify the process. We understand that "average" processing time under that Notice is 12 months. This is simply too long and too great a strain on resources to process for a year. The basic principles of cost containment, protection of current residents and expansion of affordable housing should be preserved but detailed complexity should be eliminated. HUD has capable housing partners in local PHAs and the PHA should be allowed to agree to such transfer if it believes that the transfer would be in the

best interests of the PHA, its residents or the community. The developer, owner or PHA should be obligated to articulate a reasoned basis how the transfer will benefit the new community and provide decent, safe, sanitary housing. The plan should also address how any existing residents that may be effected are protected by moving with the PBV at no out of pocket cost or able to obtain replacement rental subsidy.

Finally, we note that Section 112 of HOTMA expanded the permissible uses of voucher payments to assist manufactured homeowners paying rent on the space in which the manufactured home is sited to also include other housing expenses, including mortgage, insurance, and property tax payments on the home. We call on HUD to include in the final rule a requirement that PHAs, upon a bona fide request from any party in the local community, make available this expanded use option. Failure to do so undermines the basic purpose of the statutory provision to create this new voucher use option.

Thank you for the opportunity to comment on this proposed rule. We applaud the Departments efforts to reduce administrative burdens and remove obstacles to the development of affordable housing. We believe such changes help align the Section 8 programs with market practices, making them more effective and more powerful tools for expanding housing opportunities. Please feel free to contact Cindy Chetti, the National Multifamily Housing Council's Senior Vice President of Government Affairs, at 202-974-2300, should you have any questions.

Sincerely,

Council for Affordable and Rural Housing
Institute of Real Estate Management
Manufactured Housing Institute
National Apartment Association
National Association of Home Builders
National Leased Housing Association
National Multifamily Housing Council