February 25, 2019

SUBMITTED ELECTRONICALLY

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

Re: 60-Day Notice of Proposed Information Collection: Comment Request: Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds [FR-7006-N-15]

To Whom It May Concern:

On behalf of the National Association of Housing and Redevelopment Officials (NAHRO), I would like to offer the following comments to the United States Department of Housing and Urban Development (HUD or the Department) in response to the notice titled “60-Day Notice of Proposed Information Collection: Comment Request: Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds” published in the Federal Register on December 27, 2018.

Formed in 1933, NAHRO represents over 20,000 housing and community development individuals and agencies. Collectively, our members manage over 970,000 public housing units, 1.7 million Housing Choice Vouchers (HCVs), and receive over $1.5 billion in Community Development Block Grant (CDBG) and HOME Investment Partnerships (HOME) Program funding to use in their communities. NAHRO has the unique ability to represent public housing agencies, local redevelopment agencies, and other HUD grantees of all sizes and geography.

The Department is requesting feedback on changes to the Public Housing Annual Contributions Contract (ACC). NAHRO’s comments are in four sections. The first highlights NAHRO’s concerns with HUD’s process in issuing this new ACC, the second focuses on substantive concerns within the new ACC, and the third focuses on MTW agency specific concerns.
1. Process

Public Housing Agencies (PHAs) receive federal subsidies through the Public Housing Operating Fund and the Public Housing Capital Fund. The Operating Fund provides critical subsidy to PHAs that assists with the operation and maintenance of public housing properties, and the Capital Fund provides annual grants to PHAs for the development and modernization of public housing. In order for PHAs to access appropriated Operating and Capital Fund dollars, PHAs must adhere to an ACC that sets the terms and conditions that PHAs are bound to upon receiving those subsidies. This contract is critical to the business relationship between HUD and PHAs and has existed in some form since the passing of the U.S. Housing Act of 1937, which required the federal government to contract with PHAs.

On December 27, 2018, HUD published a revised ACC in the Federal Register through a Notice of Proposed Information Collection via the Paperwork Reduction Act (PRA). NAHRO does not believe that revising the ACC through the PRA is appropriate. The ACC has been and continues to be a contract between a PHA and the federal government and not a unilateral grant agreement issued by HUD to a PHA. As such, HUD should negotiate directly with PHAs to bilaterally enact any changes to the ACC, as opposed to publishing a Notice of Proposed Information through the PRA. NAHRO has previously expressed these concerns to HUD and will continue to do so moving forward.

In the spring of 2018, HUD issued another revised version of the ACC, which contained terms that PHAs would automatically agree to if they drew down FY 2018 Capital Fund Program (CFP) grants. The previously revised ACC did not require a signature from an Executive Director or approval from a PHA’s Board, however, HUD viewed this ACC as enforceable once the PHA drew down its capital funds. In the past, ACCs have required a signature from HUD and a signature from the Executive Director with approval from the PHA’s Board of Commissioners to validate the contract. Instead, PHA Executive Directors and Chief Executive Officers received an unsigned, undated letter via email from HUD’s Office of Public and Indian Housing (PIH) that announced the availability of Capital Fund Program (CFP) formula funding for FY 2018. Attached to that letter was an announcement that the department would begin to use an amended ACC. Although the announcement stated that the amended ACC would only make “minor clarifications and updates…based on applicable statutes and regulations,” PHA staff and attorneys familiar with the public housing program noted significant substantive changes. These substantive changes included language regarding the definitions of HUD requirements, grant funding, program and operating receipts, HUD approvals for the release of records, PHA executive compensation, and numerous changes to provisions related to mixed-finance developments. As HUD unilaterally changed the existing ACC without input from PHAs while the existing ACC was still in effect, HUD failed to meet the terms of its contract with PHAs and failed to comply with Congress’s instructions in the U.S. Housing Act of 1937 that the federal government contract with local housing agencies to operate public housing.

NAHRO, along with our industry partners, had significant concerns regarding the procedural and substantive issues of that ACC. Specifically, the industry took issue with HUD’s lack of communication to PHAs and the industry regarding changes to the ACC and several substantive issues contained within the revised ACC. As a result, HUD suspended the new ACC in October, reverting any agency that executed the new contract back to their prior ACC.
HUD’s latest revised version of the ACC is substantively similar to the version published last Spring with some slight modifications. Unfortunately, NAHRO continues to have the same concerns regarding the process and substance included within the December revision of the ACC.

HUD’s efforts to revise the ACC through the PRA process continue to demonstrate that HUD does not view the ACC as a bilateral contract between two parties, thus fundamentally changing the ACC and going against congressional intent that the federal government contract with PHAs. The ACC is a contract, and as such, PHAs that do not approve of changes to the ACC made by HUD should not be forced to sign the new ACC or risk having their operating or capital funds held hostage. In fact, language in Section 23 of the 1995 ACC notes that any amendment to the contract must be made by “mutual agreement of the parties to this ACC.” As the ACC is a contract, NAHRO maintains that the PRA is not the proper vehicle to release the revised ACC or any version of the ACC that has not been previously agreed upon by both PHAs and HUD.

The PRA requires federal agencies implementing reporting or recordkeeping requirements to the public to follow specific procedures in order to receive approval for a government form by the Office of Management and Budget (OMB), in this instance the ACC. In the 60-Day Notice Proposed Information Collection, HUD notes that the specific information request is for a currently approved collection. However, the current ACC does not exist as an OMB approved form, and rather only exists as a contract between HUD and PHAs. Again, language in Section 23 of the 1995 ACC notes that any amendment to the contract must be made by “mutual agreement of the parties to this ACC.” Although the PRA process allows for PHAs to submit comments on proposed revisions to the ACC, it does not ensure nor guarantee that there is mutual agreement by both parties.

NAHRO understands that in accordance with the PRA, HUD is required to have an OMB form in instances where there are 10 or more impacted respondents. This clearly would include the ACC. However, this refers to the form and not the content of the contract itself. As HUD is restricted from making changes and amendments to the contract without mutually agreement of both parties, HUD should simply undertake the PRA process with the currently existing versions of the ACC, allowing those existing ACCs to obtain OMB numbers and clearance.

Although NAHRO does not believe HUD should make changes to the ACC via the PRA, we also do not believe HUD should make changes to the ACC through the Administrative Procedures Act (APA). The APA is the mechanism in which HUD must follow to promulgate regulations. This requires HUD to inform the public of their procedures and rules, and allow for public participation in the rulemaking process, typically through public commenting, among other things. Again, as language in the 1937 Housing Act requires the federal government to contract with local housing agencies to operate public housing, the ACC is an agreement between the federal government and PHAs, not a regulation.

NAHRO does not believe the PRA nor the APA are the correct vehicles to make changes to a bilateral contract such as the ACC. Any unilateral change to the ACC that does not include mutually agreed upon terms from PHAs is a failure by HUD to meet the terms of its current contract with PHAs and a failure to comply with Congress’s instructions in the U.S. Housing Act of 1937 that HUD contract with local housing agencies to operate public housing.

2. Substantive Concerns
Beyond NAHRO’s concerns with HUD’s treatment of the ACC as a unilateral grant agreement as opposed to a bilateral contract, as it has always been treated in the past, NAHRO also has concerns regarding certain provisions within the revised ACC. These concerns are highlighted below by section within the new ACC.

Section 1. Definitions

The revised ACC includes the addition of the term “Program Receipts” in the definitions section, which differs from the ongoing definition “Operating Receipts.” The new contract states that interest from program receipts (the combination of operating receipts and any other funds received by the PHA for the development, modernization, sale or transfer of public housing project) must be used only to pay for public housing program expenses, unless otherwise allowed by HUD requirements. Currently, there are no regulations stating that funds received by a PHA outside of operating receipts (rent, operating fund subsidy, capital fund subsidy), must be considered as operating receipts. Rather this requirement is only mentioned through HUD Notice (Notice PIH 2017-24), which does not have the same standing as a regulation or stature. HUD should not include provisions promulgated as notices within the ACC, as notices are HUD interpretations and do not have the force and effect of law.

Section 3. HUD Requirements

Along with the requirement that PHAs must follow the law, HUD regulations, and other federal regulations and executive orders, the new ACC also requires PHAs to follow HUD-issued notices and HUD-required forms or agreements. NAHRO has serious concerns with defining HUD requirements in this manner. Although NAHRO agrees PHAs should be beholden to follow statutes, and regulations, the inclusion of HUD-issued notices, and HUD-required forms should not be included in the ACC. HUD-issued notices are the agency’s interpretation of governing laws and regulations, however HUD-issued notices do not have the force and effect of law.

There have been many instances in the past where HUD has issued a notice that should have been issued via regulation. For example, HUD issued instructions on demolition and disposition as notices (Notice PIH 2012-7, superseded by and Notice PIH 2018-4) instead of undergoing the rulemaking process. NAHRO does not believe that HUD should issue notices in instances wherein the agency is essentially promulgating a regulation. Rather, this must be done through the APA and normal regulatory process. Notices should only be for HUD’s interpretations of existing regulations, but should not, by definition, have the force and effect of law and should not act as a substitute for a regulation.

Through the APA, Congress has explicitly stated the importance of having the public provide feedback and comments on regulations that enact law. By regulating through guidance, HUD is going against congressional intent and removing any public feedback from being incorporated into HUD’s administration of programs that directly impact PHAs. As such, the ACC should not include HUD-issued notices and forms within the definition of HUD requirements.

Elevating HUD-issued notices to the same level as HUD regulations through the ACC demonstrates HUD’s clear intent to continue regulating through notice. NAHRO strongly disapproves of this and feels it ignores the public input process which is critical to promulgate rules and regulations in ways that meet the criteria of the law.
Section 9. Accounts, Records, and Government Access

Regarding accounts, records, and government access, the revised ACC prohibits PHAs from releasing any information contained in HUD’s system of records (SORN) without prior HUD approval, as information contained in SORN is subject to the Privacy Act, the Freedom of Information Act, and other such applicable law.

According to conversations between NAHRO and HUD’s Office of General Counsel staff, HUD has noted that Section 9 of the revised ACC only refers to data specifically held within HUD’s SORN. HUD noted that data held by a PHA can be used at the PHA’s discretion and within the same applicable laws. As it is written, Section 9 of the revised ACC does not make this clear. Sharing data can be critical for a multitude of reasons including research, media outreach, and working with contractors or vendors on improving public housing properties.

Section 10.

Section 10 provides that “[g]rant funding may also be terminated, recaptured, withheld, suspended, reduced, or such other actions taken in accordance with HUD Requirements.” As noted above in Section 3. HUD requirements would now also include HUD-issued notices, and HUD-required forms, or agreements. As these notices and forms are neither statutes nor regulations, they do not have the force and effect of law. As such, Section 10 would essentially allow HUD to terminate agency funding without Congressional authority.

NAHRO strongly disagrees with the inclusion of HUD-issued notices, and HUD-required forms or agreements as HUD requirements. These entities do not undergo the public comment process, bypassing the APA and Congressional intent. NAHRO believes those items should be removed from Section 3 of the revised ACC in order to ensure Section 10 of the revised ACC does not fundamentally provide HUD unilateral authority to terminate, recapture, withhold, suspend, or reduce funding without Congressional approval.

3. MTW-Specific Concerns

NAHRO has additional concerns with the revised ACC as it relates to the current Moving to Work (MTW) agencies and agencies joining the MTW Expansion. Currently, the 39 agencies already participating in the MTW program operate under a Standard Agreement. Under the Standard Agreement, MTW agencies are allowed to waive certain regulations and statutes under the U.S. Housing Act of 1937. However, there are concerns that the flexibility inherent to the MTW Demonstration through the ability to use waivers may be impacted by the requirement that MTW agencies to strictly adhere to all “HUD Requirements” as defined by the revised ACC.

The 100 agencies entering the MTW Expansion, authorized by the 2016 Consolidated Annual Appropriations Act, may also be impacted by HUD’s revisions to the ACC. Like the current 39 MTW agencies, there is concern that the flexibilities inherent to the MTW Demonstration may be impacted by HUD’s definition of “HUD Requirements.” However, unlike the current 39 MTW agencies, agencies entering MTW through the expansion will not have a Standard Agreement with HUD. Rather, these agencies will have an MTW Amendment to their ACC which will formalize their participation in the demonstration. This is concerning to NAHRO, considering HUD’s actions to unilaterally revise the ACC.
The MTW Amendment is attached to the ACC, NAHRO fears HUD may unilaterally change the MTW CACC Amendment without MTW agency input. Agencies that agree to enter the current MTW Expansion have no guarantee that their funding formula will remain the same and have no guarantees that the flexibilities granted in this operations notice will remain if HUD can unilaterally change the ACC. Currently, agencies agreeing to enter the program will have trouble making long term capital investments without having the certainty that their funding formula will remain the same and they will continue to have the waiver flexibilities inherent to the demonstration.

4. Conclusion

As always, NAHRO appreciates the opportunity to comment on this critical agreement between HUD and PHAs. However, NAHRO strongly believes neither the PRA nor the APA are the proper mechanisms to receive feedback for the ACC. In the past, the ACC has always been treated as a bilateral agreement between PHAs and HUD, and HUD’s current efforts to change this arrangement not only go against Congressional intent but will also fundamentally change the business relationship between HUD and PHAs. Although NAHRO remains concerned about certain substantive additions to the revised ACC, we remain deeply troubled by HUD’s process in revising the ACC. NAHRO recommends HUD remove this revised ACC from the PRA process and either receive OMB approval for the existing ACCs or allow PHAs to continue operating under their current ACC without any additional changes.

If you have any questions, please feel free to contact me at 202-580-7213.

Thank you,

Frederick Oberdorfer
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