December 9, 2019

SUBMITTED ELECTRONICALLY

HUD Desk Officer
Office of Management and Budget
New Executive Office Building
Washington, DC 20503

Re: 30-Day Notice of Proposed Information Collection: Comment Request: Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds [FR-7011-N-50]

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 “30-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 November 8, 2019.

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 three 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 other general 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. The ACC sets the terms and conditions that PHAs are bound to upon receiving those subsidies.

On December 27, 2018, HUD published a revised ACC in the Federal Register through a 60-Day Notice of Proposed Information Collection via the Paperwork Reduction Act (PRA). HUD then posted a 30-Day Notice of Proposed Information Collection via the PRA for the latest revision of the ACC on November 8, 2019.

As NAHRO has noted before, we do not believe that revising the ACC through the PRA is appropriate. Language in Section 23 of the 1995 ACC states that any amendment to the contract must be made by “mutual agreement of the parties to this ACC.” As such, NAHRO does not believe HUD is permitted to make substantive changes to the ACC through the PRA process. Although the PRA process allows for PHAs to submit comments on proposed revisions to the ACC, it does neither ensure nor guarantee that there is mutual agreement by both parties. If HUD opts to use the PRA to align the ACC with Office of Management and Budget (OMB) requirements, then there should no substantive changes in the ACC.

Although HUD is required to respond to comments on a Notice of Proposed Information Collection through the PRA, there is no requirement that HUD accept or agree to any of the comments or suggestions. Furthermore, NAHRO worries that there is no certainty that HUD will provide the same level of engagement in the future if the ACC is changed or updated again through the PRA. This is an especially pertinent concern considering HUD’s initial efforts to revise the ACC in 2017, wherein HUD posted a Notice of Information Collection that did not include the revised ACC and made it appear as though there were no substantive changes included in the revision, which was not the case.

When revising the ACC, the cornerstone document of the Public Housing Program, HUD should ensure that appropriate and adequate feedback from affected parties is considered, and HUD must always ensure that the revised form is easily available for public view. NAHRO appreciates HUD’s efforts to make the revised ACC more publicly viewable throughout this second ACC revision process, however, as exemplified by the first iteration of revisions to the ACC in 2017, this does not always occur. NAHRO recommends that HUD codify with explicit language that the PRA process will only be used for the ACC moving forward if there are no substantive changes to the document, and that if there are substantive changes to the document, HUD will ensure that comments and suggestions are addressed and considered through an appropriate process, in line with Section 23 of the 1995 ACC.
2. Substantive Concerns

Beyond NAHRO’s concerns with the process used by HUD to revise the ACC, NAHRO also has concerns regarding certain provisions within the revised ACC. These concerns are highlighted below by section within the new ACC.

Section 2. Public Housing Administration

To ensure that both HUD and PHAs are contractually obligated to abide by all statutory and regulatory requirements as intended by the Housing Act of 1937, NAHRO recommends adding additional language to section 2 of the ACC that states both HUD and the PHA shall administer public housing programs in accordance to the ACC and Public Housing requirements. Currently, the section only obligates PHAs.

NAHRO also recommends language stating that HUD shall provide public housing funds in accordance to Public Housing Requirements. This will ensure that HUD provides operating and capital funds via the regulatory formulas that are currently in place. It is critical the ACC assures agencies that HUD will appropriately provide funding on a pro rata basis as required in 24 C.F.R. § 990.210(c). As per Public Housing Authorities Directors Ass’n v. United States, 130 Fed. Cl. 522 (2017), it is imperative that “the language in the regulations (and in the ACCs) that makes the government’s obligation to pay operating subsidies ‘subject to the availability of funds’ does not excuse HUD’s failure to apply the methodology set forth in the regulations for determining the amount of the operating subsidy.” Id. at 536. There must be language in the ACC denoting HUD will pay operating subsidies on a pro rata basis as established by formulas created through negotiated rulemaking that are codified in HUD regulations.

NAHRO further recommends replacing “but are not limited to” in Section 2 with “are defined as” before listing Public Housing Requirements. As Public Housing Requirements set forth the requirements public housing agencies must follow by regulation in the current ACC, NAHRO believes any additional requirements that fall outside of Public Housing Requirements is a substantive change that should be made through the regulatory process and not the PRA process.

In Section 2B, NAHRO recommends HUD state that nothing in the ACC shall release either HUD or the PHA from compliance with all applicable laws, executive orders, and regulations, and replace “incorporated herein by reference” with “defined as Public Housing Requirements” for additional clarity. This change will ensure that both PHAs and HUD are responsible for following applicable laws, executive orders, and regulations.

For exact language, please see Appendix 1.

Section 11. Breach

NAHRO recommends removing Section 11 from the ACC, as it believes this is a substantive change to the ACC that should not be included through the PRA process. The current ACC does not address the PHA’s ability to seek monetary damages if HUD does not adhere to the ACC. Section 11 in the revised ACC prohibits PHAs from seeking monetary damages from HUD. This is a substantial change to the ACC, and as such should not be included in a revised ACC that undergoes the PRA process.
NAHRO recommends removing language in the PHA acceptance section of the ACC that requires PHAs to follow other requirements of HUD. As Public Housing Requirements set forth the requirements public housing agencies must follow by regulation in the current ACC, NAHRO believes any additional requirements that fall outside of Public Housing Requirements is a substantive change that should be made through the regulatory process and not the PRA process. Removing this language would align the PHA Acceptance section of the revised ACC with NAHRO’s suggested changes to language in Section 2 of the revised ACC.

For exact language, please see Appendix 2.

3. Other Concerns

NAHRO would also like to take this opportunity to express our serious concern with including “HUD Notices” in the definition of PHA Requirements in 24 C.F.R. 905.108. Although NAHRO acknowledges this concern is regulatory and outside the scope of this Notice of Proposed Information Collection, NAHRO would like to note that there have been instances in the past where HUD has issued notices 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 believes there are instances in which there is an immediate need for program implementation through notice when the matter is noncontroversial and provides an immediate benefit to the administration of HUD programs. However, by requiring PHAs to consider all notices as equal to regulation and statute, HUD is essentially creating requirements through notice that have the force of law without the protection of the rulemaking process. We remind HUD that regulations should have the force of law, while notices are technically considered “suggestions.”
4. Conclusion

As always, NAHRO appreciates the opportunity to comment on this critical agreement between HUD and PHAs. However, NAHRO strongly believes that the PRA is not the proper mechanism to make substantive changes to the ACC. Any substantive changes should be made with “mutual agreement of the parties to this ACC” as stipulated by Section 23 of the 1995 ACC. Although NAHRO remains concerned about certain substantive additions to the revised ACC, we remain deeply troubled by HUD’s process in revising the ACC.

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

Thank you,

Frederick Oberdorfer
Policy Advisor
Appendix 1

**Bold type** has been added or edited. **Strike-through language** has been removed.

2. Public Housing Administration. **HUD and the PHA** shall administer its public housing program for the provision of decent, safe, and sanitary housing to eligible families in accordance with this agreement and Public Housing Requirements. **HUD shall provide public housing funds in accordance to; and** the PHA shall comply with, and shall ensure compliance by, any contractors or subcontractors with, the Public Housing Requirements.

   a. Public Housing Requirements are defined as: include but are not limited to:
      - The 1937 Act as it exists now and as it may be amended in the future;
      - Regulations issued by HUD at Title 24 of the CFR and the Uniform Guidance at 2 CFR part 200 as they exist now and as they may be amended in the future;
      - Appropriations acts, as they exist now and amended in the future; and
      - Other federal statutes, regulations and executive orders applicable to Public Housing Funds and Public Housing Projects; as they exist now and as they may be amended in the future.

   b. Nothing herein shall release **HUD or the PHA** from compliance with all applicable laws, executive orders, and regulations (as they exist now or are amended in the future) applicable to the receipt, use, and maintenance of public housing funds and public housing projects that are not specifically **defined as Public Housing Requirements.** incorporated herein by reference. The term “public housing project” is defined in 24 CFR 905.108.
Appendix 2

PHA Acceptance: The PHA hereby accepts this agreement executed by the Department of Housing and Urban Development on the above date as a Recipient designated to receive federal financial assistance for public housing, and agrees to comply with the terms and conditions of this agreement, and applicable the Public Housing Requirements, and other requirements of HUD now or hereafter in effect, pertaining to the federal financial assistance provided the PHA for its public housing program.