April 23, 2012

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

Re: Docket Nos. FR–5630-N-01/02
Docket ID: HUD-2012-0018
Rental Assistance Demonstration: Notice of Web Availability and Request for Comments

To Whom It May Concern:

The National Association of Housing and Redevelopment Officials (NAHRO) is pleased to submit comments in response to the U.S. Department of Housing and Urban Development’s (HUD’s) Notice PIH 2011-18 proposing implementation guidelines for the Rental Assistance Demonstration (RAD). NAHRO represents more than 3,100 agencies and over 20,000 individual members and associates, and is the oldest and largest association serving the public housing industry. For several years, NAHRO has been deeply engaged in conversations regarding the future of the public housing inventory and has offered several proposals to provide PHAs with additional tools and resources to support and preserve this critical component of the nation’s infrastructure. There is no doubt that NAHRO and its members have a vested interest in the outcome of HUD’s implementation efforts around RAD.

NAHRO appreciates the Department’s decision to open the entirety of Section 1 of the RAD notice for public comment. After years of policy discussions around various proposals for the conversion of public housing to another form of assistance, we feel it is both necessary and appropriate to continue that dialogue in the context of the notice. Heretofore, NAHRO has struggled to evaluate the Administration’s proposal in the absence of the sort of specific details regarding implementation that are contained in the notice. With a more detailed proposal now on the table for consideration, we are pleased to be able to offer substantive comments and

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suggestions. We put these recommendations forward in good faith, expecting that the Department will carefully consider adopting them in whole or in part.

NAHRO has long supported providing PHAs with the flexibility to choose from a range of options to stabilize and preserve their public housing stock in the manner that best meets their local needs. A responsible approach to preservation is a comprehensive one; it requires a range of tools and approaches including tax credits, debt financing, credit enhancements (e.g. FHA insurance, other federal guarantees), direct grants, and other resources, in addition to conversion, to ensure the preservation of public housing properties that elect not to participate in or are not suitable candidates for a conversion initiative. Furthermore, a responsible approach requires a true commitment to the protection of units that remain in the traditional public housing portfolio. This includes ensuring that any funding dedicated to a conversion program does not come at the expense of a continued commitment to providing stable and adequate funding for the Operating Fund and Capital Fund.

NAHRO believes that any new proposed program intended to transform public housing must be focused on producing a financial environment characterized by stable, reliable, and adequate funding for PHAs. Such an environment is a prerequisite to positioning PHAs to tap into the value of the physical inventory to recapitalize their public housing stock and preserve these units for the future. To this end, we are pleased that the administration’s proposal has evolved to more closely mirror our own, relying on the existing Section 8 Project-Based Voucher (PBV) and Project-Based Rental Assistance (PBRA) programs rather than creating new ones, as did earlier approaches put forward in the form of the administration’s proposed Transforming Rental Assistance initiative and Preservation, Enhancement, and Transformation of Rental Assistance draft legislation. In particular, owners of properties assisted through the PBRA program have historically faced far fewer challenges meeting their financial needs than public housing due to: 1) the Congress’s historical commitment to full funding of the Section 8 Project-Based Rental Assistance (PBRA) account, 2) the flexible operating environment created by the Section 8 PBRA program, and 3) the level of comfort within the lending community that the PBRA program has achieved.

Despite movement in the right direction, NAHRO notes that HUD’s proposed approach to implementing RAD would alter the existing programs in fundamental ways. By making significant changes to the programs, including importing various administratively burdensome provisions from the public housing program, RAD and the new regulatory environment that would accompany it risk introducing uncertainty to the conversion process and undermining the benefits that conversion of assistance is intended to bestow. NAHRO believes strongly that an approach to conversion that capitalizes on the level of comfort already established around the existing Section 8 project-based programs is much more likely to succeed. RAD is also infused
with collateral policy initiatives - including the choice-mobility option - which risk undermining preservation efforts. As a result, NAHRO remains unconvinced that the approach embodied by RAD will provide the financial and operating environments necessary to preserve converted properties.

The statute which created RAD limited funding for each converted property to that amount which it currently receives. NAHRO has consistently expressed its belief that the preservation of public housing will require an investment above that which is currently provided. Absent incremental appropriations, we question whether, at the individual property level, a meaningful number of PHAs will be good candidates to address the substantial backlog of capital needs through RAD. Furthermore, NAHRO is concerned that the Administration is not fully recognizing the administrative costs associated with RAD. The President’s FY 2013 budget request does not ask for additional funding for the Section 8 administrative fees or Performance Based Contract Administrators that would be needed for converted properties. Without incremental appropriations, these additional costs will further strain these already oversubscribed accounts. Similarly, temporary relocation vouchers and tenant-protection vouchers are not funded under RAD. Lenders are unlikely to lend against anything other than the increased value of a converted property; it would not be good public policy to expect PHAs to borrow to finance these vouchers.

NAHRO urges the Department to appropriately contextualize the evaluation of RAD required in statute. Insomuch as RAD is intended to demonstrate the potential of conversion to another form of rental assistance, it is important to recognize that the participants in the demonstration are far from representative of the public housing portfolio and PHA industry. While they are required to vary by size and geography, they will, by definition, be those PHAs who have the capacity to undertake such a transaction, and will only convert those properties for which they believe the RAD program offers a benefit. For obvious reasons, properties for which RAD does not “pencil out” will not apply, and will therefore not be reflected in the evaluation. As a result, results of the demonstration will highlight only those instances where RAD can be effective and not where its limitations lie. While NAHRO certainly supports a rigorous evaluation of the demonstration, we urge caution in drawing broad conclusions from what is by necessity a “cherry picked” sample.

In addition to these global comments, NAHRO offers the following comments relating to specific portions of the notice.

Definitions: NAHRO recommends inclusion of precise definitions for “prior year” and “current year” to increase clarity throughout the notice. It is critical that the notice provide additional specificity around the point in time relative to which these terms apply (i.e., the date on which the conversion transaction closes) as well as whether they apply to calendar or fiscal years.
Section 1.3 General Program Description: NAHRO recommends more precise language governing which agency will administer vouchers for PBV conversions. Agencies that choose to convert to PBV and have existing voucher programs should be guaranteed the opportunity to administer their own vouchers.

Section 1.4 Eligibility: NAHRO cautions the Department against overemphasizing PHAS scores for purposes of eligibility to participate in the RAD program. Given that the PHAS Interim Rule has increased physical assessment scores to forty percent of the total points possible, PHAs with properties most in need of preservation are likely to have lower scores that reflect these needs.

Section 1.5 Rehabilitation and Financing Considerations: NAHRO is concerned by the tension that RAD creates between encouraging PHAs to contribute and leverage the maximum possible portfolio-wide resources and ensuring that sufficient resources exist to protect the PHA’s remaining assets. While we do support maximum flexibility in the use of available resources, NAHRO fears that this policy incentivizes PHAs to sacrifice the well-being of other properties in their portfolio in order to increase the scope of the RAD rehabilitation and earn additional points in the competition. HUD’s review of applications should strive to prevent the pursuit of such Pyrrhic victories to ensure the future health and stability of both converted and unconverted properties.

A. Rehabilitation Considerations: NAHRO strongly supports the requirement of a high quality Physical Condition Assessment for converting properties. We encourage HUD, however, to consider a range of products that are generally accepted in the development and real estate industry. These assessments should also satisfy the public housing physical needs assessment (PNA) requirement if the property is not selected for conversion.

The notice should strive to be consistent with other HUD policy directives on green and energy efficient improvements. In general, PHAs are encouraged to undertake these enhancements when they are “cost effective,” not “financially feasible” as written in the notice. The notice must not erode PHAs’ control of the prioritization of local needs and their ability to allocate scarce resources to their most pressing needs, regardless of the potential savings of an energy conservation measure (ECM). HUD must also recognize that conversion comes at the expense of the incentives that the public housing program offers for completion of ECMs, and that, following conversion, PHAs will not enjoy significant direct financial benefits from these upgrades.

B. Financing Considerations: As written, the notice requires PHAs only to “disclose the estimated amount of any indebtedness…that is associated with the subject property.” This requirement should be broadened to include all debt associated with the portfolio as a whole. For Capital Fund Financing Program (CFFP) transactions, the PHA pledges an
interest in its portfolio-wide Capital Fund stream. Even if the CFFP proceeds were not invested in the subject property, HUD should ensure that the reduced Capital Fund allocation that would result from conversion of a portion of the portfolio does not place the PHA at risk of default.

NAHRO is concerned that the timeline outlined by the notice will create significant challenges to PHAs’ ability to leverage competitive 9 percent LIHTCs. By proposing a rigid timeline, narrow application window, and very short lead time, the notice would unfairly disadvantage those PHAs whose allocating agency QAP timelines do not synch up. Although the notice does not require applicants to have a firm commitment until a later stage, NAHRO believes that few agencies that do not already have credit allocations will be able to secure them in conjunction with RAD conversions. Given the demonstration’s emphasis on leveraging additional capital, NAHRO believes that this is a missed opportunity.

Section 1.6 Waivers and Other Alternative Public Housing Requirements

1. Use of Public Housing Program Funds to Support Conversion: According to the notice, in cases where a subsidy layering review is triggered, “the loan amount may not exceed the amount required for feasibility.” Given that this provision is likely to affect almost all applicants, NAHRO requests that this provision be clarified to define feasibility and articulate any other limitations.

2. Inapplicability of Section 18: NAHRO support the exclusion from Section 18 of units lost due to reconfiguration of efficiency units. This flexibility will help PHAs to better serve their residents and compete in the private marketplace.

4. Effect of Conversion on PHA’s Faircloth Limit: NAHRO recommends that HUD clarify this section to more clearly indicate that only those units that remain at the conclusion of the conversion process are subtracted from Faircloth limits. Units that are not rebuilt or replaced due to de minimis or other exceptions or exclusions are not subtracted from the PHA’s Faircloth limit.

6. Moving-to-Work Agencies: Although NAHRO supports the eligibility of MtW agencies for participation in RAD where the PHA decides it is in their best interest, NAHRO strongly opposes any requirement that an MtW agency participate. Properties that convert to PBRA would be wholly outside of MtW agencies’ contracts and will thus be akin to a new, additional program requiring administrative resources. NAHRO requests additional clarification about the scope of MtW flexibilities that would be preserved for conversions to PBV under RAD. Rather than furthering the ability of MtW agencies to innovate and combine their resources in creative ways that enhance their
programs, RAD severely restricts these activities. As such, a requirement to participate in RAD could interfere with an agency’s existing MtW activities.

Section 1.7 Special Provisions Affecting Conversions to PBVs

A. Project Selection: NAHRO supports HUD’s use of waivers to exempt conversions to PBV from counting against the maximum amount of assistance a PHA may utilize for the PBV program, from the owner proposal selection process, and from site selection requirements. Given the unique circumstances of conversion from another form of assistance, these are appropriate waivers. However, NAHRO is disappointed that the notice does not entirely waive income-mixing requirements as well. Despite being one of the goals of the PBV program, in circumstances where the development is already 100 percent assisted it simply does not make sense to set a lower threshold. Doing so would severely constrain PHAs’ ability to use the PBV option for conversion of family properties when funding for supportive services is unavailable. For those PHAs that are able to acquire or build sufficient additional units to be able to deconcentrate and convert a family property to PBV, this policy would force the displacement of half of the residents, an expensive, complicated, and generally undesirable outcome.

B. Contract Terms: NAHRO has long expressed concerns about the requirement that PHAs must accept all offers of contract renewal, regardless of the terms that are offered. This provision essentially creates a unilateral contract in perpetuity, providing PHAs with no leverage for negotiation with either HUD or Congress. Despite the statutory nature of this provision, NAHRO recommends the inclusion of additional protections for PHAs guaranteeing that contract renewal will be offered on terms not less favorable than those offered to other owners of properties assisted under the PBV program.

NAHRO is pleased to see that the term of use agreements has been shortened to coincide with the contract term. Previous iterations of HUD’s conversion proposals had suggested use agreements that outlasted contract terms, a provision which greatly concerned NAHRO.

NAHRO recommends that the notice specify that the operating cost adjustment factor (OCAF) to be applied on an annual basis is the same OCAF applied to other PBV properties, including the protection that it “shall not result in a negative adjustment.”

C. Tenant Rights and Participation: NAHRO requests that rent increases be applied only upon household income recertification rather than at the time of conversion. In the initial year following conversion, amounts transferred from the Operating and Capital Funds should reflect this reduced subsidy eligibility due to increased total tenant payments.
D. Other Miscellaneous Provisions: Requests for data should be specified up front rather than on an ad hoc basis.

Upon conversion, properties should no longer be subject to requirements that do not apply to PBV. Repairs completed after the date of conversion should not be subject to Davis-Bacon requirements if they would not otherwise be subject.

NAHRO recommends additional clarity around the requirements for PHAs that currently maintain centralized, rather than site-based, waiting lists. In these instances, PHAs should have the discretion to choose whether to provide households from the centralized waiting list with priority access to the new site-based list. This specificity may be help to protect PHAs from potential legal challenges.

Section 1.8 Special Provisions Affecting Conversions to PBRA

A. Contract Terms: As discussed with respect to PBV, NAHRO has long expressed concerns about the requirement that PHAs must accept all offers of contract renewal, regardless of the terms that are offered. This provision essentially creates a unilateral contract in perpetuity, providing PHAs with no leverage for negotiation with either HUD or Congress. Despite the statutory nature of this provision, NAHRO recommends the inclusion of additional protections for PHAs guaranteeing that contract renewal will be offered on terms not less favorable than those offered to other owners of properties assisted under the PBRA program.

NAHRO is pleased to see that the term of use agreements has been shortened to coincide with the contract term. Previous iterations of HUD’s conversion proposals had suggested use agreements that outlasted contract terms, a provision which greatly concerned NAHRO.

NAHRO recommends that the notice specify that the operating cost adjustment factor (OCAF) to be applied on an annual basis is the same OCAF applied to other PBRA properties, including the protection that it “shall not result in a negative adjustment.”

NAHRO is pleased that the Department has not placed limitations on allowable distributions, but requests that the notice specify that distributions to the owner are not federal funds.

B. Tenant Rights and Participation: NAHRO recommends the replacement of “cannot lose their unit if over-income” (p. 30) and “eligible under public housing FSS guidelines” (p. 31) with more precise language that clearly articulates rights and responsibilities of each party.
NAHRO requests that rent increases be applied only upon household income recertification rather than at the time of conversion. In the initial year following conversion, amounts transferred from the Operating and Capital Funds should reflect this reduced subsidy eligibility due to increased total tenant payments.

C. Other Miscellaneous Provisions: NAHRO recommends additional clarity around the requirements for PHAs that currently maintain centralized, rather than site-based, waiting lists. In these instances, PHAs should have the discretion to choose whether to provide households from the centralized waiting list with priority access to the new site-based list. This specificity may be help to protect PHAs from potential legal challenges.

Regarding the proposed choice-mobility feature under PBRA conversions, NAHRO believes the Department is likely overstepping the statutory authority provided under the FY 2012 Appropriations Act. More specifically, NAHRO has serious doubts concerning HUD’s legal authority to require PHAs to give households assisted in developments converted to PBRA under RAD a preference above all other households on the waiting list for their Tenant-Based Voucher programs. HUD’s proposal effectively forces PHAs to abandon local preferences in favor of accepting the imposition of a de facto federal preference for admission to the TBRA program, despite the fact that federal preferences were repealed under QHWRA.

Although the Department received statutory authority to “waive or specify alternative requirements for...any provision of section 8(o)(13),” NAHRO questions whether sufficient authority was granted by the Congress to allow for changes to or alternate requirements for the tenant-based program, which is not covered by 8(o)(13). The FY 2012 Act does allow for waivers and alternative requirements for provisions governing “funds made available” under the Project-Based Rental Assistance account, but that authority is not as broad as the authority provided relative to 8(o)(13) and would not seem to extend to statutorily- and regulatorily-imposed requirements of the tenant-based program (as opposed to the use of funding under the program). In any case, unlike the waiver authority granted relative to 8(o)(13), the authority provided relative to “funds made available” under the Project-Based Rental Assistance account is further constrained by the requirement that such a waiver or alternative requirement be “necessary for the effective conversion of assistance under the demonstration.”

NAHRO does not believe that the implementation of a choice-mobility feature is related in any meaningful way to the transactional nature of converting a public housing unit from a Section 9 subsidy to a Section 8 PBRA contract. Indeed, any waivers or alternative requirements the Department issues to activate the choice-mobility component will be motivated purely by a desire to test a policy that is a priority for the current
political leadership. We would also note that, to the extent that this feature affects the conversion of subsidy, it is likely to complicate such conversions rather than facilitate them by injecting financial uncertainty into the underwriting process.

If the Department believes that the statutory authority to implement the choice-mobility feature under PBRA conversions exists and implements this policy as proposed, then NAHRO respectfully requests that the final notice provide a clear explanation of this issue and that the Department produce a formal legal opinion to the same effect.

While NAHRO appreciates HUD’s recognition of the potential negative consequences of the choice-mobility provision and the attempt to strike a balance through the annual limitations of one third of turnover vouchers or twenty percent of units, NAHRO remains concerned that the choice-mobility provision will incentivize “churning” in converted properties, disrupting communities, destabilizing rental income, and increasing turnover costs. As a result, we believe that this will threaten the sense of community within the development and undermine PHAs’ collective ability to leverage private capital, an essential component of the proposed initiative. Additionally, it will be very costly to administer and, in the absence of incremental vouchers, will increase the already lengthy periods that households endure before a Housing Choice Voucher becomes available.

HCV waiting lists are already far oversubscribed, and NAHRO opposes this provision that would siphon HCV resources away from those already on the waiting list. Furthermore, creating a “short cut” to the front of the HCV waiting list will only further incentivize churning, effectively turning converted developments into way stations for families seeking tenant-based vouchers. NAHRO continues to question analyses of likely turnover based on current turnover in the PBV program. Properties in the PBV program are required to meet significant conditions that have been waived for purposes of RAD, including site and neighborhood conditions as well as income-mixing. The intent behind these provisions was to ensure that properties assisted through PBV are highly desirable to residents and can compete with the private market. Properties converted under RAD will receive less funding and will not have these safeguards in many cases and are likely to experience significantly higher turnover as a result.

If, over our objections and with adequate legal justification, the Department insists on moving forward with the choice-mobility provision as proposed, then NAHRO strongly urges HUD to at least employ a more responsible design to gauge the feasibility and outcomes of the policy. The initial notice states that HUD may grant a good-cause exemption from the choice-mobility requirement for no more than 10 percent of units in the demonstration, meaning that all or nearly all of the units converted to PBRA will be
burdened with a new and untested feature that is not part of the regular PBRA program and is likely to have a serious impact on the Section 8 tenant-based program. A more responsible design would limit the choice-mobility option to 50 percent of the units converted to PBRA. This would allow the Department to test the approach responsibly while learning what impact the addition of this feature has on the underwriting process, lender appetite, and program administration. We urge you to make this change.

Section 1.10 Application Submission Requirements: NAHRO recommends the inclusion of additional clarification around the responsibilities of a PHA that agrees to administer vouchers for another to also provide turnover vouchers to residents of the converted property exercising the choice-mobility option.

Section 1.11 Application Submission Instructions: NAHRO recommends extending the application preparation period to provide PHA additional time to compile their applications. Providing only sixty days for applications to an unfamiliar, complex program will constrain the ability of PHAs to leverage outside resources and undertake ambitious proposals. Given the structure of the competition, PHAs have a strong incentive to submit during the initial application period rather than investing additional time and waiting until the ongoing application period, by which point the demonstration may be oversubscribed.

Section 1.12 Selection Criteria:

C. Application Periods: HUD should be required to review all complete, eligible applications in order to rank them.

D. Ranking Factors: Given that the primary purpose of conversion is preservation of the asset, NAHRO believes it is appropriate to place particular emphasis on the level of physical needs that an application proposes to address. The notice should clarify that costs related to investments in the site and common areas are included in this calculation. NAHRO would recommend using building type, rather than population type, to categorize for purposes of creating the scale on which these needs are evaluated.

NAHRO recommends that small PHAs proposing to convert their entire portfolio be allowed to designate all units, even if split into multiple properties, as the priority project. For small PHAs, receiving permission to convert only a portion of their portfolio could create administrative burdens far out of proportion with their administrative capacity.

Small public housing-only PHAs should be allowed to apply for good-cause exemptions from the choice-mobility requirements for multiple properties if converting to PBRA.
Section 1.13 Notification of Award, Execution of CHAP, and Related Milestones:

A. CHAP: NAHRO requests additional clarification on the sequencing of events. The Financing Plan must be submitted within 180 days of issuance of the CHAP, but other significant milestones relating to financial commitments are required earlier in the process. NAHRO is concerned that this sequence will create confusion and potential for problems should the Financing Plan not be approved.

E. PHA RAD Developer Fees: NAHRO requests that the notice specify that developer fees earned are not federal funds.

NAHRO thanks you for the opportunity to submit comments, and we look forward to your careful consideration of our recommendations. As the Department continues to work to implement the demonstration in a responsible manner, please do not hesitate to contact us if we can be of assistance.

Sincerely,

Saul N. Ramirez, Jr.
Chief Executive Officer