NATIONAL
LEASED HOUSING
ASSOCIATION

January 31, 2020

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: White House Council on Eliminating Regulatory Barriers to Affordable Housing;
Request for Information

Docket Number: HUD-2019-0092
FR 6187-N-01

To Whom It May Concern:

We appreciate the Administration's establishment of a White House Council on Eliminating Regulatory Barriers to Affordable Housing (EO13878). Our member organizations are dedicated to the provision and preservation of affordable housing. By way of background, NLHA has been an advocate for federally assisted rental housing since 1972. Its members include developers, owners, managers, lenders, nonprofits, public housing agencies and other related entities.

The National Leased Housing Association (NLHA) is pleased to offer the following suggestions for reducing regulatory and administrative burdens related to Multifamily housing programs.

1. Uniform Relocation and Real Property Acquisitions Act (URA)

HUD's imposition of URA requirements has recently expanded to cover situations beyond its original intent or appropriate fit. The URA, under the jurisdiction of the Department of Transportation, is intended to protect households displaced by eminent domain and federal construction projects, particularly large infrastructure and transportation projects. The focus is on direct federally-funded actions, not all federally-influenced private actions. To illustrate this distinction, we note that the URA does not apply to private construction motivated by tax benefits under the low-income housing tax credit. However, HUD has increasingly applied the URA to new situations and projects where the requirements create an unnecessary burden and add to the cost of producing and providing affordable housing. URA should not apply to private activity where the only federal tie is FHA-insured debt or the fact that federal assistance is helping the tenant pay the rent at privately-owned apartments under a Section 8 HAP contract.

The expansion of the application of URA has occurred within the past few years. In some cases, we disagree with, but can understand the desire for, an expanded applicability of the URA. The primary example of this is the imposition of URA requirements, and relocation requirements more rigorous than the URA requirements, on RAD public housing conversions, where the history of relocation in the HOPE VI program and the sensitivity to relocation issues expressed by key stakeholders in the RAD coalition makes extensive relocation requirements in the RAD public housing context understandable. Although we would support a streamlining and further tailoring of the relocation guidance to the program needs

specific to the RAD program, our primary concern is the expanded misapplication of the URA and RAD public housing conversion relocation requirements to **other** situations.

The Department has begun applying URA rules to new contexts, outside of RAD public housing conversions, including the conversion of privately-owned housing under RAD Component 2 and transfers of existing Section 8 properties. Our members report that HUD has required an owner to send a "General Information Notice" (GIN) and a "Notice of Intent to Acquire" to tenants of privately-owned Section 8 properties as a precondition to a HAP transfer or refinancing. Some HUD offices interpret all resident move-outs before the GIN as presumptively displaced if the resident ever subsequently claimed relocation protections. While the presumption is longstanding, HUD has recently required owners to hire private investigators to track down residents who moved out voluntarily or were evicted and pay them moving assistance and 42 or more months of rent differential payments.

In addition, the standardized URA forms are often confusing for the tenants as they may not be tailored to the situation. Rather than quell fears or provide relevant information to tenants, receipt of these forms, which include the Department of Transportation language applicable to displacement because of infrastructure projects, raises the question for tenants of whether they are going to be displaced and confuses tenants about what project plans entail, when displacement was never contemplated. Owners that have tried to tailor the forms to provide more accurate information to tenants have been told their GINs are defective and that they need to locate and provide payments to residents who voluntarily moved or were evicted from the property. As another recent example, HUD delayed a closing until the purchaser provided the URA form of "acquisition notice" to the seller even though the "acquisition notice" is intended to give notice to a property owner when a governmental body is exercising eminent domain rather than to give notice to parties who have entered into a purchase and sale agreement.

We urge you to reexamine the determination that sale of a HAP contract or other private actions by private participants constitutes an action on behalf of the federal government imposing URA requirements, and urge a more commonsense application of the URA requirements.

2. Davis-Bacon wage applicability

In recent years, HUD has greatly expanded the applicability of Davis-Bacon wage rates. For decades, the HUD rule was clear and simple: work done in the development of a new Section 8 project was subject to Davis-Bacon requirements; work done on existing housing was not. If a project met Housing Quality Standards (HQS) and was already operating under an existing rental assistance contract, it was considered existing housing and Davis-Bacon did not apply. If the project was subject to an Agreement to Enter into a Housing Assistance Payment Contract (AHAP) instead of a Housing Assistance Payment contract (HAP) because new construction or substantial rehabilitation work was needed in order for the property to meet HQS, the work was considered development and Davis-Bacon applied. The rule focused on project-based voucher (PBV) projects because, prior to RAD, there were generally no new project-based Section 8 contracts.

In December 2013, HUD issued new guidance, changing its previous position, greatly expanding Davis-Bacon applicability in the RAD Second Component (RAD 2). Under the new guidance, any work done within 18 months of entering into a HAP contract except for like-kind replacement of materials and equipment is considered "development" and requires Davis-Bacon wages. HUD has interpreted this to mean that any upgrades – for example, the replacement of decades-old appliances with new appliances – fall under property "development" and subject to Davis-Bacon. After much discussion with HUD, the guidance for RAD 2 was revised to exempt such properties from the 2013 guidance. However, the 2013 guidance continues to apply to other properties with PBV assistance,

This expanded new regulation has increased costs. For example, if a project is using FHA 223(f) financing, which by definition applies to existing housing that Housing has determined does not need substantial rehabilitation, Davis-Bacon should not apply. However, if the property with 223(f) financing also entails placement of new PBV assistance, because of the expanded PBV rules, HUD has imposed Davis-Bacon requirements on these projects.

We ask that you rescind the December 2013 guidance. The pre-existing Davis-Bacon statute and regulations provided sufficient guidance for decades prior to this new guidance and should be re-asserted.

Moreover, we believe that in general labor costs have been a major barrier in the construction and rehabilitation of affordable housing. The Department of Labor's (DOL) wage determinations often inflate the actual costs of construction and repair by over 30 percent in some markets. We understand there have been ongoing conversations between HUD and DOL to attempt to remedy the problem. We support all proposals to reduce these burdens in whatever manner is feasible and as soon as possible to address the serious shortage of affordable housing.

3. Environmental Review

HUD has increasingly broadened the scope of environmental rules, requiring extensive environmental review at inappropriate situations. HUD regulations require environmental review to be undertaken before HUD funds are committed to a project. However, HUD applies an entirely overbroad interpretation of these metrics.

For example, HUD has recently determined that an applicant's entering into a purchase and sale contract, or even an option to purchase, for a parcel of land is a "choice limiting action" and requires environmental approval. The delay that this requirement imposes on transactions is devastating. Imposing this requirement effectively limits HUD-development to publicly owned and already encumbered land. Private landowners in prized locations have too much competition for their land to wait several months for an environmental review to be completed before a contract for the land can be entered into. Environmental review could easily be required instead prior to actual acquisition of the parcel.

The concept of "choice limiting action" does not make sense in the HUD context. Receipt of HUD grants or of FHA insurance is NOT "as of right." If federal funds are not being used, HUD retains discretion as to whether or not to award funds or issue the Firm Commitment and any commitment is subject to environmental clearance, no action by the applicant can be a choice limiting action.

We are encouraged by the recent RAD guidance developing a "tiered environmental review" for certain RAD transactions by small housing authorities. We encourage HUD to review other kinds of RAD transactions and expand this applicability or similar measures wherever possible.

Furthermore, we encourage you to review HUD's current application of "choice limiting actions" more broadly. We believe the Department should apply environmental review to those situations and at those times within a project timeline where they make the most sense.

4. Project-based Rental Assistance (PBRA) Process Standardization

Many PBRA policies and procedures vary substantially by field office or otherwise impose unnecessary burdens on owners and other stakeholders. We believe that review of PBRA policies will quickly reveal many simple adjustments that could greatly increase the efficiency of the program without increasing costs to HUD.

- **Payment Systems.** We understand that HUD does not always have the resources to update its computer systems, but at some point, we are hopeful that the subsidy payment system can be made more efficient to avoid delayed HAP payments. While payment delays are often a result of the Congressional funding timelines which require "continuing resolutions" where OMB apportions funds in short term funding allotments – such delays can be exacerbated by the amount of time it takes HUD's internal system to process the OMB apportionment of funds. There are other times housing providers are incorrectly informed that there is a "funding shortage" when it turns out that a rent schedule was not completed or some step in the process missed by the contract administrator or field office. While HUD Central staff is great about resolving individual property payment delays when brought to their attention, it is probably not the best use of their time. We believe a review of the process may help to avoid or reduce future delays. In addition, problems have been reported on existing as well as renewal contracts; when terminating short-term contracts in order to issue longer-term contracts and when transferring contracts to a new owner. It is particularly vexing that HUD pulls existing HAP contract funds from the current HAP contract only to reissue the same funds into the new HAP contract. This causes unnecessary delays. Any amount of funding in the contract should be sufficient to allow the processing of the renewal.

- **Term of HAP Contracts:** Permit short term HAP renewals to facilitate the use of FHA financing. Currently, HUD requires at least 15 years be remaining on the HAP contract for reduced MIP (see bullet under FHA processing). In many instances, the HAP contract has 14 - 14.5 years or so remaining and HUD will not allow a short extension to facilitate the transaction. Long term renewals are not always feasible or desirable particularly when the HAP contract is a mark to market restructuring contract with OCAF limitation. Owners in this situation would most certainly renew their HAP contracts to coincide with the expiration of the use restriction with the promise of a subsequent Option 1 or 2 HAP renewal We urge HUD to consider such flexibility.

- **HAP Assignment requirements and process.** We also urge you to review the process for assigning HAP contracts. The process and required submission materials vary substantially by field office. HUD is often asking for items that staff have no ability to review and are irrelevant to the owner's capacity to run decent housing. For example, in the context of a simple HAP assignment, the personal financial statements from officers and directors of a corporation are not relevant, requiring audited financial statements is unnecessary, assignment documents do not need to be recorded, and imposing a debt service coverage ratio is counterproductive. Several different forms for assignment and consent to assignment of HAP contracts are in use in different offices (sometimes even among account executives in the same office). We urge you to publish a simple, basic checklist and basic standardized assignment and consent to assignment forms, applicable to straightforward HAP contract assignments that stakeholders nationwide could access and follow. We would be happy to work with HUD to develop this checklist and these forms.

There are several other simple adjustments that could be made to greatly improve the efficiency, stability and effectiveness of the PBRA program, without increasing HUD's costs. These include:

- **TPA Requirements.** Clarify that the Transfer of Physical Assets (TPA) process is required only when there is a change in the borrower or a controlling participant of the borrower. All other changes to a project's participants should be limited to previous participation clearance (2530), as revised in 2016. In addition, the full TPA process is also burdensome with requirements inconsistently applied from field office to field office. We would be happy to work with you to standardize a checklist or other guidance for the TPA process.

- **Reserve Accounts.** Eliminate HUD control of reserve accounts on new regulation Section 8 properties. The requirement is outdated; lenders generally have their own reserve requirements. HUD control creates burdens for HUD and owners without any effective results and can interfere with financing requirements.

- **Redundant Certifications.** For certain transactions, HUD has required a "certification" that the owner understands and has signed the documents that the owner has already signed. Not only is such a requirement redundant it suggests HUD documents are not readily understandable. The signed documents should suffice.

- **Rent Comparability Studies.** We suggest that HUD review the process for submission and reviews of HUD Rent Comparability Studies (RCS's). Furthermore, greater clarity is necessary as to when third-party RCS's are required. HUD's recent hiring of third-party appraisers has reduced some of the delays in retaining a third party appraiser when HUD determines that such a study is required, but the completion of the studies have not been prompt and our members report uneven results often related to the appraisers' lack of familiarity with the geographic area or the HUD requirements.

  Third party RCS's are costly and largely unnecessary, especially in high-cost areas where the 140 percent median zip code rent benchmark is always exceeded. HUD has attempted to offer a waiver process in certain circumstances including where the owners' RCS is less than 150 percent of the median zip code area. However, the process to request the waiver is unnecessarily time consuming. Considering HUD is paying for an increased number of third-party studies, HUD's benchmark should be reviewed. We believe a benchmark of 165 percent of median zip code rents are more realistic in high cost markets. It is our belief that in most cases, in-house HUD reviews of the owner's RCS should suffice. We urge however, that HUD require the CA or HUD review appraisers to be trained on Chapter 9 of the Section 8 Renewal Guide. It is our experience that when FHA appraisers have been tasked with such RCS reviews, they are unfamiliar with Chapter 9's requirements.

- **Tenant Notices.** Eliminate unnecessary tenant notices for Mark-Up-to-Market projects when the property is 100% project-based Section 8 and the tenant's portion of rent is not affected.

- **Utility Allowances.** Delay determination and adjustment of utility allowances until project acquisition and rehabilitation are complete. Current utility allowance rules are very difficult to comply with, particularly for buyers doing a preservation transaction who do not have access to residents or their data. In many cases, utility companies cite privacy concerns and will not share data.

- **Post-Rehab Rents.** Extend "Day One" post-rehabilitation rent allowances on Chapter 15 "Mark-Up-to-Budget" projects beyond 12 months. In many cases the rehabilitation takes longer than twelve months.

  Further, establish greater flexibility on the Qualified Non-profit (QNP) allowances for post-Mark-to-Market (post-M2M) projects. Providing greater flexibility on the definition of a QNP, such as allowing for joint ventures and affiliations between entities that would currently qualify as QNPs and for-profit organizations could help to expedite the repositioning of post-M2M projects. Currently, HUD is only approving QNP transactions that fall within the "safe harbor" guidelines. While we agree that HUD should impart greater scrutiny on proposals that fall outside the safe harbor, there should be some allowance provided.

  Approve budget-based rent increases to stabilize post-M2M properties as is permitted under the regulations (but never implemented). We understand from conversations with OGC that there is

disagreement concerning HUD's authority. We urge the Department to seek a legislative change if no resolution is forthcoming or where feasible calculate Operating Cost Adjustment Factors (OCAFs) for a smaller geographic area or even on a property basis to more accurately reflect actual operating cost increases. More than a few owners of post-M2M properties are facing funding shortages and struggling to maintain the financial stability of their projects, particularly those that were underwritten in the early years of the program before HUD changed the criteria. A number of post-M2M projects will need increased resources in coming years, in order to remain viable. Often the rents are well below the comparable market. Without some creative assistance, we will lose the affordability that these assets provide to their communities

5. Transfer of PBRA Budget Authority (8bb)

PBRA HAP contracts are powerful tools for increasing housing opportunities across the country. Because there is no new budget authority for PBRA contracts, outside of RAD's conversion of assistance on existing properties, the preservation of the existing PBRA budget authority is crucial to the preservation of affordable housing nationwide. Section 8bb of the U.S. Housing Act of 1937 gives HUD broad authority to implement measures to preserve this budget authority. While the Section 8bb process to transfer HAP contracts has improved considerably in recent years, the process and requirements are still too onerous to be truly effective and would benefit from further standardization and streamlining. Further, HUD's additional authority to transfer HAP contracts, use agreements and mortgages that has been provided in annual HUD appropriations bills (for example, Section 210 of the 2019 Appropriations Act, Section 209 of the 2020 Appropriations Act) should be outlined in HUD guidance. We expect more transfers will be requested in the coming years as the existing portfolio ages. HUD has announced efforts to revise and streamline the 8bb process and we wholeheartedly encourage and support this effort. In order to make the process as efficient as possible and preserve as much of the PBRA budget authority as possible, no requirements should be imposed on the current owner who is opting out of continuing HUD assistance. The process should vet the proposed new owner and the proposed new project, and should ensure that the budget authority is fully utilized. In addition, HUD should exercise greater discretion and allow for more requests for the use of budget authority after the budget authority has expired, as the statutory language allows. We would be happy to work with you to revise and streamline the process and suggest standardized checklists.

6. Project-Based Voucher Asset Management

The Project-Based Voucher (PBV) program was never intended to have direct HUD oversight and asset management control. PBVs are a way for local public housing authorities (PHAs) to allocate resources in a manner they determine to be most advantageous for their communities. In recent years, HUD has been asserting a greater role in asset management of PBV contracts. This is an error. HUD does not have the infrastructure to take on adequate asset management of PBV projects. Instead, HUD should emphasize the local nature of the program and elevate the strengths of local control. Discretion should remain at the PHA level and basic contract law principles should apply to the administration of the PBV contracts. A few examples:

- Transfers of PBV Contracts and Pass-Through Contracts. There is no statutory or regulatory prohibition against the transfer of PBV HAP contracts. Yet, HUD has claimed that the lack of explicit authority to transfer the contracts means that transfer is prohibited. HUD should reach the exact opposite conclusion: the lack of explicit prohibition should mean that basic rules of contract law apply. If the PHA and the project owner decide to terminate a contract early or transfer a contract, HUD should not get in the way. Likewise, if a natural disaster or other event causes damage to a PBV property, the PHA and the contract owner should be allowed to institute a "pass-through" structure, in order to maintain assistance to affected

residents by passing-through the subsidy to a safer location. The PBV program was intended to empower local PHAs. HUD should encourage and support this tool for local control.

- Subsidy Layering Review. Subsidy Layering Review is required by 24 CFR 983.55. Given the other controls over the PBV program and its design as a program of local control, the Subsidy Layering Review requirement seems outdated and we would support its elimination. If not eliminated, the review needs to be revised significantly. In recent years, the review, done in Headquarters, has become exceedingly burdensome. Review requirements are not representative of the realities of real estate development. For example, inexplicably, it has become a requirement that all projects have debt service. Some projects, such as permanent supportive housing projects do not support hard service and are financed through other means, such as grants and forgivable loans. Why would HUD want to increase the burden on these properties? Does HUD suggest that permanent supportive housing, or any affordable housing project, is receiving excess subsidy because it does not have debt service requirements? As another example, the Subsidy Layering Review requirements for underwriting cash flow are overly restrictive and make poor assumptions. When project owners try to challenge these assumptions or provide counter-arguments, they are often met with silence. Reviewers are not often in-accessible to the project owners and it is often a guessing game as to what will satisfy the review.

- Construction/Demolition Prior to AHAP. HOTMA attempted to address the issue of construction and demolition prior to an AHAP. However, this provision has not yet been implemented. The prohibition on any work on the site from proposal submission until the AHAP can be very difficult when there is abatement/demolition that needs to be done on the site.

- Competition exemption. HOTMA provided an exemption from the PBV competition requirements for site selection for PHA replacement housing, but such exemption is largely limited to on-site replacement, since it requires the PHA to have an ownership interest in the land or the units. Allowing any replacement housing to be exempt from competition requirements would be a simple way to drive the de-concentration of poverty. The statute does not limit the exemption to onsite replacement. HUD should allow all PHA replacement housing, in whatever form, to meet the HOTMA exemption.

7. Fair Housing Review

We applaud HUD's recent efforts to refocus fair housing review and enforcement on HUD's mission and to encourage application of fair housing principles by acknowledging practical realties. Along these lines, we urge you to examine the process and requirements in place for fair housing reviews. Whenever fair housing review is necessary, the review adds months to the project's timeline. We have heard several reports of fair housing reviews in RAD transactions and otherwise taking well over 6 months, and even over 1 year in some cases. If the fair housing staff is over-burdened, then the review should be conducted by program staff. Moreover, we urge you to look at the fair housing review standards. The exceptions for construction in areas of minority concentration were never correctly applied in accordance with the plain meaning of the regulatory language. For example, 24 CFR 983.58(e)(3)(ii) allows for construction in an area of minority concentration if the project meets an "overriding housing need." While the regulatory text goes on to offer an "overall housing strategy" and of "revitalizing areas" as examples of overriding housing needs, the regulatory text does not limit overriding housing needs to these two examples. Yet, these two examples are the only allowed interpretations of overriding housing need and little flexibility or transparency is provided in applying these standards. This erroneous application has only become more outdated with the increased gentrification pressure on urban areas, rising housing costs

and the Administration's focus on revitalizing Opportunity Zones. We urge you to reform fair housing review standards and procedures.

8. FHA Processing

FHA Insurance is an important tool for the provision and preservation of affordable housing. We commend the Department for its ongoing efforts to streamline it processes in the Office of Multifamily Housing to facilitate timely commitments and closings. Please consider the following suggestions:

- Three-Year Rule**.** Our members are very much interested in the "3-year rule" in Section 223(f) transactions, regarding the timing requirements that allow a project to qualify for the Section 223(f) loan program. We understand that HUD has committed to reviewing this rule and applaud HUD's effort to examine whether this rule creates unnecessary barriers that can be eliminated. As stated above, we also urge HUD to consider revisions to the environmental review in FHA-insured transactions, and we urge HUD to incorporate such revisions in the MAP Guide.

- Reduced MIP for Affordable Housing**.** We also urge HUD to restore the reduced Mortgage Insurance Premium (MIP) category for Subsidized and other Affordable Properties that do not qualify for Broadly Affordable. Prior to the 2016 MIP reductions projects with a Section 8 HAP contract or other affordable use restriction with a remaining term of less than 15-years were eligible for a reduced MIP of 0.45% versus the MIP for market rate properties of 0.60%. This is consistent with the intent of reduced MIP for affordable housing projects as originally published in the April 10, 2012 and August 15, 2012 Federal Register which was to distinguish between the risk associated with market rate properties v. affordable housing. The guidance in the April 10 and August 15, 2012 notices did not include a stipulation or requirement of *15-years for PBRA contracts or use restrictions. The guidance was simply, "These changes will not apply to loans combined with Low Income Housing Tax Credits, other affordable housing loans for HUD-assisted properties, or loans insured under FHA's Risk Sharing Programs. 'Other affordable housing loans for HUD-assisted properties' include those for properties with an active project-based Section 8 contract covering any of its units." This language was repeated in the August 15, 2012 Notice, "The term 'other affordable housing loans for HUD- assisted properties' includes those properties with an active project-based Section 8 contract covering any of its units." Neither the April 10 or the August 15, 2012 Notices referenced the need for a project based rental contract to have a term of 15-years to qualify under the MIP established for affordable housing projects. *Please see earlier comments relating to term of HAP renewals.

9. Unreasonable Enforcement Issues

We believe it is important to strike a balance between appropriate enforcement and excessive burden. HUD's announcement to limit the use of the False Claims Act against institutional lenders, acknowledging that recent enforcement has become too extreme and counterproductive to FHA's mission and goals, is one example. We urge you to look more broadly at HUD's enforcement efforts. Current enforcement protocols are seeking maximum penalties -- in the millions of dollars – for all cases, including many cases that involve only technical violations with no loss to the government and no harm to the public.

Furthermore, there is a tremendous amount of uncertainty and conflicting information regarding protocols over reviews, inspections and enforcement. Participants should not face multiple inquiries from multiple HUD offices on the same matter simultaneously. It would be better to organize and consolidate inquiries within one office, such as the Departmental Enforcement Center, who could avoid unnecessary duplication that wastes time and resources for both HUD and project owners alike.

I along with NLHA members stand ready to assist the Department in its efforts to improve and streamline processes for the benefit of HUD staff, housing providers and the residents we serve.

Sincerely,

Denise B. Muha,
Executive Director