CLPHA
Strengthening Neighborhoods.
Improving Lives.

RENO & CAVANAUGH PLLC

March 20, 2017
Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Docket No. FR–5976–N–03: Housing Opportunity Through Modernization Act of 2016: Implementation of Various Section 8 Voucher Provisions

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments on the Housing Opportunity Through Modernization Act of 2016: Implementation of Various Section 8 Voucher Provisions Notice (the "Notice").

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households.

Reno & Cavanaugh represents more than one hundred PHAs throughout the country and has been working with our clients on public housing development and operations issues since its inception. Reno & Cavanaugh was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh's original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

On behalf of CLPHA and Reno & Cavanaugh, we thank you for the opportunity to comment on the Notice. In a House vote of 427-0 and by Unanimous Consent in the Senate, the Housing Opportunity Through Modernization Act ("HOTMA") was passed and signed into law on July 29, 2016. While we appreciate and applaud HUD's efforts to simplify the various Section 8 voucher provisions as required by HOTMA, we remind HUD of Congress' legislative intent – streamline, simplify, and modify programs to "improve their effectiveness and provide enhanced

opportunity for program beneficiaries and the organizations that serve such individuals."[1] As such, while the Notice remains a significant first step, it is important that HUD promptly and fully implement all of the provisions contained in HOTMA as Congress intended to enhance the tenant-based and project-based voucher programs, reduce unnecessary cost, and increase flexibility.

Below we offer additional comments on the Notice as requested by HUD.

Inspection of Dwelling Units (Notice II.A):

Several PHAs have reached out to us voicing concerns with the following provisions of the Notice: (1) the proposed definition of life-threatening conditions, and (2) the limited timeframe within which PHAs have to conduct an inspection of a unit under the alternative inspections provision.

First, though we recognize HUD's list of life-threatening conditions is based on the definition currently used by the UPCS-V demonstration, we encourage HUD to also consider the various definitions of "life-threatening conditions" and "non-life-threatening conditions" that PHAs may have adopted, especially by many larger PHAs with code enforcement divisions which have already defined those terms. HUD ought to consider these preexisting definitions in creating one of its own. Furthermore, as long as such definitions are reasonably similar to those promulgated by HUD, PHAs should retain the authority to continue using their pre-existing definitions in lieu of those proposed by HUD.

Second, the alternative inspection requirement that PHAs must complete an initial inspection within fifteen (15) days of receiving the RFTA, regardless of the size of a PHA's tenant-based program, is neither statutorily required under HOTMA nor is it practicable for larger housing authorities to implement. Adopting a one-size-fits-all approach places larger housing authorities at a distinct disadvantage as such a requirement will be practically impossible to achieve. We believe that the current program regulations at 24 CFR 982.305(b)(2) sufficiently recognize and account for this distinction. Under 24 CFR 982.305(b)(2), PHAs with 1,250 or fewer budgeted units in their tenant-based program have fifteen (15) days to complete the initial inspection, while PHAs with more than 1,250 budgeted units are required to complete the initial inspection within a reasonable time of receiving the RFTA. We urge HUD to continue allowing larger

[1] H.R. REP. NO. 114-397, at 18 (2016) ("Introduced by Representative Luetkemeyer on October 7, 2015, H.R. 3700, the Housing Opportunity Through Modernization Act of 2015, reforms certain Department of Housing and Urban Development (HUD) and Rural Housing Service programs in order to improve their effectiveness and provide enhanced opportunity for program beneficiaries and the organizations that serve such individuals.").

PHAs with over 1,250 budgeted units in their tenant-based programs to have a reasonable time to complete their initial inspections.

Units Owned by a PHA (Notice II.B):

We recognize that the pre-HOTMA definition of units "owned by a public housing agency" created much confusion among PHAs and appreciate Congress' effort to clarify and simplify this definition. However, we fear that in implementing the HOTMA-definition of "owned by a public housing agency" HUD has over-defined this term in a way that is unlikely to resolve much of the previous consternation. Neither the statute nor the legislative history requires HUD to further define this term; therefore, it should be self-implementing.[2] The definition simply provides that units located in a project "owned by the PHA, by an entity wholly controlled by the PHA, or by a limited liability company ("LLC") or limited partnership ("LP") where the PHA holds a controlling interest" will be considered "owned by a public housing agency." As such, we believe the definition of "owned by a public housing agency" employed by HUD should simply allow the statutory text to stand on its own.

If HUD is unwilling to limit the "owned by a public housing agency" definition to the statutory text, then HUD should at least focus its definition on the issue of control rather than mere ownership. For example, a PHA may have 51% ownership of the general partner entity for purposes of obtaining additional points on a low-income housing tax credit application, but may not exercise any control over the day-to-day operations or management of the owner entity. While the statutory definition would not consider such units "owned by the public housing agency" as they are neither owned by the PHA, by an entity wholly controlled by the PHA, nor by an LLC or LP where the PHA holds a controlling interest, the definition presently proposed by HUD would result in a different outcome. When defining a "controlling interest," we encourage HUD to focus on the entity or entities providing day-to-day control, rather than those simply holding an arbitrary percentage of ownership, much like it does in the newly-revised 2530 Previous Participation guidance[3].

Project-Based Vouchers (Notice II.C):

[2] H.R. REP. NO. 114-397, at 37 (2016) ("This provision defines the types of units owned by a PHA to be any dwelling unit that is located in a project that is owned by the PHA, by an entity wholly controlled by the PHA, or by a limited liability company or limited partnership where the PHA holds a controlling interest. Units will not be considered owned by a PHA if the agency only holds an interest in the ground lease, holds a security interest under a mortgage or deed of trust on the unit or holds a non-controlling interest in an entity that owns the unit.").

[3] 24 C.F.R. Part 200, subpart H and Housing Notice H 2016-15, issued October 20, 2016

Changing the Maximum Amount of PBVs Permitted in the PHA HCV Program (Notice II.C.2) –

1) *Should HUD allow PHAs that were administering PBV units that would qualify under the additional 10 percent exception categories but were placed under HAP contract prior to the effective date of this notice count those units as excepted?*

HUD ought to allow PBV units that qualify under the additional ten percent (10%) exception categories to qualify for the exception, regardless of when such units were placed under HAP contract. The legislative history and the statutory text are clear: Congress did not intend for any time limits to be placed upon when units may or may not fall within the additional ten percent (10%) exception categories.[4] To create such a time limit would run counter to Congress' intent by increasing, rather than decreasing, administrative burdens, as doing so would force PHAs to differentiate and categorize otherwise "like" units separately. Additionally, in keeping with the broader goals of the HOTMA legislation, Congress has made clear its intent for there to be programmatic flexibility to help preserve and maintain affordable housing units. Those goals are best accomplished by incorporating as many units as possible under the PBV cap. Furthermore, on a practical note, there are many housing authorities that have already fully utilized the original twenty percent (20%) authority for projects that would otherwise qualify under the exception categories and might now be interested in using vouchers for "traditional" PBV purposes. By disallowing such projects from falling within the additional ten percent (10%) exception, merely because of the date of their HAP contract, HUD essentially penalizes those housing authorities that were at the forefront of providing permanent supportive housing and other PBV-based supportive services by eliminating their ability to now use the expanded authority for traditional voucher allocations.

2) *The new (o)(13)(B) further provides that the additional 10 percent exception may be applied to units that are difficult to use, as determined by the Secretary, and with respect to census tracts with a poverty rate of 20 percent or less. This document, for now, only applies the statutory exception provision to those units located in a census tract with poverty rates of 20 percent or less. What criteria should HUD use to define or determine the areas where vouchers are "difficult to use" for this exception category?*

[4] H.R. REP. NO. 114-397, at 37 (2016) ("This section authorizes a PHA to attach vouchers to an apartment, rather than a tenant, a.k.a. project base voucher (PBV), up to a limit of 20 percent of its authorized voucher allocation. It also enables a PHA to provide up to an additional 10 percent of its authorized vouchers to create units targeting homeless individuals and families, veterans, elderly households or households with persons with disabilities, or units in areas where vouchers are difficult to use due to market conditions.").

Instead of prescribing situations in which a voucher may qualify as "difficult to use," HUD should allow PHAs to self-define the various situations, unique to local circumstances, which may make a voucher "difficult to use." The legislative history indicates that Congress intended the "difficult to use" exception to be provided when "vouchers are difficult to use due to market conditions."[5] Because market conditions may vary widely from one locality to the next, PHAs ought to be afforded the flexibility to define this term as it best responds to their individual jurisdiction's needs. Additionally, HUD should add three additional criteria that can determine where vouchers are difficult to use: (1) in areas experiencing rapid rent appreciation as shown by increases in fair market rent, (2) areas with low vacancy rates, and (3) areas undergoing revitalization. Adding these categories will allow PHAs to preserve affordability in areas that are rapidly changing and allow residents opportunities and choice to move into or remain in areas that are gentrifying when they may otherwise be priced out.

3) *The statute allows the Secretary to issue regulations to create additional exception categories from the normally applicable PBV program limit, which could apply to the additional 10 percent authority or that could be exempted from the program limit entirely. What additional exception categories that should be included in the 10 percent authority? What other types of units should be exempted from the PBV program limit entirely?*

With respect to units that are "previously subject to federally required rent restrictions or receiving another type of long-term housing subsidy provided by the Secretary," HUD should allow the statutory language to stand on its own as self-implementing in order to comply with the statutory mandate. As currently proposed, the list articulated by HUD is too narrow and fails to include a wide variety of rent-restricted programs that we believe Congress intended to include in the PBV program limit exemption. Such programs that HUD fails to include under the current implementation language include, but are not limited to, low-income housing tax credit properties subject to a Land Use Restrictive Covenant as well as housing provided through the HOME program, programs under the McKinney-Vento Homeless Assistance Act[6], and Neighborhood Stabilization Program ("NSP") grants. As such, in deciding whether a property falls within the PBV exemption, HUD need look no further than the statute itself. As long as a PHA is able to demonstrate that a property was previously subject to either "federally required

[5] H.R. REP. NO. 114-397, at 37 (2016) ("[This section] also enables a PHA to provide up to an additional 10 percent of its authorized vouchers to create units targeting … areas where vouchers are difficult to use due to market conditions.").

[6] 42 U.S.C. 11302

rent restrictions" or another type of "long-term housing subsidy provided by the Secretary," such units ought to qualify.

Additionally, HUD should delete the text that incorrectly states that supportive services must be available "to all families receiving PBV assistance in the project" in order for the property to qualify for an exception to the project cap. There is nothing in the statute or legislative history that would require *all* units to receive or be qualified for supportive services in order to utilize this exception to the cap. Rather it should be clarified that supportive services only need to be available to units designated as supportive housing.

Additionally, we believe HUD should give PHAs the opportunity to determine additional exception categories that should be included in the ten percent (10%) authority. Such exception categories may be spelled out in the PHA's Annual Plan and subject to public comment and HUD approval and may include, but are not limited to, targeted groups such as: intergenerational families, youth aging out of foster care, emancipated youth, and single member households.

4) *This document sets out certain conditions that a PBV new construction unit must meet in order to be considered replacement housing and eligible for the exception to the PHA PBV program limitation. Are those conditions appropriate or should they be changed or expanded?*

We believe the conditions are appropriate. However, as described above, we note that the as long as a PHA is able to demonstrate that a property was previously subject to either "federally required rent restrictions" or another type of "long-term housing subsidy provided by the Secretary," such units ought to qualify for the exception as replacement housing.

5) *In light of the impact that additional exceptions and exemptions from the program limit will have on the number of vouchers available for tenant-based assistance under the HCV program, should HUD establish additional categories at all? What limits or requirements on project-basing, if any, should be placed on the use of this exception authority to ensure that the PHA has sufficient tenant-based assistance available for families to exercise their statutory right to move from the PBV project with tenant-based assistance after one year of occupancy at the PBV project?*

We strongly object to the idea that there should be additional limits or requirements placed on the PHA's ability to project-base its vouchers. The HOTMA statute was designed to provide PHAs with the flexibility and ease of use needed to reduce costs and increase effectiveness. To best achieve these goals, HUD ought to allow and encourage PHAs to make decisions in light of their individual local needs.

Changes to Income-Mixing Requirements for a Project (Project Cap) (Notice II.C.3) –

1) *What other standards should HUD require for supportive services under B.2, above?*

HUD should continue to allow PHAs to define "supportive services" on a case-by-case basis in their Administrative Plans and through their local processes. This would allow the PHA to retain flexibility to design programs based on their individual, local needs. Additionally, HUD should delete the text that incorrectly states that supportive services must be available "to all families receiving PBV assistance in the project" in order for the property to qualify for an exception to the project cap. This is incorrect given the ability under the current regulations to layer types of exceptions within the same property, or only utilize exceptions for the portion of the units over the cap. There is nothing in the statute or legislative history that would require *all* units to receive or be qualified for supportive services in order to utilize this exception to the cap.

2) *The Secretary has authority to define areas where tenant-based vouchers are "difficult to use." This document, for now, only applies the statutory provision of census tracts with poverty rates of 20 percent or less. What are some other criteria that HUD should include?*

Instead of prescribing situations in which a voucher may qualify as "difficult to use," HUD should allow PHAs to self-define the various situations, unique to local circumstances, which may make a voucher "difficult to use." The legislative history indicates that Congress intended the "difficult to use" exception to be provided when "vouchers are difficult to use due to market conditions."[7] Because market conditions may vary widely from one locality to the next, PHAs ought to be afforded the flexibility to define this term as its best responds to their individual jurisdiction's needs. Additionally, HUD should add three additional criteria that can determine where vouchers are difficult to use: (1) areas experiencing rapid rent appreciation as shown by increases in fair market rent, (2) areas with low vacancy rates, and areas undergoing revitalization. Adding these categories will allow PHAs to preserve affordability in areas that are rapidly changing and allow residents opportunities and choice to move into or remain in areas that are gentrifying when they may otherwise be priced out.

3) *Are there additional properties formerly subject to federal rent restrictions or receiving rental assistance from HUD that should be exempted from a project cap?*

[7] H.R. REP. NO. 114-397, at 37 (2016) ("[This section] also enables a PHA to provide up to an additional 10 percent of its authorized vouchers to create units targeting … areas where vouchers are difficult to use due to market conditions.").

Again, as outlined above, when determining the types of units that ought to be exempted from the PBV program limit entirely, we believe that HUD should follow Congress' statutory mandate that any units of project-based assistance attached to units "previously subject to federally required rent restrictions or receiving other project-based assistance provided by the Secretary" shall qualify, regardless of the type of rent restriction or project-based assistance. As currently proposed, the list articulated by HUD is too narrow and fails to include a wide variety of rent-restricted programs that we believe Congress intended to include in the project cap exception. In deciding whether a property falls within the PBV exemption, HUD need look no further than the statute itself. If a PHA is able to demonstrate that a property was previously subject to "federally required rent restrictions" or another type of "project-based assistance provided by the Secretary," such units ought to qualify.

4) *The statute allows HUD to impose additional monitoring and requirements on projects that project-base assistance for more than 40 percent of the units. How can PHAs ensure that this increase in PBV units will not hamper mobility efforts and moves to opportunity areas?*

This question presupposes that an increase in the number of available PBV units will hamper mobility efforts and moves to opportunity areas. On the contrary, we believe that the use of project-based vouchers helps improve the communities where voucher-holders already live and can be an integral part of large-scale redevelopment plans that can create neighborhoods of choice and opportunity. The PBV program is one of the last-remaining HUD programs that allow a PHA to add to the availability of affordable housing stock by using the voucher commitment in underwriting the financing of a project.

PBV Contract Terms (Notice II.C.4) –

We ask that HUD revise paragraph D. Additional Units Without Competition with respect to situations where owners and PHAs are restoring units up to the number originally under a HAP Contract. When HUD last issued regulations on the Project Based Voucher program, a requirement was added that project owners must remove units from a Housing Assistance Payments ("HAP") contract if the unit's residents were either over-income for a period of six months or were wrong-sized and refused to move. In the commentary to the Housing and Economic Recovery Act of 2008 (HERA): Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs Final Rule[8], HUD responded to concerns over a shrinking HAP Contract that owners could add these units back to the HAP Contract when the

[8] The Housing and Economic Recovery Act of 2008 (HERA): Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs, 79 Fed. Reg. 122 (June 25, 2014).

over-income or wrong-sized households moved from the project. However, the existing regulations at 24 CFR 983.211(c) and 24 CFR 983.207(b) only allow units to be added back to an existing HAP contract within the first three years after execution of the HAP Contract. Therefore, if a unit was removed after year three of the HAP contract due to over-housing or over-income tenants, there is no remedy available to the owner to increase the HAP Contract to the originally-intended number of units. This creates an underwriting problem for the owner and its lenders and investors, not to mention can jeopardize the long-term stability of the project. Given the commentary in the Final Rule, we believe that the three-year limitation was not intentional and the statutory language in HOTMA was, in part, intended to fix this issue. Accordingly, we believe that HUD's implementation of this provision of HOTMA is overly complicated for this purpose – adding units back up to the original number under the HAP Contract should not need HUD approval or additional explanation in the Annual or Administrative Plan as such requirement would be overly burdensome when the purpose is simply to achieve the original agreement under the HAP Contract. We urge HUD to create an exemption to these requirements for units being restored to a HAP contract that previously covered them. Additionally, on its face, we believe that this provision is overly burdensome to the Field Offices, PHAs, and Owners. We would suggest that PHAs be given more flexibility to add units to an existing HAP Contract without seeking Field Office approval. Field Office approval is not required to enter into the original HAP Contract and should not be needed to add units to an existing HAP Contract so long as the addition of units otherwise complies with PBV requirements.

Additionally, we ask that HUD revise the language regarding contract extensions to be consistent with the statutory language that allows for multiple renewal terms of 20 years. The language within the notice continues the error in the current regulations that limits PHAs and owner to one renewal term. However the statute clearly provides that the PHA may renew the contract for the period that the agency determines to be appropriate to achieve affordability and expand housing opportunities and speaks to "terms" of "20 years each". Congress clearly intended to allow multiple renewal terms and we ask that HUD correct this error and conform the notice to the statute.

1) *Are there additional parameters HUD should consider placing on PHAs and owners when amending HAP contract terms related to continuation, termination or expiration?*

No, the regulations already sufficiently cover this. Additional efforts to place parameters on PHAs and owners when amending HAP contracts would be unnecessary and administratively burdensome. However, HUD should clarify that this provision allows the PHAs and owners to add terms to the HUD form contract.

Attaching PBVs to Structures Owned by PHAs (Notice II.C.6) –

1) *Is the $25,000 per unit threshold appropriate for this exception from the competitive process?*

No, the $25,000 per unit threshold, or any other monetary threshold, is not required under the statute. Furthermore, the limitation that the units be placed on the same site goes beyond what the HOTMA statute requires and should be removed. The statute allows assistance to be attached to an "existing…structure in which the agency has an ownership interest or which the agency has control of without following a competitive process." Replacement housing should not be required to be on the same site or contiguous to it. By requiring PHAs to expend at least $25,000 per unit in hard costs on units on the site of the public housing project, HUD would essentially eliminate the ability of a PHA to replace units with off-site existing housing absent a competitive selection process. We believe HUD should instead eliminate the per unit threshold and site requirement. These limitations severely limit Congress' intent to grant PHAs flexibility when attempting to redevelop public housing properties and serve its residents. So long as the PHA designates the units as replacement units and allows former residents a preference, HUD should not dictate further conditions upon which PHAs may use this flexibility.

2) *The law provides that this section is applicable to a PHA that has a ownership interest in or has control of the project. Are there examples or cases where a PHA may have control of a project but would not have any ownership interest in the project that HUD should address in future implementing guidance or when conforming the regulation to these provisions?*

By returning to the previously-used definition of PHA-owned units, HUD would reintroduce the confusion that led to the need for a statutory definition of PHA-owned units. We agree that the PHA's interest should not need to rise to "PHA-owned" as defined in the statute; however, we believe that the statutory language could stand on its own without further definition. However, in any event, if the additional definition remains, it needs to be clarified and should definitely include situations where the PHA is the ground lessor, participates in the owner entity in any capacity, meets the requirements of "PHA-owned," and provides a loan and holds a security interest in the project.

Preference for Families Who Qualify for Voluntary Services

We thank HUD for implementing this change, however, we believe that the HUD has needlessly complicated a straightforward statutory provision with a burdensome and impractical review process that will impede PHAs from serving those with disabilities. We urge HUD to simply this section to relieve the administrative burdens on HUD and PHAs.

CLPHA
Strengthening Neighborhoods.
Improving Lives.

RENO & CAVANAUGH PLLC

Finally, in addition to our comments described above, we wish to emphasize the importance of HUD fully implementing all provisions under Section 106 of HOTMA, particularly those provisions related to: (1) entering a PBV HAP Contract for any unit that does not qualify as existing housing and is under construction or recently has been constructed regardless of whether the PHA and owner executed an AHAP; (2) providing rent adjustments using an operating cost factor; (3) establishing and utilizing procedures for owner-maintained site-based waiting lists; and (4) concerning the environmental review requirements for existing housing. While we appreciate the progress that HUD has made in implementing several of the provisions of HOTMA, we would urge HUD not to stray from the statute and allow PHAs the flexibility that Congress intended. Further, any delay in implementing the provisions of HOTMA creates challenges for PHAs and owners in their efforts to advance affordable housing through the PBV program.

Thank you for the opportunity to comment on the Notice. If you have any questions, please do not hesitate to contact us.

Sincerely,

Sunia Zaterman	Stephen I. Holmquist	Sarah Molseed
Executive Director	Member	Member
CLPHA	Reno & Cavanaugh, PLLC	Reno & Cavanaugh, PLLC