



*Filed electronically via regulations.gov*

April 3, 2023

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: Section 8 Project-Based Rental Assistance: Standard Program Regulation and Renewal Contract; Advance Notice of Proposed Rulemaking and Request for Public Comment (Docket No. FR-6320-A-01; RIN 2502-AJ62)

To Whom It May Concern:

On behalf of Stewards of Affordable Housing for the Future (SAHF), thank you for the opportunity to comment on HUD's Advanced Notice of Proposed Rulemaking on Section 8 Project-Based Rental Assistance: Standard Program Regulation and Renewal Contract (ANPR). While we appreciate HUD's efforts to explore standardizing and streamlining contracts, and the regulatory structures governing them, we are concerned that both the process and end goal could be threatened by complexities of contract renewals and timing, as well as ongoing capacity constraints at HUD and among property management.

SAHF is a national collaborative of twelve nonprofit affordable housing developers. SAHF members preserve and develop multifamily properties for low-income persons with disabilities, the elderly, families, and the homeless. SAHF members collectively own and operate more than 145,000 affordable homes across the country; more than a third of which are in properties assisted with project-based rental assistance (PBRA). In their roles as developers and operators of affordable rental homes, SAHF members have worked with HUD for decades and have deep understanding of PBRA contracts, including their regulatory and subregulatory frameworks. It is with this lens of experience and deep commitment to ensuring the long-term affordability and stewardship of these resources that we provide comments on HUD's proposal to standardize PBRA contracts and regulations.

On the next page, we respond to HUD's specific questions posed in the ANPR. Our responses are guided by the following principles that we strongly urge HUD to adopt should the agency continue to explore standardizing the PBRA contract and regulations:

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**Stewards of Affordable Housing for the Future**

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COLLABORATE. INNOVATE. ACCELERATE.

- Updated handbook and renewal guidance should not be delayed. New regulations will not obviate the need for current program guidance.
- Owners should be incentivized and not mandated to transition to a new, standardized contract. Attempts to mandate conversion to the new regulation may not only be met with legal challenges but could also have a chilling effect on investment in the preservation of PBRA properties by sowing uncertainty about the stability and terms of the program. Investors and lenders who feel less confident about the terms of HAP contracts may require costly guarantees or more conservative underwriting to mitigate risk of future changes.
- HUD must undertake any changes in a circumspect manner that considers the long implementation period and implications of any disruptions in implementation. HUD need only look to the unintended consequences of the Performance-Based Contract Administration changes to understand how equal care must be taken to ensure continuity in the operation under existing authority as implementing changes.
- Given the lengthy regulatory process and limited ability to issue waivers, HUD should limit in scope what program specifics are in regulations, and instead focus on maintaining and updating subregulatory guidance. Unique fact patterns, innovations, and disruptions in the tools used to preserve and finance PBRA properties are virtually assured. HUD should focus on regulatory guidance that provides clarity on principles and pillars of the program but continue to provide implementing guidance in handbooks.
- As HUD programs, including PBRA, are often layered with other programs, HUD should not create discrete regulations for requirements that are already addressed by cross-cutting regulations. Instead, HUD should lean towards streamlined requirements across programs. Creating discrete regulations with potentially contradictory requirements will make transactions and property operations more costly for HUD and owners and less transparent for residents.

Our comments below are cumulative and should be read in the aggregate, starting with the future state of contracts as a voluntary and incentivized transition instead of being mandated, and that contracts and their governing regulations incorporate our recommendations below.

### **SAHF Responses to Questions Posed in ANPR:**

#### ***Reserve for Replacements***

*Q1: To ensure project capital needs are met, HUD intends to require an owner to establish a HUD-controlled reserve for replacement account, with initial and annual deposits determined by means of a periodic capital needs assessment (CNA). Are there circumstances under which HUD should consider waiving the need for a CNA and, if so, what circumstances and why?*

SAHF and its members strongly support the preservation of the PBRA stock, including its financial and physical health. A reserve for replacement can be a tool to help defray the costs of replacing a project's capital items, but HUD's requirements for the reserve have too often come

at odds with, or been duplicative of, other party-required reserves, and are too burdensome for owners/managers to appropriately use for the necessary purposes. This misalignment has been most pronounced with properties that have Fannie Mae or Freddie Mac-backed mortgages.

If a property has a recognized party such as a lender of a government backed loan, a state housing finance agency, or an investor in Low Income Housing Tax Credits using an established, published process for requiring a reserve for replacement sized through periodic Capital Needs Assessments (CNAs), then HUD should refer to this CNA and not layer on additional requirements. Further, for properties in good standing where the reserve is required by a lender or investor, HUD guidance should permit owners to make withdrawals based on only lender or investor consent and report the use to HUD. If HUD disallows the use, the owner should be required to replace the fund. A delegated process like this would avoid sometimes significant delays or discrepancies in HUD processing and allow owners to make repairs and in some cases turn units more quickly.

Where there is no other required reserve for replacement, HUD should ensure that CNAs are an eligible property expense and only required periodically (no more than every 10 years). CNAs are only estimates to guide owners/managers, but HUD often too strictly adheres to those estimates. SAHF members have reported instances where account executives have prevented reserves in excess of estimated costs from being released or denied otherwise reserve-eligible expenses because they weren't on the original CNA. This misunderstanding of the nature CNAs and use of reserves delays the maintenance of the property for the benefit of residents. In properties where there is a HUD-required reserve, SAHF strongly urges HUD to recognize CNAs as estimates and to reduce barriers to accessing reserves for the ongoing preservation needs of the property.

*Q2: Should HUD provide an incentive to owners to use their own capital to establish and/or make continued deposits to reserve for replacement account? If yes, how might the incentive be structured? Should access to the incentive be tied to particular outcomes? If so, what outcomes?*

We are unclear of the fact pattern in which this question would apply. Reserve for replacement accounts should be established at the time of a recapitalization/refinancing with the initial deposit as one use of financing proceeds. Monthly deposits to the reserve should be made from operating funds. To the extent that the property has not had a reserve or has insufficient reserves, owners already advance funds to ensure timely capital improvements. This sometimes occurs even when reserve funds are available because of significant delays in HUD approval (see Q1 above). As discussed below, owners of properties in good standing, those with good REAC and MOR scores and no open audit findings, should be permitted to access cash flow monthly. This structure for a return will sufficiently incentivize owners to make advances when necessary.

Where the property has not had a reserve for replacement requirement and will convert to the new streamlined regulation, owners should not be expected to make a large initial deposit of their own funds. Owners often use corporate (non-project) funds to meet a range of needs across properties. It does not make financial sense for an owner to restrict enterprise level funds (equity) on behalf of a single property. Reserves for these properties should be built over time and owners should advance funds for reserve eligible uses as needed.

### **Rehabilitation**

*Q3: Should the standard program regulation address requirements when a project assisted under section 524 is undergoing rehabilitation? If not, why not?*

SAHF cautions against overly detailed regulations on requirements when a project is undergoing rehabilitation, and instead urges HUD to reference cross-cutting regulations on rehabilitation related issues such as relocation and keep program guidance current to reflect processing details and evolutions in preservation financing, including updates to Chapter 15 of the Section 8 Renewal Policy Guide.

*Q4: If the standard regulation should address rehabilitation, what elements of rehabilitation should it cover (i.e., rehabilitation planning, tenant relocation, use of the pass-through?) Are there items that should be excluded from the regulation?*

In a new regulatory framework, HUD should support preservation transactions while ensuring that residents are safely housed during rehabilitation. Instead of attempting to anticipate every rehabilitation scenario and financing structure in drafting prescriptive regulations on rehabilitation, we urge HUD to address core principles around rehabilitation in regulations. This should include clear regulatory authority for the use of Section 8 pass-through payments in a voluntary rehabilitation context, clear guidance that owners have a right to deferral of physical inspections while rehab is active, and the right to a rent increase at the time of renewal. Details of the implementation of these principles should be addressed in a handbook or renewal guide language that can be more easily be clarified or updated to reflect changes in HUD organization, systems, or new practices in the preservation space. In implementation guidance, we urge HUD to explore sound policy that allows postponement of inspections during a rehabilitation period (including a reasonable lead up) while ensuring continued safe conditions for residents. SAHF members have acquired properties, including some troubled, that required rehabilitation but received low inspection scores before rehabilitation was complete, creating a negative incentive to taking on these transactions and long-term preservation.

### **Project Finances**

*Q5: To ensure compliance with the reserve for replacement requirement, HUD intends to require all owners to submit annual financial reports. Please comment.*

Most properties with PBRA already have a requirement to submit annual financial reports so this would not be a new requirement for most owners/managers. We do encourage HUD to consider

ways in which annual financial reports could be better streamlined when required. To the extent that HUD will be imposing this requirement more broadly, it is an ideal time for HUD to explore interagency alignment of financial reporting with state housing finance agencies administering the Low-Income Housing Tax Credit program.

*Q6: Should the standard program regulation contain any limits on distributions? If not, how should HUD ensure that owners dedicate appropriate funds to operating and maintenance costs, and that taxpayer funds are not providing excessive compensation to owners?*

HUD should not impose any limits on distributions of surplus cash. Limitations on distributions in HAP contracts were instituted in a very different financing environment where development and preservation of properties were financed only with debt and operating subsidy. The tools currently available for preserving affordable rental homes are more complex and financing generally requires several funding sources, including equity investments and soft funding that is not required to be paid in fixed payments from operating income, but must be paid from cash flow over time in order to be a part of the financing structure. Owners of affordable rental homes serving the lowest income people need to be able to access cash flow so that they can leverage the full complement of funding tools to preserve properties.

The narrative of “excessive compensation to owners” is inconsistent with the rent setting provisions of MAHRA and neglects to consider how many owners, including SAHF members, actually use distributions. Rents in most PBRA properties are limited by market comparability or by the budget needed to operate the property, as prescribed by statute. In cases where there is surplus cash available, nonprofit owners use those funds to further their mission and ensure the preservation of affordable rental homes and resident stability. Distributions are used to provide operating capital to properties when they struggle, fund construction overruns and rehabilitation gaps. Owners can leverage these funds to provide more and better solutions. The availability of these funds to provide advances or fund services has been pivotal in times of disruption – such as the COVID-19 pandemic, when owners were asked to incur significant additional health and safety costs and take extraordinary measures to ensure housing stability. These measures and sound management require resources. Asking the partners that provide PBRA rental homes to operate on the thinnest possible margins undermines the mission and the health of the portfolio.

Instead of limiting these actions, HUD should focus on encouraging adequate funds to operating and maintenance costs through an appropriate review of financing and operating budgets and enforcement of physical condition requirements. Where there are failing REAC scores, unresolved audit findings or rehabilitation that has, without reasonable cause, been materially delayed or abandoned, it is appropriate for HUD to limit the distribution of surplus cash.

HUD in [Mortgagee Letter 2022-16](#) outlined a procedure for monthly distribution of surplus cash, which includes the obligation to repay funds if Surplus Cash is negative. HUD should seek to

align PBRA requirements with the 2022-16 procedure to the greatest extent possible while balancing protection and preservation of the PBRA portfolio.

### **Enforcement**

*Q7: In the interest of providing clarity and transparency, HUD believes it would be beneficial to include in the regulation a subpart on enforcement, where the tools available to HUD and the circumstances under which such tools could be employed would be addressed. Please comment.*

In undertaking any updates to guidance around the PBRA program, HUD should consider how it can clearly articulate enforcement tools and processes as a means of safeguarding the portfolio and providing due process for owners and protections for residents. HUD may wish to incorporate the provisions of [Housing Notice 2018-08](#) in regulation but should consider that this notice applies to other programs and should be in a cross-cutting regulation, rather than a PBRA-specific section. Further, HUD should see this as an example of why regulations should be more evergreen than detailed—as all references to REAC in the notice would have to be updated to reflect the transition to NSPIRE.

HUD has a number of effective enforcement tools of varying degrees of gravity. In cases of noncompliance, a failure to leverage existing tools rather than a lack of tools has led to a negative outcome. We strongly encourage HUD to focus on upfront review and ongoing compliance requirements that focus on the health of PBRA properties and on capacity building and updated guidance for HUD staff and tenant groups on available tools and procedures. This updated guidance would include an updated Chapter 11 of the Section 8 Renewal Policy Guide.

### **Vacancy Payments**

*Q8: What incentives could HUD use to encourage owners to re-lease vacant units quickly? Are there programmatic changes HUD might consider encouraging this result?*

SAHF and its members have not heard concern about owners not re-leasing vacant units quickly enough. There are already incentives to do so as vacancy payments do not cover the full amount of rent on a unit. HUD could best help expedite unit turns by providing efficient processing for replacement reserve requests since replacement and repairs may occur while units are empty and by fully and effectively implementing Housing Opportunity through Modernization Act (HOTMA) provisions that may streamline certification/recertification procedures.

### **Scope**

*Q9: What topics should be addressed in a standard program regulation? For example, should the regulation be comprehensive, addressing all aspects of the program, ranging from renewal, management, occupancy, enforcement, and nondiscrimination, accessibility for persons with disabilities and equal opportunity requirements? If not, how should the scope of the regulation be limited?*

To the extent that HUD creates new regulations, we urge HUD to focus these regulations on issues uniquely applicable to the PBRA program, such as rent setting and property rehabilitation. For issues already addressed elsewhere (e.g., in 24 CFR Part 5) including income eligibility, nondiscrimination and accessibility, we urge HUD to cross reference or incorporate by reference the organic provisions. Owners/managers of PBRA properties comply with many regulations already as programs are braided and stacked tougher, and such an action will add to their burden, confusion, and could ultimately impact their interest in the PBRA program.

*Q10: HUD expects to incorporate into the regulation tenant rights equivalent to those that apply currently under RAD PBRA HAP contracts (as currently described in Notice H 2019-09/PIH 2019-23). Should the regulation contain a subpart addressing tenant rights and responsibilities? If so, what specific topics should the subpart cover?*

Residents of PBRA properties should have rights that are clearly protected in regulation. This includes the right to notices of changes in rents and utility allowances already codified in part 245. Standard notice requirements offering residents meaningful notice and opportunity to comment on rehabilitation plans should also be included in the subpart. As stated above, we continue to urge HUD to carefully consider and limit what is included in a new regulatory framework, avoiding discrete program regulations for PBRA that confuse stakeholders and create additional burdens.

HUD could include principles of resident rights and responsibilities in updates to Section 245, including the right to notice for a change in subsidy or in the case of rehabilitation. Specific relocation rights and protections may vary by transaction types. Given the complexity of preservation, we strongly urge HUD to continue to cross reference and provide clear and better aligned program guidance that addresses specific preservation transactions.

While many of the RAD protections for PBRA contracts should apply broadly including notices related to relocation and housing stability, provisions related to mobility, continued participation in Jobs Plus and other programs are not applicable as these resources don't extend to the PBRA portfolio. HUD should focus any regulatory guidance on broadly applicable principles able to be funded under the PBRA programs.

### **Renewal Options**

*Q11: Upon expiration, most contracts in MFH's portfolio are eligible for renewal under section 524 of MAHRA. HUD intends to require renewal of such contracts by means of the standard program contract, so that as owners renew, they will be subject to the requirements laid out in the standard program regulation. Please comment.*

SAHF strongly believes that HUD should incentivize, and not mandate, renewal of contracts by means of a standard program contract. Such a mandate would likely invite legal challenges which could impact the PBRA program for decades. Further, a mandate could create costly reviews for existing financing and create uncertainty among lenders and investors about the

stability of the program. Incentivizing, meanwhile, could help HUD and stakeholders understand where barriers remain for owners/managers that do not transition and respond to those needs. Owners could be incentivized to convert with priority processing for preservation transactions.

Even with voluntary and incentivized conversion, HUD cannot presume that new regulations will obviate the need for updated program guidance. HUD must prioritize updates to the Section 8 renewal guide, the Occupancy Handbook and the Asset Management Handbook. This level of detail is not appropriately addressed in regulation but is vital for smooth operations of properties and the preservation of affordable homes.

*Q12: In addition to the subject areas described above, MFH welcomes any other input that interested parties believe would contribute to the successful design and implementation of a standard program regulation and contract, including input on education and outreach efforts that would assist owners in understanding and complying with requirements in the standard program regulation and contract.*

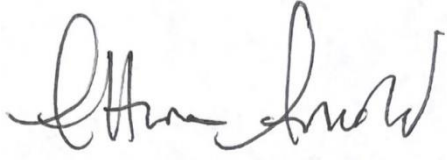
Should HUD continue exploring the standardization of a PBRA contract and regulatory framework, we urge HUD to abide by the principles listed on page 1-2 of our comments. A successful migration to new contracts and regulations will require significant understanding of and mitigating consequences of a drawn-out period of transition, and the ability to take on rulemaking and subregulatory work (most notably the Section 8 Renewal Policy Guide). This will take significant capacity at HUD, in the field, and among property owners and management staff to implement. While we appreciate that HUD is seeking ways to standardize and streamline the PBRA program, we are seriously concerned by these limitations. HUD's capacity has been severely challenged in the past few years, and the agency has not even been able to release timely updates to the Section 8 Renewal Policy Guide (which does not require going through a lengthy regulatory process that must abide by the Administrative Procedures Act). For example, it took a full year for HUD to update Chapter 9 of the renewal guide after receiving public comments. Requiring a new regulatory framework which will potentially include more comprehensive details of program rules is far more time intensive.

If HUD is to start transitioning owners over to a new contract at the time of renewal (hopefully voluntarily and not mandated), there will very likely be a time of at least one more contract type and regulatory part so there will be eight instead of seven regulatory parts. This could be an opportunity to provide incentives to move to a standard contract to minimize this time frame. We look forward to working with HUD on more detailed plans but believe this could start with incentives around priority processing and providing owners/managers that have converted a significant portion of their portfolio an assigned contact point at HUD.

We appreciate this opportunity to provide comments in response to HUD's ANPR. Please feel free to contact Althea Arnold, SAHF's Senior Vice President for Policy ([aarnold@sahfnet.org](mailto:aarnold@sahfnet.org)) or Jenna Hampton, SAHF's Policy and Program Manager ([jhampton@sahfnet.net](mailto:jhampton@sahfnet.net)) with any questions about our comments above.



Sincerely,

A handwritten signature in black ink, appearing to read "Althea Arnold". The signature is fluid and cursive, with the first name being more prominent.

Althea Arnold  
Senior Vice President, Policy