

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**[Docket No. FR-7006-N-15]**

**30-Day Notice of Proposed Information Collection:**

**Public Housing Annual Contributions Contract for Capital and Operating Grant Funds**

**30-Day Notice of Proposed Information Collection: Agency Information Collection**

**Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds**

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD has submitted the information collection described below to the Office of Management and Budget (OMB) for review and approval, in accordance with the Paperwork Reduction Act. The public housing program provides Operating Funds and Capital Funds to public housing projects owned and operated by public housing agencies (PHAs), subject to the terms and conditions contained in the federal award, HUD-53012.

HUD has revised the federal award based on current applicable statutes and regulations as well as in response to public comments received during the public comment period provided for by the 60-Day Notice of Proposed Information Collection. These revisions are more thoroughly described below. One notable revision is that HUD has revised the title of the public housing federal award; previously entitled *Public Housing Annual Contributions Contract for Capital and Operating Grant Funds*, the award will now be entitled *Annual Contributions Terms and Conditions for the Public Housing Program*. For clarity and consistency, the award will continue to be referred to as "ACC." Additionally, mixed-finance provisions in the proposed

ACC have been removed from the revised ACC and will instead be included in an ACC amendment; a model mixed-finance ACC amendment is published herewith.

This publication is to provide notice to PHAs of the revisions and to give PHAs the opportunity to comment on such revisions. The purpose of this notice is to allow for an additional 30 days of public comment. Please note that the 30-Day Notice of Proposed Information Collection for the Moving to Work Amendment to Consolidated Annual Contributions Contract is published elsewhere in this issue of the Federal Register.

**DATES:** Comments Due Date: **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

**Addresses:** Interested persons are invited to submit comments regarding this proposal.

Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Officer of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202-395-5806; email: OIRA\_Submission@omb.eop.gov.

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7<sup>th</sup> Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202-402-3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877-8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The Federal Register notice that solicited public comment on the information collection for a period of 60 days was published on December 27, 2018 at 83 FR 66729.

## **A. Overview of Information Collection**

*Title of Information Collection:* Annual Contributions Terms and Conditions for the Public Housing Program.<sup>1</sup>

*OMB Approval Number:* 2577-0075.

*Type of Request:* Revision of a currently approved collection.

*Form Number:* HUD-53012<sup>2</sup>

*Description of the need for the information and proposed use:* The proposed *Annual Contributions Terms and Conditions for the Public Housing Program (ACC)* is necessary to establish the basic terms and conditions for a PHA's public housing program and requires the PHA to manage and operate its public housing projects in accordance with the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) (1937 Act) and all applicable HUD requirements.

This 30-Day Notice of Proposed Information Collection provides PHAs with notice of revisions to the current ACC form HUD-53012. The ACC published in this notice updates HUD-53012 to streamline the ACC. In order to further streamline the ACC and in response to public comments received, the ACC published in this notice deletes or revises several ACC provisions published in the 60-Day Notice of Proposed Information Collection. Those revisions are summarized in Section E of this notice. Additionally, HUD has summarized public comments and provided responses to those comments in Section F of this notice.

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<sup>1</sup> The previous title was *Public Housing Annual Contributions Contract for Capital and Operating Grant Funds*.

<sup>2</sup> The forms listed in the 60-Day Notice were "HUD-52840A, HUD-53012A, HUD-53012B." HUD forms HUD-53012A and HUD-53012B have been combined into one form, HUD-53012. HUD is not revising HUD-52840A, the *Capital Fund Program (CFP) Amendment to the Annual Contributions Contract (ACC)*, with this proposed information collection. The HUD-52840A (exp. 01/31/2021) is available at HUDCLIPS, [https://www.hud.gov/program\\_offices/administration/hudclips/forms](https://www.hud.gov/program_offices/administration/hudclips/forms). If HUD continues to use the HUD-52840A, it will be incorporated into the ACC as an amendment. The forms approved as part as OMB Control Number 2577-0075 that are not being revised at this time are: HUD-51999; HUD-52190A; HUD-52190B; HUD-52840A; HUD-52860, HUD-52860B, HUD-52860C; HUD-52860; HUD-52860E, and HUD-52860F, HUD-52860G, HUD-5838 and HUD-5837 (expiration date of 01/31/2021).

**Respondents:** Public housing agencies.

**Total Estimated Burdens:** The burden costs associated with this collection are as follows:

Information Collection	Number of Respondents	Frequency of Response	Responses Per Annum	Burden Hour Per Response	Annual Burden Hours	Hourly Cost Per Response	Cost
<b>HUD-92577 ACC</b>	<b>3,107</b>	<b>1 each</b>	<b>0</b>	<b>1.00</b>	<b>0</b>	<b>\$52.88</b>	<b>\$164,298</b>
<b>Mixed-Finance Amendment</b>	<b>94</b>	<b>1 each</b>	<b>0</b>	<b>1.00</b>	<b>94</b>	<b>\$52.88</b>	<b>\$4,970</b>

The burden costs shown represent burden associated with a one-time execution of the ACC for all PHAs and the burden represented with each transactional execution of a Mixed-Finance Amendment to the ACC. Previously, in the 60-Day PRA Notice published on December 27, 2018 at 83 FR 66729, HUD over-estimated the estimated burden hours associated with the execution of the ACC and the Mixed-Finance ACC Amendment. The burden hours did not account for the fact that the ACC and Mixed-Finance ACC Amendment have been streamlined and no longer repeat statutory and regulatory requirements. Additionally, the burden hours included the hours estimated for all HUD forms that are part of OMB Control Number 2577-0075, not just the ACC and the Mixed-Finance ACC Amendment. During the 60-Day comment period, HUD received no comments related to the estimated burden hours.

#### **B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- (2) The accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

### **C. Authority**

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

### **D. Background**

In 1995 the Department of Housing and Urban Development (HUD) issued PIH Notice 95-44 which transmitted Consolidated Annual Contributions Contract (ACC), Form HUD-53012A and Form HUD-53012B. The forms were intended to replace the 1969 Consolidated ACC(s) (Form HUD-53011), and any amendments to the ACC, between HUD and HAs with respect to low-rent and homeownership public and Indian housing projects. HUD noted that:

[t]he revised ACC eliminates the recitation of the specific statutory, regulatory and executive order requirements to which a HA is subject with respect to its public or Indian housing projects. Instead, the HA is made subject to "all applicable laws, executive orders and regulations," whether or not these authorities are specifically incorporated by reference in the ACC. The purpose of this revision is to minimize the scope of the requirements contained in the ACC, so that this document can remain a living and vital contract even after statutes, executive orders and regulations to which a HA is subject are

enacted, promulgated, amended or repealed. With the execution of this revised ACC, HUD intends to eliminate the obsolescence that has developed over time in the existing ACC as a result of the enactment of new legislation and the promulgation of new regulations that conflict with specific requirements contained in the ACC.

HUD is further revising the ACC to achieve the goals first articulated in 1995, to “eliminate specific statutory, regulatory and executive order requirements to which a PHA is subject . . . and to minimize the scope of the requirements contained in the ACC.” HUD’s intent is to include those terms and conditions that apply to the acceptance and use of federal financial assistance for the public housing program which are necessary to “*insure the lower income character of the project involved in a manner consistent with the public housing agency plan*” (42 USC 1437d), and that are not already specifically included in HUD regulations at Title 24 of the Code of Federal Regulations (CFR), the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (“Uniform Guidance” at 2 CFR Part 200), and/or made applicable by statute.

HUD initially proposed a revised ACC through an information collection Paperwork Reduction Act (PRA) 60-day Notice soliciting public comment issued on March 1, 2016 at 81 FR 10651. The changes were primarily additional requirements applicable to mixed-finance and public housing development, and clarifications and updates consistent with the Uniform Guidance. HUD received no public comments on the 60-day notice. On September 6, 2017, HUD issued a 30-day notice soliciting public comment at 82 FR 42106, and no comments were received. HUD received considerable feedback on the ACC it issued. As a result, HUD decided to re-open the ACC a second time for additional public comment. On December 27, 2018 HUD published a revised ACC in the Federal Register via a second PRA notice at 83 FR 66729. This

notice provided 60-days for the public to comment on the revised ACC. The comments received are summarized in Section F of this notice.

#### **E. Overview of Significant Changes Made to the ACC**

The following represents the most notable changes to the ACC. However, other changes have also been made which may not be identified below because they are editorial or non-material and minor changes. The ACC should be reviewed in its entirety to determine the exact nature and scope of these revisions. HUD has posted a document online that provides a side-by-side comparison of the ACC proposed in the 60-Day Notice and the ACC proposed in this 30-Day Notice. The side-by-side document is available at

[https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/ph/capfund/2018pi/acc](https://www.hud.gov/program_offices/public_indian_housing/programs/ph/capfund/2018pi/acc)

- The revised agreement is retitled slightly to more clearly reflect its purpose. The new title is the *Annual Contributions Terms and Conditions for the Public Housing Program*. For clarity and consistency, the agreement will continue to be referred to as “ACC.”
- In the 1995 ACC, the PHA was made subject to "all applicable laws, executive orders and regulations," whether or not these authorities are specifically incorporated by reference in the ACC. The ACC published in the 60-day notice on December 27, 2018 contained similar language in Section 3 of the ACC (HUD Requirements). The revised ACC requires the PHA to administer its Public Housing Funds in compliance with all “Public Housing Requirements,” which include the United States Housing Act of 1937 (1937 Act), HUD regulations at Title 24 CFR, the Uniform Guidance, appropriations acts, and “other federal statutes, regulations and executive orders applicable to Public Housing Funds and Public Housing Projects,” as they exist now and amended in the future, whether or not those requirements are incorporated by reference in the ACC.

- HUD deleted the following definitions: Annual Contributions Contract, Consolidated Contributions Contract, Cooperation Agreement, Fiscal Year, Grant Funding Exhibit, Operating Costs (Operating Expenditures or Operating Expenses), Operating Receipts, Operating Reserve, Program, Program Receipts, and Replacement Reserve Account.
- HUD has used the term “public housing funds” in a manner that defines such term in Section 1. Additionally, in Section 1, HUD has included by reference to existing regulations at Title 2 Part 200 of Code of Federal Regulations (CFR) the following terms: federal award, federal financial assistance, and recipient; and Section 2 has included by reference to existing regulation at 24 CFR § 905.108 the definition of “public housing project.” In Section 2, the term Public Housing Requirements is also defined. Finally, HUD has included a new Section 11 – Remedies, in response to public comments.
- HUD has responded to public comments by excluding all mixed-finance specific language in the revised ACC. HUD has determined that, to the extent PHAs need mixed-finance terms that vary from what is stated in the ACC, HUD will continue to work with PHAs on project-specific solutions, including the use of the revised mixed-finance amendment (a copy of HUD’s revised model document is published herewith), adding language to Regulatory and Operating Agreements that are required for mixed-finance development, or adding language to the restrictive covenant.
- HUD has deleted the following sections from the 60-day published ACC: Section 1 - Definitions, Section 2 - Mission of HUD and PHA, Section 4 - Cooperation Agreement, Section 9 - Accounts, Records and Government Access, Section 14 – HUD in Possession of Project(s). Please refer to Section G of this notice to review a chart summarizing



these deletions as well as the existing statutory or regulatory public housing requirements that already apply to PHAs.

- HUD has retained but revised in part the following sections from the 60-day published ACC: Section 3 – HUD Requirements (retained in part at Section 2), Section 5 – Declaration of Restriction Covenants (retained in part at Section 4), Section 6 – Disposition and Encumbrances (retained in part at Section 3), Section 7 – Insurance Requirements (retained in section 5), Section 8 – Employer Requirements (retained at Section 6), Section 10 – Grant Funding (revised and retained in part at Section 1), Section 11 – Depository (revised and retained in part at Section 7), Section 12 – Termination of a Project (revised and retained in part at Section 10), Section 13 – Notices, Defaults, Remedies (retained in part at Section 9), Section 15 – Conflicts of Interests (revised and retained in part at Section 8), Section 16 – Civil Rights and Employment Requirements (retained in part at Section 6), Section 17 – Members or Delegates to Congress (HUD has retained prohibition in Section 8), Section 18 - Rights of Third Parties (retained at Section 12), and Section 19 – Waiver or Amendment (revised and retained at Section 13).

#### **F. Summary of Public Comments Responding to the 60-Day Information Collection Notice**

HUD received 79 comments on the revised ACC published on December 27, 2018 through [www.regulations.gov](http://www.regulations.gov). The comments can be found on the *www.regulations.gov* web site at <https://www.regulations.gov/docket?D=HUD-2018-0103>. HUD also received two additional letters relating to the proposed ACC outside of the formal public comment process: a letter from a public housing agency forwarded by Congressman H. Morgan Griffith and a letter from Senator Charles E. Grassley.

### *ACC Generally*

Comment: Commenters disagreed with HUD's characterization of the ACC as a grant agreement for a variety of reasons. Commenters asked: If the new ACC is substantively the same as the old ACC, why is HUD revising it? Others felt that HUD was misinforming the public about its ACC changes when HUD stated that it was simply adding requirements applicable to mixed-finance public housing development and making minor clarifications. Finally, some commenters felt HUD's primary motivation for proposing these changes was its loss in the United States Court of Federal Claims in suits contesting the Department's funding distribution method used in 2012.

HUD Response: The changes update the ACC to reflect that the Office of Management and Budget (OMB) revised its Uniform Guidance which applies to all agencies that award federal financial assistance (with regard to the public housing program, these requirements were formerly covered in HUD regulations at 24 CFR part 85). The revised ACC ensures that the Uniform Guidance is applied consistently, and that all PHAs are subject to the same terms and conditions applicable to public housing funds.

Additionally, the changes are intended to achieve the goals first articulated in 1995 to eliminate "the recitation of the specific statutory, regulatory and executive order requirements to which a HA is subject . . ." (See PIH Notice 95- 44 transmitting the 1995 ACC). This revision further minimizes the scope of the requirements contained in the ACC. Since 1995 there have been numerous changes to the specific statutory, regulatory and executive order requirements to which a PHA is subject with respect to its public projects. For example, on October 24, 2013 HUD revised the Capital Fund Program at 24 CFR Part 905 (78 FR 63770). Part 905 combines and streamlines the former legacy public housing modernization programs, including the

Comprehensive Grant Program, the Comprehensive Improvement Assistance Program and the Public Housing Development Program (which encompasses mixed-finance development).

More than 400 PHAs continue to operate under the 1969 version of the ACC, which was developed prior to the conversion of the public housing program from a loan program. In 1995, HUD noted PHAs that failed to execute the revised ACC would continue to be governed by requirements contained in their existing ACC with HUD, which in certain instances was more restrictive than requirements established in the revised 1995 ACC (e.g., the revised 1995 ACC eliminated the requirement under section 307(A) of the 1969 version concerning the need for a comparability analysis of PHA personnel policies and the 1969 ACC term for PHA procurements set at two years with a one-year option with the approval of HUD).

The ACC, pursuant to section 6(a) of the 1937 Act, sets forth the terms and conditions deemed necessary by HUD to insure the low-income character of public housing projects and that PHAs act in accordance with Public Housing requirements. The ACC governs PHA conduct in connection with its acceptance and receipt of federal assistance. While addressing past litigation outcomes is not a principal purpose for HUD's revisions to the ACC, HUD makes clear in the current version that HUD has never contemplated money damages for action or inaction by HUD with respect to the ACC. Nothing in the revised ACC forecloses avenues for judicial relief from any HUD action that is arbitrary, capricious or contrary to law.

Comment: A commenter stated that PHAs are confused, anxious, and concerned as to what HUD's changes are trying to remedy. \_\_

HUD Response: The revised ACC ensures that the Uniform Guidance is applied consistently, and that all PHAs are subject to the same terms and conditions applicable to public housing funds. Additionally, the changes eliminate specific statutory, regulatory and executive order

requirements to which a PHA is subject and to minimize the scope of the requirements contained in the ACC. There have been many changes to the public housing program since 1995, which require that PHAs be more familiar with specific regulatory requirements, and the 1969 or 1995 ACC versions may be inconsistent or misleading. .

Comment: Commenters disagreed with HUD's "redefining" of the ACC as a grant agreement, and stated that the ACC is, and has always been, a contract, and should consistently refer to itself as such. A comment stated that Congress and HUD have consistently failed to view the existing public housing CACC as a contract and need to treat public housing contracts in the same way as the contracts for Project Based Section 8.

HUD Response: The Public Housing program, which was initially a loan program, was changed by Congress to a direct grant program in 1987, through which HUD awarded grants for the development and operation of public housing (see sections 112 and 119 of the Housing and Community Development Act of 1987, Public Law 100-242 (approved Feb. 5, 1988) (the HCD Act)). Consequently, in 1988, HUD implemented OMB Circular A- 102, "Grant Awards and Cooperative Agreements with State and Local Governments," by codifying its provisions in 24 CFR part 85 (March 11, 1988, 53 FR 8025, 8650). HUD made the public housing program subject to 24 CFR Part 85. Below is the statement HUD made regarding Part 85 applicability to the public housing funding (53 FR 7875):

HUD previously took the position that annual contributions for public housing development and modernization were not subject to Circular A-102 requirements because the Federal assistance to public housing agencies (PHAs) was in the form of loans and loan guarantee commitments made by HUD. The Department's *current method of funding public housing development and modernization by means of capital grants* (as opposed to

loans, as in the past) has the effect of subjecting public housing development and modernization funding to A-102 requirements. Public housing *operating subsidies are administered as grants* and therefore are also appropriate for A-102 grant management treatment [emphasis added].

Accordingly, as a result of the changes to the program made by the HCD Act, since 1988, HUD consistently administered the public housing program subject to the requirements of 24 CFR part 85 (until such requirements were superseded by the Uniform Guidance). In addition to codifying A-102 at 24 CFR Part 85, HUD codified the provisions of OMB Circular A-133, “Audits of States, Local Governments and Non-Profit Organizations,” in 24 CFR parts 84 and 85 in 1997 (November 18, 1997, 62 FR 61617), and such other circulars related to grants management. In the intervening years since codifying the guidance in these circulars, HUD has cross-referenced applicable provisions of 24 CFR part 85 throughout program regulations, including applicable regulations for public housing development, modernization and operating funding.

The 1995 version of the ACC was revised against the backdrop of these above-mentioned statutory and regulatory requirements (e.g., 24 CFR § 941.103 (ACC definition), §§ 941.612, and 968.103). Consequently, the ACC, when it was revised in 1995 was an agreement related to the receipt of public housing grant funding. In 1998, when the public housing funding was fully converted to formula funding, HUD continued to use the same version of the ACC and continued to subject the formula funding and public housing program to the requirements of 24 CFR part 85. Nothing in the rulemaking processes for the Operating Fund regulation or the Capital Fund regulation changed the form of the funding that was being provided by HUD, and the Operating Fund and Capital Fund Rules specifically included and made applicable the requirements of Part

85. HUD's proposed changes to the ACC were consistent with Congressional intent first expressed 1987.

Comment: HUD is seeking to "redefine" terms to position themselves more favorably and insulate themselves from future challenges/litigation.

HUD Response: HUD notes the consistency of its position in litigation regarding the characterization of the federal financial assistance provided for the public housing. Furthermore, such funding is provided subject to a broad array of statutory and administrative requirements, including appropriations acts. HUD's changes to the ACC were not proposed in response to litigation, but HUD is aware of litigation surrounding the ACC. HUD makes clear in the current version that HUD has never contemplated money damages for action or inaction by HUD with respect to the ACC. Nothing in the revised ACC forecloses avenues for judicial relief from any HUD action that is arbitrary, capricious or contrary to law.

While the United States Court of Appeals for the Federal Circuit determined the Performance-Based Annual Contributions Contract (PBACC) to be a procurement contract, no such court has made such a determination with respect to the public housing ACC. In the absence of legislation to the contrary, HUD is required to continue to administer the public housing program consistent with the HCD Act of 1987, and other applicable requirements.

Comment: "Operating Receipts" and "Program Receipts" are interrelated terms, and changes to one affect the others. Commenters said that "program receipts," previously called "operating receipts," had been broadened. One commenter said "this could potentially recapture de-federalized funds and require HUD approval for uses of all forms of income and proceeds produced by projects. The new definition restricts the use of all program and operation funds to public housing expenditures, which potentially captures de-federalized funds." Similarly, other

commenters expressed concerns that “the categories covered by ‘program receipts’ has been broadened and could potentially allow HUD to “recapture de-federalized funds and require HUD approval for uses of all forms of income and proceeds produced by projects.” Another commenter said “[t]he definitions of Operating Reserves, Operating Costs, Operating Receipts, and Program Receipts are interrelated. HUD should explain and justify these definitions within the framework of the APA.” More specific concerns related to the definition of Operating Receipts was that “broadening this definition to include ‘Program Receipts’ results in controlling non-federal resources earned by PHAs and the refederalization of fees paid into a PHA’s Central Office Cost Center.”

Finally, a number of comments expressed concerns about HUD’s having “restricted the definition of the term ‘operating expenses’ or ‘operating expenditures’ to those costs which may be charged against Operating Receipts in accordance with the CACC and HUD requirements.” A commenter noted that “[i]t is unclear what impacts these definition changes will have on reserves and offsets of reserve balances for operation expenses and . . . requests further clarity on these proposed changes as they appear to be an attempt to change statutory funding obligations.”

HUD Response: Operating Receipts is a term that was already defined in the 1995 version of the ACC. The changes between the 1995 ACC and the proposed ACC published in the 60-Day Notice were slight, and were made primarily to align the term with the Uniform Guidance, and to make the definition more consistent with 24 CFR Part 905, Subpart F. Because PHAs are already bound by HUD regulations, including the requirements of the Uniform Guidance, HUD has deleted this definition from the ACC since it is adequately covered by regulations.

Additionally, HUD considers the following definitions: Operating Costs (Operating Expenditures or Operating Expenses), Operating Reserve, Program, Program Receipts, and

Replacement Reserve Account, to be unnecessary due to regulatory coverage; and they have also been deleted. The determination of eligible costs and the use of program funds are covered by the Uniform Guidance and HUD regulations at Title 24 CFR, specifically those regulations at Parts 905 and 990.

As to concerns regarding the broadening of the term “program receipts,” HUD agrees that HUD cannot regulate PHA activity outside of the public housing program. However, program income (as that term is defined at 2 CFR 200.80), non-rental income (as covered by statute and by regulations determined by HUD), and proceeds from the sale of public housing real property are already subject to federal statutes and regulations. HUD has deleted the term “program receipts” as it is redundant of regulatory and statutory requirements. HUD has no intention of changing statutory funding obligations, and notes that public housing funding is subject to various statutory requirements, including funding requirements in the appropriations acts, HUD regulations, and the Uniform Guidance.

#### *PHA Mission*

Comment: Many commenters indicated that the PHA mission needs to be developed locally with public input and approval of its Board of Commissioners rather than by contract with HUD. Commenters noted that the addition of a requirement to comply with all applicable HUD requirements, coupled with changes in the proposed Section 3 of the ACC, unfairly imposes any HUD non-regulatory provisions, and the Mission statement should be removed.

HUD Response: The ACC mission statement incorporated the essential PHA requirements under Sections 2(a) and 3(a) of the 1937 Act, (42 U.S.C. 1437 note, and 1437a respectively), and has been part of the 1969 and 1995 ACC versions. By accepting public housing funds, the PHA makes itself subject to the statutory requirement that property funded with public housing



assistance including dwelling units assisted with public housing funds be rented only to low income families. Because the mission statement is unnecessary and redundant of statutory and regulatory requirements, this section has been deleted from the ACC. PHAs are required to administer their Public Housing Funds in compliance with all “Public Housing Requirements” which include the 1937 Act, HUD regulations at Title 24 CFR, the Uniform Guidance, appropriations acts, and “other federal statutes, regulations executive orders applicable to Public Housing Funds and Public Housing Projects,” as they exist now and are amended in the future, whether or not those requirements are incorporated by reference in the ACC.

#### *HUD requirements*

Comment: Most commenters objected to including HUD-issued notices, forms, and agreements as HUD requirements because, the commenters state, these requirements do not have a regulatory or statutory basis.

HUD Response: The HUD Requirements section was added to the ACC as a reminder. PHAs are already required in the 1995 version of the ACC to comply with “all applicable laws, executive orders, and regulations that are not specifically incorporated [in the ACC] by reference”; and under 24 CFR 905.108, to comply with HUD-issued ACC and amendments, HUD notices, all applicable federal statutes, executive orders and regulatory requirements, as amended. All required forms are issued through the Paperwork Reduction Act process with public opportunity to comment or are required by the regulations, which were properly promulgated under the APA. However, to lessen confusion, the HUD Requirements section has been deleted from the ACC, and the term “HUD Requirements” has been replaced with the term used in existing regulations at 24 CFR 905.108, “Public Housing Requirements.”

Comment: MTW PHAs stated that requiring compliance with HUD’s notices, forms, and agreements would reduce MTW flexibilities.

HUD Response: The MTW Standard Agreement contains a provision that it “supersedes the terms and conditions of one or more ACCs between the Agency and HUD, to the extent necessary for the Agency to implement its MTW demonstration initiatives as laid out in the Agency’s Annual MTW Plan, as approved by HUD.” This provision covers regulatory or statutory waivers granted under the MTW Agreement and provisions in PIH notices implementing provisions thereof to the extent of a conflict between the authorized MTW activity and the Public Housing Requirement. The MTW ACC amendment for the MTW expansion, similarly, amends the ACC to the extent necessary to allow the agency to participate in the MTW demonstration in accordance with the MTW Operations Notice. Because the MTW ACC Amendment requires compliance with all HUD requirements not exempted by the MTW Operations Notice, language has been added to that document to clarify the applicability of subregulatory guidance impacting MTW authorizations.

*Cooperation agreement*

Comment: “HUD should not have prior approval of Cooperation Agreements entered into with local governments to address local needs. Ratification or review to protect federal interest should be sufficient. HUD has no right to inject itself into local negotiations over changes to Cooperation Agreements.” One commenter also noted that “HUD’s proposed involvement in local cooperation agreements will potentially upend ‘win-win’ arrangements between PHAs and local governments that have ultimately benefited its tenants and communities for years.”

Additionally, one commenter noted that “[w]hile Section 4 of the proposed ACC requires a Cooperating [sic] Agreement to be in effect, Cooperation Agreements do not apply to mixed finance projects that have made an election pursuant to Section 35(f) of the United States Housing Act of 1937, as amended.”

HUD Response: HUD’s requirement concerning a local cooperation agreement is authorized by statute and regulations. Specifically, Section 5(e)(2) of the of the 1937 Act provides that Federal financial assistance to PHAs shall not be made unless the governing body of the locality involved enters into an agreement with the PHA providing for the local cooperation required by the 1937 Act. In order to implement this requirement, HUD requires PHAs to comply with the provisions of a Cooperation Agreement in the form prescribed by HUD, which form has not changed since 1968; and not terminate or amend the Cooperation Agreement without prior written approval of HUD. HUD has a statutory obligation to monitor and ensure the proper use of public housing funds. However, in light of HUD’s determination that this agreement should not unnecessarily repeat statutory or regulatory requirements, the proposed Section 4 has been deleted as the requirement for the HUD-prescribed Cooperation Agreement is in the 1937 Act, and HUD implementing regulations at 24 CFR Part 905.

The ACC provides general terms that apply to all housing authorities. As noted by the commenter, Section 35(f) of the 1937 Act allows for a PHA to choose to exclude mixed finance projects from the Section 6(d) tax exemption and the Cooperation Agreement. If a PHA does not make that election, a Cooperation Agreement is required. If a PHA makes that election, HUD regulations implement this requirement at 24 CFR 905.606(a)(8), and an express statement is not needed.

#### *Declaration of Restrictive Covenants*

Comment: One commenter stated that the “DOT [Declaration of Trust] signed by the PHA restricts the use of the units deeded to the PHA. Units are to be used by low-income families.” Another comment noted that the use of “shall” in the proposed Section 5.a means this is a requirement (vs. prior 1995 version that said “may”), and that “HUD ought to clarify its reasoning behind this modification as it removes PHA discretion and as such may negatively impact current project implementation.”

HUD Response: The proposed Section 5 was updated to reflect statutory and regulatory requirements that have been in effect since the public housing program was a loan program – namely the use of restrictive covenants to ensure the long-term use restrictions mandated by the 1937 Act. For more than 30 years the form instrument prescribed by HUD was a “Declaration of Trust.” See Form HUD-52190 (current DOT form available at <https://www.hud.gov/hudclips>). The requirement that the Declaration of Trust be the first recorded document against public housing property is longstanding and ensures the long-term use of public housing projects by low-income families. See 24 CFR 905.108 (definition of Declaration of Trust), 905.304, and 905.505(c)(4). The use of “may” in Section 5.a of the 1995 version of the ACC applies to the form of the instrument but not to the requirement for order of recordation. Because of the

mixed-finance program, HUD began to allow the use of other HUD-approved instruments otherwise known as declarations of restrictive covenants, and the change in language is not intended to change this practice; however, the recordation requirement is long-standing, and any exceptions have always required HUD approval.

Comment: One commenter said “[t]hough Section 5.b of the proposed ACC requires a declaration be recorded against the Project ‘prior to the recordation of any other encumbrance,’ such requirement is inconsistent with HUD’s practice, and we advise HUD to instead require such only ‘unless otherwise approved by HUD.’”

HUD Response: The general requirement for any form of restrictive covenant is that it be the first recorded document. See 24 CFR 905.505(c)(4). We believe waiver of the ACC provision (now located at Section 4 – Restrictive Covenants) is sufficient to allow HUD to approve, after a finding of good cause, those circumstances when a restrictive covenant is not recorded prior to the recordation of other encumbrances.

#### *Disposition and Encumbrances*

Comment: A commenter stated as to proposed Section 6:

- 6.a: The general covenant against disposition and encumbrances does not acknowledge that mixed finance projects will need to enter into mortgages, use restrictions, and other encumbrances to finance the projects. Accordingly, we would recommend HUD clearly state that mixed finance projects will instead only be subject to the provisions contained in the proposed Section 6.b.
- 6.b: Modifications are required in order to be consistent with the standard language in prior HUD mixed finance deals that has been vetted extensively with lenders and investors.

HUD Response: The HUD regulations at Title 24 CFR (in particular those provisions at 24 CFR Part 905, Subpart F) address the concerns raised by the commenter. HUD has not incorporated any mixed-finance specific language in the revised ACC. However, in response to comments HUD has revised the model Mixed-Finance Amendment. To the extent PHAs need commitments for mixed finance approvals beyond what is stated in the ACC, HUD will continue to work with PHAs on project-specific solutions, including the use of a mixed-finance amendment, adding language to the Regulatory and Operating Agreements that are required for a mixed-finance development, or adding language to the restrictive covenant.

HUD notes that it has revised the proposed published version of Section 6. Additionally, Section 3 of the revised ACC published herein makes specific reference to the Public Housing Requirements, which include 42 U.S.C. 1437p and HUD regulations at 24 CFR Part 970.

Comment: One commenter included a markup of proposed Section 6:

**6. Disposition and Encumbrances.**

a. *Covenant Against Disposition and Encumbrances.* The HA shall not demolish or dispose of any project, or portion thereof, other than in accordance with the terms of the CACC and applicable HUD Requirements. With the exception of entering into dwelling leases with eligible families for dwelling units in the Projects covered by the CACC, except as set forth in a Mixed-Finance declaration, mortgages identified in a Mixed-Finance amendment, and normal uses associated with the operation of the Project(s), the HA shall not in any way encumber any project, or portion thereof, without the prior written approval of HUD. In addition, unless approved in advance and in writing by HUD, the HA shall not pledge as collateral for a loan the assets of any Project covered under the CACC.

b. *Mixed-Finance Projects*. No transfer, conveyance, or assignment shall be made without the prior written approval of HUD of: (i) any interest of a managing member, general partner, or controlling stockholder (any such interest being referred to as a "Controlling Interest") of the Owner Entity; or (ii) a Controlling Interest in any entity which has a Controlling Interest in the Owner Entity; or (iii) prior to the payment in full of all equity contributions described in the approved evidentiary documents, other than equity contributions made solely for the purpose of paying developer fees, any other interest in the Owner Entity, or in any partner or member thereof. The term "Controlling Interest" shall not include any interest, no matter how large, of a member or partner of Owner who is not a managing member or general partner of Owner.

1. Notwithstanding the foregoing, HUD consent is not required ~~where a business-organization that has~~ for the transfer of a limited interest (non-controlling and non-managing) in the Owner Entity ~~transfers a non-controlling and non-managing interest in or in any partner, member or stockholder of the business organization~~ holding such limited interest, provided that the Owner Entity: (i) provides HUD with written notice of such transfer; and (ii) certifies to HUD that the new owner of the limited interest remains obligated to fund its equity contribution in accordance with the terms of the HUD-approved organizational documents of the Owner Entity.

2. HUD will not unreasonably withhold, delay, or condition a request by the Owner Entity for HUD's consent to an internal reorganization of the corporate, company or partnership structure of the Owner Entity or any of the partners, members or stockholders of the Owner Entity.

3. Notwithstanding the foregoing, the prior approval of HUD and the HA will not be required for the exercise by any investor ~~member or~~ partner of the Owner Entity (“Investor”) of its right pursuant to the ~~Amended and Restated Limited Operating Agreement or~~ Partnership Agreement of the Owner Entity (~~an Operating Agreement or Limited Partnership Agreement~~ referred to herein as a “Partnership Agreement”) to remove the ~~managing member or~~ general partner (~~a managing member of a limited liability company or the general partner of a limited partnership~~ referred to herein as a “General Partner”) of the Owner Entity and appoint the Investor or its Affiliate (i.e., any entity which directly or indirectly controls, or is controlled by, or is under common control with, the specified entity) as an interim ~~general partner~~ General Partner of the Owner Entity so long as the Investor gives prompt written notice to HUD of such removal and appointment (“Removal Notice”); provided that HUD and the HA consent will be required for the appointment of such interim ~~general partner~~ General Partner to extend beyond a ninety (90) day period and for the appointment of any entity (including the Investor of an ~~affiliate~~ Affiliate thereof) as the permanent replacement ~~general partner~~ General Partner. Such 90-day period will commence on the date of the Removal Notice (“Interim Replacement Period”). With the prior written approval of HUD and the HA, the Interim Replacement Period may be extended for an additional 90 days to allow the substitute ~~general partner~~ General Partner of the Owner Entity to find a replacement ~~general partner~~ General Partner acceptable to HUD and all other parties, provided that prior to the expiration of such additional 90-day period, the substitute ~~general partner~~ General Partner demonstrates that the Investor is continuing to fund (or has already



funded) capital as required under the Partnership Agreement and that the Project continues to be operated in a manner consistent with HUD Requirements.

4. The consent of HUD and the HA will not be required for (i) any exercise by the Investor of its right to require the repurchase of its investor member or limited partnership interests as against the General Partner, any guarantor, and/or any affiliate thereof (“Repurchaser”) pursuant to the Partnership Agreement, provided that the Investor provides prompt written notice to HUD and the HA at the time of its exercise of such right, and further provided that any resale of the investor member or limited partnership interests by the Repurchaser will be subject to the approval of HUD and the HA, such approval not to be unreasonably withheld, delayed or conditioned, or (ii) the exercise by the HA (or any approved Affiliate thereof) of its rights to acquire interests or the Property pursuant to the Right of First Refusal and Purchase Option Agreement of approximately even date herewith.

5. HUD and the HA authorize the Controlling Interest to collaterally assign and pledge its interest in the Owner Entity to a construction and/or permanent lender, and to allow a construction and/or permanent lender to exercise any of its rights pursuant thereto, so long as the construction and/or permanent lender gives prompt written notice to HUD of the exercise of such rights at the time of such exercise (the “Pledge Notice”). However, the consent of HUD and the HA shall be required for the appointment of any substitute Controlling Interest (including construction and/or permanent lender or its Affiliates) extending beyond a 90-day period. Such 90-day period will commence on the date of the Pledge Notice (the “Pledge Replacement Period”). With notice to the HA and notice and prior written approval of HUD, the Pledge Replacement Period may be

extended for an additional 90 days to allow the substitute Controlling Interest of the Owner Entity to find a replacement Controlling Interest acceptable to HUD and the HA provided that prior to the expiration of such additional 90-day period, the substitute Controlling Interest demonstrates that the Investor is continuing to fund (or has already funded) its equity contribution as required by the Partnership Agreement and that Project continues to be operated in accordance with the Applicable Public Housing Requirements.

HUD Response: As previously stated, HUD has decided not to incorporate any mixed-finance specific language in the revised ACC but has revised the model Mixed-Finance Amendment. To the extent PHAs need commitments for mixed finance approvals beyond what is stated in the ACC, HUD will continue to work with PHAs on project-specific solutions, including the use of a mixed-finance amendment, adding language to the Regulatory and Operating Agreements that are required for a mixed-finance development, or adding language to the restrictive covenant.

#### *Insurance*

Comment: HUD failed to allow for PHA's professional judgment on risk and cost benefit of various types of insurance as well as ignoring state law on tort immunity. Commenters requested that HUD indicate what is adequate coverage. Commenters stated it is unnecessary for HUD to collect and monitor Certifications of Insurance.

HUD Response: HUD's primary concern is making sure that public housing projects acquired, developed and assisted with federal assistance, and public housing assets are covered from losses. This provision has been in place since the 1969 ACC. The list of mandatory and recommended, but optional insurance is consistent with, or required by, 2 CFR 200.447 and 24

CFR 965 subpart B, and identifies those “costs of insurance required or approved and maintained, pursuant to the Federal award” that are allowable (2 CFR 200.447(a)). To further assist PHAs in understanding HUD’s intentions, HUD refers PHAs to its explanatory guidance on insurance in PIH Notice 2016-13.

HUD will continue to require Certifications of Insurance and require that PHAs keep copies of it in their records, and make them available for inspection, subject to Public Housing Requirements. The revised ACC removes the process of establishing a PHA self-insurance fund, because 24 CFR 965.205(c) details this process.

#### *Employer Requirements*

Comment: Various commenters noted that a provision appearing in a previously proposed ACC limiting the use of funds made available under the 1937 Act for the salary, including bonuses, for PHA employees (30-day notice published on September 6, 2017 at 82 FR 42106) is not included in the proposed ACC. These commenters assert that the elimination of this provision reflects HUD’s understanding that it lacks Congressional authorization to limit the use of funds made available under the 1937 Act for PHA employee salaries.

HUD Response: HUD disagrees with commenters asserting that HUD lacks Congressional authorization to limit the use of funds made available under the 1937 Act for PHA salaries; since Federal Fiscal Year (FFY) 2012, through HUD appropriations, Congress has imposed limits on the amount of Section 8 HCV and Section 9 funds PHAs may use for employee salaries. PIH Notice 2016-14 and PIH Notice 2018-13 detail PHA salary limitations and PHA reporting responsibilities. Additionally, for FY 2019, division G, title II, section 222 of the Consolidated

Appropriations Act, 2019 (under the heading “General Provisions—Department of Housing and Urban Development”) states: “None of the funds made available by this Act, or any other Act, for purposes authorized under section 8 (only with respect to the tenant-based rental assistance program) and section 9 of the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), may be used by any public housing agency for any amount of salary, including bonuses, for the chief executive officer of which, or any other official or employee of which, that exceeds the annual rate of basic pay payable for a position at level IV of the Executive Schedule at any time during any public housing agency fiscal year 2019.” PHAs remain subject to the provisions contained in HUD appropriations, regardless of incorporation into the Terms and Conditions agreement pursuant to Section 2 of the revised ACC.

*Accounts, Records, and Government Access*

Comment: Section 9.b: Commenters state that the proposed Section 9.b would interfere with PHA compliance with information requests pursuant to FOIA or local open records laws by requiring prior HUD approval before releasing information contained in HUD’s systems of records. A few commenters express doubt that HUD would have the capacity to track and approve PHA submissions and requests in a timely fashion. A few commenters state that requiring HUD approval prior to a release of records, especially in response to a valid information request, could subject a PHA to liability for denying a request. Additionally, the proposed provision could make it more difficult for law enforcement entities to conduct investigations of issues such as public benefit fraud.

One commenter stated that the proposed Section 9 does not make it clear that Section 9.b refers only to data held within HUD’s systems of records. Another commenter states that section 9 would inhibit a PHA from operating in a transparent manner by limiting the release of

information to stakeholders. A number of commenters assert that, as independent entities and political subdivisions of States, PHAs are not subject to HUD's control relating to transparency to the public.

Comment: Section 9.c: Numerous commenters assert that the proposed Section 9.c of the proposed ACC would expose privileged communications, records, and information, including records protected by attorney-client privilege, to HUD examination.

Comment: Section 9.e: Several commenters state that the proposed Section 9.e of the ACC could impact the ability of PHAs to engage in data-sharing agreements and other arrangements with third-party services providers. One MTW PHA expresses concern that the proposed provision would hinder its ability to monitor, evaluate, and understand policy questions that guide its MTW activities. Numerous commenters stated that the proposed Section 9.e of the proposed ACC is overly broad and would open all records of a PHA agent or contractor, not just those records of work supporting the operation of public housing, to HUD inspection. These commenters assert that PHA contractors and partners will terminate their relationships with PHAs to protect their confidential records. Alternatively, a couple of commenters state that PHAs might have to pay higher costs to contractors or use substandard contractors because of the HUD record inspection requirements contained in the proposed Section 9.e. Several commenters express concern that HUD might misuse its access to contractor records to obtain records outside of HUD's authority. A few commenters suggest that the phrase "assists in fulfilling any obligation under this CACC" is too broad and would capture too many activities. A couple of commenters assert that HUD would make PHAs liable for the actions of independent contractors and that it is unreasonable to impute contractor actions to a PHA that could be deemed a PHA violation of the ACC.

HUD Response: HUD notes that the proposed Section 9 (or a similar provision) has been included in the 1969 and 1995 versions of the ACC. The change in language in the proposed 2018 version was to remind PHAs of their responsibility to make information available consistent with applicable statutory and administrative requirements, and that the maintenance of information and the prohibition on sharing particular information, such as tenant data, is prohibited by the same or similar statutory and administrative requirements, including regulations issued by HUD at title 24 CFR. HUD has removed the proposed Section 9 from the ACC because PHAs remain subject to statutory and regulatory recordkeeping and monitoring requirements (including HUD notices on HUD's system of records (SORN) (e.g., [https://www.hud.gov/sites/documents/DOC\\_15179.PDF](https://www.hud.gov/sites/documents/DOC_15179.PDF), and [https://www.hud.gov/program\\_offices/officeofadministration/privacy\\_act/pia/fednotice/SORNs\\_LoB#pih](https://www.hud.gov/program_offices/officeofadministration/privacy_act/pia/fednotice/SORNs_LoB#pih)) in connection with the use of financial assistance provided pursuant to the 1937 Act. HUD recognizes attorney-client privilege as a longstanding common law protection, and HUD does not unduly compel PHAs to disclose privileged or work product protected information. However, HUD reminds PHAs that the disclosure of information related to the public housing program is required to be shared for various reasons.

Section 5(h)(1) of the 1937 Act (42 U.S.C. 1437c(h)(1)) provides that when a PHA carries out activities using financial assistance provided pursuant to the 1937 Act for the operation, modernization, and development of public housing, the PHA must allow HUD access to books, documents, and records related to the activities. Section 5(h)(1) of the 1937 Act and 2 CFR 200.336 also require that the HUD Inspector General, Comptroller General of the United States, and all of their authorized representatives, have the right to inspect a PHA's records that pertain to a public housing award. In the context of audits, pursuant to 2 CFR 200.501(g), PHAs

are “responsible for ensuring compliance for procurement transactions which are structured such that the contractor is responsible for program compliance or the contractor’s records must be reviewed to determine program compliance.” To the extent that a PHA contractor is responsible for public housing program compliance (e.g., under a management contract), PHAs are responsible for ensuring that the contractor has adequate records. More specific recordkeeping requirements include, but are not limited to, the requirements at 24 CFR sections 905.326 and 990.325.

Other 1937 Act statutory requirements that concern recordkeeping or information sharing include section 42 U.S.C. 1437y (Provision of information to law enforcement and other agencies) and 42 U.S.C. 1437n(e)(C)(4). Additionally, pursuant to Section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (“McKinney Homeless Amendments”), tenant and participant income information required or necessary to be collected by a PHA, for the purpose of verifying income information pertinent to the applicant’s or participant’s eligibility or level of benefits, must be kept under the terms of the Privacy Act, as such terms are made applicable by HUD. The McKinney Homeless Amendments are implemented at 24 CFR Part 5. Pursuant to 5 CFR 5.212(a), “[t]he collection, maintenance, use, and dissemination of [social security numbers] SSNs, [Employer Identification Numbers] EINs, any information derived from SSNs and . . . EINs and income information under this subpart shall be conducted, to the extent applicable, in compliance with the Privacy Act (5 U.S.C. 552a) and all other provisions of Federal, State, and local law. Thus, regardless of local open records laws, PHAs must retain records in compliance with the McKinney Homeless Amendments the Privacy Act as provided at 24 CFR Part 5; other Public Housing requirements, including HUD

SORNs; and are required to get HUD approval to release information maintained in HUD databases such as PIC.

### *Depository*

Comment: Commenters stated that this section imposes federal deposit and investment requirements on defederalized and non-federal fees paid to PHAs' COCC, as well as contributions from affiliates and subsidiaries. These commenters stated that HUD does not have the authority to so impose such requirements.

HUD Response: Commenters misread the coverage of this requirement and HUD's changes. The General Depository Agreement (GDA) (HUD-51999) has been a requirement in the 1969 and 1995 ACC versions. The GDA is just one part of HUD's implementation requirements imposed on HUD with regard to the disbursement of federal funds before such funds have been expended. Additionally, the GDA requirement applies to Public Housing Funds, disposition proceeds and program income, and other funds that are restricted, by statute or regulations, in their use, and/or are received by or held for the account of the PHA in connection with the development, operation, improvement and disposition of its public housing property. These funds are to be insured or fully and continuously collateralized above the federal insurance limits per the General Depository Agreement and Department of the Treasury statutes and regulations, including but not limited to 31 CFR Part 202. HUD has slightly revised this section in the ACC.

The changes to the ACC are not intended to address any future changes to the Public Housing requirements regarding COCC.

### *HUD in Possession of Project(s)*

Comment: Commenters stated that the proposed ACC must clarify that a PHA's decision to subject its mixed-finance public housing units to real estate taxes should not result in a violation



of section 14.b(6) of the ACC published in the 60-Day Notice, which states that “termination of tax exemption (either real or personal property) on behalf of a Project covered under the CACC” constitutes a substantial default. Commenters also recommend HUD insert the following sentence to the proposed section 14.e to ensure HUD will not disturb a compliant mixed finance Owner Entity’s rights: “Notwithstanding the forgoing, for Mixed Finance projects, so long as the Owner Entity shall not be in default of its obligations related to such a project, HUD shall not exercise any rights under this sub-section 13.e. in such a manner as to disturb the Owner Entity’s and other participating parties’ rights under any Project agreements.”

HUD Response: The proposed Section 14 has been removed from the ACC. HUD believes the provision is essentially redundant of requirements at title 24 of the CFR, specifically 24 CFR Part 907. However, HUD has retained in the new section 9 (Substantial Default) the standard for default under such ACC. Section 9 does not retain the specific requirements for mixed finance public housing projects, which are included in the model Mixed-Finance Amendment. The ACC provides general terms that apply to all housing authorities. To the extent PHAs need commitments for mixed finance approvals beyond what is stated in the ACC, HUD will continue to work with PHAs on project-specific solutions, including the use of a mixed-finance amendment, adding language to the Regulatory and Operating Agreements that are required for a mixed-finance development, or adding language to the restrictive covenant. Whatever the project-specific solution, HUD would continue to make clear that a PHA that subjects its mixed-finance public housing units to real estate taxes is not in a violation of Public Housing requirements.

*Conflict of Interest*

Comment: Many commenters objected to what was mistakenly understood to be a “new written conflict of interest” standard for board members. Commenters also stated that HUD lacks the authority to impose such a requirement and the requirement may conflict with existing state and local conflict of interest requirements involving public officials.

HUD Response: This is not a new conflict of interest standard for board members. Sections 19 and 515 respectively, of the 1995 and 1969 versions of the ACC had conflict of interest provisions that covered board members. Section 15.a. of the proposed ACC provides that PHAs must maintain written standards of conduct covering conflicts of interest and governing the performance of its board members, executives, and employees engaged in the administration and operation of Projects covered by the ACC. This requirement is consistent with the Uniform Guidance at 2 CFR §§ 200.112 and 200.318, which requires that PHAs maintain written standards of conduct covering conflicts of interest. For clarity HUD has revised the provision at Section 8 of the ACC. Because PHAs are already bound by the Uniform Guidance, HUD revised the section to reflect coverage when PHAs are using public housing funds for its procurements (as required by the Uniform Guidance); HUD includes members and delegates to Congress in the covered classes for purposes of evaluating conflicts in PHA hiring and procurement. Additionally, Section 8.e of the revised ACC repeats the language in Section 14 of the 1995 version that public housing funds cannot be used “to pay any compensation for the services of members of the PHA’s Board of Commissioners.”

#### *Civil Rights and Employment Requirements*

Comment: A number of commenters stated that a sentence in the Section 16.d of the proposed ACC, “Civil Rights and Employment Requirements,” should be removed as irrelevant: “The HA may, consistent with applicable law and regulation, utilize work requirements when and where

appropriate.” One commenter added that the inclusion of this sentence could confuse PHAs and result in the implementation of policies that harm vulnerable families.

HUD Response: HUD agrees with commenters that the inclusion of the sentence would have been confusing; additionally, consistent with HUD’s removal of provisions that repeat existing statutory and regulatory requirements, the proposed Section 16 has been removed from the final ACC, but it has been retained in part and moved to Section 6 of the ACC. Additionally, HUD includes by reference under Section 2 (Public Housing Administration) PHA obligations to comply with statutory and regulatory civil rights requirements. PHAs are also reminded that section 5A of the 1937 Act states that PHAs “will carry out the public housing agency plan in conformity with title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the Fair Housing Act [42 U.S.C. 3601 et seq.], section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], and title II of the Americans with Disabilities Act of 1990 [42 U.S.C. 12131 et seq.], and will affirmatively further fair housing.”

#### *Waiver or Amendment*

Comment: A commenter suggested a need for an expiration date for waivers and amendments to be agreed to in writing by HUD and the PHA. Another commenter suggested that HUD must seek written agreement from HAs to any proposed changes. Other comments noted that the “most responsible approach for HUD to take is for it to negotiate the revision of the ACC with industry groups who then, if the negotiations are fruitful, encourage their members to agree to the amendments.” Commenters stated that “the revised ACC provides that the contract can be amended in writing, presumably only by HUD. Such a contract is an illusory contract.”

Commenters stated that [t]he appropriate method to implement a new CACC would be to work

with representatives of local housing authorities to arrive at a mutually agreeable product that could be adopted by PHAs without controversy.”

HUD Response: Section 19 of the proposed ACC published in the 60-Day Notice stated that “[t]his agreement may be amended in writing.” This provision was not intended to provide HUD with the ability to unilaterally revise the ACC during its term. Pursuant to section 6(a) of the 1937 Act, HUD is authorized to change the ACC terms and conditions as the Secretary deems necessary, but these changes will not alter the ACC terms and conditions applicable to prior year public housing funds. In response to the comments, HUD has revised the ACC to make clear that a PHA may request an amendment to the ACC. Additionally, upon a request of a PHA, HUD may waive administrative provisions in the ACC, based on a finding of good cause. HUD cannot waive statutory prohibitions.

*Paperwork Reduction Act (PRA), Administrative Procedures Act (APA), and Negotiation*

Comment: A few commenters state that use of the Paperwork Reduction Act (“PRA”) is not a legitimate means with which to promulgate public comment on the proposed ACC. A number of commenters assert that the proposed ACC does not collect information, so the PRA does not apply. Many commenters add that PRA standards for public comments do not satisfy Administrative Procedures Act requirements. As noted by a few commenters, while the Federal Register PRA notice provides a description of proposed ACC revisions, it does not provide an explanation of the underlying rationale, public policy purpose or benefits, or statutory or regulatory basis of the proposed ACC revisions. Additionally, these commenters assert that PRA does not require HUD to formally respond to comments received. A few commenters state that HUD’s actions in revising the ACC are “arbitrary and capricious,” and they assert that the

proposed ACC Federal Register notices have been deceptive. Finally, several commenters criticize HUD's burden hour chart and cost estimate as being unrealistic.

A number of commenters state that HUD must promulgate changes to the public housing ACC pursuant to Administrative Procedures Act (APA) rulemaking rather than pursuant to PRA. Several commenters added that statutory changes may also be required because the proposed ACC includes significant substantive changes from the prior ACC.

HUD response: Information collection can occur by a number of vehicles in addition to standard government forms. As discussed above, the Public Housing program has been a grant program since 1987. The ACC is an information collection under the definitions in 5 CFR 1320.3(c)(1), which states that a collection of information may be in any form or format, including an agreement. The ACC is a form with an OMB form number; therefore, review and public comment under the PRA are appropriate.

Contrary to statements in the comments, the PRA process does require solicitation of and response to public comments (see 5 CFR 1320.5(a)(1)(F) (requiring "A summary of the public comments received under §1320.8(d), including actions taken by the agency in response to the comments"). In fact, HUD received 79 comments and is here responding to the issues raised as well as providing its rationale for proposed ACC revisions. HUD revises the ACC pursuant to its inherent authority under the Department of Housing and Urban Development Act (42 USC 3531 et seq.), and section 6 of the 1937 Act. A primary purpose of this revision is to minimize the scope of the requirements contained in the ACC and to ensure that Public Housing requirements are uniformly applied. More than 400 PHAs continue to operate under the 1969 version of the ACC. The revised ACC ensures that the Uniform Guidance is applied

consistently, and that all PHAs are subject to the same terms and conditions applicable to the receipt of public housing funds.

Regarding the assertion that the proposed ACC Federal Register notices have been deceptive, HUD has taken steps to clearly identify the provisions that have been deleted, revised or retained. However, the ACC should be reviewed in its entirety to determine the exact nature and scope of any revisions.

As to the comment on the burden hour statement, HUD's prior experience indicates that it is reasonable.

Comment: Some commenters argue that even if HUD followed APA rulemaking requirements, APA rulemaking is not the appropriate method by which to amend the public housing ACC because a regulation cannot override or amend contract terms. A couple of commenters assert that HUD must withdraw the proposed ACC and negotiate revisions to the 1995 ACC with PHAs. One commenter asserts that the proposed ACC needs to be reviewed by "an independent legal authority" to determine its fairness and compliance with statutes.

HUD response: Pursuant to section 6(a) of the 1937 Act, and section 200.38(b) of the Uniform Guidance, the Secretary has the authority to include in the ACC such covenants, conditions, or provisions as he may deem necessary in order to insure the low-income character of public housing projects and that PHAs act in accordance with Public Housing requirements; the Secretary is not obligated to negotiate with PHAs as it is within his discretion what terms and conditions related to the federal award are "necessary." Accordingly, the Secretary, through the ACC, establishes the necessary terms and conditions related to the award of public housing funds. The terms and conditions of the ACC published in this notice do not override or amend prior versions of the ACC. The ACC terms and conditions apply to a PHA's public housing

funding received after execution. Prior awards of public housing funding received by a PHA while subject to either the 1969 or 1995 ACC will continue to be governed by the terms of those ACCs. To the extent commenters were concerned that the ACC did not comply with relevant statutes, the revised ACC minimizes the scope of the ACC requirements, and eliminates the recitation of specific statutory and regulatory requirements. As noted earlier, the PRA process requires solicitation of and response to public comments.

#### *Implementation of ACC*

Comment: Several commenters stated that the new ACC must include Board and Executive review and approval and signature by both HUD and Housing Authorities.

HUD Response: The ACC serves as notice of the terms and conditions that attach to HUD's award and the PHA's request for, acceptance, and use of federal financial assistance. Execution of the ACC represents acceptance of those terms and conditions undergirding all instruments subsequently executed to provide public housing funding, including, but not limited to SF-424 forms, Operating Fund budget letters, competitive grant agreements, etc. Pursuant to Section 1.a of the ACC published in this notice, such funding instruments will be incorporated into the ACC as amendments or funding exhibits.

HUD agrees that entering into the ACC requires Board and Executive Review. HUD expects the Board and Executive Review approval would be conducted as part of same process engaged by PHAs before making submissions for financial assistance through the Operating Fund and Capital Fund formulas (e.g., using an SF-424 form). Electronic signatures are permissible for HUD programs, and that option will be made available for the ACC; however, HUD has added a signature line for PHAs on the revised form for those PHAs that prefer or are required under State law to effectuate agreements by a wet signature.

Comment: Two commenters did not think that drawing down funds should result in an agreement between HUD and the PHA. One argued that PHA staff lack authority to bind the PHA, which could make the agreement unlawful or against the PHA's internal governing procedures.

HUD Response: A PHA's drawdown of funds is a certification by the PHA that the funds are being drawn for, or in connection with, an eligible activity under the public housing program. Federal financial management requirements are based on the presumption that the personnel in a PHA's organization who drawdown funds are authorized to do so. Consequently, PHA employees should not be drawing down funds or taking any other actions on behalf of the PHA without proper authority. Every draw down or use of funding must be in compliance with HUD statutes, regulations and other HUD requirements. It is incumbent on PHAs (not HUD) to ensure that PHA personnel are authorized to act on their behalf.

#### *Moving to Work*

Comment: MTW agencies commented that HUD was precluded from revising the ACC by the 2016 appropriations act language extending the current MTW agreements and by language regarding the ACC in the MTW Standard Agreement.

HUD Response: HUD disagrees. The new ACC does not amend the MTW Standard Agreement. The MTW Standard Agreement provision stating that the agreement supersedes the terms of the ACC to the extent of a conflict between the ACC and a HUD-approved MTW activity continues to apply to the new ACC.

Comment: MTW agencies raised concerns that the new ACC would change the funding formulas provided under those agreements and that it would allow HUD to circumvent statutory requirements regarding offsets of MTW PHA reserves.



HUD Response: The funding language in Attachment A of the MTW Standard Agreement varies among MTW agencies. The majority of MTW agencies do not have a unique funding formula for public housing funds in their MTW agreements and receive public housing funds in accordance with the same formulas and requirements as non-MTW PHAs. Agencies with specific alternative formulas for public housing funds in their MTW Agreements continue to have those same provisions in their MTW Agreements under the new ACC. Further, the MTW Agreements were amended in 2016 to incorporate the statutory provision prohibiting offset of reserves equal to four months of operating expenses.

**G. Chart Summarizing Statutory or Regulatory Public Housing Requirements Deleted from the ACC proposed in the 60-Day Notice**

<b>60-Day Notice Proposed ACC</b>	<b>30-Day Notice Proposed ACC</b>	<b>Existing public housing requirements that apply to <u>deleted</u> portions of the 60-Day Notice Proposed ACC</b>
Sec. 1 – Definitions	Deleted	“Cooperation Agreement” (24 CFR 905.108) “Operating Costs” (24 CFR 990.115) “Operating Receipts” (2 CFR 200.80, Sec. 9(k) and Sec. 18(a)(5) of the 1937 Act) “Program Receipts” (2 CFR 200.80) “Public Housing” (24 CFR 905.108) “Replacement Reserve Account” (Sec. 109 of HOTMA, P.L. 114-201)
Sec. 2 – Mission of HUD and HA	Deleted	Sec. 2(a), Sec. 3(b)(1) (“low-income housing” and “public housing”) and Sec. 3(b)(6) (“Public Housing Agency”) of the 1937 Act
Sec. 3 – HUD Requirements	Sec. 2 – Public Housing Administration (deletes compliance with HUD notices)	“Public housing requirements,” 24 CFR 905.108

Sec. 4 – Cooperation Agreement(s)	Deleted	Sec. 5(e)(2) of the 1937 Act and 24 CFR 905.108
Sec. 5 – Declaration of Restrictive Covenants	Sec. 4 – Restrictive Covenants (deletes description of instrument terms and mixed-finance provisions)	Sec. 9(d)(3) and 9(e)(3) of the 1937 Act and 24 CFR 905.108 (“Declaration of Trust,” “Declaration of Restrictive Covenant”); 24 CFR 905.304(a); and 24 CFR 905.505(c);  [Mixed-finance provisions will be included in a mixed-finance ACC amendment]
Sec. 6 – Disposition and Encumbrances	Sec. 3 – Encumbrances (deletes general disposition requirements and mixed-finance provisions)	Sec. 18 of 1937 Act and 24 CFR part 970  [Mixed-finance provisions will be included in a mixed-finance ACC amendment]
Sec. 7 – Insurance Requirements	Sec. 5 – Insurance Requirements (deletes self-insurance provision and mixed-finance provisions and optional insurance coverage)	24 CFR 965.205(c)  [Mixed-finance provisions will be included in a mixed-finance ACC amendment]
Sec. 8 – Employer Requirements Sec. 16 – Civil Rights and Employment Requirements	Sec. 6 – Civil Rights and Employer Requirements (deletes civil rights provisions summarizing civil rights requirements)	Civil rights laws, e.g., Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d; 24 CFR part 1); the Fair Housing Act (42 U.S.C. 3601-3619; 24 CFR part 100); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794; 24 CFR part 8); (the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107; 24 CFR part 146); the Americans with Disabilities Act (Pub. L. 101-336, approved July 26, 1990; 28 CFR part 35); Executive Order 11063 on Equal Opportunity in Housing (24 CFR part 107); Executive Order 11246 on Equal Employment Opportunity, as amended by Executive Order 11375 (41 CFR part 60); and Executive Order 12892 on Affirmatively Furthering Fair Housing.

Sec. 9 – Accounts, Records, and Government Access	Deleted	Sec. 5(h)(1) of the 1937 Act; 2 CFR 200.336; 2 CFR 200.501(g); 24 CFR 905.326; 24 CFR 990.325; 42 USC 1437y and 1437n(e)(C)(4); Sec. 904 of McKinney Homeless Amendments (42 USC 3544); and 5 CFR 5.212(a)
Sec. 10 – Grant Funding	Sec. 1 – Annual Contributions Terms and Conditions (a.k.a. ACC) (revised and deletes specific information about funding calculations)	24 CFR 905.108 (“Public Housing Requirements” include “all applicable federal statutes,” including appropriations acts); 24 CFR part 905, subpart D (Capital Fund formula); and 24 CFR part 990, subparts B – E (Operating Fund formula)
Sec. 11 – Depository	Sec. 7 – Depository (no significant deletions)	N/A
Sec. 12 – Termination of a Project	Sec. 10 – Termination (no significant deletions)	N/A
Sec. 13 – Notices, Defaults, Remedies	Sec. 9 – Substantial Default (deletes notice and possession provisions and deletes mixed-finance provisions)	Sec. 6(j) and Sec. 6(g)(2) of the 1937 Act; and 24 CFR part 907, particularly 24 CFR 907.5  [Mixed-finance provisions will be included in a mixed-finance ACC amendment]
Sec. 14 – HUD in Possession of Project(s)	Deleted	Sec. 6(j)(3)(H) of the 1937 Act
Sec. 15 – Conflict of Interest Sec. 17 – Members or Delegates to Congress	Sec. 8 – Conflict of Interest (deletes procurement conflicts of interest and resident board member requirement)	2 CFR 200.318(c) and Sec. 2(b)(1) of the 1937 Act; 24 CFR part 964, subpart E

Sec. 18 – Rights of Third Parties	Sec. 12 – Rights of Third Parties (no deletions)	N/A
Sec. 19 – Waiver or Amendment	Sec. 13 – Waiver or Amendment (no significant deletions)	N/A
	Sec. 11 – Remedies (did not appear in 60-day notice version of the ACC, therefore no deletions)	N/A

Date: \_\_\_\_\_

\_\_\_\_\_  
R. Hunter Kurtz  
Assistant Secretary for Public and Indian Housing

**[BILLING CODE: 4210-67]**

### **Annual Contributions Terms and Conditions for the Public Housing Program**

#### **U.S. Department of Housing and Urban Development Office of Public and Indian Housing**

1. **Annual Contributions Terms and Conditions (a.k.a. ACC)** - This agreement between the Department of Housing and Urban Development (HUD) and a Public Housing Agency (PHA) establishes HUD's basic terms and conditions for the PHA's federally funded public housing program, and is authorized pursuant to the United States Housing Act of 1937 (the 1937 Act), (42 United States Code (USC) §1437 et seq.).
  - a. The ACC includes any funding exhibits, or amendments, to the ACC; and supersedes any previous ACC, or consolidated contributions agreement for the public housing program.
  - b. The ACC together with the PHA's written submissions for public housing funds including but not limited to, the SF-424 (or successor document) and any exhibits to the SF-424 reflecting HUD's commitment to provide such financial assistance, constitutes a federal award which is not awarded under the Federal Acquisition Regulations.
  - c. Public housing funds are federal financial assistance provided to a PHA pursuant to the 1937 Act for the development or operation of public housing and include public housing

formula funding. Public housing formula funding is provided as non-competitive federal awards for:

- capital funding provided to a PHA pursuant to section 9(d) (42 USC 1437g(d) of the 1937 Act (the Public Housing Capital Fund program), and
  - operating funding provided to PHAs pursuant to section 9(e) (the Public Housing Operating Fund program) (42 USC 1437g(e) of the 1937 Act.
- a. The terms “federal award” “federal financial assistance” and “recipient” are defined in 2 Code of Federal Regulations (CFR) (Version 2018) at §§ 200.38, 200.40(a)(1), and 200.86 respectively.
2. **Public Housing Administration.** The PHA shall administer its public housing program for the provision of decent, safe, and sanitary housing to eligible families in accordance with this agreement and Public Housing Requirements. The PHA shall comply with, and shall ensure compliance by, any contractors or subcontractors with, the Public Housing Requirements.
- a. Public Housing Requirements include but are not limited to:
- The 1937 Act as it exists now and as it may be amended in the future;
  - Regulations issued by HUD at Title 24 of the CFR and the Uniform Guidance at 2 CFR Part 200 as they exist now and as they may be amended in the future;
  - Appropriations acts, as they exist now and amended in the future; and
  - Other federal statutes, regulations and executive orders applicable to Public Housing Funds and Public Housing Projects; as they exist now and as they may be amended in the future.
- b. Nothing herein shall release the PHA from compliance with all applicable laws, executive orders, and regulations (as they exist now or are amended in the future) applicable to the receipt, use, and maintenance of public housing funds and public housing projects that are not specifically incorporated herein by reference. The term “public housing project” is defined in 24 CFR § 905.108.
3. **Encumbrances.** Except for dwelling leases with eligible families for public housing dwelling units and normal uses associated with the operation of dwelling units, the PHA shall not encumber (including the pledge as collateral for a loan) a public housing project or portion thereof, public housing funds, or other public housing assets without the prior written approval of HUD.
4. **Restrictive Covenants.** Promptly upon the PHA’s acquisition, development, or assistance of any real property with public housing funds, the PHA shall, consistent with Public Housing Requirements, execute, file for record (prior to the recordation of any other encumbrance), and maintain an instrument against the property (which may be in the form of a declaration of trust, declaration of restrictive covenant, or such other document), as approved or prescribed by HUD.

5. **Insurance Requirements.** Consistent with 24 CFR § 965.205 the PHA shall procure adequate insurance to protect the PHA from financial loss resulting from various hazards.

a. *Mandatory Insurance Coverage.* The following types of insurance are required:

1. Commercial Property. Each policy must be written with a blanket limit, on a replacement cost basis, and with an agreed value clause eliminating any coinsurance provision.
2. Commercial General Liability.
3. Workers Compensation and Employers Liability.
4. Owned and Non-Owned Automobile Liability.
5. Theft, Disappearance, and Destruction, only if the amount of cash and checks on hand at any one time exceeds the amount prescribed by HUD.
6. Employee Dishonesty.
7. Boiler and Machinery only if steam boilers have been installed.
8. Flood Insurance for property located in a flood plain, as determined in the Federal Government's National Flood Insurance Program.
9. Lead-Based Paint Liability for PHAs undergoing lead-based paint testing and abatement.

b. *Optional Insurance Coverage.* Subject to the Cost Principles of the Uniform Guidance, the following insurance coverage is recommended and can be purchased if the PHA determines that exposure exists:

1. Boiler and Machinery coverage is recommended if there is extensive central, conditioning, electrical transformers, or similar equipment.
2. Directors and Officers or Public Officials Liability.
3. Law Enforcement Liability: highly recommended where the exposure exists, and the Commercial General Liability insurer has excluded coverage.
4. Fidelity Bond Coverage. The PHA is recommended to carry adequate fidelity bond coverage, as required by HUD, of its officers, agents, or employees handling cash or authorized to sign checks.

- c. *Authorized Insurance Companies.* Insurance must be purchased from an insurance company or other entity that is licensed or duly authorized to write insurance in the State where the PHA is located. At each renewal, the PHA shall promptly have certificates of insurance submitted by the insurers to HUD describing the types of coverage, limits of insurance, policy numbers, and inception and expiration dates.
  - d. *Waivers.* Requests for waivers of this section not to purchase any form of required insurance, must be submitted in writing to HUD for approval and include specific justification and risk analysis.
  - e. *Restoration* - Unless the PHA received prior written approval of HUD to the contrary, the PHA shall, to the extent that insurance proceeds permit, promptly restore, reconstruct, and/or repair any damaged or destroyed Public Housing Project, in accordance with all Public Housing Requirements.
6. **Civil Rights and Employer Requirements.** Nothing herein shall release the PHA from compliance with all applicable civil rights laws, executive orders, and regulations applicable to the receipt, use, and maintenance of Public Housing Funds; and the operation and development of Public Housing Projects, that are not specifically incorporated herein by reference. The PHA shall comply with all State and Federal laws applicable to employee benefit plans and other conditions of employment.
7. **Depository.** The PHA shall deposit and invest its public housing funds received by, or held for the account of, the PHA in connection with the development, operation, improvement, and disposition of its Public Housing Project in accordance with the terms of a General Depository Agreement (GDA). The GDA shall be in the form prescribed by HUD and must be executed by the PHA and the depository.
- a. Immediately upon the execution of a GDA, the PHA shall furnish to HUD an executed or conformed copy thereof as HUD may require. A GDA shall not be terminated except after 30 days' prior notice to HUD.
  - b. The PHA shall maintain records that identify the source and application of funds in such a manner as to allow HUD to determine that all funds are and have been expended in accordance with Public Housing Requirements. Except as approved by HUD, and consistent with Public Housing Requirements, funds provided as separate federal awards are not fungible.
8. **Conflict of Interest.** In addition to any Uniform Guidance conflict of interest requirements at 2 CFR Subpart D, PHAs are subject to the following conflict of interest requirements:
- a. Neither the PHA nor any of its contractors or subcontractors may enter into any contract or arrangement, including employment contracts or arrangements, in connection with the operation and administration of the public housing program in which any of the following

classes of persons has any real or apparent interest, (direct or indirect), during his or her tenure or for one year thereafter:

1. Any present or former member or officer of the PHA (except a present tenant commissioner who does not serve on the governing body of a resident corporation, and who does not occupy a policymaking position with the resident corporation, the PHA or a business entity), or any member of the officer's immediate family;
  2. Any employee of the PHA, or any contractor, subcontractor or agent of the PHA, who formulates policy or who influences decisions with respect to the programs, or any member of the employee's immediate family;
  3. Any public official, member of a governing body, or State or local legislator, who exercises functions or responsibilities with respect to the programs, or any member of such individual's immediate family; or
  4. Any member of the Congress of the United States; or resident commissioner. As used in this section, the term "resident commissioner" refers to an individual appointed to oversee a territory or possession of the United States of America, (e.g., Guam).
- b. The officers, employees, and agents of the PHA shall neither solicit nor accept gratuities, favors or anything of monetary value from residents of public housing or participants in programs covered by this agreement; nor enter into any financial arrangement (direct or indirect) with public housing residents or participants in program covered by this agreement. However, the PHA may set written standards for situations in which a gift is an unsolicited item of nominal value.
  - c. Any member of the classes described in paragraph (a) of this section must disclose their interest or prospective interest to the PHA and HUD.
  - d. The conflict of interest prohibition under this section may be waived by HUD for good cause if HUD is provided with written evidence that (1) a prohibited contract or arrangement is permitted under State and local law; and (2) the PHA Board of Commissioners supports the waiver.
  - e. No Public Housing Funds may be used to pay any compensation for the services of members of the PHA's Board of Commissioners.
  - f. For purposes of this section and the Uniform Guidance (or any succeeding requirements thereto) the term "immediate family member" means: spouse, domestic partner, mother, father, mother-in-law, father-in-law, brother, sister, brother-in-law, or sister-in-law, or child of a covered class member (whether related as a full blood relative, or as a "half" or "step" relative, e.g., a half-brother or stepchild).
9. **Substantial Default.** Upon the occurrence of a substantial default by the PHA, as determined by HUD, the PHA shall (1) convey to HUD title to the Project(s), or (2) deliver possession



and control of the Project(s) to HUD if, in the determination of HUD (which determination shall be final and conclusive), such conveyance or possession is necessary to achieve the purposes of the 1937 Act. HUD shall also be entitled to any or all other remedies allowed by the Public Housing Requirements. A substantial default is a serious and material violation of any one or more of the covenants contained in this agreement, or as defined in the Public Housing Requirements.

- a. Events of substantial default under this agreement shall include, but shall not be limited to any of the following occurrences: (1) PHA's failure to maintain and operate the Public Housing Project in a decent, safe, and sanitary manner; (2) PHA's encumbrance of any Public Housing Project or portion thereof without HUD approval; (3) abandonment of any Public Housing Project or assets by the PHA, (4) the determination by HUD that the powers of the PHA to operate the public housing program in accordance with the provisions of this agreement or the Public Housing Requirements are curtailed or limited to an extent that will prevent the accomplishment of the objectives of this Agreement.
- b. Nothing contained in this agreement shall prohibit or limit HUD exercising any other right or remedy existing under applicable law, or available at equity. HUD's exercise or non-exercise of any right or remedy under this agreement shall not be construed as a waiver of HUD's right to exercise that or any other right or remedy at any time.

10. **Termination.** If a Public Housing Project is disposed of (through sale or other method), all related public housing funds shall (in accordance with Public Housing Requirements) become part of another Public Housing Project administered by the PHA. If no other Public Housing Project exists, the remaining personal and real property (including any funds held under or required to be held under a GDA) shall be distributed as directed by HUD, consistent with Public Housing Requirements, which may include remittance to HUD.

11. **Breach.** This agreement does not contemplate money damages as a remedy for a breach of the agreement by HUD.

1. **Rights of Third Parties.** Nothing in this agreement shall be construed as creating any right of any third party to enforce any provision of this agreement, or to assert any claim against HUD or the PHA.

2. **Waiver or Amendment.** The PHA may request a waiver or amendment to this ACC. Any administrative right that HUD may have under this ACC may be waived in writing by HUD for good cause.

Name: \_\_\_\_\_

Signature and Title: \_\_\_\_\_

Date: \_\_\_\_\_

Department of Housing and Urban Development

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

Name: \_\_\_\_\_

Signature and Title: \_\_\_\_\_

Date: \_\_\_\_\_

Public Housing Agency

## MIXED-FINANCE AMENDMENT

### TO THE ANNUAL CONTRIBUTIONS TERMS AND CONDITIONS FOR THE PUBLIC HOUSING PROGRAM (ACC)

I. On \_\_\_\_\_ the United States Department of Housing and Urban Development (“HUD”) and \_\_\_\_\_ (“PHA”) executed an Annual Contributions Terms and Conditions for the Public Housing Program (“ACC”), which establishes HUD’s basic terms and conditions for the PHA’s federally funded public housing grant programs.

II. This Mixed-Finance Amendment to the ACC (“Mixed-Finance Amendment”) sets forth additional requirements that apply to the public housing units and related appurtenances (“Project Units” or “Project”), which are being developed as part of the larger development known as \_\_\_\_\_ (the “Development”), for which HUD approved a development proposal and related evidentiary documents (together known as the “Development Proposal”) on \_\_\_\_\_.

III. The following amendments are made to the ACC and shall apply to the Project Units and/or Project, unless otherwise approved by HUD.

A. Section 3, Encumbrances: The requirements of Section 3 of the ACC are replaced with the following requirements:

1. Neither the Project Units nor any part thereof shall be demolished or disposed of, encumbered in any way, or the assets of the Project pledged as collateral for a loan, other than in accordance with the terms of the Public Housing Requirements and only with prior written approval of HUD, so long as this Mixed-Finance Amendment remains in force with respect to the Project, with the exception of:

a. Mortgage, deeds of trust, and other financing arrangements approved as part of the Development Proposal;

b. Dwelling leases with eligible families living in the Project;

c. Conveyance or dedication of land for use as streets, alleys, or other public rights-of-way, and grants and easements for the establishment, operation and maintenance of public utilities approved as part of the Development Proposal;

d. A memorandum of ground lease for record against the Project prior to recordation of the HUD restrictive covenant, as approved by HUD as part of the Development Proposal; and,

e. Normal uses associated with operation of the Project.

2. No transfer, conveyance, or assignment of the Project shall be made without the prior written approval of HUD of:

a. any interest of a managing member, general partner, or controlling stockholder (any such interest being referred to as a "Controlling Interest") of the Owner; or

b. a Controlling Interest in any entity which has a Controlling Interest in the Owner; or

c. any other interest in the Owner, or in any partner or member thereof, prior to the payment in full of all equity contributions, as approved in the Development Proposal.

3. Notwithstanding the foregoing, HUD consent is not required where a business organization that has a limited interest (non-controlling and non-managing) in the Owner transfers a non-controlling and non-managing interest in the business organization, provided that the Owner:

a. provides HUD with written notice of such transfer; and

b. certifies to HUD that the new owner of the limited interest remains obligated to fund its equity contribution in accordance with the terms of the organizational documents of the Owner.

4. Notwithstanding the foregoing, the prior approval of HUD shall not be required for the exercise by the investor, i.e., limited partner, limited owner, etc. or its affiliates ("Limited Interest"), of their rights to remove a Controlling Interest of the Owner or partner or

member thereof and to designate an affiliate of the Limited Interest as a substitute Controlling Interest under the terms of the Partnership Agreement or Operating Agreement, provided that HUD is given prior written notice of default and of the Limited Interest's intent to exercise its right of removal and appointment under the Partnership Agreement or Operating Agreement (the "Notice"). However, HUD consent shall be required for the appointment of any permanent replacement Controlling Interest or substitute Controlling Interest beyond a 90-day period. Such 90-day period will commence on the date of the Notice (the "Interim Replacement Period"). With notice and the prior written approval of HUD, the Interim Replacement Period may be extended for an additional 90 days to allow the Limited Interest to find a permanent replacement Controlling Interest acceptable to HUD, provided that prior to the expiration of such additional 90-day period, the substitute Controlling Interest demonstrates that the Limited Interest is continuing to fund (or has already funded) its equity contribution, as required under the Partnership Agreement or Operating Agreement, and that the Project continues to be operated in a manner consistent with the Public Housing Requirements.

5. HUD and the PHA authorize a Controlling Interest to collaterally assign and pledge its interest in the Owner to a construction and/or permanent lender, and to allow a construction and/or permanent lender to exercise any of its rights pursuant thereto, so long as the construction and/or permanent lender gives prompt written notice to HUD at the time it exercises such rights (the "**Pledge Notice**"). However, consent of HUD shall be required for the appointment of any permanent replacement Controlling Interest or substitute Controlling Interest (including construction and/or permanent lender or its Affiliates) extending beyond a 90-day period. Such 90-day period will commence on the date of the Pledge Notice (the "**Pledge Replacement Period**"). With notice to the PHA and notice and prior written consent of HUD, the Pledge Replacement Period may be extended for an additional 90 days to allow construction and/or permanent lender to find a permanent replacement Controlling Interest acceptable to HUD and the PHA, provided that prior to the expiration of such additional 90-day period, the substitute Controlling Interest demonstrates that the Limited Interest is continuing to fund (or has already funded) its equity contribution as required by the Owner's Partnership Agreement (or, if the Owner is a limited liability company, the Owner's Operating Agreement) and that Project continues to be operated in accordance with the Public Housing Requirements.

6. HUD will not unreasonably withhold, delay, or condition a request by the Owner for HUD's consent to an internal reorganization of the corporate or partnership structure of the Owner or any of the partners, members or stockholders of the Owner.

B. Section 4, Restrictive Covenants: The requirements of Section 4 of the ACC are replaced with the following requirements:

1. The PHA shall require the Owner to execute and file on record against the Development, in the order approved by HUD, an instrument against the property (which may be in the form of a declaration of trust, declaration of restrictive covenants, or such other document as approved or prescribed by HUD) that encumbers the property and confirms the Owner's obligation to develop, maintain and operate the Project in compliance with the Public Housing Requirements. This instrument may not be modified, amended or released without the prior written approval of HUD.

C. Section 5(e), Restoration: The requirements of Section 5(e) of the ACC are replaced with the following requirements:

1. Taking or Casualty: In the event of a taking or threatened taking by condemnation or other exercise of eminent domain of all or a portion of the Development (collectively a "Taking") or the occurrence of a fire or other casualty resulting in damage to all or a portion of the Development (collectively a "Casualty"), the following shall apply:

The PHA shall promptly cause the restoration, reconstruction, and/or repair ("Restoration") of any damaged or destroyed property of the Development, but only to the extent that insurance proceeds or condemnation award proceeds ("Proceeds") permit and only if Restoration is feasible. The obligation for Restoration, to the extent Proceeds and other funds (if any are made available by the Owner or the PHA) permit, is also a requirement with which the Owner must comply, if Restoration is feasible. In addition, each mortgagee must permit Restoration if Proceeds permit and if Restoration is feasible (rather than require application of Proceeds to reduce mortgage debt.)

Restoration is deemed "feasible" if (without limitation), following Restoration, the financial viability of the Project would not be materially impaired from its condition prior to the casualty, including (without limitation) if tax benefits would not be materially reduced or if committed sources of debt or equity financing would not be relieved of their obligation to fund as a result of the Casualty.

However, a mortgage may provide and a mortgagee may exercise (with HUD approval, as provided below), an option to apply any Proceeds to repayment of the mortgage debt instead of restoration, if any of the following conditions is met in the reasonable determination of the mortgagee or, if different, the lender:

- a. there is no substantial certainty of sufficient funds for Restoration (whether from insurance proceeds, a condemnation award or settlement, or other funds that may be provided by the Owner, the PHA or other lenders);
- b. there is no substantial certainty that Restoration will be completed prior to the maturity date of the note secured by the mortgage;
- c. if the loan is a construction loan, there is no substantial certainty that committed and sufficient loan repayment sources will be available upon Restoration, completion and loan maturity;
- d. there is no substantial certainty that the operating income of the Development following Restoration will be sufficient to meet all operating costs and other expenses, payments for reserves, and loan repayment obligations relating to the Development;
- e. there is no substantial certainty that Restoration of the Development to a condition approved by lender will be completed prior to the earlier of the maturity date of the loan or any fixed date resulting from tax credit requirements or otherwise imposed by schedule sources of repayment for the loan.

2. Restoration Is Not Feasible: In the event a lender, Owner and/or PHA determines that Restoration is not feasible, the PHA shall apply to HUD for approval not to restore the Project, which shall not be unreasonably withheld, conditioned or delayed. Upon HUD approval not to restore the project, Proceeds shall be applied as follows:

- a. to pay-off or reduce outstanding mortgage debt in accordance with the recordation order of the mortgage liens on the Development;
- b. to reduce any outstanding indebtedness of the Owner to the PHA for an unsecured loan;
- c. to reimburse the PHA for any funds disbursed to the Owner for development of the Development other than by loan. Such reimbursement shall include any funds provided by the PHA for predevelopment work or soft costs;

d. to the Owner, in an amount equal to the amount that the Owner or its general partner or managing member is required to pay to any investor member or partner in connection with the Casualty or Taking, as provided for in the Owner's limited partnership agreement or operating agreement, such as repurchase of an interest, the triggering of "credit adjusters", or otherwise;

e. to the Owner, to the extent not otherwise covered by paragraph (d), above, in an amount equal to the amount that the Owner is required to pay or distribute upon dissolution in accordance with its limited partnership agreement or operating agreement, including without limitation all debts of the Owner whether to third persons or to partners or members, and whether for funds advanced, property or services, but disregarding for this purpose any provision in the limited partnership agreement or operating agreement for distribution of residual funds.

f. to the PHA an amount equal to the total "cost of construction" attributable to the Project Units, less the sum of (a), (b) and (c) above; and,

g. to the Owner Entity.

3. Restoration Is Feasible – Partial Loss: In the event lender, Owner Entity and/or PHA determine that Restoration is feasible and less than all of the dwelling units in the Development are damaged, destroyed or lost as a result of casualty or condemnation, the following provisions shall apply:

a. If the Proceeds are sufficient to restore the Development to the same number of units that existed prior to the Casualty or Taking, the number of Project Units in the Development shall be the same number (and bedroom configuration) that existed prior to the Casualty or Taking.

b. If the Proceeds are not sufficient to restore the Development to the same number of units that existed prior to the Casualty or Taking, the number of Project Units in the Development shall be the same percentage of the total number of units (and bedroom configuration) as existed prior to the Casualty or Taking.



c. Any excess Proceeds remaining following redevelopment shall be distributed as follows:

i. to pay-off or reduce outstanding mortgage debt in accordance with the recordation order of the mortgage liens on the Development;

ii. to reduce any outstanding indebtedness of the Owner to the PHA for an unsecured loan;

iii. to reimburse the PHA for any funds disbursed to the Owner Entity for development of the Development other than by loan. Such reimbursement shall include any funds provided by the PHA for predevelopment work or soft costs;

iv. to the Owner, in an amount equal to the amount that the Owner or its general partner or managing member is required to pay to any investor member or partner in connection with the Casualty or Taking, as provided for in the Owner's limited partnership agreement or operating agreement, such as repurchase of an interest, the triggering of "credit adjusters", or otherwise;

v. to the Owner, to the extent not otherwise covered by paragraph (iii), above, in an amount equal to the amount that the Owner is required to pay or distribute upon dissolution in accordance with its limited partnership agreement or operating agreement, including without limitation all debts of the Owner whether to third persons or to partners or members, and whether for funds advanced, property or services, but disregarding for this purpose any provision in the limited partnership agreement or operating agreement for distribution of residual funds;

vi. to the PHA an amount equal to the total "cost of construction" attributable to the Project Units, less the sum of (i), (ii) and (iii), above; and,

vii. to the Owner.

4. Restoration is Feasible – Total Loss: In the event that all of the units in the Project are damaged, destroyed or lost as a result of casualty or condemnation, and lender, Owner and/or PHA determine that restoration is feasible, the following provisions shall apply:

a. If the Proceeds are sufficient to restore the Development to the same number of units that existed prior to the Casualty or Taking, the number of Project Units in the Development shall be the same number (and bedroom configuration) that existed prior to the Casualty or Taking.

b. If the Proceeds are not sufficient to restore the Development to the same number of units that existed prior to the Casualty or Taking, the number of Project Units in the Development shall be the same percentage of the total number of units (and bedroom configuration) as existed prior to the Casualty or Taking.

c. Any excess Proceeds remaining following redevelopment, shall be distributed as follows:

i. to pay-off or reduce outstanding mortgage debt in accordance with the recordation order of the mortgage liens on the Development;

ii. to reduce any outstanding indebtedness of the Owner Entity to the PHA for an unsecured loan;

iii. to reimburse the PHA for any funds disbursed to the Owner Entity for development of the Development other than by loan. Such reimbursement shall include any funds provided by the PHA for predevelopment work or soft costs;

iv. to the Owner, in an amount equal to the amount that the Owner or its general partner or managing member is required to pay to any investor member or partner in connection with the Casualty or Taking, as provided for in the Owner's limited partnership agreement or operating agreement, such as repurchase of an interest, the triggering of "credit adjusters", or otherwise;

v. to the Owner, to the extent not otherwise covered by paragraph (iii), above, in an amount equal to the amount that the Owner is required to pay or distribute upon dissolution in accordance with its limited partnership agreement or operating agreement, including without limitation all debts of the Owner whether to third persons or to partners or members, and whether for funds advanced, property or services, but disregarding for this purpose any provision in the limited partnership agreement or operating agreement for distribution of residual funds;

vi. to the PHA an amount equal to the total "cost of construction" attributable to the Project Units, less the sum of (i), (ii) and (iii), above; and,

vii. to the Owner.

5. The term "cost of construction" shall mean the total cost of developing the Development, less land acquisition costs, if any, included as part of the initial development budget.

6. The above restoration requirements must be incorporated into or otherwise addressed by the Regulatory and Operating Agreement between the PHA and the Owner (and ground lease, if applicable) and all mortgage documents encumbering the Development shall be consistent with these provisions.

D. Section 9, Substantial Default: In addition to the requirements of Section 9 of the ACC, the following shall constitute an event of substantial default under the ACC:

1. the drawdown and/or expenditure of Public Housing Funds is in an amount greater than approved in the Development Proposal or in an amount greater than allowed by the Public Housing Requirements;

2. a serious and material breach of any provision of the Development Proposal;  
and,

3. a serious and material breach of any terms, covenants, agreements, provisions, or warranties of:

a. the PHA, which in the opinion of HUD, adversely affects the performance obligations of the PHA, the Owner, and/or other participating parties; and

b. the Owner, partner, or other participating party, made in any agreement or document submitted to HUD as part of the Development Proposal, which, in the opinion of HUD, adversely affects the performance obligations of the PHA, the Owner, partner, and/or other participating parties.

4. HUD shall permit an Owner, partner, or lender to participate, and may in its discretion, permit any other party to the Development to participate in any appeal from a notice of substantial default delivered by HUD to the PHA pursuant to this Mixed-Finance Amendment or the Public Housing Requirements, with respect to the Project.

5. During the term of any agreement between the PHA and Owner, and so long as the Owner shall not be in default of its obligations thereunder, HUD agrees that in the event of the substantial default by the PHA under this Mixed-Finance Amendment, HUD shall exercise any remedies or sanctions authorized by the ACC and this Mixed-Finance Amendment or the Public Housing Requirements, including taking possession of the PHA's interest in the Project, in such a manner as not to disturb the Owner's rights under any such agreements.

6. Any rights of the mortgagee under a Note and First Mortgage (if any), including the right to exercise all remedies specified therein, shall not be subordinate to any other obligations imposed upon the Project, except as such obligations (a) shall be reflected in the HUD restrictive covenant approved by HUD, as provided for in Paragraph B of this Mixed-Finance Amendment, or a memorandum of lease (if applicable), and/or any other recorded instrument which shall have been recorded prior to the lien of the First Mortgage or (b) shall be the subject of a subordination agreement with such mortgagee.

IV. Terms and Conditions: All other terms and conditions of the ACC shall remain applicable to the Project, unless otherwise waived or amended by HUD.

[Signature on the Following Page]

In consideration of the foregoing covenants, the parties do hereby execute this Mixed-Finance ACC Amendment:

**HOUSING AUTHORITY**

By: \_\_\_\_\_

(signature)

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**UNITED STATES OF AMERICA**

**Secretary of Housing and Urban Development**

By: \_\_\_\_\_

(signature)

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_