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630 Eye Street, N.W.
Washington, D.C. 20001
Phone: (202) 289-3400
Email: hdl@hdl.org
www.hdl.org

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Orlando, FL

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Lisa L. Walker, Esq.

Director of Administration

Timothy P. Coyle

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

To Whom it May Concern:

The Housing and Development Law Institute (HDLI) appreciates the opportunity to submit the following comments on HUD's proposed policy change regarding "over-income" tenants as set forth in *Strengthening Oversight of Over-Income Tenancy in Public Housing, Advance Notice of Proposed Rulemaking*, Docket No. FR-5904-A-01 (February 2, 2016).

Since 1984 HDLI has been a legal resource for stakeholders in the public and affordable housing industry nationwide. HDLI provides legal education and support to its members and others in the industry through the provision of educational conferences, training endeavors, periodical publications, an active electronic list-serve, one-on-one legal counseling, the submission of *amicus* briefs in the U.S. Supreme Court and other appellate courts, and other programs.

HDLI has more than 200 members across the country, consisting of public housing agencies (PHAs), attorneys who represent those agencies, management and development companies and other industry stakeholders. HDLI counts among its members some of the most sophisticated PHAs in the nation, and some of the most respected housing attorneys, many of whom are former senior HUD officials who currently sit on HDLI's prestigious 23-member Board of Directors.

HDLI and its members appreciate the complexities involved in setting national housing policy. It is no easy task, and HDLI commends HUD on its efforts to assist our nation's poor and disadvantaged renters and homeowners. Our members are the agencies entrusted with implementing HUD's policies, and understand that policy-making is an evolving process.

Periodically HDLI weighs in on issues of particular interest and concern to its membership. For the reasons set out herein, HDLI urges HUD to stay the course with current “over-income” policy, maintaining full discretion within public housing agencies to determine local over-income policies that best fit local circumstances.

The public and affordable housing industry at large is concerned about HUD’s proposed policy shift. HDLI has had the opportunity to review the comments submitted by the Public Housing Authority Directors Association (PHADA) and the National Association of Housing and Redevelopment Officials (NAHRO). HDLI concurs with the legal and historical analysis set forth in PHADA’s comments. HDLI also notes the statistical information laid out in NAHRO’s comments demonstrating the current level of under-funding of the public housing program. Rather than restate similar comments here, HDLI adopts the comments provided by PHADA and NAHRO by reference and urges HUD to meaningfully consider them.

HDLI and its members have serious concern about HUD’s proposed policy change regarding “over-income” tenants which reverses current HUD policy concerning the continued program eligibility of so-called “over-income” public housing residents. Our concerns are multi-faceted and fall within six general areas: lack of statutory support, fair housing, *fiscal*, societal, potential conflict between housing programs, and enforcement. We have attached as an Appendix, comments and concerns we have received from our membership with respect to these six areas.

The U.S. Housing Act Does Not Support This Policy Change

The U.S. Housing Act, 42 U.S.C. 1437 *et seq.* (1937, as amended), does not prohibit “over-income” families who initially were income-eligible from continuing to be eligible for public housing assistance. To the contrary, in addition to not prohibiting such, the Act specifically forbids the termination of over-income families with family self-sufficiency contracts and those receiving earned income disallowances. 42 U.S.C. 1437. Accordingly, HDLI believes that HUD’s current regulations set forth at 24 CFR § 960.261 (a) and (b) properly implement the Act, and are reasonable and sufficient. These regulations give PHAs discretion to develop policies that serve their local needs. The current

regulations support PHA efforts to help families increase their incomes toward the goal of reaching self-sufficiency, and provide much-needed rental income to PHAs struggling to fund and operate their housing programs. HUD's proposed policy appears to be contrary to the specific language of the operative statute and regulations.

Fair Housing Concerns.

HDLI members are concerned that targeting families for eviction based upon their level or source of income may well violate fair housing laws under a disparate impact theory in cases where persons impacted disproportionately fall within a protected class, such as race, ethnicity, or gender. See 24 CFR Part 100; *Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule*, 78 FR (11460)(2/15/13). Courts, the HUD Inspector General, and/or state fair housing offices could deem this targeting as a violation of an agency's duty to affirmatively further fair housing. This is surely an unintended consequence of HUD's proposal.

The U.S. Housing Act, the Quality Housing and Work Responsibility Act of 1998 (QHWRA), and HUD rules and regulations encompass the goals of establishing a mix of incomes at public housing sites, deconcentrating poverty, and creating communities that foster self-sufficiency. For the income mix and deconcentration requirements see 42 U.S.C. §1437n. For affirmatively furthering fair housing see 24 CFR Parts 5, 91, 92, *et seq*; *Affirmatively Furthering Fair Housing; Final Rule*, 79 FR 42272 (7/16/15). For family self-sufficiency see 24 CFR Part 984; PIH Notice 2011-65 titled *Timely Reporting Requirements of the Family Report*; PIH Notice 2011-51 titled *Promoting Partnerships to Utilize Housing as a Platform for Improving Quality of Life*.

Evicting higher income tenants and re-creating public housing communities that include only the poorest of families erodes past efforts to deconcentrate poverty, makes it increasingly difficult to deconcentrate poverty in the future, and runs afoul of the important goals of affirmatively furthering fair housing and fostering resident self-sufficiency.

A number of commenters have raised this issue as well, and have spoken to other ramifications that this proposed rule would have in the fair housing context. HDLI raises the issue to complement those comments, and to emphasize our concern

that the proposal violates existing statutes and regulations. HDLI respectfully submits that any policy change should be both statutory and regulatory, and not solely regulatory.

Fiscal Concerns.

Additionally, HDLI members are very concerned that terminating higher income residents based upon their income will significantly decrease rental revenues that agencies greatly rely upon to help fund their programs. They use rental income to provide and maintain the housing stock, operate the programs, and provide critical tenant support services. For the past several years, assisted housing programs have continually experienced significant funding cuts and public housing program shortfalls. Even the current FY2017 budget under consideration, contains significant fiscal shortfalls in the public housing program. With aging housing stock and increasing operating expenses, PHAs have had to stretch their financial resources. Each and every revenue source matters. HUD's approach to terminate higher income families who pay higher rents will eliminate from agency coffers an increasingly-important rental revenue stream, which ultimately will result in fewer families of all incomes being served. This is another potentially unintended consequence of HUD's proposal.

Societal Concerns.

Our members point to HUD's enunciated forward approach to "rethinking" public housing and question whether HUD's new over-income policy is contradictory to such an approach. Higher income tenants are ostensibly moving toward self-sufficiency, and while on that journey they are supported by the safety net of public housing assistance. While HDLI is not engaged in social work, our members nonetheless are concerned about the effect that HUD's new approach will have on the actual human beings who ultimately may be forced into homelessness or other substandard housing after losing their public housing assistance. We are concerned about the generational effect this policy shift may have on the children in these families, and the corresponding effect of all of this on the larger communities in which these families live. These also all are unintended possible consequences of HUD's proposal.

Conflict Between Housing Programs

Moreover, HDLI members are concerned that these proposed rules will conflict with rules of other housing programs that do not contemplate eviction of “over-income” families; that is, that public housing residents will be judged by an unfairly different standard than participants in other assisted housing programs. There already seems to be the sense that public housing is governed more strictly than the HCV program, that the rules governing HCV are less burdensome on landlords and residents than in the public housing context, and that participants in the LIHTC program are treated differently in terms of income examination than those in public housing. This proposed regulation likely would exacerbate these differences and perceptions.

Once more, currently Housing Choice Voucher/Section 8 (HCV) Program participants are terminated from the program when their 30% of adjusted income pays the full rent for six (6) months. HUD’s proposal for Public Housing Program tenants is to terminate them when their income reaches 80% of Average Medium Income for the area. This is inconsistent, and the two programs should have the same requirements.

Enforcement Concerns

Finally, HDLI members are not optimistic that landlord-tenant courts across the country will be a partner in the effort to enforce these proposed rules. In the event that families terminated for being “over-income” refuse to move, HDLI members believe that local courts may be loath to evict tenants who have demonstrated success toward self-sufficiency, particularly when there has been no other lease or program violations. HUD can take notice of the difficulties housing authorities have had in evicting residents who may be late on their rent. This likely will be made more difficult when a family is \$1 over whatever limit HUD sets as the cut off for continued participation. HUD’s proposal makes no mention of what should happen if PHAs find themselves with no way to enforce this new proposal.

In conclusion, HDLI appreciates HUD's consideration of the foregoing comments. HDLI urges HUD to stay the course with current "over-income" policy, maintaining full discretion within PHAs to determine local over-income policies that best fit local circumstances, and not promulgate regulations that mandate eviction under any particular circumstances. HDLI stands ready to assist HUD in any working group or other mechanism to develop a sensible and workable legal solution with respect to "over-income" residents that will not have a significant adverse impact on PHA rental income streams and disrupt public housing programs nationwide.

Respectfully submitted,

Lisa L. Walker

CEO & General Counsel

APPENDIX
COMMENTS FROM HDLI MEMBERS
REGARDING SPECIFIC TOPIC AREAS ADDRESSED IN THE HDLI COMMENT

Fair Housing Concerns Expressed by HDLI Members:

- “I think an argument could be made that it is anathema to the “furthering fair housing” mandate that HUD is preparing to strictly implement in the near future—at least from what they have suggested.”

Fiscal Concerns Expressed by HDLI Members:

- “...If you terminate the higher earners, then only lower earners are left. This will concentrate poverty.”
- “HUD cuts subsidies to PHAs, higher rent can help to off-set those cuts.”
- “HUD is not treating PHAs like landlords for multifamily housing (recall this was the standard used by the Harvard Cost Study). PHAs are moving to Section 8 only housing and HUD’s perspective would only hurt this movement. PHAs should be able to act more like section 8 landlords or private landlords. This is the future.”
- “In rural areas such as ours, suitable housing is very, very limited. HUD should consider allowing PHAs to set aside a percentage of their public housings for persons of higher income. Our PHA is located in an area of very high poverty. We need higher income families to meet our deconcentration goals, as well as to off-set budget cuts.”
- “...let's talk 100% subsidy, capital fund etc. before we reduce rental income any further.”

Societal Concerns Expressed by HDLI Members:

- “HUD will reinforce the stigma that public housing is only for the poor and criminal elements of society. This clearly contradicts “re-thinking public housing.”
- “Removal of “over income” families, who most likely are wage earners, eliminates “peer support and influence” to help work able unemployed adults realize the value in employment, education, etc. In fact, evicting/terminating out “over income” families continues the concept of “disincentive”, ‘why work when you lose your housing?’”
- “Another argument against it: For many people in public housing they have raised their children in the same school system by virtue of the difficulty transferring inherent in public housing. While the school system may or may not be ideal, the consistency itself and the community that the family has created, is stability and structure. That forced change from one stable, albeit low-income environment, to a different potentially slightly better, but possibly another low income environment, could have negative effect on the school age family members and family itself. I have no statistical data but I suspect people who live in apartments and are not tied to the apartment complex by nature of public housing probably move more frequently generally, which could create a pattern of disruption for young family members as well.”
- “This issue affects a minority of public housing residents. We looked at our residents and 21/2700 had income over 80%AMI. Most others say that this topic affects less than 1% of their residents. When I looked at the 21 families, I found that they --had “unstable” employment, meaning that several adults had low-wage jobs, or one adult had more than one job. Several of these families had income for in-home support services. - began this higher income recently, within the past year or two. Only one family had sustained income for over 2 years and that was because it was a 2 person household and one adult was disabled so received Social Security and SSI and the other adult was employed. --had families with a disabled adult. There was concern about the impact of a disabled adult moving out of their community of support (and maybe services) where neighbors were

available to assist as needed. --The highest income was 135% of AMI. -- About ½ of them had income-based rent and the other ½ had flat rent.”

- “Many of the “over income” families are marginally over the limit, often due to entry level employment and/or multiple minimal /low wages earnings for adult household members. An eviction would devastate their credit ratings, and in many tight markets, potentially create housing instability for their families, as well as unemployment (they no longer work close to work), instability for the child’s education (removal from school community), and of course, trauma to the household as they manage the displacement of their family-all because the adults made the important step toward self sufficiency. This impact is illustrated in Matthew Desmond’s new book recently released on March 1, 2016: *‘Evicted-Poverty and Profit in the American City.’*”

Conflict Between Housing Programs Concerns Expressed by HDLI Members:

- “Public Housing [is] layered with other Housing Programs, such as LIHTC’s ... the LIHTC Program allows for households that exceed 140% of AMI for their household to have their unit re-designated as a Market Rate unit, and then the next available unit of the same size must be rented to a qualifying household at the previously designated % AMI for the over-income unit. In properties where there are no Market Rate units, this is not possible, e.g. ... properties that are both 100% Public Housing and 100% LIHTC. ... [T]his is a conflict in housing programs that must be considered. At the very least ... no over-income household should be terminated unless they were at least at or above 140% of AMI for two consecutive recertifications.”

Enforcement Concerns Expressed by HDLI Members:

- “Court’s in our area would be hesitant to evict someone for this, creating a problem for the PHA.”
- “Eviction based on this factor, alone, may not be deemed by courts as “just cause,” which is a necessary consideration under the public housing lease.