Arnall
Golden
Gregory LLP

Orlando J. Cabrera
Direct phone: [redacted]
Direct fax: [redacted]
E-mail: [redacted]
www.agg.com

November 19, 2019

The Honorable Maxine Waters, Chairwoman
Financial Services Committee
United States House of Representatives
2129 Rayburn House Office Building
Washington, D.C. 20515

RE: Written testimony of Orlando J. Cabrera, Former Assistant Secretary for Public and Indian Housing, United States Department of Housing and Urban Development ("HUD") with respect to testimony to be provided on Wednesday, November 20, 2019 before the Subcommittee on Housing, Community Development, and Insurance of the Financial Services Committee ("Subcommittee")

Dear Chairwoman Waters:

I would like to thank you, Ranking Member McHenry, and members of the Financial Services Committee and Subcommittee for inviting me to testify with respect to the topic of "Safe and Decent? Examining the Current State of Residents' Health and Safety in HUD Housing." I am grateful for the opportunity.

Since my time serving at HUD, I have held two roles that have helped me understand HUD's implementation of policy with respect to providing "safe and decent" housing. This testimony focuses upon specific observations from my perspective as a lawyer and as the chief executive officer of a developer and owner.

Regardless of the pointedness of my comments herein, I want express my genuine, continued, and profound respect for the overall HUD team that ultimately does their work daily. They were (and figuratively although no longer officially, remain) my colleagues and I support their mission. Further, most days, HUD gets an awful lot right. These observations relate to more effectively moving HUD toward the objective of assuring "safe and decent" affordable housing particularly when it veers a bit off from that which is clearly permitted by law or regulation.

"HUD Housing" has a broad potential meaning. The spectrum of housing modalities referenced by the term "HUD Housing" includes single family homeownership on one side of the spectrum and ranges along that spectrum on the other end toward public housing.

Furthermore, it is conceivable that other HUD programs, such as HOME, the Community Development Block Grant, including the Community Development Block Grant – Disaster Relief program, can also include the concept of "HUD Housing." Yet, HUD does not provide housing. HUD "owns" nearly no housing. HUD allocates Congressionally-appropriated resources under authorization statutes and supplemental appropriations that ultimately allow other entities to house Americans.

Those entities that directly or indirectly receive the benefit of Congressional support include for- and non- profit entities, public housing authorities ("PHAuthority" or, if plural, "PHAuthorities"), public housing agencies (there is a difference between PHAuthorities and public housing agencies), and individuals. This written testimony focuses upon multifamily housing that receives federally funded housing assistance, which we call federally-assisted housing. It excludes other tax appropriation- and tax expenditure-based Congressionally-created housing programs undertaken by other agencies, including the United States Department of Agriculture, military housing, and the Internal Revenue Service.

While the Subcommittee's topic today is punctuated with a question mark, the topic perhaps more appropriately merits one of those ever blinking ellipses we see on computer screens than any other punctuation because anything relating to "safe and decent" federally-assisted housing must always be a work-in-progress that seeks out the best tools over time for the purpose of improving tenants' lives. The wide ranging nature of the assets that HUD impacts requires a fluid and constant oversight role. Contrary to popular notions, federally-assisted housing in a direct sense, such as public housing, project based Section 8, Housing Choice Vouchers, Project Based Vouchers, Section 202 (housing for the elderly), and Section 811 (housing for the disabled) can be narrowly defined for purposes of this testimony yet nonetheless federally-assisted housing under a narrow definition touches millions of lives. All housing providers, be they developers, public housing agencies or owners, work daily to meet HUD's legislative, regulatory, and non-rule policy requirements and commonly exceed the legislative notion of "safe and decent housing."

As noted above, Congress and HUD have determined that federally-assisted housing has a specific meaning under federal law. Federally-assisted housing excludes housing constructed using other housing-related resources, such as affordable housing constructed using the low income housing tax credit ("LIHTC"), that after successful construction, have tenants who use federal housing assistance.

Altogether, there are millions of Americans who live in federally-assisted units in the United States. All of the units they use are impacted by statutes, regulation, and policy pronouncements - and affirmative legal agreements assuring that owners of units abide by federal law.

Federally-assisted housing costs a lot of money – both federal and otherwise. All providers receiving federally funds must rightly comply with Fair Housing law and regulation,

National Environmental Protection Act ("NEPA"), lead-based paint remediation and notice laws and regulations, (often) Davis-Bacon law and regulation, and other federal requirements. Few providers expect serious relief from these long required provisions, but they also do not expect those provisions to impede their legally required assurance of complying with Congress's directive that federally-assisted housing be "safe and decent." All stakeholders have long incorporated compliance with those and other federal programs into their business plans and operations.

With few exceptions, like all federal agencies, all Congressional appropriations that are administered by HUD must require HUD to assure that recipients of federal funds comply with housing and non-housing-related federal laws. Most notably, those are the overarching, cross-program laws mentioned above, such as lead-based paint notice and remediation, Davis-Bacon, Fair Housing, environmental (NEPA), and 24 CFR Part 200 compliance. My testimony does not advocate deviation from anything but faithful adherence to those important laws. As a rule, though, the stress point between HUD and stakeholders often touches on how those cross-enterprise laws apply to housing-related activities.

Sometimes, HUD administers federal laws in a manner that impedes the objective of providing "safe and decent" housing by adopting policy that is applied in an overreaching manner. There are specific examples, all of which I have experienced.

The nation's stakeholder recipients handling federally-assisted housing and legally compliant "safe and decent" housing are not furthered when HUD:

- Rejects, through its Fair Housing arm, a PHAuthority's efforts to redevelop a then-77-year old, obsolete public housing property claiming that the PHAuthority could not achieve compliance with Affirmatively Furthering Fair Housing regulatory compliance. HUD determined that as a pre-condition to departmental clearance for a Rental Assistance Demonstration ("RAD") application, an unrelated, non-applicant City that HUD had no authority over had to first change its city code relating to its zoning and land use laws before HUD would permit the PHAuthority to use RAD for the redevelopment of new affordable LIHTC units serving the same extremely- and very-low income housing tenant community served by the existing public housing development. Why would HUD require a PHAuthority to first accomplish the legally impossible task of getting a local government to change its city code as a pre-condition to razing dilapidated and provably unhealthy obsolete public housing units and building new affordable units?
- Delays a CDBG-DR's grantee's allocation award to a subrecipient based upon a misreading of NEPA, thereby imperiling the development of new LIHTC-financed affordable housing units despite clear evidence that the subrecipient complied with all federal laws.

- Threatens to sanction an outstanding 40-year program participant and faith-based, non-profit-owner of elderly and disabled housing for "failing" Real Estate Assessment Center ("REAC") scores, which HUD uses to determine quality of housing provided, despite clear evidence that part of the property in question had suffered a fire.
- Implements Housing Opportunities through Modernization Act ("HOTMA") changes to the Housing Opportunities for People with AIDs ("HOPWA") program in a manner that is sanctioning large cities *and* rural HIV-infected tenants who might otherwise become homeless and service-less.
- Contractually re-regulates Moving to Work program ("MTW")-participating PHAuthorities in a manner that essentially reimposes laws and regulations that impedes the very relief MTW-participant PHAuthorities were supposed to have received.
- Threatens the federal funding of two major cities, in most cases without an affirmative federal statutory obligation, to comply with the provisions of the Fair Housing Act applicable to owners, and effectively use local and state funds to pay for HUD's insistence that city-code and building requirements on future property owners that helps neither most tenants that are covered by the Fair Housing act in the absence of compulsory law or regulation.
- Suspends Management and Occupancy Reviews ("MORs") conducted by project based contract administrators ("PBCAs") placing PBCAs in the unworkable position of both being unable to deal with MOR issues and essentially needing to "catch up" on years of pent up operational shortcomings when MORs were finally reinstated by HUD years later.

These specific examples are offered to highlight broader issues facing HUD with respect to its mission shortcomings relating to the provision of "safe and decent" housing. Every example above is offered in an attempt to highlight the broader common experience of my colleagues who have experienced similar challenges.

One part of HUD's policy prerogative can run the risk of undermining the greater mission of providing "safe and decent" affordable housing to Americans who qualify for and need that housing. Another risk to HUD and others is that there is a form of institutional redux at HUD that is severely impacting HUD's capacity. In either case, HUD should take some affirmative steps. They are:

- Implement better technology.
- Hire staff and work to retain institutional memory. Talent retention was a crisis management challenge when I served at HUD and remains so.
- Provide technical capacity so that HUD program employees avoid making policy decisions that flatly contradict law and regulation.

  - I have a concern that there will come a time when a recipient of federal funds will challenge HUD, on a major Fair Housing compliance matter for instance, and win – which will both regrettably weaken Fair Housing enforcement and cause others to question legitimate Fair Housing compliance.
  - As noted above, HUD must keep faith with all PHAuthorities and public housing agencies that seek to compete to become PBCAs.
- Implement desired policy without one HUD-department, for example, and again Office of Fair Housing and Equal Opportunity, effectively derailing desired housing outcomes in another HUD department, for example HUD's Office of Recapitalization that runs RAD – and that fundamentally serve Congress's "safe and decent" housing objective.
- Redirect a reaction-based regulatory scrutiny. Bad facts make for bad policy outcomes. HUD has myriad sanctioning tools yet moves toward the most rigid enforcement positions too precipitously. HUD would serve itself well by adopting more nuanced regulatory positions that contemplates a full spectrum of noncompliance tools.

As a further example of the risks of regulatory overreach and expense, HUD's enforcement of other requirements in a manner with a tenuous foundation in federal or state law or regulation might cause local governments to revisit their participation in HUD programs. Two local governments, in my recent experience – have concluded their relationship with HUD, causing them to formally end some or all of their relationship with HUD programs because HUD's compliance costs with respect to federally-assisted housing could not be feasibly met by those local governments.

I did not want to end this topic without adding a thought about a program I have always supported – MTW. MTW status has helped PHAuthorities reinvent themselves and become more effective developers and owners. MTW status or MTW-like authority should be made widely available beyond small PHAuthorities and named MTW public housing agencies.

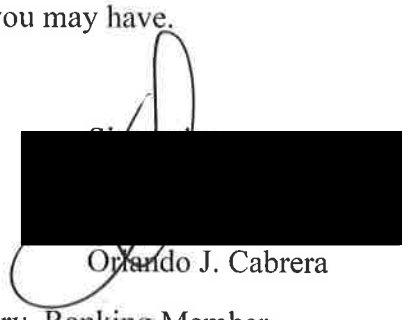
HUD need not be the only place change starts. For example, MTW has been a tool of transformation for many PHAuthorities, yet while MTW has been expanded, it has simultaneously become more constraining. If more of the nation's public housing agencies are allowed to use MTW, it would unquestionably improve tenant's lives and create better public housing authority-service providers.

One version of federally-assisted housing that deserves its own distinct mention is the programs administered by HUD's Office of Public and Indian Housing's Office of Native American Programs ("ONAP"). Indian Country deserves a significant Congressional commitment. HUD's obligation to provide "safe and decent" housing entirely includes all ONAP programs. Tribally Designated Housing Entities ("TDHEs") are suffering through the same capacity issues that are impacting all PHAuthorities and HUD itself. Unlike PHAuthorities, TDHE are impacted by treaty obligations in addition to the Native American Housing and Self-Determination Act ("NAHASDA"), which is a critical legislative tool for

federally recognized tribes and TDHEs. All federally recognized tribes deserve "safe and decent" affordable housing as well.

In closing, providing "safe and decent" requires hard work. I have no doubt that HUD has the people and capacity to undertake the effort in the most productive way. Some of the most talented people I have ever worked with (still) work at HUD. Please support them. Despite the difficult stories about talent drain that we hear from every federal department, including HUD, in my view they have earned that support.

Once again, thank you for the opportunity to submit my written testimony. As always, I stand ready to address any questions you may have.



Orlando J. Cabrera

cc: The Honorable Patrick McHenry, Ranking Member