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Via electronic submission to the Federal e-Rulemaking
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Secretary Marcia Fudge
c/o Regulations Division, Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 10276
Washington, DC 20410-0500

RE: Comments from State Attorneys General in Support of HUD Interim Final Rule:
*“Extension of Time and Required Disclosures for Notification of Nonpayment of
Rent”*, Docket No. FR 6286-I-01 (October 7, 2021).

Dear Secretary Fudge:

We, the Attorneys General of the States of **New York, California, Colorado, Connecticut, the District of Columbia, Delaware, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington State** write today to indicate our strong support of HUD’s Interim Final Rule, *“Extension of Time and Required Disclosures for Notification of Nonpayment of Rent”*, FR 6286-I-01 (October 7, 2021) which provides that during the COVID-19 pandemic and other future emergencies, the HUD Secretary may require federally funded public housing authorities (PHAs) and project-based rental assistance owners (PBRA) to provide tenants facing eviction for non-payment of rent with notification of and information about the opportunity to secure federal emergency funds like Emergency Rental Assistance (“ERA”) funds and time to secure such funding prior to eviction.¹ Tenants who are evicted before they can obtain

¹ For purposes of this rule, HUD has indicated that PBRA includes project-based rent assistance in the following programs: Section 8 PBRA, Section 8 Moderate Rehabilitation, Section 202/162 Project Assistance Contract, Section 202 Project Rental Assistance Contract (PRAC & SPRAC), Section 811 PRAC, Section 236 Rental Housing Assistance Program and Rent Supplement. The rule does not apply to PHAs that administer only the Housing Choice Voucher (HCV) program or to families assisted by the HCV program, including Project-based Vouchers (PBV). See Federal Register/Vol. 86, No. 192/Thursday, October 7, 2021/Rules and Regulations, pgs. 55693-55702 and see also, [Supplemental Guidance to Interim Final Rule](#) at [2021 HUD PIH LEXIS 27](#).

funds face not only eviction, but also (1) difficulty obtaining new housing due to the eviction filing on their record and (2) debt-collection and deleterious effects on their credit reports even after vacating their home, affecting their ability to find new housing and apply for a loan.

The States have a strong interest in ensuring that Americans experiencing either COVID-19 pandemic related job loss or illness or other emergencies do not end up homeless, that their children do not needlessly experience disruption to their schooling or that individuals and families end up doubled up or in a shelter environment that would further spread COVID-19 disease before federal funds available to prevent eviction can reach them. Protecting tenants in public housing and other low to moderate-income federally funded housing who have been unable to pay rent by requiring that they receive notice of and time to obtain emergency rent assistance ensures that our most vulnerable residents do not experience the additional devastation of homelessness, while providing the benefit to HUD assisted housing programs of relieving expenses associated with unnecessary evictions.

Nationally, there have been over 46 million people infected with COVID-19 and 747,970 people have died.² The pandemic has had a severe impact on the economy resulting in high rates of job loss, reductions in work hours and income, challenges finding childcare, and long-term health consequences for some of the infected. The spread of the Delta variant in recent months has added to the already immeasurable loss brought upon the nation by the pandemic. The federal government has responded by distributing tens of billions of dollars intended to support tenants and landlords.³ And though many tenants were protected from eviction while these funds funneled down to the states, the recent invalidation of the federal Center for Disease Control's ("CDC") moratorium by a decision of the United States Supreme Court in late August has immediately subjected tenants in states without their own moratoriums to eviction without the opportunity to access federal relief funds.

As eviction moratoriums expire nationally, tenants now face eviction from mounting rent arrears at the same time as the price of consumer goods like food, furniture, gas and rent are increasing rapidly and as a limited supply of housing and goods caught in supply chain troubles contribute to rising inflation.⁴ A large number of renter households financially impacted by COVID-19 are headed by women and people of color who, without further stays of eviction to allow for emergency relief to reach them, will experience a deepening of already historical and structural inequities against them.⁵

The roll out of the allocated ERA funds from the U.S. Department of the Treasury to the states had a slow start and despite our states' best efforts to quickly establish processes to get ERA and other relief funds to our constituents, there are still many tenants nationwide who are either unaware of the existence of rent relief available in their states, need special assistance to make an application or whose

² Centers for Disease Control and Prevention, COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited on 11/5/21).

³ Two separate programs have been established ERA 1 which provides up to \$25 billion under the Consolidations Appropriations Act of 2021 (enacted on December 27, 2020) and ERA 2 which provides up to \$21.55 billion under the American Rescue Plan Act of 2021 (enacted on March 11, 2021).

⁴ https://www.nytimes.com/2021/10/13/business/economy/september-2021-cpi-inflation.html?campaign_id=9&emc=edit_nn_20211014&instance_id=42828&nl=the-morning®i_id=107298501&segment_id=71613&te=1&user_id=4d6158e0d6e2c157bdae456d9fd89482

⁵ <https://www.justice.gov/opa/blog/how-state-courts-can-prevent-housing-and-eviction-crisis>

rental assistance applications are still in process, with payments not yet having been made to their landlords.⁶

Requiring PHA and PBRA owners to provide their tenants with specified information regarding the availability of federal funds to prevent eviction for non-payment of rent and imposing a minimum of thirty-days advanced notification of lease termination due to non-payment of rent appropriately allows these low-income tenants, who have been most seriously impacted by the pandemic, additional time needed to complete the application process in their states. The rule not only protects tenants but appropriately mandates PHAs and PBRA owners to use sound management practices by informing tenants of potential funds necessary to pay off rent arrears. PHAs and PBRA owners must be encouraged to take measures to collect rent and avoid unnecessary and costly evictions by notifying tenants of the availability of federal funds for arrears and providing them time to obtain those monies in advance of any potential eviction.

While we applaud the HUD Secretary for adopting this Rule, it may not go far enough to accomplish its stated goal of “preventing unnecessary hardship for HUD-assisted tenants” who are eligible to prevent their nonpayment eviction with ERA funds.⁷ Agencies continue to face challenges to swift dispersal of the emergency funds even where an application for relief has been made. Just a few months ago, only 11% of the \$46.5 billion dollars in rental aid allocated nationally had been distributed.⁸ Though expenditure levels improved with implementation of more program flexibility, the United States Census Bureau reports that 33% of Americans still face likely eviction or foreclosure in the coming months.⁹ Tenants in states where there are no eviction moratoriums or expiring moratoriums need the added protection of a stay of eviction *upon the filing of their emergency rent arrears application through decision on that application*. This would ensure that no tenant is evicted because they were unable to secure funds in time to prevent eviction. It would also ensure that PHAs and PRBA owners are not wasting resources on evicting tenants and foregoing rent arrears that could be paid through the Federal funds.

EXTEND HUD RULE TO INCLUDE AN AUTOMATIC STAY UPON THE FILING OF AN ERAP APPLICATION THROUGH DECISION¹⁰

We the Attorneys General of the undersigned states firmly believe that tenants nationwide need more than thirty days to 1) learn about their eligibility for federal emergency rent assistance, 2) make an application that appends all required documentation (which varies significantly by state) and 3) receive a decision from the state or locality distributing funds, on that application before being faced with potential eviction from their homes. We believe HUD has the authority to require an automatic stay of filing new nonpayment cases or pending proceedings when an emergency rent assistance application is in process.

⁶ <https://www.urban.org/urban-wire/just-month-left-eviction-moratorium-many-mom-and-pop-landlords-and-tenants-are-still-unaware-federal-rental-assistance>

⁷ Federal Register/Vol. 86, No. 192/Thursday, October 7, 2021/Rules and Regulations, pgs. 55693-55702.

⁸ See <https://www.nytimes.com/2021/08/25/us/politics/eviction-rental-assistance.html>.

⁹ See <https://home.treasury.gov/news/featured-stories/more-than-420000-households-received-emergency-rental-assistance-in-august-totaling-over-2.3-billion-in-payments> (last visited on 11/5/21; see also, <https://www.census.gov/data-tools/demo/hhp/#/?measures=EVICTFOR> (last visited on 11/05/21).

¹⁰ To the extent that expanding or extending this HUD Interim Rule is not a procedural possibility, then we urge HUD to adopt an additional Interim Final Rule for effect that includes the proposals herein.

Under HUD’s Interim Final Rule, a PHA or PRBA tenant whose nonpayment of rent case is already pending will not benefit from the required 30-day pre-lease termination notice but will have the same or greater need for adequate time to have an ERA rent arrears application processed to approval. In recent U.S. Department of Justice guidance, Associate Attorney General Vanita Gupta, recognized that nationwide, tenants need protection from the threat of pending nonpayment eviction cases no longer stayed by the CDC Moratorium. She implored state courts to put eviction cases on a “slower track”, recognizing that a period of between 30-60 days, at least, to accomplish the filing, processing and paying out of emergency rent arrears funds was reasonable.¹¹

There is evidence of significant and continuing confusion amongst both landlords and tenants about the eligibility for and requirements involved in, making an application for ERA funds to prevent eviction. Some tenants are simply unaware of the opportunity, some believe they do not qualify because of a mistaken belief that rent relief funds are tied to other programs they have already benefitted from, such as exhausted Unemployment Insurance Benefits or cash stimulus payments already received and spent. Still others may mistakenly believe that rent is not owed, having been counseled during moratorium periods to disregard “pay or quit” notices or only recently being faced with court proceedings after the national CDC moratorium was invalidated or other local moratoriums expired. Differences in the way each state has fashioned their ERA application processes has also led to confusion and delays.¹² And some states who have not relaxed stringent documentation requirements or targeted outreach to low income communities still have not distributed the bulk of their aid.¹³

We therefore urge HUD to expand their rule to include an automatic stay of any filing or proceeding for eviction when a public housing or PRBA tenant has a pending ERA application for relief, until determination of that application. HUD should look for guidance to New York State who recently passed comprehensive legislation that, upon the tenant’s filing of an ERA program rent relief application (“ERAP” in NYS), stops pending non-payment cases from proceeding until a final determination on the application. The ERAP stay also applies to localities in NYS that have opted out of the statewide ERAP program, if a tenant has applied for rent arrears assistance and the application is pending with the locality.

In lieu of the type of legislation that New York passed above, staying eviction pending determination of an ERA application, some states have responded to their residents’ need for protection from eviction by using their court systems to put policies in place to stay evictions if a tenant has applied for rental assistance. Not all states have done this, however, leaving large and unequal gaps in nationwide protection and making expansion of the HUD Interim Rule to formalize a practice across HUD assisted housing nationwide, imperative. Additionally, as noted above, many states (notably several of the states signing on to this letter) have *no current eviction moratorium* and still require time to reach a higher level of expenditure of their ERA funds to ensure that their citizens are sufficiently protected. For example, Colorado has no current eviction moratorium and only 35.8%

¹¹ <https://www.justice.gov/opa/blog/how-state-courts-can-prevent-housing-and-eviction-crisis>.

¹² See generally, <https://www.urban.org/urban-wire/just-month-left-eviction-moratorium-many-mom-and-pop-landlords-and-tenants-are-still-unaware-federal-rental-assistance>.

¹³ See <https://www.nytimes.com/2021/09/10/business/evictions-rental-assistance.html>.

of the first set of ERA1 funds are currently obligated or expended, according to data collected by the National Low-Income Housing Coalition.¹⁴ Similarly, the state of Pennsylvania has no current eviction moratorium and has obligated or expended just over 35% of its emergency rental assistance.¹⁵

While Minnesota's eviction moratorium has expired, it has carved out a legislative exception to eviction for households that have a pending ERA application. The same is true in Washington State.¹⁶ These protections will ensure that Minnesotans and Washingtonians will not experience unnecessary eviction when emergency rent assistance may still be available or is on its way. Minnesota has expended just over half of its available ERA1 funds at 59.7% obligated or expended according to data collected by the National Low-Income Housing Coalition.¹⁷ Similarly, California's eviction moratorium ended on September 30, 2021, but an exception has been made for low-income tenants who have a pending rent assistance application.¹⁸ Even so, until recently, a small percentage of the relief funds had been distributed in the State though it has now picked up speed.¹⁹ The stays of eviction for pending rent arrears applications in place in these few states are crucial to avoiding homelessness crises there but must be available as broadly as possible nationwide.

Expanding HUD's Interim Final Rule to include an automatic stay of filing or proceeding with eviction cases for all PHA and PRBA tenants until a determination of eligibility for ERA funds can be made is an appropriately finite period, unlike some of the broader and lengthier eviction moratoriums that have been challenged in the courts. Yet this relatively limited expansion of the HUD Rule will more comprehensively reach tenants who require more than 30 days to prevent their eviction through accessing federal emergency rent assistance funds. PHA and PRBA owners will still be authorized to move forward with eviction proceedings against tenants who are not found eligible for emergency rent assistance but will be appropriately mandated to take all measures to collect arrears owed through relief applications and not waste resources on unnecessary evictions.

EXTEND THE HUD RULE TO REQUIRE THAT PHA AND PRBA LANDLORDS SEEK MONEY JUDGMENTS ONLY FROM TENANTS WHO FILE EMERGENCY RENT

¹⁴ <https://www.denverpost.com/2021/10/01/tenant-rights-colorado-new-laws-landlord/#:~:text=There%20is%20no%20active%20eviction,nationwide%20moratorium%20in%20late%20August>; See National Low Income Housing Coalition ERA Dashboard for a list of all states ERA 1 fund expenditures to date: <https://nlihc.org/era-dashboard> (last visited on 11/5/21); see also [Colorado's ERA program dashboard: https://public.tableau.com/app/profile/connor.everson5568/viz/HousingReliefProgramsDashboard/PaymentsApprovals](https://public.tableau.com/app/profile/connor.everson5568/viz/HousingReliefProgramsDashboard/PaymentsApprovals) (last visited on 11/5/21).

¹⁵ See National Low-Income Housing Coalition ERA Dashboard for a list of all states ERA 1 fund expenditures to date: <https://nlihc.org/era-dashboard> (last visited on 11/5/21) and see <https://www.dhs.pa.gov/ERAP/Pages/ERAP.aspx> (last visited 11/5/21).

¹⁶ Wash. Rev. Code section 59.18.410(2).

¹⁷ Minnesota's "eviction moratorium off ramp" described here at <https://www.mnhousing.gov/sites/Satellite?c=Page&cid=1520221592207&pagename=External%2FPPage%2FEXTStandardLayout>; See National Low Income Housing Coalition ERA Dashboard for a list of all states ERA 1 fund expenditures to date: <https://nlihc.org/era-dashboard> (last visited on 11/5/21) and see [Minnesota's ERA program dashboard: https://www.mnhousing.gov/renthelpmn-dashboard](https://www.mnhousing.gov/renthelpmn-dashboard) (last visited on 11/5/21).

¹⁸ <https://www.npr.org/2021/09/29/1041408746/californias-eviction-moratorium-ends-on-thursday>. Certain counties in California have also implemented local eviction moratoriums.

¹⁹ See National Low Income Housing Coalition ERA Dashboard for a list of all states ERA 1 fund expenditures to date: <https://nlihc.org/era-dashboard> (last visited on 11/5/21) and see California's ERA program dashboard: https://housing.ca.gov/covid_rr/dashboard.html (last visited on 11/5/21).

ASSISTANCE APPLICATIONS BASED ON FINANCIAL HARDSHIP AND WAIVE LATE FEES THAT ACCRUE DURING A PRESIDENTIALLY DECLARED EMERGENCY

The HUD Interim Rule should also be expanded to require that PHA and PRBA landlords be limited, during presidentially declared periods of emergency, to collecting rent arrears as money judgments only, in non-payment of rent cases and not as possessory judgments leading to eviction when a tenant has filed an emergency rent assistance application based on emergency related financial hardship.

We urge HUD to look again as an example to the New York Legislature who passed the Tenant Safe Harbor Act (“TSHA”) allowing tenants sued in a summary nonpayment proceeding to interpose the affirmative defense of financial hardship in order to prevent a possessory judgment for their eviction from being entered by the court. If the tenant demonstrates that they fell into rent arrears as a result of financial loss related to COVID-19, their rent arrears accruing during the pandemic period (currently between March 7, 2020 through January 15, 2022) will only be collectible as a money judgment and will not result in a possessory judgment resulting in a warrant for their eviction. This allows PHA and PRBA owners to continue efforts to collect rent money owed without the unnecessary social and economic costs of evicting tenants who, but for pandemic related hardships, would be otherwise stable tenants. While, PHA and PRBA tenants in New York State will be able to raise this defense to prevent their eviction, they will not be able to do so in other states. An expansion of HUD’s Interim Final Rule to provide for this same relief to PHA and PRBA tenants nationwide indefinitely through the end of the declaration of the nationwide COVID-19 pandemic would protect a large number of tenants experiencing pandemic related financial hardship from the traumatic impact of eviction.

Further, prohibiting PHA and PRBA landlords from charging late fees to tenants altogether during a presidentially declared pandemic period would prevent tenants from unnecessarily accruing debt that could damage their credit and eat away at their security deposits during a period of time when late fees served no incentivizing purpose because the nonpayment of rent was not about delayed payments but about pandemic related impossibility. Currently, certain HUD assisted programs are allowed to charge late fees, though late fee arrears cannot be the basis for eviction, they can be deducted from security deposits and can be sought as non-possessory judgments against struggling tenants.²⁰ By Executive Order, the Governor of New York State imposed a restriction on all private landlords from charging late fees to their tenants for the pandemic period between March 20, 2020 through the end of the authorizing Executive Order which expired on June 24, 2021. After June 24, 2021, though landlords are able to charge late fees to their tenants in New York, they are still prohibited from collecting them in summary non-payment eviction proceeding and they cannot be deducted from a security deposit.²¹

²⁰ Only certain HUD Assisted programs may charge late fees. Section 202/8, 202 PAC, 202 PRAC and Section 811 PRAC projects may not charge any late fees. See HUD Handbook 4350.3, Chapter 6-23 “Charges for Late Payment of Rent”, https://www.hud.gov/program_offices/administration/hudclips/handbooks/hsgh/4350.3.

²¹ See e.g. [NY CLS Gen Oblig § 7-108](#).

HUD HAS THE AUTHORITY TO EXPAND ITS INTERIM FINAL RULE TO ASSIST PHA AND PRBA TENANTS DURING A PRESIDENTIALLY DECLARED EMERGENCY

The HUD Secretary has broad authority under her rulemaking power to not only require PHA and PBRA owners to give advance notice and information to tenants about the availability of federal emergency rent assistance before lease termination, but also to stay proceedings for eviction until a determination of tenant eligibility for aid to be distributed can be made and to determine the mechanism for collecting rent arrears from PHA and PBRA tenants. This is especially true when these requirements are limited in scope and time to a presidentially declared emergency period.

HUD's general rulemaking authority under 42 U.S.C. §3535(d) allows the agency to implement its statutory mission to provide assistance for housing to promote "the general welfare and security of the Nation and the health and living standards of [its] people".²² Additionally, HUD is empowered to specifically prescribe procedures and requirements for assisted housing to follow that "assure that sound management practices will be followed in the operation" of housing projects, including but not limited to the "establishment of satisfactory procedures designed to assure prompt payment and collection of rents...".²³

HUD has determined, by this Interim Final Rule, that it was an appropriate use of their authority to require that PHAs and owners provide tenants facing eviction for nonpayment of rent with "adequate time and notice to secure [ERA] funding".²⁴ However, by providing only for pre-lease termination notice for the "longest of the standard periods" (30 days' notice), the Interim Final Rule does not go far enough to 1) ensure the best possible financial outcome for HUD assisted projects experiencing large numbers of tenants who are behind in rent payments 2) protect those projects from the unnecessary expenditures associated with evicting tenants and loss of rents needed for operational costs during potential post eviction vacancy periods 3) ensure the overall stability of the housing project and community by keeping tenants, many of whom, but for the pandemic, may have had reliable and long term tenancies 4) prevent tenants and their families from unnecessarily experiencing homelessness. Taking the additional steps of requiring that PHAs and PRBAs refrain from filing eviction proceedings and pause those that are pending, until determination of an application for emergency rent assistance, will ensure the soundest economic outcome for the housing projects, bring stability and ensure that the largest number of tenants possible are not unnecessarily displaced to greater risk of exposure to life-threatening COVID-19 in overcrowded alternative housing or shelter settings.

In a long line of precedent cases, courts typically sustain the policy choices of agencies, "...so long as that choice is reasonabl[y] consistent with the legislative scheme." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 1984 U.S. LEXIS 118, 52 U.S.L.W. 4845, 14 ELR 20507, 21 ERC (BNA) 1049; See also, *Valentine Props. Assocs., LP v. United States HUD*, 501 Fed. Appx. 16, 2012 U.S. App. LEXIS 22164, 2012 WL 5259033 (2d Cir. N.Y. October 25, 2012)(holding that HUD's promulgation of new housing inspection standards, through notice and comment, made applicable to project-based Section 8 housing only, were not arbitrary and capricious because they bore a "reasonable relationship" to HUD's goals of maintaining "decent, safe and

²² [42 USCS § 3531](#); [42 USCS § 3535](#).

²³ [42 USCS § 1437d\(c\)\(4\)](#).

²⁴ Federal Register/Vol. 86, No. 192/Thursday, October 7, 2021/Rules and Regulations, pg. 55697.

sanitary” dwellings.)²⁵ And the prospective application of any new HUD policy related to evictions imposed during a presidentially declared emergency, are appropriately in line with the Agency’s quasi-legislative rulemaking authority. See [De Niz Robles v. Lynch, 803 F.3d 1165, 2015 U.S. App. LEXIS 18426.](#)

CONCLUSION

The expansion of the HUD Interim Final Rule in the above manner is crucial to providing the best chance for emergency rent assistance to reach its intended recipients, for the overall financial health of HUD assisted housing projects and for the prevention of a massive eviction and homelessness crisis in the United States. The States’ proposal above will raise no constitutional infirmities because the changes are supported by the agency’s broad statutory authority, are needed to formalize a standard of protection for HUD assisted tenants and housing projects nationally and are narrowly tailored to apply to only until a determination on an emergency rent assistance application can be made by a locality and/or are limited to arrears accumulated or late fees waived, during a similarly limited period of a presidentially declared emergency. These rules comport with HUD’s important goals of fostering stability by preventing tenant turnover and supporting the ongoing financial health of the housing programs affected. The rules are a quasi-legislative agency function which apply prospectively and uniformly to balance the health, safety of tenants and economic concerns of housing programs under HUD purview as delegated by Congress and are of urgent importance to the States.

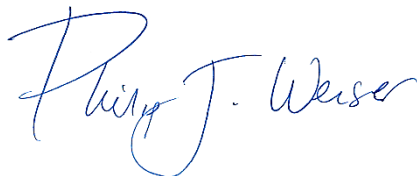
Sincerely,



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PHILIP J. WEISER
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²⁵ While HUD Interim Final Rule was published for effect, given the good cause exigencies of getting notice of emergency funds quickly to tenants facing eviction, a 30-day comment period is built into the process before the Rule takes effect on November 8, 2021.



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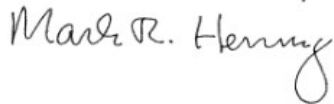
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