U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT
OFFICE OF INSPECTOR GENERAL

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MEMORANDUM NO:
2015-FW-0801

Memorandum

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SUBJECT: Intergovernmental Personnel Act Appointment Created an Inherent Conflict of Interest in the Office of Public and Indian Housing

INTRODUCTION AND OBJECTIVE

Based on a hotline complaint and additional work by our Financial Audit Division and Office of Legal Counsel, we reviewed whether a conflict of interest existed within the U.S. Department of Housing and Urban Development (HUD) Office of Public and Indian Housing (PIH). Specifically, former PIH Assistant Secretary Sandra B. Henriquez appointed Debra Gross, a former lobbyist and the deputy director of the Council of Large Public Housing Authorities (CLPHA),[1] a housing industry group, to be responsible for PIH's Office of Policy, Program and Legislative Initiatives (OPPLI).

[1] The deputy director was appointed under the Intergovernmental Personnel Act. While serving in this capacity, she remained an employee of CLPHA.

Our objectives related to this portion of a multifaceted assignment were to determine whether HUD complied with requirements to obtain the services of the deputy director, whether a conflict of interest existed under this arrangement, and whether HUD took appropriate actions to mitigate the conflict of interest.[2]

METHODOLOGY AND SCOPE

To achieve our review objectives, we interviewed[3] the CLPHA deputy director; current and former HUD employees, including legal staff; Assistant Secretary Henriquez; general deputy assistant secretary for PIH Deborah Hernandez; the deputy assistant secretary for the Office of Public Housing and Voucher Programs; and the associate deputy assistant secretary for Multifamily Housing. We also reviewed the following information:

- Applicable statutory, regulatory, and policy requirements;
- Office of Inspector General (OIG) and Government Accountability Office (GAO) audit reports;
- Relevant HUD reports, budget requests, and clearance forms;
- Vacancy announcements, personnel files, human resource files, ethics disclosure forms, and salary and travel payments for pertinent positions and individuals;
- Subpoenaed employee and salary information from CLPHA;
- Email messages of pertinent HUD employees;
- Contents of HUD's SharePoint site used by PIH's streamlining committee;
- Lobbying reports from the Websites of the U.S. House of Representatives and U.S. Senate;
- HUD continuing resolution, appropriation, and apportionment documents for fiscal years 2011 and 2012 and related Congressional Reports;
- Information on public Websites, including HUD, CLPHA, and other public housing industry groups;
- HUD's 2013 annual report to the Inspector General on Reducing Improper Payments; and
- Reports on Quality Control for Rental Assistance Subsidy Determinations for 2011 and 2012.

Our scope was from October 2010 through July 2014. We performed work in Washington, DC, and OIG offices in Fort Worth, TX, and Oklahoma City, OK, from July 2013 through September 2014.

BACKGROUND

Generally, a conflict of interest exists when a person has responsibilities or loyalties to multiple groups or interests that could conceivably conflict with one another. An inherent conflict of interest exists when the responsibilities or loyalties of a person are such that the person may need to choose between competing groups or interests that the person is responsible for representing.

According to its Website, CLPHA "is a national non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis and public education. CLPHA's 70 members represent virtually every major metropolitan area in the country. Together they manage 40 percent of the nation's public housing program; administer 26 percent of the

[2] We have issued separate correspondence on other objectives related to this assignment.

[3] Special agents from our Office of Investigation, Special Investigations Division, led most of the interviews.

Housing Choice Voucher program; and operate a wide array of other housing programs." Debra Gross has served as CLPHA's deputy director since February 2004.

Sandra B. Henriquez was the Assistant Secretary for PIH from June 2009 through June 2014. Before coming to HUD, she was the administrator and chief executive officer of the Boston Housing Authority. She had also been the president of the board of directors at CLPHA from 2005 through 2007. At HUD, Assistant Secretary Henriquez had the responsibility of managing the operations of PIH, including its policy-making division, OPPLI.

OPPLI has the lead responsibility for coordinating development of new legislation, regulations, and policy; program performance measurement; program data collections; and evaluations of programs administered by PIH. In February 2011, CLPHA's deputy director, Debra Gross, was appointed to the deputy assistant secretary (DAS) of OPPLI position under an Intergovernmental Personnel Act (IPA) agreement. Under the IPA agreement, she remained a CLPHA employee. HUD agreed to reimburse CLPHA for the full cost of the deputy director's salary, benefits, bonuses, and cost-of-living salary increases. She served as HUD's DAS of OPPLI until February 2014, after which she returned to CLPHA.[4]

According to the Office of Personnel Management (OPM), "the goal of the IPA program is to facilitate the movement of employees, for short periods of time, when this movement serves a sound public purpose. Each assignment should be made for purposes which the Federal agency head, or his or her designee, determines are of mutual concern and benefit to the Federal agency and to the non-Federal organization. Assignments arranged to meet the personal interests of employees, to circumvent personnel ceilings, or to avoid unpleasant personnel decisions are contrary to the spirit and intent of the mobility assignment program."[5] An individual appointed to a Federal agency under the IPA is deemed a Federal employee with respect to rights and responsibilities, including the compliance with ethical requirements.[6]

RESULTS OF REVIEW

HUD inappropriately used the IPA to appoint CLPHA's deputy director as HUD's DAS of OPPLI. In doing so, Assistant Secretary Henriquez created an inherent conflict of interest because she placed the deputy director of an industry group in charge of PIH's policy-making division, the division responsible for developing and coordinating the regulations applicable to the entities that CLPHA represents. HUD's lack of oversight in the IPA agreement process allowed this inherent conflict of interest to occur without prior ethical review by HUD's Office of General Counsel (OGC). Additionally, HUD did not obtain required financial disclosure reports from the deputy director,[7] failed to provide the deputy director with required ethics training, and allowed her to hire permanent HUD employees. In her HUD policy-making role, it appeared that the deputy director championed the public housing industry's regulation relief agenda at HUD while retaining her job at CLPHA. Also, apparent lobbying efforts by CLPHA and other housing industry groups during this period complicated the matter. Due to the

[4] To avoid confusion, Debra Gross will be referred to as deputy director throughout this memorandum.

[5] OPM Web site: http://www.opm.gov/policy-data-oversight/hiring-authorities/intergovernment-personnel-act/#url=Provisions.

[6] 5 U.S.C. § 3374. This excludes Federal retirement and life and health insurance benefits.

[7] HUD also failed to obtain the required reports from other people serving under IPA agreements.

inherent conflict of interest and HUD's failure to recognize and mitigate it, HUD cannot know whether the policy decisions enacted during the deputy director's tenure were inappropriately influenced or in the best interest of HUD and all of its stakeholders.

Appointment of Deputy Director under the IPA

Contrary to the spirit and intent of the IPA mobility program, the Assistant Secretary used the program to appoint CLPHA's deputy director to a DAS position at her existing salary and benefits. On October 24, 2010, the deputy director applied for the HUD-advertised GS-15[8] DAS of OPPLI position. As shown in table 1, on November 5, 2010, she was deemed ineligible because of her failure to submit required documentation with her application. Subsequently, she was deemed eligible after PIH staff got involved and emailed human resources on November 10, 2010, asking to reissue and amend the certificate of eligibles to include the deputy director. Despite being eligible for the position, HUD did not select her or anyone else for the position and rated the quality of applicants as low with a score of two out of five. In February 2011, HUD appointed the deputy director to the DAS of OPPLI position using an IPA agreement. Both the Assistant Secretary and general deputy assistant secretary confirmed that they used the IPA so that the deputy director would receive a higher salary and retain benefits offered by CLPHA. In multiple email messages, the Assistant Secretary expressed excitement about the deputy director taking the position and being able to work together. In summary, rather than competitively hire a permanent HUD employee to fill this position, the Assistant Secretary chose to appoint CLPHA's deputy director at a significantly higher salary and benefits to temporarily fill the position. This seems to directly contradict OPM's advice about not arranging IPA assignments to meet the personal interests of an employee. Table 1 shows a timeline of events of the deputy director's application and the IPA process.

Table 1: Timeline of CLPHA's Deputy Director's Application and IPA Process

Date	Description
October 6, 2010	• CLPHA's deputy director emailed Assistant Secretary Henriquez about the deputy director's efforts to obtain her personnel records. • The Assistant Secretary forwarded the deputy director's email to staff in the PIH Office of Planning, Resource Management and Administrative Services (OPRMAS). • OPRMAS forwarded the message to HUD human resources who then contacted the National Personnel Records Center (NPRC) to obtain a record on the deputy director's behalf.
October 7, 2010	NPRC faxed the required record of the deputy director to HUD.
October 15, 2010	DAS of OPPLI job announcement opened.
October 24, 2010	CLPHA's deputy director applied for OPPLI position advertised.
October 29, 2010	DAS of OPPLI job announcement closed.
November 5, 2010	Applicant rating sheet indicated the deputy director was ineligible as a non-status applicant. This was because the deputy director did not submit the required documentation with her application.

[8] The GS classification and pay system covers the majority of civilian white-collar Federal employees (about 1.5 million worldwide) in professional, technical, administrative, and clerical positions. GS classification standards, qualifications, pay structure, and related human resources policies (e.g., general staffing and pay administration policies) are administered by the U.S. Office of Personnel Management on a government wide basis. The GS has 15 grades, with GS-15 being the highest.

November 8, 2010	Certificate of eligibles did not include the deputy director because the employee reviewing the applications did not have the record obtained from NPRC on October 7, 2010.
November 10, 2010	OPRMAS emailed HUD human resources asking to reissue and amend the certificate of eligibles to include the deputy director because HUD staff had obtained the necessary documentation on her behalf and provided it to human resources. The employee complied with the request and reissued the certificate to include the deputy director.
November 22, 2010	The deputy director emailed the Assistant Secretary about IPA agreement guidelines concerning the negotiation of a cost sharing arrangement on salary between HUD and CLPHA.
December 1, 2010	CLPHA's deputy director emailed the Assistant Secretary about CLPHA's director having unspecified conflict of interest concerns[9] related to the IPA process.
December 17, 2010	The general deputy assistant secretary did not select anyone from the certificate of eligibles. She did not provide a specific reason for not selecting from the certificate of eligibles. In the attached survey, she rated the quality of applicants as 2 out of 5.
February 28, 2011	CLPHA's deputy director appointed as the DAS of OPPLI under an IPA agreement.

OPM guidelines stated the reimbursement for an individual under an IPA agreement was to be through a cost sharing negotiation between the participating organizations. There appeared to be no cost sharing of the deputy director's salary under the IPA agreement because HUD agreed to pay her full salary and benefits.[10] Further, HUD did not have documentation to show it negotiated the deputy director's cost of living increases and bonuses. HUD agreed to reimburse CLPHA approximately $40,000 more in salary costs than it would have paid if it had hired the deputy director under the vacancy announcement at the maximum GS-15 salary of $155,500. It appears that the Assistant Secretary used the IPA to circumvent GS salary limitations to accommodate the deputy director's higher salary.

According to Assistant Secretary Henriquez, she and the CLPHA director verbally discussed the deputy director's performance and negotiated the cost of living increases[11] and bonuses for the deputy director. Neither CLPHA nor HUD had documentation of the deputy director's performance while serving as the DAS of OPPLI. Nonetheless, CLPHA awarded her two bonuses, of which HUD reimbursed one.[12] The results of these negotiations, performance evaluations, and support for bonuses and cost of living increases should have been documented. At a minimum, because individuals under IPA agreements have the same rights and responsibilities as Federal employees, HUD needed to review the deputy director's performance in accordance with law, regulation, and its Performance Management Plan.[13] CLPHA awarded her bonuses and cost of living increases during her period at HUD without any

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9 The addendum to the agreement stipulated that the deputy director would be subject to the conflict of interest restrictions applicable to HUD employees during the assignment and upon separation from HUD.

10 For another individual under an IPA agreement, PIH's reimbursement did not exceed the maximum GS-15 salary plus benefits, even though the individual received a significantly higher salary from his organization. PIH signed both agreements on the same day.

11 During this period of time, Federal employees did not receive a cost of living increase.

12 Based on a review of invoices and payments, CLPHA only billed, and HUD only reimbursed CLPHA for one of the two $5,000 bonuses and 2 percent cost of living increases that it awarded the deputy director.

13 5 U.S.C § 3374, 5CFR § 430.205(b), HUD Handbook 430.1 REV effective November 2013, and predecessor Performance Management Plan

documentation, such as performance reviews. HUD has since drafted a new policy regarding IPA agreements, which included a section requiring performance reviews of such individuals.

HUD Created an Inherent Conflict of Interest

Assistant Secretary Henriquez created an inherent conflict of interest by appointing CLPHA's deputy director to a policy-making role in PIH. To maintain her position at CLPHA, the potential existed for the deputy director to champion CLPHA's regulation relief agenda within HUD. The Assistant Secretary stated she chose the deputy director to head OPPLI to "shake it up." She wanted someone in that position who would regulate public housing with more emphasis on real estate rather than tenants. She stated she wanted to lessen HUD's burdensome regulations imposed on PHAs. While industry groups, such as CLPHA, share some similar objectives with HUD, HUD has unique objectives and responsibilities that at times conflict with industry groups. For example, HUD is responsible for regulating, monitoring, and evaluating those entities that the industry groups represent. HUD created this inherent conflict of interest by placing an industry group employee in charge of policy development and legislative initiatives, or stated differently, HUD appointed someone who represents the regulated to be in charge of developing the regulations. While CLPHA is only accountable to its members and sponsors, HUD must solicit and consider input from all stakeholders in developing policy, programs, and legislative initiatives.[14] Review of email correspondence indicated that industry groups representing the interests of public housing agencies (PHAs) and their executives had greater access to HUD and undue influence over OPPLI, its policy-making department. HUD should not favor or appear to favor one stakeholder over others or compromise the achievement of its monitoring and evaluating objectives.

The deputy director's financial interests in CLPHA contributed to the inherent conflict of interest. Since the deputy director retained her CLPHA job and was expected to return to CLPHA, matters dealing with CLPHA or the PHAs it represents may have had a direct impact on the deputy director's financial interests. After leaving HUD in February 2014, the deputy director returned to CLPHA as its deputy director. It did not appear that HUD or the deputy director took any action to mitigate the appearance of a conflict of interest.

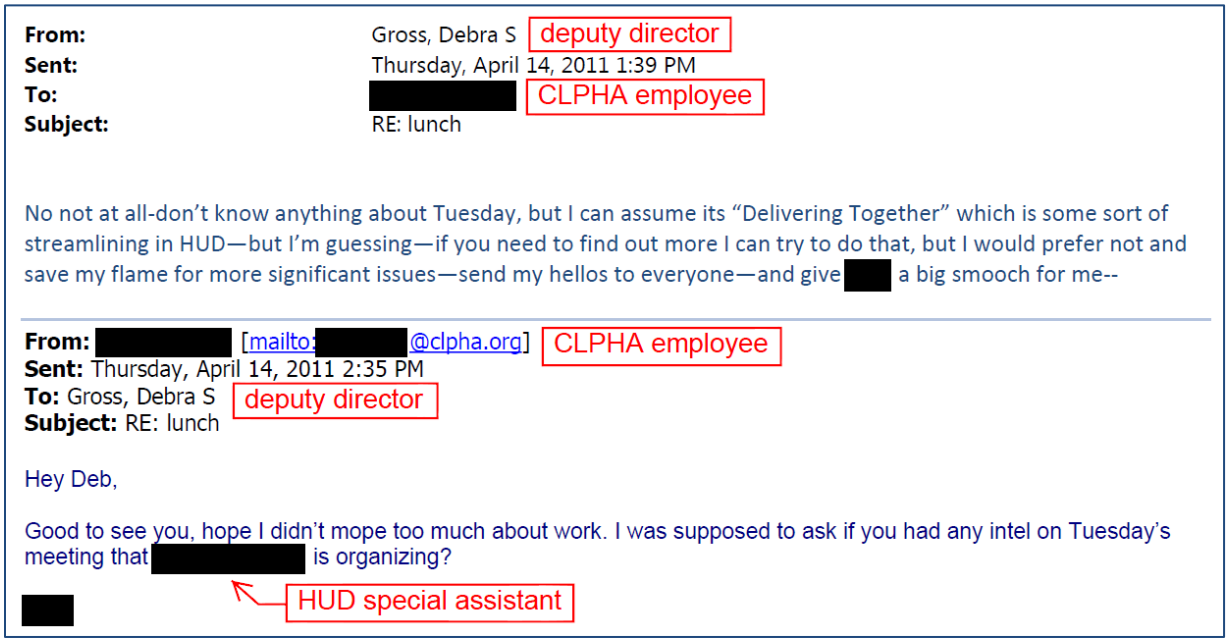
According to the DAS position description, the deputy director was supposed to provide advice and assistance to the Assistant Secretary on overall policy, legislation, program development, and evaluation. This included working with HUD OGC in recommending PIH legislative proposals and coordinating and expediting PIH program regulations. Considering the inherent conflict of interest, it is questionable whether the input she provided would ensure HUD maintained the necessary oversight controls to protect its interests while serving the needs of all PHAs, their residents, and communities.

Despite her acknowledgement of conflict of interest rules,[15] the deputy director failed to recuse herself from dealings with her employer. Following her move to HUD, the deputy director continued direct communications with colleagues from CLPHA regarding industry matters. CLPHA's director continued to include the deputy director as a blind courtesy copy recipient in correspondence to HUD executives and others. For example, the deputy director was blind courtesy copied on CLPHA correspondence

[14] Stakeholders include residents, landlords, Congress, State and local governments, and citizens.

[15] The IPA agreement the deputy director signed stated that "Applicable Federal, State or local conflict-of-interest laws have been reviewed with the employee to assure that conflict-of-interest situations do not inadvertently arise during this assignment."

addressed to then HUD Secretary Donovan on September 14, 2011, regarding support for the rental assistance demonstration program, and in correspondence to the Assistant Secretary on March 12, 2012, regarding CLPHA's concerns with two public housing notices. Further, approximately 2 months after her HUD appointment, the deputy director had the following conversation with a CLPHA employee she later hired at HUD:



Additional communications included a CLPHA employee providing the deputy director with community service guidance, which was later championed by a PIH committee focused on regulation relief. The deputy director and the same CLPHA employee discussed operating subsidies for PHAs with excess reserves. These dealings demonstrate that at least some CLPHA officials believed that it was appropriate for the deputy director to continue to be involved in CLPHA affairs as they related to HUD business.

The Deputy Director May Not Have Appeared to be Impartial

Another aspect of the inherent conflict of interest was the potential favoritism towards industry groups and the HUD employees that shared their agenda to the detriment of other stakeholders and the HUD employees that had different views or perspectives. Under government ethics rules,[16] the deputy director was required to consider whether her impartiality would be questioned whenever her involvement in a "particular matter involving specific parties" might affect certain personal or business relationships.[17] HUD provided no evidence that the deputy director ever considered this part of her ethical obligations.

With the deputy director maintaining her job at CLPHA while at HUD, it is questionable how she would remain impartial because of the dual roles she held, especially given the evidence that suggests she was not impartial. The deputy director attempted to change established regulations through notices versus

[16] 5 CFR § 2635.101 (b)(14)
[17] 5 CFR § 2635.502

established methods of regulatory change, such as through the Federal Register. She also asked staff whether PIH could bypass the role of HUD OIG in the departmental clearance process. The deputy director attempted to deregulate PHA reporting requirements and loosen HUD's oversight of PIH programs, which aligned with CLPHA's and other similar industry groups' agenda. The deputy director established and headed a streamlining committee to provide PHAs with "regulation relief." The deputy director hired two industry employees who actively participated and assisted her in the streamlining committee. The deputy director's actions showed her interests may have remained with her employer and similar-minded industry groups and therefore it is questionable if her policy advice protected HUD. Further, as described below, some of her policy change efforts would have complicated HUD's ability to meet its responsibilities for monitoring, evaluating, and reporting on program performance.

Financial Disclosure Forms

In addition to having no performance evaluations, the deputy director did not file financial disclosure forms in a timely manner during her tenure at HUD. Under government ethics rules, the deputy director had an obligation to complete and file public financial disclosure forms while serving as an IPA appointee. Failure to accurately do so could have subjected her to civil and criminal penalties.[18] HUD OGC, which is responsible for reviewing the financial disclosure forms, did not question the absence of the deputy director's forms until OIG inquired about it as part of this review. After our February 2013 inquiry, HUD OGC notified the deputy director of her requirement to file U.S. Office of Government Ethics (OGE) Form 278, Public Financial Disclosure Report on March 29, 2013. OGC granted her a filing extension until May 21, 2013, more than 2 years after it was due. Table 2 shows the periods she was required to file, the due dates, dates she filed, and the date OGC completed its review.

Table 2: OGE Form 278, Public Financial Disclosure Reports of CLPHA's deputy director

Period covered	Filing due date	Date of filing	Date of OGC review
New entrant	March 30, 2011	May 20, 2013	August 8, 2013
2011 annual report	May 15, 2012	July 30, 2013	August 8, 2013
2012 annual report	May 15, 2013	July 30, 2013	August 8, 2013
Termination report	March 12, 2014	Not filed	N/A

The deputy director was also required to attend annual ethics training but did not. The deputy director's failure to file OGE Forms 278 in a timely manner subjected her to potential fines and disciplinary actions.[19]

In February 2014, just before she left HUD to return to CLPHA, HUD OGC gave the deputy director post government employment advice restricting her contact with HUD. A month later,[20] HUD OGC concluded, contrary to its previous advice, that the deputy director was not required to file an OGE Form

[18] 5 CFR § 2634.701, Failure to file or falsifying reports

[19] In August 2013, OGC waived the late penalties associated with her filings. There was no disciplinary action taken.

[20] March 18, 2014

278.[21] Therefore, the deputy director did not file a termination report. In responding to a draft of this memorandum, HUD wrote that it now believed the deputy director should have filed OGE Form 450, Confidential Financial Disclosure Form, because of the GS-15 DAS position that she occupied.

It seems OGC correctly required CLPHA's deputy director to file the OGE Form 278 based on the level of her compensation.[22] Due to the uniqueness of this IPA agreement in which the deputy director occupied a position that would normally require the employee to file OGE Form 450 but was compensated at a level that would require her to file OGE Form 278, HUD should seek an opinion from OGE concerning which financial disclosure forms the deputy director was required to file, if any. Further, HUD needs to ensure that it has a process to evaluate suitability and compliance with requirements when making appointments under the IPA.

OGC Failed to Ensure Others under IPA Agreements Filed Financial Disclosure Forms

The deputy director's failure to file financial disclosure forms was not an isolated occurrence. HUD provided a list of 16 people[23] assigned to HUD under IPA agreements for fiscal years 2011 through 2013. Only 3 of the 16 (19 percent), which included the deputy director who only filed after we inquired, filed the required financial disclosure reports. By delaying the identification and possible mitigation of financial conflicts of interest or prohibited sources of investments or income, HUD put itself and the employees in a vulnerable position. HUD attempted to address this issue when then HUD Deputy Secretary Maurice Jones issued letters on January 22, 2014, requiring OGC review of temporary assignments of non-Federal employees. While HUD has developed draft procedures to ensure individuals under IPA agreements do not have any conflicts of interest, it needs to ensure that it implements those draft procedures, starting with current individuals under an IPA agreement.

CLPHA's Deputy Director Provided Preferential Hiring Treatment to Two Industry Insiders

During the deputy director's tenure at HUD, she inappropriately hired two permanent HUD employees with industry ties. The deputy director was the selecting official for a vacancy announcement for multiple GS-14 program analyst positions in OPPLI. In one particular hire, she selected an individual who previously worked for an industry group but was currently working as a HUD consultant. This individual solicited for the position and helped tailor the vacancy announcement to fit her resume. In a second hire, rather than recuse herself from the process, the deputy director also selected an individual who worked for her at CLPHA. According to interviews with the two employees, the deputy director did not interview them for their position.[24] Table 3 describes key communications between the deputy director and the consultant concerning the vacancy.

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[21] Pursuant to the Ethics in Government Act, those in positions which are classified above GS-15 under the General Schedule; those in positions outside the General Schedule, for which the rate of basic pay is equal to or greater than 120% of the minimum rate of basic pay payable for GS-15; and those in any other position determined by the Director of OGE to be of equal classification are required to file Public Financial Disclosure Forms. OGC did not take into consideration the deputy director's compensation when reaching this determination.

[22] 5 CFR § 2634.202, Public filer defined

[23] HUD's Office of the Chief Human Capital Officer prepared the listing of individuals under an IPA agreement.

[24] Under a separate job announcement for permanent Federal employees, the deputy director promoted a third individual.

Table 3: Collaborations and Events of Hiring the Consultant

Date	Event
March 12, 2011	Consultant requested a "chat" with the deputy director regarding working for her and asked that it be kept between them.
May 19, 2011	Consultant provided the deputy director with a proposed job description for herself and expressed concern about a reduction in force at HUD.
June 21, 2011	The deputy director provided the consultant with a draft copy of a vacancy announcement for the program analyst position and asked, "Can you look this over and see if the skills and other stuff is aligned for you – I have zippo experience in this area so we can noodle through it together." This draft copy contained the same key requirements, duties, and knowledge, skills and abilities requirements as the published vacancy announcement.
July 5, 2011	Email correspondence between consultant and the deputy director regarding updates on the vacancy announcement and forwarded discussions between the deputy director and human resources staff regarding the vacancy.
July 11-15, 2011	Program analyst vacancy announcement open period.
July 20, 2011	Consultant initiated action to move her workplace to PIH.
July 28, 2011	Consultant asked whether she should attend OPPLI staff meetings. The deputy director responded, "Not yet—we have some sensitivities and I am trying to get status changes for some staff-meanwhile I need to do everything by the book."
August 1, 2011	Qualified program analyst applicants were available for selection.
August 3, 2011	The deputy director selected the consultant and her CLPHA employee for the program analyst positions.
September 12, 2011	Consultant and former CLPHA employee reported for duty.
September 12, 2011	Consultant emailed the deputy director that her title was program analyst but she would prefer to be the deputy director's special assistant, if possible. The deputy director responded, "I trie dhtat *[sic]* -- that was my first choice, but was not allowed-according to [redacted] -- hang in and we should talk with [redacted] —ok?"
September 16, 2013	In a later email between the deputy director and the former CLPHA employee that she selected as a program analyst, the deputy director wrote, "When we hired you we had good advice from [redacted] who… knows the process and advised that we write the ad and tailor it to *[the consultant]*'s resume-very narrow with little room for others. But you had parallel experience. It was smart. Not the [redacted] job-i guess [redacted] had help from the cap office I have not seen the ad-who knows-????"

Although hired for a position in OPPLI, the former CLPHA employee never physically worked there. The deputy director was concerned how it would look if the former CLPHA employee worked directly for her at HUD.[25] Therefore, the deputy director arranged for the former CLPHA employee to work in a different department than the one in which she hired him, while showing that he worked in OPPLI on

[25] The former CLPHA employee said he had a personal relationship with the deputy director.

paper. After more than 6 months, he was officially reassigned to the Office of Public Housing and Voucher Programs, where he had purportedly been working since he started his employment at HUD. While physically located in the other department, he worked closely with the deputy director on policy matters. As discussed later, he actively participated on a committee focused on regulation relief and other policy-change initiatives that the deputy director appeared to have led. Further, OPPLI staff members reported the deputy director eliminated them from projects if they disagreed with her or the former CLPHA employee's opinion.

The IPA requirements did not expressly prohibit the deputy director from hiring permanent HUD staff. However, according to an OPM staff member, "…the ability to engage in hiring and staffing decisions on behalf of a Federal agency is outside of the scope and intent of the IPA mobility program." Additionally, the deputy director may have also committed a prohibited personnel practice by pre-selecting and hiring two individuals. Federal law[26] prohibits an official from giving an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant. HUD should establish and implement a policy prohibiting individuals under an IPA agreement from selecting permanent HUD staff. Further, HUD needs to develop and implement policies and procedures to ensure that its employees occupy the positions for which they are hired to prevent the manipulation of the hiring process or possibly causing Antideficiency Act violations.[27]

Streamlining PIH Regulations

Under the auspices of "regulation relief" and with the support of the Assistant Secretary, the deputy director established a streamlining committee to lead efforts to streamline PIH regulations. Both employees that the deputy director hired served on this committee,[28] which evaluated suggestions from PHAs and industry groups for reducing the perceived administrative burdens of program delivery. Both CLPHA and other similar industry groups requested relief from regulatory requirements, including suspending program reporting and evaluation activities and simplifying income verification. The committee worked to determine which requests for "regulation relief" HUD could implement and whether they would require regulatory or legislative changes. The deputy director and her committee met weekly to discuss regulatory relief issues. The committee routinely contacted outside groups such as CLPHA and other similar industry groups for input. Conversely, the previous DAS of OPPLI stated she would not consult with industry groups on programmatic matters. Based upon the inherent conflict of interest, the deputy director should not have been put into a position to influence regulation relief attempts such as for verification of income, decreasing the use of the Enterprise Income Verification (EIV) system, and increasing the amount of asset management fees PHAs charged. HUD needs to independently review any rules or regulations implemented or in progress for implementation involving the deputy director that positively impacted these industry groups to determine whether these rules and regulations protect HUD's interests and responsibilities.

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[26] 5 U.S.C. § 2302(b)(6)

[27] We issued audit memorandum 2014-FW-0801 entitled "Potential Antideficiency Act Violations - Intergovernmental Personnel Act Agreements" that involved another individual under an IPA agreement for whom HUD reimbursed salary expenditures from funds that were potentially for a position the individual did not occupy.

[28] The former HUD consultant served as the SharePoint administrator for the committee.

Enterprise Income Verification

The deputy director and the former CLPHA employee led the effort to remove or weaken some requirements that HUD cited as reducing improper payments. Most notably, HUD required PHAs to use its EIV system, which electronically matched tenant-reported income against income information provided by third parties.[29] The regulation relief the deputy director championed on industry's behalf included diminished EIV report use and less frequent reexaminations for tenants on fixed incomes. Unlike the well-documented decline in improper payments because of mandated EIV use,[30] industry opinions about this burden and its related costs remained unsubstantiated. HUD provided no evidence that reducing requirements would cause significant cost savings by reducing staffing, overtime, space requirements, etc. commensurate with the significant benefits of these controls.

In July 2013, OPPLI circulated two draft notices through the departmental clearance process containing proposed policy changes for (1) verification of income and (2) the use of EIV. Both draft notices were intended to update and supersede PIH's original implementing guidance on the required use of the EIV system.[31] The draft notices contained provisions that conflicted with regulations.

The proposed notice regarding verification of income conflicted with HUD regulations that required PHAs to request the employer or other income source to furnish the information when income information in EIV differed substantially[32] from what the tenant provided.[33] PIH staff, including the former CLPHA employee, argued it was difficult for PHAs to obtain third party verification of income from employers. Contradicting these assertions, the contractor that performed HUD's annual study of rent determinations reported an 84-85 percent return rate from employers from 2010 to 2012. Further, HUD's Office of Multifamily Housing commented that it disagreed with PIH's contention that tenant-provided documents were third-party documents because they were not provided by a third party. Multifamily Housing also wrote that the rule change would undermine the effectiveness of EIV and have the potential to increase the improper payment rate. In its role of commenting on proposed HUD rules, OIG objected to the notice on similar grounds and commented that the new notices excluded important language from the original guidance.

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29 In 1994, GAO designated HUD as high-risk because of fundamental management and organizational problems that put billions of dollars at risk. In 2001, it narrowed the high-risk designation to HUD's single-family mortgage insurance and rental housing assistance programs. GAO cited four reasons why it removed HUD's rental assistance programs from its High-Risk Series in 2007, including HUD's progress in reducing improper payments and its implementation of EIV. In a January 31, 2007 press release celebrating its removal from GAO's high-risk list, HUD credited improved guidance, training, and automated systems support along with the development and implementation of EIV with a 60 percent decline in improper payments between 2001 and 2005. With the full implementation and use of EIV, HUD predicted the further reduction of improper payments. GAO cautioned against proposed legislative changes that could complicate HUD's oversight efforts by eliminating the uniformity of its current programs.

30 In March 2013, HUD's Deputy Chief Financial Officer's annual report to the Inspector General on reducing improper payments credited the increased availability and use of the EIV system with having a direct correlation to the reduction of improper payments associated with income reporting errors. In addition to the GAO report mentioned above, HUD's contractor that performed its 2011 and 2012 study of rent determinations and estimates of improper payments concluded that mandatory use of the EIV system and related HUD monitoring helped decrease improper payments. In a memorandum attached to the annual report to the Inspector General, the Assistant Secretary proposed suspending the annual study.

31 Notice PIH 2010-19 (HA), Administrative Guidance for Effective and Mandated Use of the Enterprise Income Verification (EIV) System, issued May 17, 2010

32 HUD defined a substantial difference as $200 or more per month or $2,400 annually.

33 24 CFR § 5.236(b)(3)

In the draft notice on the use of EIV, under the deputy director's supervision, PIH attempted to eliminate the requirements that PHAs review income verification reports in some instances. Further, it weakened the requirement that PHAs with interim reexamination policies monitor the income discrepancy report on a quarterly basis to a mere recommendation. Again, in its role of commenting on proposed HUD rules, OIG objected to the draft notice because the changes would delay the identification of overpayments and reduce the ability of PHAs to recapture overpaid funds.

The draft notices proposed by the deputy director's office on income verification and EIV would have weakened the effectiveness of EIV as a tool to proactively identify underreported income and prevent subsidy overpayments. Although these draft notices promoted policies that would lessen PHAs' reliance on EIV, PIH published temporary provisions, as discussed below, that would have allowed PHAs to rely solely on participants' past income as documented in EIV for calculating household income. These policies would have had the combined effect of allowing PHAs to be selective about using EIV as it suited PHAs' desires to reduce perceived administrative burden, rather than as a tool to prevent and detect fraud. The deputy director's actions illustrate an interest in adopting rules that were favorable to industry while decreasing HUD's controls to prevent, detect, and collect improper payments in its rental assistance programs and resulted in disagreement with other HUD components.

Streamlining Initiative to Increase Asset Management Fees

A June 2014 HUD OIG report[34] recommended that HUD remove the provision that allowed PHAs to charge asset management fees. The report concluded that the fees did not serve any purpose other than to allow a PHA to de-federalize[35] additional funds from its projects to retain as profit in its central office cost center (COCC). A review of emails showed, as part of the administrative streamlining initiative, the former CLPHA employee pursued discussions in late 2012 with HUD public housing officials to explore various fees in the public housing program. He cited HUD's failure to make changes based on the Public Housing Authorities Directors Association's (PHADA)[36] comments regarding the implementation of asset management. In an email, the former CLPHA employee presented PHADA's various arguments and requested that the HUD officials answer related questions. For example, the former CLPHA employee wrote to the PIH financial management division director, "PHADA suggests that there is no basis for the $10 [per unit month] amount HUD determined was an appropriate asset management fee. Further, PHADA suggests that given the scope of activities that asset managers complete, the fee should be in the range of $20 or more per month similar to the amount paid to contract administrators."

The HUD OIG report determined that HUD had not provided an explanation or methodology in describing how it arrived at its asset management fee rate of $10 and the basis for allowing the fee. Additionally, it reported that, on average, approximately $81.6 million in asset management fees were de-federalized annually by PHAs nationwide. The report recommended that HUD re-federalize these fees, thereby making the expenditure of these funds subject to HUD regulation and requirements.

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[34] Audit report 2014-LA-0004, Public Housing Operating and Capital Fund Program Central Office Cost Center Fees, issued on June 30, 2014.

[35] Reasonable fees earned, including those derived from Federal funds, are treated as local revenue subject only to the controls and limitations imposed by State and local requirements, as applicable.

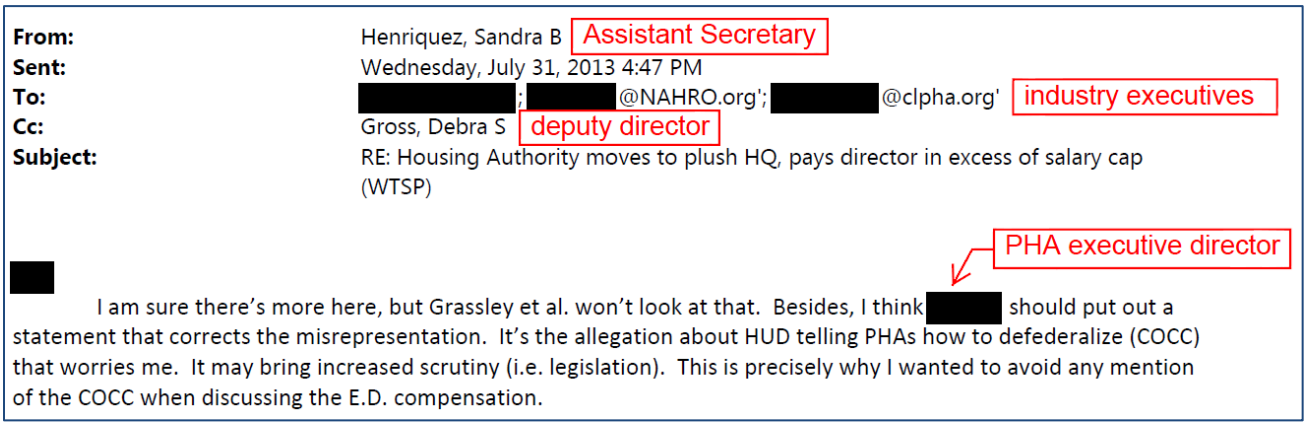
[36] CLPHA and PHADA often worked in collaboration and with similar industry groups to affect HUD policy.

Executive Director Salaries

After Congress enacted legislation[37] to limit salaries for PHA staff, PHADA requested that the HUD Secretary use PHADA's interpretations for implementation of the law. PHADA provided the Secretary with a four-page letter, suggesting various ways that HUD could interpret the mandate. Suggested interpretations included:

- COCC funds were not subject to the Congressional mandate.
- Salaries paid by PHAs during their 2013 fiscal year were not subject to the limitation; it also suggested dates through which the limitation did not apply and that "An annual salary based on salary of $155,000 from March 17, 2012 through December 31, 2012 is approximately $196,000."
- The language limited salary rather than compensation.
- HUD should consider adjustments to accommodate cost of living differences between communities.

Many of these suggestions appeared to be strategies to circumvent the law rather than properly implement it. Internal emails showed HUD staff members were in the process of considering similar implementation strategies, which would primarily benefit highly compensated PHA officials. Excessive executive director salaries had been a national issue. After negative news reports about the Tampa Housing Authority, the Assistant Secretary wrote the following email to executives at CLPHA, PHADA, and National Association of Housing and Redevelopment Officials (NAHRO):



Failure to establish an objective fee schedule could create a windfall to PHAs by de-federalizing HUD funds. Once funds are de-federalized, HUD oversight is lost and PHAs are in a position to use the funds as they wish. PHAs could use the funds to improve programs and housing stock for tenants or alternatively, spend the funds circumventing HUD limits, such as increasing compensation for executives beyond Congressional limits and lobbying.

[37] Public Law 112-55, Section 234(a)

PIH Modified Regulations Without Following Public Notice and Comment Requirements

Rulemaking, the Departmental process for considering and formulating the issuance, modification, or repeal of a rule or regulation, required HUD to undertake public notice and comment procedures in accordance with public law and its regulations.[38] PIH issued Notice PIH 2013-03 (HA): Public Housing and Housing Choice Voucher Programs – Temporary Compliance Assistance, on January 22, 2013. This notice contained temporary provisions that any PHA could selectively adopt in fulfilling certain program requirements during a period of decreased resources (i.e., sequestration). The provisions were to be available through March 2014. In November 2013, however, PIH published another notice to make the alternative regulatory provisions available for another year, through March 2015. Based on the evidence, HUD inappropriately modified regulatory requirements in the notice rather than undertake formal rulemaking to enact a regulatory modification. In fact, the notice itself disclosed that HUD intended to pursue more permanent changes, thereby acknowledging that it intended to permanently modify the regulations.

One of the temporary provisions included in the notice was to allow PHAs to choose to calculate a participant's annual income using either anticipated future income or actual past income. Existing regulations required PHAs to calculate participant income using anticipated future income. Several years before PIH issued this notice, PIH had submitted the same topic of annual income calculation through a Federal Register notice and received public comments on the proposed rule. PIH withdrew the topic after several implementation delays and wrote, "[s]hould HUD determine that additional rulemaking on the subject of annual income is necessary or appropriate, HUD will provide the public with the opportunity to comment on any proposed changes to the regulations."[39] Since PIH provided a choice for all PHAs to select from regarding annual income calculation (i.e. a modification to the regulation) and referenced the topic as rulemaking in the past, it would seem appropriate to address the topic as rulemaking and follow the appropriate procedures in the future.

The notice required PHAs to follow specific procedures that included informing HUD staff via email if they elected to adopt any provisions described in the notice. HUD maintained that the process established in the notice constituted case-by-case waivers for PHAs that adopted the measures, not rulemaking subject to public notice and comment. However, HUD did not publish the individual waivers in the Federal Register; it published only a summary outlining the provisions of the notice.[40] In the Federal Register notice, HUD wrote that the PIH "notice involved offering PHAs the option to comply with certain alternative requirements to existing regulations, and if they opted to do so the existing regulation would be waived." However, the notice itself did not assert that the modified rules would be considered waivers. It was not until HUD published the information in the Federal Register 8 months later that it disclosed that it regarded the modified rules as waivers. According to HUD OGC, HUD had previously used this method of granting waivers in situations such as disasters in which only a specific subset of PHAs was affected. However, in this situation, the alternative requirements were

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38 24 CFR § 10

39 Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of Enterprise Income Verification, 74 FR 52934, October 15, 2009

40 HUD published a notice of regulatory waiver in the Federal Register on September 16, 2013, outlining the temporary provisions in Notice PIH 2013-03, granted January 22, 2013. However, HUD did not file the notice when required, and it did not identify the agencies for which it granted the waivers. The Federal Register notice stated the provisions were temporary and were available during the current and upcoming fiscal year (September 2014). However, Notice 2013-03 had an expiration date of March 31, 2014, and HUD later extended it through March 2015.

available to any PHAs that chose the alternative without regard to circumstances. Through this notice, HUD essentially modified regulatory requirements for all PHAs, yet claimed it granted individual waivers only to agencies that formally adopted them. If these were truly individual waivers, then HUD should publish the individual waivers in the Federal Register.

In addition to circumventing public notice and comment in rulemaking, such a piecemeal approach to policy-making could have the effect of complicating HUD's compliance monitoring and reporting activities because different PHAs will have adopted different measures for temporary periods of time. HUD would therefore be forced to identify and apply inconsistent program rules among PHAs as it evaluates and reports their performance.

Documentation showed PIH sought and considered input from prominent industry groups on the "FAQs" it posted as implementation guidance for the notice. In an internal email message dated August 8, 2013, the director of the Public Housing Management and Occupancy division wrote that "[t]hese provisions were all requested by PHAs, and as such, the notice has been well received by PHAs." Contrary to that assertion, in April 2013, shortly after PIH issued the notice, NAHRO's Chief Executive Officer[41] wrote to then HUD's Deputy Secretary Jones, "NAHRO appreciated the Department's attempt to provide relief through the issuance of PIH Notice 2013-3. Unfortunately, the notice in some cases imposes administrative burdens that are more onerous than those that already exist under existing regulation, making it difficult for PHAs to utilize what would otherwise be useful flexibilities. We recommend that PIH Notice 2013-3 and its related FAQs be rescinded, revised, and reissued." Further, the deputy director approached OGC with the idea for this arrangement, and the Assistant Secretary signed the PIH notice. HUD should not use a PIH notice to provide "regulatory relief" to PHAs as it works internally to modify regulations to further the relief agendas of the industry groups.

PIH staff attempted to add a provision to allow PHAs to accept a tenant's self-certification that they met the community service requirements into the extension notice for PIH Notice 2013-03. In another example of pursuing the industry's agenda, the former CLPHA employee continued to argue with OGC on the issue, despite OGC's objections and legal citations for why PIH could not waive the statutory requirement through a PIH notice. OGC advised that the statute would permit PIH's proposed policy if the regulations were amended, but as proposed, it conflicted with the regulations. HUD should refrain from modifying program regulations via PIH Notice, and instead follow required rulemaking procedures.

CLPHA Had Been a Registered Lobbying Organization

Until it terminated its registration in September 2009, CLPHA was a registered lobbying organization under the Lobbying Disclosure Act and filed the required disclosure reports. Both the deputy director and the former CLPHA employee the deputy director hired had been registered lobbyists employed by CLPHA before it terminated its registration. In interviews, they both stated their duties and responsibilities did not change after CLPHA terminated its registration in 2009.[42]

[41] Saul N. Ramirez, Jr. had previously served as HUD Deputy Secretary.

[42] The deputy director stated she did not ever consider herself a lobbyist.

The Lobbying Disclosure Act[43] defined lobbying contact (in part) as any communication to a covered executive or legislative branch official made on behalf of a client regarding Federal legislation (including legislative proposals), Federal rules, regulations, Executive Orders, or any other program, policy, or position of the United States Government, or Federal programs or policies. The Act required lobbyists or their employers to register and file quarterly reports on their lobbying activities with the Secretary of the Senate and the Clerk of the House of Representatives. The quarterly reports must list the specific issues upon which the lobbyist engaged in lobbying activities, identify the Houses of Congress and the Federal agencies contacted, list the employees who acted as lobbyists, and provide a good faith estimate of the total expenses that the registrant and its employees incurred in connection with lobbying activities during the quarterly period.

CLPHA terminated its registration as a lobbying organization in September 2009. However, as illustrated in table 4, its ongoing contacts with HUD and Congressional personnel on policy and legislative matters demonstrated it continued to serve its members' interests by lobbying both HUD and the Congress on PIH matters.

Table 4: Examples of CLPHA's Lobbying Activity After It Terminated its Registration

Date	Lobbying activity
August 11, 2010	HUD (including Assistant Secretary Henriquez) and CLPHA (including the deputy director before she joined HUD under an IPA agreement) met to discuss legislative and appropriations strategy regarding various issues including funding, streamlining, conversions, project-based vouchers, rent setting and contract terms.
April 10, 2012	CLPHA sent draft legislative language to a House staff employee recommending changes to an amendment.
May 4-10, 2012	Email discussions between CLPHA and HUD staff regarding an April 27, 2012 draft version of Title IV of the proposed Affordable Housing and Self-Sufficiency Improvement Act bill that CLPHA provided to HUD.
May 10, 2012	CLPHA's director asked the deputy director if HUD was sending the bill to the Hill.
March 18, 2013	CLPHA's director sent sequester waiver legislative language to the deputy director and the Assistant Secretary for consideration. CLPHA's proposed waiver would allow PHAs to deviate from restrictions under the U.S. Housing Act of 1937 and from regulations to the maximum extent practicable.

CLPHA's activities indicated it continued to function as a lobbying organization and was therefore required to submit quarterly reports to the House and Senate disclosing its specific lobbying activities, income, and expenses. Its advocacy and policy analysis for large PHAs suggests it continued to lobby despite the deregistration that occurred in 2009.

[43] 2 U.S.C. § 1602(8)

CONCLUSION

HUD's use of the IPA to appoint the deputy director of CLPHA in a policy-making role in PIH was inappropriate. In doing so, Assistant Secretary Henriquez created an inherent conflict of interest that placed the deputy director in a position that allowed her to pursue CLPHA's organizational goals and the industry's regulatory relief agenda while simultaneously being responsible for devising objective regulatory policy at HUD. Additionally, CLPHA and other housing industry groups may have lobbied HUD when the deputy director occupied her HUD position. Further, the use of the IPA resulted in HUD paying the deputy directory a higher salary than if it had hired her at the GS-15 level for the position for which she applied. HUD's lack of oversight in the IPA process led to ethical concerns that included the inherent conflict of interest, failure to obtain the deputy director's and others' financial disclosure reports and provide her with ethics training, and allowing her to hire permanent HUD employees. Due to HUD's failure to recognize and correct the inherent conflict of interest, HUD did not know whether the deputy director enacted policy that was in the best interest of HUD and all of its stakeholders and constituents.

RECOMMENDATIONS

We recommend that the Deputy Secretary

1A. Establish and implement Department-wide procedures to ensure that when HUD makes assignments of individuals under the IPA it (1) vets them for potential conflicts of interest, (2) requires them to file the proper financial disclosure reports, and (3) complies with other normal employment requirements to protect the integrity of HUD programs and avoid putting an individual or HUD in a potentially compromising situation.

1B. Direct the Acting Assistant Secretary for PIH to hire a permanent HUD employee as the deputy assistant secretary for Policy, Program and Legislative Initiatives in accordance with the established hiring rules and regulations.[44]

1C. Require an independent review of the streamlining committee's and the deputy director's actions to determine whether they compromised HUD's integrity or objectivity in managing, monitoring, and evaluating its PIH programs.

1D. Direct OGC to seek a formal advisory opinion from OGE about whether the deputy director and other individuals under IPA agreements needed to file financial disclosure forms, and if so, which forms were required.

We recommend that the Chief Human Capital Officer

IE. Implement policies and procedures to ensure HUD uses IPA agreements responsibly, including but not limited to (1) not using the services of industry advocacy groups in a policy-making role within HUD, (2) not allowing individuals under an IPA agreement to make or be the selecting official for

[44] HUD advertised the position in June 2014 at the higher senior executive service level, a position that would be subject to the filing of the ethics form OGE Form 278.

hiring decisions, (3) ensuring employees under IPA agreements receive written performance evaluations, and (4) documenting the negotiation of compensation and the performance evaluations of the individuals.

1F. Develop and implement policies and procedures to ensure that employees occupy the positions for which they are hired to prevent the manipulation of the hiring process.

We recommend that the Acting Assistant Secretary for Public and Indian Housing

IG. Refrain from modifying program regulations through PIH Notice, and instead follow required rulemaking procedures, including ensuring public participation in accordance with 24 CFR § 10.

1H. Publish in the Federal Register the regulatory waivers granted to individual PHAs as a result of PIH Notice 2013-03 and subsequent extension notices.

AUDITEE COMMENTS AND OIG'S EVALUATION

Ref to OIG Evaluation **Auditee Comments**

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THE DEPUTY SECRETARY
WASHINGTON, DC 20410-0050

December 5, 2014

MEMORANDUM FOR Gerald R. Kirkland, Regional Inspector General for Audit, 6AGA

FROM: Helen R. Kanovsky, Acting Deputy Secretary, SD

SUBJECT: Review of Draft Audit Memorandum – Intergovernmental Personnel Act Created an Inherent Conflict of Interest in the Office of Public and Indian Housing

Thank you for the opportunity you provided on November 7, 2014, to review the subject draft Office of Inspector General (OIG) audit memorandum. I have reviewed your report, including its analysis, carefully, and wish to convey that I take these issues seriously. Prior to receiving your draft report, the Offices involved with the Intergovernmental Personnel Act had identified some deficiencies in the program and implemented changes in how we operate it; these changes are in line with some of your recommendations. These Offices will further improve the program by putting procedures in place based on those findings for which we agree. However, I must note that I do not concur with certain other recommendations, and request that you correct the errors in the body of the draft and the related recommendations before the audit report is issued.

The audit concerned the 2011 appointment through the Intergovernmental Personnel Act (IPA) of the deputy director of the Council of Large Public Housing Authorities (CLPHA) as Deputy Assistant Secretary (DAS) of the Office of Policy, Programs and Legislative Initiatives (OPPLI) of the Office of Public and Indian Housing (PIH), and actions by the DAS in that position.

The draft audit report asserted that the appointment action created an inherent conflict of interest. In addition, the draft report asserted the Office of General Counsel (OGC) did not properly consider the DAS's level of compensation when reaching conclusions concerning whether she was required to file a public financial disclosure report. Additionally, the draft report asserted that OGC did not properly consider whether the DAS should have filed a confidential financial disclosure report upon leaving HUD and that OGC did not properly advise other IPA appointees or detailees that they were required to file financial disclosure reports. We have determined, as detailed below, that the assertions regarding an inherent conflict of interest are contrary to long settled principles of ethics law, and the assertions regarding OGC do not accurately reflect the facts or the law.

Ref to OIG Evaluation **Auditee Comments**

In regard to public notice and comment requirements for developing notices, and to issuing and publicizing waivers of regulations, the draft report asserts that HUD appeared to circumvent public notice and comment in rulemaking. We have determined, as detailed below, that HUD did comply with the applicable requirements in regard to issuing developing notices, the duration of waivers, and publicizing waivers of regulations.

Analysis of Draft Audit Report

I. Inherent Conflict of Interest

Comment 1

The draft report asserted that an "inherent conflict of interest exists when the responsibilities or loyalties of a person are such that the person may need to choose between competing groups or interests that the person is responsible for representing." In this instance, the draft report concludes that an inherent conflict of interest was created when PIH appointed the deputy director of CLPHA, an industry group, to be in charge of PIH's policy-making division, which is responsible for developing and coordinating the regulations regarding the entities that CLPHA represents. In other words, according to the draft report, the DAS would have to choose between the policies advocated by CLPHA and those advocated by HUD. In addition, the draft report asserted that there is a financial component and an impartiality component to this inherent conflict of interest. However, we believe that the draft report's analysis misapplies the law in this situation.

A. Policy Loyalties

Comment 1

According to the Office of Government Ethics (OGE), under 18 U.S.C. § 208, an executive branch employee may not participate personally and substantially in any "particular matter" in which, to the employee's knowledge, the employee has a "financial interest," if the matter will have a "direct and predictable effect" on that financial interest. For purposes of section 208, the financial interests of the employee's spouse will serve to disqualify the employee to the same extent as the employee's own interests. OGE Legal Advisory 00 x 4, Letter to an Agency Ethics Advisor, dated April 11, 2000. Imputed financial interests include those of the employee's spouse, minor child, general partner, or of an organization in which the employee serves as an officer, director, trustee, general partner or employee. *Id.* The DAS was still an employee of CLPHA while serving as the DAS. Therefore, as an employee of CLPHA, CLPHA's financial interests were imputed to the DAS. Therefore, in order for a conflict of interest to exist, either the DAS, or her outside employer, CLPHA, would have had to have had a financial interest in the issues at stake.

Comment 2

The draft report concluded that a conflict of interest existed because HUD and CLPHA may have had divergent policy interests in some instances. This conclusion is, however, contrary to the long settled principle of ethics law that a nonprofit umbrella organization [like CLPHA] does not have a "financial interest" in a particular matter solely by virtue of the fact that the organization spends money to advocate a position on the policy at issue in the matter. The Department of Justice's Office of Legal Counsel (OLC) reached this conclusion in its Memorandum Opinion for the General Counsel Office of Government Ethics on Financial

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Interest of Nonprofit Organizations. *See* OLC Memorandum Opinion for the General Counsel Office of Government Ethics on Financial Interest of Nonprofit Organizations, January 11, 2006. Significantly, OLC discusses the Senior Executive Association (SEA) and Councilors of the American Meteorological Society (AMS), which are umbrella nonprofit organizations like CLPHA. OLC states that "nonprofit organizations such as SEA and AMS do not have a financial interest in a particular matter solely by virtue of spending money to advocate a position on the policy under consideration in that matter." *Id.* More significantly, OLC points out that without a financial interest at issue there can be no conflict of interest. *See id.* OLC explained that when the matters at issue are policy interests, like those described in the draft report, the resolution of the questions being addressed by the Government does not affect the financial interest of the nonprofit organization. *Id.* A conflict of interest requires a link between a governmental matter and a pecuniary gain or loss to the employee or specified entity. *Id.*

Finally, it is important to note that OLC also explains that the fact that an umbrella organization's members may reap a gain or loss does not translate to the umbrella organization having a financial interest in the policy matter. *Id.* The potential effect on the members is simply too attenuated to have a direct and predictable effect on the financial interest of the umbrella organization. *Id.* In this case, in order for a conflict of interest to have existed, either CLPHA or the DAS would have had to have had a financial interest in the policy matters described in the draft report and there would have had to have been the potential for a direct and predictable effect on those financial interests. OGC believes that the draft report applied the wrong analysis under the ethics laws when stating that there was an inherent conflict of interest between HUD and CLPHA.

B. Financial Interests

In its second component of the alleged inherent conflict of interest, the draft report tacitly acknowledges that CLPHA did have a financial interest in the policy matters described in the draft report by asserting that the DAS had a financial interest in her salary and benefits. Specifically, the draft report said that:

> "The deputy director's financial interests in CLPHA may have contributed to the inherent conflict of interest. Federal employees (including those appointed to a Federal position under the IPA) are prohibited from participating in an official capacity in any "particular matter" that would have a direct impact on their own or imputed financial interests. A "particular matter" can include government matters the deputy director might be assigned, including policy matters and matters involving specific parties, such as contracts or grants. Since the deputy director retained her CLPHA job and was expected to return to CLPHA, matters dealing with CLPHA or the public housing authorities (PHAs) it represents may have had a direct impact on the deputy director's financial interests. As previously discussed, CLPHA awarded her bonuses and cost of living increases during her period at HUD without any written support, such as performance reviews. After leaving HUD in February 2014, the deputy director returned to CLPHA as its deputy director. It did not appear that HUD or the deputy director took any action to mitigate the appearance of a conflict of interest." (Draft Report, pg. 6)

Comment 3

It is generally understood that unless a Federal employee is deciding his or her own pay and benefits, which is not alleged here, the potential for gain or loss in Federal salary and benefits is too attenuated to be considered direct and predictable. *See* Memorandum Opinion for the General Counsel Office of Government Ethics on Financial Interest of Nonprofit Organizations. Of course, if there was a direct contractual or other correlation between the work the DAS did and the bonuses the draft report said she received that may also be considered direct and predictable. But here, even with the benefit of hind sight and an investigation the draft report states only that the DAS' interest in her salary and benefits "may have contributed to the inherent conflict of interest." Given that assertion, it is difficult to also claim that the effect on her salary and benefits was direct and predictable all along. Specifically, OLC pointed out that unless an employee sets her pay and benefits there cannot be a conflict. *Id.* In fact, OGE has issued an exemption, for the "financial interest aris[ing] from Federal Government . . . salary or benefits" unless the individual in question is deciding his or her own pay and benefits. See 5 C.F.R. § 2640.203(d). As OGE has observed in discussing the IPA in the context of 18 U.S.C. 209, "the IPA itself provides that a sending organization may pay some or all of the individual's salary" without violating the supplementation of salary statute. *See* 5 U.S.C. § 3374(c); *see also* OGE Legal Advisory 06 x 10 Memorandum from Robert I. Cusick, Director, to Designated Agency Ethics Officials Regarding Intergovernmental Personnel Act Summary, October 19, 2006. In short, the draft report implied that the DAS' bonuses were direct and predictable while simultaneously showing that they were neither direct nor predictable.

C. Impartiality

Finally, the draft report maintains that the inherent conflict of interest includes a component of impartiality. Every employee that HUD hires whether through an IPA or otherwise must guard against misusing his or her position. However, if an employee does misuse his or her position it does not mean that HUD created a conflict of interest by hiring the employee; it means that the employee misused his or her position. The provisions for "Misuse of Position" are found in Subpart G of the "Standards of Ethical Conduct for Employees of the Executive Branch" (Standards of Conduct). This subpart contains provisions relating to the proper use of official time and authority, and of information and resources to which an employee has access because of his Federal employment. 5 C.F.R. §§ 2635.701 - 2635.705.

Comment 4

Here, the draft report asserted that HUD created a conflict of interest by hiring the DAS and the DAS may have misused her position during the hiring process. *See* 5 C.F.R. §§ 2635.701 - 705. Much of the conduct that the draft report offers as proof of the impartiality component of the conflict of interest rules concerns alleged misuse of position and has nothing to do with a conflict of interest. For example, the draft report alleges that the DAS used her position to improperly hire an employee and to provide nonpublic information to outsiders. As OGE has stated on a number of occasions, this type of conduct falls squarely within the misuse of position regulations in Subpart G of the government wide standards of conduct, and does not appear to be a conflict of interest as the draft report asserted. *See e.g.*, OGE DO-07-023, "Misuse of Federal Position to Help Another Person Get a Job," August 1, 2007. Thus, while such conduct may constitute misuse of position it would not constitute a lack of impartiality.

Additionally, there is sufficient information to conclude that there was no violation of

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the impartiality regulation. The conflict of interest statutes and impartiality regulation use the phrases "particular matter" and "particular matter involving specific parties." *See* OGE DO-06-029, "'Particular Matter Involving Specific Parties,' Particular Matter,' and 'Matter'," October 4, 2006. The first category of particular matters is the "particular matter of general applicability." *Id.* Examples of these types of particular matters include general policies that focus on a discrete and identifiable class of persons, such as a general policy matter that is only applicable to the meat packing industry. *Id.* In statutes and regulations where the term "particular matter" is qualified by the term "specific parties," the phrase only applies to a specific proceeding affecting the legal rights of identified parties or the above-described first category of particular matters. *See id.* Under the impartiality regulation, an employee is required to disqualify herself from working on a "particular matter involving specific parties" if she has a "covered relationship" with one of the specific parties or a representative of one of the specific parties. 5 C.F.R. § 2635.502. The DAS had a covered relationship with CLPHA; however, according to the draft report, she was not involved in any "specific party" matters involving CLPHA.

Comment 4

According to the draft report, the DAS led OPPLI, which is the central policy office in PIH. Accordingly, the DAS worked on legislative, regulatory and programmatic policy initiatives. This type of work may evolve into "particular matters of general applicability" if it becomes narrowly focused on a discrete and identifiable class, but unless it devolved into a contract, grant or transaction involving the legal rights of particular parties to the matter it would not be a "particular matter involving specific parties," which is necessary under the impartiality regulation. *See* 5 C.F.R. § 2635.502. The draft report does not identify any particular matters involving specific parties such as grants, contracts or transactions where CLPHA was a party. Further, the draft report does not identify any instance where CLPHA represented a specific large PHA in a contract grant or transaction with HUD. To the contrary, the draft report goes to great lengths to show that the DAS held a policy position and CLPHA is a policy advocacy organization. These matters are not the type covered by the impartiality regulations.

Finally, while HUD must certainly be concerned about the potential for misuse of position by its employees, it is simply untenable to conclude that HUD is responsible for individual conduct that created an "inherent conflict of interest" where none in fact existed.

II. DAS Reporting Requirements

Comment 5

The draft report alleges that OGC reversed its opinion regarding whether the DAS had to file a public financial disclosure report (OGE-278) without considering the DAS's salary, when it did not require her to complete a termination OGE-278. Additionally, the draft report states that OGC did not issue an opinion on whether she should file an OGE-450. However, these statements do not accurately reflect the relevant law and facts. The law clearly states that it is the filer's position, not the compensation amount, that controls whether an IPA detailee or appointee files a financial disclosure report. Additionally, OGC's initial decision to require the DAS to file an OGE-278 was based on erroneous information it received regarding the DAS's position.

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Congress amended section 3374(c)(2) of the IPA, as part of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107 (2001), to specify that an IPA detailee to a Federal position is a Federal employee for purposes of the Ethics in Government Act. *See* OGE Legal Advisory 06 x 10. This provision subjects certain IPA detailees and appointees to the obligation to file an OGE-278. OGE has advised that it is the position, rather than the individual's compensation, that controls the OGE-278 filing requirement for IPA and appointees to and not all IPA detailees or appointees are required to file a financial disclosure report. *See id.* Thus, only an IPA detailee or appointee who is assigned to an established designated OGE-278 public filer position, and who reasonably is expected to perform the duties of that position for more than 60 days, must file an OGE-278. *See id.* An agency should not take into consideration the detailee or appointee's actual salary amount in determining whether the detailees or appointee s should file an OGE-278. If an IPA detailee or appointee is not required to complete an OGE-278, he/she may be required to file a confidential financial disclosure report (OGE-450) only if the detailees or appointee's duties and responsibilities meet the criteria set forth in OGE's government-wide ethics regulations at 5 C.F.R. § 2634.904(a)(1). *See id.* The regulation does not require an OGE-450 filer to submit a termination report when she leaves Federal service.

When OGC first learned that the DAS was at HUD on an IPA, it conferred with OCHCO and PIH to determine whether she should file an OGE-278 based on the relevant criteria OGE has set forth for IPA detailees and appointees to file these reports. Based on the information provided to OGC, it was determined that she should file an OGE-278. However, OGC later learned when the DAS was getting ready to leave the Department, that it had been given inaccurate information regarding her filing status. Specifically, OGC learned that the position the DAS held was actually classified as a career GS-15 position. A GS-15 career position is not required to file an OGE-278, nor a termination OGE-278 based on OGE's guidance. This GS-15 career position would have been required to file an OGE-450. Because she was leaving Federal service, there was no requirement that she file an OGE-450 upon her departure. Therefore, OGC did not ask the DAS to file an OGE-450 upon her departure. Contrary to the draft report audit recommendation, OGC does not see a need to contact OGE to determine which forms the DAS needed to file because the law is clear that it is the position that controls this determination, not the salary amount.

III. Not All IPA Detailees File Financial Disclosure Forms.

Comment 6

The draft report suggests that HUD failed to ensure that all IPA detailees file financial disclosure reports stating that only three of the 16 assigned IPAs during FY11-13 "filed the required financial disclosure reports." The draft report stated that by delaying the identification and possible mitigation, OGC put HUD and its employees in a vulnerable position. However, not all IPA detailees are required to complete financial disclosure reports. As noted above, OGE has advised that it is the position, rather than the individual, that controls the public financial disclosure reporting requirement. *See* OGE Legal Advisory 06 x 10. Thus, only an IPA detailee who is assigned to an established designated public filer position, and who reasonably is expected to perform the duties of that position for more than 60 days, must file an OGE-278. If an IPA detailee is not required to complete an OGE-278, they may have to file an OGE-450 only if the detailee's duties and responsibilities meet the criteria set forth at 5 C.F.R. § 2634.904(a)(1).

6

A detailee who does not meet the OGE-450 filing criteria would not be required to file a financial disclosure report.

When OGC was presented with the list of 16 IPA agreements, it determined that some of those individuals were no longer at HUD. OGC reviewed the IPA agreements that were current at the time and determined that only three of the individuals were required to file a financial disclosure report. In sum, the draft report inaccurately stated that only three IPA detailees filed the "required financial disclosure" reports, in a manner that implied that more such individuals were required to do so. In actuality, only three IPA detailees were required to file financial disclosure reports.

IV. Procedures for Implementing IPA Agreements.

Comment 7

The draft report suggests that HUD would be acting responsibly in regard to IPA agreements only if it did not use the services of industry advocacy groups in policy-making roles within HUD, did not allow personnel covered by an IPA agreement to make or be the selecting official for hiring decisions, ensured that such personnel receive written performance evaluations from the Department, and documented compensation negotiations and performance evaluations for such personnel.

Regarding the concept of not using IPA agreements with industry advocacy groups, the IPA regulations (5 C.F.R. Part 334) require, to the contrary, that the organization providing the individual have, "as a principal function the offering of professional advisory, research, educational, or development services, or related services to governments or universities concerned with public management," thus, explicitly allowing agreements with such groups. 5 C.F.R. § 334.103(b)(4). Further, nothing in Part 334 prohibits use of personnel covered by an IPA agreement in policy-making roles. Further, it should be noted that CLPHA is a national non-profit organization whose goal "to preserve and improve public and affordable housing" mirrors HUD's mission "to create strong, sustainable, inclusive communities and quality affordable homes for all." *See* www.clpha.org/about and http://portal.hud.gov/hudportal/HUD?src=/about/mission.

Comment 8

Regarding the concept of prohibiting personnel covered by an IPA agreement from involvement in hiring actions, this appears to be based on the assumption that they would have an inherent conflict of interest or would inherently be partial, but this is refuted in the sections, above, of this memorandum on Inherent Conflict of Interest, and Impartiality, respectively. Furthermore, Part 334 does not include such a prohibition on its own. In regard to the statement in your draft report that an OPM staff member had said that the "the ability to engage in hiring and staffing decisions on behalf of a Federal agency is outside the scope and intent of the IPA mobility program," it would be beneficial if the name and title of the OPM staff member were disclosed. Our OCHCO staff has had numerous conversations with OPM on this issue over time, and their position has remained constant – that the IPA regulations do not prohibit an IPA assignee from working in supervisory or managerial positions.

Comment 9

Regarding the concept of ensuring that personnel covered by an IPA agreement receive written performance evaluations from the Department, this is not required, because these individuals are not federal employees in the competitive service. The performance appraisal statute excludes individuals occupying a position not in the competitive service, and individuals covered by an IPA agreement "may … be appointed in the Federal agency without regard to the provisions of this title governing appointment in the competitive service;" these individuals are covered by an OPM regulation that does not provide for the Federal agency to conduct a performance appraisal of them. *See, e.g.,* 5 U.S.C. § 4301(2)(G), 5 U.S.C. § 3374(a)(1), and 5 C.F.R. Part 334. This does not leave HUD with no recourse should the performance of an IPA participant be unsatisfactory to HUD. The Department may terminate an IPA assignment at any time at its request, and, while ordinarily 30-days advance notice is provided, this waiting period is not required. 5 C.F.R. § 334.107(a).

Regarding the concept of requiring that HUD document compensation negotiations regarding personnel covered by an IPA agreement, the development of the agreement is covered by the IPA general provisions, which does not require compensation negotiations to be documented. 5 U.S.C. § 3372.

Regarding the concept of requiring that HUD document performance evaluations for personnel covered by an IPA agreement, as noted above, the evaluations themselves are not required, so documenting them cannot be required.

V. Procedures for Ensuring Employees Occupy Positions for Which They Are Hired.

HUD is subject to the Employee statutes of 5 U.S.C. Part III. In particular, within Part III, Chap. 33, appointments at HUD are subject to Subch. I, details, to Subch. III, and transfers, to Subch. IV. HUD is, similarly, subject to the corresponding OPM regulations in 5 C.F.R. Part 330 with regard to appointments, transfers, and details. HUD's Handbook 335.1, Merit Staffing Policy, provides its policy for appointments, transfers and details. As a result, the Department does not need to develop policies for ensuring employees occupy positions for which they are hired.

Comment 10

The draft report indicates, on page 10, that a HUD employee was "hired for a position in OPPLI … but never physically worked there." HUD acknowledges that this was contrary to the applicable statutory, regulatory, and policy requirements. As a result, the Department does need to implement procedures for ensuring employees occupy positions for which they are hired. HUD will implement a procedure to increase education on the importance of monitoring hiring and post-hiring transfers and details, for managers involved with hiring in all Offices, both program offices and support offices, to ensure that the positions employees occupy are the ones for which they are initially hired and, as applicable, to which they are detailed or transferred subsequently. In fact, the Department has already developed a new policy on Details, Interagency Assignments, and Intergovernmental Personnel Act assignments, which will be issued upon the completion of union negotiations. Further, I have personally conveyed to my management officials the necessity of consulting with OCHCO to ensure that all movements of personnel are in line with Federal regulations and Departmental policy. As it relates to the manager responsible for establishing the IPA action that is the subject of your audit, I have

Comment 11

counseled her on the importance of the appearance as well as the substance of all actions relating to personnel. I cautioned her that the need to exercise sound judgment in all cases was as important as following the rules and regulations.

VI. PIH Rulemaking, Temporary Regulatory Relief, and Waiver Notification Procedures.

The draft report's discussion of PIH rulemaking is based in significant part on the actions PIH took in 2013 to offer temporary compliance assistance to PHAs via regulatory waivers through PIH Notice 2013-03 (which was extended by Notice 2013-26), and the notification to the public that the waivers had been issued.

A. PIH Rulemaking Procedures.

Procedures for rulemaking that include public participation are found in 24 C.F.R. Part 10, which covers all of HUD's programs. When developing rules, PIH works closely with OGC's Office of Legislation and Regulations to ensure compliance with Part 10. The draft report does not indicate that PIH has been failing to follow Part 10. No need for a separate PIH regulatory development policy has been demonstrated.

Procedures for notice development are found in Departmental Handbook 000.2 REV-3, HUD Directives System, especially its sections B-5 – Notices, and D – Clearance. Policy notice development does not require the same level of coordination and public participation as a rulemaking. The draft report does not indicate that PIH has been failing to follow the Handbook, and no need for a separate PIH policy notice development procedure has been demonstrated. Accordingly, HUD does not need to develop separate policies and procedures for policy notice development by PIH; instead, that Office, like all Offices, will continue to follow the Directives handbook and ensure, through training and ongoing managerial monitoring, that staff are well aware and versed in the applicable requirements, policies and procedures.

B. PIH Temporary Regulatory Relief Procedures.

As noted in the draft report, PIH has offered regulatory relief through waivers. Waivers are measures of regulatory relief explicitly allowed by section 106 of the Department of Housing and Urban Development Reform Act of 1989 (HUD Reform Act) (Pub. L. No. 101-235) (42 U.S.C. § 3535(q)) for all HUD offices. This statutory provision places no constraint on the duration of waivers, hence, they may be temporary or permanent as the authorizing official determines. In authorizing waivers of PIH regulations, the Assistant Secretary for PIH carefully considers the need for the waiver and the intended and unintended consequences if granted. This is done in consultation with the relevant program office and counsel.

C. PIH Waiver Notification Procedures.

As noted in the draft report, PIH announced the granting of regulatory waivers referenced in PIH Notice 2013-03 in the Federal Register. 78 FR 56912, September 16, 2013, *at* 56916.

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Ref to OIG Evaluation **Auditee Comments**

This announcement complied with the requirements of the HUD waiver procedures notice. Waiver of Regulations Issued by HUD Restatement of Policy, 73 FR 76674, December 17, 2008. In the waiver notice pertaining to PIH Notice 2013-03, PIH described the waiver without listing the PHAs approved for the waiver. The waiver procedures notice requires, in section 6.c.i, that HUD identify "the project **or activity** that is the subject of the regulatory waiver," [**emphasis** added]; it does not require identifying the parties affected by the waiver. Accordingly, the waiver notice pertaining to PIH Notice 2013-03 complied with HUD waiver procedures policy and the HUD Reform Act.

Response to Draft Recommendations:

Comment 1
Comment 3
Comment 6

1A: While the draft report recommends establishing and implementing Departmental IPA hiring procedures regarding conflict of interest, financial disclosure reporting, and other integrity protection requirements, these policies and procedures are, as noted above, already established and are being implemented. Accordingly, I recommend that this OIG recommendation be deleted from the audit report to be issued.

1B: As the draft report noted, HUD advertised the OPPLI DAS position in June 2014. The Department is continuing the processing of filling the vacancy with a person to be a HUD employee, and expects to complete the action shortly. Accordingly, I concur with this recommendation.

Comment 1
Comment 2

1C: While the draft report recommends an independent review of the actions of the streamlining committee and the CLPHA deputy director in her tenure as OPPLI DAS, as noted above, its assertions regarding conflict of interest are contrary to long settled principles of ethics law, so such a review is not necessary or appropriate. In addition, it should be noted that the streamlining committee no longer exists. Accordingly, I recommend that this OIG recommendation be deleted from the audit report to be issued.

Comment 5

1D: Based on the analysis above, including use of information from OGE, of requirements for individuals under IPA agreements to file financial disclosure forms, there is no need for OGC to seek an opinion from OGE on the scope of such requirements. Accordingly, I recommend that this OIG recommendation be deleted from the audit report to be issued.

Comment 7
Comment 8
Comment 9

1E: This recommendation includes four elements in regard to HUD's use of IPA agreements; for each, the analysis above indicates that each of the individual elements' recommendations are unsupported. Accordingly, I recommend that this OIG recommendation be deleted from the audit report to be issued.

Comment 10

1F: The portion of this recommendation that HUD develop policies for ensuring that employees are occupying the positions for which they are hired is not germane because HUD is subject to statutory and OPM regulatory requirements, and already has its own merit staffing policy handbook, as noted above. Accordingly, I recommend that the policy development portion of this OIG recommendation be deleted from the audit report to be issued.

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Ref to OIG Evaluation **Auditee Comments**

At the same time, the Department acknowledges that its procedures for implementing the policies can be strengthened. HUD will increase education on the importance of monitoring hiring and post-hiring transfers and details, for managers involved with hiring in all Offices, including program offices and support offices, to ensure that employees' positions are the ones for which they are initially hired and, as applicable, to which they are detailed or transferred subsequently. Accordingly, I concur with the policy implementation portion of this OIG recommendation.

Comment 11

1G: As discussed, HUD-wide regulations and a handbook that govern rulemaking, public participation, and the development of policy notices are in place. Regarding rulemaking procedures, the draft report does not indicate that PIH has been failing to follow Part 10 or the HUD Directives System Handbook. Accordingly, I do not concur that PIH should develop separate policies and procedures for regulatory or policy notice development, and recommend that this portion of this OIG recommendation be deleted from the audit report to be issued.

Regarding offering temporary measures for regulatory relief, waivers for this purpose are permitted by the HUD Reform Act. Accordingly, I do not concur that PIH should cease offering temporary measures for regulatory relief, and recommend that this portion of this OIG recommendation be deleted from the audit report to be issued.

Comment 11

1H: PIH fulfilled this requirement before the draft report was prepared. As the draft report noted, the granting of regulatory waivers referenced in PIH Notice 2013-03 was announced in the Federal Register on September 16, 2013. That announcement complied with the announcement requirements of the HUD waiver procedures notice, which does not require identifying individual entities subject to a waiver. Accordingly, I recommend that this OIG recommendation be deleted from the audit report to be issued.

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OIG Evaluation of Auditee Comments

Comment 1 HUD's response only addressed a criminal conflict of interest. HUD held the position that if the arrangement was not illegal, then it was permissible.

The memorandum did not allege violations of criminal conflict of interest statutes. We maintain the position that placing a housing industry advocacy employee in charge of PIH's policy-making division created an inherent conflict of interest. An inherent conflict of interest exists when the responsibilities or loyalties of a person are such that the person may need to choose between competing groups or interests that the person is responsible for representing. An inherent conflict of interest existed in that the deputy director of an advocacy group for large PHAs was in charge of developing policies and procedures that directly, materially, and financially impacted the members of that advocacy group. HUD's response neglected to address this inherent conflict of interest and the supporting facts. We modified the memorandum to clarify this difference.

Comment 2 HUD used a variety of legal citations to support its conclusion that CLPHA did not have a financial interest in HUD policy matters, and therefore the deputy director did not have an illegal conflict of interest.

As HUD summarized in its response, the draft memorandum concluded that an [inherent] conflict of interest existed because HUD and CLPHA had divergent policy interests. This is precisely the basis of the conflict of interest that HUD should have sought to avoid. HUD and CLPHA have some similar goals and objectives. However, HUD has additional goals, objectives, and responsibilities that CLPHA does not have. CLPHA advocates on behalf of large PHAs, which HUD is responsible for monitoring and evaluating. HUD is responsible for using publicly-allocated funds responsibly and in accordance with the law to help those in need of housing. We modified the memorandum language as appropriate.

Comment 3 HUD's response argued that unless a Federal employee decided his or her own pay and benefits, the potential for gain or loss in Federal salary and benefits cannot be considered direct and predictable. It further argued that unless an employee set his or her pay and benefits, there cannot be a conflict.

Contrary to HUD's analysis, the deputy director did not have a Federal salary. Assistant Secretary Henriquez stated that HUD used the IPA agreement process, instead of the job announcement, to provide CLPHA's deputy director her CLPHA salary and benefits. Therefore, we maintain our position that CLPHA's deputy director's salary, along with the expectation she would return to CLPHA, created a financial incentive for the deputy director to further CLPHA's agenda and supported the existence of an inherent conflict of interest.

Comment 4 HUD claimed that the question of impartiality did not mean that HUD created a conflict of interest by hiring the employee. Rather, it meant that the employee misused his or her position. HUD stated that the use of her position while DAS to hire an employee and to provide nonpublic information to outsiders was a misuse

of position rather than a conflict of interest.

We contend that the deputy director misused her position to the benefit of outsiders because she had a conflict of interest. Her misuse of position was the result of the conflict of interest, not the cause of it. While the impartiality regulations do not specifically cover every possibility, HUD would be remiss to dismiss the inherent conflict of interest created by placing the deputy director of a housing policy advocacy group in charge of developing policies, procedures, and legislative initiatives that directly, materially, and financially impacted the group's members.

Comment 5

HUD maintained its position that the deputy director was not required to file a public financial disclosure form.

While the deputy director's position at HUD was classified as a GS-15, her compensation was at a higher rate. According to 5 CFR § 2634.202 (c), a public filer included an individual whose rate of basic pay was equal to or greater than 120 percent of the minimum rate of basic pay for a GS-15. As discussed in the memorandum, PIH took a number of steps to provide the deputy director with a higher salary than the GS-15 position allowed. While the memorandum briefly discussed the interaction between OGC and OIG on this matter, it did not disclose some of the initial discussions related to whether the deputy director was even required to file a financial disclosure form. Because of the uniqueness of these circumstances, the reversal of OGC's opinion and timing thereof, and the differing positions about what dictates which form was required, we maintain our position that OGC should seek an opinion from OGE about whether the deputy director and other individuals under IPA agreements needed to file financial disclosure forms, and if so, which forms were required.

Comment 6

HUD noted that not all IPA assignees were required to complete financial disclosure reports. HUD also stated that of the persons on the list of 16 IPA agreements questioned, some of the individuals were no longer at HUD. OGC reviewed the current IPA agreements and determined that only three of the remaining individuals were required to file a financial disclosure report.

HUD's response did not contain any context of its review or conclusions reached. Specifically, its response did not address if OGC sought to determine if all IPA assignees at HUD from 2011 to 2013 should have filed financial disclosure reports. HUD did disclose that three individuals were required to file, but did not indicate if they filed every year they were required to file, if the filings were timely, or if the filings revealed any conflicts of interest. Without these details, we cannot adequately evaluate HUD's response. HUD's new policy requiring OGC to review assignments under the IPA is an opportunity for OGC to determine in advance whether particular personnel should file financial disclosure reports and evaluate the reported information to determine whether a financial conflict of interest could exist.

Comment 7

HUD wrote that regulations allowed agreements with advocacy groups such as CLPHA and did not prohibit the use of personnel covered by an IPA agreement in policy-making roles.

We do not disagree with HUD's general comments. While the IPA regulations may not specifically prohibit using IPA agreements to temporarily employ industry advocacy group employees in Federal policy-making roles, HUD's analysis did not include the impact of the Assistant Secretary inappropriately using the IPA process to appoint the deputy director to the HUD position at a significantly higher salary and benefits. Additionally, HUD did not address the deputy director's actions while she was at HUD. We maintain our position that it was inappropriate to use the IPA to place CLPHA's deputy director in a policy-making role at HUD.

Comment 8

HUD contended that the IPA regulations did not prohibit an IPA assignee from working in supervisory or managerial positions.

We agree that IPA regulations did not specifically "prohibit an IPA assignee from working in supervisory or managerial positions." However, we do not agree that its exclusion from the regulations implies that it is good policy or management to allow IPA assignees to make long-term personnel decisions.

HUD's response further failed to acknowledge that it was uncommon for HUD to use IPA agreements to fill supervisory or managerial roles. In fact, while arranging the IPA agreement, the branch chief of the OCHCO policy development branch wrote in an email message that "it is highly unusual for an outside non-HUD employee to serve in a managerial/supervisory position and is not typically something HUD does." To allow CLPHA's deputy director while on an IPA agreement to be the selecting official for a CLPHA employee she supervised while at CLPHA gives the appearance of favoritism and a conflict of interest. In addition, CLPHA's deputy director then arranged for this employee occupy a position other than the one for which he was hired to avoid the appearance of favoritism and a conflict of interest. While HUD contended that nothing prohibited IPA assignees from serving in managerial or supervisory roles, HUD did not assert that this was either its normal policy or a best practice for management. We maintain our recommendation that HUD should implement policies to ensure it uses IPA agreements responsibly.

Comment 9

HUD commented that personnel covered by an IPA agreement were not required to receive written performance evaluations.

We revised the memorandum to show that HUD was required to review the performance of individuals under IPA agreements. Documented performance evaluations show what was expected versus what was accomplished and support that the stated purpose of the IPA agreement was being fulfilled. During the deputy director's tenure at HUD, HUD reimbursed CLPHA more than $600,000 in salary, benefits, and a bonus for her services. We maintain our position that good management controls include documented evaluations of performance,

including supporting that associated costs were reasonable and necessary. Additionally, documenting evaluations of performance will increase the appearance of impartiality and transparency.

Comment 10

HUD acknowledged that an employee was hired for a position in OPPLI, but never physically worked there. It agreed that it needs to implement procedures that ensure employees occupy positions for which they are hired. HUD conveyed that it had established a new policy and counseled individuals involved in this matter.

We commend HUD for recognizing that employees hired need to occupy the positions for which they were hired. We agree with HUD that it is important to exercise sound judgment in all cases, and this is as important as following rules and regulations.

Comment 11

HUD claimed that it did not need to develop separate policies and procedures for policy notice development by PIH; instead, PIH will continue to follow procedures for notice development found in Handbook 000.2 REV-3, HUD Directives System.

HUD's response misconstrued the draft memorandum's conclusion concerning waivers and public notice. We contend that HUD essentially engaged in rulemaking and circumvented public notice and comment requirements when it issued and extended Notice 2013-03 (HA), modifying the program regulations PHAs where required to follow. HUD's rules at 24 CFR § 10 defined rulemaking as the Departmental process for considering and formulating the issuance, modification, or repeal of a rule. Further, we did not assert that HUD failed to follow its procedures for departmental clearance of Notices. Instead, it failed to follow Part 10 by disguising its rulemaking in a Notice. We clarified our position and revised the associated recommendations.