



May 30, 2022

To: The Honorable Adrienne Todman  
*Deputy Secretary, SD*

From: The Honorable Rae Oliver Davis  
*Inspector General, G*

Subject: Management Alert (2023-IG-002) – HUD Should Take Additional Steps to Protect Contractor Employees Who Disclose Wrongdoing

The OIG has learned that employees of thousands of contractors who receive funds from the U.S. Department of Housing and Urban Development (HUD) are not protected against retaliation for blowing the whistle on wrongdoing. The gap in protections exists because (1) the contracts pre-date July 1, 2013, the date on which the anti-retaliation law codified at 41 U.S.C. § 4712 (Section 4712) became effective; and (2) HUD has not modified the contracts to include Section 4712 anti-retaliation provisions that would protect the employees.<sup>1</sup> The OIG identified this problem following recent investigations of allegations of whistleblower retaliation against several employees of contractors. Although the investigations revealed this problem with respect to Housing Assistance Payments (HAP) contracts, as discussed below, we believe that the same risk is present in many other HUD contracts.<sup>2</sup> The OIG recommends that HUD address this serious risk by undertaking a comprehensive review of all contracts to determine whether they include Section 4712 anti-retaliation provisions. We also recommend that HUD be proactive in seeking to modify any HUD contracts that do not include Section 4712 anti-retaliation language to confer whistleblower protections on contractor employees.

Section 4712 was enacted, and expanded, to provide critical protections for employees of entities that do business for or on behalf of Federal agencies. In the statute, Congress expressly safeguards the right of whistleblowers to report unlawful retaliation to the OIG and authorizes the Secretary of HUD to order relief, if appropriate. The statute also authorizes the OIG to investigate complaints from employees of contractors, subcontractors, personal services contractors, grantees, and subgrantees who allege that their employers retaliated against them for disclosing wrongdoing related to Federal contracts and

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<sup>1</sup> Section 4712 was originally enacted in 2013 as a pilot program in the National Defense Authorization Act for Fiscal Year 2013 (NDAA), Pub. L. No. 112-239, div. A., title VIII, § 828, 126 Stat. 1837 (2013). The pilot program was made permanent in 2016 through Pub. L. No. 114-261 § 1, 130 Stat. 1362 (2016). When the pilot program was enacted in 2013, the NDAA provided that Section 4712 applies to contracts awarded on or after July 1, 2013, and to contracts entered into before July 1, 2013 that “are modified to include a contract clause providing for the applicability of Section 4712.” NDAA, Pub. L. No. 112-239, div. A., title VIII, § 828, 126 Stat. 1841. In light of this, the OIG uses “July 1, 2013” as the date of reference to address the issues in the management alert.

<sup>2</sup> The term “HUD contracts” includes circumstances where HUD enters into a contract indirectly with a property owner, through a state or local entity, or directly with the property owner.

grants.<sup>3</sup> Section 4712 requires the OIG to send a report of the findings of these investigations to the Secretary of HUD, and the Secretary, in turn, shall determine whether there is a sufficient basis to conclude that retaliation occurred and, if warranted, to order relief for the aggrieved employees.<sup>4</sup>

In December 2022, HUD determined that it was not authorized to order relief for three complainants whose allegations the OIG investigated and referred to the Secretary on June 13, 2022 and November 3, 2022, for further action. The three complainants were former employees of two different contractors who received HUD funding pursuant to two separate HAP contracts that subsidized rent through HUD's Project-Based Rental Assistance program.<sup>5</sup> One of the two HAP contracts was last renewed in 2010 for a period of 20 years. The other HAP contract was last renewed in 2006 for a period of 20 years. Both of the contracts stated that statutory requirements enacted after the contracts had been signed but during the term of the contracts should apply. Specifically, Section 9 of the contracts provide as follows:

The Renewal Contract shall be construed and administered in accordance with all statutory requirements, and with all HUD regulations and other requirements, including changes in HUD regulations and other requirements during the term of the Renewal Contract.

The OIG interpreted the language of Section 9 of the contracts to mean that the terms of an after-enacted law, such as the whistleblower protections of Section 4712, applied to the two HAP contracts that had been renewed in 2006 and 2010, even if they had not been modified to include Section 4712 since the renewals. Furthermore, when Congress enacted the whistleblower protections of Section 4712 in 2013, it anticipated the need for contract modifications by stating that the law would apply to pre-2013 contracts "that are modified to include a contract clause providing for the applicability of [Section 4712]."<sup>6</sup> Congress also stated that "at the time of any major modification to" pre-2013 contracts, "the head of the [Department] shall make best efforts to include in the contract a clause providing for the applicability of [Section 4712]."<sup>7</sup>

On December 13, 2022, HUD informed the complainants that their complaints of retaliation were not actionable under Section 4712 because the law's provisions applied only to contracts awarded on or after July 1, 2013 or to pre-2013 contracts that have been modified to include a clause applying the statute. Because the two contracts at issue had been awarded pre-2013 and had not been modified to include a clause applying Section 4712, HUD concluded that the Secretary was not authorized to issue the complainants relief.

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<sup>3</sup> See 41 U.S.C. § 4712(a)(1) makes it unlawful for contractors and grantees to discharge, demote, or otherwise discriminate against employees who disclose information they reasonably believe evidences gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract or grant).

<sup>4</sup> *Id.* at § 4712(c).

<sup>5</sup> A HAP contract serves as a vehicle by which HUD subsidizes rent for eligible tenants. A HAP contract also includes requirements for housing providers to abide by HUD's rules and regulations (*e.g.*, ensuring housing is safe and sanitary). Typically, HUD utilizes HAP contracts to provide rent subsidies indirectly through state or local entities that enter into HAP contracts with property owners. HUD may also enter into HAP contracts directly with private property owners.

<sup>6</sup> Pub. L. No. 112-239, div. A., title VIII, § 828, 126 Stat. 1841.

<sup>7</sup> *Id.*

In light of HUD's conclusion that whistleblowers are not protected if they work under unmodified, pre-2013 HAP contracts, the OIG believes that proactive modifications to these, and other unmodified, contracts are imperative, and that HUD must pursue them as soon as possible in order to safeguard individuals who disclose wrongdoing. We are concerned that HUD is waiting until the time that a contract is renewed to seek to include Section 4712 protections, likely leaving thousands of contractor employees without the law's whistleblower safeguards.<sup>8</sup>

As noted above, the two pre-2013 contracts at issue in our investigations were signed on May 30, 2006, and on April 21, 2010, and have twenty-year renewal terms. HUD opined that renewals of existing contracts would constitute major modifications under Section 4712 and has committed to updating relevant program guidance and model contract renewal templates to include a Section 4712 requirement. However, waiting for these contracts to be renewed before modifying them to include Section 4712 whistleblower protections could mean waiting until 2026 and 2030, respectively. In the intervening years, it is likely that all of the employees who work under those contracts, and under many other unmodified contracts, would be without Section 4712 protections from reprisal for reporting wrongdoing. As HUD is also responsible under Section 4712 for ensuring that "contractors, subcontractors, grantees, and subgrantees ... inform their employees in writing of [whistleblower] rights and remedies," HUD's patchwork implementation of Section 4712 for pre-2013 contracts risks gaps in HUD's ability to know whether employees are being appropriately educated about those rights.

In all, including Section 4712 whistleblower protections in HUD contracts will promote integrity in HUD's programs by ensuring that employees who work under those contracts are safeguarded from retaliation when they disclose wrongdoing. Uncertainty over whether whistleblower protections apply dissuades contractor employees from reporting wrongdoing to HUD, Congress, and the OIG, and potentially emboldens employers to retaliate against employees if they know Section 4712 anti-retaliation prohibitions do not apply to them. This is likely to have a chilling effect on whistleblowers who will be hesitant to step forward due to uncertainty about whether HUD has modified decade-old contracts to incorporate Section 4712 protections.

### **OIG's Recommendations**

We recommend that:

1. HUD (a) identify all contracts related to its programs that pre-date July 1, 2013 and that have not yet been modified to include Section 4712 whistleblower protections; and (b) review all contracts entered into on or after July 1, 2013, to ensure they include a clause that requires contractors to comply with Section 4712.
2. HUD seek voluntary cooperation from program participants to proactively modify pre-2013 contracts for the purpose of including a clause requiring compliance with Section 4712.
3. HUD use best efforts to include a clause requiring compliance with Section 4712 at the time of major modifications to contracts with program participants with whom HUD is unable to gain voluntary cooperation.

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<sup>8</sup> HUD has informed the OIG that since 2014, HUD has included Section 4712 provisions in its procurement contracts, and that it now includes a Section 4712 provision in HUD Notices of Funding Opportunities (NOFO). The procurement contracts and NOFOs are types of funding vehicles that are different from the HAP contracts and potential other contracts addressed by this Management Alert.

4. HUD seek legislative authority to expeditiously include Section 4712 protections within contracts for which HUD believes it must otherwise wait until there is a major modification.
5. HUD develop and implement controls to ensure that the provisions of Section 4712 are included in all contracts.

### OIG's Evaluation of HUD's Response

In response to a draft of this Management Alert, HUD affirmed that it takes seriously its obligation to protect contractor employees from retaliation for disclosing wrongdoing in HUD programs, and identified steps it has already taken to protect some contractor employees. These steps include: incorporating Section 4712 provisions in its procurement contracts above the simplified acquisition threshold; establishing controls to ensure the clause is included in the procurement contracts; and incorporating Section 4712 in HUD's program Notices of Funding Opportunities in its "Administrative, National and Departmental Policy Requirements and Terms for HUD Applicants and Recipients of Financial Assistance Awards." We acknowledge HUD's efforts as important steps towards providing whistleblower protections to HUD contractor employees.

In addition to describing its efforts, HUD reiterated that (1) unmodified, pre-2013 contracts do not confer protections on whistleblowers, and (2) HUD does not view itself to have the legal authority to unilaterally incorporate into its pre-2013 HAP contracts the provisions of Section 4712 that would provide for the critical anti-retaliation safeguards. To that end, HUD restated its view that Section 4712 requires specific steps for incorporation into contracts, and that the statute "requires" HUD to use "best efforts" to include the law's protections in the pre-2013 HAP contracts at the "time of any major modification."

In concluding its response, HUD did not address directly each of our recommendations and, instead, outlined 6 actions it will take to address our recommendations. We evaluate HUD's proposed actions in the context of each of our recommendations below. In summary, we believe that the 6 proposed actions do not go far enough to close the gap in whistleblower protections available to contractor employees who work under unmodified, pre-2013 contracts. Failure to include Section 4712 safeguards in all HUD contracts leaves thousands of contractor employees without a key protection from reprisal for reporting wrongdoing in HUD programs. Without those safeguards, we believe contractor employees will be less likely to report wrongdoing and more likely to be retaliated against when they do bring forward complaints. In light of this, we consider each OIG recommendation open and unresolved, and we will continue working with HUD to reach agreement on its proposed actions to address the recommendations.

My office will continue to provide support for whistleblowers, and we look forward to working with HUD to expeditiously close all of the recommendations.

**Recommendation 1 – HUD (a) identify all contracts related to its programs that pre-date July 1, 2013 and that have not yet been modified to include Section 4712 whistleblower protections; and (b) review all contracts entered into on or after July 1, 2013 to ensure they include a clause that requires contractors to comply with Section 4712.**

HUD responded to Recommendation 1 by affirming that it will identify all unmodified, pre-2013 contracts that do not include Section 4712 protections and will review all post-2013 contracts to ensure they include the statute's protections. We urge HUD to prioritize these efforts to enable it to take additional steps to incorporate anti-retaliation safeguards of Section 4712 into all its contracts. Identifying all unmodified, pre-2013 contracts is a critical first step towards evaluating how best to close the gap in protections for those contracts.

**Recommendation 2 – HUD seek voluntary cooperation from program participants to proactively modify pre-2013 contracts for the purpose of including a clause requiring compliance with Section 4712.**

Importantly, HUD’s response acknowledged that HUD does not need to wait for the time of a major modification to seek to include Section 4712 provisions in unmodified, pre-2013 contracts. HUD’s response notes that to include Section 4712 provisions in such contracts “means each contract would have to be negotiated separately, and such pre-modification negotiation would be voluntary by the program participant.”

We agree with this position, and we recommended in our Management Alert that HUD take this exact action. We believe HUD should act now to proactively engage with program participants and seek their voluntary cooperation to modify any HUD contracts that do not include Section 4712 anti-retaliation language to confer whistleblower protections on contractor employees.

In its response, HUD agreed only to “consider the impact of requesting voluntary cooperation” from program participants and to notify contractors of their Section 4712 obligations and develop guidance and training for HUD’s contracting officials about the statute. We are not aware of any risk that seeking voluntary cooperation would create for HUD. Conversely, the risk of inaction for potential whistleblowers is high. Many contracts will not undergo a major modification for several years, meaning voluntary cooperation is the only avenue by which employees of those contractors will have protection from retaliation for disclosing wrongdoing.

Thus, we strongly encourage HUD to initiate contact with program participants as soon as possible, and to seek their voluntary cooperation to include Section 4712 protections in the contracts prior to any major modifications. This proactive engagement is imperative to HUD’s affirmed commitment to protect whistleblowers and can double as an opportunity for HUD to ensure that contractors know about and inform their employees of whistleblower rights and remedies.

**Recommendation 3 – HUD use best efforts to include a clause requiring compliance with Section 4712 at the time of major modifications to contracts with program participants with whom HUD is unable to gain voluntary cooperation.**

HUD provided a partial response to Recommendation 3 in its proposed actions 2 and 3. HUD stated that it would develop and institute new controls to ensure that Section 4712 whistleblower protections are included in “major modifications for all relevant contracts,” and that it will update the model HAP renewal contracts to include the statute’s safeguards. For several reasons, we consider HUD’s proposed actions 2 and 3 to be only partially responsive to the recommendation.

Specifically, HUD stated that it will implement controls in “relevant” contracts at the time of “major modification.” Notably, HUD did not identify the universe of the relevant contracts, did not define “major modification,” and has not cited authority or precedent regarding when HAP contracts, which typically have long renewal terms, undergo major modification. Also, HUD has not stated whether any pre-2013 HAP contracts have gone through major modification and include, now, Section 4712 anti-retaliation provisions. Finally, HUD limited the potential future use of an updated model HAP contract to the time of renewal.

We will continue working with HUD to understand the specific steps it intends to take going forward.

**Recommendation 4 – HUD seek legislative authority to expeditiously include Section 4712 protections within contracts for which HUD believes it must otherwise wait until there is a major modification.**

HUD did not respond to Recommendation 4.

We believe that seeking legislative authority to expeditiously include Section 4712 protections in HUD contracts would remove the legal impediment HUD believes it faces in conferring whistleblower protections on contractor employees. Having such authority could expedite protecting whistleblowers by obviating the need to wait for a major modification and avoiding the need to negotiate with contractors over the extent to which they want to protect their employee whistleblowers.

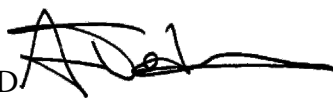
**Recommendation 5 – HUD develop and implement controls to ensure that the provisions of Section 4712 are included in all contracts.**

HUD provided a partial response to Recommendations 5. Our analysis of HUD’s response to Recommendation 5 is the same as our evaluation of HUD’s response to Recommendation 3.



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

May 25, 2023

MEMORANDUM FOR: Rae Oliver Davis, Inspector General, G  
FROM: Adrienne Todman, Deputy Secretary, SD   
SUBJECT: Management Response to OIG Management Alert (2023-IG-002)

The Department of Housing and Urban Development (HUD) is committed to protecting individuals who expose waste, fraud, abuse, and mismanagement, which can help enhance the integrity, efficiency, and effectiveness of HUD and its contractors and grantees. The Department takes the requirement to protect employees of HUD contractors very seriously and appreciates the information presented by the Office of Inspector General (OIG) in the management alert referenced above (“Management Alert”).

HUD has undertaken extensive efforts in accordance with 41 U.S.C. § 4712 (Section 4712) in order to protect whistleblowers from retaliation who are employees of HUD contractors, subcontractors, personal services contractors, grantees, and subgrantees. A provision incorporating Section 4712 has been included in HUD’s procurement contracts above the simplified acquisition threshold since it became effective in the Federal Acquisition Regulations in 2014. The Office of the Chief Procurement Officer established controls to ensure the clause is included in these contracts.

In addition, a provision incorporating Section 4712 is included in HUD’s program Notices of Funding Opportunities in its “Administrative, National and Departmental Policy Requirements and Terms for HUD Applicants and Recipients of Financial Assistance Awards.” Therefore, whistleblower protection is afforded to employees of grant recipients.

Recently, the Department has taken several additional actions to increase our ability to meet the requirements and objectives of Section 4712, including (i) clearly delegating authority to resolve these matters to the Office of General Counsel, (ii) conducting outreach to the OIG’s Whistleblower Office and Counsel to increase coordination on investigations and adjudication, and (iii) working with program offices to ensure timely updates of relevant contracts during major modifications, including contract renewals, contemplated by the statute.

As you know, Section 4712 requires agencies to make their “best effort to include in the contract” these provisions at the “time of any major modification” of a contract.<sup>1</sup> In light of that

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<sup>11</sup> Pub. L. No. 112-239, § 828, 126 Stat. 1632, 1837-1841 (2013) (codified at 41 U.S.C. § 4712).



language from the governing statute, we respectfully disagree with any assumption that HUD has the legal authority to unilaterally incorporate the relevant contract clauses into Housing Assistance Payment (HAP) contracts agreed to or renewed prior to July 1, 2013, as noted in your Management Alert. While Section 9 of the HAP contracts reviewed by OIG does apply “current and future HUD regulations and requirements,” to HAP contractors, Section 4712 requires specific steps for such incorporation. To include these provisions in contracts entered into prior to July 1, 2013, and prior to a “major modification” means each contract would have to be negotiated separately, and such pre-modification negotiation would be voluntary by the program participant.

The OIG mentioned in its Report of Findings into Allegations of Whistleblower Retaliation at [REDACTED], accused parties have previously raised concerns about the lack of a statutorily required contract clause and we appreciate that the OIG “defers to HUD in its interpretation” of the contract language. This is one of several significant issues that HUD is working on to ensure that the Department provides sufficient due process to the parties in these disputes so that the Agency’s decisions can withstand any challenge.

As mentioned at the outset of this response, HUD appreciates the OIG’s focus and partnership on the whistleblower statute. Based on the Department’s experience and the important concerns raised by this Alert, HUD will take the following steps to address the OIG’s recommendations:

1. Identify the scope of contracts that pre-date July 1, 2013, that have not been modified to include Section 4712 whistleblower protections as well as any contracts entered into on or after July 1, 2013, to ensure they include the Section 4712 whistleblower protections.
2. Develop and institute new controls to ensure that HUD includes Section 4712 whistleblower protections in major modifications for all relevant contracts.
3. Update the model HAP renewal contract to include Section 4712 whistleblower protections.
4. Notify contractors of their obligations under Section 4712 and develop internal guidance and training for HUD’s contracting officials and program offices to better educate program participants about the statute and assist them in abiding by all requirements.
5. Consider the impact of requesting voluntary cooperation to apply Section 4712 protections to contracts HUD would otherwise wait until a major modification to update.
6. Continue to work with OIG to update the compliant processing requirements to ensure HUD’s determinations are made in a timely manner and in accordance with due process rights of the parties.
  - a. This work will include requests for access to additional investigatory materials collected by OIG and inclusion of key information necessary for HUD to make a determination based on “clear and convincing” evidence collected during OIG’s investigation.

The Department recognizes the fundamental value of individuals reporting concerns about waste, fraud, and abuse and being protected in doing so. We understand, outside of HUD and the OIG's role, the statute provides further protections to whistleblowers who experience retaliation by granting employees of any contractor, subcontractor, grantee, or subgrantee the right to file an action in federal district court.

In conclusion, we are grateful for the work of the OIG to protect whistleblowers and we share your commitment to these efforts. We look forward to working collaboratively on these matters moving forward.