

**U.S. Department of Housing and Urban Development**

Office of Inspector General

**Office of Investigation**



**Review of HUD's Disbursement of Grant  
Funds Appropriated for Disaster Recovery  
and Mitigation Activities in Puerto Rico**



# Executive Summary

## Review of HUD's Disbursement of Grant Funds Appropriated for Disaster Recovery and Mitigation Activities in Puerto Rico

Report Number: 2019SU008945I

April 20, 2021

### Introduction

The Office of Inspector General (OIG) opened this review in March 2019 after receiving a congressional request to examine alleged delays in the disbursement of approximately \$20 billion of disaster recovery and mitigation funds appropriated for Puerto Rico following Hurricanes Irma and Maria.

Our review examined the decisions and actions of U.S. Department of Housing and Urban Development (HUD or Department) officials that affected the timing of HUD's release of three tranches of funds intended to address Puerto Rico's unmet needs for repairs and mitigation efforts. We examined (1) the effect that the government shutdown during late 2018 to early 2019 had on the release of these funds; (2) HUD's decision-making process for making the second and third tranches of funding available to the Puerto Rico grantee; and (3) whether former HUD Deputy Secretary Pamela Patenaude resigned because of undue influence related to HUD's administration of Puerto Rico disaster-recovery funds.

Our examination of HUD officials' decision-making in this review included inquiry into their interactions with Office of Management and Budget (OMB) and White House officials regarding the execution of HUD's disaster-recovery programs. Our role in this review was not to opine on the appropriateness of any OMB or White House officials' actions, as our oversight authority does not extend to their conduct, but we assessed the extent to which OMB or White House officials directed or influenced HUD officials' actions.

### Methodology

We reviewed HUD documents and employee electronic communications from September 2017, after Hurricanes Irma and Maria struck Puerto Rico, through August 2019. We conducted 31 interviews of 20 current and former HUD officials and two now-former Puerto Rico Department of Housing (PRDOH) senior officials. The witnesses included both senior political appointees and career agency officials.

The OIG's access to HUD information in this review was delayed or denied in several instances. We did not obtain testimony from former HUD Secretary Ben Carson because he declined to be interviewed by the OIG unless an attorney from the Department ("agency counsel") was present. We were also delayed in interviewing several senior HUD political appointees because of the Department's insistence that agency counsel be present during these interviews. Some of those same officials eventually agreed to be interviewed without agency counsel present in the interview room, but then refused to answer certain questions because they claimed the information was protected from disclosure to the OIG by executive privilege. One former HUD official, who was previously assigned to the Office of the Deputy Secretary, declined our request for an interview.

We also requested but were unable to obtain information from several former senior OMB officials related to OMB's involvement in the decision-making related to disaster recovery and mitigation funds appropriated for Puerto Rico.

We experienced delays in our access to relevant electronically stored information (ESI), primarily because of HUD's concern that certain ESI could contain communications protected by executive privilege. The timelines for each ESI request and the Department's responses are as follows: (1) April 8, 2019: the Department began producing responsive ESI on April 29, 2019, and completed production on May 10, 2019; (2) May 21, 2019: the Department produced all ESI responsive to this request by June 20, 2019; (3) August 14, 2019: the Department began producing responsive ESI on September 3, 2019, and completed production on October 29, 2019; and (4) October 1, 2019: the Department produced responsive ESI on October 31, 2019.

### **Overview of Disaster Recovery and Mitigation Funds Intended for Puerto Rico**

As we describe in Chapter 3, Congress appropriated the grant funds at issue in this review to be disbursed to Puerto Rico through HUD's disaster recovery (CDBG-DR) and mitigation (CDBG-MIT) programs. This resulted in four tranches of funds: two for unmet needs for recovery activities (\$1.5 billion and \$8.2 billion, respectively), a third for mitigation efforts (\$8.3 billion), and a fourth for improving Puerto Rico's electrical grid (\$1.9 billion), which HUD would later release to PRDOH, the grantee designated by the Puerto Rico government. For the funds to be distributed, HUD must issue a Federal Register notice "allocating" or announcing the availability of funds, PRDOH must submit an action plan to HUD outlining how it intends to spend the funds, and HUD must enter into a grant agreement with PRDOH. HUD began this process in February 2018.

By the time the federal government shut down most of its operations in December 2018 due to a lapse in appropriations, HUD had approved the action plan and entered into a grant agreement with PRDOH for the first tranche of \$1.5 billion in funding for unmet needs to make those funds accessible to PRDOH. At that point, HUD had issued Federal Register notices announcing the availability of the second tranche of \$8.2 billion in funding for unmet needs and PRDOH had submitted its action plan for that tranche. HUD had not yet announced the availability of the third or fourth tranches designated for mitigation funding and improving Puerto Rico's electrical grid.

### **The 2018-2019 Government Shutdown Delayed PRDOH's Ability to Access the First Tranche of Relief Funds and Stopped HUD's Work on the Action Plan for the Second Tranche**

As we describe in Chapter 4, during the government shutdown, which lasted from December 22, 2018, to January 25, 2019, HUD and other affected agencies halted all activities funded by annual appropriations that did not fit within an exception to the federal law that prohibits government operations from continuing during a lapse in funding. Certain activities are "excepted" from this general prohibition and may continue despite a lapse in appropriations. HUD determined that its work related to the first tranche of \$1.5 billion in funding for unmet needs was excepted under the law because the Department had already executed a grant agreement with PRDOH to obligate these funds. This determination permitted HUD to continue work to disburse these funds during the shutdown. However, staffing shortages due to the shutdown and miscommunications between HUD and PRDOH pertaining to the grantee's bank information delayed PRDOH's ability to access grant funds until several days after the shutdown ended.

HUD officials initially considered work reviewing PRDOH's action plan for the second \$8.2 billion tranche of funding for unmet needs to be excepted under the guidance contained in its Contingency Plan for Possible Lapse in Appropriations, but later stopped work on this tranche based on guidance from OMB. The OMB guidance

concluded that because HUD had not yet executed a grant agreement to make the second tranche of funds accessible to PRDOH by the time the shutdown began, HUD work on that tranche could not continue during the shutdown. Thus, HUD stopped work on all disaster-recovery action plans. Former General Counsel Paul Compton told the OIG that he accepted OMB as the final authority on operations during a lapse in appropriations and he accordingly felt bound to follow OMB's direction on what constituted an excepted activity.

As a consequence of HUD's decision to suspend work on disaster-recovery action plans during the shutdown, the Department tolled and then waived certain deadlines by which it was required to approve or disapprove Puerto Rico's amended action plan for the second tranche of funding. HUD ultimately published a Federal Register notice on February 28, 2019, stating that it would review and respond to disaster action-plan amendments pending at the start of the shutdown, which included those submitted by Florida, the U.S. Virgin Islands (USVI), and Puerto Rico, by March 1, 2019. HUD completed its review of Puerto Rico's action plan on February 28, 2019.

We concluded that OMB's directive to HUD to stop work on disaster-recovery grantee action plans during the government shutdown resulted in a delay of at least several weeks in HUD's administration of disaster-relief funds intended for Puerto Rico and several other disaster-grantee jurisdictions.

### **HUD's Negotiations with OMB Delayed Its Issuance of the Federal Register Notice Required to Begin Making Mitigation Funds Available**

As we describe in Chapter 5, HUD was delayed in releasing a Federal Register notice allocating disaster mitigation funds to PRDOH and other eligible grantees because of lengthy negotiations with OMB about the parameters and conditions that should be included in the notice. HUD originally drafted a CDBG-MIT notice applicable to all eligible grantees in November 2018 and OMB provided comments on the draft that same month. HUD officials told the OIG that OMB considered HUD's November 2018 draft inadequate, which resulted in extensive redrafting. HUD worked on addressing OMB's comments over the next several months.

In March 2019, HUD set a May 1, 2019 target-date for publication of the notice, which former Secretary Carson announced during an April 2019 congressional hearing. HUD officials engaged extensively with OMB throughout April to address OMB's concerns in hopes of publishing the notice by this date. On April 26, 2019, five days before HUD's declared target-date, OMB provided HUD with additional comments on the draft CDBG-MIT notice. HUD officials described these comments as extensive, and they were concerned that some conditions OMB proposed were potentially beyond HUD's authority to impose on grantees. HUD responded to OMB's comments on April 29, 2019, and HUD officials believed their response resolved OMB's comments and rendered the document ready for publication.

That same day, former OMB Office of Information and Regulatory Affairs (OIRA) Administrator Paul Ray informed Compton that OMB would require that HUD's draft CDBG-MIT notice go through OIRA's inter-agency review process pursuant to Executive Order 12866. This meant that HUD could not publish the draft notice without OMB approval, which could only come after completion of the OIRA process. This effectively prevented HUD from publishing the draft notice by HUD's May 1, 2019 target-date.

HUD officials were surprised by OMB's invocation of the OIRA review, as OMB had never before required OIRA review for a Federal Register notice allocating disaster-recovery funds and there had been no prior discussion with OMB indicating that the CDBG-MIT notice would be subject to OIRA review. We were unable to obtain testimony from Compton or former OIRA Administrator Paul Ray regarding why this notice was subject to OIRA review.

On May 15, 2019, OIRA provided HUD its comments on the CDBG-MIT notice. HUD officials expressed frustration with these comments because they believed the same comments had already been provided in prior OMB reviews and had been addressed by HUD.

Beginning in the spring of 2019, former Secretary Carson and former Deputy Secretary Montgomery communicated to former Acting OMB Director Russell Vought their mounting concerns and frustrations regarding HUD's inability to make progress on disbursing CDBG-MIT funds. We were unable to obtain testimony from Carson, Vought, and other senior OMB officials regarding the reason HUD and OMB were not able to reach consensus on the notice so that it could be published. During his OIG interview, Montgomery declined on executive privilege grounds to answer questions about the full extent of these conversations. Therefore, we could not determine the reasoning for OMB's guidance and direction to HUD regarding the CDBG-MIT notice.

On June 6, 2019, Congress passed a law that established September 4, 2019, as the deadline for HUD to publish a Federal Register notice allocating mitigation funding to all CDBG-MIT grantees. HUD submitted the Department's response to OIRA's comments on the CDBG-MIT notice on July 2, 2019.

HUD's intention was to publish a CDBG-MIT notice that applied to all 16 jurisdictions receiving mitigation funding. But, as early as March 2019, OMB had advocated for HUD to issue separate CDBG-MIT notices for Puerto Rico and USVI, an approach that the Department resisted. However, HUD ultimately relented and decided to issue separate CDBG-MIT notices for Puerto Rico and USVI, a decision former Secretary Carson made after consulting with Vought. In August 2019, the Department announced its decision to split Puerto Rico from the CDBG-MIT notice applicable to other grantees because of concerns regarding alleged corruption and fiscal mismanagement in that jurisdiction. HUD officials echoed this justification in OIG interviews.

HUD's decision to split the CDBG-MIT notice was a reversal of its initial position. On May 1, 2019, HUD Office of General Counsel (OGC) career attorneys sent a draft memorandum to Compton regarding HUD's legal authority to impose different requirements on grantees. During his OIG interview, Compton noted that this document was not final and asserted that its contents did not necessarily reflect the opinion of HUD OGC. Compton could not recall whether HUD OGC revised or finalized this memorandum but pointed out that HUD ultimately determined that it could issue different notices.

HUD published a CDBG-MIT notice for 14 of the 16 eligible CDBG-MIT grantees on August 30, 2019, and a notice for USVI on September 10, 2019 (dated September 4, 2019). HUD did not meet the September 4, 2019 statutory deadline in the case of Puerto Rico. As of that date, the Department had not resolved ongoing issues with OMB nor had HUD received OMB approval to publish a notice for Puerto Rico. Department officials noted in their OIG interviews that ongoing OIG oversight activities in Puerto Rico were a factor in their decision to delay issuing the notice.

HUD continued to engage with OMB regarding the Puerto Rico CDBG-MIT notice through fall 2019, and ultimately published a CDBG-MIT notice for Puerto Rico on January 27, 2020, missing the September 4, 2019 statutory deadline by 145 days.

### **Revisions to HUD's CDBG-DR Grant Agreement and the Development of Parallel Conditions in the CDBG-MIT Federal Register Notice Delayed Puerto Rico's Access to the Second Tranche of Funding for Unmet Needs**

As we describe in Chapter 6, HUD leadership decided to substantially revise the content of its disaster-grant agreements in 2019. HUD officials believed that revisions to its grant agreement were necessary to improve the disaster-recovery program overall and that the revisions added value. But we also found evidence indicating that

HUD's decision to make the revisions stemmed at least in part from a desire from both OMB and HUD to create a grant agreement that would include the same conditions that they were separately working to include in the Federal Register notice for Puerto Rico's CDBG-MIT funding. HUD officials told the OIG that the CDBG-MIT notice and the revised grant agreement for Puerto Rico were interdependent of one another.

We found that HUD and OMB's negotiations regarding the inclusion of conditions in Puerto Rico's grant agreement delayed the finalization of the grant-agreement revisions significantly, and eventually resulted in OMB approving HUD to move ahead with grant agreements for jurisdictions other than Puerto Rico on June 27, 2019. HUD executed grant agreements with most grantees receiving funding for unmet needs in the late summer or early fall of 2019 but did not execute such an agreement with Puerto Rico at that time. Compton told the OIG that the Department resolved matters with OMB relating to the specific conditions that would be included in both the Puerto Rico mitigation notice and unmet-needs grant agreement throughout fall 2019, and HUD ultimately executed a grant agreement with Puerto Rico for its second tranche of funding for unmet needs on February 21, 2020.

HUD's decision to revise its grant-agreement template impacted the timeframe of HUD's execution of a grant agreement for the second tranche of \$8.2 billion in funding for unmet needs for Puerto Rico. The grant agreement for this tranche of funds took considerably longer than the agreement for the first \$1.5 billion tranche, and the execution of this agreement was delayed in comparison to the other jurisdictions from the same appropriation.

#### **Former Deputy Secretary Pamela Patenaude's Resignation**

As we describe in Chapter 7, the OIG did not find evidence that undue influence or other concerns regarding the improper handling of grant funds intended for Puerto Rico caused Patenaude to resign. In her OIG interview, Patenaude said she resigned for personal reasons and denied that any specific directions from former Secretary Carson or any other Executive Branch official regarding Puerto Rico had anything to do with her resignation. None of the current or former HUD officials the OIG interviewed as part of this review gave evidence contradicting Patenaude's assertion that she did not resign because of delay in making disaster-relief funds available to Puerto Rico.

#### **Recommendations**

Our report makes three recommendations to the Department on actions it should take to improve the clarity and consistency of requirements in the CDBG-DR and CDBG-MIT programs and to clarify and streamline its process for administering funds to grantees in those programs.

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## Chapter 1: Introduction

### I. Background

We undertook this review to examine certain decisions and actions of U.S. Department of Housing and Urban Development (HUD or Department) officials that affected the timing of the release of approximately \$20 billion in disaster-recovery funds that Congress appropriated to help Puerto Rico recover from Hurricanes Irma and Maria. We also examined related decisions and actions of the Department stemming from the December 2018 lapse in appropriations. Following the devastation caused by those hurricanes in September 2017, collectively among the costliest natural disasters in United States history, Congress appropriated these funds in 2017 and 2018 for HUD to disburse through HUD’s Community Development Block Grant Disaster Recovery (CDBG-DR) and Community Development Block Grant Mitigation (CDBG-MIT) programs. Congress intended for the CDBG-DR funds to address the “unmet needs” of Puerto Rico, including funding to repair physical damage and broader impacts not covered by other programs. The CDBG-MIT funds were intended to support “mitigation” activities to increase resilience to and lessen the impact of future disasters.

Congress provided the CDBG-DR and CDBG-MIT funds at issue through successive individual appropriations. This resulted in four “tranches” of funds, two for unmet needs, a third for mitigation, and a fourth for improving Puerto Rico’s electrical grid, which HUD would later release to a grantee designated by the Puerto Rico government. For the funds to be distributed, HUD must issue a Federal Register notice announcing the availability of funds, the Puerto Rico grantee must submit an action plan to HUD outlining how it intends to spend the funds, and HUD must enter into a grant agreement with the Puerto Rico grantee. HUD began this process in February 2018. By the time the federal government shut down most of its operations in December 2018 due to a lapse in appropriations, HUD was still in the process of making the first tranche of \$1.5 billion in funding for unmet needs available to the Puerto Rico grantee. At that point, HUD had issued Federal Register notices announcing the availability of the second tranche of \$8.2 billion in funding for unmet needs, and Puerto Rico had submitted its action plan for that tranche. HUD had not allocated the third or fourth tranches designated for mitigation funding and improving Puerto Rico’s electrical grid.<sup>1</sup>

In January 2019, while the government shutdown was ongoing, HUD’s Office of Inspector General (OIG) received a request from Representatives Nydia Velazquez, Bennie Thompson, and Raul Grijalva to investigate several allegations that had been reported in a January 16, 2019 *Washington Post* article related to the CDBG-DR funds appropriated for Puerto Rico.<sup>2</sup> Specifically, the letter asked the OIG to inquire into whether the Office of Management and Budget (OMB) or any other office within the White House had unduly withheld or hindered the obligation of funds for Puerto Rico. The letter also posed several questions relating to HUD’s processing of disaster-recovery

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<sup>1</sup> For the purposes of this report, the first “tranche” of congressional funding refers to the initial \$1.5 billion in funding for unmet needs appropriated by P.L. 115-56 in September 2017. The second, third, and fourth tranches refer, respectively, to the additional \$8.2 billion in funding for unmet needs appropriated in February 2018 in P.L. 115-123, the \$8.3 billion appropriated in that same law for future mitigation efforts, and the \$1.9 billion appropriated in that same law to enhance or improve electrical systems. The appropriations are discussed in detail in Chapter 2 of this report.

<sup>2</sup> See Letter from Members of Congress to HUD OIG (Jan. 17, 2019), <https://velazquez.house.gov/media-center/press-releases/vel-zquez-thompson-grijalva-call-investigation-hud-departure>.

funds during the government shutdown that occurred between December 22, 2018, and January 25, 2019.<sup>3</sup> Additionally, the request asked us to inquire into whether there had been any “undue influence” exerted on Pamela Patenaude, former HUD Deputy Secretary (DS) prior to her resignation in December 2018, effective in January 2019, regarding the obligation and disbursement of CDBG-DR funds.

When we initiated this review in March 2019, we began examining the decisions and actions of HUD officials related to the release of the first \$1.5 billion tranche of disaster-related CDBG funds to the Puerto Rico grantee. Our scope also included examination of why HUD deviated from its plan to continue processing disaster-recovery funds during the late 2018 to early 2019 government shutdown and whether Patenaude resigned because of undue influence related to HUD’s administration of the Puerto Rico disaster-recovery funds.

Our examination of HUD officials’ decision-making in this review included inquiry into their interactions with OMB and White House officials regarding the execution of HUD’s disaster-recovery programs. Our role in this review was not to opine on the appropriateness of any OMB or White House officials’ actions, as our oversight authority does not extend to their conduct, but we assessed the extent to which OMB or White House officials directed or influenced HUD officials’ actions.

We later expanded the scope of the review to include the second and third tranches of funding designated for Puerto Rico’s unmet needs and mitigation efforts, respectively. Some of the HUD decisions and actions related to these tranches occurred during the course of our review. Our review did not include examination of any actions or decisions related to the fourth tranche of funds designated for enhancing and improving Puerto Rico’s electrical grid.

## II. Methodology

### 1. Overview

For our review, we obtained and reviewed HUD documents and employee electronic communications from September 2017, after Hurricanes Irma and Maria struck Puerto Rico, through August 2019. We conducted 31 interviews of 20 current and former HUD officials and two now former Puerto Rico Department of Housing (PRDOH) senior officials.<sup>4</sup> The witnesses included Patenaude; Brian Montgomery, then Acting and now former DS; Paul Compton, former General Counsel (GC); Andrew Hughes, former Chief of Staff (CoS); Irving Dennis, former Chief Financial Officer (CFO); David Woll, former Principal Deputy Assistant Secretary for Community Planning and Development (PDAS-CPD); and Len Wolfson, former Assistant Secretary for Congressional and Intergovernmental Relations (AS-CIR). We also interviewed agency officials in the key offices involved, including from the Office of the Secretary, the Office of Community Planning and Development (CPD), the Office of General Counsel (HUD OGC), and the Office of the Chief Financial Officer. One former HUD official, who was previously assigned to the Office of the Deputy Secretary, declined our request for an interview.

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<sup>3</sup> See *id.*

<sup>4</sup> The OIG is not identifying certain individuals by name in this report to protect their privacy, including most non-HUD employees and HUD employees serving in non-supervisory GS-15 positions or positions at or below the GS-14 level during relevant events.

The OIG experienced certain challenges obtaining access to HUD information and witnesses during this review.<sup>5</sup> Most notably, we did not obtain testimony from former Secretary Ben Carson because he declined to be interviewed by the OIG unless an attorney from the Department (“agency counsel”) was present. We were delayed in interviewing several senior HUD political appointees because of the Department’s insistence that agency counsel be present during these interviews. Some of those same officials eventually agreed to be interviewed but did not answer all of our questions and claimed some information the OIG sought was protected from release to the OIG by executive privilege. Further, though the OIG sought information directly from OMB related to OMB’s involvement in the decision-making related to the CDBG-DR and CDBG-MIT funds, we ultimately received no information directly from OMB. While the OIG undertook efforts to mitigate these challenges, the delays and denials of access and refusals to cooperate negatively affected the ability of the OIG to conduct this review.

## *2. Delays in Access to HUD Officials and Denial of Access to Information*

Department leadership initially requested that agency counsel attend OIG interviews of political appointees to advise the witnesses on matters covered by executive privilege. We did not permit any agency counsel to be present during our interviews of any HUD official during this review. We offered every official, including former Secretary Carson, the option of having personal counsel present for his or her OIG interview.

We did not agree to the Department’s request to have agency counsel present during our interviews because we disagree that this is necessary to protect privilege. Disclosure of information to the OIG does not waive any applicable privilege. We requested that HUD OGC advise interviewees of this legal principle and also advise them on the broader application of executive privilege prior to their OIG interviews.

We expressed concern with the Department’s request because it sought to have agency counsel present primarily for the interviews of HUD political appointees, which we believed raised questions of fairness and consistency regarding expectations for HUD employees’ cooperation with the OIG. In addition, the presence of agency counsel risks confusing witnesses as to whether that attorney represents the interviewee or the Department. Moreover, the presence of a Department attorney could create a chilling effect that prevents witnesses from speaking freely with the OIG and potentially discourage whistleblowers from coming forward for fear agency counsel could be inserted into their conversations with the OIG.

The OIG provided numerous written and verbal assurances to former Secretary Carson, Montgomery, and Compton, along with other senior officials, that the OIG would not release potentially privileged information about this review without affording the Department an opportunity to review the draft report and assert privilege over information to prevent its public

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<sup>5</sup> The Inspector General Act of 1978 (IG Act), as amended, grants the OIG broad authority to obtain information from the Department. The IG Act authorizes the OIG to “have timely access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to [the Department] which relate to the programs and operations with respect to that which the Inspector General has responsibilities under [the] Act,” 5 U.S.C. app 3, § 6(a)(1). The OIG’s access to this material is guaranteed by the IG Act “notwithstanding any other provision of law,” except pursuant to “a provision of law enacted by Congress” that expressly refers to the IG and expressly limits the access of the OIG. *Id.* at § 6(b).

release. In those assurances, we stated that we would defer to the Department's good faith assertion of privilege when considering release of information to third parties.<sup>6</sup>

We first began discussions with the Department on this issue in March 2019 and eventually reached agreement on an accommodation that allowed nearly all of our interviews of political appointees to move forward without agency counsel present in early October 2019. That accommodation permitted agency counsel to make a statement on the record at the beginning of the interview and to remain outside the interview room to advise witnesses on executive privilege should they request a break from the interview to obtain such advice.

The HUD statement advised witnesses not to disclose specific non-public communications to the OIG that were made by or derived from senior White House officials, despite the OIG's assurances that we would protect the Department's ability to assert privilege. The statement defined "senior White House officials" as elected officials, officials confirmed by the Senate or of the rank of Deputy Assistant to the President or higher, or officials in corresponding positions of authority.

Although we allowed HUD OGC to read the statement at the outset of certain interviews, we objected to portions of the statement that sought to limit the scope and nature of our questions or the witness's response.

After reaching this agreement, we offered this accommodation to former Secretary Carson, and he again declined to participate in an OIG interview without agency counsel present. We decided not to conduct the interview under those conditions and informed former Secretary Carson that we would outline in our report the reason why we did not obtain testimony from him in this review.

During their OIG interviews, Montgomery, Compton, Hughes, Dennis, Woll, and Wolfson refused to answer certain questions on the basis that their answers were protected from disclosure by executive privilege. These questions sought information about Puerto Rico disaster-relief communications taking place in 2019 between senior officials at HUD, OMB, and the White House, including but not limited to communications involving former Secretary Carson; Montgomery; Compton; Paul Ray, OMB's Office of Information and Regulatory Affairs' (OIRA) then Acting and now former Administrator (OIRA Administrator); Mark Paoletta, OMB's former General Counsel (GC); and Russell Vought, then Acting and now former OMB Director (OMB Director).

HUD officials' refusal to speak on these matters hampered the ability of the OIG to obtain access to all information relevant to this report. The communications at issue are relevant to the understanding of facts and decisions of significant importance in this review, including whether OMB or any other office within the White House had directed HUD to withhold or hinder the obligation of funds for Puerto Rico.

### ***3. Delays Obtaining Access to Electronically Stored Information***

We made our first request for electronically stored information (ESI) of certain HUD political appointees on April 8, 2019. The Department initially expressed concern about producing ESI responsive to this request because it could contain communications protected by executive privilege. We began receiving ESI responsive to our first request on April 29, 2019.

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<sup>6</sup> The OIG has made the same assurances with respect to information gathered in any oversight review, audit, evaluation, or investigation.

That same day, the HUD Inspector General (IG) issued a Management Alert to former Secretary Carson detailing our broad concerns with the Department's process for handling the OIG's requests for ESI. The Management Alert outlined the negative effects that delayed response times have on OIG investigations, as well as the risks HUD's process posed to the confidentiality and integrity of OIG investigations. The Department later completed production of ESI responsive to our first request on May 10, 2019.

The OIG made a second request for ESI on May 21, 2019, and the Department produced all ESI responsive to this request by June 20, 2019. The OIG made a third request on August 14, 2019, for which the Department began producing responsive documents on September 3, 2019, and for which the OIG received full production by October 29, 2019. The OIG made a fourth request on October 1, 2019, for which the Department completed production on October 31, 2019.

#### ***4. OIG Request for Information from the Office of Management and Budget***

The documentary and testimonial evidence we obtained during our review reflected a great deal of interaction with OMB throughout the process of administering appropriated funds through HUD's disaster-recovery grant programs. Because the evidence demonstrates OMB officials were deeply involved in the decision-making related to the CDBG-DR and CDBG-MIT funds at issue in this review, we sought information directly from OMB. In January 2020, we requested interviews with four senior OMB officials that we identified as having significant interactions with HUD officials related to the CDBG-DR and CDBG-MIT funds intended for Puerto Rico – Vought, Paoletta, Ray, and former Associate Director for General Government Dana Wade.<sup>7</sup>

OMB's Office of General Counsel stated that its practice was to respond to IG requests for information in a phased approach, which involves stages of submitting written questions before advancing to phone or in-person interviews. We agreed to submit written questions and receive written responses to further develop the record in this review because OMB officials do not have the same obligation to cooperate with the OIG as HUD officials do.

Between May and December 2020, we agreed to several requests from OMB for extensions of time to respond, with the final extension allowing OMB to submit answers by December 14, 2020. We did not ultimately receive any written responses from OMB.

### **III. Structure of the Report**

Chapter 2 of this report provides an overview of the applicable laws and HUD policy and guidance related to the CDBG-DR and CDBG-MIT programs. Chapter 3 provides an overview of the disaster-relief funding appropriated for Puerto Rico in 2017 and 2018. Chapter 4 details the effect of the government shutdown on HUD's administration of CDBG funds for Puerto Rico. Chapter 5 discusses HUD decision-making regarding publication of a Mitigation Notice in the Federal Register. Chapter 6 discusses HUD's efforts to revise its standard grant agreements for CDBG-DR funds and its impact on the second tranche of funding for unmet needs for Puerto Rico. Chapter 7 describes our inquiry into the circumstances surrounding Patenaude's resignation. Chapter 8 contains the OIG's conclusions and recommendations.

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<sup>7</sup> At the time of our request, Wade was serving in a senior advisor role at HUD, but she referred our interview request to OMB's Office of General Counsel. She was nominated by President Donald Trump to serve as HUD's Assistant Secretary for Housing and Federal Housing Administration Commissioner in February 2020, and was confirmed in that position on July 28, 2020.

## Chapter 2: Applicable Laws and HUD Policy and Guidance

### I. CDBG-DR and CDBG-MIT

CDBG-DR is a HUD program intended to help communities recover from natural disasters.<sup>8</sup> The program, which is funded by supplemental appropriations following natural disasters, operates under the auspices of HUD's broader Community Development Block Grant (CDBG) program, which was created by Title I of the Housing and Community Development Act of 1974 (HCDA).<sup>9</sup> The CDBG-MIT program was created in February 2018 to fund "mitigation activities" that lessen the impact of future disasters and need not tie back to any previous disaster.<sup>10</sup> While HUD implemented CDBG-MIT as a separate program, that program followed the same general disbursement process as with CDBG-DR funding.

Between 1992 and 2020, Congress has provided over \$89 billion in supplemental appropriations to CDBG disaster grants, which HUD's CPD oversees for the Department.<sup>11</sup>

CDBG-DR and CDBG-MIT rules are not codified in the Code of Federal Regulations, and HUD publishes "notices" in the Federal Register outlining the rules applicable to each supplemental appropriation. These notices may waive certain HCDA provisions and add alternative ones that are applicable to that specific appropriation.<sup>12</sup> The programs' grantees are typically states, territories, or local governments, which in turn may designate specific entities to carry out activities under the grant.<sup>13</sup> Grantees may subgrant funds to subrecipients such as nonprofits or economic development authorities, or provide assistance directly to businesses, individuals, or households.<sup>14</sup>

After Congress appropriates funds for a particular disaster, HUD sends a request for those funds to OMB, the office within the Executive Office of the President of the United States that assists "the President in meeting his policy, budget, management and regulatory objectives and to fulfill the agency's statutory responsibilities."<sup>15</sup> OMB makes appropriated disaster funds available for obligation by HUD through an "apportionment schedule."<sup>16</sup> An "apportionment" is an OMB-

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<sup>8</sup> See *CDBG: Community Development Block Grant Disaster Recovery Program*, HUD Exchange, <https://www.hudexchange.info/programs/cdbg-dr/> (last visited May 1, 2020).

<sup>9</sup> See 42 U.S.C. §§ 5301-5322 (2018).

<sup>10</sup> See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. at 103.

<sup>11</sup> See *Community Planning and Development*, HUD.gov, [https://www.hud.gov/program\\_offices/comm\\_planning](https://www.hud.gov/program_offices/comm_planning) (last visited March 13, 2020).

<sup>12</sup> See *CDBG-DR Policy Guide for Grantees 2019 2*, HUD Exchange, <https://files.hudexchange.info/resources/documents/CDBG-DR-Policy-Guide.pdf>; Department of Housing and Urban Development Office of Inspector General, 2018-FW-0002, Audit Report, Community Development Block Grant Disaster Recovery Program 3 (2018), <https://www.hudoint.gov/sites/default/files/documents/2018-FW-0002.pdf>.

<sup>13</sup> See, e.g., Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 40314, 40315 (Aug. 14, 2018); see also Allocations, Common Application, Waivers, and Alternative Requirements for 2017 Disaster Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 5844, 5844 (Feb. 9, 2018).

<sup>14</sup> See 42 U.S.C. § 5305(a)(15)(2018); *id.* at 5854; see also *CDBG-DR Fact Sheet*, HUD Exchange, <https://files.hudexchange.info/resources/documents/CDBG-DR-Fact-Sheet.pdf> (last visited March 13, 2020).

<sup>15</sup> *C, fice cf Management and Budget*, WhiteHouse.gov, <https://www.whitehouse.gov/omb/> (last visited March 13, 2020).

<sup>16</sup> See 31 U.S.C. § 1513(b) (2018); Exec. Order No. 12,608, 52 Fed. Reg. 34617 (Sept. 14, 1987); Exec. Order No. 6,166 (1933); OMB Cir. A-11: Preparation, Submission, and Execution of the Budget, Pt. 4, § 120 (2019).

approved plan to use budgetary resources and typically limits the obligations an agency may incur for specific time periods, programs, or activities.<sup>17</sup> The Anti-Deficiency Act (ADA) prohibits agencies from incurring obligations or making expenditures in excess of the amount of appropriated funds made available through apportionments from OMB.<sup>18</sup>

Once HUD receives OMB's apportionment schedule, HUD allocates funds to eligible grantees using a formula informed by data from other federal agencies and issues Federal Register notices regarding the allocation and other requirements.<sup>19</sup>

CPD also performs front-end risk assessments, a formal, documented review to determine the susceptibility of the proposed activities to waste, fraud, abuse, and mismanagement and the proposed controls to mitigate that risk.

Federal Register notices are generally drafted in consultation with OMB and are promulgated by HUD in part under the authority of the Paperwork Reduction Act.<sup>20</sup>

The Paperwork Reduction Act also created OIRA within OMB.<sup>21</sup> Pursuant to Executive Order 12866,<sup>22</sup> OIRA reviews "significant regulatory actions" by federal agencies.<sup>23</sup> A "significant regulatory action" is defined as any regulatory action that is likely to result in a rule that may

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.<sup>24</sup>

Executive Order 12866 further states that once an OIRA review is initiated, an agency cannot publish in the Federal Register or otherwise issue the regulatory action under review until the agency receives notification that (1) OIRA has waived its review, (2) the review is complete, or (3) the OIRA 90-day review period has expired.<sup>25</sup> If the agency wants to publish a regulatory action before the OIRA process concludes, it may request presidential consideration, and disagreements

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<sup>17</sup> See OMB Cir. A-11: Preparation, Submission, and Execution of the Budget, Pt. 4, § 120.1 (2019).

<sup>18</sup> See 31 U.S.C. § 1517(a)(1), (b) (2018).

<sup>19</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for 2017 Disaster Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 5844, 5854 (Feb. 9, 2018).

<sup>20</sup> See 44 U.S.C. §§ 3501 et seq. (2018).

<sup>21</sup> See *id.*

<sup>22</sup> Executive Order 12866 notes that "[c]oordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency." Exec. Order No. 12866 § 2(b), 58 Fed. Reg. 51735 (Oct. 4, 1993). As such, OIRA was deemed the repository of expertise concerning regulatory issues.

<sup>23</sup> *Id.* § 6(b)(1).

<sup>24</sup> *Id.* § 3(f)

<sup>25</sup> See *id.* §§ 6(b)(2)(B), 8.

or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President or by the Vice President, acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials).<sup>26</sup> According to HUD officials, CDBG-DR-related Federal Register notices have not historically been subject to OIRA review. As further discussed in Chapter 5, while the CDBG-MIT program was new and required a unique Federal Register notice, HUD did not expect OIRA to review the new CDBG-MIT notice based on historical practice.

The allocation notice published in the Federal Register requires grantees to submit a proposed action plan. Grantees work with HUD to develop an action plan for disaster recovery, which they submit to the Department for approval. The action plan typically describes the activities for which the funds will be used, including the eligibility criteria, award amount, and national objective compliance.<sup>27</sup> HUD is obligated to approve action plans generally within 45 days, extendable to within 60 days; however, the Secretary can waive this and other applicable statutory and regulatory provisions “if the Secretary finds that good cause exists for the waiver or alternative requirement and such waiver or alternative requirement would not be inconsistent with the overall purpose of Title I of the Housing and Community Development Act of 1974 (HCDA).”<sup>28</sup>

Once HUD approves an action plan, the Department and the grantee then sign a grant agreement.<sup>29</sup> Upon execution of the grant agreement, the grantee inputs approved activities into HUD’s Disaster Recovery Grant Reporting (DRGR) system for final approval.<sup>30</sup> This system allows grantees to access grant funds and submit quarterly performance reports.<sup>31</sup> HUD also uses DRGR to monitor compliance and the status of funds.<sup>32</sup>

Image 1 below depicts the CDBG-DR process from appropriation to the point when a grantee may begin receiving disaster-relief funds.

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<sup>26</sup> See *id.* §§ 7, 8.

<sup>27</sup> See, e.g., Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 40314, 40316 (Aug. 14, 2018); see also *CDBG-DR Policy Guide for Grantees 2019* 6-7, HUD Exchange, <https://files.hudexchange.info/resources/documents/CDBG-DR-Policy-Guide.pdf> (last visited March 13, 2020).

<sup>28</sup> Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. at 103; see also 42 U.S.C. § 12705(c)(1) (2018); Waiver and Alternative Requirement for Community Development Block Grant Disaster Recovery (CDBG-DR) Grantees, 84 Fed. Reg. 6813, 6813 (Feb. 28, 2019).

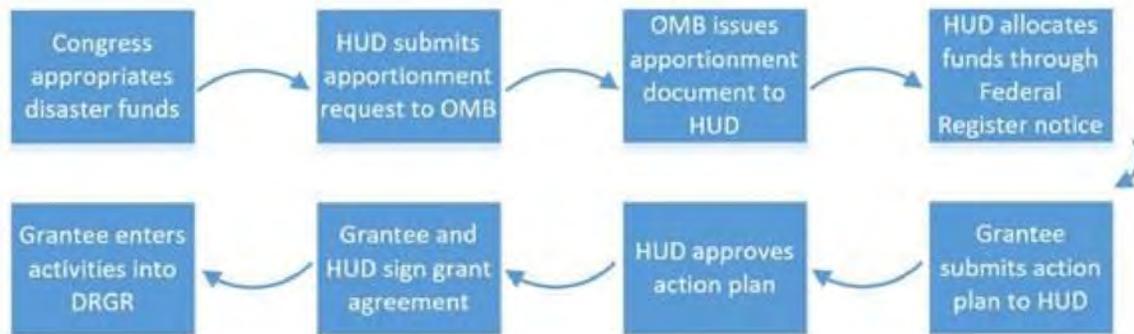
<sup>29</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for 2017 Disaster Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 5844, 5846 (Feb. 9, 2018).

<sup>30</sup> See *id.* at 5846; see also *CDBG-DR Policy Guide for Grantees 2019* 6-7, HUD Exchange, <https://files.hudexchange.info/resources/documents/CDBG-DR-Policy-Guide.pdf> (last visited March 13, 2020).

<sup>31</sup> See *CDBG-DR Policy Guide for Grantees 2019* 6-7, HUD Exchange, <https://files.hudexchange.info/resources/documents/CDBG-DR-Policy-Guide.pdf> (last visited March 13, 2020); *DRGR: Disaster Recovery Grant Reporting System*, HUD Exchange, <https://www.hudexchange.info/programs/drgr/> (last visited March 15, 2020).

<sup>32</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for 2017 Disaster Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 5844, 5852-5853 (Feb. 9, 2018); see also *CDBG-DR Policy Guide for Grantees 2019* 11, HUD Exchange, <https://files.hudexchange.info/resources/documents/CDBG-DR-Policy-Guide.pdf> (last visited March 13, 2020); *DRGR: Disaster Recovery Grant Reporting System*, HUD Exchange, <https://www.hudexchange.info/programs/drgr/> (last visited March 15, 2020).

**Image 1: Disaster Recovery Obligation Process**



Congress may also pass statutes stipulating specific deadlines by which the agency must achieve the steps outlined above. For example, the Additional Supplemental Appropriations for Disaster Relief Act, passed in June 2019, required that HUD publish a notice in the Federal Register for the CDBG-MIT funds by September 4, 2019.<sup>33</sup>

The OIG has performed prior audits related to the CDBG-DR regulatory framework. Notably, a 2018 HUD OIG audit report recommended codifying the CDBG-DR program to (1) ensure that a permanent framework is in place for future disasters, (2) reduce the existing volume of Federal Register notices, (3) standardize the rules for all grantees, and (4) ensure that grants are closed in a timely manner.<sup>34</sup>

HUD agrees that codification would increase the speed by which grantees are able to develop action plans, but HUD maintains that its authority to issue regulations for disaster-recovery funding is predicated on the legislative authority granted in each supplemental appropriation. The OIG has maintained the position that HUD could promulgate regulations for the CDBG-DR program under the authority provided by the HCDA. In January 2021, HUD and the OIG agreed to close this recommendation with disagreement.

## **II. Shutdown-Related Authorities and Restrictions**

The Anti-Deficiency Act also prevents the incurring of obligations or the making of expenditures in excess or in advance of amounts available in appropriations or funds, which limits the activities that may continue during a government shutdown.<sup>35</sup> The ADA bars any executive agency “from incurring obligations” during a lapse in appropriations. This includes payment of salaries to federal employees, meaning “the agency must commence an orderly shutdown of affected functions” once a lapse occurs.<sup>36</sup> Absent appropriated funds, an agency may “incur obligations only where an exception to [the ADA] allows the agency to do so,” including in the case of “emergencies

<sup>33</sup> Additional Supplemental Appropriations for Disaster Relief Act, 2019, Pub. L. No. 116-20, 133 Stat. 871, 900 (2019).

<sup>34</sup> See Department of Housing and Urban Development Office of Inspector General, 2018-FW-0002, Audit Report, Community Development Block Grant Disaster Recovery Program 3 (2018), <https://www.hudoig.gov/sites/default/files/documents/2018-FW-0002.pdf>.

<sup>35</sup> See 31 U.S.C. §§ 1341–42, 1350–51, 1511–19 (2018).

<sup>36</sup> The ADA generally prohibits any Government officer or employee from (1) obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation or an apportionment; (2) incurring an obligation in advance of an appropriation; and (3) accepting voluntary services, “except for emergencies involving the safety of human life or the protection of property.”

involving the safety of human life or the protection of property.”<sup>37</sup> “Determining which agency activities may be excepted under the [ADA] requires a case-by-case analysis and a narrowly tailored application of the relevant statutory framework.”<sup>38</sup>

### **Chapter 3: Overview of CDBG-DR and CDBG-MIT Funds Intended for Puerto Rico**

On September 8, 2017, Congress appropriated \$7.4 billion to address damage caused by Hurricane Irma.<sup>39</sup> Through a Federal Register notice published on February 9, 2018, HUD allocated funds to four grantees: Texas, Florida, the U.S. Virgin Islands (USVI), and Puerto Rico. Of the entire amount appropriated by Congress, HUD allocated the first tranche of \$1.5 billion specifically for addressing the “unmet needs” of Puerto Rico.<sup>40</sup> Under CDBG-DR, unmet needs are those addressing broad disaster impacts, not just damages, which are not covered by other programs.<sup>41</sup>

That same day, February 9, 2018, Congress enacted Public Law 115-123, which appropriated nearly \$28 billion in additional funding to address damage caused by natural disasters occurring in 2017.<sup>42</sup> Congress required HUD to allocate up to \$16 billion of additional funding to address unmet needs caused by the disasters, which included the second tranche of \$8.2 billion in unmet-need funding for Puerto Rico and \$2 billion for improvements to electrical power systems for grantees affected by Hurricane Maria. The law also required HUD to allocate at least \$12 billion to support “mitigation activities,” which are administered under the CDBG-MIT program.<sup>43</sup> HUD defined “mitigation activities” as “those activities that increase resilience to disasters and reduce or eliminate the long-term risk of loss of life, injury, damage to and loss of property, and suffering and hardship, by lessening the impact of future disasters.”<sup>44</sup>

On February 23, 2018, the now former Governor of Puerto Rico designated the Puerto Rico Department of Housing as the authorized recipient of CDBG-DR funds intended for Puerto Rico,<sup>45</sup> giving this entity primary responsibility for the implementation, management, and compliance of

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<sup>37</sup> U.S. Gov’t Accountability Office, GAO- B-331132, *Office of Management and Budget—Regulatory Review Activities During the Fiscal Year 2019 Lapse in Appropriations* (December 19, 2019) (citing 31 U.S.C. 1341).

<sup>38</sup> *Id.* at 6.

<sup>39</sup> See Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56, 131 Stat. at 1137. This bill was passed prior to Hurricane Maria’s devastation of the island. See *National Hurricane Center Tropical Cyclone Report: Hurricane Maria*, National Hurricane Center, [https://www.nhc.noaa.gov/data/tcr/AL152017\\_Maria.pdf](https://www.nhc.noaa.gov/data/tcr/AL152017_Maria.pdf) (last visited May 5, 2020).

<sup>40</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for 2017 Disaster Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 5844, 5845 (Feb. 9, 2018).

<sup>41</sup> See *Disaster Impact and Unmet Needs Assessment Kit 1-2*, HUD Exchange, [https://files.hudexchange.info/resources/documents/Disaster\\_Recovery\\_Disaster\\_Impact\\_Needs\\_Assessment\\_Kit.pdf](https://files.hudexchange.info/resources/documents/Disaster_Recovery_Disaster_Impact_Needs_Assessment_Kit.pdf) (last visited May 5, 2020).

<sup>42</sup> See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. at 103.

<sup>43</sup> See *id.*

<sup>44</sup> Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees 84 Fed. Reg. 45838, 45840 (Aug. 30, 2019). Congress set aside a minimum amount of \$11 billion that jurisdictions affected by Hurricane Maria (Puerto Rico and the USVI) would receive for unmet needs from both P.L. 115-56 and P.L. 115-123 (\$2 billion of which would be to enhance or improve electrical systems). See Pub. L. No. 115-123, 132 Stat. at 103. HUD found that Puerto Rico had \$6,767,795,949 of unmet needs but supplemented this figure and the USVI figure to meet the congressionally mandated \$11 billion minimum.

<sup>45</sup> See Puerto Rico Disaster Recovery Action Plan (Feb. 28, 2019), <https://www.cdbg-dr.pr.gov/en/download/action-plan-amendment-1-substantial-amendment-february-28-2019/>.

programs supported by CDBG disaster funds.<sup>46</sup> PRDOH administers Puerto Rico's disaster-relief program in collaboration with the Central Office of Recovery, Reconstruction, and Resilience (COR3), which performs an oversight function for the Governor's Office, verifying compliance with HUD's grant requirements and ensuring coordination with other federal funding streams.<sup>47</sup>

Following this designation, there was a prevailing concern in HUD that a large sum of money was going to a new grantee that did not, until that point, appear to have the infrastructure necessary to administer it. These concerns were also linked to the broader financial challenges that Puerto Rico as a whole was facing.

By a Federal Register notice published on August 14, 2018, HUD allocated over \$10 billion of the CDBG-DR funding for unmet needs made available by Public Law 115-123 to address the unmet needs of seven different grantees, including the USVI, Florida, and Puerto Rico.<sup>48</sup> Puerto Rico's portion of this allocation was \$8.2 billion.<sup>49</sup> For reasons discussed in Chapter 5, HUD did not publish its main CDBG-MIT notice until August 30, 2019. That Federal Register publication allocated appropriated funds among 14 of the 16 eligible CDBG-MIT grantees but did not include USVI or Puerto Rico. HUD subsequently published the CDBG-MIT notice for USVI on September 10, 2019. However, HUD did not publish the CDBG-MIT notice for Puerto Rico until January 27, 2020, allocating almost \$8.3 billion from the February 2018 appropriation to Puerto Rico.<sup>50</sup> HUD has not yet published a Federal Register notice for the last \$2 billion appropriated by Congress "to provide enhanced or improved electrical power systems."<sup>51</sup> In consultation with HUD, PRDOH drafted and submitted action plans to meet the requirements set out in the Federal Register notices regarding funding for unmet needs and mitigation. Once these plans were submitted to HUD, there was a multi-step process involving several offices within the Department as well as further consultation with PRDOH to review and approve these plans.

After approving PRDOH's action plans, HUD continued to assess whether PRDOH's capabilities, financial procedures, and procurement practices met the various requirements before executing formal grant agreements with PRDOH. After the agreements were executed, PRDOH submitted its action plans and budgets into the DRGR system for final HUD review and approval.

HUD provided final approval of PRDOH's action plan for the first tranche of \$1.5 billion in funding for unmet needs on January 30, 2019. The evidence indicates that HUD notified PRDOH of its ability to access funds from that tranche on or about February 4, 2019,<sup>52</sup> which PRDOH did for the first time on February 8, 2019. HUD provided final approval of PRDOH's action plan for the second tranche of \$8.2 billion in funding for unmet needs on May 4, 2020. As of January 4, 2021, PRDOH's total drawdowns from the first tranche of funding for unmet needs amounted to approximately \$150 million and approximately \$665,017 from the second tranche of CDBG-DR

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<sup>46</sup> See Puerto Rico Disaster Recovery Action Plan 8 (Feb. 28, 2019), <https://www.cdbg-dr.pr.gov/en/download/action-plan-amendment-1-substantial-amendment-february-28-2019/>.

<sup>47</sup> *Id.*

<sup>48</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 40314, 40315 (Aug. 14, 2018).

<sup>49</sup> *Id.*

<sup>50</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; Commonwealth of Puerto Rico Allocation 85 Fed. Reg. 4,676 (Jan. 27, 2020).

<sup>51</sup> Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. at 103.

<sup>52</sup> The OIG also identified some evidence indicating that the corresponding DRGR approval may have occurred on February 6, 2019.

funds. PRDOH submitted an action plan for the third tranche of \$8.3 billion in CDBG-MIT funds on December 3, 2020.

Table 1 shows the time elapsed between steps necessary for the disbursement of CDBG-DR and MIT funds to PRDOH, which varied greatly depending on the category of funding at issue. In the chapters that follow, we discuss relevant actions taken and decisions made during the process set forth in this table.

**Table 1: Puerto Rico Disaster Recovery Funding Progress**

Process Step	Unmet Needs - \$1.5 B	Unmet Needs - \$8.2 B	Mitigation - \$8.3 B	Electrical Grid - \$1.9 B
Congress Appropriates Funds	9/8/2017	2/9/2018	2/9/2018	2/9/2018
Initial OMB Apportionment of Funds	9/27/2017	3/28/2018	3/28/2018	3/28/2018
HUD Allocates Funds through Federal Register Notice	2/9/2018	8/14/2018	1/27/2020	Pending as of April 14, 2021
Grantee Submits Action Plan to HUD	6/14/2018	11/16/2018	12/3/2020	Pending as of April 14, 2021
HUD Approves Action Plan	7/29/2018	2/28/2019	Partially approved as of February 17, 2021	Pending as of April 14, 2021
Grantee & HUD Sign Grant Agreement	9/20/2018	2/21/2020	Pending as of February 17, 2021	Pending as of April 14, 2021
HUD Approves Action Plan in the Disaster Recovery Grant Reporting System	1/30/2019	5/04/2020	Pending as of February 17, 2021	Pending as of April 14, 2021

#### **Chapter 4: The Effect of the Government Shutdown on HUD’s Administration of Disaster-Relief Funds Intended for Puerto Rico**

Due to a partial lapse in appropriations, the United States federal government experienced what is commonly referred to as a “shutdown” during the period between December 22, 2018, and January

25, 2019.<sup>53</sup> During the shutdown, HUD and other affected agencies halted all activities funded by annual appropriations that could not be deemed “excepted” to avoid violating the ADA.<sup>54</sup> Determinations of what CDBG-DR-related activities were excepted under the ADA and could continue during the shutdown affected the review and approval of pending action plans for Georgia, California, and Missouri,<sup>55</sup> and pending action plan amendments for Puerto Rico, the USVI, and Florida.<sup>56</sup>

During the December 2018-January 2019 government shutdown, HUD officials were engaged in activity necessary to make both tranches of funding for unmet needs, \$1.5 billion and \$8.2 billion, respectively, available to PRDOH. HUD was also engaged with OMB on the drafting of the Federal Register notice that would make the third tranche, \$8.3 billion for mitigation activities, available to PRDOH. Evidence gathered by the OIG shows that while the shutdown incidentally impacted HUD officials’ ability to make the first \$1.5 billion tranche available earlier, PRDOH was able to access these funds soon after the shutdown ended. With regard to the second tranche, the evidence shows that decisions made during the shutdown delayed HUD’s ability to perform work to make these funds available to PRDOH by at least several weeks. As discussed further in Chapter 5, HUD did not work on the draft notice for the third tranche of \$8.3 billion in CDBG-MIT funding during the shutdown.

### **I. The Shutdown Delayed PRDOH’s Access to the \$1.5 Billion Tranche of Funding for Unmet Needs**

Federal agencies plan for government shutdowns by making determinations as to which of their activities will be considered excepted under the ADA,<sup>57</sup> such that they can continue despite the lapse in funding. The 2018 HUD Contingency Plan for Possible Lapse in Appropriations (Lapse Plan) guided the Department in this regard during the December 2018-January 2019 shutdown.<sup>58</sup> Citing a 1995 opinion from the U.S. Department of Justice, Office of Legal Counsel, the Lapse Plan outlined the following general categories of activities that could be deemed excepted:

- (1) activities to address cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response, (2) government functions funded with multi-year appropriations or indefinite appropriations, (3) express authorizations for

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<sup>53</sup> “A shutdown furlough . . . occurs when there is a lapse in appropriations, and can occur at the beginning of a fiscal year, if no funds have been appropriated for that year, or upon expiration of a continuing resolution, if a new continuing resolution or appropriations law is not passed. In a shutdown furlough, an affected agency would have to shut down any activities funded by annual appropriations that are not excepted by law.” Office of Personnel Management, *Pay & Leave – Furlough Guidance*, OPM.gov, <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/> (last visited March 4, 2020).

<sup>54</sup> See Waiver and Alternative Requirement for Community Development Block Grant—Disaster Recovery (CDBG-DR) Grantees, 84 Fed. Reg. 97 (Jan. 9, 2019). Florida and Puerto Rico submitted their action plan amendments on November 16, 2018, and the USVI submitted an action plan amendment on November 20, 2018.

<sup>55</sup> See *id.* at 97.

<sup>56</sup> See *id.*

<sup>57</sup> As stated earlier in Chapter 2, the ADA prohibits federal agencies from obligating or expending federal funds in advance or in excess of an appropriation and from accepting voluntary service or employing federal personnel except if the employee is excepted or in emergencies. See 31 U.S.C. §§ 1341-1342 (2018); see also U.S. Department of Housing and Urban Development, *HUD Contingency Plan for Possible Lapse in Appropriations* (2018).

<sup>58</sup> See U.S. Department of Housing and Urban Development, *HUD Contingency Plan for Possible Lapse in Appropriations* at 5.

agencies to enter into contracts or to borrow funds to accomplish their missions (without appropriations), (4) obligations necessary to discharge the President’s constitutional duties and powers, and (5) the orderly termination of functions that may not continue during a period of lapsed appropriations.<sup>59</sup>

According to the Lapse Plan, CPD could “[c]ontinue to disburse CDBG . . . funds and other block grant funds where prior year funds ha[d] been obligated” and “[c]ontinue Disaster Recovery Assistance Programs funded through multi-year appropriations,” as the Department concluded that such activities fell within exceptions outlined above.<sup>60</sup> This determination permitted HUD officials to continue work necessary to make the first tranche of \$1.5 billion in funding for unmet needs available to PRDOH during the shutdown because the Department had already approved the initial action plan and entered into the requisite grant agreement associated with these funds, meaning the funds had been effectively “obligated.”

The evidence shows that PRDOH’s ability to access the first tranche of funds was delayed during the shutdown. The delay was due in part to a limited number of HUD staff available to work with PRDOH, but the delay was also due in part to confusion about PRDOH’s submission to HUD of required bank account information before PRDOH could draw grant funds.

### ***1. HUD Had Limited Staff Available to Handle Disaster-Relief Tasks During the Shutdown***

During the shutdown, CPD reduced its career headquarters staff available to work on disaster-related activities to four senior officials. According to two CPD officials, several term hires in CPD’s San Juan, Puerto Rico, office also remained available to work on certain disaster-related tasks during the shutdown because they were not subject to the same restrictions under the ADA as permanent employees. According to one of these officials, however, CPD’s San Juan term employees had not worked for the Department for long by the time the shutdown began and may have lacked the expertise and familiarity with CPD operations necessary to perform their work effectively without guidance from longer tenured career employees, which was difficult for them to obtain during the shutdown. Indeed, this official said the point of contact for these term hires during the shutdown was a senior official within the Department, Stan Gimont, the then Deputy Assistant Secretary for Grant Programs (DAS-GP).

According to a former senior PRDOH official, the lack of available career CPD staff during the shutdown created complications for PRDOH. This official told the OIG that “everything stopped” during the shutdown; “[w]e didn’t have any responses for anything.” The official noted that, even though PRDOH officials continued to have weekly meetings with HUD officials during the shutdown, “[n]othing was resolved.” “It was pretty frustrating not to be able to do anything, and just spin our wheels on things that wouldn’t advance anything . . . [on] our part,” the official said and added that he felt like PRDOH was “pushing a rock that wouldn’t budge, or wouldn’t move” during the shutdown.

### ***2. Missing Bank Information Delayed Transmission of Funds to PRDOH During the Shutdown***

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<sup>59</sup> *Id.* at 4

<sup>60</sup> *Id.* at 8. The Lapse Plan also indicated that CPD could “[c]ontinue to maintain the CACI contract for the systems . . . that support excepted activities.” *Id.*

HUD approved PRDOH's action plan for the first \$1.5 billion in funding for unmet needs in its Disaster Recovery Grant Reporting (DRGR) system on December 14, 2018, just over a week before the shutdown began, which senior CPD officials told us should have been one of the last steps necessary for PRDOH to access this money.<sup>61</sup> However, according to former PDAS-CPD Woll, PRDOH was not able to access these funds immediately following this approval because it had not yet provided certain banking information that the Department needed to make these funds available. Evidence shows that a PRDOH official sent HUD additional banking information on December 27, 2018, five days after the shutdown had started, and a former PRDOH official told the OIG that PRDOH believed it had provided HUD with all the requisite banking information by this date.

Evidence indicates that Gimont "asked [HUD's] San Juan staff to get [the] voided check/letter and forward it" on December 28, 2018, and that HUD staff may have told PRDOH about this missing information over a week later on a January 8 or 9, 2019 phone call. Tennille Parker, Director of the Disaster Recovery and Special Issues Division within CPD (DDR-SID), told the OIG that her understanding was that PRDOH received notification that it needed this banking information prior to the shutdown. However, a former PRDOH official told the OIG that HUD did not previously inform PRDOH that it needed this banking information, and in support of this statement, he provided the OIG with a contemporaneous email communication between PRDOH officials that noted, "[t]he Standard Form 1199A directions do not indicate the need for an additional or secondary account certification documentation." When asked about the potential for confusion about these specific HUD requirements, Woll said that he did not fault PRDOH if it lacked knowledge about what was needed because "it's complex stuff."

A PRDOH official told the OIG that PRDOH did not have checks for this account but sent a bank certification letter to HUD's Fort Worth Accounting Office on January 10, 2019. On January 16, 2019, HUD Accounting staff verified that PRDOH's banking information had been updated, but this addition of new information caused PRDOH's action plan to revert to disapproved status in HUD's DRGR system, blocking access to the funds until entry of a new approval.<sup>62</sup>

The evidence shows that PRDOH officials understood that renewed "approval was still in the HUD queue held up due to the shutdown" as of January 23, 2019, and HUD provided this approval on January 30, 2019, five days after the government shutdown ended. HUD notified PRDOH of this approval and its ability to access funds on or about February 4, 2019,<sup>63</sup> and PRDOH made its first drawdown of approximately \$42,000 on February 8, 2019.<sup>64</sup>

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<sup>61</sup> A PRDOH official indicated that he did not believe that the banking information was what stopped PRDOH from drawing down its funds but, rather, "locks" on DRGR separate from this banking information was the obstacle.

<sup>62</sup> According to the Parker, if a grantee makes changes within the DRGR system, HUD has an internal control mechanism in place for the changes to be verified by HUD staff.

<sup>63</sup> A HUD Meeting Briefing Memorandum indicated that HUD provided PRDOH notification that it could draw down on February 4, 2019. However, the OIG observed a DRGR approval on February 6, 2019, and an internal PRDOH email indicated that the DRGR Action Plan was approved that day, "validating that the bank account was correctly established."

<sup>64</sup> As of January 4, 2021, PRDOH's total drawdowns from the first tranche of funding for unmet needs amounted to approximately \$150 million and approximately \$665,017 from the second tranche of CDBG-DR funds.

## II. The Shutdown Delayed HUD’s Review and Approval of PRDOH’s Action Plan for the \$8.2 Billion Tranche of Funding for Unmet Needs

While HUD’s Lapse Plan permitted CPD officials to continue work on the first tranche of \$1.5 billion in funding for unmet needs to PRDOH during the shutdown, the plan was less clear as to whether the Department’s employees could continue work necessary to make the second tranche of \$8.2 billion available.

At the time of the shutdown, Puerto Rico, the USVI, and Florida had already submitted action plans to HUD for their second tranche of funding for unmet needs. HUD staff needed to approve these plans and their corresponding amendments before Puerto Rico and the other jurisdictions could enter into grant agreements with the Department, which would then permit them to access this funding. By its terms, the Lapse Plan did not clearly address whether a review of a CDBG-DR action plan was allowed during a shutdown.<sup>65</sup> But former GC Compton and HUD’s senior appropriations law attorneys agreed that HUD staff could continue work on disaster-recovery action plans under the Lapse Plan because such work fit within the ADA exception for activities that addressed threats to life and property.

As the shutdown progressed, OMB directed HUD to stop work on disaster-recovery action plans that had not yet been approved, which HUD complied with and stopped review of PRDOH’s action plan for the second tranche of funding for unmet needs. Doing so prevented HUD from completing the review within its statutory and self-imposed deadlines, and former Secretary Carson issued a waiver of the statutory requirement to allow the Department’s complete review of the action plan after the shutdown.

### 1. *HUD Initially Decided That It Could Continue Reviewing CDBG-DR Plans During the Shutdown*

In his OIG interview, Compton stated that “although it wasn’t perfectly clear,” the Lapse Plan “seemed to suggest that . . . because it related to addressing threats to life and property, disaster relief . . . was something that would be permitted to be worked on” during the shutdown. On December 28, 2018, one week after the shutdown began, Compton provided a legal memorandum to Woll regarding excepted activities during a lapse in appropriations.<sup>66</sup> Upon receiving this memorandum, CPD officials prepared to resume work on activities related to the second tranche of \$8.2 billion in funding for unmet needs for PRDOH. Evidence shows that Parker contacted HUD staff in Puerto Rico and informed them that “[w]e will be asked to complete our [PRDOH] action plan review during the shutdown.”

On January 1, 2019, Michael Moran, the Director of Appropriations Law Staff in the Office of the Chief Financial Officer (DALO-OCFO), concurred with Compton’s guidance regarding shutdown

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<sup>65</sup> See *Grantee Reports and Plans*, HUD Exchange, <https://www.hudexchange.info/grantees/reports/#consolidated-plans-annual-action-plans-and-capers> (last visited March 17, 2020); see also U.S. Department of Housing and Urban Development, *HUD Contingency Plan for Possible Lapse in Appropriations* at 8.

<sup>66</sup> In response to a draft version of this report that quoted certain portions of this memorandum, HUD asserted that those portions should not be disclosed pursuant to legal privileges or protections available to the Department. The OIG removed these quoted portions of the memorandum from the final version of this report.

review of pending CDBG-DR action plans.<sup>67</sup> Particularly, Moran informed CPD staff that day that “[f]rom an appropriations law perspective, we have no concerns about characterizing review of these DR action plans as an excepted activity during the shutdown.” In another email to CPD staff the following day, Moran more definitively stated that the “CDBG-DR effort to review and either approve or reject proposed CDBG-DR action plan amendments is an activity that falls within the emergency exception and is thus excepted from the lapse,” reasoning that the Lapse Plan prohibition on the review of consolidated plans “was meant to apply to the main CDBG program and not specifically to the DR action plans” at issue.<sup>68</sup> Another senior official in the CFO’s Office (CFO Official 1) forwarded this email to an OMB official later that day, who responded by saying the official was “going to re-reroute this to . . . our [Office of General Counsel] OGC office” because Moran’s determination “has to do with the legal interpretation of excepted activities.”

## **2. Discussions with OMB Caused HUD to Reverse Its Decision to Review CDBG-DR Plans During the Shutdown**

The evidence shows that Compton and Woll participated in several calls with OMB officials on January 3 and 4, 2019, including at least one call that appeared to include OMB’s General Counsel.<sup>69</sup> In his interview with the OIG, Compton said he “ma[d]e the argument” during these discussions with OMB “that [he] thought [HUD’s] position was right” regarding the review of disaster action plans during the shutdown being an excepted activity but that OMB disagreed with this conclusion. Specifically, Compton explained that OMB officials did not think that this activity could be considered as excepted because the work was not aimed at addressing an “imminent” threat to life and property.

According to Compton, HUD did not agree with OMB’s assertion but ultimately deferred to OMB’s judgment, because OMB has the “final call” on the ADA and is the “judge and jury on this” matter. Compton also said that OMB’s reasoning about the lack of an imminent threat to life or property to justify HUD’s work on the action plans seemed sound to him, given that the storms prompting this work happened almost 15 months earlier and the Federal Emergency Management Agency (FEMA) had already handled the government’s immediate response to them. Moran similarly told the OIG that he was deferential to OMB on the subject of what activities could be considered excepted under the ADA despite his earlier conclusion that work on CDBG-DR action plans could continue.

On January 4, 2019, Compton sent a memorandum to Woll informing him about OMB’s decision, stating:

[OMB], which has authority to make determinations regarding lapse of appropriations issues, has today advised us that while work that is a necessary implication of Disaster Recovery Assistance Programs funded through multiyear appropriations may continue where such work is a

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<sup>67</sup> Moran indicated that the appropriations law office is a division within the CFO’s office largely responsible for responding to inquiries from HUD staff about potential ADA violations. According to Parker, the determination of what was allowable during the shutdown would have been made by HUD OGC, as well as the appropriations law attorneys in the CFO’s office.

<sup>68</sup> Accord U.S. Department of Housing and Urban Development, *HUD Contingency Plan for Possible Lapse in Appropriations* at 8.

<sup>69</sup> Although email evidence seems to indicate that OMB’s General Counsel was involved, Compton told the OIG that he didn’t “have a basis for . . . confirming that” this discussion involved OMB’s General Counsel.

necessary implication of such, that general disaster recovery work activities, unless there is an *imminent* threat to human life or property, is not an excepted activity. This is the conclusion notwithstanding the terms of our 2018 HUD Contingency Plan for Possible Lapse in Appropriations, as previously provided to, and reviewed by, OMB.

### 3. *Halting Review of CDBG-DR Plans During the Shutdown Caused HUD to Miss a Statutory Deadline*

PRDOH submitted an amended action plan for the second tranche of \$8.2 billion on November 16, 2018, for HUD's approval.<sup>70</sup> Based on this submission date, HUD was statutorily obligated to either approve or disapprove PRDOH's pending action plan on or before January 14, 2019.<sup>71</sup> In addition to the statutory deadline, HUD also established a 45-day deadline of December 30, 2018,<sup>72</sup> for itself to approve or disapprove PRDOH's action plan. However, OMB's guidance that HUD could not work on disaster-relief action plans during the shutdown created a dilemma for the Department, since both the statutory deadline and the self-imposed deadline occurred during the shutdown. During the initial phase of the shutdown, HUD extended this 45-day period to the statutory maximum of 60 days established by 42 U.S.C. (United States Code) § 12705(c)(1),<sup>73</sup> citing the following rationale for doing so in a December 21, 2018 waiver prepared by CPD:

There are several issues related to the action plan amendments as submitted that can be fully resolved via further discussion and revision during the extended review period provided by this waiver, rather than through HUD disapproval of the amendments which in turn would require grantees to take additional time to revise and resubmit their respective amendments. Additionally, the current review period is curtailed by several holidays and the uncertainty of a federal government shutdown . . . . This waiver will avoid a delay in the award of the CDBG-DR funds to communities that continue to recover from the hurricanes. As such, good cause is established, and the waiver is granted.

As of January 4, 2019, when Compton informed Woll about OMB's decision that HUD staff could not review disaster action plans during the shutdown, the Department had not completed its review of PRDOH's November 16, 2018 submission. This meant HUD was left with the options of (1) not taking any action, which would have resulted in automatic approval of PRDOH's action plan ten days later; or (2) taking action to waive the 60-day statutory deadline. HUD chose the third option and published a notice in the Federal Register on January 9, 2019, stating that it was waiving the 60-day deadline for review of action-plan amendments pending during the shutdown<sup>74</sup> and that former Secretary Carson would establish a new review deadline once HUD resumed normal operations.<sup>75</sup> According to the Federal Register notice, HUD took this action due to the shutdown

<sup>70</sup> Email evidence indicates that Florida submitted its action plan amendment on the same day, November 16, 2018, while the USVI submitted its action plan amendment on November 20, 2018.

<sup>71</sup> See 42 U.S.C. § 12705(c)(1) (2018).

<sup>72</sup> Other internal HUD email indicated that this 45-day review period would end on December 31, 2018. However, for ease of reading, this report references the December 30, 2018 date.

<sup>73</sup> The HUD Secretary may extend this review period upon a finding of good cause. See 24 C.F.R. § 5.110 (2019).

<sup>74</sup> See Waiver and Alternative Requirement for Community Development Block Grant—Disaster Recovery (CDBG-DR) Grantees, 84 Fed. Reg. 97, 97 (Jan. 9, 2019).

<sup>75</sup> See *id.* at 98.

and HUD’s “inability to satisfactorily complete the review and approval process” of disaster action plans.<sup>76</sup>

On February 28, 2019, HUD published another Federal Register notice, stating that it would review and respond to disaster action-plan amendments pending as of December 21, 2018, which included those submitted by Florida, the USVI, and Puerto Rico, by March 1, 2019.<sup>77</sup> According to the notice, “[t]his approach means that HUD will act upon such Action Plan amendments within 35 days of resuming operations subsequent to the appropriations lapse that ended January 26, 2019[.]”<sup>78</sup> or within a period equal to the length of the shutdown. The notice explained that this new March 1 deadline

[A]ccount[s] for days lost to the review process during the lapse but also . . . for time associated with the full resumption of regular work activities by HUD staff subsequent to the end of the lapse. This approach acknowledges not only the general complexity of the Action Plan submissions, but also the cumulative impact upon HUD staffing and operations resulting from the lapse in appropriations.<sup>79</sup>

HUD approved PRDOH’s action plan for its second tranche of funding for unmet needs on that same day - February 28, 2019.

## **Chapter 5: Delay in the Finalization of CDBG-MIT Federal Register Notice for Puerto Rico**

The CDBG-MIT program was created in February 2018 to fund “mitigation activities” that lessen the impact of future disasters. HUD implemented CDBG-MIT as a separate program. While the new program followed the same general disbursement process as with CDBG-DR funding, HUD’s issuance of allocation notices for CDBG-MIT funding deviated from what typically happens under CDBG-DR.

HUD typically sends OMB draft CDBG-DR allocation notices identifying requirements for disaster grantees shortly prior to publication in the Federal Register. However, for CDBG-MIT, OMB engaged earlier and more extensively in the development of the program. For example, OMB brought HUD and other agencies together to develop an allocation notice applicable to grantees in all 16 jurisdictions that received supplemental appropriations for disaster mitigation.<sup>80</sup> The 16 mitigation grantees and their corresponding allocations are listed in Table 2.<sup>81</sup>

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<sup>76</sup> See *id.* at 97.

<sup>77</sup> See Waiver and Alternative Requirement for Community Development Block Grant Disaster Recovery (CDBG-DR) Grantees, 84 Fed. Reg. 6813, 6814 (Feb. 28, 2019).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> CPD Official 1 noted that this interagency collaboration was between HUD, OMB, FEMA, the Small Business Administration (SBA), and the U.S. Department of Energy. Woll told the OIG that mitigation involved many agencies, including FEMA, the SBA, and the U.S. Army Corps of Engineers.

<sup>81</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees, 84 Fed. Reg. 45838, 45842 (Aug. 30, 2019); *see also* Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; U.S. Virgin Islands Allocation, 84 Fed. Reg. 47528, 47529 (Sept. 10, 2019); Allocations, Common

**Table 2: Mitigation Grantees and Allocations**

Grantee	CDBG-MIT Allocation
1. State of California	\$88,219,000
2. State of Florida	\$633,485,000
3. State of Georgia	\$26,961,000
4. State of Louisiana	\$1,213,917,000
5. State of Missouri	\$41,592,000
6. State of North Carolina	\$168,067,000
7. State of South Carolina	\$157,590,000
8. Columbia, South Carolina	\$18,585,000
9. Lexington County, South Carolina	\$15,185,000
10. Richland County, South Carolina	\$21,864,000
11. State of Texas	\$4,297,189,000
12. Houston, Texas	\$61,884,000
13. San Marcos, Texas	\$24,012,000
14. State of West Virginia	\$106,494,000
15. U.S. Virgin Islands	\$774,188,000
16. Commonwealth of Puerto Rico	\$8,285,284,000
<b>Total</b>	<b>\$15,934,516,000</b>

HUD first provided a draft of the CDBG-MIT allocation notice to OMB on November 18, 2018. Between November 2018 and July 2019, OMB and HUD staff engaged extensively about including conditions in the notice that would have presented unique challenges for Puerto Rico. Former Secretary Carson announced a May 1, 2019 target release date for the CDBG-MIT notice, which HUD missed due to unresolved disagreements with OMB and OMB’s decision to submit the notice for OIRA review. In June 2019, Congress enacted a statutory deadline of September 4, 2019, to publish the CDBG-MIT notice.

In July 2019, HUD made the decision to remove Puerto Rico and the USVI from the CDBG-MIT notice and publish separate notices applicable to these two jurisdictions. HUD published a “Main Mitigation Notice” applicable to 14 of the 16 eligible grantees on August 30, 2019,<sup>82</sup> and published the USVI mitigation notice two weeks later, on September 10, 2019.<sup>83</sup> HUD published the mitigation notice for Puerto Rico on January 27, 2020<sup>84</sup> – 23 months and 19 days after the corresponding appropriation and 146 days after the statutory deadline.

### **I. HUD’s Initial Work on the CDBG-MIT Notice and OMB’s Comments**

Public Law 115-123, enacted on February 9, 2018, made no less than \$12 billion available to disaster-relief grantees for “mitigation activities.”<sup>85</sup> As HUD explained in a subsequent Federal

Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; Commonwealth of Puerto Rico Allocation, 85 Fed. Reg. 4676, 4677 (Jan. 27, 2020).

<sup>82</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees, 84 Fed. Reg. 45838, 45842 (Aug. 30, 2019).

<sup>83</sup> See *id.* at 47528.

<sup>84</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; Commonwealth of Puerto Rico Allocation, 85 Fed. Reg. 4676, 4676 (Jan. 27, 2020).

<sup>85</sup> This mitigation funding was later increased to \$15.9 billion to support such activities because HUD calculated that it only needed \$12,030,484,000 of the \$16 billion provided for in Public Law 115-123 for unmet needs. Per statute,

Register notice, these funds are intended to help grantees “carry out strategic and high-impact activities to mitigate disaster risks and reduce future losses,” as opposed to repairing damage from the disasters that already occurred.<sup>86</sup> Congress made these funds available to the 16 grantees that received funding for unmet needs from presidentially declared disasters taking place between 2015 and 2017.<sup>87</sup> Puerto Rico was slated to receive \$8.3 billion in mitigation funds, making it the largest CDBG-MIT grantee.<sup>88</sup>

HUD designed a new standalone program for the disbursement of mitigation funds in consultation with other federal agencies.<sup>89</sup> As part of this process, HUD first had to publish a notice in the Federal Register, which allocated appropriated funds among eligible grantees, set parameters for the funds’ disbursement, and stipulated conditions to be imposed upon grantees.<sup>90</sup> The program then required grantees to submit action plans for HUD’s approval along with other requirements, such as documentation showing financial controls, procurement processes, and grant-management procedures.<sup>91</sup> Upon approval of these action plans, HUD could then enter into grant agreements, allowing grantees to obtain a line of credit for expenditures compliant with their action plans.<sup>92</sup>

Former PDAS-CPD Woll told the OIG that establishing the mitigation program required a “new Federal Register notice” that did not “look . . . like anything that’s ever been written before,” meaning HUD was “almost like starting from scratch, basically.” Several other HUD officials also noted that because the disbursement of mitigation funds was a new program for the Department, it took time for HUD to set the parameters for the program. Former DS Montgomery and Neal Rackleff, the former Assistant Secretary for CPD (AS-CPD), both told the OIG that HUD initially

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the remaining funds were to be used for mitigation activities. See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. at 104, 106; see also *HUD Awards \$28 Billion in CDBG-DR Funds*, HUD Exchange, <https://www.hudexchange.info/news/hud-awards-28-billion-in-cdbg-dr-funds/> (last visited Feb 4, 2020).

<sup>86</sup> Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees, 84 Fed. Reg. 45838, 45838 (Aug. 30, 2019).

<sup>87</sup> See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. at 104.

<sup>88</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees, 84 Fed. Reg. 45838, 45842 (Aug. 30, 2019); see also Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; U.S. Virgin Islands Allocation, 84 Fed. Reg. 45728, 47529 (Sept. 10, 2019); Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; Commonwealth of Puerto Rico Allocation, 85 Fed. Reg. 4676, 4677 (Jan. 27, 2020).

<sup>89</sup> See, e.g., 165 Cong. Rec. 164 (daily ed. Oct. 17, 2019); Oversight Hearing: The Department of Housing and Urban Development’s Community Development Block Grant-Disaster Recovery Program, House Appropriations Subcommittee, Transportation, Housing and Urban Development, and Related Agencies at 12 (October 17, 2019).

<sup>90</sup> See *id.*

<sup>91</sup> The action plan identifies “how the proposed use of all funds: (1) [m]eets the definition of mitigation activities; (2) addresses the current and future risks as identified in the grantee’s Mitigation Needs Assessment of most impacted and distressed areas . . . ; (3) will be CDBG-eligible activities under title I of the HCDA or otherwise eligible pursuant to a waiver or alternative requirement; and (4) will meet a national objective, including additional criteria for mitigation activities and Covered Projects.” Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees, 84 Fed. Reg. 45838, 45846 (Aug. 30, 2019).

<sup>92</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees, 84 Fed. Reg. 45838, 45843 (Aug. 30, 2019).

prioritized distributing funding for unmet needs over mitigation funding in an effort to help people who were in immediate need, with the expectation that HUD would turn to mitigation soon after.<sup>93</sup>

In the fall of 2018, HUD began working with OMB and other federal agencies on preparing a CDBG-MIT notice applicable to all 16 grantees, with the expectation of publishing the notice in December 2018. On November 8, 2018, HUD submitted a pre-clearance draft of this CDBG-MIT notice to OMB and other relevant agencies. FEMA provided comments on this draft on November 15, 2018, and OMB provided its comments on November 30, 2018. OMB's comments raised several overarching concerns with HUD's approach to the notice.

In interviews with the OIG, several HUD officials described a sense of disappointment within the Department upon receiving OMB's comments. Woll, for example, told the OIG that addressing OMB's comments would have required extensive redrafting, which would also alter HUD's timeframe for publishing the CDBG-MIT notice. Former DAS-GP Gimont told the OIG that OMB's comments "hit [HUD] hard" and he did not expect to receive so many comments from OMB. According to DDR-SID Parker, after meeting with OMB "multiple times and [HUD being] told we missed the mark," OMB's comments were "disappointing" to HUD. A program attorney assigned to assist with the Department's disaster-relief program (HUD Attorney) told the OIG that the message from OMB after it provided its comments was not to rush publishing a mitigation notice and not to "anticipate that [HUD is] going to need to do this before the shutdown."

Several HUD officials told the OIG that they observed a noticeable shift in OMB guidance at this point. Up until November 2018, HUD Attorney said, "everything [from OMB] was just, we're going to move so quickly," but after OMB provided comments to the draft notice, the focus appeared to move away from publishing the notice quickly and became "want[ing] to get it right." As one career CPD official (CPD Official 1) described it to the OIG, OMB's messaging had changed from pushing publication of the notice to expressing caution that mitigation "is a big new national program; we need to make sure we get it right."

## **II. HUD and OMB Worked on a Revised Version of the CDBG-MIT Notice, and HUD Set a May 1, 2019 Target Date for Its Publication**

The federal government shutdown beginning in December 2018 prevented HUD from addressing OMB's comments on the draft CDBG-MIT notice until February 2019. Evidence shows that HUD circulated a revised version of this draft notice within the Department in early March 2019. Later that month, HUD leadership set May 1, 2019, as the target date for publishing the CDBG-MIT notice.

According to DALs-OCFO Moran, the May 1 date corresponded with HUD officials' "best guess" at the time as to when the Department would be able to "resolve all the OMB issues" and publish the notice. Former Secretary Carson announced this May 1 target date at an April 2019 hearing

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<sup>93</sup> An internal HUD document likewise noted, "HUD made a conscious decision last spring to prioritize guidance on the \$12.1 billion unmet need portion of the CDBG-DR funding provided by Public Law 115-123 over the mitigation funding. This approach ensured that jurisdictions that had not previously received CDBG-DR funding in response to 2017 disasters (California, Georgia and Missouri) would receive direction on how to develop their plans, and it provided additional unmet need-funding to Puerto Rico and the US Virgin Islands."

before the House Appropriations Subcommittee.<sup>94</sup> The evidence indicates that around this same time, HUD officials were receiving increased pressure from Congress to release more funding to PRDOH, and were considering setting a 90-day deadline to publish the notice in a supplemental bill.<sup>95</sup>

The evidence shows that HUD sent OMB a revised version of the draft notice on April 2, 2019, and that HUD and OMB officials discussed ideas to strengthen its enforcement provisions in late March and early to mid-April 2019. In late April 2019, OMB officials reacted to the draft by encouraging HUD to retain the ability to disapprove of specific mitigation-related activities by inserting “line item veto” language into the notice. This language would allow “HUD to disapprove of a particular project or activity, or issue subsequent notices for specific grantees based on unique risks.”

CPD Official 1 saw this request as OMB’s providing “policy prescriptions” that did not “really fit within the framework of a block grant program.” “[T]he opportunity for HUD to say no to this water line or yes,” this official explained, “is not a business that we’re in or necessarily I think want to be in.” HUD Attorney similarly told the OIG that “at the end of the day . . . this is a block grant program and the grantees are the ones that get to decide what projects they want to fund.” “[I]n fact,” HUD Attorney said, “when you look at the legislative history . . . there was . . . a statutory move away from programs where HUD could approve individual projects to block grants.”

To address OMB’s recommendations, HUD officials prepared a document, titled “HUD Actions to Increase Oversight and Strengthen Control of CDBG-MIT Funding,” which described controls being established through the CDBG-MIT notice and other controls to be implemented through grant conditions,<sup>96</sup> while at the same time clarifying certain limitations on HUD’s authority to manage grantee expenditures. Evidence from the spring 2019 timeframe indicates that HUD officials began to express concerns among themselves about OMB “slow roll[ing]” the Department and questioned whether OMB had the authority to prevent HUD from publishing its mitigation notice.

On April 26, 2019, five days before HUD’s declared May 1 publication date, Woll circulated written comments on the draft CDBG-MIT notice provided to him that day by a senior political official at OMB. Gimont characterized these comments as “extensive” and requiring a number of structural reforms for grantees to implement as a prerequisite to accessing mitigation funds. OMB’s proposed structural reforms are summarized in Table 3 below.<sup>97</sup>

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<sup>94</sup> See Oversight Hearing: U.S. Housing and Urban Development Secretary Benjamin S. Carson, Sr. Testimony before House Committee on Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related Agencies at 232, 242 (Apr. 3, 2019), available at <https://www.govinfo.gov/content/pkg/CHRG-116hhrg37628/pdf/CHRG-116hhrg37628.pdf> (last visited March 19, 2020).

<sup>95</sup> Montgomery stated that that after the shutdown, Congress began to pressure HUD to release these funds.

<sup>96</sup> This document noted that HUD estimated a mitigation grant agreement would not be executed before August 2019, to provide time to “hone triggers and grant conditions.”

<sup>97</sup> OMB’s comments also sought to impose other conditions on grantees, including, for example, (1) prioritization of high-impact investments; (2) monitoring requirements, including the issuance of noncompliance remedies; and (3) a new requirement for grantees to submit a “hazard mitigation plan” to FEMA.

**Table 3: OMB’s Proposed Structural Reforms**

<b>Proposed OMB Structural Reform</b>	<b>Description of Proposed OMB Structural Reform</b>
<b>Property Management</b>	Grantee must establish systems for effective property management (including progress on Puerto Rico’s addresses, property database, real property assessments, and title clearance). <sup>98</sup>
<b>Revenue Maintenance</b>	Grantee must establish systems that enforce regular revenue maintenance requirements and fee collection (including regular update of property assessments, property tax collection, and actual enforcement of property tax laws). <sup>99</sup>
<b>Permitting, Enforcement, and Inspection</b>	Grantee must establish functional permitting, code enforcement, and inspection systems.
<b>Cost Reasonableness</b>	Grantee must demonstrate cost reasonableness by reducing unnecessary and excessive overhead costs (e.g., minimum wage on Federal contracts, Christmas bonuses).
<b>Timely Payments</b>	Grantee must document how it will ensure that contracts and other bills that require payment will be paid in a timely manner.

The evidence shows that HUD officials reacted with frustration to OMB’s written comments on the revised CDBG-MIT notice. For example, Montgomery wrote in an April 26, 2019 email to former GC Compton, Woll, former AS-CIR Wolfson, former CoS Hughes, and several other senior HUD officials: “How many poison pills are in here? . . . [W]e are not delaying the notice. Secretary has said May 1 for several months and that is our deadline.” In a subsequent email that day, Montgomery questioned who would determine grantee compliance with the criteria and whether the Department had the authority to enforce such requirements.

During his OIG interview, Montgomery said he characterized OMB’s revisions as containing “poison pills” because they would impose unworkable criteria and he was not sure it was “even legal” to insist upon grantees meeting the conditions as a prerequisite to receiving mitigation funding. For example, Montgomery said he did not believe that HUD could coerce Puerto Rico to fix its property-tax system to receive mitigation funding because the property-tax system was not related to mitigation activities. He also indicated that HUD did not put these types of conditions on other disaster-recovery grantees. Compton similarly told the OIG that some of OMB’s suggested conditions, which in his opinion were perhaps well-intended, may have been beyond HUD’s legal authority to impose.

HUD Attorney received approval to work over the weekend on OMB’s comments and stated HUD was “under a tight timeline.” HUD Attorney explained that HUD officials flagged as many legal issues as they could and identified issues requiring additional research. HUD Attorney also noted that the Department flagged policy questions as well. HUD worked under this tight deadline and transmitted a memorandum to OMB on April 29, 2019, containing its response to OMB’s

<sup>98</sup> HUD officials noted that Puerto Rico’s housing stock was “informal” (e.g., a lack of clear property titles) and cited problems with Puerto Rico’s underlying data for its property address system.

<sup>99</sup> Rackleff cited problems with Puerto Rico’s tax system, including that Puerto Rico was not consistently collecting property taxes and that Puerto Rico had not reappraised properties for tax collection purposes in a long time.

comments. HUD’s response expressed several legal concerns with the comments, which are summarized in Table 4.<sup>100</sup>

**Table 4: HUD’s Legal Concerns to OMB Comments on Mitigation Notice**

HUD Concern	Description of HUD Concern
<b>HUD’s Power to Issue Requirements Limited to the Authority Delegated by Congress</b>	<p>“As a general matter . . . there must be a reasonable relationship between the HUD imposed condition or requirement for obtaining access to funds and the effective administration of disbursement and use, within the confines of the statutory authority, of the funds.</p> <p>In particular, waivers and alternative requirements must be for good cause and must be not inconsistent with the purposes of title I [of the HCDA].”</p>
<b>10th Amendment Federalism Concerns</b>	<p>“In this regard, there are 10th amendment federalism concerns regarding grants to states. Conditions on the use of Federal grant funds must be related to the purpose of the funds, clear and unambiguous, and not coercive. <i>See South Dakota v. Dole</i>, 483 U.S. 203, 207 (1987). While the 10th amendment does not afford the same protections to Puerto Rico as it does to CDBG-MIT grantees that are states, <i>see United States v. Lebrón-Caceres</i>, 157 F. Supp. 3d 80, 82 (2016) (territorial governments are a creation of Congress and owe their powers to the statutes of the United States) . . . Puerto Rico and the United States Virgin Islands are defined as a ‘state’ under title I of the HCD Act. Thus, the discussions herein are equally applicable to all jurisdictions. . . .”</p>
<b>The Impoundment Control Act<sup>101</sup></b>	<p>“Particularly when considered as a collection of requirements, the structural reform requirements also raise issues under the Impoundment Control Act (ICA). To the extent the structural reform requirements, as implemented, cause substantial difficulty or delay in accessing funds, the basis for the conditions is likely to be more closely scrutinized under the principles set forth above. More fundamentally, undue delay in disbursing appropriated funds may result in a determination of ‘impoundment’ . . . . It should be noted that HUD staff are unaware of any deferral or rescission requests related to the mitigation funds appropriated by Public Law 115-123. If funds are delayed beyond ordinary processing timelines or subjected to unusual conditions or requirements, the question of impoundment may arise, either in a litigation or political context.”</p>

The memorandum also identified HUD’s concerns regarding structural changes that OMB wanted grant recipients to make before receiving funds, which are described in more detail in Table 5.

<sup>100</sup> In response to a draft version of this report, HUD asserted that certain portions of the memorandum that the OIG had initially quoted in Table 4 should not be disclosed subject to legal privileges or protections available to the Department. The OIG removed those portions from the version of Table 4 that appears in this final report.

<sup>101</sup> The OIG also observed some internal HUD emails about the issue of impoundment around this timeframe.

**Table 5: HUD’s Concerns to OMB’s Structural Comments on Mitigation Notice**

OMB Structural Reform	Excerpts of HUD Concerns
<b>Property Management</b>	<p>“Most HUD programs <u>do not</u> require proof of ownership but instead are targeted merely to ‘occupants[.]’ See HCDA 105(a)(4) (42 U.S.C. Sec. 5305 (a)(4)) and 24 CFR 570.208(a)(3). This weakens the relationship to requirements for a property management system. In contrast, FEMA does often look to ownership.”<sup>102</sup></p> <p>“Property tax assessments clearly would appear to be outside the reasonable relationship to grant administration.”</p>
<b>Revenue Maintenance</b>	<p>“Insofar as tax matters are legislative in nature, HUD would generally have no authority to impose statutory changes as a precondition to funding. Congress has previously directed HUD, across a range of issues, not to mandate local law changes as a condition to making grants.” (Citation omitted).</p>
<b>Permitting, Enforcement and Inspection</b>	<p>“HUD would have no authority to impose requirements outside of projects using grant funds. We also note that many jurisdictions would be found to have significant deficiencies in this area if standards were consistently applied. HUD currently has no available means of specifically assessing this or resource capacity to do so. Instead, HUD’s current financial certification requirements are based on uniform federal administrative requirements.”</p>
<b>Cost Reasonableness</b>	<p>“OMB regulations at 2 CFR 200.420 through 200.475 address cost reasonableness in significant detail.”</p> <p>“The appropriations act specifically prohibits HUD from establishing alternative requirements to federal labor standards. Insofar as Federally imposed Davis-Bacon wage rates are the principal driver of additional labor costs with respect to Federal grants, focusing on locally imposed minimum wage rates may have relatively little impact, particularly in the construction area, and raises a potentially potent public policy paradox.”</p> <p>“HUD has no statutory authority to apply remedies against the personnel of a grantee except in cases of fraud, waste and abuse. Principles of federalism . . . would also impede such action. Further, applying discipline against grantee employees . . . would likely be deemed an indirect violation of the express restrictions against waivers of labor law provisions.”</p>
<b>Timely Payments</b>	<p>“There seems to be little proximate relationship between these factors [ensuring that contracts and bills will be paid in a timely manner], especially given the difficult of measuring this. Further, this objective seems to be at cross-purposes with other provisions aimed at ensuring all payments to vendors are thoroughly reviewed and vetted. It seems highly likely that if requirements were imposed in this area, it would result in cross-claims against the federal government for delays in disbursing grant funds.”</p>

In interviews with the OIG, several HUD officials, including Hughes, Woll, and Gimont, recalled conversations with senior political OMB officials regarding the issues framed in HUD’s April 29, 2019 response memorandum. Woll noted that these discussions with OMB centered on the potential nexus between OMB’s proposed conditions and the mitigation funds at issue and the potential for financial mismanagement and waste.

<sup>102</sup> Emphasis in original.

Woll told the OIG he thought a few of the disagreements between OMB and HUD may have been resolved during the late-April 2019 timeframe. Several other HUD officials recalled an ongoing lack of agreement between HUD and OMB at this time. Despite the ongoing disagreements, HUD prepared to issue the CDBG-MIT notice on May 1, 2019. According to several HUD officials whom the OIG interviewed, HUD considered the CDBG-MIT notice a “done document” that was ready to be published by the end of April 2019, even though there had not been a complete “meeting of the minds” between HUD and OMB regarding the notice.

Montgomery told the OIG he believed HUD would publish the notice on or before the May 1 deadline even if the Department had not fully resolved OMB’s comments. Montgomery told the OIG he was not sure of HUD’s legal authority to publish the notice without fully resolving the OMB comments but noted that there was a belief within the Department that this was permissible because HUD’s Secretary “outranks” the Acting OMB Director. Compton similarly recalled advising former Secretary Carson during this timeframe that he could issue the notice without OMB’s approval.

On April 29, 2019, former OIRA Administrator Ray informed Compton that, pursuant to Executive Order 12866, OIRA required review of HUD’s proposed CDBG-MIT notice. Contemporaneous emails indicate that the plan within the Department at that time remained for former Secretary Carson to sign the CDBG-MIT notice on May 1, 2019. The evidence indicates that Gimont met with former Secretary Carson and presented the notice to him for signature and publication in the Federal Register on that date but he did not sign the notice. On May 1, 2019, HUD submitted the CDBG-MIT notice to OIRA for review, as opposed to publishing the notice on that date as the Department had intended.

### **III. OMB’s Initiation of the OIRA Process Prevented HUD from Publishing the CDBG-MIT Notice by Its May 1, 2019 Target Date**

As described in Chapter 2, OIRA reviews are “significant regulatory actions” by federal agencies pursuant to Executive Order 12866.<sup>103</sup> HUD Attorney explained that OMB determines what items are sent for OIRA review. In support of this determination, Aaron Santa Anna, then Acting Associate General Counsel for the Office of Legislation and Regulations, explained that HUD develops a semiannual agenda of regulations and a list of rulemakings potentially subject to OIRA review, but this official noted that this process does not generally include CDBG-DR notices. As CDBG-DR notices do not normally go through the OIRA process, Santa Anna explained that the Department had not discussed CDBG-DR notices with the OMB desk officer prior to OMB’s decision to put the CDBG-MIT notice through OIRA.

Once an OIRA review is initiated, an agency cannot publish in the Federal Register or otherwise issue the regulatory action under review until the agency receives notification that (1) OIRA has waived its review, (2) the review is complete, or (3) the OIRA 90-day review period has expired.<sup>104</sup>

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<sup>103</sup> Executive Order (EO) 12866 § 6(b)(1). The EO notes that “[c]oordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency.” *Id.* § 2(b), 58 Fed. Reg. 51735 (Oct. 4, 1993).

<sup>104</sup> *See id.* §§ 6(b)(2)(B), 8. If the agency wants to publish a regulatory action before the OIRA process concludes, it may request Presidential consideration, and “disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or

While under review, OIRA solicits comments from federal agencies with a potential interest in the proposed regulatory action. OIRA collates the comments it receives and sends them to the agency proposing the action, to which the agency responds in writing. According to a HUD official knowledgeable about the OIRA process, once OIRA receives this response, it may and often does require a second round of comments or otherwise request additional information from the affected agency. At the end of the process, OIRA either “approves” the proposed regulatory action by concluding its review or returns the matter to the agency for further consideration.

OMB required HUD’s CDBG-MIT notice to undergo OIRA review just prior to its May 1, 2019 target date for publication. In an April 30, 2019 email, Compton wrote the following to Ray:

I understand from our conversation yesterday that OIRA requires, pursuant to Executive Order 12866, review of HUD’s proposed CDBG-DR mitigation notice (FR-6109-N-01) under Public Law 115-123. Please confirm that direction to HUD and let me know how you would like us to transmit the grant notice for your review. . . . In addition, I would appreciate your analysis, for future reference, of how this notice falls under EO 12866, in particular the “general applicability” provision. We note that historically grant solicitations categorically have not been deemed “significant guidance documents[.]”

The evidence shows that Compton had a call with Ray to discuss why OMB decided that this notice would be subject to OIRA in early May 2019. According to Compton, this call was for his “edification” and included a general discussion about when something would be considered significant guidance, noting that “much of this conversation was actually not in the context of the mitigation notices.” However, Compton would not answer the OIG’s questions about what was discussed, specifically based upon an assertion of executive privilege. We attempted to interview Ray in this review and later provided written questions to OMB about this particular conversation in lieu of an interview. As noted in Chapter 1, OMB did not provide answers to our written questions.

Montgomery told the OIG that work on the CDBG-MIT notice stopped because of OMB’s decision to submit it for OIRA review. HUD “had to [stop] at that point,” Montgomery explained, because “we’d be wasting our time trying to put the notice out if it’s sitting in OIRA. That would have been some sort of process foul at that point.” Compton similarly explained that the OIRA review “had a significant impact” on HUD’s ability to publish the notice because such a review has “the force of the Office of the President behind it.” Woll likewise noted that it would have been “a big deal” for HUD to violate an executive order by publishing the CDBG-MIT notice while it was under OIRA review.<sup>105</sup> Woll also noted that phone calls between OMB and HUD “dropped off significantly” once the OIRA review commenced.

Several HUD officials told the OIG that they were surprised that the CDBG-MIT notice had to undergo OIRA review, noting that similar disaster-related notices had not been subject to such review before. For example, Compton told the OIG that this “was a break from past practice.” The

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by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials).” *Id.* § 7.

<sup>105</sup> However, Wolfson recalled that the option to publish the notice despite the OIRA review was “floated” but said he did not recall anyone pushing for that option or seriously considering contesting OMB’s authority.

evidence shows HUD OGC attorneys researched the issue and notified Compton that there was “no record of OIRA ever having reviewed a DR notice under EO 12866.” According to CFO Official 1, OIRA had not previously been “used in this way.” HUD Attorney was “shocked” by OMB’s decision to require OIRA review of the CDBG-MIT notice, saying it was “unheard of” for a disaster-related notice and noted that HUD officials questioned whether the notice truly “qualified” for OIRA review.

In an email to other senior HUD officials, Montgomery described the initiation of the OIRA review as “unfortunate.” Compton told the OIG that HUD advocated against OIRA review because it did not want to set a precedent that disaster-relief notices must undergo such review as “our experience generally with OIRA is that it adds more time.” Senior CPD officials also expressed concerns in their OIG interviews that the OIRA process would cause additional delay.

The evidence indicates that HUD officials continued to feel a sense of urgency to publish the Main Mitigation Notice while it remained under OIRA review. For example, in a May 9, 2019 email, Hughes reminded HUD employees that, “[a]s the Secretary has indicated repeatedly, [i]t is very important to get this notice out. I know this is not at HUD, but do we have an update on when it will be released?” At least one HUD official had a positive view of OIRA’s review of the notice. During his OIG interview, Woll said the OIRA review period provided HUD with an “opportunity to make our arguments without being under the gun, because we’re already within the May 1 deadline. . . . We could . . . hopefully reach some compromise on provisions and that those provisions would be cleared by all lawyers on both sides.”

On May 15, 2019, OIRA provided HUD with its comments on the CDBG-MIT notice, which substantially resembled OMB’s April 26, 2019 comments on the notice.<sup>106</sup> In an email sent the next day, CPD Official 1 wrote, “Much of this certainly looks familiar from our last OMB go-around.” Other HUD assessments of OIRA’s comments at the time reached similar conclusions, with one internal HUD document characterizing the comments as “recycled from OMB discussions at [the] end of April with understanding that OMB apparently did not accept HUD’s edits as provided at that time.” Another such assessment stated, “[T]he OIRA process has not yielded any previously unknown comments. The central issue remains the comments submitted by OMB to HUD on April 26 and to which we responded on April 29. OMB has effectively resubmitted those comments to HUD through the OIRA process . . . .”

Gimont said he viewed OIRA’s comments as “kind of like Groundhog Day, just keeps coming back. And that’s . . . where your frustration will set in. . . . It’s almost like we’re going to keep bringing this back to you until you just eat it.” HUD Attorney similarly said that HUD received “the same comments from OMB through the OIRA review . . . It was as if they just ignored” HUD’s initial response to OMB’s comments. This official’s perception was that OIRA’s

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<sup>106</sup> Santa Anna noted that according to an OMB official, HUD officials “may have seen some of the comments in the narrative comments but OIRA ‘wanted to send again as [they didn’t] think they were resolved.’” Other agencies provided comments during the OIRA process, *e.g.*, FEMA, the National Security Council, and the United States Environmental Protection Agency. The OIG observed some frustration among HUD officials regarding the comments received from other agencies. For example, Woll stated, “FEMA and SBA had comments [to the OIRA process] which we found humorous because we’ve gone back and forth with them like 20 times. A little frustrating, frankly.” Woll also noted that FEMA was, in his view, “taking the second bite of the apple, which I thought was kind of funny, that they were – weren’t letting some things go.” CPD Official 1 further noted, “[T]hat was kind of interesting to have other agencies that . . . also aren’t that familiar with our notices sort of weighing in and commenting on - . . . the notices themselves.”

comments made it seem as though OMB had deemed HUD “unresponsive” because HUD had not given OMB the policy outcome it wanted.

The evidence shows that HUD leadership raised these concerns during a call with several of OMB’s most senior officials.<sup>107</sup> Montgomery told the OIG that he, former Secretary Carson, Compton, and possibly Woll, participated in this call for the Department. Montgomery recalled telling former OMB Director Vought during the call that OMB’s actions were tantamount to holding disaster-relief funds “hostage.” Montgomery said that Vought “took exception to that comment” but would not tell the OIG what Vought said based upon an assertion of executive privilege.

When asked what he meant by the “hostage” statement, Montgomery told the OIG that “these demands they were putting on us . . . had never been done. It slowed down the flow, the process to get the notice out.” Montgomery also said he believed his statement reflected a generally shared sentiment within HUD at the time. We attempted to interview Vought in this review and later provided written questions to OMB about this particular conversation in lieu of an interview. As noted in Chapter 1, OMB did not provide answers to our written questions.

The evidence indicates that several senior HUD officials participated in another conference call with OMB officials soon after OIRA sent HUD its comments on the CDBG-MIT notice. During her OIG interview, Parker recalled that this call occurred on May 16, 2019, and that Compton raised the specific concern that the conditions OMB wished to impose on grantees through its comments on the CDBG-MIT notice could amount to “impoundment” of the funds.<sup>108</sup> However, during his OIG interview Compton could not recall a specific discussion with OMB wherein he raised concerns about impoundment.

According to Parker, OMB officials responded to HUD’s impoundment concerns by conveying their belief “that this action [was] well within their authorities and it kind of end[ed] there. Pretty starkly ends there but it ends.” CPD Official 1 similarly remembered OMB’s OGC saying, “don’t worry about it . . . we think we’re fine” and that there was no legal basis for impoundment concerns. Although Compton did not recall a specific discussion with OMB wherein he raised concerns about impoundment, he did recall learning at some point “that OMB’s view was that because DR funds are so called no-year funds that the ordinary principles of impoundment would not be applicative.” Compton said HUD was ultimately deferential to OMB’s position on the question of impoundment.

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<sup>107</sup> Montgomery, through his attorney, told the OIG that he believed this call occurred on April 23 or May 16, 2019.

<sup>108</sup> On February 7, 2020, we received a request from Senators Elizabeth Warren, Edward Markey, Richard Blumenthal, Bernard Sanders, and Chris Van Hollen and Representatives Joaquin Castro, Darren Soto, Alexandria Ocasio-Cortez, James P. McGovern, Raul Grijvala, and Jose Serrano, asking the OIG to conduct an inquiry into whether delays in HUD’s release of the disaster-recovery funds appropriated for Puerto Rico violated the *Impoundment Control Act of 1974* (ICA). As stated in our response, our work in this review developed evidence that could be relevant to an analysis of whether a potential impoundment occurred. However, because the ICA provides the Comptroller General with exclusive authority to determine whether a violation of the ICA occurred, we do not analyze or take a position on a potential ICA violation in this report.

As HUD worked on responding to OIRA's May 15, 2019 comments, Congress enacted a law on June 6, 2019, that required HUD to publish a Federal Register notice allocating mitigation funding to all mitigation grantees on or before September 4, 2019.<sup>109</sup>

Montgomery told the OIG that he believed that the general sentiment shared by senior HUD staff members at this time was that efforts to deliver mitigation funding were unnecessarily delayed by bureaucratic obstacles. Compton told the OIG that the Department was faced with "competing tensions between the authority of the Secretary with respect to [disaster-recovery] matters generally and Congress's [September 4] deadline on the one hand, and the import of Executive Order 12866 on the other hand." He added that he did not think HUD OGC ever "conclusively resolved those" tensions and said, "I don't know that they can be conclusively resolved." Woll told the OIG that HUD leadership concluded that they needed "to re-double our efforts to negotiate this thing through OMB." The Department eventually submitted its response to OIRA's comments on July 2, 2019.

#### **IV. HUD Decided to Publish a Mitigation Notice for Other Jurisdictions Several Months before a Separate Notice for Puerto Rico**

OMB began advocating as early as March 2019 for HUD to issue separate mitigation notices for different grantees so that "the process for grantees with better capacity and preparedness to handle this funding" was not held up. According to Santa Anna, "a discussion" took place between OMB and HUD during the spring of 2019 regarding "whether or not we could redraft the notice to exclude Puerto Rico and USVI and to allow monies to flow to the other states."

HUD officials initially resisted OMB's suggestion to publish separate notices for different grantees. As CPD Official 1 told the OIG, HUD leadership "hung pretty tough" on its position of including both Puerto Rico and the USVI in a notice applicable to all other grantees. Gimont explained that HUD made the argument that the appropriation requires that grantees be treated with the same terms and conditions and "if you're cutting somebody out and putting them in a different basket, [are they subject to the] same terms and conditions?" HUD Attorney further explained that HUD could impose terms and conditions on a grantee through the grant agreement and use enforcement tools to address grantee-level risk.

On May 1, 2019, HUD OGC career attorneys sent a draft memorandum to Compton regarding the imposition of different requirements on grantees.<sup>110</sup> During his OIG interview, Compton noted that this document was not final and asserted that its contents did not necessarily reflect the opinion of HUD OGC. Compton could not recall whether HUD OGC made revisions to or finalized this memorandum but pointed out that HUD ultimately determined that it could issue different notices. When asked if he could recall discussion within HUD OGC about altering the analysis found in the May 1, 2019 memorandum, Compton responded, "Yeah, because we reached a different . . . conclusion." Compton was unable, however, to provide any specific detail on why or

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<sup>109</sup> Public Law 116-20 states that "the Secretary shall publish in the Federal Register the allocations to all eligible grantees, and the necessary administrative requirements applicable to such allocations within 90 days after enactment of this Act[]." Additional Supplemental Appropriations for Disaster Relief Act, 2019, Pub. L. No. 116-20, 133 Stat. 871, 900 (2019). This appropriation also provided an additional \$331 million to address unmet needs for Puerto Rico and the USVI. *See id.* at 896.

<sup>110</sup> In response to a draft version of this report that quoted certain portions of this memorandum, HUD asserted that those portions should not be disclosed pursuant to legal privileges or protections available to the Department. The OIG removed these quoted portions of the memorandum from the final version of this report.

how HUD OGC would have reached this different conclusion, and the OIG did not locate any revised or subsequent versions of this memorandum.

HUD ultimately relented on its resistance to separate notices for CDBG-MIT grantees by mid-summer 2019.<sup>111</sup> HUD Attorney believed the Department justified including grantee-specific conditions in the notices based on the reasoning that HUD had regulatory authority to include special conditions in the grant agreement and, thus, the notices “are basically statements of conditions which will go into the grant [agreement].” Woll and former AS-CIR Wolfson told the OIG and contemporaneous emails confirm that former Secretary Carson made the decision to issue separate notices after consultation with former OMB Director Russell Vought. On August 2, 2019,<sup>112</sup> HUD issued a press release acknowledging that it would be publishing separate notices:

Recovery efforts in jurisdictions prepared to do their part should not be held back due to alleged corruption, fiscal irregularities and financial mismanagement occurring in Puerto Rico and capacity issues in the U.S. Virgin Islands, which is why HUD will award disaster mitigation funds in two separate tranches . . . .<sup>113</sup>

HUD officials cited several justifications for the Department’s decision to issue separate notices. For example, Montgomery justified this decision during his interview with the OIG by explaining that Puerto Rico was going through a period of political turmoil at the time, which included (1) the indictment of a cabinet secretary and another high-ranking government official for procurement fraud, (2) widespread protests, and (3) a change of gubernatorial administrations. An internal HUD document from this period similarly discussed concerns about corruption, prior mismanagement, political unrest, uncertainty, and capacity issues as justification for separating out Puerto Rico and the USVI.

Woll told the OIG that HUD ultimately decided to issue separate notices in part because of considerable pressure it was receiving from other grantees to publish a notice applicable to them and the Department’s desire not to delay relief to other jurisdictions because of the risk level in Puerto Rico and the USVI. Other HUD officials, including Montgomery, cited concerns about HUD not meeting the September 4, 2019 statutory deadline for any grantees as justification for issuing separate notices.

Several senior HUD officials, including Montgomery and Compton, also stated that OIG oversight work factored into HUD’s decision. Specifically, these officials referenced the fact that the OIG informed them in July 2019 of ongoing oversight activities in Puerto Rico.

Montgomery said that after HUD leadership became aware of these activities, it was “hard to go forward” with issuing the notice for Puerto Rico, not knowing the extent of what the OIG oversight activities might uncover.

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<sup>111</sup> During this timeframe, HUD officials also discussed the idea of a Federal Financial Monitor “to review and monitor” the flow of funds in real-time in Puerto Rico to ensure controls were in place at the grantee and sub-grantee level.

<sup>112</sup> On this same day, HUD also issued a press release about the Federal Financial Monitor. The Secretary said the Federal Financial Monitor was the result of the Puerto Rican government’s “alleged corruption, fiscal irregularities and mismanagement.” HUD Public Affairs, *HUD to Release Mitigation Funds in Two Tranches*, HUD.gov, [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_19\\_115](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_115) (last visited Feb. 5, 2020)

<sup>113</sup> *Id.*

The evidence shows that HUD employees worked on finalizing a “Main Mitigation Notice” applicable to 14 grantees and separate notices for the USVI and Puerto Rico during the summer of 2019. OIRA completed its review of the Main Mitigation Notice on August 22, 2019,<sup>114</sup> and HUD published this notice in the Federal Register on August 30, 2019.<sup>115</sup>

The Main Mitigation Notice allocated \$6.875 billion in mitigation funds to 14 states and local governments and stated that Puerto Rico and the USVI would be governed by subsequent notices.<sup>116</sup> The Main Mitigation Notice also stated HUD’s intent “to establish special grant conditions for individual CDBG-MIT grants based upon the risks posed by the grantee.”<sup>117</sup> CPD Official 1 told the OIG that one positive development resulting from the OIRA process was enhanced oversight and controls in the final Main Mitigation Notice (*e.g.*, controls related to financial certification and expectations for grantees and how they were going to oversee their subrecipients). This was so, CPD Official 1 explained, because even though some conditions contained in the Main Mitigation Notice resulted from concerns specific to Puerto Rico and the USVI, OMB did not ask HUD to “dial back” these controls before publication of the Main Mitigation Notice.

Woll told the OIG that HUD next prioritized finalizing and publishing a notice for the USVI over Puerto Rico because it did not seem likely that HUD would be able to meet the September 4, 2019 statutory deadline for both grantees given concerns specific to Puerto Rico.<sup>118</sup> A USVI notice, dated September 4, 2019, was published in the Federal Register on September 10, 2019, incorporating terms from the Main Mitigation Notice along with certain additional conditions and allocating \$774,188,000 in funding to this grantee.<sup>119</sup> These additional conditions included, among others, (1) requiring a Staff Analysis Worksheet detailing staff and contractors, (2) increasing requirements for citizen engagement, (3) requiring enhanced policies and procedures, and (4) requiring support documentation for drawdown requests.<sup>120</sup>

The USVI notice did not go through formal OIRA review. Evidence indicates that HUD did not have any record that the document was approved by OMB or whether OIRA wanted to call it in

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<sup>114</sup> The OIRA review started on May 2, 2019, and ended on August 22, 2019, lasting 112 days, or 22 days past the 90-day OIRA review timeframe. However, Executive Order 12866 states, “The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.” Exec. Order No. 12866 § 6(b)(2)(C), 58 Fed. Reg. 51735 (Oct. 4, 1993); *see also Historical Reports*, Office of Information and Regulatory Affairs RegInfo.gov, <https://www.reginfo.gov/public/do/eoHistoricReport> (last visited June 3, 2020).

<sup>115</sup> *See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees*, 84 Fed. Reg. 45838, 45838 (Aug. 30, 2019).

<sup>116</sup> *See id.* at 45838.

<sup>117</sup> *Id.* at 45839.

<sup>118</sup> Further, in mid-August, there was an internal HUD email about the potential litigation risk if the statutory deadline was not met. Additionally, an August 23, 2019 email showed that HUD’s “best case scenario” for publishing the Puerto Rico mitigation notice was after the September 4 deadline.

<sup>119</sup> *See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; U.S. Virgin Islands Allocation*, 84 Fed. Reg. 47528, 47528-47531 (Sept. 10, 2019). One interviewee noted that USVI suffered some “collateral damage” (*i.e.*, delays in notice publication and/or enhanced conditions) as a result of it being lumped together with Puerto Rico. However, Woll noted some capacity concerns in USVI that may have warranted HUD’s efforts.

<sup>120</sup> *See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; U.S. Virgin Islands Allocation*, 84 Fed. Reg. 47528, 47528-47531 (Sept. 10, 2019).

for review. A review of OIRA’s website likewise indicated that this notice did not appear to go through another round of OIRA review.<sup>121</sup> Montgomery recalled that HUD made OMB aware of the Department’s intent to publish the USVI notice and that the notice went through a very brief two-hour OMB review.

HUD published a mitigation notice for Puerto Rico on January 27, 2020,<sup>122</sup> missing the September 4, 2019 statutory deadline by 145 days.<sup>123</sup> During his interview, Montgomery told the OIG that HUD did not miss this statutory deadline “cavalierly.” Compton justified this delay during his OIG interview by saying HUD officials had to decide whether it was worse to miss the congressional deadline or release the funds and face congressional inquiries related to fraud, waste, and abuse at a future time and ultimately determined that the latter would be worse. Woll similarly stated in an October 2019 House Appropriations Subcommittee oversight hearing that “[o]ur choice quite simply was whether to . . . explain why we did not meet the deadline, but hopefully safeguarded the funds or . . . explain why we released billions of dollars that were wasted and never reached the people of Puerto Rico.”<sup>124</sup>

Several HUD officials cited the same concerns with Puerto Rico’s financial issues and political turmoil that contributed to the decision to split it from the Main Mitigation Notice as reasons for delaying publication of the Puerto Rico notice until after publication of the USVI notice.

Other HUD officials also cited the OIG’s pending audit and oversight activities related to Puerto Rico as justification for missing the statutory deadline,<sup>125</sup> including Montgomery, who stated, “[i]n the eleventh hour, again, it was more just . . . a series of the events of what was going on down there and then [the OIG] making us aware of [oversight activities] and the audits. . . . That kind of tipped the scale for me.”

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<sup>121</sup> See *Historical Reports*, Office of Information and Regulatory Affairs RegInfo.gov, <https://www.reginfo.gov/public/do/eoHistoricReport> (last visited June 3, 2020).

<sup>122</sup> See *Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; Commonwealth of Puerto Rico Allocation*, 85 Fed. Reg. 4676, 4676 (Jan. 27, 2020). On September 30, 2019, OMB sent HUD an apportionment schedule apportioning the disaster recovery funds in quarters. Under this apportionment schedule, the already-obligated funding for unmet needs constituted the only funds available to Puerto Rico during the first quarter of FY 2020, meaning October, November, and December 2019. The remaining funding for unmet needs and mitigation appropriated in Public Law 115-123 were not available until the second quarter of FY 2020, starting in January 2020.

<sup>123</sup> There was a provision in the 2020 Appropriations Bill stating that that no money could be spent on HUD’s finance transformation until the Mitigation Notice was published. See *Further Consolidated Appropriations Act, 2020*, H.R. 1865, 116th Congress (2019).

<sup>124</sup> See 165 Cong. Rec. 164 at 8 (daily ed. Oct. 17, 2019) (Oversight Hearing: The Department of Housing and Urban Development’s Community Development Block Grant-Disaster Recovery Program, House Appropriations Subcommittee, Transportation, Housing and Urban Development, and Related Agencies).

<sup>125</sup> See U.S. Department of Housing and Urban Development Office of Inspector General, 2020-AT-1002, *Puerto Rico Department of Housing, San Juan, PR: Office of Community Planning and Development, Community Development Block Grant Disaster Recovery* (Mar. 2020). HUD OIG’s former Counsel to the Inspector General testified that this audit found “typical findings that [HUD] would find with a new grantee” and that PRDOH should improve financial controls, develop processes to prevent duplication of benefits, improve procurement controls, and continue to increase staffing. See 165 Cong. Rec. 164 at 41-42 (daily ed. Oct. 17, 2019) (Oversight Hearing: The Department of Housing and Urban Development’s Community Development Block Grant-Disaster Recovery Program, House Appropriations Subcommittee, Transportation, Housing and Urban Development, and Related Agencies).

Discussions with OMB also contributed to HUD missing the September 4, 2019 deadline. Compton told the OIG that OIRA advised the Department that it intended to review HUD's Puerto Rico mitigation notice and that HUD was not authorized to publish this notice until OIRA approved it. Woll also told the OIG that, as of September 4, 2019, HUD and OMB "hadn't resolved the same issues" with respect to Puerto Rico "that we've been . . . debating."

HUD officials told the OIG that the Department made significant progress with OMB on a number of conditions related to Puerto Rico during October and November 2019. Wolfson recalled that HUD addressed a number of OMB's proposed conditions, including the wage issue, bonuses, and Puerto Rico's land-record system, during this time period. According to Compton, HUD came to believe it had authority to impose certain conditions that OMB wanted, while OMB dropped other conditions because HUD convinced OMB that it lacked authority to impose them.

OMB ultimately decided not to subject the Puerto Rico mitigation notice to additional OIRA review, because OIRA reportedly determined that it was "substantially similar" to the other notices, except for the special conditions, which had been independently reviewed and approved by OMB. As a result, HUD was finally able to publish the Puerto Rico mitigation notice on January 27, 2020. The Federal Register notice allocated \$8.25 billion in mitigation funding to Puerto Rico.<sup>126</sup> The notice built upon the requirements in the Main Mitigation Notice and contained several additional conditions, including reforms to Puerto Rico's property-management records and suspension of Puerto Rico's minimum wage on federal contracts.<sup>127</sup>

## **Chapter 6: Revisions to the CDBG-DR Grant Agreement Delayed Disbursement of the Second Tranche of Disaster-Recovery Funding for Puerto Rico's Unmet Needs**

Evidence gathered by the OIG shows that many of the same issues raised during HUD's discussions with OMB that resulted in delayed publication of Puerto Rico's CDBG-MIT notice also delayed HUD from executing a grant agreement with PRDOH for its second tranche of funding for unmet needs. These issues were largely centered around HUD's legal authority to impose certain conditions on grantees. HUD wanted to incorporate similar conditions into the grant agreement for the second tranche of funding for unmet needs that were in the CDBG-MIT notice. As former PDAS-CPD Woll told the OIG, the CDBG-MIT notice and this grant agreement were "interdependent" with respect to reaching resolution with OMB on the conditions to be imposed on PRDOH.

HUD was able to sign a grant agreement with PRDOH to make its first tranche of \$1.5 billion in funds for unmet needs available approximately one year after Congress appropriated this money.<sup>128</sup> However, it took HUD more than two years to approve and execute a grant agreement making the

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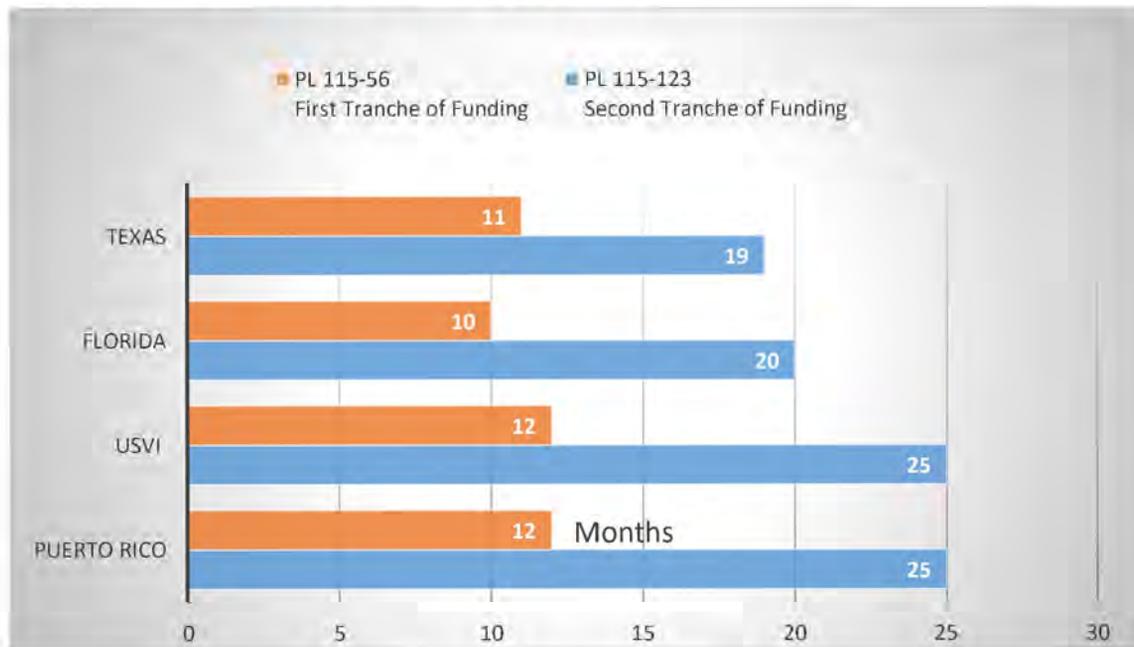
<sup>126</sup> See Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Mitigation Grantees; Commonwealth of Puerto Rico Allocation, 85 Fed. Reg. 4676, 4676 (Jan. 27, 2020).

<sup>127</sup> See *id.* at 4676-4681.

<sup>128</sup> See Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56, 131 Stat. at 1137; see also *HUD and Puerto Rico Ink \$1.5 Billion Disaster Recovery Grant Agreement*, HUD.gov, <https://archives.hud.gov/news/2018/pr18-104.cfm> (last visited May 6, 2020).

second tranche of \$8.2 billion available.<sup>129</sup> As shown in the graph below, other disaster grantees also experienced delays because of the grant-agreement revisions:

**Graph 1: Months Elapsed between Congress’ Appropriation and HUD’s Execution of the Grant Agreement for P.L. 115-56 and P.L. 115-123**



HUD’s decision to substantially revise the content of its disaster-grant agreements in 2019 contributed to these delays. While the evidence shows that senior HUD officials believed these revisions were generally necessary and added value, there is also evidence indicating that HUD’s decision to make the revisions stemmed at least in part from OMB concerns about disbursement of disaster-relief money to Puerto Rico.

**I. HUD’s Process for Revising Its Disaster-Grant Agreements Substantially Delayed Release of PRDOH’s Second Tranche of Funding for Unmet Needs**

At the time of the appropriations made by Public Laws 115-56 and 115-123, HUD’s CDBG-DR grant agreements consisted of a standard one-page form containing terms applicable to all funding recipients and an attachment for other special conditions that the grantee must abide by regarding the use of its particular grant funds.<sup>130</sup> The agreements incorporated by reference rules and conditions found in relevant Federal Register notices and were typically no longer than three-to-six pages in their entirety.<sup>131</sup>

In early 2019, HUD OGC convened a working group tasked with revising these standard grant agreements, which included a representative from the OIG. During his OIG interview, former GC Compton said that this effort was borne out of broader discussions with Woll and former CFO Dennis regarding CDBG-DR risk issues. According to Compton, the first time he saw HUD’s

<sup>129</sup> See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. at 103.

<sup>130</sup> See *Funding Approval Agreement, HUD Form 7082*, HUD.gov, <https://www.hud.gov/sites/documents/7082.PDF> (last visited March 19, 2020).

<sup>131</sup> See *id.*

existing grant agreements he was surprised by their brevity and questioned whether the Department was “really going to provide billions of dollars” to disaster-grant recipients “on a tear off the pad front and back document” as if it were disbursing “\$300,000 for Omaha to build a new park.” Stating that the prevailing agreement “was just not an appropriate way to mitigate our risk,” Compton said he believed the working group would allow HUD to “rethink DR grant agreements from the ground up.”

Woll and HUD Attorney told the OIG that the working group wanted to ensure that HUD’s grant agreements better reflected conditions OMB wanted included in the Federal Register notice governing disbursement of mitigation funding to Puerto Rico. Particularly, Woll told the OIG HUD wanted PRDOH’s grant-agreement conditions to have parity with the conditions the Department intended to impose through the CDBG-MIT notice taking shape at the time such that the two documents would be “interdependent of the other one.” This ultimately meant, according to Woll, that the revised grant agreement for PRDOH’s second tranche of funding for unmet needs was subject to “beyond normal debate about what the appropriate conditions [should be] for Puerto Rico.” Woll agreed that the prior grant agreement template was too short and “completely insufficient” for the objective at hand.

HUD Attorney stated that HUD’s working group and the revisions made to the Department’s grant agreement were borne out of an effort to satisfy OMB and its request that HUD issue multiple Federal Register notices with conditions specific to the grantees in each notice. According to HUD Attorney, HUD disagreed with this approach, as it had never engaged in that practice before, and looked for ways to avoid issuing multiple notices. According to HUD Attorney, work on the CDBG-MIT notices and the grant-agreement revisions were “wrapped up together,” and OMB’s involvement included review of the terms and conditions contained in both.

CFO Official 1 also provided information indicating OMB involvement in the grant-agreement revision process. According to CFO Official 1, an OMB official indicated that OMB “found [that] the original grant agreements were probably too lax” and that “rewrites” of the agreements were “a good thing to do.”

In a February 2019 memorandum, Compton set out specific objectives for HUD’s revised grant agreements. According to the memorandum, the new agreements should

- (1) Establish “milestones” or “gates” for separate tranches of funding so that compliance with financial controls and achievement of tangible goals can be audited and evaluated prior to all funds being expended[;]
- (2) Fully accommodate “real time” monitoring of expenditures[;]
- (3) Ensure that grantees utilize, to the fullest extent available from time to time, available Community Planning and Development (CPD) grant systems[;]
- (4) Provide a framework for grantees to impose suitable conditions and controls, similar to those applicable to themselves, on subgrantees, etc.[;]
- (5) Require grantees (and subgrantees) where appropriate to engage technical assistance and auditing and financial controls experts[;]
- (6) Mandate prudent actions to ensure that costs are reasonable, such as plan and cost reviews for construction[;]
- (7) Enhance the grantee’s understanding of both its legal obligations as well as best [p]ractices[;]
- (8) Ensure robust remedies in the event of improper actions.

## II. HUD Developed Revised Agreements, which OMB Approved for Use with Other Grantees Before Puerto Rico

By the summer of 2019, HUD had produced revised CDBG-DR grant agreements consisting of three sections that contain (1) general conditions imposing regulatory, statutory, and notice-alternative requirements; (2) specific conditions responding to identified, unmitigated high risks;<sup>132</sup> and (3) an appendix consolidating all applicable post-award requirements from multiple Federal Register notices. Rather than incorporating by reference these applicable Federal Register notices, the appendix features language from the notices, significantly lengthening the revised agreements. HUD's career staff also developed a "risk tool" in conjunction with this effort to identify high-risk conditions specific to particular grantees, allowing the Department to tailor the conditions found in the second section of the revised agreements as it deemed necessary.

When speaking with the OIG, HUD officials recognized that making these changes to the grant agreement had effectively delayed HUD's entering into new disaster-grant agreements, but most expressed the view that the previous agreements were inadequate for such large grants. For example, one official in the CFO's Office told the OIG that, although grant recipients complained about the lengthy revision process, the result was a "good document" that provided important information to recipients about governing rules, conditions, and controls. CPD Official 1 said development of the risk-assessment tool in particular was "a really good thing" that came out of this process. HUD Attorney believed the revised agreements implemented "useful" changes, such as having consolidated grant requirements in one place, and thought the risk assessment was an effective risk-management tool.

The evidence shows that the Department presented its revised grant agreements to OMB during a June 27, 2019 briefing. According to a memorandum describing this briefing, the presentation resulted in "permission" from OMB for HUD to move forward on the pending unmet needs grant agreements for Florida, Texas, and Missouri but not Puerto Rico. CPD officials prepared this memorandum for former DS Montgomery in anticipation of a July 10, 2019 meeting at the White House focused on "the status of funding for disaster recovery in Puerto Rico" and the "appropriate level of fiscal controls for that funding." In the memorandum, HUD officials expressed concern that the Department would not be able to finalize an agreement with Puerto Rico in the near term due to OMB disapproval. Specifically, the memorandum states:

While CPD and OGC have completed work on the revised grant agreement and a parallel process to identify appropriate conditions, it appears that OMB is unlikely to find the approach adequate where Puerto Rico is concerned. . . . There remains significant concern that OMB will press for conditions on Puerto Rico and, possibly the USVI, that are beyond HUD's legal authority to impose absent the due process afforded grantees by the CDBG authorizing statute and relate[d] regulations.

The memorandum notes that HUD intended to distribute the grant agreements necessary for Florida, Texas, and Missouri to secure their second tranche of funding for unmet needs based on OMB's approval, and the Department was able to execute those agreements by the end of summer or early fall 2019 as a result.

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<sup>132</sup> These risks are removed when HUD determines risk is addressed.

The evidence shows it took several more months from the execution of grant agreements with Florida, Texas, and Missouri before HUD would be able to execute revised grant agreements with the USVI and Puerto Rico. Because OMB wanted parity between the conditions in the CDBG-MIT notice and the grant agreement, HUD's and OMB's protracted discussions over conditions in the CDBG-MIT notice also delayed the finalization of Puerto Rico's revised grant agreement. According to several witnesses, the Department worked with OMB to address particular conditions OMB wanted in Puerto Rico's CDBG-MIT notice over the course of subsequent discussions that stretched through late fall of 2019. As Woll put it during his OIG interview, Puerto Rico's grant agreement got caught up in the "beyond normal debate about what the appropriate conditions" should be for the Puerto Rico mitigation notice. Ultimately, Compton told the OIG that "the matters that related to the specific conditions that would be included both in the mitigation notice as well as the unmet needs grant agreement were resolved in our discussions with the Office of Management and Budget."

Compton told the OIG that, in the end, HUD was persuaded that it had the authority to impose certain conditions and that with respect to other conditions, OMB was persuaded that the desired conditions were not within the Department's power. Reaching agreement with OMB allowed the Department to execute a grant agreement with PRDOH for its second tranche of funding for unmet needs funding on February 21, 2020, more than two years after Congress appropriated these funds for Puerto Rico.

## **Chapter 7: The Resignation of Former HUD Deputy Secretary Pamela Patenaude**

In the January 2019 letter from several members of Congress asking the OIG to initiate this review, those members requested that we assess whether former DS Patenaude may have resigned her position with the Department due to concerns about improper handling of the disaster-relief funds appropriated for Puerto Rico. Specifically, the letter asked whether "undue influence . . . regarding the obligation and disbursement of CDBG-DR funds to Puerto Rico" was applied to Patenaude prior to her resignation.<sup>133</sup>

The letter referenced a January 16, 2019 *Washington Post* article that reported she was leaving the Department in part due to disagreements with the White House regarding its "attempt to block disaster-recovery money for Puerto Rico."<sup>134</sup> Although the article also cited a series of disagreements and frustrations unrelated to Puerto Rico that led to Patenaude's departure, it noted particularly how she had "expressed concern over the Trump administration's intervention in disaster-recovery money that Congress had appropriated for Puerto Rico and states hit by hurricanes."<sup>135</sup> The article stated that Patenaude "told White House budget officials during an early December [2018] meeting in the Situation Room that the money had been appropriated by Congress and must be sent."<sup>136</sup>

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<sup>133</sup> Letter from Members of Congress to HUD OIG (Jan. 17, 2019), <https://velazquez.house.gov/media-center/press-releases/vel-zquez-thompson-grijalva-call-investigation-hud-departure>.

<sup>134</sup> Tracy Jan, et. al., *After butting heads with Trump administration, top HUD official departs agency*, Wash. Post, Jan. 16, 2019, [https://www.washingtonpost.com/business/economy/top-hud-officials-departure-follows-disagreements-over-housing-policy-and-puerto-rico-disaster-funds/2019/01/16/e6ba5bc4-1839-11e9-9ebf-c5fed1b7a081\\_story.html](https://www.washingtonpost.com/business/economy/top-hud-officials-departure-follows-disagreements-over-housing-policy-and-puerto-rico-disaster-funds/2019/01/16/e6ba5bc4-1839-11e9-9ebf-c5fed1b7a081_story.html) (last visited Feb. 7, 2020)

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Patenaude submitted her resignation on December 17, 2018, and announced her decision to leave the Department one month later, on January 17, 2019. We did not find evidence indicating that Patenaude resigned because she had concerns regarding the disbursement of disaster-recovery funds to Puerto Rico, nor did we find evidence that she resigned at the request of former Secretary Carson or any other Executive Branch official due to her voicing concerns regarding HUD's administration of Puerto Rico disaster-relief funds.

During her OIG interview, Patenaude described herself as the lead for HUD on Puerto Rico disaster recovery and said that she was an "advocate" for Puerto Rico. Patenaude stated unequivocally that she did not resign from HUD because of any HUD officials' resistance to her approach or advocacy or because of any specific direction from the administration regarding disaster-recovery funds for Puerto Rico. Patenaude explained that she decided to resign for purely personal reasons, saying "it was time for me to go." Patenaude also said that she never had a conversation in the Situation Room of the White House like the one described in the January 16, 2019 *Washington Post* article.

Other senior HUD officials with whom the OIG spoke also said Patenaude did not express any concerns to them about the meeting at the White House or regarding the handling of Puerto Rico disaster relief nor did she indicate to them that Puerto Rico had anything to do with her resignation.

## **Chapter 8: Conclusion and Recommendations**

Based on the facts uncovered during our inquiry, the OIG found the following with respect to each respective tranche of Puerto Rico's disaster-relief funding for Hurricanes Maria and Irma:

### **I. First \$1.5 Billion Tranche of Funding for Unmet Needs**

We found that PRDOH's access to the first \$1.5 billion tranche of funding for unmet needs was incidentally impacted due to events surrounding the 2018-2019 government shutdown.

Congress appropriated the first tranche of \$1.5 billion in funds for unmet needs for Puerto Rico in September 2017, and OMB apportioned the funds a little more than two weeks later. HUD published a notice in the Federal Register allocating these funds on February 9, 2018. PRDOH then submitted its action plan to HUD on June 14, 2018. HUD approved the plan six weeks later on July 29, 2018. HUD and PRDOH signed a grant agreement for these funds on September 20, 2018, roughly one month after Florida and Texas signed their respective agreements relating to this appropriation. This timeline is generally consistent with the grant obligation process for other CDBG-DR grantees, and the OIG did not receive any allegations or identify evidence indicating a concern with respect to these events.

The evidence shows that there was some delay in the final steps needed for PRDOH to access this first tranche of \$1.5 billion in funding for unmet needs during the government shutdown. Following the grant agreement execution, HUD had to approve the action plan in DRGR, which it initially did on December 14, 2018. During the ensuing 2018-2019 government shutdown, activities related to this funding were determined to be "excepted" under the ADA, and HUD was permitted to continue working on this tranche of funds. However, the evidence shows that staffing shortages due to the shutdown and miscommunications between HUD and PRDOH pertaining to the grantee's bank information appear to have impacted final DRGR approval, which did not occur until after the shutdown ended on January 30, 2019. PRDOH was not able to draw down its funds until this final DRGR approval occurred on or about February 4, 2019.

## II. Second \$8.2 Billion Tranche of Funding for Unmet Needs

The OIG found that HUD's grant agreement revision process for all CDBG-DR grantees, as well as the revised grant agreement's nexus to the conditions in the Puerto Rico mitigation notice, impacted the timeframe for executing a grant agreement for PRDOH's second tranche of \$8.2 billion in funding for unmet needs. Additionally, the evidence shows that work on this tranche of funds was curtailed during the government shutdown.

Congress appropriated the second tranche of \$8.2 billion in funding for unmet needs on February 9, 2018, and OMB apportioned these funds several weeks later. HUD published the applicable Federal Register notice on August 14, 2018. PRDOH submitted its action plan to HUD on November 16, 2018. We found that HUD's review and approval of the action plan was delayed due to the government shutdown.

Former GC Compton initially believed that HUD was authorized to work on CDBG-DR action plans as an excepted activity. However, after consulting with OMB, Compton issued a memorandum informing HUD staff that OMB determined that such activity was not excepted and, therefore, work could not be performed on such plans during the shutdown. Compton told the OIG that he accepted OMB as the final binding authority as to what constituted an excepted activity. This suspension of work caused the Department to waive both an internal (December 30, 2018) and statutory (January 14, 2019) deadline to approve PRDOH's action-plan amendment for this tranche of funds, as these deadlines fell within the government-shutdown period. HUD ultimately approved PRDOH's action-plan amendments on February 28, 2019. Other CDBG-DR grantees with pending action plans were similarly impacted in this regard.

The OIG also found that HUD's decision to revise its template for CDBG-DR grant agreements was a factor in delaying disbursement of this second tranche of funding for unmet needs to PRDOH. In early 2019, HUD decided to substantially revise the content of its standard disaster-grant agreements, which at the time consisted of a brief three-to-six-page document that HUD considered to not have appropriately mitigated risk. While some senior HUD officials believed that these revisions were necessary, the revisions stemmed at least in part from OMB concerns related to PRDOH. During the grant-agreement revision process, it became clear to HUD staff that the agreement conditions needed to have parity with the CDBG-MIT notice conditions taking shape at the same time, thus making the obligation of the second tranche of funding for unmet needs dependent on completion of the Puerto Rico CDBG mitigation-notice negotiations. Accordingly, the protracted process for publishing the Puerto Rico CDBG-MIT notice contributed to a delay in finalizing the Department's grant agreement with PRDOH for the second tranche of funding for unmet needs.

HUD and PRDOH did not ultimately sign a grant agreement regarding this tranche of funds until February 21, 2020, several days after the USVI signed its grant agreement. By contrast, Texas signed its grant agreement relating to second tranche funds 178 days earlier, on August 27, 2019, and Florida signed its agreement 150 days earlier, on September 24, 2019. This tranche of funding was also delayed when viewed in comparison to the first tranche of funding for unmet needs for PRDOH, owing in significant part to the parallel delays in publishing Puerto Rico's CDBG-MIT notice.

### **III. \$8.3 Billion Tranche of Mitigation Funding**

The OIG found that the Puerto Rico CDBG-MIT notice was delayed in large part because HUD could not reach an agreement with OMB over the content of the Federal Register notice for this third tranche of funding. HUD missed both a May 1, 2019 internal and September 4, 2019 statutory deadline to publish the Federal Register notice applicable to this tranche.

Congress appropriated this \$8.3 billion tranche of funding on February 9, 2018, and OMB apportioned these funds several weeks later. HUD originally drafted a CDBG-MIT notice in November 2018, and OMB provided comments on the draft that same month, which HUD officials described as extensive. HUD was unable to work on addressing OMB's comments during the government shutdown in late 2018-early 2019, and HUD did not circulate a revised draft of the CDBG-MIT notice until March 2019.

Around that time, HUD set a May 1, 2019 target date for publishing the notice. In April 2019, five days before HUD's target publication date, OMB provided extensive comments on the updated draft mitigation notice. Although HUD officials tried to address these comments quickly, OMB subsequently decided to subject the notice to OIRA review. This effectively prevented HUD from publishing the notice by the May 1 target date. In June 2019, Congress set a September 4, 2019 deadline for the CDBG-MIT notice, which HUD ultimately did not meet for Puerto Rico. This occurred in part because of continuing lack of consensus with OMB over appropriate conditions. But senior HUD officials also stated to the OIG that political and financial turmoil in Puerto Rico, as well as considerations raised by ongoing OIG oversight activities, contributed to their decision not to publish the notice by the deadline.

HUD did not publish a notice in the Federal Register with respect to these funds for Puerto Rico until January 27, 2020 -- 145 days past the statutory deadline and nearly two years after the corresponding appropriation. By contrast, HUD published a notice for the other 14 eligible CDBG-MIT grantees 150 days earlier, on August 30, 2019, and a notice for the USVI 139 days earlier, on September 10, 2019, (dated September 4, 2019). Moreover, the evidence indicates that concerns related to PRDOH were a factor in delaying the publication of the Federal Register notices for all of the CDBG-MIT grantees.

In contrast with the nearly two years that elapsed between the congressional appropriation and the publication of the CDBG-MIT notice for Puerto Rico, the Department was able to publish Federal Register notices for the first and second tranches of funding for unmet needs for Puerto Rico within six months of the corresponding congressional appropriation of those funds.

### **IV. Recommendations**

We recommend that the Department

1. Pursue codification of the CDBG-DR and CDBG-MIT programs by rulemaking or if necessary, legislative action to (1) create a standardized framework for future disasters, (2) reduce the volume of Federal Register notices needed for the program, (3) standardize rules for grantees and clarify the scope of HUD's authority in this area, and (4) ensure that funds can be disbursed in a timely manner.
2. Enhance the HUD Contingency Plan for Possible Lapse in Appropriations to provide more specificity with respect to which CDBG-DR and CDBG-MIT

activities are exempt under the ADA during a shutdown and communicate that enhanced plan to OMB and grantees.

3. Seek clarification and guidance from OMB regarding whether or when CDBG-DR and CDBG-MIT notices are subject to the OIRA review process and update HUD policies and procedures as necessary to reflect that guidance.

## **Agency Comments and OIG Response**

We requested comments on our draft report from agency officials. They provided technical comments, some of which we incorporated into the report, but they did not provide formal comments.



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