



February 25, 2018

SUBMITTED ELECTRONICALLY

Colette Pollard  
Reports Management Officer, QDAM  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street, SW  
Room 4176  
Washington, DC 20410-0500

Re: Docket No. FR-7006-N-20:  
60-Day Notice of Proposed Information Collection: Moving to Work Amendment  
to Consolidated Annual Contributions Contract

To Whom It May Concern:

The undersigned constitute the designated Steering Committee of the thirty-nine (39) Moving to Work ("MTW") Public Housing Authorities ("PHAs") who have been successfully serving families under MTW, in some cases for nearly twenty (20) years, and have been authorized to represent the consensus views of the 39 MTW PHA's on this Notice of Proposed Information Collection related to the Moving to Work Amendment to Consolidated Annual Contributions Contract (the "MTW ACC Amendment").

The stated purpose of the 1996 statute authorizing the MTW program is to provide flexibility to design and test various new approaches to providing housing assistance that are more cost effective, promote self-sufficiency, and provide housing choice. To do so, HUD enters into a Moving to Work Agreement with each MTW PHA, providing MTW PHAs with certain flexibilities by superseding the terms and conditions of the MTW PHA's existing Annual Contributions Contract ("ACC") with HUD (the "Standard Agreement").

In 2016, Congress extended the current MTW Standard Agreements of "previously designated participating agencies until the end of each such agency's fiscal year 2028," and expanded the MTW program from the existing 39 MTW PHAs to include an additional one-hundred PHAs (P.L. 114-113). While it is not contemplated by the statute, HUD chose to implement this expansion in 2018 by issuing the Operations Notice for the Expansion of the MTW Demonstration Program, FR-5994-N-03 (the "Operations Notice"), to govern the expansion of the MTW program and solicited comments on the Operations Notice. The Steering Committee submitted comments to HUD in response to the Operations Notice and continues to track the expansion of the MTW program closely.



Although the existing 39 MTW PHAs are not subject to either the Operations Notice or this MTW ACC Amendment, we, nonetheless, offer our comments as agencies who understand what is required to launch and operate MTW programs. While we appreciate the ongoing dialog with HUD regarding the expansion of MTW, we remain concerned that the MTW expansion HUD seeks to implement is inconsistent with Congress's intent that there be one MTW program for all MTW agencies, regardless of whether such agencies are newly admitted under this MTW expansion authorization or previously designated as one of the existing 39 MTW sites. Despite HUD's stated intent of using the Operations Notice and the MTW ACC Amendment to "streamline and simplify" processes for newly-admitted MTW agencies, the MTW ACC Amendment as drafted would provide new MTW agencies with less flexibility than current MTW agencies receive and would require new MTW agencies to comply with burdensome requirements, mandates, and processes that do not apply to current MTW agencies and could be unilaterally changed by HUD. Instead of achieving HUD's goal of streamlining and simplifying the MTW program, we fear that expanding MTW in this manner will result in confusion and the programmatic changes proposed in the Operations Notice and through the MTW ACC Amendment would be detrimental to the new MTW agencies, stifling their ability to engage in local decision-making and innovation. We instead believe, consistent with Congress's original intent, that all MTW agencies be subject to the same set of requirements and processes outlined in the existing Standard Agreement.

Below please find our additional comments with respect to the MTW ACC Amendment.

**The use of the Paperwork Reduction Act ("PRA") is not a legitimate means with which to promulgate public comment on the MTW ACC Amendment.**

- Issuance of the proposed MTW ACC Amendment and the solicitation of comments through the PRA process, rather than through the notice and comment rulemaking process, violates the APA and HUD's own regulations, as the PRA standards for public comment do not satisfy APA requirements. The PRA applies every time a federal agency proposes, requests, or requires persons obtain, maintain, retain, report, or publicly disclose information. The public comment period under the PRA is subject to OPM approval and OMB approval. However, when a federal agency promulgates a rule<sup>1</sup> that is designed to have binding legal effect on both the issuing agency and the regulated public, such agency is ordinarily required to go through notice-and-comment rulemaking before such binding requirements may be enforced. Though matters of contract are ordinarily

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<sup>1</sup> The term "rule" is defined for APA purposes as, "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..." (see 5 U.S.C. § 551(4)). HUD defines the term "rule" or "regulation" as, "all or part of any Departmental statement of general or particular applicability and future effect designed to: (1) Implement, interpret, or prescribe law or policy, or (2) describe the Department's organization, or its procedure or practice requirements. The term regulation is sometimes applied to a rule which has been published in the Code of Federal Regulations." (see 24 C.F.R. § 10.2(a)).



exempt from notice and comment under the APA,<sup>2</sup> it is HUD's policy, adopted through regulation, "to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts even though such matters would not otherwise be subject to rulemaking by law or Executive policy."<sup>3</sup> Here, in the MTW ACC Amendment, HUD attempts to rewrite regulations and promulgate legislative rules designed to have binding legal effect on PHAs through contract or "grant agreement" absent APA notice and comment procedures to which it should otherwise be subject.

**Section 3: "...The Authority's participation in the expansion of the MTW demonstration shall be governed by the MTW Operations Notice for the Expansion of the Moving to Work Demonstration (PIH Notice 2019-XXXX) or any successor notice issued by HUD, [sic] (which shall collectively be called "the Operations Notice" throughout this document)."**

- The Standard Agreement for the existing 39 MTW PHAs clearly sets forth that amendments may only be made through mutual agreement of the Agency and HUD, except in limited circumstances where HUD seeks to add to an MTW PHA's existing authorizations. However, this is not the approach that HUD takes for the expansion MTW PHAs in the MTW ACC Amendment. Instead of a negotiation process as contemplated in the Standard Agreement whereby amendments may only be made through mutual consent, HUD proposes to govern the new expansion MTW PHAs through the Operations Notice, as it currently exists or as it may be amended in the future regardless of whether or not an expansion MTW PHAs consents to such changes. In addition, the language "or any successor notice issued by HUD" means that HUD could change the terms of participation solely by notice, which would not even require a notice and comment period (though HUD may choose to publish for notice and comment).
- While HUD presents this provision as merely a contractual requirement, the MTW ACC Amendment appears as pretext for HUD to re-write its own policies, procedures, and regulations absent notice and comment procedures under the APA. Such substantive changes to notices and other documents would benefit from an open comment period to allow PHAs and HUD to work together in understanding and evaluating the impact of such proposed changes and to minimize disruption to the mission they share with HUD of serving low-income communities and providing quality housing throughout the country. The PRA process simply does not allow for such an open, interactive, and substantive comment process.

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<sup>2</sup> See 5 U.S.C. § 553(a)(2).

<sup>3</sup> U.S. Department of Housing and Urban Development, *Rulemaking 101*, [https://www.hud.gov/program\\_offices/general\\_counsel/Rulemaking-101](https://www.hud.gov/program_offices/general_counsel/Rulemaking-101) (last visited Feb. 14, 2019); see also 24 C.F.R. § 10.1.



**Section 5(A): “As a participant in the MTW demonstration, the Authority must operate in accordance with the express terms and conditions set forth in the Operations Notice. The MTW Operations Notice may be superseded or amended by HUD at any time during the MTW term of the Authority’s participation in the MTW demonstration.”**

- Same comment as above re: HUD’s potential ability to unilaterally change the terms of program participation through Notice rather than through contract negotiations.

**Section 5(C): “The Authority may be exempted from certain provisions of the Housing Act of 1937 and its implementing regulations in accordance with the requirements and procedures set forth in the Operations Notice. However, the Authority remains subject to all other federal laws and HUD requirements, as they may be amended from time to time even in the event of a conflict between such a requirement and a waiver or activity authorized by the Operations Notice.”**

- While we recognize that there are some statutory requirements that MTW designation cannot waive, the above language does not align with HUD’s stated intent and would render nearly every MTW waiver null and void. The above states, “the Authority remains subject to all other federal laws and HUD requirements, as they may be amended from time to time even in the event of a conflict between such a requirement and a waiver or activity authorized by the Operations Notice.” However, there are a few ways that the undefined term “all other federal laws and HUD requirements” in the last sentence could be interpreted – in the ACC Amendment itself, HUD requirements also includes things like notices and handbooks. Under a strict reading of the last sentence as drafted, in the event of a conflict between an MTW activity authorized by HUD and a HUD requirement, it does not make sense that the MTW Agency would remain subject to the HUD requirement (i.e., notice, forms, or agreements, etc.). This is just not true – MTW agencies can and do waive portions of the Housing Act and various “HUD requirements” all the time. Accordingly, in the event of a conflict, the MTW waiver should govern and the PHA should be exempt from the conflicting HUD requirement just as they would be from a conflicting HUD regulation.
- To avoid such issues as those presented above, we recommend HUD instead revise the above to read as follows,

This MTW ACC Amendment only waives certain provisions of the 1937 Act and its implementing regulations and HUD requirements. Other federal, state and local requirements applicable to public housing shall continue to apply notwithstanding any term contained in this MTW ACC Amendment or any Authorization granted thereunder. Accordingly, if any requirement applicable to public housing, outside of the 1937 Act, contains a provision that conflicts or is inconsistent with any



authorization granted in this MTW ACC Amendment, the MTW Agency remains subject to the terms of that requirement.

This way, consistent with the operation of the existing 39 MTW PHAs, in the event of a conflict between an authorized MTW activity and a federal, state or local law, the MTW Agency would remain subject to those requirements; however, in the event of a conflict between an authorized MTW activity and a HUD requirement (as such term is defined in the ACC), there is no ambiguity and it is clear that the authorized MTW activity would prevail.

**Section 5(D) and 5(E): “HUD reserves the right to require the Authority to discontinue any activity or to revise any activity to comply with the Operations Notice and other applicable HUD requirements in the event of a conflict between an MTW activity and such requirements, as determined by HUD.” and “HUD reserves the right to require the Authority to discontinue any activity derived from a waiver granted by the Operations Notice should it have significant negative impacts on families or the agency’s operation of its assisted housing programs using Section 8 and 9 funds, as determined by HUD.”**

- This language is not consistent with what is required of current MTW PHAs under the Standard Agreement, and we strongly object to HUD asserting that it can unilaterally decide whether or not an MTW activity should be allowed to continue, especially as the proposed language makes it very unclear what standard of review HUD will use to make such a determination, whether the PHA can appeal said determination, and what alternatives there might be. In addition, because MTW activities and waivers are often intertwined, we would strongly discourage HUD from reviewing individual waivers independently of other factors, many of which may be outside of a PHA’s control.

**Section 6: “At least one year prior to the expiration of this MTW CACC Amendment, the Authority shall submit a transition plan to HUD.”**

- When the Operations Notice was first published in 2016/2017, we previously commented that such a “transition plan” should not be required a year in advance as such a plan should only be required after both HUD and the MTW PHAs have negotiated in good faith to extend current MTW designations and such negotiations were not successful. Before HUD focuses on how to unwind a PHAs MTW designation, we believe that HUD should first work with the MTW PHA to determine if and how such MTW designation can be extended. We were pleased that the latest version of the Operations Notice published in 2018 did not mention or require agencies to submit a transition plan; however, we are now dismayed to see that this concept of unwinding a PHA’s MTW designation has re-emerged through the MTW ACC Amendment. While the existing 39 MTW PHAs have a transition plan



requirement in their Standard Agreement, the Standard Agreement also provides a mechanism for them to propose existing MTW authorizations/features or flexibilities be retained by the agency beyond the expiration date of the Standard Agreement.<sup>4</sup> At minimum, if HUD is unwilling to abandon the transition plan concept altogether, HUD should ensure that such language from the Standard Agreement is also reflected in the MTW ACC Amendment that applies to the incoming one-hundred (100) MTW PHAs so they, too, can ensure that successful MTW flexibilities that become embedded in their programs can continue, even in the unlikely event that they are unable to retain their broader MTW designation.

**Section 8: "...Any future laws affecting the Authority's funding, even if that effect is a decrease in funding, and HUD's implementation thereof that affects funding shall not be deemed a breach of this CACC Amendment and shall not serve as any basis for a breach of contract claim, or breach of contract cause of action, in any court."**

- In the proposed ACC, HUD presents a changed approach to its treatment of the Comprehensive Grant Program and Grant Funding Amounts to which a PHA is entitled, which is then picked up through the MTW ACC Amendment. It is clear that in making this change through the proposed ACC and MTW ACC Amendment, HUD is attempting to contract around the decision in *Public Housing Authorities Directors Association, et al. v. United States*, 130 Fed. Cl. 522 (2017), where the Court held that “the language of the ACCs reflects an intent to incorporate by reference into the contract the provisions of Title 24 of the C.F.R. [including the pro rata reductions prescribed by 24 C.F.R. § 990.210(c)], but [demonstrates] no intent to incorporate by reference future statutory provisions like the 2012 Appropriations Act, 2012.”

Thank you for the opportunity to comment. If you have any questions, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew J. Lofton".

Andrew Lofton  
Executive Director, Seattle Housing Authority  
On behalf of the MTW Executive Steering Committee

<sup>4</sup> Standard Agreement reads, “The [transition] plan shall also include any proposals of authorizations/features of the Restated Agreement that the Agency wishes to continue beyond the expiration of the [Standard] Agreement. The Agency shall specify the proposed duration, and shall provide justification for extension of such authorization/features.”