February 25, 2019

SUBMITTED ELECTRONICALLY

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-7006-N-15:
60-Day Notice of Proposed Information Collection: Comment Request:
Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds

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 thirty-nine (39) MTW PHA's on this Notice of Proposed Information Collection related to the Public Housing Annual Contributions Contract for Capital and Operating Grant Funds.

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 "supersed[ing] the terms and conditions of one or more ACCs [including, the MTW PHA's existing Annual Contributions Contract ("ACC")] between the Agency and HUD, to the extent necessary for the Agency to implement its MTW demonstration initiatives as laid out in the Agency's Annual MTW Plan, as approved by HUD" (the "Standard Agreement").

In 2016, when Congress extended the current MTW agreements of "previously designated participating agencies until the end of each such agency's fiscal year 2028," HUD did so "under the same terms and conditions of such current [Standard Agreements], except for any changes to such terms or conditions otherwise mutually agreed upon by the Secretary and any such agency" and required that extensions of the Standard Agreement "prohibit any statutory offset of any reserve balances equal to 4 months of operating expenses" (P.L. 114-113).

While HUD is not presently proposing any changes to the Standard Agreement itself, the changes HUD unilaterally proposes to the underlying ACC affect the Standard Agreement and, thereby, circumvent Congress' stated intent that there be no changes to terms and conditions except for those "mutually agreed upon by the Secretary and any such agency." In addition, the changes that HUD intends to implement to grant funding arrangements in the proposed ACC could allow HUD to circumvent its statutory requirements with respect to offsets of MTW PHA reserves. If HUD seeks to change its existing relationship with MTW PHAs, Section V of the Standard Agreement sets forth a clear process when one or both parties wishes to amend the terms of the Standard Agreement. By making unilateral changes to the ACC, which serves as the underlying contract to the Standard Agreement, HUD attempts to bypass its statutory obligation to consult with MTW PHAs and obtain their mutual consent.

The proposed ACC changes presented by HUD unilaterally change how MTW PHAs can operate and affects their ability to use the MTW flexibilities in the Standard Agreement that Congress has expressly affirmed and HUD cannot change absent mutual consent.

There are a number of unilateral changes in the proposed ACC issued by HUD that, while objectionable on their own, would also directly affect an MTW PHA's ability to operate under the terms of the existing Standard Agreement. One example is that, as drafted, the proposed ACC would require PHAs comply with "HUD-issues notices, and HUD-required forms, or agreements [*sic*]," and, because the Standard Agreement only waives "certain provisions of the 1937 Act and its implementing regulations" (Amended and Restated Standard Agreement, Section I(C)), if left unchanged, MTW PHAs would be forced to comply with these additional obligations which would render many of their MTW flexibilities in Attachment C and Attachment D of their Standard Agreements null and void.

For example, the Statement of Authorizations at Attachment C, Paragraph B(4) provides, "The Agency is authorized to amend the definition of elderly to include families with a head of household or family member who is at least 55 years old, and must be in compliance with all Fair Housing Requirements, in particular the Housing for Older Persons Act of 1995. This authorization waives certain provisions of Section 3 (B)(3) and (G) of the 1937 Act and 24 C.F.R. § 5.403 as necessary to implement the Agency's Annual MTW Plan." However, Notice PIH 2014-20 sets forth a clear definition that "Elderly family means a family whose head (including co-head), spouse or sole member is a person who is at least 62 years of age." Because the Standard Agreement does not waive provisions set forth in HUD Notices, a MTW PHA presumably, would be required to comply with Notice PIH 2014-20, which would change the terms of authorizations provided in the Standard Agreement.

Not only is such result in direct contravention of the statutory requirement that changes must be "mutually agreed upon by the Secretary and any such agency," but it is also in opposition with the terms of HUD's own Standard Agreement, which states that, "The Statement of Authorizations (Attachment C) may be unilaterally amended by HUD only in order to add to the

existing authorizations. The Legacy and Community-Specific Authorizations (Attachment D) may be amended upon mutual agreement between HUD and the Agency." The Standard Agreement does not waive compliance with "HUD-issues notices, and HUD-required forms, or agreements [*sic*]" because, as a matter of law, such documents are generally considered nonlegislative rules under the Administrative Procedures Act ("APA"), often exempted from notice and comment under the APA as "interpretative rules" or "general statements of policy,"[1] and are not meant to have binding legal effect, making this a unilateral change to the ACC and a MTW PHA's obligations thereunder.

We would also note that this is not HUD's first attempt to make unilateral changes to the Standard Agreement through alternate means. In the time since Congress extended the terms of the Standard Agreement, HUD has proposed notices on topics such as "Substantially the Same" and others and subjected MTW PHAs to additional approvals and oversight not required under the Standard Agreement. While objectionable then, such blatant efforts to redefine the arrangement between HUD and MTW PHAs remain objectionable now as HUD seeks to change the terms of an MTW PHA's participation through contractual modifications to the ACC, or the underlying document to the Standard Agreement. Congress was clear that the Standard Agreement is to be extended "under the same terms and conditions of such current [Standard Agreements], except for any changes to such terms or conditions otherwise mutually agreed upon by the Secretary and any such agency." When Congress has directly spoken to the precise question at issue, an agency must give effect to the unambiguously expressed intent of Congress. As such, the deliberate, unilateral changes HUD presents in the proposed ACC fail to comply with Congress' clear directive to HUD.[2]

The proposed ACC, as drafted, would allow HUD to make unilateral changes and alterations to the funding methodology between MTW PHAs and HUD in contradiction of the Standard Agreement.

In the proposed ACC, HUD is attempting to change the funding amounts to which a PHA is entitled. Attachment A of the Standard Agreement provides, "An Agency's formula characteristics and grant amount will continue to be calculated in accordance with current law as of the date of execution of this Agreement." Accordingly, per the Standard Agreement, funding for the MTW PHAs ought to be calculated based only upon the current law that was in effect as of the date of execution of the Standard Agreement. However, Section 10(B) of the proposed ACC would change that and instead states, "Grant funding may be reduced by an offset of a HA's funding, pursuant to a formula prescribed by Congress in an appropriations act."

Further, though the Standard Agreement makes clear that, "The amount of assistance received under sections 8 or 9 of the 1937 Act by an Agency participating in the demonstration shall not

[1] David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. (2010), available at: http://digitalcommons.law.yale.edu/ylj/vol120/iss2/2.
[2] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

be diminished by the Agency's participation in the MTW demonstration," it is not clear that HUD would be bound to follow such a requirement as the proposed ACC instead would allow HUD to "reduce or offset [funding] pursuant to a formula devised by HUD if Congress has invested HUD with the discretion to devise and implement a funding formula in the appropriations act."

It is clear that in making this change through the proposed ACC, 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." HUD's efforts to do so through the proposed ACC, rather than through negotiation between HUD and each agency directly contravenes HUD's statutory obligation to only amend the Standard Agreement through mutual consent.

In addition to requiring mutual consent for any changes to the Standard Agreement, Congress also required in the 2016 Appropriations Act that "extension [of the Standard] Agreements shall prohibit any statutory offset of any reserve balances equal to 4 months of operating expenses. Any such reserve balances that exceed such amount shall remain available to any such agency for all permissible purposes under such agreement unless subject to a statutory offset." However, yet again, HUD continues to propose language that would allow HUD to circumvent its statutory obligation. If adopted, the proposed ACC would allow grant funding to be "reduced or offset pursuant to a formula devised by HUD if Congress has invested HUD with the discretion to devise and implement a funding formula in the appropriations act." There is no requirement in the proposed ACC that HUD comply with Congress' directive to prohibit any offset of any reserve balances equal to four months of operating expenses for the MTW PHAs. Further, through the proposed ACC, HUD has restricted the definition of the term "operating expenses" or "operating expenditures" to those costs "which may be charged against Operating Receipts in accordance with the CACC and HUD requirements." While such changes, in and of themselves, may seem innocuous, definitions matter, and what constituted four months of operating expenses under the prior definition may now be significantly less under HUD's newly proposed definition, resulting in unilateral change to the Standard Agreement by HUD and an attempt to circumvent HUD's statutory obligation to MTW PHAs.

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

Issuance of the proposed ACC 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[3] 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 exempt from notice and comment under the APA,[4] 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."[5] Here, in the proposed ACC, 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.

For example, the regulations at 24 C.F.R. § 970.19 allow a PHA to use disposition proceeds for the retirement of outstanding obligations associated with the project and for "the provision of low-income housing or to benefit the residents of the PHA, through such measures as modernization of lower-income housing or the acquisition, development, or rehabilitation of other properties to operate as lower-income housing." However, in the proposed ACC, such funds, which HUD now defines as "Program Receipts" would be restricted to "(1) the payment of the costs of development and operation of the Projects under the CACC with HUD; (2) the purchase of investment securities as approved by HUD; and (3) such other purposes as may be specifically approved by HUD."

While HUD presents such changes as merely contractual, the proposed ACC 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 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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[3] 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)).

[4] *See* 5 U.S.C. § 553(a)(2).

[5] U.S. Department of Housing and Urban Development, *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.

Calling the proposed ACC a "Grant Agreement" does not change the underlying contractual relationship that HUD has with PHAs which is established through the ACC.

Under 24 C.F.R. § 990.115, the Annual Contributions Contract (the "ACC") governs the contractual relationship between PHAs and HUD "whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of its public housing projects." While HUD attempts to change the contractual nature of the ACC by defining it as a "grant agreement" in the proposed ACC, HUD cannot change the underlying regulatory definition of the ACC without first engaging in notice and comment rulemaking.

Further, the use of a grant agreement to govern the contractual relationship between HUD and MTW PHAs in light of HUD's attempts to expand its authority, control, and involvement in MTW PHA operations is suspect at best. Under 31 U.S.C. § 6304, a "grant agreement" shall be used when "substantial involvement is **not** expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement" (emphasis added). "Substantial involvement" is both expected and required between HUD and MTW PHAs under the proposed ACC.

Lastly, we remind HUD that its past attempts to change its contractual relationships by simply calling a document by a different name, have failed to persuade federal courts.[6] While it is unclear what HUD ultimately wishes to accomplish by changing the name of the document, as a legal matter, whether a document is considered a grant agreement or a contract triggers different legal recourse and damages upon breach or default, which is of concern to all PHAs.

HUD's proposed prohibition on a PHA sharing with a third party any financial and program data, reports, records, statement, and documents submitted through HUD's system of records without prior HUD approval could impact the ability of MTW PHAs to engage in data-sharing agreements and other arrangements with third-party service providers.

Under the proposed ACC, HUD is attempting to give itself unrestricted access to PHA records while restricting the ability of a PHA to release any information contained in HUD's system of records without prior HUD approval. Effectively, this requires HUD approval for a PHA to release its own data, once that data has been uploaded to HUD's system of records, some of which HUD already publishes. Many PHAs, and especially MTW PHAs, have various data-sharing arrangements with third parties related to the provision of services and through other non-traditional MTW activities. This is something HUD encourages in the Standard Agreement, through authorizations for "Partnerships with For-Profit and Non-Profit Entities" ("The Agency may partner with for-profit and non-profit entities…to implement and develop all or some of the initiatives that may comprise the Agency's MTW Demonstration Program") and

[6] See *Public Housing Authorities Directors Association, et al. v. United States*, 130 Fed. Cl. 522 (2017); *see also CMS Contract Management Services, et al. v. Massachusetts Housing Finance Agency v. United States*, 745 F.3d 1379 (2016).

"Transitional/Conditional Housing Programs" ("The Agency may develop and adopt new…housing programs…in collaboration with local community-based organizations and government agencies"). If a MTW PHA cannot release some of its own information to its partners absent HUD approval, simply because that information is contained in HUD's system of records, its efforts to partner with third-parties will undoubtedly be frustrated. We question whether HUD has the capacity to track and approve such submissions and requests without unduly stalling or disrupting PHA operations, especially with respect to MTW PHAs.

HUD's proposed ACC requires compliance with a new conflict of interest standard presenting potential conflict with state and local conflict of interest requirements.

The proposed ACC requires PHAs to comply with a new conflict of interest standard for PHA board members. We are unaware of any law that authorizes HUD to impose such requirements on PHAs. Furthermore, PHAs are subject to existing state and local conflict of interest requirements. HUD's new conflict of interest standard not only requires PHAs to reconcile their existing conflict of interest policies but also potentially exposes PHAs to compliance issues if HUD's new standards conflict or otherwise cannot be reconciled with the state and local requirements. HUD cannot require PHAs to violate state and local law through contract.

HUD must explicitly incorporate a MTW PHA's Standard Agreement and any other prior Amendments to the existing ACC that would remain in effect under the proposed ACC.

We would note that while the proposed ACC contains language for waiver or amendment in Section 19, such language is prospective and there is nothing in the proposed ACC that would address ACC amendments that are already in effect between the PHA and HUD.[7] This is of particular note and concern to the MTW PHAs, whose Standard Agreements amend and supersede the terms and conditions of the PHAs ACC with HUD. While we believe there are statutory restrictions on HUD's ability to unilaterally require MTW PHAs to adhere to this new form of ACC, at minimum, the lack of any language incorporating prior ACC Amendments, such as the Standard Agreement, into this new form of proposed ACC leaves many questions as to the status and enforceability of those amendments when the underlying ACC contract would no longer exist.

PHA employees lack the authority to bind a PHA to any form of proposed ACC without first complying with matters of state and local law governing authorization to contract and a PHA's internal governing procedures.

When HUD initially proposed a revised ACC through a similar PRA notice issued on May 1, 2018, HUD also issued a Capital Fund Processing Guidance for FFY 2018 Grant Awards notice

[7] Section 19 of the proposed ACC reads, "Any right or remedy that HUD **may have** under this ACC may be waived in writing by HUD without the execution of a new or supplemental agreement, or by mutual agreement of the parties to this ACC. This agreement **may be** amended in writing: Provided that, none of the provisions of this ACC may be modified or amended in a manner that impairs HUD's obligation to pay any annual contributions that have been pledged as security for any obligations of the HA." (emphasis added).

proclaiming that, "[w]hen a PHA draws down funds from an FFY 2018 Capital Fund formula grant, it will become bound to the requirements of the…ACC." As we previously communicated to HUD, this is problematic for a number of reasons. First, it is questionable, at best, whether the PHA employee who draws down the funds electronically actually has the authority to bind the PHA to a new contract with HUD. This "contract by drawing funds" ignored the fact that PHAs are local government agencies bound by established state and local law governing, among other things, authorization to contract. Additionally, entering into such contracts requires review and approval by the PHA board of directors under internal governance and policy requirements. We raised our concerns with HUD, noting that HUD had no authority to preempt or force PHAs to violate such requirements. While HUD did not issue a similar notice with the proposed ACC issued on December 27, 2018, we remain concerned that HUD may attempt a similar "contract by drawing funds" approach to implement the proposed ACC.

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

Sincerely,

Andrew Lofton

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

Cc: Senate Subcommittee on Transportation, Housing and Urban Development, and Related Agencies

- Honorable U.S. Senator Susan Collins, Chair
- Honorable U.S. Senator Jack Reed, Ranking Member

House Subcommittee on Transportation, Housing and Urban Development, and Related Agencies

- Honorable U.S. Representative David Price, Chair
- Honorable U.S. Representative Mario Diaz-Balart, Ranking Member