



December 9, 2019

SUBMITTED ELECTRONICALLY

HUD Desk Office
Office of Management and Budget
New Executive Office Building
Washington, DC 20503

Re: Docket No. FR-7011-N-49:
30-Day Notice of Proposed Information Collection: Moving to Work Amendment
to Consolidated Annual Contributions Contract (ACC)

To Whom It May Concern:

On behalf of the MTW Collaborative, we are pleased to submit comments on the Department of Housing and Urban Development's ("HUD") 30-day notice of proposed information collection regarding the Moving to Work Amendment to the Consolidated Annual Contributions Contract (ACC) (the "MTW ACC Amendment").

The MTW Collaborative represents public housing authorities participating in HUD's Moving to Work Demonstration program ("MTW"). The MTW Collaborative monitors and advocates on behalf of MTW agencies' interests and facilitates the sharing of information, best practices, and innovations between MTW agencies. It continues to track the expansion of the MTW program, as authorized by Congress in the Consolidated Appropriations Act, 2016 (Pub. L. 114-113), closely. Its membership includes those agencies currently participating in the MTW program and, upon implementation, will include public housing authorities newly designated as MTW pursuant to the expansion of the MTW program as authorized by Congress.

The MTW Steering Committee, a predecessor to the MTW Collaborative, previously submitted comments on the proposed Moving to Work Amendment to Consolidated Annual Contributions Contract (Docket No. FR-8006-N-20) on February 25, 2019. We appreciate HUD's consideration of our prior comments and recognize certain revisions that HUD has made in response to those comments. However, while we appreciate these efforts, there are many concerns that remain regarding HUD's approach to expanding the MTW program.

We reiterate our concern that the MTW expansion HUD seeks to implement is inconsistent with the intent of Congress that there be one, singular 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. Furthermore, we note that unless and until the Operations Notice for the Expansion of the MTW Demonstration Program (the



“Operations Notice”) is republished in final form, the contents of the Operations Notice remain subject to change and there is no way for the MTW Collaborative to fully assess the validity of HUD’s responses to our comments on the MTW ACC Amendment based on the alleged contents of the Operations Notice. Accordingly, we strongly urge HUD not to finalize the draft MTW ACC Amendment while the Operations Notice remains outstanding and encourage HUD to re-open the comment period on the MTW ACC Amendment following republication of the Operations Notice.

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

HUD’s use of the Operations Notice and MTW ACC Amendment to govern the MTW expansion creates two separate MTW programs and fails to effectively streamline or simplify operations.

- 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, we believe the use of the MTW ACC Amendment as drafted and the Operations Notice as proposed (noting that such is not final) would fundamentally alter the nature of the MTW program as it presently exists. Instead of streamlining and simplifying operations, we fear that the programmatic changes proposed in the Operations Notice and through the MTW ACC Amendment will result in confusion and would be detrimental to the new MTW agencies, stifling their ability to engage in local decision-making and innovation and would be subject to unilateral change by HUD. While we note HUD’s statement that “...the framework of the MTW expansion was drafted with the intent to provide generally the same flexibilities of the existing MTW agencies,” the use of the term “*generally* the same flexibilities” (emphasis added) indicates that they are not the same flexibilities. We instead believe that all MTW agencies ought to be part of one program and subject to the same set of requirements, processes, and flexibilities, which may only be altered by mutual consent and are outlined in the existing Standard Agreement. Additionally, as noted in HUD’s response to comments on the proposed Public Housing Annual Contributions Contract for Capital and Operating Grant Funds (Docket No. FR-7011-N-50) (the “Proposed ACC”), more than 400 PHAs continue to operate under the 1969 version of the ACC. It is unclear whether HUD would use this proposed MTW ACC Amendment for MTW expansion agencies who decline to execute the Proposed ACC (once such is final), and we remain concerned that HUD may use the MTW ACC Amendment and an agency’s participation in MTW to require agency approval of the Proposed ACC.
- While we are sympathetic to the demands placed on staff in HUD’s MTW Office, we do not believe that there is justification to fundamentally alter the nature of the program as such would be applied to the 100 expansion agencies (*see* HUD response that, “administration of over 100 individual MTW Agreements is not feasible for HUD”). The ability of each agency to enter into a Standard Agreement with HUD, inclusive of agency-specific waivers and amended only through mutual agreement, is a fundamental



aspect of the MTW program. Although HUD considers amending over 100 contracts to be “much more difficult,” it is also engaged in an effort to amend thousands of ACC Contracts, so such is something that, if motivated, HUD considers themselves capable of, and we would like to see HUD make the Standard Agreement a priority for all present and future MTW agencies.

- There is not a one-size-fits-all approach to MTW and we strongly reject HUD’s efforts to re-regulate and force such upon incoming agencies. We strongly disagree with HUD’s response to prior comments that “To improve scalability and allow for ease of adding additional flexibilities to the demonstration, PIH looked to the Rental Assistance Demonstration (RAD) program and its implementation through HUD notices. Using RAD’s model, HUD will be able to revise the MTW Operations Notice as it learns from and develops the demonstration, whereas it is much more difficult to amend over 100 contracts.” The RAD program is a transactional, development program. It is a single program with a single set of criteria that HUD consistently uses to evaluate each RAD transaction. Conversely, MTW was intentionally designed as a program to reduce the oversight role of HUD and allow local decision-making. MTW agencies are fundamentally different from one another based on the flexibilities they choose to implement, agency priorities, and local need. Agencies would not be eligible for the MTW expansion if they were not already high performers under either PHAS or SEMAP. Based on their capacity and past performance, MTW agencies were awarded such designation by HUD and are deserving of less monitoring at the federal level so that they can best respond to local need. Combined with their track record of success, HUD should feel confident reducing the monitoring requirements placed upon other non-MTW public housing authorities knowing that MTW agencies remain subject to local oversight and board approval processes.
- While we appreciate and share HUD’s desire to consistently interpret and administer MTW provisions, the latest draft of the Operations Notice delegated much of the oversight responsibility to the various HUD Field Offices, which appears inconsistent with HUD’s stated goal of ensuring consistency. For years, MTW agencies have offered to assist HUD in revising the current MTW oversight model, and we again extend that offer to HUD. As discussed above, MTW agencies are high performers who have demonstrated their capacity to successfully operate housing programs to serve the needs of low-income residents. We believe that by allowing local MTW agencies to address the individual and varied needs of their communities, focusing the role of HUD’s MTW office on monitoring of the core objectives of the MTW program and using their unique national perspective to identify and share positive outcomes and areas of success from across the MTW program, many administrative efficiencies can be achieved. We would encourage HUD to work with existing MTW agencies to develop, through mutual agreement, more appropriate and efficient oversight mechanisms that would be useful for both current and future MTW agencies.



The use of the Paperwork Reduction Act (“PRA”) is not a legitimate means by which to solicit public comment on the MTW ACC Amendment.

- We previously commented that the use of the PRA is an inappropriate method to solicit public comment on the MTW ACC Amendment, as it does not satisfy the public notice and comment process required under the Administrative Procedures Act (“APA”), and we continue to raise these concerns. Instead of responding to our prior comments, HUD instead replied that, “Contrary to statement made by commenters, the PRA process does require solicitation of and response to public comments...” and that the information collection is authorized pursuant to 5 CFR 1320.3(c)(1). While we previously acknowledged that the PRA process can include contracts and agreements which are ordinarily exempt from notice and comment under the APA,¹ 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.”² While it is true that the PRA does involve public comment, such comment requirements do not satisfy the heightened standard under the APA that applies to rulemaking and is thereby extended to contracts through HUD regulation. The public comment period under the PRA is subject to OPM approval and OMB approval. However, when a federal agency promulgates a rule³ that is designed to have binding legal effect on both the issuing agency and the regulated public, such agency is required to go through notice-and-comment rulemaking before such binding requirements may be enforced. With respect to the MTW ACC Amendment, HUD attempts to rewrite regulations and promulgate legislative rules designed to have binding legal effect on PHAs through contract absent APA notice and comment procedures to which it is otherwise subject.

Section 3: “...The PHA’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) as it is issued and may be amended in the future, or any successor notice issued by HUD (“the MTW Operations Notice”); and

¹ See 5 U.S.C. § 553(a)(2).

² 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.

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)).



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 twenty-year MTW term.”

- Unless and until the Operations Notice is republished in final form, the contents of the Operations Notice remain subject to change, and there is no way for the MTW Collaborative to fully assess or provide comment on the impact of this provision of the MTW ACC Amendment.
- We would again remind HUD that the Standard Agreement, which governs participation 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. We are concerned to see that this is not the approach taken by HUD 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 PHA consents to such changes. Although HUD asserts in response to comments that, “The MTW Operations Notice states that any significant updates to the Operations Notice by HUD will be preceded by a public comment period,” until the Operations Notice is finalized, we do not know what it will or will not say. We additionally have concerns about who or what would be used to define the term “significant update,” as something may seem insignificant to HUD but may be very significant to MTW agencies or vice versa. Finally, we note that a notice and comment period is a very different standard than the mutual consent requirement applied to the Standard Agreements of the existing 39 MTW agencies. As required by Congress with respect to the existing 39 MTW agencies, we continue to believe that any changes by HUD to the MTW program ought to require mutual agreement, regardless of when the MTW agency entered the MTW program.

Section 5(C): “Notwithstanding any exemptions pursuant to this MTW ACC amendment and the MTW Operations Notice, the PHA remains subject to all other HUD Requirements (which include the Public Housing Requirements), as they may be amended in the future.”

- We appreciate HUD’s consideration of our earlier comments that the original language first published by HUD in Section 5 of the MTW ACC Amendment could be interpreted to subject expansion MTW agencies to sub-regulatory guidance, despite waiver of the authorizing statute or regulation. Yet, while HUD addressed that issue, because the above sentence reads, “Notwithstanding any exemptions pursuant to this MTW ACC amendment and the MTW Operations Notice...” and the term “other HUD Requirements” in the above



sentence remains undefined, we remain concerned that this provision creates unnecessary ambiguity with respect to exactly which “other HUD Requirements” HUD intends to apply to an MTW agency and which “other HUD Requirements” HUD intends to be waived. Accordingly, we again request that HUD revise the above to be consistent with the MTW Standard Agreement 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 and what we believe to be HUD’s intent, there is little ambiguity that 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 any “other HUD Requirement” waived under the 1937 Act, it is clear that the authorized MTW activity would prevail.

Former Sections 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.” “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.”

- The above language was included in the previous version of the MTW ACC Amendment, and while we appreciate that HUD has removed this language in response to public comments, we also note HUD’s response to comments that this deletion from the MTW ACC Amendment does not solve the underlying issue as “the final MTW Operations Notice will provide additional information on the factors HUD will evaluate when considering requiring a PHA to discontinue an activity.” As stated elsewhere, without access to the final version of the Operations Notice, we are unable to appropriately comment on the particulars of this policy
- With the above in mind, we reiterate our previous concerns regarding HUD’s language about the discontinuation of activities. Namely that 1) this language is not consistent with



what is required of current MTW PHAs under the Standard Agreement, and 2) we strongly object to HUD asserting that it can unilaterally decide whether or not an MTW activity should be allowed to continue, especially because without the Operations Notice it is 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.”

- We appreciate HUD's consideration and implementation of our earlier comments that recommended the inclusion of language derived from the Standard Agreement to allow a process for MTW waivers to continue in the unlikely event that an MTW agency loses its broader MTW designation. We are also pleased to see that HUD has revised its transition plan requirement to only require such one year prior to the expiration of an agency's initial or extended MTW term.

Section 8: “...Any future laws affecting the Authority's funding, even if that future law causes a decrease in the PHA's funding, shall not be deemed a breach of this ACC amendment. No future law or HUD's execution thereof shall serve as a basis for a breach of contract claim in any court.”

- Consistent with prior comments submitted by the MTW Steering Committee, we continue to object to the inclusion of the above language in the MTW ACC Amendment. This is a clear attempt by HUD to strip MTW PHAs of their ability to challenge HUD for breach of contract actions. It is clear that in making this change through the proposed MTW ACC Amendment, HUD is engaging in efforts to contract around the decision in *Public Housing Authorities Directors Association, et al. v. United States*, 130 Fed. Cl. 522 (2017). Although HUD states in its response to comments on the Proposed ACC, “Nothing in the revised ACC forecloses avenues for judicial relief from any HUD action that is arbitrary, capricious or contrary to law,” through the inclusion of this language in the MTW ACC Amendment, HUD is requiring MTW PHAs to contractually agree not to bring a breach of contract claim in the event of future reductions or offsets in funding by HUD. The MTW Collaborative requests HUD remove such language, which is nothing other than an effort by HUD to eliminate the ability of MTW agencies to bring future litigation in the United States Court of Federal Claims. We strongly oppose this clear attempt by HUD foreclose avenues of judicial relief and condition MTW designation on a public housing authority's acquiescence to HUD breaches of the MTW ACC Amendment.



While we appreciate HUD's efforts to take our earlier comments under consideration and making select revisions to the MTW ACC Amendment, our primary concern remains the same – the MTW expansion as implemented by HUD creates two separate MTW programs and abolishes the existing requirement for mutual agreement. We share HUD's goal of ensuring a successful MTW expansion by allowing the many flexibilities that MTW PHAs have implemented to be realized by the incoming agencies and look forward to continued dialog with HUD as to how that can best be achieved, consistent with Congressional intent.

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 that reads "Andrew J. Lofton". The signature is written in a cursive style with a large initial "A".

Andrew Lofton
President, MTW Collaborative