



December 9, 2019

SUBMITTED ELECTRONICALLY

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

Re: Docket No. [FR-7006-N-15]: 30-Day Notice of Proposed Information Collection: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds: 30-Day Notice of Proposed Information Collection: Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds

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 Public Housing Annual Contributions Contract for Capital and Operating Grant Funds (the "ACC").

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 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.” 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. We have attempted to engage HUD regarding these concerns and have been forced to raise our concerns with members of Congress.

**The proposed ACC is simply HUD’s latest attempt to unilaterally change the contractual relationship between HUD and MTW PHAs, which Congress has expressly affirmed through the Standard Agreement and cannot be changed absent mutual consent.**

We disagree with HUD’s assertion that, “The new ACC does not amend the MTW Standard Agreement.” As the underlying contract between HUD and MTW PHAs, any changes to the ACC will affect the terms of the Standard Agreement. This is not HUD’s first attempt to make unilateral changes to the Standard Agreement through alternate means. Since 2016, when Congress extended the terms of the Standard Agreement, HUD has proposed notices on topics such as “Substantially the Same” and others attempting to re-define the terms of the Standard Agreement 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, 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.<sup>1</sup>

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<sup>1</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).



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. While HUD has revised its previous definition of "HUD Requirements," which previously expanded compliance requirements beyond properly promulgated laws and regulations to include compliance with any and all HUD-issued notices, forms, and agreements, HUD's new definition of "Public Housing Requirements" still presents issues for MTW PHAs. At first glance, the new "Public Housing Requirements" definition appears to be tempered; however, such is not a finite list of items to which a PHA may be required to adhere. While we acknowledge that the Standard Agreement does "supercede the terms and conditions of one or more ACCs...", the Standard Agreement only waives "certain provisions of the 1937 Act and its implementing regulations" (Amended and Restated Standard Agreement, Section I(C)). The Standard Agreement does not waive compliance with HUD-issued notices, and HUD-required forms, or agreements, which we fear could still be required under HUD's new Public Housing Requirements definition, because, as a matter of law, such documents are generally considered non-legislative rules under the Administrative Procedures Act ("APA"), are often exempted from notice and comment under the APA as "interpretative rules" or "general statements of policy,"<sup>2</sup> and are not meant to have binding legal effect, making this a unilateral change to the ACC and a MTW PHA's obligations thereunder. If left unchanged, MTW PHAs could be required to comply with additional sub-regulatory guidance, which would render many of their MTW flexibilities in Attachment C and Attachment D of their Standard Agreements null and void. While we would note that in response to some of these concerns HUD amended the MTW ACC Amendment, which would apply to incoming MTW expansion agencies, to clarify that authorized waivers also apply to sub-regulatory guidance, such language is absent from the Standard Agreement.

**HUD's addition of a signature line on the ACC continues to fall short of the mutual agreement requirement under the prevailing ACC and falls short of Congress's mutual agreement requirement for changes to the Standard Agreement.**

Under the prevailing 1995 ACC currently in place between PHAs and HUD, any amendment must be made in writing "by mutual agreement of the parties." Though HUD now acknowledges that "entering into the ACC requires Board and Executive Review," in 2018, HUD purported to bind PHAs to the amended ACC not by mutual agreement, but simply by drawing down Capital Funds, ignoring the fact that PHAs are local government agencies bound by established state and local laws governing authorization to contract. Furthermore, as MTW agencies, there are to be no changes to terms and conditions in the Standard Agreement except for those "mutually agreed upon by the Secretary and any such agency." Though HUD states in response to comments that it "expects the Board and Executive Review approval would be conducted as part of same process engaged by PHAs before making submissions for financial assistance through the Operating Fund and Capital Fund formulas," it is unclear what will happen to PHAs, MTW or

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<sup>2</sup> 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>.



otherwise, who fail to adopt this proposed ACC. As with the implementation of the 1995 ACC, we believe that PHAs should have a meaningful choice of whether to adopt this new ACC or remain governed by the 1995 or 1969 form of ACC.

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

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<sup>3</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 exempt from notice and comment under the APA,<sup>4</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>5</sup>

While HUD presents such changes to the ACC 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.

**HUD does not have the authority to foreclose future litigation efforts through a PRA notice.**

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<sup>3</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)).

<sup>4</sup> *See* 5 U.S.C. § 553(a)(2).

<sup>5</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 10 in the prior version of the ACC gave HUD broad authority to reduce, offset, terminate, recapture, withhold, suspend, reduce, or take any other action it wished regarding PHA funding. While HUD eliminated this language in the 2019 proposed ACC, new Section 11 of the proposed ACC provides that, “This agreement does not contemplate money damages as a remedy for a breach of the agreement by HUD.” 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). Outside of Tucker Act jurisdiction, HUD has sovereign immunity against breach of contract claims. 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 ACC, HUD is requiring PHAs to contractually agree not to bring a breach of contract claim against 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 public housing funding on a public housing authority’s acquiescence to HUD breaches of the ACC.

**Re-naming the proposed ACC an “Annual Contributions Terms and Conditions for the Public Housing Program” 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.” We would 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.<sup>6</sup> However, such has not deterred HUD; in 2018, HUD attempted to redefine the ACC as an “annual grant agreement,” and in this 2019 Notice, HUD attempts to rename the ACC as the “Annual Contributions Terms and Conditions for the Public Housing Program.” Although HUD may attempt to change the name of the ACC, HUD cannot change the underlying regulatory definition of the ACC at 24 C.F.R. § 990.115, which defines such as a contract, 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”

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<sup>6</sup> 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).





(emphasis added). “Substantial involvement” is both expected and required between HUD and MTW PHAs under the proposed ACC.

**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 13, 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.<sup>7</sup> This is of particular note and concern to the MTW PHAs, whose Standard Agreements amend and supersede the terms and conditions of the 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.

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 fluid and cursive, with a large initial "A".

Andrew Lofton

President, MTW Collaborative

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<sup>7</sup> Section 11 of the proposed ACC reads, “Breach. This agreement does not contemplate money damages as a remedy for a breach of the agreement by HUD.” And Section 13 reads “Waiver or Amendment. The PHA may request a waiver or amendment to this ACC. Any administrative right that HUD may have under this ACC may be waived in writing by HUD for good cause.”