



February 21, 2017

SENT VIA EMAIL

Office of Public and Indian Housing
Department of Housing and Urban Development
451 Seventh Street, S.W., Room 4130
Washington, DC 20410-0001

Re: Request for Comments and Recommendations on a Revised Methodology To Track the Extent to Which Moving to Work Agencies Continue To Serve Substantially the Same Number of Eligible Families

Docket No. FR-5958-N-01

Introduction

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. The statute directs PHAs to submit applications to HUD and request authority to combine public housing and Section 8 voucher funds into a single block grant, along with “a plan developed by the agency” after a local process that takes into account comments from residents and the public and that includes criteria for “continuing to assist *substantially* the same total number of eligible low-income families as would have been served had the amounts not been combined.”

The undersigned constitute the designated Steering Committee of the 39 MTW PHAs who have been successfully serving families under MTW, in some cases for nearly 20 years, and have been authorized to represent the consensus views of the 39 MTW PHA’s on this Substantially the Same (STS) Notice. Indeed, in 2015 Congress affirmed its support for our MTW programs by directing HUD to extend the existing MTW agreements until 2028 “under the same terms and conditions...except for any changes...mutually agreed on” by HUD and an MTW agency. Yet, through this STS Notice, HUD now announces its intention to impose new regulations that are inconsistent with the law and that threaten to undermine our ability to serve our communities as Congress intended.

For the reasons stated below, we urge HUD to withdraw the STS Notice, take no further action based upon it and, instead, engage in discussions with the MTW PHAs regarding an STS policy that is consistent with the statute. In addition, we note that the STS Notice is one of three MTW notices which HUD put forward in the December 2016 to January 2017 time period which take a similar approach to re-regulating MTW. We believe HUD should reconsider its approach to MTW so that it advances Congressional goals and enhances our ability to serve low-income families and communities based on local needs and priorities.

Congress assigned to PHAs, not HUD, the task of developing local plans to serve families which meet program criteria. The need for HUD to defer to local communities in the use of federal housing assistance is even more apparent today than it was in 1996. To begin with, there is now a broad consensus that housing subsidies alone will not provide many families with the foundation they need to achieve economic stability. MTW allows PHAs to adjust the form and level of subsidies they provide to families and to supplement housing assistance with other supports and services in ways that traditional HUD programs do not. In a very constrained budgetary environment, with competing statutory and policy priorities that the federal government does not fund, HUD must respect the choices that local PHAs have to make to meet the needs in their communities with scarce resources, as Congress called for.

In that regard, Congress's use of the term "substantially" the same number of families is critical, as it indicates that a PHA may use federal housing assistance in other ways to promote self-sufficiency even if it means that fewer total families receive housing assistance alone at any one time. It seems obvious to us that a family which uses these additional services to become self-sufficient opens up a new opportunity to another family on the waiting list. Similarly, in some communities where housing supply is a critical issue, PHAs may choose to use some housing subsidy dollars either to engage with development partners to produce additional affordable housing units or to rehabilitate or otherwise preserve existing units, both of which make more units available over the long term. The MTW statute requires PHAs to pursue a broad set of goals without providing any additional funds. Thus, a rigid interpretation of STS would defeat the purpose of the program. In addition, we note that the statute references STS only with respect to situations where funds are "combined", whereas HUD is attempting to inappropriately use that language to broadly regulate the number of families a PHA serves only with housing assistance.

Our views are informed by the extensive conversations regarding STS held with HUD staff over the course of 2015 before Congress intervened. Those conversations highlighted the complexity and pitfalls of attempting to develop a standardized and fine-grained formula that could reflect the varying MTW strategies and market conditions in all parts of the country. We believe such a formula is contrary to the intent of the MTW program, which is to provide maximum flexibility to local communities so that they may use these resources to efficiently and effectively coordinate with local partners to develop local strategies that reflect local conditions. As in 2015, the proposed HUD approach will force MTW PHAs to redirect MTW funds into the traditional, standardized HUD program formats and force successful locally designed strategies already underway to be curtailed or abandoned.

The approach taken by HUD would penalize MTW housing authorities who are creatively using MTW funds to accomplish critical objectives. For example, the approach would:

- Use standardized tenant total payments (TTP) that would penalize PHAs who are intentionally targeting the homeless, which has been a key HUD objective.
- Use standardized regional benchmarks for payment standards that would penalize PHAs that are providing payment standards that enable subsidies in high-opportunity neighborhoods or in some cases counteract unrealistic HUD-determined fair market rents.
- Penalize MTW PHAs that provide shallow subsidies where the PHA is leveraging funding for employment and case management services that reduce long-term dependency.
- Discourage the use of funds for housing preservation or new construction through locally designed approaches that reflect local market conditions and housing needs by substituting a centralized, one-size-fits-all program.
- Discourage use of MTW funds for recapitalization of public housing stock, which endangers existing tenants, contributes to neighborhood destabilization, and is more costly in public dollars over the long run. This also runs contrary to HUD's Rental Assistance Demonstration (RAD).

Section-by-section comments follow. In addition, if HUD does not withdraw the STS Notice, it would appear that the comment period must be extended under the Assistant to the President and Chief of Staff's January 20, 2017 memorandum entitled "Regulatory Freeze Pending Review." The undersigned reserve the right to submit additional comments in the event that the comment period is extended.

Section A: Connecting the Number of Families an MTW PHA Must Serve to Funding Received.

The funding that a PHA receives obviously relates to the number of families an MTW PHA can serve, but the use of STS in the MTW statute is more focused. HUD's questions indicate that HUD intends to regulate far beyond the STS statutory framework.

A1: HCV Denominator of STS Requirement Ratio

a. How should the average agency cost to house a family in the HCV program for MTW PHAs be established to ensure it: Is unaffected by MTW flexibilities already in place, is accurately weighted by household size, and reflects local market costs and factors?

Use of MTW flexibilities could decrease or increase per-unit cost. Decreases in per-unit cost by definition mean that more families are being served and thus are not an STS concern. HUD should tread lightly on making downward adjustments to counteract increased per-unit costs for rental assistance, which may well reflect local markets rather than MTW flexibilities related to combining funds. Agencies must be able to demonstrate the impact of local market costs on STS compliance. Any increased costs that relate to the provision of services to help families succeed and thrive with rental assistance do not result from combining of funds and thus are not subject to STS regulation.

b. If payment standards are utilized in determining the average cost to house a family in the HCV program for MTW PHAs, what level of payment should be used?

The use of payment standards to determine the average cost to house a family in the HCV program is a national one-size fits-all methodology that will be counter-productive.

If this methodology is used, it would penalize PHAs in areas with volatile rental markets and those who are responding to changes in local rental housing market conditions. Such an approach would not account for a lower housing success rate in areas with extremely high market rents or extremely low vacancy rates. If the agency sets a higher payment standard greater than 110% and thus reduces the number of persons served, that is not a result of combining funds under MTW and thus is not subject to STS regulation. The use of HUD's Small Area FMRs or similar strategies would create an exorbitant amount of complexity in trying to apply an "average" payment standard (or prevent MTW agencies from being able to participate in Small Area FMRs).

c. What other factors should HUD consider in establishing the number of families an MTW PHA must serve with HCV funds?

HUD could follow the statute and allow individual MTW PHAs to propose STS requirements that take their individual circumstances into account. HUD possibly could adopt a safe harbor standard that focuses on a minimum percent of HCV funding expended for rental assistance as a proxy for a minimum number of households served, or alternatively at the PHA's option, a minimum percent of units under annual contributions contract that are leased; with the safe-harbor percentage allowing for flexibility to address critical needs such as for supportive services, preservation of public housing and other initiatives to further the self-sufficiency and housing choice purposes of the statute. Some fairly simple approaches were discussed at points during the 2015 discussions and in 2014 with the Assistant Secretary for Public and Indian Housing.

A2: Public Housing Denominator of STS Requirement Ratio

a. How should the average agency cost to operate a public housing unit for MTW PHAs be established to ensure it: Is unaffected by MTW flexibilities already in place, accounts for local market costs and factors, and ensures accountability for MTW PHAs that receive higher levels of public housing operating subsidy?

HUD should keep any safe harbor related to number of families served by public housing simple.

HUD's reference to ensuring accountability for MTW PHAs with alternative operating subsidy formulas is really a dispute with Congress' extension of the MTW Agreements that contain these subsidy formulas for ten years. This dispute has nothing to do with the statutory STS requirement and has no place in this discussion. Even if this were not the case, neither HUD nor the MTW PHAs collected the data over the 12 year period to determine what these agencies' subsidy levels would be under the standard formula.

b. What other factors should HUD consider in establishing the number of families an MTW PHA must serve with public housing funds?

Regardless of the public housing funds received, the maximum number of families a PHA can serve in the public housing program is the total number of units authorized under the Public Housing Annual Contributions Contract. Appropriate further adjustments must be made to address funding shortfalls. HUD's approval of local STS methodologies should not count units off-line for reasons approved by HUD; should allow the same average vacancy rate of 3% for MTW PHAs as given to non-MTW PHAs; and should include an additional allowance to provide for flexible use of MTW funds to address statutory goals.

Section B: Addressing the Varied Subsidy Levels at Which MTW PHAs Serve Families

1. How should HUD define and address Shallow Subsidy in the STS Requirement methodology?

Defining a separate measure for households receiving shallow subsidies goes beyond the statutory STS requirement. For this and many other reasons, every assisted household should be counted as one whole household. If HUD has concerns that agencies might game an STS requirement by adopting MTW activities for this purpose, HUD can address that in its Annual MTW Plan activity approval process.

2. If the rent burden of the family receiving assistance is utilized in defining Shallow Subsidies, what level of rent burden should be used? How should the households meeting that level of rent burden be counted in the numerator of the STS Requirement methodology?

HUD should abandon its effort, unsupported by statute, to regulate MTW agencies based on "shallow subsidies." The provision of shallow subsidies is a policy choice that MTW agencies are authorized to make.

Further, using rent burden as a proxy by which to discount the number of households an MTW agency serves is problematic and in contradiction to the statutory MTW objectives regarding efficient use of funds and increasing economic self-sufficiency among assisted households. Many factors outside of an agency's control can contribute to a household's rent burden and may not necessarily be the result of a policy decision. This proposal does not account for the unique scenarios and decisions that families make or markets dictate, nor for the extent to which factors resulting in reduced per-unit subsidy affect all PHAs (who are not penalized for resulting "shallow subsidies") and not just MTW agencies, nor for the extent to which MTW subsidies are limited because they are leveraging other funds.

A key aspect of MTW is the ability to be responsive to local conditions and local needs. For example, many agencies are using their MTW status to address the growing homelessness crisis by leveraging funding to reach those individuals and families who are underserved by traditional housing subsidy programs. MTW has allowed agencies to create targeted subsidy programs that meet the diverse and varying needs of those experiencing homelessness. Some examples of programs include Rapid Re-housing programs for working families who need only a few months of shallow subsidy, stepped rent models for youth coming out of homelessness or the foster care system, flexible rent assistance for domestic violence survivors, and sponsor-based supportive housing for those experiencing chronic homelessness. These are households who, until recently, were left behind and often unsuccessful in traditional housing programs. By prorating households served in programs in pursuit of this goal, HUD would be penalizing agencies who are aiming to effectively serve more households and assist them in their journey to self-sufficiency.

Proration of "Shallow Subsidy" households further incentivizes the PHAs to adhere only to a traditional deep subsidy model, limits innovation and solutions in partnership with the private sector, and wholly supports continued dependency on Federal funds to support families every month through traditional Section 8 or Section 9 program models.

3. If the rent burden of the family receiving assistance is utilized in defining Shallow Subsidies, should certain exceptions be made for households paying minimum rent, zero income households, and/or households opting for a unit in an area of opportunity that is above the standard affordability threshold? Are there other households that should be included as exceptions, therefore receiving a full credit despite rent burden?

As previously stated, all households served, despite their rent burden, should count as one whole household.

4. What other factors should HUD consider in addressing Shallow Subsidies?

A formula that discounts certain types of households would be overly complex and difficult to administer. Such a complicated methodology would make it challenging for agencies to calculate and project service levels, adversely impacting planning and budgeting activities. By going beyond the statute and addressing varied subsidy levels in the STS Requirement, HUD effectively would penalize and demotivate agencies from creatively applying MTW funds to address critical local needs and the fundamental statutory objective to demonstrate cost-effective new approaches, while increasing the administrative burden of the program.

Section C: Accounting for the Development of Affordable Units with the MTW Block Grant that are Outside of the Public Housing and HCV Programs

1. Does the MTW Block Grant investment amount divided by TDC approach appropriately capture this type of MTW flexibility?

Absolutely not. This approach does not adequately capture the fact that relatively small amounts of MTW funds can leverage significantly more funding from other sources for the development of affordable housing units and fill an essential gap without which the development will not happen. HUD should encourage such investments. The TDC approach assumes that units are developed on a total cash basis. Further, counting households served through local non-traditional developments using the TDC approach will be a disincentive to develop affordable units. The TDC approach also would create an incentive to site projects outside of higher opportunity areas in an effort to keep costs at or below HUD-published TDC figures and keep a project from negatively affecting an MTW PHA's STS compliance ratio. Units need to be counted whether they are newly constructed, rehabilitated or otherwise preserved.

2. Are there other suggestions for how the development of affordable housing units outside of the public housing and HCV programs can be included in the numerator of the ratio?

All project based voucher units of course would be included in the numerator. Any unit produced (by a PHA, a PHA affiliate or an unaffiliated entity) utilizing MTW funds that has a long term affordability restriction (at or below 80% AMI) should be included in the numerator for the duration of the affordability period.

Section D: Setting Reasonable Levels and Categories of Compliance

1. How should "Substantially the Same" be interpreted under the 1996 MTW Statute?

HUD's notice recognizes that the statute's inclusion of "substantially" must be given meaning; this is a fundamental aspect of MTW. It would be unrealistic to expect MTW PHAs to serve exactly the same number of households while utilizing program flexibility to meet other statutory requirements and goals, including self-sufficiency and housing choice.

Treatment of STS must recognize that the required flexibility is not a question of small or nominal dips below 100 percent. Instead, MTW agencies must have ongoing flexibility to address all of the statutory objectives in a manner that makes the most sense locally.

Given that the authorizing legislation places the responsibility for defining STS on the Agency rather than HUD, there need not be a “one-size-fits-all” definition of how to define STS. HUD’s role should be to establish simple, basic parameters for compliance as a safe harbor, but not to dictate to localities the specifics, and certainly not to create one rigid and complex formula that is sure to miss local circumstances and thereby unduly constrain MTW.

2. Should there be a percentage below 100% that is considered fully compliant with the STS Requirement without further justification by the MTW PHA? What should this level be and why?

To fully account for MTW flexibilities and allow MTW agencies to address all statutory goals, compliance with the STS requirement must allow families-served levels considerably below 100% without further justification by an MTW PHA. Additionally, a 100% families-served level is difficult to determine accurately, because it requires assumptions about costs, the causes of those costs and whether they can be attributed to MTW activities. HUD’s regulatory efforts must take this into account. As well, all MTW funds expended, including funds expended on preservation of existing housing, must be included in an assessment of compliance.

3. Should there be a percentage below 100% that is considered fully compliant with the STS Requirement with further justification by the MTW PHA and approval by HUD? What should this level be and why? What justifications should be allowable?

HUD should set a safe harbor threshold that is considered compliant, without further justification. If the PHA is below the safe harbor, HUD could require justification. Allowable justifications should include instances in which a PHA prepares a major transformation plan or other strategic plan requiring the shift of MTW Block Grant Funds toward major capital improvement, major redevelopment or development activity.

4. What should be considered “non-compliance” under the STS Requirement? What enforcement actions should be taken by HUD and what opportunities for corrective actions should be available to MTW PHAs?

Non-compliance must be set at a level that allows MTW agencies to further demonstrate goals and respond to local rental housing market demands. In other words, the non-compliance threshold must not be set as a ratio that would prohibit or discourage MTW agencies from developing bold activities that respond to local need and that look for experimental ways to meet MTW obligations to encourage family self-sufficiency and increase housing choices. Any non-compliance determination must fully consider the impact of funding cuts.

Furthermore, PHAs only should be considered noncompliant under the STS Requirement after a reasonable notification period and a reasonable opportunity to cure any alleged noncompliance in accordance with MTW Agreements. The Steering Committee in 2015 proposed a three-year look; an agency that is out of compliance for a year based on mutually agreed requirements under STS would have the next year to cure the non-compliance considered over a three-year period. The period included the non-compliant year and the years before and after that year. If the agency were non-compliant based on the entire period, HUD could invoke remedies to be discussed further. A corrective action plan should be submitted with a timeline that provides at least two fiscal years from notification to implement.

Section E: Adjusting for Changes to the Capacity of an MTW PHA to Serve Families and Unforeseen Effects

1. The variables that result in standard, annual incremental increases or decreases to an MTW PHA’s capacity to serve families are listed in PIH Notice 2013–02. Should HUD consider any changes to this list?

HUD could consider changes included in individual agency STS proposals, such as counting of services-only families or some circumstances based on locally proposed STS requirements. Funding proration must be considered in compliance determinations.

2. Should there be future adjustments of the denominator to account for cost changes outside the scope of the MTW Demonstration Program? If so should such adjustments be elective for each MTW PHA or applied at fixed points to all MTW PHAs? If applied at fixed points, at what intervals should such adjustments occur? What types and levels of changes to costs should be considered in such potential recalculations?

Any safe harbor requirements should build in adjustments for cost changes every several years, whether these changes result from market factors, governmental requirements or other factors. MTW agencies should have the ability to show at any time that their compliance with the STS requirement has been affected by significant changes in costs.

Section F: Ensuring Predictability Under the STS Requirement for Current MTW PHAs

1. What, if any, transition time should be available to current MTW PHAs in moving from the existing methodology in PIH Notice 2013-02 to the revised methodology?

Each PHA should be given a minimum of at least two budget cycles to transition after its locally-developed STS methodology has been approved. This will give the parties time to evaluate and address any unintended consequences of the locally-revised methodology.

2. What testing and provisional data should be made available to MTW PHAs in moving from the existing methodology in PIH Notice 2013-02 to the revised methodology?

The transition period can be used for testing and to develop confirmation data. The specifics need further discussion in the context of local generation for HUD's approval of STS requirements and a HUD safe harbor for approvals.

3. What are other suggestions to ensure predictability for MTW PHAs with regard to the STS Requirement?

Predictability will be improved by simplicity of the proposed safe harbor. Reliance on constructs or proxies for average costs is likely to compromise predictability and should be avoided.

Section G: Other Feedback

1. What are other suggestions to improve monitoring of the STS Requirement not covered in other portions of this Notice?

The STS language in the law is designed to ensure that MTW PHAs do not use their ability to combine funds to pursue initiatives or programs that lead to a substantial diminishment in the number of eligible families that MTW Agencies serve. Similar checks on MTW Agencies' decision making are found elsewhere in the statute, like the 75% very low-income at admissions and comparable mix of families served requirements. Taken together, these statutory obligations are designed to ensure that MTW agencies do not use their flexibilities to stray from the fundamental purpose of the Public Housing and Housing Choice Voucher programs; that is, to use federal funds received for housing low-income families to house low-income families. Local participation processes and Board oversight are further checks on MTW PHAs' performance.

Nothing in the law supports HUD's supposition that MTW agencies be held to a higher standard with respect to utilization of their programs, as HUD appears to be attempting with this notice, by correlating funds received with households to be served. STS exists to determine whether an MTW PHA's choice to combine funds is resulting in a substantial diminution in the number of households served had the funds not been combined, not to determine whether an MTW agency should serve additional or fewer households based on the amount of funding they receive through HUD. While this may be a strategy the Department is anxious to pursue, the law does not support it.

MTW PHAs must, per the statute, demonstrate compliance with the STS requirement. We remain committed to working with the Department to ensure that, consistent with the law, the Annual Plan of any MTW PHA that combines Housing Choice Voucher, Public Housing Operating and/or Public Housing Capital funding in ways only permitted by its MTW designation, includes criteria for demonstrating that the PHA is serving substantially the same number of households as it would have had those funds not been combined.

These comments suggest that HUD's consideration of the STS requirement needs to be fundamentally re-set. We strongly encourage HUD to reconsider the process by which the STS methodology will be developed and finalized and consider, instead, offering the existing 39 MTW housing authorities the option to work with HUD on working through an inclusive approach to reach a solution for all agencies that adheres to the statute and preserves the intent of the MTW Demonstration. We strongly believe that this should be developed by a negotiation with the Steering Committee.

2. Should this revised methodology apply to both current MTW PHAs and PHAs that will be added to the MTW Demonstration program through the MTW Expansion?

For the reasons articulated throughout this response, no STS methodology should be applied to either existing or new MTW PHAs that is inconsistent with the law, holds MTW agencies to higher utilization or expenditure requirements than non-MTW agencies, contains insufficient flexibility to allow agencies to address all statutory purposes, and is difficult to understand or communicate and costly to implement. We hope that, after meaningful collaboration with the MTW Steering Committee, an approach for demonstrating STS that meets the Department and the agencies' needs will be developed that could be universally applied to both existing and new MTW agencies that elect to combine both Section 8 and 9 funds. We strongly believe that the Department should not implement any new STS rule before a mutually acceptable methodology is developed.

Sincerely,



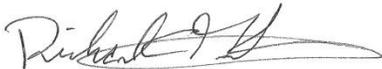
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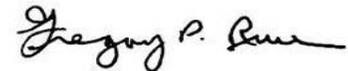
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cc: MTW Agencies