

September 9, 2014

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th St. SW, Room 10276
Washington, DC 20410-0001
Submitted electronically through www.regulations.gov

Re: Docket No. FR-5578-P-01, Streamlining Requirements Applicable to Formation of Consortia by Public Housing Agencies

To whom it may concern:

These comments are submitted by 10 organizations that are committed to expanding housing opportunities for low-income families and increasing the effectiveness of the federal rental assistance programs. Six of the organizations work at the national level: Center on Budget and Policy Priorities, Consortium for Citizens with Disabilities Housing Task Force, National Housing Law Project, National Low Income Housing Coalition, Poverty & Race Research Action Council, and the Technical Assistance Collaborative; four focus on state or regional policy: BRiCK Partners and the Metropolitan Planning Council (leaders of the Chicago Regional Housing Choice Initiative, Housing Choice Partners (Illinois) and the Massachusetts Law Reform Institute.

In sum, we strongly support the proposal to allow public housing agencies (PHAs) to form single-ACC consortia, and recommend two changes in the proposed rule to enhance the incentives for PHAs to enter into these consortia arrangements and one additional change to avoid creating additional legal barriers in some states. In addition, we recommend that HUD allow partial consortia and permit agencies in the Moving to Work demonstration to participate in them. Finally, we urge HUD to allow agencies that administer only Mainstream vouchers for people with disabilities to participate in all types of consortia.

Allow single-ACC consortia

We strongly support the proposal to allow PHAs to form single-ACC consortia. With a single funding contract from HUD for Housing Choice Voucher (HCV) program subsidies and administrative fees, agencies will be able to realize much more significant administrative cost-savings than under the current rule. Most importantly to the undersigned groups, single ACC consortia have the potential to better serve families in at least three ways:

1. eliminating portability barriers to moving from the area served by one member PHA to another,
2. reducing the need for applicants to submit multiple applications to have the best chance of receiving assistance, and
3. freeing up administrative resources that can be redirected to bringing more landlords into the program and implementing other strategies to improve performance.

The ability to form single-ACC consortia is particularly important for small PHAs and PHAs that operate in the same metropolitan area. More than 1,300 of the approximately 2,300 PHAs that administer HCV programs manage 550 or fewer vouchers, a standard Congress has used to define “small” agencies; about half of these small agencies operate in metropolitan areas and nearly half administer HCVs but not public housing.¹ In most metropolitan areas, one agency administers the HCV program in the central city, and one or more different agencies serve suburban cities and towns. This pattern is the case in 95 of the 100 largest metro areas, where 78 percent of households in the HCV program lived in 2012.² Because of the importance of allowing these PHAs to form single-ACC consortia, we urge HUD to finalize this rule as quickly as possible, without waiting until similar rulemaking for public housing consortia.

Enhance incentives for PHAs to form single ACC consortia

We recommend two changes in the proposed rule to enhance the incentives for PHAs to form single-ACC consortia.

- *Allow higher administrative fee rates for small HCV programs for a reasonable transition period.* Under current federal statute and HUD policy, PHAs with 600 or fewer vouchers receive a higher per-unit administrative fee than PHAs that administer more than 600 vouchers. An unintended consequence of this policy is that it creates a financial disincentive for smaller agencies to consolidate or form a single ACC consortium, because the administrative fees for the new entity will be calculated based on the overall number of authorized vouchers of all member agencies.

For example, if five PHAs each have 600 vouchers under lease on average for 12 months, and their monthly “column A” rate is \$100 per voucher, each PHA would earn \$720,000 per year in fees (assuming there was sufficient funding to pay the full amount of fees due), for a total of \$3.6 million for the five agencies. If the five PHAs formed a single ACC consortium, however, and the “column B” rate for more than 600 vouchers is \$93 (a common differential), the same agencies would earn a total of \$3,398,400, or about \$200,000 less for leasing the same 3,000 vouchers.

To counter this disincentive and help PHAs meet the transition costs of forming consortia, HUD should include in the final rule a provision holding PHAs harmless from a reduction in the number of vouchers earning the column A rate for a period of three years. The column A rate should apply to the same total number of vouchers for which the member agencies earned that rate in the year prior to formation of the consortium, if such number is greater than the number of vouchers earning the column A rate under a single ACC consortium. Alternatively, HUD

¹ Barbara Sard and Will Fischer, “Bill to Simplify Housing Program Administration Contains a Few Promising Proposals, But Numerous Problematic Ones,” Center on Budget and Policy Priorities, Nov. 15, 2012, <http://www.cbpp.org/cms/index.cfm?fa=view&id=3863>.

² CBPP analysis of 2012 HUD data. In 255 out of the 352 metro areas, two or more PHAs administered HCV programs; a single agency served only a little more than one-fourth of metro areas.

could revise proposed § 943.217(d) to authorize payment of extraordinary fees for a 3-year transition period rather than a single year, and use the savings in fee eligibility to cover the costs in whole or in part.

The key point here is that PHAs need certainty that they won't lose income during the transition period. If sufficient appropriations are available to pay for additional transition costs beyond the recommended hold-harmless provision, it may be most helpful to PHAs to receive such supplemental fees in the period prior to initiation of the single-ACC consortium, while they are going through the planning process, changing systems, etc., and then to receive the boosted administrative fees under the transition rule for the 3-year transition period. HUD has authority to use a portion of the appropriations for administrative fees for this purpose.

- *Encourage PHAs with management challenges to enter into consortia.* Becoming part of a single-ACC consortia could resolve the problems of a PHA that has had difficulty managing its HCV program effectively, due to economies of scale, more experienced staff or other benefit. If the proposed management and oversight plan for the consortium demonstrates specifically how the new structure will improve the management of troubled PHAs and be likely to operate the HCV program effectively throughout its new jurisdiction, HUD should approve the participation in the consortium of one or more PHAs that have a troubled rating under SEMAP or are otherwise subject to corrective action or have open findings under SEMAP, an OIG or other financial audit, or HUD monitoring review.

To avoid any implication to the contrary, HUD should revise proposed §943.203(a)(3) and (5) to be clear that past performance problems will not prevent participation in a consortia if the consortia likely will resolve the prior problems.

In addition, HUD should state explicitly in the final rule that there will only be a single SEMAP rating for a single ACC consortium. HUD likely considered this implicit, but it is important to state explicitly so that PHAs realize that they will benefit from the improved performance of a single-ACC consortium, as well as from the reduced administrative burdens of only having to submit one set of documentation for SEMAP on behalf of all the member agencies.

Allow partial consortia, and allow MTW agencies to participate in them

We strongly urge HUD to allow partial HCV consortia in the final rule. Partial consortia could enable PHAs to operate components of their HCV program more effectively and efficiently. For example, PHAs in a region may want to collaborate to promote housing mobility and increase families' housing choices. A partial consortium could help them achieve this goal by eliminating the costs of portability billing and paperwork exchanges, and using the savings to increase landlord outreach and provide other housing search assistance. A partial consortium recognized by HUD also could enable PHAs to collaborate efficiently to provide a specialized project-based voucher program, such as one using HUD-VASH vouchers, or to operate a regional project-based voucher program with a regional waiting list at far less cost than they could do under a cooperative agreement. Similarly, a partial

consortium to administer vouchers designated for people with disabilities together with supportive services could better achieve economies of scale and attract participation of service providers.

At least initially, many PHAs are likely to be more willing to enter into partial consortia than single-ACC consortia, because it will be less challenging to come to agreement on how to operate a single joint project than to merge much of the administration of their individual HCV programs, and political resistance is likely to be substantially less. As PHAs deepen their collaboration through partial consortia, the administrative efficiencies of single-ACC consortia may outweigh concerns about losing control as political resistance diminishes, resulting in the expansion over time in the number of PHAs that are willing to make the more dramatic change of forming single-ACC consortia.

How partial consortia could work

For a partial consortium to result in significant streamlining for PHAs, it would need to provide PHAs the option to have separate funding from HUD (subtracted from member PHAs' funding eligibility) and authority for the lead agency in the partial consortium to submit data to HUD on behalf of member PHAs. These authorities are consistent with the statutory authorization of consortia in section 13 of the U.S. Housing Act.

Separate funding would, for example, enable PHAs to operate a regional mobility program without portability billing for moves within the region. It also would facilitate a regional PBV program in which member agencies pool an agreed number of vouchers to take advantage of development opportunities within the region without the need for complex arrangements or developers having to work with multiple PHAs on a particular property. The PHAs could designate to HUD in advance of the issuance of each year's funding award the amount of their funds they wish to transfer to the lead agency under the partial consortium agreement. That agency – or its contractor – would then be able to use these funds to provide HAP payments to landlords throughout the operational area of the agreement, and submit data to the Voucher Management System for the subsidies paid. In addition, if the PHAs wanted the partial consortium to take on these additional responsibilities, the lead agency or its contractor could perform more complete administrative services, such as doing annual rent recertifications for families in units funded through the partial consortium and submitting the 50058 data to PIC for these families.

By eliminating the administrative work for portability cases that otherwise would have to be performed by “initial” PHAs (i.e., the PHAs whose right to funding for the agreed number of vouchers is in effect transferred to the lead agency of the partial consortium) and “receiving” PHAs (i.e., the PHAs in whose jurisdictions families live with the transferred funds), and reducing the overall amount of administrative work per case, such an arrangement --- in contrast to the current 80/20 split for portability cases -- could benefit both types of agencies, and enable the lead agency to use a portion of the transferred administrative fees to provide additional services as part of the joint initiative. (PHAs that wished to absorb port-in vouchers could continue to do so; the key benefit of partial consortia for portability purposes is to eliminate billing.)

Providing a portion of member PHAs' funding directly to the lead agency of a partial consortium will create some additional work for HUD. But the additional work should not be substantial, and may be offset by the reduction in the number of inter-agency conflicts over portability billing that HUD staff respond to. The additional work would be limited in duration if agencies "graduate" to a single-ACC consortium based on the trust built through operating as a partial consortium. From the perspective of advancing HUD's goals, the potential benefits to families as well as the member PHAs should outweigh the minor additional administrative work for HUD staff.

In the preamble to the proposed rule, HUD noted its concern that partial consortia would not reduce the number of PHA plans or other reporting submissions, and may create overlapping PHA plans and reports for the same program. The above explanation demonstrates how partial consortia could substantially reduce reporting burdens for PHAs. It is true that partial consortia will not reduce the number of PHA plans, as each member agency would remain responsible for submission of its own plan. HUD could comply with the statutory requirement that members of a consortium "be subject to the requirements of a joint public housing agency plan" (section 13(a)(3)(A)) by allowing each member PHA to include in its plan the same language applicable to the initiative[s] subject to the partial consortium agreement, rather than requiring the partial consortium to submit a separate plan. Indeed, some types of initiatives PHAs may choose to operate through a partial consortium – such as a mobility or a supportive housing initiative that does not involve PBVs – may not be a required part of the PHA plan process.

Why MTW agencies should be allowed to participate in partial consortia

We agree with HUD's rationale for not allowing MTW PHAs to join either type of consortium allowed under the proposed rule.³ Nonetheless, we believe it is important to allow MTW agencies to collaborate with other PHAs through a consortia mechanism when such collaborations will bring significant benefits to eligible families in the region as well as to the agencies, as in the examples of regional mobility and PBV initiatives discussed above. Moreover, in a number of the larger and more segregated metropolitan areas in this country, the center city where most low-income non-white households live is served by an MTW agency (e.g., Atlanta, Baltimore, Chicago, New Haven, Oakland, Philadelphia and Pittsburgh). If HUD doesn't permit MTW agencies to join with other PHAs to help families in protected groups expand their ability to choose to live in an area that is not racially- or ethnically-concentrated, HUD will be hindering the ability of the PHAs in these metro areas to affirmatively further fair housing.

We submit that partial consortia can provide the vehicle for such collaborations between MTW agencies and other PHAs, without the legal and policy risks that legitimately concern

³ There is one situation where we think that MTW agencies should be permitted to form a single ACC or multiple ACC consortium without running afoul of the legal and policy concerns HUD raises: where the consortium consists solely of MTW agencies. There are a few regions with multiple MTW agencies (notably the Seattle area, as well as Cambridge and MA DHCD in the Boston metro area). There seems to be no sound rationale for preventing MTW agencies operating in the same region from entering into a consortia of any type so long as it doesn't include non-MTW agencies.

HUD. HUD could – and should – specify in the final rule that in operating a partial consortium in which some member agencies are not part of the MTW demonstration, all activities must comply with the requirements of the HCV program. An MTW agency could only agree to transfer funds it receives through HCV funding streams to the lead agency in an HCV partial consortium. If the MTW agency is the lead agency, it would have to operate the partial consortium under regular HCV rules and not its MTW plan.

State Law Barriers to the Formation of Single-ACC Consortia

Concerned that PHAs may only be able to take advantage of the proposed rule if state law allows them the flexibility to do so, HUD seeks comments specifically on state-law barriers to the formation of single-ACC consortia. Every state has a law to enable the formation of PHAs. These laws tend to explicitly enable a combination of municipal, county, state, and regional PHAs, but only one state, Nebraska, explicitly authorizes consortia. An analysis of state-enabling legislation (including Attorney General opinions) suggests that PHAs in a substantial minority of states may not be authorized by state law to form single-ACC consortia.

Single-ACC consortia essentially function as regional PHAs that have one ACC with HUD. In 23 states, state law does not explicitly enable regional PHAs that extend through multiple jurisdictions.⁴ But in at least two of these states (Iowa and Kansas), PHAs are able to form regional housing authorities under their joint powers statutes. Most of the remaining 21 states may provide similar flexibility for PHAs to form single-ACC consortia, except for five states in which state law limits the jurisdiction of a local PHA to the geographic area in which it operates, and Hawaii, which has no joint powers statute.⁵

HUD's proposed rule, however, may unintentionally and unnecessarily create barriers for PHAs in the 15 states that have joint powers statutes which may provide sufficient authority to form single-ACC consortia. Proposed § 943.103 states that a single-ACC consortium becomes "a separate legal entity and is considered a single PHA for purposes of the Section 8 HCV program." In states where PHAs must rely on the joint powers statute, that authority may not extend to formation of a "separate legal entity," in contrast to the inherently collaborative nature of a consortium. The "separate legal entity" clause seems unnecessary to HUD's power to enter into a single ACC with the consortium. HUD can

⁴ According to analysis by the National Housing Law Project, these states are: Arizona, Colorado, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Maryland (except municipal-level PHAs may act on a statewide basis), Maine, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, and Wisconsin. Of these states, Arizona, Kansas and Ohio have HUD-recognized multi-ACC consortia, according to the preamble to the proposed rule. In some additional states, PHAs with jurisdiction over an area larger than a municipality (CT, VT), or smaller than a county (FL, MN, MS, ND) may not be able to participate in a single-ACC consortium. It is important to note that in many states some city or county government agencies act as PHAs administering the HCV program (as do some state agencies). These governmental entities may have broader authority than housing authorities organized under state enabling laws.

⁵ The five states with restrictive state laws are Delaware, Indiana, Maryland, Michigan and Pennsylvania, although it is important to note that both Delaware and Michigan have state-level PHAs with broad jurisdictions.

consider a single-ACC consortia as a PHA for administrative purposes — and define a consortia of PHAs as a PHA as federal statute permits — without that clause. Especially given HUD’s proposal that participating PHAs remain individually liable for substantial violations of HCV program or administrative requirements (proposed § 943.215(b)), it would be consistent with the goal of the proposed rule to remove the “separate legal entity” language in order to alleviate potential state law barriers to the formation of single-ACC consortia. We recommend that HUD revise § 943.103 to avoid the use of the “separate legal entity” clause.

Given that state law could prevent the formation of single-ACC consortia in a significant number of states, HUD should invoke every available strategy to preempt restrictive state laws. There is at least one circumstance in which federal law preempts state law jurisdictional boundaries. If the Secretary determines that no PHA is willing or able to effectively operate a tenant-based section 8 program in a particular area, then HUD may contract with a public housing agency for another area, or another public or private non-profit entity to perform the functions of a PHA in that jurisdiction. See section 3(b)(6) of the U.S. Housing Act, 42 U.S.C. § 1437a(b)(6)(B)(iii). The Secretary may use this authorization to contract with a PHA to operate outside of its jurisdiction, including PHAs participating in a consortium, despite any state or local law restrictions.

Federal preemptive authority is thus currently in place for PHAs to operate outside of their state-law jurisdiction if HUD determines that the Section 8 program has to be administered in such a coordinated manner to operate effectively. HUD should include express preemption language that mirrors the federal statute in the final consortia rule, and state explicitly that PHAs may seek HUD approval to operate as a full or partial consortium, notwithstanding state law, if they can demonstrate that such operation is necessary to effectively implement the HCV program, in whole or in part. This addition to the final rule would provide PHAs in many states with at least one direct track to the formation of single-ACC consortia, notwithstanding restrictive state law. HUD should also modify the proposed definition of “Public Housing Agency” in § 5.100 to include a consortium approved under the authority of section 3(b)(6) of the U.S. Housing Act.

It would be helpful for HUD to provide examples, in the preamble to the final rule or other guidance, of how PHAs may meet their burden of proof to justify HUD’s use of its preemption authority. One possibility is where the PHAs can demonstrate that enabling voucher holders to move freely within the expanded geographic area made possible by a single-ACC consortium is important to reduce residential segregation and fulfill the PHAs’ obligation to affirmatively further fair housing. Another possibility is where the lack of economies of scale prevents small PHAs from continuing to operate their separate HCV programs effectively with the administrative fees available.

HUD should not prohibit PHAs that administer only Mainstream vouchers from participating in single-ACC consortia

Section 943.201(a)(2) of the proposed rule would prohibit entities which are only authorized to administer Mainstream 5 vouchers from joining or forming single-ACC consortia. HUD does not provide any rationale for this exclusion, and there does not appear to be any sound

reason for it. The 33 Mainstream-only entities typically administer about 70 vouchers.⁶ This small size means they cannot achieve economies of scale and may have great difficulty administering their HCV programs effectively, particularly with recent reductions in administrative fees. Allowing these entities to participate in consortia could result in more effective provision of housing assistance and related services to people with disabilities.

For example, a Mainstream-only agency could agree to have the lead or other PHAs in a consortium manage the core HCV functions on their behalf, reserving the time of their staff for interactions with applicants, individuals searching for housing, and participants facing challenges retaining their housing, as well as providing other services – directly or through other agencies – that individuals need to remain stably housed. If other nearby PHAs also administer vouchers restricted to use by people with disabilities, a full or partial consortium could benefit from economies of scale to enhance the specialized services provided to disabled individuals receiving HCV assistance.

Mainstream vouchers are restricted to use by non-elderly people with disabilities by law, and this requirement would remain in effect regardless of whether the administering agencies participate in consortia. HUD apparently recognizes this fact and permits Mainstream 5 vouchers to be included in consortia agreements, *when they are administered by PHAs with other vouchers*. There is no sound reason to withhold this flexibility from Mainstream-only agencies.

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Technical Assistance Collaborative

BRicK Partners LLC
Housing Choice Partners of Illinois, Inc.
Massachusetts Law Reform Institute
Metropolitan Planning Council, Chicago

⁶ Based on March 2014 data from HUD's Voucher Management System, the 33 Mainstream-only agencies' median leasing rate was 70 vouchers. Total leasing ranged from fewer than 15 to 168 vouchers.