Center on Budget and Policy Priorities

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March 20, 2017

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: HOTMA Implementation Notice, Docket No. FR-5976-N-03

To whom it may concern:

These comments are submitted by the Center on Budget and Policy Priorities. The Center is an independent, nonprofit policy institute that conducts research and analysis on a range of federal and state policy issues affecting low- and moderate-income families. The Center's housing work focuses on improving the effectiveness of federal low-income housing programs, and particularly the Housing Choice Voucher (HCV) program. Center staff had a significant role in developing many of the HCV-related (and other) policy changes the Housing Opportunity Through Modernization Act (HOTMA) included.

We commend HUD for the prompt issuance of the HOTMA Implementation Notice. These comments address various aspects of the notice concerning inspections, project-based vouchers, and manufactured housing.

Inspections

Maximum time for withholding or abating payments before termination of HAP contract. Similar to prior law, HOTMA delegates to PHAs — not to HUD — the authority to determine the maximum time for an owner to repair non-life-threatening defects, so long as such period is "reasonable." (See new section 8(o)(8)(G)(i)(III)(bb).) Consequently, **HUD should not specify a maximum time period**, such as 180 days, within which all PHAs must terminate a HAP contract and require a family to move. However, **HUD could issue guidance** indicating its view that 180 days would be a reasonable maximum time period for an owner to come into compliance with HQS (or other applicable criteria), though PHAs could specify a shorter or longer period based on local circumstances. Such guidance would be useful in assuring PHAs that a "reasonable" period need not be shorter than six months.

SEMAP modification. Preferably, HUD would revamp SEMAP generally to focus on key outcomes rather than process compliance. Within the current framework, however, HUD could modify Indicator 11 for PHAs opting to implement the new flexibility on initial inspections. An appropriate modification would be to check whether units were inspected prior to occupancy (by

the PHA or through reliance on an alternative inspection) and found to be free of life-threatening conditions prior to the effective date of the HAP contract, and brought into full compliance with quality standards within the maximum time frame allowed by the PHA's administrative plan.

Other discretionary factors. It is sensible to allow PHAs to choose to utilize the new statutory flexibility for all or only some of its vouchers. HUD could make this option clearer by stating specifically, for example, that PHAs could choose to apply this flexibility when quick occupancy is most important for families because they would otherwise be homeless or in danger of domestic or other violence. PHAs may also want to apply this flexibility in areas where few owners are willing to participate in the HCV program. Beginning HAP payments promptly while minor defects are repaired would provide landlords with additional funds and minimize the differences between voucher and regular tenancies, and if well-advertised could encourage more owners to accept vouchers.

Reliance on alternative inspections for initial interim period. In addition to providing PHAs with new flexibility to speed up initial occupancy by allowing families to occupy units when the initial PHA-conducted inspection reveals only non-life-threatening defects, HOTMA also allows PHAs to permit families to occupy units that the PHA has not inspected if the units passed inspection under a comparable program within the prior two years. Unfortunately, HUD's implementing notice severely limits the value of this provision to PHAs, making it unlikely that many will take advantage of it.

The January 18, 2017 **notice requires PHAs to conduct the initial HQS inspection within 15 days of receiving the request for tenancy approval. HUD's policy is without any statutory foundation**, and undermines the flexibility that is the purpose of the amendment. If a unit passed a comparable alternative inspection in the prior 24 months, it is in a different category than a unit that has not been recently inspected and found to meet program standards. Instead of recognizing this difference and providing PHAs appropriate flexibility, HUD's notice imposes the same 15-day standard that now applies to PHAs with 1,250 or fewer vouchers on *all* PHAs. (Larger agencies now must inspect units within a reasonable time, and only if "practicable" within 15 days. §982.305(b)(2)(B).)

HUD's policy diminishes the incentive for PHAs to implement the new policy option, particularly for larger PHAs that would be under a stricter time constraint if they use the alternative inspection flexibility. HUD should revise the 15-day requirement and allow PHAs to establish a reasonable time period for the PHA to conduct an initial inspection. Such time periods could vary based on how recently the alternative inspection was conducted. At the least, HUD should allow PHAs that administer more than 1,250 vouchers such greater flexibility, in order not to undermine their incentive to make use of this provision to enable families to occupy units more quickly.

Project-based Vouchers

Share of a PHA's vouchers that may be project-based. HUD requested comments on five issues relevant to the agency cap.

1. *Timing of commitments to qualify for exception authority.* Congress limited the 10 percentage point increase in PBV authority to projects that assist particular types of households or that are located in particular types of areas in order to create incentives for PHAs to address the

specified needs. The statutory language is plain: "A public housing agency may use up to an *additional* 10 percent of [its vouchers] to…" and then enumerates the purposes for which the additional authority may be used (emphasis added). Hence, HUD is without legal authority to count PBVs used for these purposes up to the pre-existing cap of 20 percent of funding or the new generally applicable cap of 20 percent of authorized vouchers, and then allow PHAs to increase other types of PBVs up to 30 percent of authorized vouchers. **To count towards the exception authority, PBVs must be committed for one of the purposes specified in the statute *after* the PHA has reached the general cap.** If, however, a PHA commits PBVs to more than one property on the same date or as part of the same competitive round, and taken together the total number of new PBVs exceeds the agency cap, HUD should allow the PHA the flexibility to count the "other" types of new PBVs toward the regular cap, and PBVs that meet the special exception categories toward the 10 percent exception authority.

HUD should modify the discussion of the exception category for supportive housing (82 FR 5464) **to be consistent with the statutory changes.** Supportive services do not have to be available to *all* residents of PBV units in a project, but only to residents of those units designated as supportive housing. For example, if a PHA is 25 units below its PBV program cap and wants to commit PBVs to a 50-unit project to provide integrated housing opportunities for people with disabilities in need of supportive services, it could provide 50 PBV units to the project and designate 25 of the units as supportive housing for people with disabilities. Only residents of the latter 25 units would need to qualify for the available services.

2. *Definition of areas where vouchers are "difficult to use."* One of the multiple grounds for a PHA to increase the share of its vouchers that are project-based from 20 percent to 30 percent is whether the location of the PBVs is one where vouchers are "difficult to use". Properties in such locations also can have up to 40 percent of units with PBVs, instead of the usual 25 percent (or 25 unit) limit. Areas that have a poverty rate of 20 percent or lower also qualify for both flexibilities, which means that the "difficult to use" measure, to be meaningful, should be something other than "not poor". We propose a two-part definition, to better get at areas where more development of rental housing is needed, as well as those areas that have rental housing in the right price range but the stock inadequately serves voucher holders. Specifically:

   Vouchers should be considered "difficult to use" in an area if:

   a) The ratio of vouchers (tenant-based and project-based) leased in a zip code to the total number of housing units in the zip code (rental or homeownership) is below the metropolitan average; or
   b) The ratio of vouchers (tenant-based and project-based) leased in a zip code to the total number of rental units in the zip code with gross rents below 110 percent of the applicable Fair Market Rent is below the metropolitan average.

   In non-metropolitan areas, the measures shall apply at the county rather than zip code level, and the ratio comparison is to the state non-metropolitan average.

3. *Exemptions.* Regarding the types of units that should be exempted from the PBV Program Unit Limitation (and the PBV Income-Mixing Project Cap), the statute requires the exemption of PBVs attached to "units previously subject to federally required rent restrictions" *or* to units receiving a long-term HUD subsidy. **The first component of the exemption test is not limited to HUD-imposed rent restrictions; it could include, for example, USDA mortgage subsidies that carried a rent restriction, and units that previously received Low Income Housing Tax Credits.** The notice should be revised accordingly. We have no suggestions for additional exception categories at this time, but recommend that HUD preserve its authority to add further such categories in the future based on Federal Register notice and comment, without full rulemaking.

4. *Exemption of replacement housing.* HUD should make one very important change in the conditions for a PBV new construction unit to be considered replacement housing for one of the specified forms of assisted or previously rent-regulated housing, and thus exempt from the PBV Program Unit Limitation and the project cap. **Replacement housing should *not* be required to be on the same site or contiguous to it.** This requirement could incentivize building replacement housing in areas of poverty and minority concentration, in contravention of HUD's and PHAs' duty to affirmatively further fair housing. It also could reduce the potential of replacement housing to expand children's access to high-opportunity areas, despite the evidence that children who grow up in lower poverty areas fare significantly better as adults. There is no sound reason for an on-site restriction. As long as an off-site PBV property meets all of the requirements of paragraphs (a) and (c) of the PBV New Construction as Replacement Housing provision, it can demonstrate that it is truly replacement housing.

5. *Other considerations.* **HUD should issue guidance to PHAs** to consider, in deciding whether to increase the share of vouchers that are project-based (including for properties exempted from the cap), whether the increase in PBVs will hinder the PHA's ability to comply with the statutory requirement to allow tenants of PBV units to move after one year of occupancy with the first available tenant-based voucher. If a PHA does not have sufficient regular turnover to meet then current demand for moving vouchers, or if the demand for moving vouchers takes up half or more of annually available vouchers limiting rental assistance options for families on the tenant-based voucher waiting list, a PHA should be extremely cautious about adding more PBV units. This guidance would be worthwhile regardless of whether HUD allows additional exception or exemption criteria.

PBV Income Mixing Project Cap. Before responding to HUD's questions, we want to point out an important omission in paragraph B(3) of this section of the notice. The extent of the exception to the project cap for projects in a census tract with a poverty rate that is 20 percent or lower is 40 percent of units, not 100 percent as is the case for projects serving elderly families or households eligible for supportive services. HUD omitted this important difference specified in section 8(o)(13)(D)(ii)(II).

1. Regarding the *supportive services exception* under B(2), HUD should make the following changes:

   - **HUD should delete the text that incorrectly states that supportive services must be available "to all families receiving PBV assistance in the project" in order for**

the property to qualify for an exception to the project cap. This is incorrect for the same reason stated above concerning the program cap. For example, a developer or owner could propose a 75-unit property in which 25 units would be unassisted, and of the remaining 50 units with PBVs, 25 would be supportive housing for people with disabilities, formerly homeless people or others, and 25 would provide affordable housing for extremely low-income families who may not be eligible for services made available to the residents of the supportive housing units. Under no reasonable construction of the statutory language is such a unit allocation impermissible. Moreover, preventing such uses of PBVs would undermine the goal of integrated housing for people with disabilities that the notice later underscores as a vital principle. Throughout paragraph B(2) HUD should make clear that the specified requirements apply only to PBV units designated as supportive housing.

- Concerning FSS families, HUD should clarify that only in the circumstance that a family in an excepted unit, in a property that is 100 percent PBV supportive housing, fails to successfully complete its FSS contract or supportive services objective *without good cause, and is ineligible for any other supportive services offered in conjunction with assisted units,* would the family have to vacate the PBV unit. In addition, HUD should remind PHAs that if the ineligibility for supportive services occurs after the family has resided in the property for a year, the family should be informed of its right to request a moving voucher. This is extremely important, as otherwise HUD will have converted compliance with services into a condition of participation in the HCV program. HOTMA makes clear that services offered in conjunction with PBV units must be voluntary for all families, and not just families with disabilities. See HOTMA sec. 106 paragraph 7, inserting a new third sentence into section 8(o)(13)(J).

2. Regarding areas where vouchers are difficult to use, see the proposed definition on page 3 for the identical term that applies to the program cap.

3. Regarding additional exemptions, see discussion above re LIHTC or USDA rent-regulated properties with expired rent restrictions.

4. Re possible additional monitoring and oversight for properties with PBVs in more than 40 percent of units, the major concern is the possible loss of market discipline, particularly if all units are assisted. HUD could require PHAs in such cases to provide annual notice to residents of their right to move with the next available voucher, and could encourage PHAs to follow best practices for asset management of fully assisted properties.

Terms of Contract Extensions and Additional Contract Conditions

The notice language concerning contract extensions makes the same error in statutory construction as §983.205(b): it limits cumulative extensions to the revised time frame of 20 years. This clearly violates the plain language of section 8(o)(13)(G) as amended in HERA in 2008, which

explicitly allows for multiple extensions (with no lesser time limit) in order to achieve long-term affordability.[1] HUD should take the opportunity to correct its error in its revision of this notice.

Concerning new §8(o)(13)(F)(iv), HUD should clarify that this provision allows PHAs and owners to add terms to the HUD form contract. There would be no purpose in Congress specifying that *HUD* has such discretionary authority, as HUD implicitly has such authority and has already exercised it with regard to mandatory provisions.

Preference for Families Who Qualify for Voluntary Services

We appreciate HUD making this important change immediately effective. Unfortunately, however, HUD has chosen to needlessly complicate straightforward statutory language and create a burdensome and impractical review process that may impede the development of supportive housing for people with disabilities. We support the comments on this issue submitted by the Consortium for Citizens with Disabilities.

Project-basing Family Unification Program Vouchers

HUD's questions in this section appear to indicate that HUD staff believe project-basing FUP vouchers may be unwise, but that is no longer HUD's decision to make. A PHA, in consultation with its partner child welfare agency, may decide that project-basing FUP vouchers is sensible in order to ensure that recipients can easily find available housing, particularly in tight markets or safe neighborhoods, and to create economies of scale in service provision. PHAs have the flexibility to use a single waiting list for FUP vouchers that are tenant-based and project-based. See 983.251(c)(2). If a PHA project-bases FUP vouchers intended for youth aging out of foster care, these individuals could opt for a moving voucher after a year, thereby opening up a unit for a similar young adult eligible for the services that might be offered in conjunction with the property. The fact that the tenant-based voucher would expire at the end of three years from admission to the FUP program creates no greater problems than the time limit does for FUP youth that receive a tenant-based voucher from the beginning. Indeed, possible landlord reluctance to accept a time-limited voucher tenant could be another reason for a PHA to choose to project-base FUP youth vouchers.

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[1] **(G) Extension of contract term [as modified by HOTMA, emphasis added]**
A public housing agency may enter into a contract with the owner of a structure assisted under a housing assistance payment contract pursuant to this paragraph to extend the term of the underlying housing assistance payment contract *for such period as the agency determines to be appropriate to achieve long-term affordability of the housing or to expand housing opportunities*. Such contract may, at the election of the public housing agency and the owner of the structure, specify that such contract shall be extended for renewal *terms* of up to 20 years *each*, if the agency makes the determination required by this subparagraph and the owner is in compliance with the terms of the contract. Such a contract shall provide that the extension of such term shall be contingent upon the future availability of appropriated funds for the purpose of renewing expiring contracts for assistance payments, as provided in appropriations Acts, and may obligate the owner to have *such extensions* of the underlying housing assistance payment contract accepted by the owner and the successors in interest of the owner. A public housing agency may agree to enter into such a contract at the time it enters into the initial agreement for a housing assistance payment contract or at any time thereafter that is before the expiration of the housing assistance payment contract.

Manufactured Housing

We have three concerns about the provisions of HUD's notice implementing the statutory changes on use of vouchers for families that own or are purchasing a manufactured home that sits on rented land.

1. Now that Congress has chosen to treat the manufactured home owner/land renter hybrid situation similarly to a straight rental of a manufactured home, HUD should eliminate the treatment of the hybrid situation as a special housing type that PHAs can opt to exclude from their voucher programs. This mixed owner/renter situation is an important housing option in rural areas where suitable rental housing may be scarce, and it also advances asset accumulation and housing stability goals. When manufactured homeowners own their homes but rent the land on which they sit, long-term land security gives them the opportunity to build wealth and allows their homes to appreciate in value.[2]

2. Congress required HUD to give PHAs the option of paying the voucher subsidy in a single check directly to the family if the subsidy exceeds the land rent, rather than having to issue multiple checks. Once this option is added, administering vouchers for these "hybrid" families will be no more time-consuming than for typical HCV families. If the PHA does not make a payment directly to the landowner, HUD's prediction that there would be no enforceable HAP contract between the PHA and the landowner may be correct. Congress apparently considered streamlining PHAs' work more important, however, than ensuring PHAs could enforce landowners' obligations under a land rental agreement. PHAs could require families that receive direct payments to have a written land lease that includes families' enforcement rights – including by withholding funds – if landowners don't provide utility access or other essential services, if relevant. Given the much less significant stake in PHA enforcement powers in this situation than in a typical rental of the dwelling unit, this is an appropriate policy balance.

3. In the notice, HUD states that if the family's debt service increased due to refinancing after purchase the higher amount can't be considered and a PHA must use the original debt service amount to calculate the subsidy amount. This policy is arbitrary and unnecessary. To our knowledge, cash-out refinancing does not occur for these types of loans, unlike real estate. If a family refinances to pay for repairs, or for the purpose of making up for missed payments or otherwise adjusting to financial hardship, the loan still amortizes the cost of purchasing the manufactured home. Families may be unable to produce original loan documents for a purchase contract that is no longer in effect and may have been entered into years in the past. In such cases, HUD's additional requirement could undermine the purpose of the Congressional amendment to allow families to benefit from a regular voucher subsidy. HUD's additional requirement is not necessary to control costs: the voucher subsidy will not exceed the payment standard regardless of the amount of the monthly debt service.

Respectfully submitted,

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[2] Corporation for Enterprise Development, "Manufactured Housing: Top 10 Truths," 2011, http://cfed.org/assets/pdfs/manufactured_housing/Top_10_Truths_October_2011.pdf?window_id=5