

SUBMITTED VIA THE FEDERAL E-RULEMAKING PORTAL AT  
WWW.REGULATIONS.GOV

January 4, 2021

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 10276  
Washington, DC 20410-0500

Re: [Docket No. FR-6057-P-02] “Housing Opportunity Through Modernization Act of 2016 – Re-opening Public Comment Period on Subject of Over Income Families”

To Whom it May Concern:

The Council of Large Public Housing Authorities (“CLPHA”) and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments to HUD’s proposed information collection entitled, “Housing Opportunity Through Modernization Act of 2016 – Re-opening Public Comment Period on Subject of Over Income Families.”

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. We support the nation’s largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. Our members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing, and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

The Housing Opportunity through Modernization Act of 2016 (“HOTMA”) requires families residing in a public housing unit that are over-income for two consecutive years either have their tenancy terminated or be charged rent based on the higher of fair market rent (“FMR”) or the amount of monthly subsidy provided under the U.S. Housing Act of 1937.<sup>1</sup> However, in this

---

<sup>1</sup> See Housing Opportunity through Modernization Act of 2016, Pub. L. No. 114-201, 130 Stat. 782, 792 (“...[I]n the case of any family residing in a dwelling unit of public housing whose income for the most recent two consecutive

proposed rule, for the first time, HUD suggests a different approach, which would require the termination of all over-income families from the public housing program, regardless of whether the PHA chooses to terminate the tenancy or allows the family to remain in the unit at a higher rent.<sup>2</sup> CLPHA strongly objects to HUD’s new interpretation of Section 103 of HOTMA, which is neither consistent with the statute nor with HUD’s prior interpretations of this provision of HOTMA, both of which would instead provide the PHA with a choice of either terminating tenancy or being charged rent as set forth in the statute.<sup>3</sup> The language of Section 103 does not require or invite any of the questions for which HUD is seeking comment in this new notice and represents an overreading of what the statute requires of PHAs.

Instead, when a PHA permits an over-income family to remain in their public housing unit, we believe that HUD must continue to treat the physical unit as a unit of public housing. Although an over-income family may occupy the unit, the PHA remains obligated to lease the unit to an income-eligible public housing family upon turnover, who would be subject to all of the traditional public housing requirements, and the unit remains part of a PHA’s Faircloth limit and subject to a HUD Declaration of Trust and ACC. However, we also believe that while the over-income family occupies the unit, PHAs should be afforded the discretion to determine whether the public housing lease provisions and related occupancy requirements should continue to apply, because, as HUD notes in the background of this proposed rule, “HUD would have no statutory basis to directly regulate these unassisted families.”<sup>4</sup> Some PHAs may elect to continue applying the traditional public housing rules and requirements to over-income households to avoid the administrative burden that comes with administering two parallel property management programs in each public housing building. Others may instead elect to omit some or all of the public housing-specific lease requirements for these families. As long as PHAs comply with HOTMA by charging over-income families the applicable higher rent, agencies should have the flexibility to set their own policies about serving over-income families.

---

years...has exceeded the applicable income limitations...the public housing agency shall – (i) notwithstanding any other provision of this Act, charge such family as monthly rent for the unit occupied by such family an amount equal to the greater of --(I) the applicable fair market rental [(FMR”)]...or (II) the amount of monthly subsidy provided under this Act for the dwelling unit...; or (ii) terminate the tenancy of such family in public housing not later than 6 months after the income determination...”).

<sup>2</sup> See Housing Opportunity Through Modernization Act of 2016: Re-Opening Public Comment Period on Subject of Over Income Families, 85 Fed. Reg. 78295, 78296 (Dec. 4, 2020) (“HUD believes that HOTMA provides that families who are over-income (OI) under HOTMA for two consecutive years are no longer public housing tenants eligible for the public housing program and the PHA must terminate the families’ participation in the public housing program, even if they are allowed to remain in their units.”).

<sup>3</sup> See *id.*; see also Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104, 84 Fed. Reg. 48820, 48822 (Sept. 17, 2019) (“The law requires that after a family’s income has exceeded 120 percent of the area median income (AMI) (or a different limitation established by HUD) for 2 consecutive years, a PHA must terminate the family’s tenancy within 6 months after the expiration of the 2-year period *or* charge the family a monthly rent equal to the greater of (1) the applicable Fair Market Rent or (2) the amount of monthly subsidy for the unit, including amounts from the operating and capital fund, as determined by regulations” (emphasis added)).

<sup>4</sup> See Housing Opportunity Through Modernization Act of 2016: Re-Opening Public Comment Period on Subject of Over Income Families, 85 Fed. Reg. 78295, 78296 (Dec. 4, 2020).

Finally, we also object to HUD’s statement in the background of the proposed rule, which asserts that “...HUD can impose various requirements on the PHAs, which may then be able to require the [over-income] families to comply with requirements as a condition of their lease” notwithstanding HUD’s own acknowledgement that it lacks the statutory basis to directly regulate these unassisted families.<sup>5</sup> As a federal regulatory agency, HUD’s authority is derived from statute and limited to only those matters that are delegated to HUD by Congress. Congress has not provided HUD with broad discretion to “impose various requirements” or delegated the ability to regulate every aspect of a PHA’s existence. Instead, the U.S. Housing Act of 1937 is clear in its purpose that PHAs are to be vested with “the maximum amount of responsibility and flexibility in program administration.”<sup>6</sup> We remind HUD of these words, which are designed to guide HUD’s actions here and elsewhere with respect to PHAs.

Our answers to the specific questions posed by HUD are as follows.

**Question 1: For PHAs planning or currently taking advantage of options to convert public housing units under repositioning using one of HUD’s repositioning tools such as Rental Assistance Demonstration (RAD), Demolition/Disposition (Section 18) and Streamlined Voluntary Conversion (Section 22), should special considerations regarding relocation apply to OI families permitted to remain in public housing units after the 2-year grace period (the two years after a PHA has first determined a family is over-income before the PHA must terminate the family’s tenancy; for more information, see the proposed rule at 84 FR 48828) has ended?**

No. Each of the programs cited by HUD already sets forth rules and requirements to govern the relocation of households and requires PHA policies to be set forth in a relocation plan or other related documentation. We believe the existing requirements are sufficient to govern the relocation of these households and any policies specific to over-income households can be set forth in the applicable relocation plan documents, which are reviewed by HUD. We disagree with HUD’s efforts to use this proposed rule to promulgate new requirements for the RAD, Section 18, and Section 22 programs. Where existing program-specific guidance would afford relocation protections to over-income households, then those protections ought to govern. In the event relocation is required and program-specific guidance fails to apply, then the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“URA”) would govern and families would be eligible for all of the rights and benefits afforded to displaced persons under the URA.

**Question 2: What requirements, if any, in 24 CFR part 960 should apply to OI families that are permitted to remain in public housing units after the 2-year grace period has ended? Should PHAs have the option to create a preference to allow OI families that have experienced a reduction in income to be immediately re-admitted to the public housing program if they are determined to be income eligible again or should they be considered applicants starting at the bottom of the waiting list? With respect to CSSR, should HUD give**

---

<sup>5</sup> *Id.*

<sup>6</sup> 42 U.S.C. § 1437.

**discretion to PHAs to allow for non-public housing leases to contain community service requirements?**

As noted elsewhere, PHAs should be afforded the discretion to determine whether the public housing lease provisions and related occupancy requirements should continue to apply to over-income households who continue to occupy public housing units. PHAs should have the option to create a preference to allow over-income households experiencing a reduction in income to be immediately re-admitted to the public housing program, but should not be obligated to do so. Similarly, PHAs should have the option to continue to require compliance with CSSR requirements, but should not be required to do so. As long as PHAs comply with HOTMA by charging over-income families the applicable higher rent, agencies should have the flexibility to set their own policies.

**Question 3: What requirements, if any, in 24 CFR part 966 should apply to OI families permitted to remain in public housing units after the 2-year grace period has ended?**

Should a PHA so choose, all of the requirements in 24 CFR part 966 should be permitted to apply to over-income households who continue to occupy public housing units. As noted elsewhere, PHAs should be afforded maximum discretion to determine whether the public housing lease provisions and related occupancy requirements should continue to apply.

**Question 4: Should there be specific grievance or due process rights afforded to OI families permitted to remain in public housing units after the 2-year grace period has ended? At present, if such families are terminated from the public housing program, they would not be afforded the same rights as families that are public housing program participants that are over and above due process rights created by State and local law. What should be HUD's role, if any, in determining or mandating grievance and or due process rights for OI families? With respect to any grievance or due process rights, should discretion be given exclusively to PHAs and deference given to applicable state and local laws?**

We believe that discretion should be given to PHAs to either continue use of existing public housing policies, including grievance and due process rights, or to develop alternate policies that would apply to over-income families, subject to applicable state and local laws.

**Question 5: What are the consequences to the families and PHAs if a PHA allows OI families to stay in public housing units while no longer participating in the public housing program? Does such a situation increase or decrease burdens on the families and PHAs? Are there implications for other rights or procedures that have not been discussed above?**

Allowing over-income families to remain in public housing under certain conditions is required by HOTMA when permitted by a PHA. Accordingly, there would not be consequences to PHAs or to over-income families who elect to remain in their public housing unit. We again remind HUD that the statute does not require over-income families to be removed from the public housing program and urge HUD to provide PHAs with maximum discretion on the development of

applicable policies to govern the tenancy of these households. Permitting the continued occupancy of over-income families helps maintain a sense of community and rewards self-sufficiency. It also helps to promote income-mixing within a community, which is a goal in many HUD-assisted programs, including the Section 8 project-based voucher program. In addition, many of these families also live in expensive metropolitan areas where rents are some of the least affordable in the country and, despite their income level, would still struggle to find suitable housing in the private rental market.

In sum, we urge HUD to provide PHAs with maximum flexibility and the authority to manage over-income families' tenancies, subject to the rent-setting requirements as set forth in Section 103 of HOTMA. We urge HUD to issue guidance for PHAs on calculating the amount of monthly subsidy provided to the unit as set forth in Section 103 of HOTMA and would encourage HUD develop sample notices that PHAs could provide to over-income families, informing them about their right to remain in public housing at the end of the six-month grace period.

Thank you for the opportunity to submit these comments.

Sincerely,



Sunia Zaterman  
Executive Director  
CLPHA



Stephen I. Holmquist  
Member  
Reno & Cavanaugh, PLLC