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Regulations Division  
Office of General Counsel  
451 7th Street SW, Room 10276  
Department of Housing and Urban Development  
Washington, DC 20410-0500  
*Submitted electronically through [www.regulations.gov](http://www.regulations.gov)*

Re: Docket No. FR 5976-N-02: "Housing Opportunity Through Modernization Act of 2016: Solicitation of Comments on Implementation of Public Housing Income Limit"

Dear Regulations Division, Office of General Counsel, HUD:

The following comments are submitted on behalf of the National Housing Law Project (NHLP) and the Housing Justice Network (HJN) regarding the proposed rule published on Thursday November 29, 2016, "Housing Opportunity Through Modernization Act of 2016: Solicitation of Comments on Implementation of Public Housing Income Limit."<sup>1</sup> NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for protected classes. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. In addition, NHLP hosts the national Housing Justice Network, a vast field network of over 1,000 community-level housing advocates and tenant leaders. HJN member organizations are committed to protecting affordable housing and housing rights for low-income families and individuals nationwide. Meaningful tenant involvement is fundamental to all supported and public housing decisions, and the following comments draw on NHLP and HJN's extensive experience working for decades with advocates, residents, and Public Housing Authorities (PHAs).

We appreciate HUD's commitment to providing clean, safe, and affordable housing to the families who need it most. As a network of advocates working with a range of stakeholders, we understand that HUD must decide how to allocate its scarce resources. At times, it may be appropriate for a PHA to evict a family or remove a family's subsidized status to free up a subsidy for a family in need. However, it is equally important not to punish families who have succeeded in gaining and maintaining employment and to recognize that family circumstances can change rapidly with respect to income and program eligibility.

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<sup>1</sup> Housing Opportunity Through Modernization Act of 2016: Solicitation of Comments on Implementation of Public Housing Income Limit, 81 Fed. Reg. 85,996 (Nov. 29, 2016) (hereinafter "Over-Income Notice").

In passing the Housing Opportunity Through Modernization Act of 2016 (HOTMA), Congress chose to regulate the treatment of over-income tenants in public housing, yet it left a great deal of discretion to HUD to implement a policy that would authorize PHAs to create local rules that cater to local conditions. HOTMA requires that after a family's income has exceeded 120% of the AMI for two consecutive years, a PHA must either (1) terminate the tenancy or (2) charge the family fair market rent or the amount of monthly subsidy for the unit.<sup>2</sup> **HOTMA also allows HUD to establish income limitations higher or lower than 120% of AMI (1) for smaller or larger families and (2) because of local construction costs or unusually high or low family incomes, vacancy rates, or rental costs.**<sup>3</sup> HUD is proposing to use the existing income limits that determine program eligibility to define whether a tenant is over-income at 120% AMI. The existing methodology includes adjustments to account for several factors including local rents.

We support a formula that takes into consideration local housing costs (although we have several suggestions that will improve the methodology as explained in response to question one, below). However, there are several other factors that HUD should consider when adjusting the income-limit. In response to question two below, we provide specific examples of additional factors that should be captured in HUD's methodology, as authorized by HOTMA.

It is important for HUD to remember that in many localities, what is considered "over-income" by HUD will be insufficient income to afford a home in the surrounding private rental market. We offer the following suggestions to avoid the eviction and displacement of vulnerable low-income families.

### **Request for Comments**

*Question 1: Does the methodology adequately consider local housing costs and make appropriate adjustments for higher housing costs?*

We suggest making changes to two parts of the proposed methodology used to calculate the 120% AMI income limit, which relies on the existing very low-income (VLI) limit. **We recommend changes to the VLI limit only insofar as it is used as the formula for calculating the 120% AMI income limit for public housing. HUD should not revise the VLI limit methodology for any other purpose.** First, Step 1 of the VLI limit formula should be adjusted to reflect common sense figures used in other HUD programs. In Step 1, 85% of the annualized two-bedroom fair market rent is compared to 35% of the preliminary VLI limit. HUD should increase the annualized two-bedroom FMR from 85% to 100% because doing so follows the expectation that FMRs allow access to 40% or 50% of the rental market in any given area.<sup>4</sup> In addition, HUD should change the very low-income limit from 35% to 30% in order to be consistent with what HUD has determined is a reasonable affordability level for low-income families.<sup>5</sup> Although these minor changes won't dramatically affect the over-income limit, they will (1) make the VLI limit formula more accurately reflect income levels in areas where rental housing costs are unusually high in relation to median income and (2) align the formula with other HUD programs.

Second, in Step 4, HUD should revise the 5% ceiling for changes to income limits. Leaving the

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<sup>2</sup> 42 U.S.C. § 1437n(a)(5)(A).

<sup>3</sup> The Housing Opportunity Through Modernization Act (HOTMA), H.R. 3700, Pub. L. 114-210, 130 Stat. 782 (July 29, 2016); 42 U.S.C. Sec 1437n(a)(5)(C).

<sup>4</sup> Over-Income Notice at 58,952.

<sup>5</sup> See 42 U.S.C. Sec. 1437a (The Brooke Amendment).

ceiling at 5% for increases in the VLI limit will have a negative impact on tenants in jurisdictions that have undertaken rent surveys to gather more accurate data on fair market rents in their areas. Take Alameda County, CA for example. In 2016, Alameda County conducted a rent survey because the HUD-published FMRs did not accurately reflect rents in its heated competitive market. In 2016, 50% of the median income in Alameda County was \$48,600. In Step 1 of the VLI formula, that number is adjusted up by 32%, to \$61,300, using the two-bedroom FMR as determined by the rent survey. This higher income limit represents the challenges that low-income renters in Alameda County's tight and expensive rental market face. In Step 4 of HUD's proposed methodology, however, the income limit is adjusted back down to \$48,750, a 5% increase in the income limit and the maximum amount that would be allowed under HUD's formula. HUD should eliminate the 5% ceiling to account for expensive rental markets.

Importantly, we do not believe that the 5% cap should be eliminated when calculating the VLI limit for other programs. In setting rent levels, for example, the 5% cap is useful in preventing large rent increases for low-income tenants. In contrast, the 5% cap *harms* tenants who would be forced to search for an apartment in a tight market should they meet the 120% AMI income limit for public housing.

Guaranteeing that the VLI limit reflects actual rent conditions in a jurisdiction will ensure that the 120% AMI income limit does not displace individuals and families who might struggle to find housing in an expensive market.

*Question 2: What other factors should HUD consider when determining whether to make adjustments to the income limit? Please provide specific examples of circumstances that are not captured in HUD's proposed methodology.*

Ideally, HUD would require an individualized assessment of each family's income and circumstances prior to termination for being over-income. In the past, HUD has encouraged PHAs to utilize discretion before removing over-income families from public housing.<sup>6</sup> HOTMA authorizes HUD to adjust the 120% income limit based on a variety of factors. We recommend the following revisions to the proposed rule, to be sure the most vulnerable families do not become homeless because of HUD's over-income policy.

- 1. Vacancy Rates:** Local vacancy rates and the availability of safe and affordable housing are important external factors that will help a PHA determine whether the family will be successful in finding alternative housing in the private rental market. Congress explicitly authorized HUD to establish a formula that takes vacancy rates into account. In heated housing markets, for example, most families evicted from public housing will find they cannot afford an apartment, even if the family's income is 120% AMI (or higher because of an adjustment in the proposed formula). The unintended result could be displacement of families from their local communities. As HUD recognized in its Small Area FMR methodology, HUD must take into consideration vacancy rates when constructing its methodology to determine which families are over-income.<sup>7</sup>

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<sup>6</sup> Letter from Lourdes Castro Ramirez, Principal Deputy Assistant Secretary of HUD, to PHAs (September 3, 2015).

<sup>7</sup> Establishing a More Effective Fair Market Rent System: Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50<sup>th</sup> Percentile FMRs, 81 Fed. Reg. 80,567 (Nov. 16, 2016) at 80,576; 24 C.F.R. 888.113(c)(v).

- 2. Family composition:** Congress authorized HUD to consider adjustments for smaller and larger families.<sup>8</sup> In some cases, larger families with several working members may be making more than 120% AMI, but finding alternative housing to meet the family's needs would be impossible in the private rental market and alternatively, breaking the family up would mean that all members are living at or below the poverty line. HUD should therefore include in its methodology a factor for increasing the income limit for larger families.

In addition, many families deemed “over-income” consist of parents with young adult children that recently entered the job market. Due to the start of a recent job, the family's income increases, often temporarily. Families should not be penalized because an adult child household member begins to work. Many of these adult children leave the household within a few years and the parents again qualify as low-income. There is no social value to evicting families in this situation. In fact, any over-income policy runs the risk of incentivizing parents to evict their adult children and further exacerbates family homelessness. HUD should use its authority to require PHAs to consider family composition in determining whether a family is over-income.

- 3. Exemptions for Families Participating in Self-Sufficiency Programs:** HUD should provide an explicit exemption to over-income rules for families participating in self-sufficiency programs. These programs, such as the Family Self-Sufficiency Program (FSS), were designed to increase the income and savings of participating families. HUD must make clear that the over-income rules will not apply to tenants who are meeting separate and distinct requirements as part of a self-sufficiency program.
- 4. Hardship:** PHAs should be required to consider hardship related to an eviction for being over-income (such as a household member is caring for a relative close to the home or illness of a household member).
- 5. Compliance with Fair Housing Laws:** PHAs are required by federal fair housing laws to provide reasonable accommodations to people with disabilities if moving out of their current public housing unit will have a significant negative impact on his or her health and disability. HUD should consider explicitly requiring compliance with fair housing and civil rights laws in its implementing regulations.

### **Additional Questions for HUD to Consider**

Implementation of an over-income policy will impact HUD's other program areas. We urge HUD to consider these issues prior to drafting final regulations.

- 1. Streamlining:** Every HUD program has a different rule on over-income families. HUD should try to streamline the policy for the various programs.
- 2. Mixed Finance Buildings:** We urge HUD to consider how an over-income policy would affect tenants in mixed finance buildings such as a public housing property that receives tax credit. Given that a vast amount of the public housing stock is being redeveloped through

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<sup>8</sup> The Housing Opportunity Through Modernization Act (HOTMA), H.R. 3700, Pub. L. 114-210, 130 Stat. 782 (July 29, 2016); 42 U.S.C. Sec 1437n(a)(5)(C).

mixed finance strategies, HUD should implement a mechanism whereby public housing tenants in a mixed finance building can switch to a market unit if the family becomes significantly over-income, consequently freeing up an ACC unit for a low-income family in need. If the family's income subsequently drops below the eligibility level, the policy could allow the family to seamlessly access a subsidized unit again. One way to accomplish this would be to implement a preference policy (although fair housing implications must be considered as well).

Thank you for your consideration of our comments and recommendations. We look forward to working with HUD and are happy to further discuss our suggestions. Please contact Deborah Thrope ([dthrope@nhlp.org](mailto:dthrope@nhlp.org)) should you wish to talk with NHLP and/or HJN members to clarify our position on these important issues.

Sincerely,

Deborah Thrope, National Housing Law Project

On behalf of HJN:

Rasheedah Phillips, Community Legal Services of Philadelphia  
Casey Epp, Fair Housing Advocates of Northern California  
Lisa Greif, Bay Area Legal Aid  
Jeffrey Hearne, Legal Services of Greater Miami, Inc.  
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