



703 Market St., Suite 2000  
San Francisco, CA 94103  
Telephone: 415-546-7000  
Fax: 415-546-7007  
nhlp@nhlp.org  
www.nhlp.org

**TO:** Housing Justice Network Members  
**RE:** The Housing Opportunity Through Modernization Act (HOTMA)  
**DATE:** October 3, 2016

---

President Obama recently signed into law the Housing Opportunity Through Modernization Act (HOTMA), H.R. 3700, Pub. L. 114-201, 130 Stat. 782 (July 29, 2016). HOTMA is the first major federal housing legislation in almost two decades; virtually all other legislative measures in recent years have been riders to the annual appropriations acts.

The major topics of primary interest to legal services attorneys and tenant advocates include the following (analyzed in more detail below):

- Inspections (Section 8 Housing Choice Voucher program)
- Income and recertification (public housing and Section 8 programs)
- Over-income tenants (public housing)
- Asset limits (public housing and Section 8 programs)
- Project-based vouchers (Section 8)
- Family Unification Program (Section 8 Housing Choice Voucher program)
- Reasonable accommodations for an exception payment standard (Section 8 Housing Choice Voucher program)

Many of HOTMA's provisions require HUD to implement regulations, although HUD has not yet indicated when it will do so. NHLP will be sure to post any notices related to HOTMA on the HJN listserv. In addition, please note that the footnotes in this memo cite to where the law will be codified in the statute.

### **Inspections (Voucher program)**

#### *Initial Inspections*

HOTMA made significant changes to the initial inspections process in the Section 8 Housing Choice Voucher program. First, **voucher tenants are now permitted to move into a unit that has failed an inspection due to a non-life-threatening Housing Quality Standards (HQS) violation**, while the issue is being corrected.<sup>1</sup> Under prior law, tenants could not move into a unit that failed inspection, irrespective of the severity of the HQS violation. This frequently resulted in hardship to families that had to prolong their housing search (sometimes while homeless) as a result of a minor HQS violation.

---

<sup>1</sup> 42 U.S.C. § 1437f(o)(8)(1)(A)(ii).

Under HOTMA, PHAs must withhold assistance payments if the unit remains out of compliance (for a non-life-threatening condition) for 30 days.<sup>2</sup> Prior to the expiration of the 30 days, it is within the PHA's discretion whether to withhold payments for a unit that is out of compliance. HUD regulations currently require a PHA to withhold assistance payments for any unit that fails HQS until the owner corrects the violation.

HOTMA maintains that PHA are required to inspect each dwelling unit prior to the signing of a HAP contract, although it provides for an alternative inspections process. **PHAs now have the discretion to allow a family to move into a unit prior to an HQS inspection if, in the last 24 months, the unit has passed an alternative, comparable inspection.**<sup>3</sup>

These changes to existing law are likely to have the effect of streamlining the initial inspections process and reducing the amount of time it takes for a family to move into a unit. Note that these policies can be used to counter arguments often presented by landlords against source of income protection laws. Landlords and their trade groups often cite delays in the inspections process as a significant burden associated with the voucher program. The new laws could reduce one of the barriers that tenants face when leasing up in the voucher program.

### *Ongoing Inspections*

HOTMA makes a few specific changes to the procedures regarding the abatement of assistance after a unit fails HQS. The new procedure is as follows: If an HQS violation is not cured within the required time (24 hours for life-threatening violations and generally 30 days for other violations) PHAs must abate assistance to the landlord for up to 60 days (or for a reasonable time determined by the PHA) to allow the landlord to cure.<sup>4</sup> **Tenants are explicitly protected from eviction for abatement of the subsidy due to HQS violations.**<sup>5</sup> If the landlord does not correct an HQS violation within the 60 days, the PHA will terminate the HAP contract with the landlord and the lease is subsequently terminated.<sup>6</sup> The voucher tenant will then be given 90 days (from the termination of the HAP contract) to lease a new unit with the voucher.<sup>7</sup> The PHA may grant extensions to the 90-day search period.<sup>8</sup> Under HOTMA, **PHAs are authorized to assist such families with relocation costs, using up to two months of assistance that were withheld from the owner as a result of HQS noncompliance.**<sup>9</sup>

The abatement procedure outlined in HOTMA provides benefits to tenants but does not resolve one long-standing issue identified by advocates because it protects tenants from eviction only during abatement of the subsidy and not after the HAP contract has been terminated. If the tenant remains in the unit after the HAP contract has been terminated, and continues to pay only the tenant's portion of rent, in many states the tenant is at risk of eviction. The landlord can sue for possession for nonpayment of the gross rent (tenant's portion plus the subsidy amount). Advocates should note that this situation is limited to jurisdictions in which courts have not yet ruled that, after a PHA initiates a HAP contract and any subsequent lease termination, tenants are not responsible for full market rent on

---

<sup>2</sup> 42 U.S.C. § 1437f(o)(8)(1)(A)(ii).

<sup>3</sup> 42 U.S.C. § 1437f(o)(8)(1)(A)(iii).

<sup>4</sup> 42 U.S.C. § 1437f(o)(8)(1)(G)(iii).

<sup>5</sup> 42 U.S.C. § 1437f(o)(8)(1)(G)(v).

<sup>6</sup> 42 U.S.C. § 1437f(o)(8)(1)(G)(vi).

<sup>7</sup> 42 U.S.C. § 1437f(o)(8)(1)(G)(vii)(I).

<sup>8</sup> *Id.*

<sup>9</sup> 42 U.S.C. § 1437f(o)(8)(1)(G)(vii)(III).

the grounds that under the Section 8 lease, a voucher tenant agrees only to pay the tenant share of the rent.<sup>10</sup>

HOTMA provides an additional protection, however, if the family is unable to locate a unit within the 90 days after the HAP contract is terminated. **A family shall be provided the option of the first available public housing unit.**<sup>11</sup> This is an important protection for tenants in areas where it is hard to use a voucher due to low vacancy rates, lack of source of income protections, and the failure of PHAs to provide mobility counseling, among other possible reasons.

### **Income and Recertification (Public Housing and Section 8 programs)**

#### *Income Verification and Recertification*

HOTMA specifies that determinations of family income under the public housing and Section 8 programs are to be made upon admission, and then annually, except for families on fixed incomes.<sup>12</sup> **Families on fixed incomes, such as those receiving Supplemental Security Income (SSI), only need to recertify their income every three years.** HUD's final "Streamlining Rule," published earlier this year, gave PHAs the same authority. HOTMA will codify this change in the statute.<sup>13</sup>

**Additionally, HOTMA provides that rents are to be set based on the tenant's income from the prior year, except for the tenant's initial determination of income.**<sup>14</sup> For some tenants, particularly those with consistent, ongoing employment, the use of past income to determine rent will likely simplify the income verification process. For others with sporadic income and/or a recent change of circumstances, a PHA's use of past income to determine rent could result in a higher rent burden than is justified given the family's current income.

HOTMA maintains some standard annual income deductions, including for:

- reasonable child care expenses necessary to enable employment or education,<sup>15</sup>
- unreimbursed medical, attendant care and auxiliary aid expenses,<sup>16</sup>
- senior or disabled family members,<sup>17</sup>
- students,<sup>18</sup>
- other amounts excluded by the Social Security Act,<sup>19</sup> and
- veterans' aid expenses.<sup>20</sup>

---

<sup>10</sup> For more information, please see NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (4d: Ed. 2012) and NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (2016 Supp), § 11.2.3.1.9 n.296.

<sup>11</sup> 42 U.S.C. § 1437f(o)(8)(1)(G)(vii)(II).

<sup>12</sup> 42 U.S.C. § 1437a(a)(1).

<sup>13</sup> Streamlining Administrative Regulations for Programs Administered by Public Housing Agencies, PIH 2016-05 (Apr. 7, 2016) (defining "fixed income"); FAST Act, § 78001, Pub. L. No. 114-94, div. G, tit. LXXVIII, 129 Stat. 1312 (Dec. 4, 2015) (authorizing re-certifications for certain fixed income public housing and Section 8 tenants every three years).

<sup>14</sup> 42 U.S.C. §§ 1437a(a)(7)(A) & (B).

<sup>15</sup> 42 U.S.C. § 1437a(a)(5)(C).

<sup>16</sup> 42 U.S.C. § 1437a(a)(5)(D).

<sup>17</sup> 42 U.S.C. §§ 1437a(a)(5)(A) & (B).

<sup>18</sup> 42 U.S.C. §§ 1437a(c)(4)(C) & (D).

<sup>19</sup> 42 U.S.C. § 1437a(c)(4)(B)(ii).

<sup>20</sup> 42 U.S.C. § 1437a(c)(4)(B)(iv).

Some of these deductions, such as the deduction for elderly and disabled families<sup>21</sup> and the deduction for unreimbursed medical expenses,<sup>22</sup> have been increased by HOTMA. PHAs are authorized to establish additional deductions, with the caveat that HUD must ensure that the deductions do not increase federal expenditures.<sup>23</sup> These deductions are helpful in supporting tenants' needs, but, even with HOTMA's increases, may be too minimal to have a significant impact.

Also new in HOTMA, beginning in fiscal year 2018, tenants and applicants must provide PHAs with authority to access their financial records whenever the PHA determines such records are needed for income verification.<sup>24</sup> Such authority remains with the PHA for the duration of the applicants' receipt of housing benefits, overriding various provisions of the Right to Financial Privacy Act. Refusal to provide, or revocation of, this authorization is a basis for determining that the applicant or tenant is ineligible for housing benefits.<sup>25</sup>

### *Changes in Income*

**For tenant *increases* in adjusted income, HOTMA eliminates the Earned Income Disregard, which previously disregarded certain increases in earned income for tenants who had been unemployed or on welfare.** Instead, HOTMA provides that the PHA may pursue interim recertification based on an estimated increase in annual adjusted income of 10% or more,<sup>26</sup> except that interim recertification based on *earned* income is not allowed unless the tenant family has received an interim reduction during the same year.<sup>27</sup> Also, a PHA may elect not to conduct an interim recertification if it is within the last three months of the certification period.<sup>28</sup> These provisions will provide limited help for previously unemployed family members or family members who received welfare benefits whose earned income increases, but do not rise to the level of protection provided by the EID.

For tenant *decreases* in adjusted income, a family may request recertification at any time based on a decrease in annual adjusted income of 10% or more.<sup>29</sup> Advocacy with the PHA may be required to apply the income and rent adjustments retroactively to the date of the decrease income. Especially in cases where the failure to timely report a change in circumstances was a result of a tenant's disability, limited English proficiency, status as a survivor of domestic violence, or other extenuating circumstances, retroactive relief should be available to the family going back to the date the family experienced a loss in income.

### **Over-Income Tenants (Public Housing)**

---

<sup>21</sup> 42 U.S.C. §§ 1437a(a)(5)(A) & (B).

<sup>22</sup> 42 U.S.C. § 1437a(a)(5)(D).

<sup>23</sup> 42 U.S.C. § 1437a(a)(5)(E).

<sup>24</sup> 42 U.S.C. § 1437n(e)(7).

<sup>25</sup> 42 U.S.C. § 1437n(e)(7)(D).

<sup>26</sup> 42 U.S.C. § 1437a(a)(6)(A)(iv).

<sup>27</sup> 42 U.S.C. § 1437a(a)(6)(A)(iv).

<sup>28</sup> 42 U.S.C. § 1437a(a)(6)(A)(iv).

<sup>29</sup> 42 U.S.C. § 1437a(a)(6)(A)(iv).

**HOTMA creates a rule for over-income tenants in public housing.** If a public housing family's income has exceeded 120% of the area median income for two consecutive years, HOTMA states that the PHA must either:

- terminate the family's tenancy within six months, or
- charge the tenant family a monthly rent in an amount equal to the greater of: the applicable fair market rent for a dwelling unit in the same market area of the same size, or the amount of the monthly operating and capital subsidy provided for the unit.<sup>30</sup>

PHAs must provide written notice to families who are over-income after one year, which will provide over-income tenants with one year's notice before the PHA either terminates the family's tenancy or charges the family the fair market rent.<sup>31</sup> Note also that HUD may establish income limitations higher or lower than 120% of AMI because of local construction costs or unusually high or low family incomes, vacancy rates, or rental costs.<sup>32</sup>

Additionally, **HOTMA requires that all PHAs submit to HUD, and make publicly available, an annual report specifying the number of tenant families whose income exceeds 120% of AMI and the number of applicants on the public housing waiting list.**<sup>33</sup>

Note that HUD published a proposed rule in the federal register that would make changes to how PHAs deal with over-income tenants, although no final rule has been issued. NHLP provided comments to HUD expressing concern about the risk of implementing any policy that denies an over-income family access to subsidized housing because any such rule (1) could act to punish families who have succeeded in gaining and maintaining employment and (2) does not recognize that family circumstances can change. The over-income rule contained in HOTMA leaves considerable discretion to PHAs, so tenants should advocate for local policies that protect families from eviction and displacement.

### **Asset Limits (Public Housing and Section 8 programs)**

**HOTMA creates asset limits for families assisted by certain HUD programs.** The law makes applicants and current tenants ineligible for public housing or the Section 8 programs if they:

- have more than \$100,000 in net family assets (adjusted annually for inflation)<sup>34</sup>, or
- have a present ownership interest, a legal right to reside in, and the legal authority to sell a real property that is suitable for occupancy by the family as a residence, unless:
  - the home is being purchased with a voucher,
  - the family includes a person who is a victim of domestic violence, or
  - the family is offering the home for sale.

---

<sup>30</sup> 42 U.S.C. §§ 1437n(a)(5)(A) & (C).

<sup>31</sup> 42 U.S.C. § 1437n(a)(5)(B).

<sup>32</sup> 42 U.S.C. § 1437n(a)(5)(C).

<sup>33</sup> 42 U.S.C. § 1437n(a)(5)(E).

<sup>34</sup> 42 U.S.C. § 1437n(e)(1)(A).

Note that the following assets are excluded from being counted as net family assets for this purpose:

- certain inaccessible trust funds, retirement accounts, settlements or awards due to actions that resulted in the serious disability of a household member,
- equity in homes purchased with a voucher,
- equity accounts in HUD homeownership or FSS programs,
- interests in Indian trust land,
- tax-protected education savings accounts,
- personal property not of significant value, and
- real property that the family does not have legal authority to sell.

**PHAs and owners have the discretion to (1) not enforce these asset limitations, (2) establish exceptions, or (3) delay for up to six months evictions of tenants or terminations of voucher holders with assets above the limit.**<sup>35</sup>

Also, HOTMA provides that any actual income that comes from a tenant's assets is counted as income, but imputed income is only counted to the extent that the tenant's net assets exceed \$50,000.<sup>36</sup> PHAs may rely on self-certification of assets by the household.<sup>37</sup>

### **Project-Based Vouchers (Section 8)**

HOTMA made significant changes to the law with respect to project-based vouchers, many of which will need to be implemented through HUD's rulemaking process. Before HOTMA, PHAs could use up to 20% of their *available funding* for project-based vouchers. After HOTMA, **PHAs may use up to 20% of their authorized number of vouchers for project-based vouchers, subject to the availability of appropriated funds.**<sup>38</sup> This change may result in an increase in the number of available project-based voucher units in a community. **A PHA can also use an additional 10% of its vouchers to provide units for certain types of individuals (formerly homeless individuals and families, veterans, persons with disabilities, and the elderly)**<sup>39</sup> **or where tenant-based vouchers are difficult to use.**<sup>40</sup> HUD guidance is needed to further define areas where vouchers are difficult to use. Any units previously subject to federally required rent restrictions or those that are receiving another type of long-term housing subsidy do not count towards the new 20% cap, such as properties converting from public housing, Rent Supp, Mod Rehab, or RAP properties to long-term project-based Section 8 contracts via the Rental Assistance Demonstration (RAD).<sup>41</sup> HUD will likely need to further clarify which types of properties are excluded from this cap.

Additionally, **the allocation of project-based vouchers in any particular project is limited to the greater of 25 dwelling units or 25% of the dwelling units**, unless the contract is exclusive to the elderly or families eligible for supportive services, or located in areas where vouchers are difficult to

---

<sup>35</sup> 42 U.S.C. §§ 1437n(e)(4) & (5).

<sup>36</sup> 42 U.S.C. § 1437a(c)(4)(B)(i).

<sup>37</sup> 42 U.S.C. § 1437n(e)(3).

<sup>38</sup> 42 U.S.C. § 1437f(o)(13)(B). HOTMA also contains a requirement that PHAs and owners must prioritize PBV contract payments in case of insufficient appropriated funds if a PHA has other cost-saving measures that do not require the termination of an existing contract. 42 U.S.C. § 1437f(o)(13)(F)(i)(I).

<sup>39</sup> 42 U.S.C. § 1437f(o)(13)(B)(ii).

<sup>40</sup> 42 U.S.C. §§ 1437f(o)(13)(D)(ii)(II).

<sup>41</sup> 42 U.S.C. §§ 1437f(o)(13)(D)(ii)(III) & (IV).

use (as with the provisions explained above, HUD guidance is needed to further define areas where vouchers are difficult to use).<sup>42</sup> Although the 25% restriction existed before HOTMA, HOTMA adds the 25-unit count as an option, which may increase the number of project-based vouchers in smaller properties. In census tracts where there is a poverty rate of 20% or less, HOTMA allows 25 units or 40% of the units in a project (whichever is greater) to be project-based. Units previously subject to federally required rent restrictions or receiving other project-based assistance from HUD are exempt from these limitations,<sup>43</sup> and HUD will likely need to clarify which types of properties are excluded from this cap.

**HOTMA extends the maximum term length of the initial PBV contract or contract extension from 15 years to 20 years.**<sup>44</sup> Following HAP termination or expiration, tenants also now have the right to choose to remain in their units, subject to requirements including inspections and rent reasonableness.<sup>45</sup> While this creates a promising option for tenants, unlike with enhanced vouchers, these tenants will still be required to pay any amount “by which the unit rent ... exceeds the applicable payment standard.”<sup>46</sup> Therefore, the ability of tenants to exercise this right will be limited.

HOTMA also allows PHAs and owners to add units to an existing PBV contract without competition,<sup>47</sup> enter into a HAP contract with an owner for any unit that is under construction,<sup>48</sup> and allow owners to establish site-based waiting lists that are consistent with the local PHA plan.<sup>49</sup> All eligible applicants who are on the PHA’s project-based waiting list have the right to add their names to these site-based waiting lists.<sup>50</sup> Importantly, applicants retain the right to keep their place on the PHA’s waiting list should the applicant reject an offer of project-based assistance or be rejected for admission to a project by the owner or manager of a project-based assisted unit.<sup>51</sup>

Rent adjustments will be provided upon request of the owner, unless the HAP contract includes an annual operating cost adjustment factor under the provisions of MAHRAA.<sup>52</sup> This provision seeks to clarify existing policies.

Last, vouchers provided under the HUD-VASH program or Family Unification Program may be also project-based, subject to the above requirements.<sup>53</sup>

### **Family Unification Program (Voucher program)**

HOTMA broadens eligibility for the Family Unification Program (FUP) for former foster youth. FUP provides assistance to low-income families facing housing-related challenges to keeping or regaining custody, and to youth at risk of becoming homeless as they age out of foster care. Under these revisions, **eligibility for former foster youth will extend beyond age 21 to age 24, and**

---

<sup>42</sup> 42 U.S.C. §§ 1437f(o)(13)(D)(i) & (ii).

<sup>43</sup> 42 U.S.C. §§ 1437f(o)(13)(D)(ii)(III) & (IV).

<sup>44</sup> 42 U.S.C. §§ 1437f(o)(13)(F)(i) & (G).

<sup>45</sup> 42 U.S.C. § 1437f(o)(13)(F)(iv).

<sup>46</sup> 42 U.S.C. § 1437f(o)(13)(F)(iv).

<sup>47</sup> 42 U.S.C. § 1437f(o)(13)(F)(ii).

<sup>48</sup> 42 U.S.C. § 1437f(o)(13)(F)(iii).

<sup>49</sup> 42 U.S.C. § 1437f(o)(13)(J).

<sup>50</sup> 42 U.S.C. § 1437f(o)(13)(J).

<sup>51</sup> 42 U.S.C. § 1437f(o)(13)(J).

<sup>52</sup> 42 U.S.C. § 1437f(o)(13)(I).

<sup>53</sup> 42 U.S.C. § 1437f(o)(13)(O).

participation in the program is extended from 18 to 36 months in duration.<sup>54</sup> Finally, FUP will also now include individuals who will leave foster care within 90 days and be homeless or at risk of becoming homeless; current law requires applicants to have left foster care.<sup>55</sup>

### **Reasonable Accommodations for an Exception Payment Standard (Voucher program)**

**HOTMA provides statutory authority for PHAs to grant an exception payment standard of up to 120% FMR as a reasonable accommodation of a tenant with a disability, without HUD approval.**<sup>56</sup> A payment standard of over 120% as a reasonable accommodation will still require HUD approval. HUD's final "Streamlining Rule" gave PHAs the same authority so HOTMA will have little practical effect, except to codify this important change in the statute. Having to apply to HUD for an exception payment standard between 110 and 120% created a significant administrative burden for PHAs. In addition, it had a negative impact on tenants with disabilities because it often resulted in a substantial delay that would cause voucher tenants to lose out on housing opportunities. This provision goes into effect immediately. Advocates can help ensure that PHAs revise their Administrative Plans to reflect the rule.

### **Additional Resources**

HOTMA's key provisions have also been summarized by our colleagues at the Center for Budget and Policy Priorities in [CBPP's HOTMA comparison chart](#). CBPP's chart provides a side-by-side comparison of HOTMA with existing law. Advocates may also be interested in the Center's [webinar on HOTMA from March 2016](#). In addition, you can contact NHLP staff with questions about the new law.

---

<sup>54</sup> 42 U.S.C. § 1437f(x)(2)(B).

<sup>55</sup> 42 U.S.C. § 1437f(x)(2)(B).

<sup>56</sup> 42 U.S.C. § 1437f(o)(1)(D).