Preservation Working Group

March 20, 2017

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410

RE: Docket No. FR–5976–N–03 Housing Opportunity Through Modernization Act of 2016: Implementation of Various Section 8 Voucher Provisions

To Whom It May Concern:

Thank you for the opportunity to comment on implementation of the voucher provisions of the Housing Opportunity through Modernization Act of 2016 (HOTMA) as provided in FR-5976-N-03 (the Notice). These comments reflect the views of the undersigned members of the national Preservation Working Group (PWG). PWG is a national coalition of housing owners, developers, advocates, tenant associations, and state and local housing agencies dedicated to the preservation of multifamily housing for low-income families. Our comments focus on provisions related to the Project-Based Voucher (PBV) program.

General Comments

HOTMA provides public housing authorities (PHAs) with important flexibility in the administration of the Section 8 voucher program. This flexibility is intended to make the voucher program more cost-effective and efficient in providing housing assistance to low-income households. We appreciate HUD's careful consideration of the implementation of HOTMA and its guidance intended to ensure that operational changes are consistent with PHAs' administrative plans and other requirements. While we value HUD's oversight role and understand the importance of a clear and current administrative plan, we are concerned that if the administrative burden of implementing HOTMA provisions is too great, PHAs will not implement these valuable changes. Accordingly, we encourage HUD to help the PHAs achieve the efficiency and flexibility intended under HOTMA by minimizing the number of required HUD reviews and approvals and by permitting clear but flexible implementing language in PHA administrative plans to avoid unnecessary and time-consuming revisions.

Units Not Subject to PBV Program Unit Limitation

Definition of Previously Assisted Units (page 5466)

To comply with HOTMA, HUD must revise the provisions of the implementation notice (at pages 5465 and 5467-68) that improperly limit the types of properties with federally required rent restrictions that are exempt from the program and per-project caps.

The language for the 20% program cap in f(o)(13)(B) states: "Any units of project-based assistance that are attached to units previously subject to federally required rent restrictions or receiving another type of long-term housing subsidy provided by the Secretary shall not count toward the percentage limitation under clause (i) of this subparagraph. The Secretary may, by regulation, establish additional categories for the exception under this clause."

Similarly, on the 25% project cap in (13)(D), the exemption covers units in projects with higher percentages of project-based rental assistance (PBRA), as well as "units previously subject to federally required rent restrictions or receiving other project-based assistance provided by the Secretary...."

The operative phrasing of both provisions is identical for the purposes of analyzing whether units with federally required rent restrictions other than those imposed by HUD, such as Low Income Housing Tax Credit (LIHTC) units, are covered by the exemption. Our position is that any units with restrictions that are required or imposed by any federal statute or action are covered by this exemption. The clause "receiving another type of long-term subsidy ... provided by the Secretary" stands independently of the preceding clause governing units with federally required rent restrictions. The Secretary "provides" "a long-term housing subsidy", but does not "provide" a "federally required rent restriction". An interpretation that "by the Secretary" covers both would be challenging "... attached to units previously subject to federally required rent restrictions ...provided by the Secretary [shall not count]…" Thus, HOTMA exempts all "units previously subject to federally required rent restriction," regardless of whether those restrictions are HUD-created. Such federally rent-restricted properties should include any properties that have or have had such restrictions, since in either case the restrictions were previously in effect, and recapitalization needs will often predate the expiration of any extended use restrictions. HUD should conform its guidance accordingly.

This revision is also supported by policy reasons, as Congress is clearly expressing an intent to exempt existing affordable units which might need recapitalization for preservation and improvement through PBVs. According to a recent study, 100,000 LIHTC properties complete their initial 15-year compliance period each year.[i] PBVs are a critical tool to ensure these properties are maintained as deeply affordable to meet the most pressing housing needs for the long-term.

Question 1. Exception for PBVs with Existing Contracts (page 5466)

PHAs already administering PBVs that would be eligible for the 10% exception category should be permitted to count those units as excepted. The nation is facing an affordability crisis and in many jurisdictions, affordable housing is difficult to locate even with the benefit of the tenant-based vouchers. PBVs provide PHAs with a tool to ensure that affordable units remain available. The excepted categories acknowledge that PBVs are an especially valuable tool for serving specific populations where additional services may be provided or where a tenant-based voucher may be more difficult to use. Permitting PHAs to apply the 10% exception to existing projects will allow PHAs to continue to adapt to meet the needs of their communities. Absent this flexibility, PHAs that have already supported these categories will be disadvantaged when compared to those not currently using PBVs in the exception categories. Further, requiring PHAs to maintain separate exception unit counts for pre- and post-HOTMA units creates an unnecessary administrative burden.

Exceptions to PBV Program Unit Calculation

Question 2. Exception for "Difficult to Use" Areas (page 5466)

To define or determine the areas whether vouchers are "difficult to use" for this exception category, we support the two-part definition provided by the Center for Budget and Policy Priorities in its comments, to better target areas where more development is needed, as well as those areas that have rental housing in the right price range but the stock inadequately serves voucher holders. Specifically:

Tenant-based vouchers should be considered "difficult to use" in an area if:

1. 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 national average; or
2. 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 national average.

In non-metropolitan areas, the measures shall apply at the county rather than zip code level.

Question 4. Replacement Units (page 5466)

We appreciate HUD's thoughtful consideration of which new construction housing units should qualify as replacement housing units and therefore be exempt from the program unit limitation. However, contrary to HUD's guidance, eligibility as a replacement unit should not be limited to units on the site of the original public housing development. Deconcentration of poverty and the creation of sustainable, mixed-income communities is often a central goal of redevelopment and drives plans that include development of off-site replacement units. Offsite replacement units remain a critical portion of the affordable housing stock in many communities and failure to exempt them from the program cap could ultimately reduce the number of long-term affordable housing in a PHA's jurisdiction or erect disincentives to creation of mixed-income communities. The language of the statute does not require this distinction, so we recommend its deletion.

Question 5. Limits on Program Unit Exceptions (page 5466)

Congress limited the exception for PBVs in the designated categories to 10 percent of the PHA's total units. Although we currently have no additional suggested categories for HUD's consideration, HUD should leave open that possibility for future unforeseen circumstances. Moreover, further limitations on the specified categories should be unnecessary and would be inconsistent with the statute. We note that exempted units, including replacement units, are often part of preservation or redevelopment plans that include issuance of preservation or tenant protection vouchers that mitigate the impact of the transaction on the larger pool of available vouchers.

Changes to Income Mixing Requirements

Question 1. Standards for Supportive Services (page 5468)

We applaud the modified supportive services exception to the project cap, which should better facilitate the operation of supportive services. HUD should continue to allow PHAs flexibility in defining supportive services in accordance with the needs and infrastructure in their communities and should encourage PHAs to include in their administrative plans a menu of eligible services that would allow owners to tailor services

to resident needs while remaining eligible. Properties operating with a supportive services exception should have a written plan for supportive services based on an assessment of projected or actual resident needs.

However, we urge HUD to withdraw the draft language related to the Family Self-Sufficiency (FSS) program, which states that if an FSS family fails to successfully complete the FSS contract of participation or supportive services objective and consequently is no longer eligible for the supportive services, the family must vacate the unit within a reasonable period of time established by the PHA, and the PHA shall cease paying housing assistance payments on behalf of the ineligible family. FSS is a voluntary program and a family which fails to succeed in FSS with "good cause" should not be required to move out of its unit and that unit should remain exempt. Other families in the public housing or voucher program that do not meet the requirements of their FSS contracts will forfeit the escrow set aside for them. It seems punitive that PBV families should also lose their housing as well as forfeiting the escrow if this regulation is not modified.

Question 2. HUD definition of "Difficult to Use" Units (page 5468)
Please see our response to Question 2 above.

Question 3. Additional Exemptions to Project Cap (page 5468)
In addition to those programs and project types listed, properties that have received assistance under Section 201 of the Housing and Community Development Amendments of 1978, 12 U.S.C. 1715z-1a (the Flexible Subsidy program) and are or have been subject to a use agreement in connection with the assistance should be exempt from the project cap.

Additional Contract Conditions

In order to comply with HOTMA's requirements concerning the end of the PBV contract (42 U.S.C. §1437f(o)(13)(F)(iv)), HUD should revise the following sentence in the implementation notice (page 5469): "The PHA must provide the family with a voucher and that family must also be given the option by the PHA and owner to remain in their unit with HCV tenant-based assistance if the unit complies with inspection requirements and rent reasonableness requirements" to instead read as follows (change indicated in italics): "The PHA must provide the family with a voucher and that family must also be given the option by the PHA and owner to remain in *the same unit or project* with HCV tenant-based assistance if the unit complies with inspection requirements and rent reasonableness requirements." This change more accurately aligns the language of the implementation notice with the statutory requirements of HOTMA to allow assisted families to elect to remain in the same *project*, not just the same *unit*. This is especially important to allow for family size changes and any construction or rehabilitation impacts to the tenant's current unit, while providing the opportunity for the tenant to exercise their right to remain.

Regarding notice requirements, if an owner does not give timely or adequate notice of the contract termination or expiration, HUD should still require the owner to provide tenants with such legally valid notice, with specific required content, such as whether the owner plans to renew the contract. Only after the owner has provided such timely, valid notice should the 12-month notice period commence. [HUD, Section 8 Renewal Policy Guide, §11-4 (Aug. 2015).] HUD should also reiterate the ability of the owner to renew a terminating contract for a period of time sufficient to give tenants the notice required by 24 CFR 983.206.

Additionally, HUD should cite to paragraph (8) and paragraph 10(A) of the voucher statute (42 U.S.C. §1437f(o)) for the applicable inspection requirements and rent reasonableness requirements, respectively, in order to avoid any uncertainty about the sources of these specific requirements.

Thank you for your consideration of these comments. Please contact Ellen Lurie Hoffman of the National Housing Trust with any questions or for additional information.

Sincerely,

Community Economic Development Assistance Corporation
Enterprise Community Partners
LeadingAge
National Housing Law Project
National Housing Trust
National Low Income Housing Coalition
Preservation of Affordable Housing
Stewards of Affordable Housing for the Future

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[i] *Preserving Housing Credit Investment: The State of Housing Credit Properties and Lessons Learned for the Extended Use Period*, Lydia Tom and Ben Nichols 2015