



To: HJN Advocates
From: NHLP Staff
Re: Revised Regulations Pursuant to HOTMA Sections 102, 103, and 104
Date: May 18, 2023

The Housing Opportunity Through Modernization Act of 2016¹ was signed into law by President Obama in July 2016. HOTMA made important changes to the existing federal housing programs, including the Section 8 Housing Choice Voucher program, the Public Housing program, and the Section 8 Project-Based Rental Assistance program. Some of HOTMA's provisions were self-implementing, meaning they go into effect right away. Other sections required HUD to implement regulations. HUD has slowly published implementation notices in the past several years for various sections of HOTMA. NHLP recently updated a chart for advocates to reference where certain HOTMA provisions currently stand with respect to implementation.²

In January 2023, HUD published new regulations pursuant to Sections 102, 103, and 104 of HOTMA, which govern important aspects of HUD programs including:

- Income and asset calculations
- Rules for over-income tenants in public housing
- Tenant income recertifications

Below is an analysis of key revisions to HUD regulations most relevant to tenants' rights and legal services attorneys, made pursuant to HOTMA Sections 102, 103, and 104. Note that NHLP also published an accompanying outline, which covers a broader scope of the new regulations. NHLP also notes in its materials where HUD will provide additional guidance to PHAs and other stakeholders on key provisions of the rule.

The rules set forth in the final notice go into effect in January 2024, unless otherwise noted. It is important that legal services attorneys understand the changes in advance to successfully advocate with local PHAs to adopt changes in their Admin Plan, ACOP, and other documents that reflect the new rules. NHLP, in its analysis below, has noted discretionary PHA policies that tenants and their advocates can push for on a local level to benefit residents. HJN members are always welcome to reach out to NHLP staff with questions about PHA and related plans.

Please note that all of the CFR citations in this analysis are to the revised regulations pursuant to the HUD notice.

¹ Housing Opportunity Through Modernization Act of 2016, Pub. L. No. 114-201, 130 Stat. 782 (2016).

² NHLP, Quick Reference Guide to Implementation of Title I of the Housing Opportunity Through Modernization Act (HOTMA) (Updated May 2023).

How Income is Calculated

The fundamental way that income is calculated remains the same under HOTMA although HUD clarified that the definition of what *is* income relies explicitly on what is *not* income. HUD “simplified” 5.609(a) to clarify that “all amounts received by all adult household members plus unearned income by any household member under the age of 18” is income, *unless excluded.* HUD also specifies in 5.609(a)(2), that income includes imputed returns on assets over \$50,000 as well as actual returns on assets that can be calculated.

The revised regulations specify that PHAs are generally to use income from the previous year to determine income for the upcoming year, and that the PHA should make adjustments as necessary.³ We discuss income adjustments and deductions in more detail below. Per HOTMA, HUD also allows PHAs and owners to use other housing programs’ income determinations, so long as the determination was made in the past twelve months (called the safe harbor).⁴ Allowable programs include LIHTC, TANF, and Medicaid (see 5.609(c) for the full list). HUD can also add more programs to this list by signing an MOU with the administering agency and publishing the qualifying program in the federal register. This new section of the regulations also specifies how PHAs and owners that choose to use alternative income determinations can confirm the information using third party verification.

Changes to Adjusted Income/Deductions

Overall the rules regarding calculating adjusted income⁵ and applying deductions have stayed consistent with the current rule.⁶ While the categories of mandatory deductions have remained the same, HUD will annually adjust the amounts in accordance with the CPI.⁷ The deduction amount for elderly or disabled families will be increased to \$525.⁸

In addition, to qualify for a deduction for unreimbursed health and medical care for elderly or disabled family or for reasonable attendant care and auxiliary apparatus, the amount must exceed ten percent of annual income.⁹ This is a significant change from the three percent previously required. For those impacted by this increase because they received the deduction as of January 1, 2024, the rules provide for a phased-in approach.¹⁰ During the *phased-in* period the deduction will first increase to sums exceeding five percent of annual income, then in a year the deduction will increase to sums exceeding 7.5 percent of annual income and finally after 24 months the deduction will increase to the statutory number of sums exceeding 10 percent of annual income. The rules also provide for hardship relief for an elderly or disabled family experiencing financial hardship.¹¹

³ 24 C.F.R. § 5.609(c)(2).

⁴ 24 C.F.R. § 5.609(c)(3).

⁵ “Adjusted income means annual income (as determined under § 5.609) of the members of the family residing or intending to reside in the dwelling unit, after making the deductions” 24 C.F.R. § 5.611.

⁶ 24 C.F.R. § 5.611

⁷ 24 C.F.R. § 5.611(a)

⁸ 24 C.F.R. § 5.611(a)(2)

⁹ 24 C.F.R. § 5.611(a)(3)

¹⁰ 24 C.F.R. § 5.611(c)(1)

¹¹ 24 C.F.R. § 5.611(c)(2)

A PHA may adopt additional deductions for the public housing, HCV and Section 8 mod rehab programs.¹² The PHA must establish a written policy for such deductions, and be included in the admin plan for the HCV program.¹³ Additional funding will not be provided to PHAs that adopt additional deductions.¹⁴

Select Changes to Income Exclusions

Trust Distributions (5.609(b)(2))

New 5.609(b)(2) excludes various types of trust distributions from the definition of income. First, distributions of principal from an irrevocable trust or trust outside the control of the family are excluded from income (these trusts are generally excluded from the definition of net family assets under 5.603(b)(4) as well).¹⁵ Distributions of trust income from an irrevocable trust, when used to pay the costs of health and medical expenses for a minor, are also excluded from income (other income from trusts is considered income).¹⁶ For revocable trusts or trusts under the control of the family, all distributions of principal are excluded from income, but any income earned, whether or not it is distributed, is considered income by HUD.¹⁷

The new regulation finally settles the issue of how to treat trust distributions at a federal level. HJN members litigated cases challenging HUD's interpretation of the regulations, which put people who experience disabilities at a disadvantage for placing their money in a Special Needs Trust (an irrevocable trust outside the control of the family). In this final rule, HUD essentially adopts the decision in *DeCambre v. Brookline Housing Authority*,¹⁸ laying to rest any question that distributions of principal from an irrevocable trust are not income.

In the proposed HOTMA rule, HUD chose to exempt *some* distributions from a non-revocable trust "specifically provided to cover the cost of medical expenses for a minor."¹⁹ NHLP argued that this exemption, while important, was too narrow because it does not clarify how to treat non-revocable trusts that are not created for medical needs of a minor. For example, there are many cases where Special Needs Trusts (non-revocable trusts created for the benefit of people with disabilities) are created with money recovered in civil litigation and used for future needs to avoid the loss of medical assistance eligibility. HUD, instead, directed PHAs to exclude any withdrawal of principal from any type of trust. The new regulations will provide clarity to HUD tenants and PHAs.

¹² 24 C.F.R. § 5.611(b)(1)

¹³ 24 C.F.R. § 5.611(b)(1)

¹⁴ 24 C.F.R. § 5.611(b)(1)

¹⁵ 24 C.F.R. § 5.609(b)(2)(i)(A).

¹⁶ 24 C.F.R. § 5.609(b)(2)(i)(B).

¹⁷ 24 C.F.R. § 5.609(b)(2)(ii).

¹⁸ 826 F.3d 1, 35 (1st Cir. 2016) (cert denied) (case concerned how disbursements from a special needs trust should be handled by a housing authority for purposes of section 8 eligibility and rent-setting. In that case, a voucher tenant received a lump sum personal injury settlement (not counted as income) and placed the settlement into a Special Needs Trust. The housing authority subsequently counted regular disbursements of principal from the Special Needs Trust as income. In its decision, the Appeals Court highlighted the irrationality of the housing authority's position that disbursements of principal should ever be counted as income.

¹⁹ Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104, 83 Fed. Reg. 48,820 (Sept. 17, 2019) (proposed 5.609(b)(2)).

Insurance and other payments (5.609(b)(5))

5.609(b)(5) continues to exclude insurance payments and settlements for personal or property loss but in the amended regulation, HUD adds examples of common exclusions (payments through health insurance, motor vehicle insurance, and worker's compensation). HUD added these examples to clarify the types of payments that were excluded from income calculations.

Student Financial Assistance (5.609(b)(9))

HUD revised the exclusions for student financial assistance, in part by codifying mandatory income exclusions in section 479B of the federal Higher Education Act of 1965 (HEA).²⁰ Additionally, the new rule excludes from income student financial assistance for tuition, books, and supplies, room and board, and other fees required and charged to a student by an institution of higher education.²¹ For a student who is not the head of household or spouse, the rules exclude the reasonable and actual costs of housing while attending the institution of higher education and not residing in an assisted unit.²²

For the Section 8 program, for any funds from a year where HUD's appropriations acts include Section 8 student financial assistance exceptions to section 479B for Section 8 income calculations (similar to those in FY2022) those limitations will still apply with respect to Section 8 participants, even if the appropriations contradict section 479B of the HEA.²³

HUD plans to issue further guidance about how to treat student financial assistance in income calculations.

Veterans Aid and Attendant Care (5.609(b)(17))

In this final rule, HUD excludes payments related to aid and attendance for veterans under 38 U.S.C. 1521.²⁴

Payments made to keep family members at home (5.609(b)(19))

Another important change in the updated regulations is the new 5.609(b)(19), which excludes payments made to keep a family member with a disability at home. The new regulations clarify and expand on the current rule. Per the revised rule, payments made by a state (or similar) agency to the family to avoid institutionalization of a family member with any type of disability are excluded from income. HUD clarifies that the payments can be made to the family by a range of state agencies for different types of in-home support care. HUD also eliminates the confusing requirement that the payments be "offset by the cost of services or equipment."

²⁰ See 20 U.S.C. 1087uu (HUD notes that the exclusions in the HEA were formerly included under the catch-all provisions for income excluded by other federal laws); 24 C.F.R. § 5.609(b)(9)(1).

²¹ 24 C.F.R. § 5.609(b)(9)(ii).

²² 24 C.F.R. § 5.609(b)(9)(ii).

²³ HUD has determined it does not have the authority to publish a rule that contradicts section 479B of the HEA without explicit statutory authority. Therefore, in years in which the limitations are enacted in an appropriations act, they will continue to apply. See 8 Fed. Reg. 9600 at 9607-9608.

²⁴ 24 C.F.R. § 5.609(b)(17).

In its final rule, HUD followed the California Supreme Court’s decision in *Reilly v. Marin Housing Authority*²⁵ by excluding from income payments made by a state agency to a family member who is caring for someone with a disability (in the case of *Reilly*, a developmental disability). Many PHAs interpret the current regulation to count as income payments made to an in-home support worker who is also a family member.²⁶ This makes the HUD programs unaffordable for many families, who choose to care for a family member with a disability in lieu of other employment. In addition, this revision was important because some states bill Medicaid for in-home support services, but other states use a different source of funds to pay for the care. Therefore, the final rule more adequately addresses the needs of families who wish to keep a disabled family member in the home.

Catch-all for other federal statutes (5.609(b)(22))

HUD has always left room in the regulations for income exclusions required by other federal statutes. However, HUD is changing the way it will inform the public about other exclusions and commits to publishing them in the federal register. Currently, HUD publishes the new exclusions via notice to PHAs. NHLP tries to keep HJN members updates as new exclusions arise in federal statutes.

Nonrecurring income (5.609(b)(24))

HUD regulations continue to exclude “nonrecurring income” although the final rule attempts to clarify what falls into this exclusion. The clarification is welcome, as the current regulation is ambiguous and has not interpreted uniformly among housing providers. 5.609(b)(24) maintains the general exclusion of “nonrecurring income” and defines it as income that will not be repeated in the coming year, based on information that the family provides. Importantly, the regulation specifically states that income earned as an independent contractor, day laborer, or seasonal worker *does not count* as “nonrecurring” income. For example, advocates should advise tenants that income earned as a day laborer will be counted towards income for purposes of the HUD programs.

However, the rule also offers specific examples of what is *included* in the definition of nonrecurring income:

1. Census work
2. Economic stimulus payments
3. State tax refunds (at the time they are received)
4. Federal tax refunds (at the time they are received)
5. Gifts for holidays
6. In-kind donations from food banks
7. Lump sum additions to assets like lottery winnings²⁷

²⁵ *Reilly v. Marin Housing Authority*, 23 Cal. App. 5th 425 (2018).

²⁶ Compare current HUD regulation 24 C.F.R. § 5.609(b)(16): “[a]mounts paid by a State agency to a family with a member who has a developmental disability . . . living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home” with revised § 5.609(b)(16):: “payments made by or authorized by a State Medicaid agency (including through a managed care entity) or other State or Federal agency to a family to enable a family member who has a disability to reside in the family’s assisted unit. Authorized payments may include payments to a member of the assisted family through the State Medicaid agency (including through a managed care entity) or other State or Federal agency for caregiving services the family member provides to enable a family member who has a disability to reside in the family’s assisted unit.”

²⁷ 24 C.F.R. § 5.609(b)(24).

The examples in the revised regulations will hopefully provide clarity to housing providers and tenants about the types of nonrecurring payments that are excluded from income. Surely, payments will arise that do not fall into any category, in which case advocates can analogize to the inclusions/exclusions in the regulations.

Settlements or judgments from civil rights litigation (5.609(b)(25))

The regulations provide new guidance about the types of settlements or judgments that are considered income for purposes of the HUD programs. 5.609(b)(25) continues to exclude from income all settlements or judgments from any type of civil rights litigation, adding that it is excluded no matter how it is paid out (lump sum or installment payments). HUD further explains that back pay received as a result of a settlement or judgment is excluded from income because it is not fair to treat this differently than other settlement or judgment money. On the other hand, HUD distinguishes back pay from any raise or promotion that would be counted in the upcoming year as income.

Advocates and tenants must keep in mind that generally, settlements or judgments are counted as an asset. And that all income generated from a settlement account is income (at the time it is received). Further, if assets increase by over \$50,000 then HUD will impute income from the asset pursuant to 5.609(a)(2). Last, a large addition to family assets could affect eligibility for public housing if it exceeds \$100,000. These are all important considerations for advocates who engage in civil rights litigation on behalf of HUD residents and must counsel tenants on the impact of any settlement or judgment. NHELP includes an analysis of the new asset limitations below.

Earned income from FSS accounts (5.609(b)(27))

HUD clarified in the regulations how it treats FSS funds. Consistent with its current interpretation, 5.609(b)(27) excludes income earned on any amount placed in an FSS account. Distributions from an FSS account are also excluded under 5.609(b)(24)(vii) as a lump sum addition to family assets.

EID Eliminated

HOTMA eliminated the Earned Income Disregard (EIV). Starting on January 1, 2024, no new families will be eligible for EID and current participating families will be phased out. By January 1, 2026 (2 years from the implementation date of the final rule), no HUD families will receive the EID benefit.²⁸ By phasing out the elimination of EID, HUD allows participating families to benefit for the full 24-month period. HUD clarifies that families eligible to receive the Jobs Plus Earned Income Disregard (JPEID) pursuant to the 2023 NOFA (or earlier appropriation) may continue to receive JPEID.²⁹

Streamlining HUD Programs

HOTMA sections 102, 103, and 104 generally govern how HUD calculates tenant income and assets for its programs. One of the key goals of HOTMA is to streamline the rules for all HUD housing providers and residents. Accordingly, this rule makes technical revisions to the definition of income and assets for HOME, HTF, HOPWA, and 202/811 programs to align with the rules for HUD Multifamily properties,

²⁸ 24 C.F.R. § 5.617(f).

²⁹ 24 C.F.R. § 960.255(e).

public housing, and vouchers. Below is a chart, copied from the final rule, that details which of HOTMA's income and asset changes applies to the various HUD programs (some program statutes were a barrier to adopting specific regulatory revisions).

You can find this chart on page 9601 of the federal register:

| | HOPWA (Part 574) | HOME (Part 92) | Housing Trust Fund (Part 93) | 202/811 |
|---|--|---|--|--------------------------------|
| Net Family Assets Definition (§ 5.603) | Yes, except the value of a home of a participant receiving short-term mortgage or utility assistance under § 574.300(b)(6) or other homeownership assistance eligible under HOPWA is excluded (§ 574.310(f)) | Yes, unless the participating jurisdiction chooses to calculate income using the IRS income definition. The value of a homeowner's principal residence is excluded under owner-occupied rehabilitation programs. Income or asset enhancements derived from the HOME-assisted project shall not be considered in calculating assets or annual income (§ 92.203(c)(1) and (e)(1)) | Yes, unless the HTF grantee chooses to calculate income using the IRS income definition. Income or asset enhancements derived from the HTF-assisted project shall not be considered in calculating assets or annual income (§ 93.151(b)(1)(i) and (e)(1)). | Yes |
| Annual Income Definition (§ 5.609(a)) | Yes (§ 574.310(d)(1) and (2) and § 574.310(e)(1) and (2)) | Yes, unless the participating jurisdiction uses IRS income definition under § 92.203(c)(2) (§ 92.203(c)(1)) | Yes, unless grantee uses IRS income definition under § 93.151(b)(1)(ii) (§ 93.151(b)(1)(i)) | Yes (as modified in § 891.105) |
| Annual Income Exclusions (§ 5.609(b)) | Yes (§ 574.310(d)(1) and (2) and § 574.310(e)(1) and (2)) | Yes, unless the participating jurisdiction uses IRS income definition under § | Yes, unless grantee uses IRS income definition under § 93.151(b)(1)(ii) (§ | Yes (as modified in § 891.105) |

| | | | | |
|--|--|--|--|---|
| | | 92.203(c)(2) (§ 92.203(c)(1)) | 93.151(b)(1)(i)) | |
| Annual Income Calculation & Reexaminations (§ 5.609(c)) | Yes (§ 574.310(d)(1) and (2) and § 574.310(e)(1) and (2)) | No, unless unit is subject to § 92.203(a)(1) or the participating jurisdiction accepts income determination under § 92.203(a)(2) (§ 92.203(a) & (f)) | No, unless unit is subject to § 93.151(a)(1)-(3) (93.151(a) & (f)) | Yes (as modified in § 891.105) |
| Adjusted Income Mandatory Deductions (§ 5.611(a)) | Yes (§ 574.310(d)(1)) | Yes (§ 92.203(a) & (f)) | No, unless unit is subject to § 93.151(a)(1)-(3) (§ 93.151(a) and (f)) | Yes (as modified by the definition of annual income in § 891.105) |
| Adjusted Income Additional Deductions (§ 5.611(b)) | No, (§ 574.310(e)(1)(iv)). | No, unless unit is subject to § 92.203(a)(1) or the participating jurisdiction accepts income determination under § 92.203(a)(2) (§ 92.203(a) and (f)) | No, unless unit is subject to § 93.151(a)(1)-(3) (§ 93.151(a) and (f)) | No |
| Adjusted Income Financial Hardship Exemptions (§ 5.611(c)) | Yes, if the grantee elects to grant financial hardship exemptions (§ 574.310(e)(1)(v)) | Yes, if the participating jurisdiction elects to do so under § 92.203(f)(1)(i), if unit is subject to § 92.203(a)(1), or if income determination is accepted under § 92.203(a)(2), (§ 92.203(a) and (f)) | No, unless unit is subject to § 93.151(a)(1)-(3) (§ 93.151(a) and (f)) | Yes |
| Asset restriction (§ 5.618) | Yes, but only for housing activities subject to the resident rent payment | No | No | No |

| | | | | |
|--|---|--|--|--|
| | requirements in § 574.310(d) (§ 574.310(f)) | | | |
|--|---|--|--|--|

Family Assets

HOTMA made significant changes to the asset requirements for people applying or assisted by public housing and other HUD housing programs.³⁰ The changes aim to balance policies that allow low-income families to build wealth while creating an asset cap for participants.

In this rule, HUD amends the definition of “net family assets.”³¹ The final rule also creates two new asset limitations applicable to public housing, tenant-based section 8, and project-based section 8 programs.³² Finally, HUD raises the imputed asset threshold from \$5,000 to \$50,000.³³

Definitions of “Net Family Assets”

HUD restructures and revises the “net family assets” definition.³⁴ The changes do not significantly change the definition³⁵ and now includes a list of excluded items, such as:

- \$50,000 in combined value of all non-necessary personal property,³⁶
- the value of real property the participant has no effective legal authority to sell,³⁷
- the value of any retirement plan account recognized as such by the Internal Revenue Service,
- and the value of Coverdell education savings accounts, Qualified Tuition Program accounts, and Baby Bond accounts.³⁸

Understanding how to calculate net family assets is important because (1) income from assets greater than \$50,000 is counted as income and (2) there is a new asset limitation that applies to people with assets above \$100,000 or if they own certain types of real property.

³⁰ Housing Opportunities Through Modernization Act of 2016, Title I, Pub. L.114-201, § 104, 130 Stat. 782, 793-94 (2016).

³¹ 88 Fed. Reg. at 9656, 9601-02; *see also* HOTMA § 104.

³² *See* 88 Fed. Reg. at 9661 (codifying changes to 5.618(e)); *see also*, HOTMA § 104.

³³ *See* 88 Fed. Reg. at 9661 (codifying changes to “net family assets” definition in 24 CFR § 5.603(b)).

³⁴ 88 Fed. Reg. at 9656, 9602 (codifying changes to “net family assets” definition in 24 CFR § 5.603(b)); *see also*, *infra* III.B. The final rule does not change the current practices regarding the valuation of real property. 88 Fed. Reg. at 9642.

³⁵ “Net family assets” is the net cash value of all assets owned by the family, after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds, and other forms of capital investment.” 88 Fed. Reg. at 9656, 9602 (codifying changes to “net family assets” definition in 24 CFR § 5.603(b)); *see also*, *infra* III.B.

³⁶ The \$50,000 will be adjusted annually by the Consumer Price Index for Urban Wage Earners and Clerical Workers. 88 Fed. Reg. at 9660 (codifying changes to 24 CFR § 5.618(a)(1)(i)). HUD will release additional guidance for determining “whether an item is ‘a necessary item of personal property,’” or should be included in the family’s asset calculation. 88 Fed. Reg. at 9642.

³⁷ HUD defines “real property” as to have the same meaning as provided under the state law where the property is located. 88 Fed. Reg. at 9601, 9655 (codifying changes to “real property” definition in 24 CFR § 5.100).

³⁸ 88 Fed. Reg. at 9656 (codifying changes to “net family assets” definition in 24 CFR § 5.603(b)). For the list of items excluded from the net family assets calculation, *see infra* III.B.5.

New Asset Limitations

The final rule creates asset limitations for public housing, the housing choice voucher program, and the project-based section 8 programs.³⁹ A family cannot be assisted initially or after each recertification, if the family's assets exceed \$100,000.

A family also cannot be assisted initially or after a recertification if they have a present ownership interest in, and a legal authority to sell, real property that is suitable for occupancy by the family.⁴⁰ There are four exceptions to the asset requirements.⁴¹ HUD exempts families with a survivor, families receiving HCV homeownership assistance for the property, instances where jointly-owned property is inhabited by the co-owner who is not part of the family, or the family is selling the property.⁴² The rule also lists instances when HUD will consider real property not suitable for occupancy.⁴³ A property is unsuitable for occupancy if it does not meet the family's accessibility needs, is not sufficiently sized for the family, its geographic location is a hardship for the family, or has condition issues.⁴⁴

The final rule does not change the current practices regarding the valuation of real property⁴⁵ but HUD will publish additional guidance on determining if an item is "a necessary item of personal property" or should be included in the valuation of personal non-necessary items.⁴⁶ HUD will also issue additional guidance regarding acceptable documentation for determining if a family has a present interest in real property and how to calculate negative equity in real property.⁴⁷

Certification of Assets

Housing providers may accept the participant's self-certification that the family's assets do not exceed \$50,000 and the family does not have a current ownership interest in any real property at the time of review.⁴⁸ However, housing providers will still need to verify that families do not meet the other aspects of property ownership such as a legal right to reside in and the effective legal authority to sell real property that is suitable for the family's occupancy.⁴⁹ Because of the administrative expediency, many housing providers should take advantage of accepting self-certification. However, housing providers are

³⁹ See 88 Fed. Reg. at 9661 (codifying changes to 5.618(e)). See also, *infra* III.C.

⁴⁰ 88 Fed. Reg. at 9611-12, 9641, 9643, 9661. HUD defines "real property" to have the same meaning as provided under the state law where the property is located. 88 Fed. Reg. at 9601, 9655 (codifying changes to "real property" definition in 24 CFR § 5.100). A property is unsuitable for occupancy if it does not meet the family's accessibility needs, is not sufficiently sized for the family, its geographic location is a hardship for the family, or it has condition issues. 88 Fed. Reg. at 9643, 6961 (codifying changes to 24 CFR § 5.618(a)(2), the considerations for determining if the real property is "suitable for occupancy"). But see also, 88 Fed. Reg. at 9661 (providing housing providers discretion to enforce asset requirements or to establish exceptions to the restriction in 24 CFR § 5.618(c)).

⁴¹ 88 Fed. Reg. at 9661 (codifying changes at 24 C.F.R. Sec 5.618(a)(ii)(C)).

⁴² 88 Fed. Reg. at 9643, 9661 (codifying changes to 24 CFR § 5.618(a)(1)(ii)(A)-(D)). See also, *infra* III.C.4.

⁴³ 88 Fed. Reg. at 9643, 9661 (describing considerations for determining if the real property is "suitable for occupancy" in 24 CFR § 5.618(a)(2)).

⁴⁴ 88 Fed. Reg. at 9643, 6961 (codifying changes to 24 CFR § 5.618(a)(2)).

⁴⁵ 88 Fed. Reg. at 9642.

⁴⁶ *Id.*

⁴⁷ 88 Fed. Reg. at 9602, 9641, 9643.

⁴⁸ 88 Fed. Reg. at 9611, 9661 (codifying changes to 24 CFR 5.618(b)(2)).

⁴⁹ 88 Fed. Reg. at 9643 (stating housing providers still need to inquire into the family's ability to sell a property or inhabit). HUD will issue additional guidance on the use of the discretionary authority to enforce the asset restrictions. 88 Fed. Reg. at 9641.

not required to accept self-certification. Advocates and tenants should be attentive to how housing providers implement their policy of accepting self-certifications.⁵⁰

The final rule gives housing providers the ability to “enforce the restrictions...or establish exceptions to such restrictions.”⁵¹ And where housing providers seek to evict or terminate for noncompliance with the asset requirements, the action must be initiated within 6 months, unless it conflicts with other provisions of law.⁵² Advocates and tenants should be attentive to how housing providers enforce compliance with these new requirements.⁵³

Over-income families in public housing (960.507 and 960.509)

Since 2016, HUD has published several notices about addressing over income public housing families, pursuant to HOTMA.⁵⁴ In this final rule, HUD further revised the regulations for over-income public housing families. Given past deadlines to comply with the over-income rules, HUD gave PHAs a shorter deadline to comply with this newly revised regulation. PHAs are required to comply with HUD’s over-income rules by June 14, 2023, (120 days from publication of the HOTMA rule in the federal register).

While the regulation remains substantively the same, HUD updated a few definitions related to over income tenants and included a handful of other changes including that HUD:

- Clarifies that once a family is over-income, the PHA must do a recertification every year;
- Replaces two-year limits with 24 months;
- Clarifies that the rule applies to all families, including FSS and EID participants;
- Reiterates the process for over-income tenants;⁵⁵
- States that if family’s income dips during the time they are considered over-income, the family is entitled to a new 24-month grace period;
- Adds required lease terms for non-public housing over-income families in new 960.509.

If advocates are concerned with the way that PHAs are implementing the public housing over-income rules please feel free to reach out to NHLP.

⁵⁰ 88 Fed. Reg. at 9641. Housing providers cannot “create policies, criteria, or methods of administration that result in discrimination against individuals with protected characteristics under fair housing and civil rights laws and regulations.” *Id.*

⁵¹ 88 Fed. Reg. at 9641, 9643 (providing housing providers discretion to enforce asset requirements or to establish exceptions to the restriction in 24 CFR § 5.618(c)).

⁵² 88 Fed. Reg. at 9612, 9661 (changes codified at 24 CFR §§ 5.618(d), 882.151(d), 982.552(b), 960.201(a), 966.4(1)(2)).

⁵³ 88 Fed. Reg. at 9641. Housing providers cannot “create policies, criteria, or methods of administration that result in discrimination against individuals with protected characteristics under fair housing and civil rights laws and regulations.” *Id.*

⁵⁴ 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”); Housing Opportunity Through Modernization Act of 2016: Final Implementation of Public Housing Income Limit, 83 Fed. Reg. 35,490 (Jul. 26, 2018).

⁵⁵ The PHA will serve notice to an over-income family, PHA serves a second notice after 12 consecutive months of being over-income, PHA serves a third notice after 24 consecutive months, at which point the over-income family either becomes a “non-public housing over-income family” and pays alternative rent or the PHA has discretion to terminate, depending on their policy. 24 C.F.R. § 960.507.

New guidance on interim recertifications

HUD streamlines the rules regarding interim recertifications for the HUD programs and explains how PHAs may handle retroactive recertifications.⁵⁶ First, HUD clarifies that families can request an interim recertification because of any changes since their last examination. For all programs, a reasonable time for processing a recertification is no more than 30 days.⁵⁷

An interim recertification is required if family income decreases by 10% or more.⁵⁸ An interim recertification is also required if a family's *adjusted* income increases by an amount estimated to result in an increase of ten percent or more in annual adjusted income.⁵⁹ The family's earned income should not be considered unless the family previously received an interim reduction during the certification period.⁶⁰ In addition, there is no requirement to conduct an interim recertification in the last three months of the certification period.⁶¹

HUD clarifies the effective dates of any changes in rent due to an intern reexamination. If a change was timely reported, the family must be provided with 30 days' notice of any rent increase. For rent decreases, If a change was timely reported, the rent decrease is effective on the 1st day of the month after the date of the actual change leading to recertification.⁶² If a change is not reported timely, rent increases will be retroactively applied to 1st of the month following the event that resulted in the reexamination.⁶³ Untimely reported changes that lead to a rent decrease may be applied retroactively per the written policy but may not may not be applied prior to the later of the first month following the (A) date of the change leading to the reexamination or (B) the effective date of the most recent previous interim or annual reexamination.⁶⁴

Many of the rules regarding income recertifications are discretionary so this is one important area where advocates may want to comment on PHA plans to make sure that interim recertifications are handled in a way that is fair to tenants. For example, it would benefit tenants that a PHA implement a policy applying retroactive rent reductions to the first of the month following the change leading to the reexamination, for both timely and untimely reported income changes.

⁵⁶ These changes revise CFR §§ 5.657(c), 574.310(e)(4), 960.257(b), 882.515(b), and 982.516(c)

⁵⁷ CFR §§ 5.657(c)(1), 574.310(e)(4)(i), 960.257(b)(1), 882.515(b)(1), 982.516(c)(1)

⁵⁸ CFR §§ 5.657(c)(2), 574.310(e)(4)(ii), 960.257(b)(2), 882.515(b)(2), 982.516(c)(2)

⁵⁹ CFR §§ 5.657(c)(3), 574.310(e)(4)(iii), 960.257(b)(3), 882.515(b)(3), 982.516(c)(3)

⁶⁰ CFR §§ 5.657(c)(3)(i), 574.310(e)(4)(iii)(A), 960.257(b)(2)(i), 882.515(b)(3)(i), 982.516(c)(3)(i)

⁶¹ CFR §§ 5.657(c)(3)(ii), 574.310(e)(4)(iii)(B), 960.257(b)(2)(ii), 882.515(b)(3)(ii), 982.516(c)(3)(ii)

⁶² CFR §§ 5.657(c)(5)(i), 574.310(e)(4)(v)(A), 960.257(b)(6)(i), 882.515(b)(4)(i), 982.516(c)(4)(i)

⁶³ CFR §§ 5.657(c)(5)(ii), 574.310(e)(4)(v)(B), 960.257(b)(6)(ii), 882.515(b)(4)(ii), 982.516(c)(4)(ii)

⁶⁴ CFR §§ 5.657(c)(5)(iii), 574.310(e)(4)(v)(C), 960.257(b)(6)(iii), 882.515(b)(4)(iii), 982.516(c)(4)(iii)