

August 9, 2023

Richard J. Monocchio
Principal Deputy Assistant Secretary
Office of Public and Indian Housing
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410

Ethan Handelman
Deputy Assistant Secretary
Office of Multifamily Housing Programs
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410

Re: Improper Implementation of the HOTMA Asset Limitation Enforcement Mechanism

Dear Principal Deputy Assistant Secretary Monocchio and Deputy Assistant Secretary Handelman:

On behalf of the undersigned groups whose collective membership provides housing to millions of vulnerable families or who work in the affordable housing space, we are writing to you to express our concerns regarding the U.S. Department of Housing and Urban Development's ("HUD's" or "the Department's") implementation of one aspect of section 104 of the Housing Opportunity Through Modernization Act of 2016 ("HOTMA").

The Department is not following the plain meaning of the statute under proper rules of statutory interpretation to implement asset limitations in HOTMA. Section 104 of HOTMA contains provisions which establish asset limitations on receiving certain federal rental assistance (i.e., families that exceed a certain asset threshold may not receive certain federal rental assistance). The prevalent understanding of section 104, outside of HUD, is that it would set asset limitations on certain federal rental assistance programs, but that housing providers would have the authority to selectively enforce those asset limitations.

From our discussions with HUD staff, it appears that HUD will not allow for selective enforcement of asset limitation provisions in section 104 of HOTMA, despite the clear wording of the statute. Additionally, in recently published guidance titled "Public Housing and Housing Choice Voucher Program List of Discretionary Policies to Implement HOTMA," HUD states that "PHAs may choose to establish a written policy to not enforce the asset limitation for up to six months" It also states that "[n]on-enforcement policies must address the timeframe for curing non-compliance" ¹ The guidance does not allow for a full non-enforcement policy that exceeds a six-month scope.

The text of section 104 of HOTMA clearly supports a plain meaning reading of the statute that allows for a broader non-enforcement policy.

¹ Public Housing and Housing Choice Voucher Program List of Discretionary Policies to Implement HOTMA, 2023, U.S. Department of Housing and Urban Development, p. 2, <https://www.hud.gov/sites/dfiles/PIH/documents/PH%20and%20HCV%20List%20of%20Discretionary%20Policies%20to%20Implement%20HOTMA.pdf>.

First, section 104 of HOTMA adds subsection (e) to section 16 of the United States Housing Act of 1937. Subsection (e) is titled “Eligibility for Assistance Based on Assets.” Paragraph (1) of subsection (e) provides for the limitation of assets. Paragraph (1) states that “a dwelling unit . . . may not be rented and assistance . . . may not be provided, either initially or at each recertification of family income, to any family . . . whose net family assets exceed \$100,000 . . . or . . . who has a present ownership interest in . . . real property that is suitable for occupancy . . .”

Then, paragraphs (4) and (5) of subsection (e) allow for PHAs to selectively enforce the asset limitation provisions found in paragraph (1). Paragraph (4) states “[w]hen recertifying family income . . . in public housing dwelling units, a [PHA] may . . . choose not to enforce the limitation under paragraph (1).” Paragraph (5) states “[w]hen recertifying the income of a family residing in a dwelling unit assisted under this Act, a [PHA] or owner may choose not to enforce the limitation under paragraph (1) or may establish exceptions to such limitations based on eligibility criteria . . .”

The interpretation of the language above is the clearest, most straightforward interpretation of the statute. In debating the legislative proposal and whether to support it, most housing groups assumed this straightforward interpretation and natural reading of the text. For example, in its summary of HOTMA, the National Housing Law Project wrote “[housing providers] have the discretion to (1) not enforce these asset limitations, [or] (2) establish exceptions . . .”² In its summary of HOTMA, the Center on Budget and Policy Priorities wrote that HOTMA “[a]llows [housing providers] to adopt a policy of not enforcing the asset limitations at all, [or] to establish exceptions . . .”³

Despite this clear reading of the statute, HUD has chosen an alternative interpretation. The Department overemphasizes certain language in paragraph (1). Paragraph (1) states the phrase “. . . notwithstanding any other provision of this Act . . .” before listing the asset limitation thresholds. The Department prioritizes the “notwithstanding” phrase to argue that the selective enforcement provisions of paragraphs (4) and (5) do not apply to paragraph (1) and that the income thresholds are absolute (i.e., the “notwithstanding” language prevents other provisions from narrowing the scope of the asset limitations).

The Department’s reading of section 104 incorrectly contextualizes the selective enforcement provisions. By over prioritizing the “notwithstanding” language in paragraph (1) such that its scope cannot be narrowed by paragraphs (4) and (5), HUD would make paragraphs (4) and (5) meaningless. A basic rule of statutory interpretation states that in interpreting statutes, the reader should “give effect, if possible, to every clause and word of a statute, avoiding . . . any construction which implies that the legislature was ignorant of the meaning of the language it employed.”⁴ To imbue paragraphs (4) and (5) with meaning, the Department invents a connection between paragraphs (4) and (5) and paragraph (6). Paragraph (6) allows for housing providers to delay evictions and terminations of federal rental assistance for up to 6 months. Paragraph (6) states that for “. . . a family . . . who does not comply with the limitation under paragraph (1), the [PHA] or project owner may delay eviction or termination of the family . . . for a period of not more

² See The Housing Opportunity Through Modernization Act (HOTMA), 2016, National Housing Law Project, <https://www.nhlp.org/wp-content/uploads/2018/02/NHLP-Overview-and-Analysis-of-HOTMA.pdf>.

³ See Comparison Between Housing Opportunity Through Modernization Act (HOTMA) and Current Law, 2016, Center on Budget and Policy Priorities, https://www.cbpp.org/sites/default/files/atoms/files/hr_3700-current_law_12-7-15.pdf.

⁴ See Statutory Interpretation: General Principles and Recent Trends, 2014, Congressional Research Service, <https://www.everycrsreport.com/reports/97-589.html> (internal quotation marks omitted).

than 6 months.” Of course, paragraph (6) read by itself would also mean that a housing provider could delay eviction or termination of rental assistance by 6 months, so there is no need to connect paragraphs (4) and (5) with (6). The Department connects them because its reading of paragraph (1) would make paragraphs (4) and (5) extraneous without an invented connection.

For the reasons listed above, we--the undersigned groups--ask that HUD follow the plain meaning of the HOTMA statute and allow for housing providers to selectively enforce the asset limitation thresholds according to how they structure their admissions and continuing occupancy policies or their administrative plans.

Sincerely,

The National Association of Housing and Redevelopment Officials (NAHRO)
The Public Housing Authorities Directors Association (PHADA)
The Council of Large Public Housing Authorities (CLPHA)
The Moving to Work (MTW) Collaborative
National Leased Housing Association (NLHA)
National Affordable Housing Management Association (NAHMA)
Institute of Real Estate Management (IREM)

CC:

Adrienne Todman, Deputy Secretary, U.S. Department of Housing and Urban Development
Damon Smith, General Counsel, U.S. Department of Housing and Urban Development
Julia Gordon, Assistant Secretary, Housing and Federal Housing Commissioner
Dominique Blom, General Deputy Assistant Secretary, Public and Indian Housing
Danielle Bastarache, Deputy Assistant Secretary, Public Housing and Voucher Programs
Ashley Matthews, Supervisory Housing Program Specialist, Housing Voucher Management and Operations Division

Appendix A

The relevant portions of section 104 of the Housing Opportunity Through Modernization Act of 2016 have been reproduced below.

SEC. 104. LIMITATION ON ELIGIBILITY FOR ASSISTANCE BASED ON ASSETS.

Section 16 of the United States Housing Act of 1937 (42 U.S.C. 1437n) is amended by inserting after subsection (d) the following new subsection:

“(e) Eligibility for Assistance Based on Assets.--

“(1) Limitation on assets.--Subject to paragraph (3) and notwithstanding any other provision of this Act, a dwelling unit assisted under this Act may not be rented and assistance under this Act may not be provided, either initially or at each recertification of family income, to any family--

“(A) whose net family assets exceed \$100,000, as such amount is adjusted annually by applying an inflationary factor as the Secretary considers appropriate; or

“(B) who has a present ownership interest in, a legal right to reside in, and the effective legal authority to sell, real property that is suitable for occupancy by the family as a residence, except that the prohibition under this subparagraph shall not apply to--

“(i) any property for which the family is receiving assistance under subsection (y) or (o) (12) of section 8 of this Act;

“(ii) any person that is a victim of domestic violence; or

“(iii) any family that is offering such property for sale.

...

“(4) Compliance for public housing dwelling units.--When recertifying family income with respect to families residing in public housing dwelling units, a public housing agency may, in the discretion of the agency and only pursuant to a policy that is set forth in the public housing agency plan under section 5A for the agency, choose not to enforce the limitation under paragraph (1).

“(5) Enforcement.--When recertifying the income of a family residing in a dwelling unit assisted under this Act, a public housing agency or owner may choose not to enforce the limitation under paragraph (1) or may establish exceptions to such limitation based on eligibility criteria, but only pursuant to a policy that is set forth in the public housing agency plan under section 5A for the agency or under a policy adopted by the owner. Eligibility criteria for establishing exceptions may provide for separate treatment based on family type and may be based on different factors, such as age, disability, income, the ability of the family to find suitable alternative housing, and whether supportive services are being provided.

``(6) Authority to delay evictions.--In the case of a family residing in a dwelling unit assisted under this Act who does not comply with the limitation under paragraph (1), the public housing agency or project owner may delay eviction or termination of the family based on such noncompliance for a period of not more than 6 months.