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HUD issues a proposed rule further implementing HOTMA provisions and making key changes to the PBV and HCV programs

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In the [October 8 proposed rule](#), HUD proposed to codify 2017 *Federal Register* and administrative changes, detailed below. It also proposes to implement several HOTMA provisions that have not yet been implemented. Lastly, it proposes several changes to regulatory provisions unrelated to HOTMA to reduce the regulatory burden on PHAs and owners, including eliminating the applicability of Davis-Bacon wage rates to “existing housing,” allowing PHAs to conditionally implement OCAF adjustments on PBV contracts, and suspending NEPA reviews on “existing housing.”

Background

After HOTMA was signed into law, HUD issued a notice in 2016 announcing that some of the statutory changes were immediately implemented and others would require further guidance from HUD. In January 2017, HUD published a second notice, making multiple HOTMA provisions effective and requesting comments on others. In July 2017, HUD issued several technical corrections and clarifications to the January 2017 notice (collectively referred to in this Alert as “the 2017 FR”). In fall 2017, HUD issued three HOTMA implementation notices (PIH 2017-18, 20, and 21) (collectively referred to in this Alert as “the 2017 Notices”) providing further clarification of provisions related to the HCV program. To reiterate, this is a proposed rule and HUD is seeking comments. You can submit comments to HUD, especially for provisions you support and want to see implemented. These proposed rules are not applicable to current deals. After the 60-day comment period closes, HUD must review and respond to comments and re-publish in the *Federal Register*. Any final rule would not become effective until 30 days after publication.

Below, we discuss the changes proposed by HUD in more detail.

Category 1

The rule proposes codifications of the previously issued HOTMA guidance. The proposed rule:

- Codifies the alternative inspection option for both initial and biennial HQS inspections,

whereby the unit could be added to the HAP, but the PHA cannot make payments until it does an inspection. HUD is changing the timeframe for doing that inspection from 15 days to 30 days.

- Codifies changes related to adding units to an existing PBV contract and also adds a requirement that PHAs must amend their Administrative Plan to describe circumstances under which it will add units and a requirement that any units added to the HAP contract following the execution of the HAP contract must be units that existed and were part of the project when the HAP contract was executed.
- Codifies changes to the maximum initial contract term from 15 years to 20 years and clarifies requirements related to renewals of the PBV HAP.
- Codifies exemptions of previously HUD-assisted units from both the program and project caps, and expands the exemption to RD and LIHTC projects.
- Alters previously implemented guidance on selection preferences on wait lists to make clear that PHAs may establish a preference for households that qualify for disability-specific services and remove the regulatory reference that limits the services preference only to a population of families with disabilities that (i) significantly interfere with their ability to obtain and maintain themselves in housing, (ii) who would not be able to obtain or maintain themselves in housing, and (iii) for whom such services cannot be provided in a non-segregated setting.
- Codifies the requirement that a PHA can only terminate a PBV HAP due to insufficient funding if it has already taken cost-saving measures and following a determination by HUD that they do in fact lack sufficient funding. This guidance makes clear that the PHA must prioritize protecting PBV contracts over other HCV funding.

Category 2

HUD also proposes to implement several HOTMA provisions that have not yet been implemented, including:

- Implementing provisions regarding when a PHA may withhold payments, when a PHA must abate payments, and when a PHA would terminate the HAP contract as the result of HQS deficiencies. The proposed rule also clarifies when retroactive payments would be made.
- Seeking commentary on how to define “areas where vouchers are difficult to use,” which term is used to establish exceptions to the project cap limitation and income mixing requirements in the PBV program. Although HUD requested comments on this provision in the January 2017 FR, HUD did not implement it.

Providing that PBV housing may be developed without an AHAP if the developer and PHA comply with development requirements that also apply where an AHAP is used (such as Davis-Bacon, environmental review, and subsidy layering). Compliance must be shown starting with the date the project is submitted for PBV consideration (for competitively selected projects) or from the date of the PHA’s approving board resolution (for projects selected without competition).

- Clarifying that PBV assistance may be attached to both single-family and multifamily

buildings.

- Proposing that HCV administrative fee funding be made available to a PHA, if it is used for both the administration of tenant-based and project-based assistance.
- Proposing exemption of some existing housing from having to undergo environmental review. If a project that meets the definition of “existing housing” as defined in the PBV regulations for program purposes, but has not previously undergone a federal environmental review because it did not receive federal assistance, it would not be exempt. Only existing housing that had previously undergone a federal environmental review would be exempt. Environmental reviews would continue to be applicable to PBV rehabilitation and new construction projects.
- Allowing owners to maintain a site-based waiting list for PBVs (as opposed to the PHA maintaining the waiting list) and establish criteria for owners and PHAs that select this option.
- Authorizing a PHA and an owner to agree that a PBV HAP contract will be adjusted by an annual operating cost adjustment factor (OCAF), either upon request or automatically, subject to the applicable PBV cap on the rent to owner and the rent reasonableness requirement.

Category 3

HUD proposes multiple rules to streamline the programs and remove regulatory obstacles. We focus on the top five topics below:

- Clarifies that PHAs cannot sign PBV HAP contracts as both the PHA and owner for PHA-owned units; the PHA must form a separate ownership entity. However, HUD is also providing an alternative option for PHAs in this circumstance: the PHA could sign a certification in lieu of the HAP in which they certify that they will fulfill all the program responsibilities required of the owner and the PHA under the HAP contract. This is important for RAD and Section 22 projects.
- The proposed rule changes the definition of “existing housing” in the PBV program as those that “substantially comply” with HQS. A unit may “substantially comply” with HQS if it has HQS deficiencies that require only minor repairs to correct (repairs that could reasonably be expected to be completed within 48 hours of notification of the deficiencies). To qualify as existing housing, all proposed PBV units in the project must reasonably be expected to be in compliance with HQS within 48 hours of notification. Furthermore, to qualify as existing housing, the project is ready to go under HAP contract with minimal delay—after the unit inspections are complete, all proposed PBV units not meeting HQS could be brought into compliance to allow PBV HAP contract execution within 48 hours.
- The proposed rule clarifies subsidy layering requirements with regard to the PBV program. Subsidy layering requirements never apply when a PHA is attaching PBV assistance to existing housing, either prior to HAP contract execution or during the term of the contract. The owner must disclose information to the PHA regarding any additional related public assistance that is made available with respect to the contract units during the term of a PBV new construction and rehabilitation HAP contract. In those instances, a new subsidy

layering review would be required to determine if the additional assistance would result in excess public assistance in the project. The PHA must adjust the housing assistance payments to the owner if the additional public assistance results in excess public assistance to the project.

- The proposed rule revises some features of PBV HAP contracts, including those related to fair housing and ADA requirements, and “floor” rents. The proposed rule allows a floor rent to be incorporated into an existing PBV contract at any time, including during an extension term, so long as the PBV rents are currently above the initial rent. Owners with current PBV contracts that did not initially have a floor rent provision would thereby have a path to partially address the risk of future rent reductions.
- HUD proposes to eliminate Davis-Bacon requirements for existing housing. This proposal reverts back to longstanding HUD guidance on Davis-Bacon, reversing guidance from 2014 that had imposed Davis-Bacon on any “development” work, even in existing housing. The 2014 guidance imposed Davis-Bacon on any development work done within 18 months of HAP contract execution, and included relatively minor repair work as “development.” The proposed rule re-imposes the long-held standard that Davis-Bacon is not required for projects that qualify as existing housing.

For more information on the content of this alert or to discuss any of these proposed provisions, please contact your Nixon Peabody attorney or:

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