HOT ISSUES IN HOTMA

Trustees (and others) Beware!

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A Brief History of Subsidized Housing

- 1933 – The Great Depression
  - Public Works Administration Housing Division Created
    - Focused on jobs, not housing
  - 1937 – US Housing Authority Created
    - First Agency focused on low-income housing
- 1949 – Housing Act of 1949
  - Declaring a national goal of "a decent home and suitable living environment for every American family."

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A Brief History of Subsidized Housing (cont'd)

- 1965 & 1968 – Urban Development Acts
  - Lyndon Johnson's Great Society creates the Department of Housing and Urban Development
  - Concept of direct rental assistance to low-income families is created
- 1974 – Housing and Community Development Act
  - Housing Choice Voucher Program (aka Section 8 Program) is created
  - Tenant-Based Housing Choice Voucher Program
  - Section 8 Multifamily/Project Based Program
- 2023 – 5.2 million American households receive some form of federal rental assistance; 2.3 through Housing Choice Voucher Program

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HOTMA History

- Housing Opportunity Through Modernization Act (HOTMA) signed by Barack Obama in 2016
- Among the provisions are updated eligibility rules for federally subsidized housing including:
  - Traditional public housing (PHAs)
  - Section 8 vouchers (issued by PHAs)
  - Project based Section 8 (Multi Family Housing: MFHs)

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Implementation

- Regulations issued in February of 2023 (date of implementation was to be 1/1/2024)
- Notice issued by HUD on 9/29/2023 postponed implementation to 1/1/2025
- Further notices have extended those deadlines
  - PHAs were to implement income exclusions by 7/1/2025. New deadlines for implementing other sections of HOTMA, most significantly the asset provisions, have not been published.
  - The deadlines for MFHs to implement all income and asset deadlines is 1/1/2026.

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Eligibility until HOTMA is Implemented (Old Rules)

- Based on income only
- Income is imputed from assets
- Income is also imputed from assets transferred within the past two years
- Principal distributed from (d)(4)(A) trusts is not income. DeCambre v Brookline Housing Authority

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Eligibility once HOTMA is Implemented (New Rules) : Assets

- Eligibility may be precluded if the family owns
  - non-excluded assets valued in excess of $100,000 (adjusted for inflation – currently $103,200) including assets disposed of during the prior 2 years for less than FMV
  - real property suitable for occupancy

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"Family"

- For Section 8 purposes a family includes, but is not limited to,
  - A single person or group of persons
  - Regardless of whether they are related
  - Who live together and meet the eligibility requirements
  - Includes live-in aides and foster children

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Whose Assets Count?

- Included: Assets of all adult and minor family members
- Excluded:
  - Assets owned by live-in aides
  - Assets owned by foster children and foster adults
- Jointly owned assets
  - The portion owned or controlled by family members

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Assets Excluded from Net Family Assets

- Retirement accounts recognized by the IRS
- Assets held in an irrevocable trust not under the control of a member of the family or household
- Real property that family does not have effective legal authority to sell
- Trusts
  - Assets held in an **irrevocable** trust not under control of a member of the family
  - Assets held in a **revocable** trust where the grantor/owner and trustee are not members of the family

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Assets Excluded from Net Family Assets
continued

- Civil action or settlement proceeds for an incident resulting in disability based on malpractice, negligence or other breach of duty
- Tax refunds or refundable tax credits for 12 months after receipt
- Section 529 education and 529A ABLE accounts and Coverdell education accounts
- Non-necessary items of personal property with a total value at more than $50,000
- And many more.

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Asset Rules: Options

- PHA and MFH Owners are given discretion with regard to imposing asset limits on existing tenants, penalties for exceeding asset limits, and verification of income
- Policy choices of PHAs and MFH owners are required to be in writing and publicly available
  - Admissions and Continued Occupancy Policy (ACOPS) for PHAs
  - Tenant Selection Plans for MFHs

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Enforcement of Asset Limits on Existing Tenants

- PHAs and MFH administrators have discretion relative to imposing asset limits on existing tenants
  - Enforce all asset limits
  - Written policy not to enforce asset limits for all families
  - Limited enforcement to give tenants up to six months to cure
  - Establish written policy against certain families considering age, disability income ability of family to find suitable housing
- A PHA/MFH owner that does not adopt no enforcement or limited enforcement policies can nevertheless delay termination or eviction for 6 months

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Eligibility once HOTMA is Implemented: Income

- Unless specifically excluded, income is
  - All amounts received by adult household members
  - Unearned income of household members less than18 years
  - Income generated by assets
    - Actual income
    - Imputed income on net family assets in excess of $50,000 (now $51,600 adjusted for inflation) when the actual income cannot be calculated
      - Based on passbook savings rate
      - Includes income imputed on assets given away during the preceding 2 years

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Eligibility once HOTMA is Implemented: Income, continued

- No distinction between earned and unearned income other than for household members under 18
- In-kind income is included unless it is non-recurring
- Income eligibility is based on area median income

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Income Exclusions

- Non-recurring income
  - Income received in one year not expected in next year
- Distributions to family members from
  - retirement accounts that are not periodic
  - ABLE accounts
  - 529 Plans
- Distribution from Trusts
  - Principal distributions are excluded
  - Income distributions for health and medical expenses of a minor are excluded.

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Income Exclusions, continued

- Lump sum additions to net family assets
  - Lottery winnings
  - Inheritances
    - Be sure distribution happens all in one year to avoid treatment as recurring income
- VA Aid and Attendance
- Worker's Compensation
- Insurance payments and settlement for personal or property losses regardless of frequency of payments
- Claims based on negligence resulting in disability regardless of whether received periodically or as a lump sum

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Safe Harbor Income Calculation

- PHAs\MFH owners can adopt a policy to use income determinations from other programs
  - TANF
  - MassHealth
  - SNAP
  - SSI.

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Enforcement of Income Limits

- 24 month grace period for tenants of PHAs whose income exceeds the limit, then
  - PHA may allow household to stay and pay alternative rent (FMV) or
  - PHA may terminate tenancy within 6 months

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HOTMA Treatment of Trusts – Assets & Income Received

- A SNT should be funded with "excluded assets"
  - Proceeds from civil actions based on malpractice, negligence or other breach of duty for an incident resulting in a disability'
  - Assets held in an Irrevocable Trust where a family member is the beneficiary but the Grantor & Trustee are not members of the family or household and no family member has a power of revocation or amendment.
  - NOTE – the definition of "family" means persons residing together

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HOTMA Treatment of Trusts – Assets & Income Received

- Items that are considered "excluded income" and therefor not countable can be contributed to the SNT, becoming an excluded part of the corpus.
  - "non-recurring income"
    - Birthday or wedding presents
    - Inheritances
    - Lottery winnings
    - Tax refunds
    - Proceeds from judgments or settlements from malpractice, negligence or other breach of duty resulting in disability (even if received in periodic payments! – structured settlements)

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Drafting & Administrative Challenges

- In the Beginning…
  - Ask questions:
  - "Are You Now or Have You Ever Been…?"
  - Voucher or MFH?
  - Which PHA or MFH?
- Know Thy Corpus
- Drafters – Review your "usual" distribution clauses
- Consider segregating income
  - Maintain careful records

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Drafting and Administrative Challenges

- Give Trustee discretion to distribute income to other beneficiaries
- Give Trustee express discretion to retain income and distribute principal
- Include provision allowing Trustee to distribute income to ABLE account

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Beware of Recurring Periodic Distributions

- Regular Recurring periodic distributions are treated as income.
- Distributions of principal from a SNT are not income.
- Do regular distributions of principal from a SNT become "income" because they occur regularly?
- What is an "irregular periodic distribution?"

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The "In-Kind/Recurring Distribution Conundrum

- Under HOTMA, non-monetary in-kind donations, *i.e.* food, clothing, personal items from a foodbank or other non-profit aren't income, even if occurring regularly.
- But, car payments, car insurance, *i.e.* "bill paying" is considered income.
- But are they "income" if they're paid from principal of the SNT?
- And what about our BFF – the Truelink Card?
- INQUIRING MINDS WANT TO KNOW!!

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Advocate

- Like politics, the interpretation of many of the HOTMA Rules is local. PHAs and MFHs will interpret and apply the rules differently.
- Don't hesitate to advocate on behalf of your beneficiaries and Trustees!

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