

# RHS Makes Dramatic Changes to Rural Voucher Program

In the Agricultural Appropriations Act of 2006,<sup>1</sup> Congress enacted a Rural Development Demonstration Voucher Program, modeled in part on the rural voucher program authorized in Section 542 of the Housing Act of 1949,<sup>2</sup> that was designed to protect residents of Section 515 Rural Rental Housing from displacement when owners of the housing prepay their loans. The program has been reauthorized in the Agricultural Appropriations Acts of 2007<sup>3</sup> and 2008.<sup>4</sup> In March of 2006, the Rural Housing Service (RHS) and the Department of Housing and Urban Development (HUD) published in the Federal Register a somewhat surprising Memorandum of Understanding (MOU) that announced the implementation of the program and how RHS was going to turn over primary program administration to HUD.<sup>5</sup> Under the MOU, HUD agreed to subcontract day-to-day administration to local public housing authorities located in the areas where the RHS prepaid developments were located.

For reasons that have never been made public, the interagency plan proved to be unworkable and in April of 2007, RHS published an internal agency memorandum, claiming to merely clarify the program then in effect.<sup>6</sup> In fact, the announcement made significant changes to the RHS voucher program including the fact that HUD and local public housing authorities were no longer involved in the program's administration. On March 24 of this year, RHS published a new notice in the Federal Register that puts program administration in the hands of RHS and its subcontractors. At the same time the agency published and distributed, only to USDA Rural Development Offices, the *Rural Development Voucher Program Guide* (April 2008). Both the Federal Register Notice and the Guide announce and disclose major restrictive changes to the program as it will be administered under the 2008 Agricultural Appropriations Act.<sup>7</sup> This article will summarize and analyze the critical provisions of the Notice and Guide as they relate to the right of tenants who reside in Section 515 housing that is subject to prepayment or foreclosure.

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<sup>1</sup>Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2006, Pub. L. 109-97, Title III (Nov. 10, 2005).

<sup>2</sup>42 U.S.C.A. § 1490r (West 2003).

<sup>3</sup>Revised Continuing Appropriations Resolution, 2007, Pub. L. 110-5, § 101 (Feb. 15, 2007).

<sup>4</sup>Consolidated Appropriations Act, 2008, Public Law 110-161, Tit. III (Dec. 26, 2007).

<sup>5</sup>71 Fed. Reg. 14,084 (March 20, 2006).

<sup>6</sup>Clarification of Issues for Rural Development Voucher Demonstration Program, RD Unnumbered Letter (April 27, 2007).

<sup>7</sup>73 Fed. Reg. 17,473 (March 24, 2008).

## Reliance on HUD Section 8 Program Rules

The RHS Notice is by no means exhaustive with respect to its description of how the voucher program is to operate. As a result, the Notice announces that unless otherwise noted, the program is intended to follow the HUD Section 8 Regulations.<sup>8</sup> Unfortunately, substantial guidance with respect to the operation of the voucher program is included in the Guide. Neither the Notice nor the Guide explain what relationship the Guide has to the HUD regulations. Technically, since the Guide does not have the force and effect of law, conflicts between the Guide and HUD regulations that are not specifically addressed in the Notice should be resolved in favor of the HUD regulations. However, other than directing one of the RHS contractors, Quadel Consulting, to follow the HUD regulations, RHS staff is not advised to follow the HUD regulations or to even review them before meeting with residents and advising them about the voucher program.

## Unduly Restrictive Reliance on One Aspect of the Authorizing Legislation

The RHS voucher demonstration program has been authorized for three years in the Agricultural Appropriations Acts, which generally are not vehicles for authorizing legislation. As a consequence, Congress typically drafts authorizing legislation contained in appropriations acts in very condensed form and frequently only gives broad guidance to agencies as to how programs are to be operated. In the 2008 Appropriations, Congress gave RHS broad authority to operate a rural voucher program consistent with Section 542, advised it to also operate the program consistent with the HUD Section 8 voucher program, directed that the amount of subsidy under the voucher program be limited to the difference between the market rent for the unit that the resident is vacating and the rent that the resident was paying for that unit, and authorized the agency to expend funds under the appropriations until they are expended without regard to the fiscal year in which the appropriations were made. Unfortunately, it also directed that voucher spending be subject to annual appropriations.

While RHS has taken many liberties with respect to the program's implementation, it has relied heavily on the appropriations act's voucher subsidy limitation to restrict the program's operations to the point that voucher holders, who encounter circumstances both within and outside their control, may be harmed severely after becoming assisted by the program. Significantly, voucher holders are not adequately advised about the program's limitations.

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<sup>8</sup>*Id.*

## Subsidy Level

The 2008 Appropriations Act states that the rural voucher subsidy amount "shall be the difference between comparable market rent for the section 515 unit and the tenant paid rent for such a unit."<sup>9</sup> In other words, unlike in the Rental Assistance or Section 8 programs, the voucher subsidy is not determined by household income, but by the rent that the Section 515 unit will command after prepayment and the rent that the resident was paying before prepayment.<sup>10</sup>

RHS has taken the statutory language and has applied it literally throughout the Notice and Guide to limit the amount of subsidy that is available to voucher holders. It has made no accommodations for situations in which tenants receive a utility subsidy, voucher holders lose income due to illness or death of a household member, landlords initiate rent increases, or utility costs increase significantly.

The Guide makes clear that a resident who was living in a Section 515 development who was extremely low income and, as a result, was receiving a subsidy to pay part or all of her utility costs, will no longer receive that subsidy when a voucher is issued. The maximum subsidy that the resident will receive is the difference between the comparable market rent for the unit and the amount that the resident paid to the landlord, which, in the case of residents who received a utility subsidy, is zero.

The problem is worse for households who suffer a loss of income. For example, if a two-person senior household was earning \$8500 per year and paying \$213 for its portion of the rent for a unit that commands a post prepayment rent of \$375, the amount of voucher subsidy that the household receives is capped at \$162. This does not change if one of the two household members dies and the household income is reduced by 50%. Under the RHS Rental Assistance program, and under the HUD Voucher program, the household rent would be adjusted to \$107 after the death of the household member. Under the RHS voucher program it does not change. A household that was paying 30% of its income for rent is suddenly required to pay 60% of income for rent. In most instances, it is not very likely that the remaining individual would be able to afford the increased proportion of income that it is paying for rent and is likely to move, either voluntarily or involuntarily, in a relatively short period of time. Given that nearly 60% of the households living in RHS housing are elderly or persons with disabilities, the likelihood of such an occurrence is extremely high and the consequences are likely to be catastrophic.

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<sup>9</sup>Pub. L. 110-161, Consolidated Appropriations Act, 2008 (Dec. 26, 2007).

<sup>10</sup>If the resident was receiving a utility allowance, the tenant rent is determined by subtracting the utility allowance from the tenant contribution, provided the total does not go below zero.

Similar or even more severe results are likely to occur when a household has a single earner who is laid off, becomes ill, or is disabled. Less severe but nonetheless significant consequences are likely to occur when the landlord for the unit raises the rent after a year (assuming that the voucher is renewable) or the cost of utilities increases significantly, as they are doing in most areas of the country.

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Given that RHS is directed to operate the voucher program consistent with Section 542 of the Housing Act of 1949 and with the HUD Voucher program, it is difficult to believe that the agency could not find a way to adjust residents' rents when they are faced with significant hardships, particularly when those hardships are not in the voucher holder's control. It could have done so in a variety of ways but chose not to either as an oversight, lack of insight, or a desire to limit expenditures.

Disturbingly, in the various letters that Section 515 residents receive when the owner chooses to prepay a loan, or when a loan is foreclosed upon, the residents are never directly advised of the potential consequences of accepting an RHS voucher. They are simply advised that an RHS voucher is one of four options available to them. These options are moving to another Section 515 development and, if they were assisted under the Rental Assistance program, taking the subsidy with them; securing a Letter of Priority Entitlement (LOPE) which places them at the top of the waiting list at another RHS development; securing a HUD housing choice voucher (which the agency cautions may be difficult to secure); or securing the RHS voucher.

Indeed, RHS is so cavalier about its vouchers that it urges and facilitates residents and owners, in situations where the owner is required to continue to honor the resident's current lease and rent under RHS use restrictions, to mutually agree to a termination of the current lease so that the resident can begin to receive voucher assistance.<sup>11</sup> There are two disturbing aspects to these urgings. First, RHS does not explain to residents that their landlord has an ongoing and sometime indefinite obligation to continue to house them at their current rent and that this obligation may extend beyond the term of the RHS voucher. Second, RHS is willing to indirectly make subsidies available to

owners through the RHS vouchers when the owners have an obligation under RHS deed restrictions to subsidize the residents, sometimes for as long as they continue to reside in the unit. In doing this, RHS is spending money for the benefit of owners that it need not spend. In no instance has it made a similar decision with respect to residents. Significantly, RHS' practice may urge owners to prepay their loans knowing that they do not have to take a risk with respect to continuing to subsidize current residents because they will be able to convince them to convert to vouchers, thereby allowing them to collect market rent for the unit.

### **Term of Voucher**

The Notice makes clear that RHS vouchers have a twelve-month term and that renewals are subject to Congressional appropriations.<sup>12</sup> No comparable notice is provided in the Guide or in any of the letters that residents receive from the agency. They all state and emphasize, without exception, that the voucher term is for twelve months and do not mention renewals or extensions. Such an omission is unjustified.

### **Voucher Assistance Limited to Thirty-six Months**

For the first time, the RHS Notice restricts the assistance that is available to any voucher holder to thirty-six months.<sup>13</sup> There is no explanation as to the authorization that the agency has to so limit vouchers or why the thirty-six-month limitation was adopted. The Notice simply states that "[t]his short-term subsidy enables a tenant to make an informed decision about remaining in the property, moving to a new property, or obtaining other financial housing assistance."<sup>14</sup> Ironically, the thirty-six-month limitation is not mentioned anywhere in the Guide or in any of the documents that are made available to residents of Section 515 developments when they are advised about RHS vouchers. Given the omission, it is questionable how a tenant receiving a voucher can make any decision, let alone an informed decision, with respect to his or her options.

The thirty-six-month limitation is not statutory and appears to have been adopted as a means to reduce future appropriations by limiting the number of years that a voucher holder will be able to receive assistance. It will create an extreme hardship for residents of Section 515 housing whose owners prepay their loans because their voucher will terminate in thirty-six months, in all likelihood forcing their displacement.

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<sup>12</sup>73 Fed. Reg. at 15,475 (March 24, 2008).

<sup>13</sup>*Id.* at 15,473.

<sup>14</sup>*Id.*

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<sup>11</sup>Guide at ¶ 2.6.

## Vouchers Available to Residents of Foreclosed Properties

The Notice makes clear that in addition to assisting persons that are threatened with displacement due to an owner prepaying his or her Section 515 loan, vouchers will also be made available to residents of developments that are being foreclosed upon by RHS.<sup>15</sup> The Guide makes clear that the practice, initiated by RHS in 2007, of making vouchers available to residents of developments whose loans have been settled as part of a debt settlement, or compromise process after acceleration of the 515 loan, and to residents who live in developments that have been deeded to the agency in lieu of foreclosure, is being continued.<sup>16</sup> In all instances, the vouchers do not become available until the title to the property is actually transferred.

Ironically, RHS, at least initially, advises residents of properties that are subject to foreclosure that they are eligible to continue to reside in their dwelling.<sup>17</sup> The initial notice sent to residents makes no mention of the fact that the foreclosure may be due to the owner's failure to maintain the development.

### Resident Eligibility

#### Section 515 Resident as of Date of Prepayment

To be eligible for a voucher, a resident must live in a 515 development as of the date of prepayment or the date of actual foreclosure, either of which must have occurred after September 30, 2005, when appropriations for the program were first made available.<sup>18</sup>

While included in the Appropriations Act, the requirement that persons must live in the 515 development as of the day of the prepayment or foreclosure is unreasonable, at least with respect to those persons who plan to relocate from the development into other private housing. It effectively forces all persons who want, or are forced, to move from the 515 development to wait until the last minute to make a move and to compete for what is likely to be a very limited market of available decent housing in the community where the development is located. Indeed, given the limitations with respect to identifying a unit to relocate to, securing an inspection and entering a HAP contract, it is possible that residents whose lease expires close to the time of prepayment will not be able to secure a voucher in time to avoid a rent increase. If the vouchers were made available at any time after the owner applied for prepayment, when the owner rejected prepayment incentives, or at the very latest, after RHS approved the prepayment, there is likely to be a more reasonable opportunity for

residents to transition to private rental housing. The same is true for residents who live in a development that is being foreclosed upon. They should become eligible for vouchers as of the date that the agency advises the owner of its intent to foreclose, not on the actual day that title is passed to another person or entity.

#### Citizen or Permanent Resident

The Notice requires a tenant to be a citizen of the United States, a non-citizen national, or a qualified alien, all in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>19</sup> While the Notice does not define who a "tenant" is, the Guide makes clear that it is an adult member of the household.<sup>20</sup> With respect to the tenant's status, the Notice does not make it clear as to the status that the resident must have and does not extend any of the rights and protections of Section 214 of the Housing and Community Development Act of 1980<sup>21</sup> to tenants or their household members. The Guide, on the other hand, lists ten documents, one of which the voucher holder must present in order to be determined eligible for a voucher. In fact, it appears that the documents needed to establish eligibility do not conform to the list of persons eligible to receive RHS assistance under Section 214.

Significantly, the Notice and Guide seem to suggest that PRWORA supersedes Section 214 and grants RHS broad discretion to limit assistance and related rights to certain classes of immigrants. In fact, this interpretation is erroneous. PRWORA, in its introductory provisions, states that housing assistance may not be provided to persons who are not citizens or permanent residents. However, in another part of PRWORA, the act, for the first time, explicitly extends the application of Section 214 to the RHS programs, including the voucher program.<sup>22</sup>

<sup>19</sup>*Id.* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 is Pub. L. 104-193.

<sup>20</sup>Guide at ¶ 1.2.

<sup>21</sup>42 U.S.C.A. 1436a (West 2003). Currently, Section 214 restricts eligibility for certain specified HUD and RHS housing programs to citizens, permanent residents, and persons admitted to the United States for an indefinite period of time. Importantly, Section 214 has been defined to only restrict assistance to ineligible household members, effectively making an entire family eligible to live in federally assisted housing and simply prorating the actual assistance (subsidy) provided to the household based on the number of eligible and ineligible persons that are in that household. Significantly, Section 214 also allows certain elderly persons to self certify their eligibility, allows any person to appeal a status determination through a special hearing process, and allows persons to elect to have themselves categorized as ineligible to receive assistance without going through the certification process. RHS, which attempted to adopt regulations implementing a citizenship and permanent resident requirement for the Section 515 program in 2004, postponed implementation of those requirements on February 22, 2005, two days before the regulations were to go in effect, because they did not conform to Section 214. In over three years, it has not proposed new regulations to deal with the issue. Its effort to circumvent Section 214 for the voucher program by citing PRWORA is truly disingenuous.

<sup>22</sup>Pub. L. 104-193, § 441.

<sup>15</sup>*Id.* at 15,473.

<sup>16</sup>Guide at ¶ 2.4.

<sup>17</sup>Guide, Attachment 2F.

<sup>18</sup>73 Fed. Reg. at 15,474.



Given that PRWORA amended Section 214 and extended it to the RHS programs, it is inconsistent with the rules of statutory construction to conclude that one general section of PRWORA somehow grants RHS authority that is inconsistent with another section of the same act. Accordingly, it appears that the RHS Notice and Guide are in violation of Section 214 by failing to provide for a proration of voucher assistance, to allow elderly persons to self certify for assistance, to allow household members to appeal the determination of their status, and to choose not to declare themselves eligible for assistance. Given this apparent illegality, it is likely that a significant number of households that are eligible for RHS voucher assistance will be illegally denied it.

The one advantage that appears to be created by the Notice and Guide is the fact that the residents can choose who the “tenant” will be, and thereby ensure that residency status will only be checked with respect to that person. In other words, neither RHS nor the landlord will verify the status of other household members and will not prorate the assistance provided to the household if any of the household members are undocumented. Obviously, some problems will arise when the tenant dies, or, otherwise, wants to transfer the voucher to a co-tenant.

### Household Must Be Low-Income

The tenant household must be low income as of the date of the prepayment or foreclosure.<sup>23</sup> Consistent with the appropriations act, this provision denies voucher assistance to households who reside in Section 515 housing who are no longer low income and forces them to pay market rent for the unit if they choose to remain in the former Section 515 development or to pay market rent for another privately owned apartment.

### Exercising the Right to Receive a Voucher

If RHS determines a tenant to be eligible for the voucher program, it offers the primary tenant a Voucher Obligation Form, which the resident has ten months to exercise, provided it is exercised before September 15, 2008.<sup>24</sup>

This provision is internally inconsistent and will make it extremely difficult for households to exercise their voucher rights if the landlord prepays a loan in July, August or September of 2008. This is because vouchers must be requested before September 15, 2008.

Given that the RHS Notice was published in March of 2008, the provision giving a tenant ten months to exercise the voucher cannot be met. At best, any tenant will only have nine months in which to exercise the voucher. Indeed, any household living in a development that prepays in July, August or September will have a difficult

time exercising its voucher altogether if it intends to move from the former Section 515 development. Some of these voucher eligible households may not even have sixty days to locate an acceptable unit and to have it inspected.

### Right to Succession

The Notice for the first time states that if the primary tenant dies during the term of the voucher, the use of the voucher passes to an adult co-tenant.<sup>25</sup> While this is a commendable addition, it highlights a number of other problems and issues that RHS has created in the program and not adequately addressed. First, it appears that all vouchers are issued to a single adult household member. Typically this is likely to be the adult male household member, who thereby controls the voucher and, indirectly, the other household members. Indeed, the Guide states that in the event a

“voucher holder leaves the household, the voucher will not be transferred. If the voucher holder moves and takes the voucher with her, no new voucher will be issued for the remaining household members.”<sup>26</sup>

Thus, the male voucher holder can leave the unit, leaving the female co-tenant and children behind without any subsidy. This is exacerbated when the female co-tenant is a victim of domestic violence. The victim who is not the voucher holder is unable to move from the unit because she is unable to take the subsidy with her. Similarly, she is unable to force the batterer from the unit, because he can take the subsidy with him. She thus is faced with the choice of continued victimization or homelessness.

Another issue arises when the surviving adult co-tenant is not a permanent resident. Under the RHS regulations and Guide, the co-tenant would not be eligible to receive the voucher. Under Section 214, the household would be eligible for assistance based on the fact that any of the household members, including minors, are eligible for assistance. This is foreclosed by the Notice and Guide.

RHS’ failure to address these issues is shortsighted and, with respect to immigrant households, it may be illegal.

### Appeal Rights

Under the Notice, households that are determined not eligible for a voucher because they are not low income have a right to appeal the RHS decision under the RHS administrative appeals procedure.<sup>27</sup> They can also appeal the payment level of their voucher.<sup>28</sup> The Notice makes no statement with respect to applicants’ right to appeal if they are determined ineligible on other grounds, such as

<sup>25</sup>*Id.*

<sup>26</sup>Guide at ¶ 2.10.

<sup>27</sup>73 Fed. Reg. 15,474 (March 24, 2008).

<sup>28</sup>*Id.*

<sup>23</sup>73 Fed. Reg. 15,474 (March 24, 2008).

<sup>24</sup>*Id.*

citizenship. Arguably, the RHS appeals procedure should be applicable to any determination of ineligibility. Indeed, the Guide gives voucher applicants other appeal rights,<sup>29</sup> but they are not extended the right to appeal a citizenship/permanent resident status determination. This is in clear violation of Section 214.

### Securing a Voucher and Locating a Unit

Once a resident is found to be eligible for the voucher program, RHS, through its subcontractor, will conduct a rent comparability study to determine the level of subsidy that the resident will receive under the voucher. The monthly housing assistance that the resident will receive under the voucher is the difference between the comparable market rent for the family's former Section 515 unit and the tenant contribution for rent as of the date of prepayment.<sup>30</sup> The subsidy may not, however, exceed the tenant's actual rent. Moreover, if the resident stays in the unit that was previously financed under the Section 515 program, the voucher amount may never exceed the comparable market rent for the unit as of the date of prepayment.<sup>31</sup>

Arguably, the formula that RHS is using to determine the subsidy level is statutory. Unfortunately, because it is based on the rent that was charged for the former Section 515 development, it significantly limits voucher portability if the resident moves to a community where the prevailing rents are higher than the rent that the resident was paying in the 515 development.

Tenants are given an initial sixty-day period to locate a dwelling that an owner is willing to rent under the voucher program. The sixty-day period may, at the agency's discretion, be extended for another sixty days. Persons with a disability may request an extension for up to a total of 150 days. If a unit is not identified within these time frames, the voucher funding is terminated and the voucher holder becomes ineligible for any further assistance.<sup>32</sup>

This provision may be unusually harsh in communities with little decent affordable housing and particularly if a number of former Section 515 residents are all looking for housing at the same time. There simply is no reason why RHS could not have extended the period of voucher eligibility for residents who are displaced by a prepayment.

### Owner Must Be Willing to Accept the Voucher

The Notice states that an owner must be willing to accept an RHS voucher.<sup>33</sup> It does not require former Section 515 owners, who have prepaid their loans, to continue

to rent their units to voucher holders as HUD does under the Section 8 program.<sup>34</sup> This requirement illegally favors former Section 515 owners over residents of the same housing. It will undoubtedly lead to some owners illegally rejecting voucher holders from their developments.

### Inspection of Units and HAP Contract Entry

Once a resident has identified a unit, RHS must inspect the unit and ensure that it meets the agency's standards that are set out in 7 C.F.R. § 3560.103. If the unit is in a former Section 515 development, RHS need not inspect the unit if it had been inspected within one year of the agency's having received a Request for a Tenancy Approval.<sup>35</sup>

### Lease Term and Addendum

The initial lease term for any unit leased under the voucher program must be twelve months.<sup>36</sup> All leases must include the Tenancy Addendum that is used for the HUD housing choice voucher program.<sup>37</sup>

### Recertifications

Due to the fact that vouchers will not provide more than thirty-six months of assistance, RHS will not make any income eligibility determinations or income recertifications after the family is determined eligible for a voucher at the time of prepayment or foreclosure.<sup>38</sup> What the Notice means, but does not state, is that RHS will not adjust the voucher holder's subsidy if the voucher holder's income goes up or down. While this will benefit households whose income goes up, it may, as explained before, create undue hardships for households whose income decreases. This provision is totally inconsistent with the manner in which HUD operates the voucher program and may be illegal because RHS is required to operate the rural voucher program consistent with the HUD Section 8 voucher program.<sup>39</sup>

Once a unit is approved, a lease may be entered into between the owner and the resident and RHS will execute a Housing Assistance Payment (HAP) contract with the owner. HAP contracts may be executed up to sixty days after the commencement of the lease and RHS may make retroactive payments for the sixty days. However, it may not make payments for any period beyond the sixty days. It may also not enter into a HAP contract with a Section 515 owner for any period prior to the prepayment of the loan.

<sup>29</sup>See e.g. Guide Attachment 9-B.

<sup>30</sup>73 Fed. Reg. 15,474 ¶¶ 2 and 5.

<sup>31</sup>*Id.* at 15,474, ¶ 5.

<sup>32</sup>*Id.* ¶ 3.

<sup>33</sup>*Id.* 15,473, ¶ II.

<sup>34</sup>HUD, Section 8 Renewal Policy, ¶ 11-3 B (2/15/08).

<sup>35</sup>73 Fed. Reg. at 15,474, ¶ 4.

<sup>36</sup>*Id.* 15,474, ¶ 3.

<sup>37</sup>*Id.* ¶ 4.

<sup>38</sup>*Id.* ¶ 5.

<sup>39</sup>Consolidated Appropriations Act, 2008, Public Law 110-161, Tit. III (Dec. 26, 2007).

## Mobility and Portability

RHS vouchers may be used in any locality in the United States provided the unit meets the RHS health standards and the owner is prepared to accept the voucher.<sup>40</sup> Note, however, that the level of subsidy is not adjusted under the RHS voucher program as it is under the HUD voucher program. Thus, residents that move to high-cost areas will have to pay a greater proportion of their income for shelter.

RHS vouchers may not be used in tandem with any other RHS or HUD subsidy program that may be available in any dwelling. A resident who moves into another RD development that has Rental Assistance available may choose to accept the Rental Assistance at that development. By doing so, the resident gives up further eligibility for an RHS Voucher.<sup>41</sup>

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*While the Guide is available upon request from RD field offices, it is not available on the RHS website. In this day of electronic access, this is hardly the way to operate a federal program.*

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## Transfer of Rental Assistance

Although it is not technically a voucher program issue, the Guide advises residents who are receiving Rental Assistance that they can move with the Rental Assistance to another RHS project that has a vacancy. For reasons that are not disclosed, the resident is advised that he or she only has four months to move under those circumstances.<sup>42</sup> The problem with that requirement is that the resident may have to terminate his or her current lease in order to do so, something that may not always be possible. If an owner prepays a loan one month after the lease is renewed, the resident has eleven months to remain in the development. If RHS requires the resident to exercise the right to move within four months, there is no way to terminate the lease without being subject to breach penalties unless the owner consents to the termination. While this may be likely, RHS does not explain that to the residents in the notices that it provides them.

## Procedural Issues

Although the RHS voucher program has been operating for nearly three years, RHS has chosen not to publish regulations for the program and not even invite comments on its notices or Guide. Moreover, it has announced that it

does not plan to publish regulations for the program.<sup>43</sup> The legality of the agency publication position notwithstanding, the practice is unfortunate. There are many instances where provisions in the Notice and Guide are contrary to law, and many instances where information, particularly model letters included in the Guide, could use correction,<sup>44</sup> simplification,<sup>45</sup> clarification<sup>46</sup> and translation<sup>47</sup>.

RHS has also chosen not to make the Guide readily available to the public. While it is available upon request from RD field offices, it is not available on the RHS website.<sup>48</sup> More significantly, because it is not published on the web, it will be easy for RHS to make changes to the Guide and practically impossible for the public to know about those changes unless they regularly make requests to RHS for changes to the Guide. In this day of electronic access, this is hardly the way to operate a federal program.

## Contracting Entities

RHS has chosen two private contractors to assist in administrating the voucher program. The first is Quadel Consulting, which has been engaged to issue vouchers, review leases, and enter into Housing Assistance Payment

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<sup>43</sup>Guide at 2.

<sup>44</sup>It appears that RHS has modified various forms for the voucher program that it previously drafted for the program when it was intended to be administered by HUD and local public housing authorities. When it did so, it was very sloppy in the modifications that it made. For example, the HAP Contract included in the Guide makes many unintended references to HUD, public housing authorities, and to HUD's Housing Quality Standards, all of which are no longer involved in or applicable to the program. See Guide Pgs. 108-114.

<sup>45</sup>All of the letters set forth in the Guide that are sent to residents in Section 515 housing are extremely complex and full of legal expressions that are not likely to be understood by residents. They need to be written in plain English so people with limited education can understand them.

<sup>46</sup>Unfortunately, the RHS Guide letters do not explain to residents the advantages or disadvantages of various alternatives that are being offered to them. For example, there are no statements in the letters advising residents what will happen to their vouchers after the initial twelve-month term. Given that the agency never clarifies its intentions in either the Notice or the Guide as to whether vouchers are subject to renewal, it is quite possible that choosing an RD voucher may be a very poor choice if the voucher will not be renewed after the initial twelve-month period. In one case, the agency advises residents that waiting periods for Section 8 vouchers are long—a phenomenon that is frequently more urban than rural—fails to advise residents that they may qualify for a priority for Section 8 vouchers because they are being displaced, and does not encourage them to apply for Section 8 assistance during the one-year period that they will be receiving the vouchers.

<sup>47</sup>RHS has an obligation under the Civil Rights Act of 1968 and under Executive Order 13166 to communicate in other languages to persons with Limited English Proficiency. None of the letters included in the Guide are in any language other than English and no suggestion is made anywhere in the Notice or Guide that RD staff communicate with Limited English Proficiency residents in languages other than English.

<sup>48</sup>RHS has not posted its previous Guide to its website and has not stated anywhere that it intends to do so. Indeed, the fact that it refers persons to RD offices to ask for copies of the Guide clearly suggests that it has no intentions to make the Guide readily available. Persons wanting to get copies of the Guide must contact state or local Rural Development offices, whose address can be found at <http://offices.sc.egov.usda.gov/locator/app>.

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<sup>40</sup>73 Fed. Reg. 15,474 at 15,474-75, ¶ 6 (March 24, 2008).

<sup>41</sup>*Id.* 15,474-5, ¶ 6.

<sup>42</sup>Guide, Attachment 2A.

contracts. The second contractor is the Signal Group, which has been engaged primarily to undertake rent comparability studies to establish the post-prepayment rent for units in a prepaying Section 515 development. These rents are then used to establish the voucher subsidy level. Both Quadel and Signal report to RHS.

## Conclusion

The RHS Notice and Guide implement a very harsh and restrictive rural voucher program. In part this is due to the fact that the voucher program was first authorized by the formerly Republican-controlled Congress, and the current Congress has simply extended the prior appropriations acts' provisions without analyzing their impact. Hopefully, the program will be replaced by new comprehensive authorizing legislation that is presently under consideration in the House.<sup>49</sup> If that legislation is not enacted, the current Congress will likely review the past appropriations language before it extends the program into 2009-10.

The agency's failure to publish the Notice and Guide for comment is very likely illegal and may be subject to challenge for failure to conform with the Administrative Procedures Act and similar RHS statutory requirements.<sup>50</sup> This is particularly true in light of the fact that the agency has now operated the program for nearly three years under Federal Register notices and one internal notice without inviting public participation. Even if the current Notice is not illegal, the agency's failure to invite public comment on the program is unfortunate. Commentators could have alerted RHS to inconsistencies in the Notice and Guide and could have suggested better ways by which the voucher program could be run. As it is, until someone challenges the Notice or its provisions, or RHS listens to outside comments, residents will have to live with this overly restrictive and owner-favored voucher program. ■

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<sup>49</sup>H.R. 4002, Rural Housing Preservation Act of 2007 (110<sup>th</sup> Cong. 1<sup>st</sup> Sess.).

<sup>50</sup>42 U.S.C.A. § 1490n (West 2003).