

NSP TENANT PROTECTIONS AT FORECLOSURE

Overview

Congress has expressed concern about evictions of tenants from foreclosed properties. New laws have recently passed to address this issue. The American Recovery and Reinvestment Act of 2009 (Recovery Act) imposes requirements on the Neighborhood Stabilization Program (NSP) to ensure that bona fide tenants in NSP-affected properties received proper treatment. A more recent law, the Protecting Tenants at Foreclosure Act of 2009 (PTAF) provides similar protections for tenants facing eviction as a result of foreclosure on virtually all mortgaged rental properties in the United States. On June 24, 2009, HUD published a Notice in the Federal Register providing additional information on PTAF. See the last page for links to related documents and websites.

NSP recipients have requested information on complying with the Recovery Act tenant protections, which are included in the NSP Bridge Notice of June 19, 2009 and the NSP2 Notice of Fund Availability of May 4, 2009. The tenant protection requirements directly affect initial successors in interest who take title to property through foreclosure (including lenders and others who purchase property at foreclosure sales). The following are highlights methods grantees can use to determine compliance with the tenant protection requirements under NSP by the initial successor in interest. Questions on these requirements should be directed to NSP-Questions@hud.gov, not to HUD Regional Relocation Specialists.

SUMMARY OF GENERAL TENANT PROTECTION REQUIREMENTS

LAW	RECOVERY ACT (American Recovery and Reinvestment Act)	
DATE OF APPLICABILITY	Residential Properties foreclosed after Feb. 17, 2009	
PERSONS AFFECTED	Bona fide tenant occupying residential property under a lease in effect before or on the date of notice of foreclosure .	Bona fide tenant occupying residential property under a tenancy in effect after the date of notice of foreclosure .
IMPLICATIONS	Initial successor in interest (see definitions) must allow such tenants to remain to end of the lease term* and provide a minimum 90 days notice to move. These periods may overlap but cannot be less than 90 days.	Initial successor in interest (see definitions) must provide such tenants a minimum 90 days notice to move.
EXCEPTIONS	*An ISII selling the property to a person occupying the home as the primary place of residence MAY terminate the lease, but MUST allow at least 90 days to vacate	

Grantees need to be aware that the tenant protection requirements in the Recovery Act are separate and apart from the obligations imposed on grantees by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA). The URA applies to any person displaced as a direct result of acquisition, rehabilitation, and/or demolition of real property for a Federal or federally-assisted project. Eligibility determinations under the URA and the required notices and relocation assistance requirements are different and separate from the tenant protections in the Recovery Act. Grantees cannot assume that a person entitled to the tenant protections under the Recovery Act is also eligible for assistance under the URA (or vice versa). Links to relevant websites are on the last page.

Key Definitions

Bona Fide lease or tenancy: For purposes of this section, a lease or tenancy shall be considered *bona fide* only if: (i) the mortgagor under the contract is not the tenant; (ii) the lease or tenancy was the result of an arms length transaction; and (iii) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property. A “lease” does not have to be written, but either the lease or tenancy must meet the requirements of the Recovery Act.

Foreclosed: A property has been foreclosed upon at the point that, under state or local law, the mortgage or tax foreclosure is complete. HUD generally will not consider a foreclosure to be complete until after the title for the property has been transferred from the former owner under some type of foreclosure proceeding or transfer in lieu of foreclosure, in accordance with state or local law.

Initial Successor in Interest (ISII): Typically, the initial successor in interest in property acquired through foreclosure is the successful purchaser at foreclosure, such as the lender or trustee for holders of obligations secured by mortgage liens.

Options for grantees to document compliance with NSP tenant protection requirements

1. Purchase properties which were foreclosed upon prior to Feb. 17, 2009 and obtain evidence of the date of foreclosure; they are not covered by the tenant protection requirements of NSP.
2. If purchasing properties foreclosed upon after February 17, obtain adequate documentation of tenant protection compliance (or inapplicability) from the initial successor in interest, such as:
 - a. A certification that only the former mortgagor and/or immediate family occupied the property at the time of the notice of foreclosure;
 - b. Copies of the tenant’s lease and any notice to vacate from the ISII to substantiate compliance;
 - c. Where a tenancy existed without a written lease or at will, information on the tenancy and any notice to vacate from the ISII to substantiate compliance;
 - d. A certification of compliance with the NSP tenant protections (or the inapplicability of the tenant protections) from the initial successor in interest.
3. If the ISII will not or cannot certify or demonstrate compliance with the NSP tenant protections, abandon the transaction.
4. If the property is still desired, and no certification or documentation of compliance can be obtained from the ISII, perform due diligence to determine whether any bona fide tenant occupied the property. If so, determine if they were allowed to remain through the end of the lease term or tenancy (as applicable) and received any required notices.
5. Grantees that purchase tenant-occupied property can choose to assume the Recovery Act tenant protection obligations and/or may continue to operate occupied units as rental properties.
6. If the grantee knows that the ISII did not comply with the NSP tenant protection requirements and vacated the property contrary to the NSP requirements, abandon the transaction. NSP funds cannot be used for such properties.

NOTE: There is no assurance that these steps will eliminate potential lawsuits or other liability.

The following materials are optional and were designed to assist grantees.

Questionnaire on Compliance with NSP Tenant Protection Requirements

(To be completed on each property prior to acquisition. Proceed down the list unless directed otherwise.)

Date of NSP grantee's inquiry regarding status of the property: _____

1. On _____ (date), _____ became the Initial Successor in Interest (ISII) pursuant to a foreclosure on residential property located at: _____
(If date is before 02/17/09, Tenant Protections do not apply.)

2. Date of Notice of Foreclosure _____ (date)

On or after the date of notice of foreclosure, was the property occupied? Yes No
(If property was NOT occupied, Tenant Protections do not apply.)

3. If the property was occupied, is the lease or tenancy "bona fide"?

A. The occupant was the former mortgagor? Yes No
(If occupant WAS the former mortgagor, stop here. Tenant Protections do NOT apply.)

B. The occupant was a tenant (that was NOT the former mortgagor) Yes No
Name: _____

C. Was lease or tenancy the result of an arms-length transaction? Yes No

D. Was the rent required in an amount that is not substantially less than fair market rent for the property¹? Yes No
*(If ANY answer to B-D is NO, Tenant Protections do NOT apply.)
(If ALL answers to B-D are YES, you have a bona fide tenant. Continue.)*

4. Was the tenant occupying the property under a lease in effect as of the date of notice of foreclosure?
Yes No
(If YES, proceed to #6. If NO, proceed, below.)

5. Was the lease or tenancy effective after the date of notice of foreclosure? Yes No
(If YES, proceed to #7. If NO, Tenant Protections do not apply.)

6. If the property was occupied under a "bona fide" lease or tenancy effective as of the date of the notice of foreclosure, what was the remaining term? _____ (end date)

A. Has tenant vacated the property? Yes No Date tenant moved: _____

B. Did the ISII allow the tenant to stay until the end of the lease term? Yes No
(If YES, skip to D. If NO, answer C)

C. If ISII did not allow tenant to stay through lease term, did the ISII sell the property to a purchaser who will occupy the unit as a primary residence? Yes No
(If YES, go to D. If NO, abandon transaction; ineligible for NSP funding.)

D. Did the ISII provide at least 90 days notice to move? Yes No
When did/will that 90-day notice expire? _____

¹ If rent was subsidized, determine market rate as total of the tenant's portion and the subsidy paid on their behalf.

- E. Based on these facts, did ISII comply with NSP tenant protection requirements? Yes No
- F. If the ISII did not comply and the tenant is still in occupancy will the grantee assume this responsibility? Yes No
7. If the property was occupied under a “*bona fide*” lease or tenancy effective **after the date of notice of foreclosure**, without a lease, or under lease terminable at will:
- A. Has tenant vacated the property? Yes No Date tenant moved: _____
- B. Did the ISII provide at least 90 days notice to move? Yes No
When did/will that 90-day notice expire? _____
- C. Based on these facts, did ISII comply with NSP tenant protection requirements? Yes No
- D. If the ISII did not comply and the tenant is still in occupancy will the grantee assume this responsibility? Yes No
8. The use of NSP funds is subject to a determination by the grantee that the ISII complied with the tenant protection requirements of the Recovery Act, that the grantee will assume this responsibility if the ISII did not, or that the tenant protections are not applicable. If the grantee learns that the initial successor in interest did not comply with the NSP tenant protection requirements and a bona fide tenant was required to vacate the property contrary to the NSP requirements, abandon the transaction. NSP funds cannot be used for such properties.
9. If the property is occupied, or was vacated for the NSP-assisted project, the grantee must also determine if the occupant would be eligible as a displaced person under the URA.

Peer Experiences: How Other Grantees Are Managing This Requirement

NSP grantees have asked what they can do to meet the tenant protection provisions of the Recovery Act. Grantee practices and tenants' rights laws vary from state to state. Not all solutions will work in every situation, but several NSP grantees have informed HUD of their practices. No amount of due diligence can eliminate the possibility that an improperly evicted bona fide tenant will appear later; this could also make any expenditure ineligible for NSP funding.

A Northeastern city with strong tenant laws follows these procedures:

This problem is especially difficult if there is a "tenant at will," that is a legal tenant but with no lease. In this state, lenders have the right to evict tenants from foreclosed homes in 30 days, so the new law is more restrictive. We get a list of evictions from the Housing Court on a regular basis in order to track activity should we acquire the property. Some owners carry out evictions that may be illegal in this state, known as "Cash for keys", paying tenants \$500 to leave; this can be done by the prior owner or by the lender. Our city has worked with lenders and explicitly asked them not to evict tenants. We try to intervene at the point of the foreclosure petition by tracking legal notices and responding quickly. This gives us a chance to prevent problems at an early stage. When acquiring a property, the city sends a notice to the former owner and also to any residents by addressing it to the property. This does not guarantee that we will find out about protected tenants, but does show good faith should problems arise later.

Other suggestions include:

Contacting the local public housing authority to determine whether a tenant receiving Section 8 or Housing Choice Voucher assistance is occupying the property.

Asking the local Legal Aid Office to determine whether any of its clients might have a claim involving the property.

NOTE: Simply because a property has been vacant for 90 days does not mean that it satisfies these requirements. The law protects bona fide tenants occupying the foreclosed property. Any bona fide tenant must receive at least 90 days notice to vacate. In addition, any bona fide tenant occupying residential property under a lease in effect as of the date of notice of foreclosure must be allowed to stay for the remainder of the lease term. The only exception occurs in the case of a sale to a purchaser who will occupy the property as a primary residence, although the tenant still must have at least 90 days to vacate.

Resource Links

Eligibility for URA assistance and payments must be determined in accordance with the URA statute and regulations on a case by case basis. See HUD's URA website at: www.HUD.gov/Relocation

Questions on the Uniform Act requirements should be directed to the nearest HUD Regional Relocation Specialist. (See "Contacts" at www.hud.gov/Relocation).

Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property is available on HUD's Client Information and Policy System (HUDCLIPS) at <http://www.hud.gov/offices/adm/hudclips/notices/pih/files/09-17pihn.pdf>.

On August 13, 2009, the Office of the Comptroller of the Currency issued a bulletin on PTAF available at: <http://www.occ.treas.gov/ftp/bulletin/2009-28.html>.