

Notice on Rural Development Voucher Program

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On June 18, 2013, the Rural Housing Service (RHS) published a notice in the Federal Register on the operation of its Rural Development Voucher Program (RDVP).¹ The program was first funded in 2006 to protect low-income residents in RHS rental housing from displacement and loss of subsidy when an owner prepays the RHS loan or RHS forecloses on the property.² The vouchers are intended to provide a continued subsidy to residents that would enable them to remain in the property or move to other housing. This article reviews the RHS Notice, including several provisions that do not conform to applicable law or adequately protect tenants.

Operation of the RD Voucher Program

The Notice sets out several general limitations on the issuance of a voucher. These include requirements that the unit rented with a voucher must pass an RD health and safety inspection, that the owner must be willing to accept a voucher, that the voucher cannot be used in combination with any other federal deep rental subsidy (such as a project-based Section 8 or RD Rental Assistance), and that the voucher may not be used for homeownership.

To be eligible for a voucher, the Notice states that:

- a household becomes eligible for a voucher by residing in the housing on the date of prepayment or foreclosure; it has 10 months from that date to apply for the voucher and up to a maximum of 150 days from its issuance to find a rental unit that may be located anywhere in the United States;
- all household members must be U.S. citizens or qualified aliens; and

¹Rural Development Voucher Program, 78 Fed. Reg. 36,520 (June 18, 2013) (hereinafter Notice). This Notice is not the first RHS published notice governing the program, and RHS has also published a Rural Development Voucher Program Guide, which is available from RD field offices. However, since the program is only authorized annually through the Agricultural Appropriations Act, RHS apparently finds it necessary to publish a notice to implement the program periodically. Unfortunately, RHS has never invited comments to any of the notices and, as set out below, operates the program arbitrarily and in violation of various statutory provisions.

²A rural voucher program intended to protect residents in RHS-financed housing from displacement was first authorized in 1992, see 42 U.S.C. § 1490r, but has never been funded. Starting in 2006, Congress has authorized funding for a tenant protection voucher program in the annual Agricultural Appropriations Act, see, e.g., Pub. L. No. 112-55, 125 Stat. 552, 567 (Nov. 18, 2011), that is supposed to be generally run in accordance with 42 U.S.C. § 1490r, but places further restrictions on its operations.

- the household must, as of the date of prepayment or foreclosure, have income that does not exceed 80% of area median income.

Once a unit is leased by the household, RD will enter into a Housing Assistance Payment (HAP) contract with the owner that may only be funded retroactively for a term of 60 days.³

The amount of subsidy provided under the RD vouchers is limited by statute to the difference between the comparable market rent for the RD unit the household occupied and the household's former rent contribution as of the date of prepayment or foreclosure.⁴ Once set, the voucher subsidy never changes regardless of rent increases or change in household size or income.⁵

A voucher is issued to the primary household tenant for a term of 12 months and is renewable, subject to appropriations, upon request on the same conditions as the original voucher.⁶ According to the Notice, vouchers are not transferable to any other household member, except in the case of the voucher holder's death or involuntary household separation, such as the incarceration of the voucher holder or transfer of the voucher holder to an assisted living or nursing facility, in which case it can be transferred to another tenant on the voucher holder's lease.⁷

There are numerous significant problems with the RHS Notice in that it fails to conform to several statutory requirements and, in certain instances, arbitrarily penalizes voucher-eligible tenants. The balance of this article will address these issues.

Immigration Status

The Notice places illegal status and verification requirements on immigrant families who are applying for vouchers. While purporting to conform to Section 214 of the Housing and Community Development Act of 1980,⁸ which places restrictions on who is eligible to receive assistance under various federal housing programs including RDVP, the Notice, in fact violates that law. As already noted, the Notice requires every household member to be a U.S. citizen, a U.S. non-citizen national or a qualified alien. Under Section 214, however, only one household member needs to be a citizen or one of six categories of legally admitted persons. When not all household members qualify for assistance, Section 214 mandates that the assistance provided to the household be prorated based on the number of individuals in the household for whom

eligibility has been established.⁹ Because the Notice does not allow a household with *any* unqualified persons to secure a voucher, does not provide for proration of assistance, and requires status verification of all household members, it clearly violates Section 214 and should not be enforceable.

Since publication of the Notice, agency staff has admitted that it does not conform to Section 214 and has stated that RD intends to publish a new notice this year that will conform to the statute.¹⁰ Agency staff did not, however, state when it would publish that notice nor that it would not enforce the immigration status provisions until a new notice is published. In fact, there is no reason why the agency cannot immediately suspend all status determinations pending publication of a new notice that conforms to Section 214. It did so in 2005 when it established a similarly illegal citizenship requirement for eligibility to reside in the RD multi-family rental housing program.¹¹ Moreover, the process is much simpler in this case because the agency does not need to advise each multi-family landlord that the status and verification provisions are unenforceable. It simply needs to advise agency staff and the private contractor it has engaged to conduct voucher eligibility determinations.

Wait Time to Receive Vouchers

Under the Notice, it is practically impossible for at least some residents to receive voucher payments in time to avoid interim rent increases at the prepaid or foreclosed development or paying the full rent at another location. This is because RD is not required to notify residents living in a development that is prepaid or foreclosed upon of their voucher eligibility until 90 days *after* the date of prepayment or foreclosure.¹² Thereafter, once the tenant submits all the information necessary to determine her eligibility, RD has 30 days to issue the voucher, and, after the resident has located a rental unit and has submitted to RD a formal Request for Tenancy Approval, the agency has 30 days to conduct the necessary inspection. It then has an unspecified period in which to enter into the HAP contract with the landlord. Under this timeline (which does not include the time for the applicant to complete and send the voucher request form or to locate and lease a unit), it may take, at least, up to 150 days to actually complete the process. If the tenant needs housing before that time, the tenant may execute a lease before all the steps have been completed; however, RD will not pay the resident's rent subsidy retroactively for more than a period of 60 days before the HAP contract has been executed.¹³

³78 Fed. Reg. 36,521, ¶ a. (hereinafter the citation will be limited to the Federal Register page and paragraph).

⁴Consolidated and Further Continuation Appropriations Act of 2013, Pub. L. No. 113-6 (Mar. 26, 2013).

⁵Pg. 36,522-23, ¶ e.

⁶See pg. 35,623, ¶ g.

⁷*Id.*

⁸42 U.S.C. § 1436a.

⁹42 U.S.C. § 1436a (d)(6).

¹⁰RHS' admission came in an e-mail exchange between Gideon Anders of the National Housing Law Project and Stephanie White from RHS.

¹¹70 Fed. Reg. 8503 (Feb. 22, 2005).

¹²Pg. 36,522, ¶¶ b and d.

¹³*Id.* ¶ d.

Thus, it is very likely that some residents, whether or not they are dislocated, will have to pay full rent for some period of time. Clearly, this is a hardship for very low-income and senior households who simply cannot afford to pay market rents.

RD justifies this timeline on the basis of its claim that a resident does not become eligible for a voucher until the date of prepayment or foreclosure.¹⁴ While this is true, there is no reason why RD cannot start the voucher issuance process earlier. For example, it could inform residents of their potential voucher eligibility before the prepayment or foreclosure date and even accept a voucher application before that time. It can then issue the voucher as of the date of prepayment or foreclosure and thereby save up to 120 days in its current timeline.

Transferability and the Violence Against Women Act

The Notice allows vouchers to be transferred to another household member only if the voucher holder is involuntarily separated from the unit.¹⁵ Curiously, the only examples of involuntary separation given are death, incarceration, and transfer to an assisted living or nursing home facility.¹⁶ While it is unclear from these examples whether or not divorce or separation is included, it clearly should be. Moreover, a voucher should be transferable when a domestic violence abuser is evicted from the household and the survivor is allowed to stay.

When Congress recently extended the Violence Against Women Act (VAWA), it extended the act's coverage to most of the RHS housing programs.¹⁷ Unfortunately, it did not explicitly extend it to the RD voucher program and the Notice makes no mention of VAWA or any rights of victims of domestic violence. Notwithstanding this omission, tenants who are subsidized under the RDVP enjoy the benefits of VAWA for two reasons. First, RD has chosen to use the Department of Housing and Urban Development Section 8 HAP contract¹⁸ to enter into subsidy payment agreements with landlords. Part C of that agreement sets out VAWA tenant protections that are enforceable by victims. This includes the right of the victim to remain in the unit and allow the landlord to evict the abuser. In other words, the VAWA protections in the HAP contract clearly extend beyond the transfer provisions set out in the Notice.

Second, the appropriations legislation creating the voucher program directs RD to operate the program to

the maximum extent practicable consistently with the regulations and administrative guidances adopted by HUD for the Section 8 program.¹⁹ Since that program has protections for victims of domestic violence, they should also be extended to RD voucher holders.

Move by Voucher Holder

The Notice is silent on whether a voucher holder who has leased a unit can move elsewhere at the end of the lease term. Practically, this requires RD to inspect a new unit and enter into a new HAP contract. While this is not a significant burden, it is not clear whether the agency is prepared to do so. Clearly, there is nothing in the authorizing statute that authorizes RD to refuse to renew a voucher if a resident moves. Moreover, to the extent that RD has an obligation to conform to HUD's administration of the Section 8 program, voucher holders should be able to challenge any refusal by RD to renew a voucher under these circumstances.

Prepaying Owner's Agreement to Accept Vouchers

RHS takes the position that prepaying owners are not required to accept vouchers and that the agency cannot force them to do so because the owners, after prepayment, are no longer controlled by the agency.²⁰ This position is not consistent with the purpose of the voucher program, which was intended to protect residents from displacement, and is also not consistent with other restrictions, such as a perpetual prohibition on discrimination, that RD maintains on all developments that it finances. Unfortunately, the statutory language in the RD voucher program authorizing legislation is not as strong as that in the HUD Enhanced Voucher program,²¹ and it is not clear whether prepaying owners can be forced to accept vouchers under the RD program. It is likely that this deficiency can only be remedied by Congress.

Availability of Voucher Funding

The Notice also misstates the period of authority and funding levels set for the voucher program. The Notice states, "The 2013 Act only provides authority and funding levels for the Rural Development Voucher program through March 27, 2013."²² In fact, the Consolidated and Further Continuing Appropriations Act of 2013²³ extends funding for the voucher program until the end of the fiscal year, September 30, 2013. RD acknowledges

¹⁴See note 10, *supra*.

¹⁵Pg. 36,523, ¶ g.

¹⁶*Id.*

¹⁷Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 101 (2013), § 601, available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ4/pdf/PLAW-113publ4.pdf> (to be codified at 42 U.S.C. § 14043e-11(a)(3)(I)).

¹⁸Form HUD 52641 (Aug. 2009).

¹⁹Pub. L. No. 112-55, 125 Stat. 552, 567 (Nov. 18, 2011).

²⁰See note 10, *supra*.

²¹See *Feemster v. BSA Limited Partnership*, 548 F.3d 1063 (D.C. Cir. Nov. 14, 2008).

²²Pg. 36,521.

²³Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198 (Mar. 26, 2013).

the mistake and has stated that it will modify the date in a revised notice.²⁴ Fortunately, this mistake should not affect the operation of the voucher program, since RD decides whether it can issue a voucher and the date in the notice should not affect its decision.

Conclusion

The last time RHS made information available on the operation of the voucher program, only 50% of eligible households were actually assigned vouchers. There is no logical reason why close to 100% of eligible residents should not receive voucher assistance when a development is prepaid or foreclosed upon. Accordingly, advocates who serve an area where an RD development has been prepaid or foreclosed should affirmatively monitor²⁵ whether residents in the development are receiving voucher assistance and if RD is operating the program in accordance with its authorities. If not, legal challenges are available to provide relief to affected tenants. ■

²⁴See note 10, *supra*.

²⁵Advocates can sign up with RD to regularly receive notices of developments in their states that have applied to prepay their loans. <https://pix.sc.gov.usda.gov>. Unfortunately, foreclosures, which are relatively rare, can only be detected by following local newspapers that publish foreclosure notices.