

To: Housing Justice Network Advocates
From: National Housing Law Project Staff
Re: Rights of Federally-Assisted Residents during the Government Shutdown
Date: January 23, 2019

Overview of Government Shutdown and Additional Resources

All of the bills necessary to fund the government for FY 2019 are finalized and ready for votes in Congress and a signature from the President. Talks continue between the House and Senate leadership and the Administration, but there has not been progress towards a resolution.

This memo provides an overview of the impact of the shutdown on tenants in the various federally-assisted housing programs, including ways you can talk to clients about their legal rights. Please note that the memo does not cover all of HUD and USDA's numerous housing programs. Importantly, there is currently only a relatively small group of tenants in HUD and RD project-based rental assistance properties that face an immediate risk due to contracts between owners and HUD or RD that expired starting in December. Most residents should see little to no disruption in housing services at this time because rental assistance payments are expected to continue through February. HOWEVER, if the shutdown continues past the end of February, the situation dramatically deteriorates due to nonpayments to almost all owners; NHLP will publish an additional legal memo on tenant's rights if and when necessary.

Additional Resources on the Government Shutdown

- NHLP memo on the federal government shutdown: https://www.nhlp.org/wp-content/uploads/Shutdown-Status-Memo_011719-FINAL.pdf
- CHCDF Impact Summary https://nlihc.org/sites/default/files/FY19_Shutdown_Factsheet.pdf
- NLIHC Map of Expiring HUD contracts - <https://nlihc.org/issues/budget/shutdown-map>

Please feel free to widely distribute this memo and contact Deborah Thrope (dthrope@nhlp.org) with questions about the legal impact of the government shutdown on federally-assisted residents.

Project-Based Section 8 Rental Assistance

It is important to distinguish two categories of PBS8 projects for purposes of the shutdown. First, the vast majority of PBS8 properties have long-term contracts that have not expired, with terms running through at least part of 2019 and far beyond. These properties should have received HAP payments for January and expect to receive payments for February, under funding provided and legally obligated prior to expiration of the Continuing Resolution.

The second category of PBS8 properties had HAP contracts that expired in December or will expire in January or February. Because renewals cannot occur and funds cannot be obligated during the shutdown, the legal status of tenants at these properties is less clear, as explained *infra*. Reportedly, of the 1,175 properties (41,983 units) with various kinds of expiring HUD rental assistance contracts

expiring in December or January, about 300 had PBS8 contracts.¹

Can the owner/landlord increase rents or evict tenants as a result of the shutdown?

First, tenants living in properties where the owner has an ongoing HAP contract with HUD are protected from rent increases due to any nonpayment of the assistance because the owner and tenant continue to be subject to the terms of the lease. Tenants are only responsible for their portion of the rent per the lease agreement, which remains in effect until the HAP is terminated.² Even if HAP payments are not paid by HUD or a Contract Administrator, because the HAP contract contains no termination provision for such a nonpayment, it remains in effect by its own terms, and therefore so does the lease. So long as tenants continue to pay their portion of the rent, they should be protected from an eviction for non-payment of the full contract rent, should any HAP not be paid (if the shutdown continues into March). (However, note that this situation is unprecedented and this reasoning has never been tested in court.)

The legal status of tenants living in properties where the HAP contract has expired (see NLIHC Budget Shutdown map link, *supra*) is less clear, although there are arguments that the tenant remains protected from rent increases. Advocates should first review the terms of the tenants' lease to make sure that it's the HUD model lease containing the automatic termination clause. If so, the lease has been terminated upon expiration (and non-renewal) of the HAP contract. In the unlikely event that the clause is not included, the lease remains operational until its valid termination per its terms and state law.

At expired properties, tenants facing rent increases or evictions may need to resort to federal notice laws,³ or theories establishing due process or other procedural protections by styling the termination as HUD-initiated. For any termination, tenants' entitlement to Tenant Protection Vouchers (including Enhanced Vouchers), subject to availability in the TPV account, should also be evaluated.

Finally, additional protections for tenants might exist in other project documents, such as regulatory or use agreements, or state or local landlord-tenant laws⁴ or caselaw.

Who can advocates call for assistance?

¹ NHC Member Brief (January 16, 2019). 301 of these properties are project-based rental assistance, 444 are Section 202 for Seniors, and 530 are Section 811 for people with disabilities. Note the 1,175 contracts equals 41,983 units.

² HUD Model Lease for Subsidized Programs, form HUD-90105a (12/2007), paras 3 (tenant rent) and 30 (lease terminated by termination of HAP for any reason).

³ 42 USC 1437f(c)(8) requires one-year notice to residents prior to terminating a HAP contract and prohibits an eviction for non-payment of rent in the event notice is not given. Such a claim is untested, and weakened by other statutory language (Section 524(a) of MAHRA (42 U.S.C. 1437f note)) making renewal contingent upon appropriations

⁴ *E.g.*, Mass. G.L. c. 186, §§ 11 and 12 (if nonpayment of rent was due to delay or non-receipt of government payment, court must continue the case for seven days and provide notice to the government agency prior to eviction).

If there's evidence that assistance is not being paid or tenants are threatened, advocates should contact their local HUD office, although most HUD staff are furloughed due to the shutdown. Please call NHLP for technical assistance to intervene with HUD or develop another responsive strategy. Contact Jim Grow (jgrow@nhlp.org) or Bridgett Simmons (bsimmons@nhlp.org) for further assistance regarding tenants at project-based section 8 properties.

How should I advise my clients living in project-based section 8 properties?

- Tenants should be encouraged to bring any notice about rent increases to an attorney immediately.
- Tenants who live in properties with unexpired HAP contracts should be reassured their leases remain valid and enforceable. Tenants at these properties should continue to pay their portion of the rent and are not at risk of eviction for non-payment. These PBS8 properties should be funded through the end of February.
- Tenants in properties where the HAP contract expired in December 2018 or after (see the NLIHC Map of Expiring Contracts, *supra*) may still be protected. Some owners have reserves that can cover debt obligations and operating expenses for several weeks or months.

If the assistance is not paid and the owner imposes a rent increase or serves eviction notices, evaluate the lease, the HAP contracts and any use agreements, as well as any tenant protections under federal, state or local law to determine the tenant's legal rights and options.

Section 202 and Section 811 Rental Assistance

Section 202 and Section 811 programs provide capital and operating funds for the development of supportive housing. The capital advance works like a loan from HUD, except that it bears no debt service and need not be repaid so long as the housing remains available for the eligible population under the terms of the program.⁵ Rental assistance is provided through Project Rental Assistance Contracts (PRACs) or, for older Section 202 projects with direct HUD loans, Section 8 Housing Assistance contracts.⁶ Some properties have a current assistance contract in place; in others, the contract has expired and was not renewed before the shutdown, or will expire in the near future.

Can the owner/landlord increase rents or evict tenants as a result of the shutdown?

Tenants living in properties with unexpired 202 PRAC and 811 PRAC contracts will remain responsible only for their portion of the rent and are therefore protected from eviction for non-payment of the rental assistance, under the PRAC model lease.⁷ Unlike the HUD PBS8 model lease, PRAC model leases have no automatic termination clause if the PRAC contract terminates for any reason. Tenants

⁵ 12 U.S.C.A. § 1701q(c)(1) (2019).

⁶ Most of these properties have a PRAC rather than a Section 8 Housing Assistance contract. See NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS RIGHTS § 1.3.4 (5th ed. 2018).

⁷ HUD Form 90105C para. 10 (2017); HUD Form 90105D para. 10 (2017).

living in 202 properties with unexpired project-based section 8 contracts⁸ will also not be impacted by the shutdown at this time, just like other PBS8 properties, because funds have been obligated through February.)

Like other tenants who live in PBS8 buildings with contracts that expired starting in December, tenants with Section 202/PBS8 leases⁹ who live in buildings where the Section 8 HAP contract has expired have a less clear legal status. The Section 202/PBS8 model lease includes language that terminates the lease if the HAP contract has been terminated for any reason. The same analysis that applies to PBS8 residents would apply to Section 202/PBS8 tenants, explained above.

In contrast, for the small number of 202/811 PRAC contracts that have expired in December and January (or will expire in February), where HUD cannot now obligate new PRAC payments, tenants may remain legally protected under the PRAC model lease, because it remains in effect, having no automatic termination clause.

In addition, Section 202 and 811 properties have a use agreement¹⁰ that requires operation of the property under the applicable statute and regulations. Advocates should check the use agreement for any additional protections.

Most importantly, Section 202 and 811 properties are owned by nonprofits, who would usually be extremely reluctant to displace tenants for government failure.

Who can advocates call for assistance?

Because Section 202 and 811 properties are owned by nonprofits serving seniors and people with disabilities, tenants should contact their property manager/landlord with any questions. If tenants are being threatened with eviction, NHP can provide technical assistance. Contact Jim Grow (jgrow@nhlp.org) or Bridgett Simmons (bsimmons@nhlp.org) with questions regarding tenants in Section 202/811 properties.

How should I advise my clients living in these properties?

- Tenants who have a HUD 90105C or HUD 90105D PRAC lease in place should be reassured their leases remain valid and enforceable. Tenants at these properties should continue to pay their portion of the rent.
- Tenants who have a HUD 90105B PBS8 lease where the Section 8 HAP contract has expired might have similar procedural and replacement subsidy claims as other PBS8 tenants, *supra*, but these are uncertain.

⁸ Note that the only 202/811 projects with PBS8 are 202s because 811 wasn't created until 1990 when PRAC was used.

⁹ HUD Form 90105B (2017).

¹⁰ 24 C.F.R. § 891.170(a) (2019).

- Tenants should be encouraged to bring any notice about rent increases or eviction to an attorney.

Section 8 Housing Choice Vouchers

Public Housing Authorities (PHAs) received funding from HUD to operate their tenant-based voucher programs through January and all expect to receive payments that will cover February because those funds have already been legally obligated prior to the expiration of the Continuing Resolution. This includes both Housing Assistance Payments (“HAP payments”) that pay voucher families’ rents as well as administrative fees for program operations. If the shutdown is not resolved by the end of February, many PHAs will not be able to make rent payments to landlords on behalf of voucher families. Some PHAs have indicated that they have sufficient reserves to operate their voucher programs through March.¹¹ Thus, *current* voucher families should not be impacted by the shutdown, at least until PHA prior allocations and reserves are exhausted.

However, the voucher program relies on partnerships with private landlords and there are thus negative consequences of a lapse in Appropriations. Some private landlords may choose not to renew HAP contracts with the PHA and tenant leases due to the financial uncertainty inherent to the shutdown. Other landlords (in jurisdictions without voucher non-discrimination protections) will be deterred from joining the program. In addition, PHAs are not required to lease up families on the waitlist upon turnover and may stop doing so because they are hesitant to enter new contracts with landlords.¹² This may increase the number of vouchers that are not in use at any given PHA (vouchers that could be used to house poor families).

Can the owner/landlord increase rents or evict tenants as a result of the shutdown?

Because rent payments to landlords are currently not disrupted, voucher tenants should not receive rent increase, eviction, or voucher termination notices due to the shutdown.

In the event the shutdown lasts into March, PHAs have been instructed to use reserves to make rent payments to landlords. Tenants would therefore remain protected from rent increases so long as the PHA fulfills its financial obligations.

Even if the PHA has insufficient reserves and is unable to make payments to landlords according to the HAP contract, the lease agreement will remain in effect (and therefore families will only be responsible for their portion of the rent) until the HAP contract is formally terminated (or voided) or the landlord terminates the lease with proper notice and according to other applicable laws (*see infra*). Note

¹¹ See Oakland Housing Authority Press Release, “Oakland Housing Authority Statement on Impact to HUD- Funded Housing Assistance Payments Due to Oakland During the Ongoing Federal Government Shutdown” (January 16, 2019).

¹² See HUD 2018 Contingency Plan at 80. Q: Should PHAs continue to issue vouchers during a government shutdown? A: PHAs are not required to cease issuing vouchers during a government shutdown. PHAs should assess their financial ability to make payments on behalf of currently assisted households as well as those potentially to be served when considering their ability to issue vouchers.

that PHAs can terminate the HAP contract and may in fact have an incentive to do so,¹³ due to insufficient funding and according to HUD guidelines.¹⁴ Termination of the HAP contract automatically extinguishes the lease.¹⁵ However, so long as the lease is in effect, the voucher family will not be responsible for the PHA's portion of the rent.

The rights of voucher tenants who remain under a lease will depend on whether the tenant is in the initial term of the lease. Voucher tenants who are in the initial term of their lease can only be evicted for good cause and are therefore protected for the remainder of the lease term.¹⁶ However, after the initial lease term, landlords can evict a voucher family for business reasons,¹⁷ which would presumably include failure of the program to provide market rents. State and local laws will also impact voucher tenants' rights and the landlord's ability to terminate the lease (for example, notice requirements prior to termination).

Note there is one additional protection in the HAP contract and regulations, which specifically state that nonpayment of HAP by the PHA is not grounds for termination of tenancy during the term of the lease.¹⁸

Who can advocates call for assistance?

Public Housing Authorities are not federal agencies and will therefore remain open during the shutdown. Advocates and tenants can call their local PHAs with any questions/concerns. If a voucher client experiences an adverse action by either a PHA or landlord as a result of the shutdown, please contact Deborah Thrope (dthrope@nhlp.org) at NHLP.

How should I advise my clients at this time?

- Advocates should advise their voucher clients that their tenancy is secure through February. PHAs should be running business as usual.
- Wait times for inspection requests, recertifications, and other PHA functions may be a bit longer because PHA staff are focusing on shutdown impacts but overall the program should continue uninterrupted.
- If the shutdowns lasts into February, advocates and tenants should reach out to local PHAs to learn how much it has in reserves to and better understand the PHA's financial outlook.

¹³ PHAs may choose to terminate a HAP contract in the absence of Appropriated funds to avoid opening themselves up to liability for breach of contract, for example.

¹⁴ HUD, Part B of HAP Contract (Form HUD-52641), § 4(b)(5), "The PHA may terminate the HAP contract if the PHA determines, in accordance with HUD requirements, that available program funding is not sufficient to support continued assistance for families in the program."

¹⁵ HUD Section 8 Voucher Tenancy Addendum, Section 9.

¹⁶ 24 C.F.R. § 982.310; Section 8 Housing Choice Voucher Lease Addendum, Section 4.

¹⁷ 24 C.F.R. § 982.310(d); Section 8 Housing Choice Voucher Lease Addendum, Section 4.

¹⁸ 24 C.F.R. 982.310(b). HUD, Part B of HAP Contract (Form HUD-52641 § 5(d).

Tenant Protection Vouchers and Enhanced Vouchers

HUD has stated that it will not process funding requests for Tenant Protection Vouchers (TPVs) during the shutdown.¹⁹ Advocates should work with their local PHA to advocate for more time for tenants to move because of the unavailability of TPVs. Note that the situation might differ for Enhanced Vouchers due to an owner “opt-out” from a project-based contract. In the event of an opt-out, the owner can increase tenants’ rents on the effective opt-out date, so the timing of HUD’s approval and the PHA’s actual issuance of the EVs may be crucial to protecting tenants against rent increases and avoid involuntary displacement.

Please call NHLP if you are representing clients who face rent increases or cannot comply with a relocation plan due to the failure of HUD to approve or the PHA to issue TPVs.

Public Housing

Public Housing Authorities receive funds to supplement tenant rent contributions for their Public Housing through two accounts: the Public Housing Operating Fund and the Public Housing Capital Fund. Money from the Operating Fund is used for daily operations including routine maintenance, emergency repairs, processing tenant paperwork, and preparing units at turnover for occupancy. Money from the Capital fund is used to make necessary upgrades and improvements.

PHAs received payments from the Operating Fund for January and expect to receive payments through February, since funds under the Continuing Resolution were obligated before the shutdown. This means that PHAs currently have funds to operate public housing. If the shutdown continues, starting in March, PHAs will receive no funds to operate their public housing programs. As we get closer to March, PHAs will likely be advised to use any reserves to run their program if funding runs dry, although reserves vary greatly for each PHA, putting some programs (and tenants) more at risk than others if the shutdown continues. However, even if a continued shutdown prevents HUD from providing Operating Funds, tenants apparently remain protected against rent increases and resulting evictions by the federal public housing statute and their lease. Unlike PBS8, public housing has no provision automatically terminating leases if the subsidy contract lapses. Nor is there any provision addressing breach caused by a failure of appropriations.

PHAs did not receive funding from the Capital Fund for January and will not see any Capital funds until 60 days after enactment of a final Appropriations bill. PHAs are technically allowed to use 2018 Capital funds for capital needs (if any carried over), but HUD approval is required to do this and most of the HUD staff is furloughed and therefore unavailable to approve the requests to use 2018 funds. Thus, funding of any planned capital improvements may be delayed.

¹⁹ HUD 2018 Contingency Plan at 80. Q: Will HUD process funding requests for tenant protection vouchers for public housing demolition/disposition activities or Multifamily Housing Conversion Actions (e.g., owner prepayments and opt-outs) during a government shutdown? A: No. During the period of the government shutdown these applications will not be processed.

Can the owner/landlord increase rents or evict tenants as a result of the shutdown?

Public Housing tenants should not receive rent increase or eviction notices due to the shutdown because Operating Funds should continue through February. Even if the shutdown last longer, PHAs cannot increase tenant rents or terminate tenancies simply because of Congress' failure to appropriate Operating Funds.

Who can advocates call for assistance?

PHAs are not federal agencies and will therefore remain open during the shutdown. Advocates and tenants can call their local PHAs with any questions/concerns. If a public housing client experiences an adverse action by a PHA as a result of the shutdown, please contact Deborah Thrope (dthrope@nhlp.org) for further assistance.

How should I advise my clients at this time?

- Advocates can advise public housing residents that their public housing tenancy is secure, until the end of February, and apparently, even if funds are not provided afterward.
- Residents may see increased wait times for inspection requests, income recertifications, and other PHA functions due to PHAs turning attention to the shutdown of the impacts and some disruption in capital needs repairs at this time.

Rental Assistance Demonstration

Tenants in public housing properties that are undergoing a RAD conversion remain funded and protected by PH rules discussed *supra* until closing. The shutdown may delay some RAD closings because HUD staff may be unavailable, and only certain projects involving other funding deadlines will receive priority treatment.

After a RAD closing, properties will be converted to PBS8 or PBV, but the funding may continue to be from the PH account for all of 2019 if the closing occurred during or after November.²⁰ However, the fact that the PH account may continue to serve as the funding source does not affect the tenants' rights after closing, which are determined under the RAD program and the PBS8 or PBV program, as applicable. Thus, after closing, the impact of any shortfall in funding for the PBV or PBS8 program on tenant protections against rent increases or evictions should first be analyzed per the applicable program discussion, *supra* followed by a separate review of the RAD HAPs and leases for RAD PBS8 or RAD PBV.

²⁰ The funding source for a RAD-converting property does not immediately change after a RAD conversion to PBRA or PBV. Instead, the funds to meet the commitment of the HAP contract will draw on the public housing account until the first of the year after the HAP contract is effective. For example, a property that had a HAP contract effective 1/15/18, will use its public housing funding through 12/31/18. Starting on 1/1/19, the funding for the property will come out of the accounts for PBRA and PBV properties.

The shutdown may cause delays in the processing of RAD deals and the closing dates of RAD conversions. Delays may impact tenants, including the timeline to exercise choice mobility rights.²¹ Additionally, given that many converting properties are in substandard condition, tenants may be forced to live in these conditions for time periods longer than initially expected.

Can the owner/landlord increase rents or evict tenants as a result of the shutdown?

RAD properties that have not yet closed are subject to public housing rules and procedures. There is no basis to increase the rent or evict a tenant in a RAD-converting property because public housing authorities that administer public housing received operating funds through January and expect to receive them through February. Similarly, in post-conversion properties where there is a current PBS8 or PBV HAP contract, tenants are protected from rent increases and related evictions because the owner should be receiving payments through February and both parties are subject to the terms of the lease. Because new HAP contracts in PBRA and PBV are for 20 years,²² no RAD properties and tenants face the expiring contract problem experienced by some PBS8 and PRAC properties reviewed *supra*.

If the shutdown continues into March, and HAP funds are not provided, RAD tenants in PBS8 properties may be protected from rent increases and evictions, per the analysis of PBS8 tenants living in properties with ongoing rental assistance contracts, *supra*. An analysis of tenants in project-based voucher units, including RAD-converted properties, is not included in this memo but is forthcoming from NHLP.

Who can advocates call for assistance?

If tenants at RAD properties are being threatened with rent increases or evictions, please contact Kara Brodfuehrer (kbrodfehrer@nhlp.org) at NHLP for technical assistance. If residents are facing a health and safety issue due to the shutdown, call HUD's Office of Recapitalization.²³

How should I advise my clients at this time?

- Residents in RAD properties should not experience any disruption to their tenancy based on the government shutdown. Tenants should contact an advocate immediately if they are threatened with a rent increase or eviction.

²¹ Tenants in PBV properties have a right to a voucher after 12 months in the property and tenants in PBRA properties have a right to a voucher after 24 months of the execution of the HAP (or move-in). 24 CFR § 983.260. If HAP execution and move-ins are delayed, tenants will have a delay in when they can exercise their choice mobility rights to receive a voucher.

²² See RAD PBRA (HUD Form 90105a) and RAD PBV Lease Addendum.

²³ HUD's contingency plan for RAD only allows the Office of Recapitalization to respond if it is necessary to protect life, safety, or property. The issues that fall into these categories are limited and thus far have pertained to situations that could result in the loss of tax credits or other financial issues. However, health and safety issues that impact residents related to relocation, for example, could be characterized as necessary issues that HUD must immediately address.

- RAD residents may experience longer wait times for inspection requests, recertifications, or other PHA/owner functions, especially those that require HUD approval.

USDA Rural Development Housing Programs

The Rural Housing Service (RHS) and Rural Development (RD) have not released any information broadly about the operation of its housing programs during the federal government's shutdown.²⁴ NHLP has, however, received some responses from RD about specific questions that we posed to them. In addition, they have contacted some Section 515 owners who have threatened to raise residents' rents and to evict them for nonpayment if they did not pay the unsubsidized rents starting in February. Fortunately, the owners have rescinded the tenants' rent increase notices. Notwithstanding, some of the information set out below is anecdotal, it was gathered from people who are familiar with program operations and representatives of owners of RD rental housing. As with other federal agencies, practically all RHS and RD staff have been furloughed. Less than a handful are working in the Washington National Office. A few more are in the RD Servicing Center in St. Louis. They are primarily involved in disbursing funds to rental housing owners that have Rental Assistance contracts with the agency and troubleshooting.

Rental Housing Programs

RD has about 13,500 Section 515 rental developments, with about 420,000 units throughout rural areas in the United States. About 270,000 of these units receive Rental Assistance, RD's deep rental subsidy. There are an additional 590 developments with approximately 14,000 rental units that operate under the Section 514 and 516 farm labor housing programs. About 64% of the households living in these developments also receive Rental Assistance subsidies. About 70% of the residents living in RD rental housing are elderly persons or persons with disabilities who live on fixed incomes. On average, people receiving rental assistance have an annual household income of less than \$11,000, while households not receiving RA have slightly higher annual incomes averaging at about \$13,000. Clearly, these households cannot afford increased rents if their RD landlords attempt to raise their rents in response to the loss of RD rental assistance subsidies.

Not all households in RD Section 515 rental housing receive RA. The number of units that receive RA is governed by the RA agreement between the owner and RD. Residents of Section 515 housing who receive RA pay 30% of their household income for rent. Those that do not receive RA pay the higher of 30% of income or the project's basic rent, which is based on the cost of operating the development and amortizing the RD loan at 1%. Residents in Farm Labor development receiving RA also pay 30% of their income for rent. Those that do not receive RA, pay rent based on the cost of operating the project and amortizing the RD loan at 1% interest.

²⁴ Rural Development has published a shutdown plan. It, however, has many unclear terms that it is not clear how RD is supposed to operate its programs during the shutdown. In addition, it is not known whether RD is actually following the plan. The plan is available at <https://www.usda.gov/sites/default/files/documents/usda-rd-shutdown-plan.pdf>.

In both types of developments, only residents that receive RA are likely to be affected by the shutdown. This is because RD makes monthly payments to the owners that cover the difference between all RA recipients' shelter costs and the rent that the owner would have received if the residents had paid the project's basic rent. If those payments stop, the owners typically do not have enough money on hand to continue the management operations of their developments. Owners are not adversely affected by the loss of subsidies for residents who pay the basic rent or more because there is no subsidy that RD returns to the owner on their account.

RD rental assistance subsidy is paid retroactively and owners of both Section 515 and 514/516 housing that have Rental Assistance contracts with the agency received subsidy payments in January of 2018, which covered residents' December 2018 subsidies. It is expected that the agency will also release some Rental Assistance funds in February, which will cover the January subsidy costs. RD has advised NHP that owners with RA contracts that have not expired will continue to receive monthly RA disbursements.

RA agreements between RD and owners are 12-months contracts with beginning and ending dates that are spread throughout the federal fiscal year. RD does not have authority to renew RA Agreements that are expiring during the shutdown. Thus, unless RD anticipated the shutdown and entered into RA agreements with owners whose agreement were set to expire during January and February, it is expected that some RA agreements will expire during the shutdown and that the owners will not have adequate operating funds to manage and maintain their housing. Because RD has never released information on when RA Agreements begin or expire, it is not known whether and where projects with expired or expiring agreements are located and what owners are doing if their agreements have expired. Fortunately, there has not been any news so far about developments with expiring RA contracts. However, RD has informed Senate staff that approximately 700 development with RA contracts will not be renewed in February because the contracts have expired and that no RA will be made available to them as a result. This may affect over 17,000 households. Clearly, if the shutdown continues past February, that number will increase.

Unlike HUD, RD has not advised its owners that they may dip into their reserves to continue to operate their developments when RA contracts are not renewed. RD reserve accounts are under the owners' control, although RD's approval is needed to expend reserve funds. It is, therefore, possible that RD owners may be able to meet their operating costs during the shutdown if their reserves are sufficient to meet their operating costs. In all likelihood, RD will not punish them for using reserves without permission and will only require owners to replenish the accounts once the owners receive funds after the shutdown. Accordingly, advocates should encourage owners that run out of RD subsidy funds to use project reserve funds to maintain the projects' operations.

Owners whose RA contracts expire during the shutdown as well as all other owners who do not know what is happening during the shutdown may try to recover lost rent subsidies from residents by increasing rents to the basic rent and threatening to evict them if they do not pay the increased amount. Several managers in Arkansas have done so in anticipation of not getting RA funding in February. Fortunately, because the manager's actions received wide news coverage, the rent increase notices were rescinded after an RD person called the managers and advised that RA payments will be

made in February and will continue to be made as long as the contracts do not expire.

Very few residents in RD housing can afford any rent increases and may become subject to eviction. Defenses to these actions will vary greatly because RD does not prescribe a standard lease for all Section 515 or 514/516 developments. Instead, the agency prescribes certain provisions that must be included or excluded from the lease used at any development.²⁵ What owners may do in the event of a government shutdown is not set out in these regulations. Advocates, therefore, will have to review residents' leases carefully to see if such rent increases violate the resident leases, if the owner met all of the resident's due process rights, and whether the rent increase notices as well as the eviction notices conform to RD regulations and state and local law.

There is one statutory provision that advocates may be able to rely on in defending residents against evictions. It is codified at 42 U.S.C. § 1490a(a)(3)(C). It states that

No rent for a [unit](#) financed under section [1484](#) or [1485](#) of this title shall be increased as a result of this subsection or other provision of Federal law or Federal regulation by more than 10 per centum in any twelve-month [period](#), unless the increase above 10 per centum is attributable to increases in income which are unrelated to this subsection or other law, or regulation.²⁶

While this statutory provision has been in place since 1984, there is no reported case where it has been raised to challenge owners' rent increases. The shutdown may be an appropriate time to prevent owners from raising residents' rents and evicting them for failure to pay rent.

Regardless of any legal defenses, advocates are urged to publicize owners' efforts to raise rents on residents. Residents of RD housing who are elderly or disabled are particularly sympathetic and should draw attention from local, state or even national media. RD's intervention in the Arkansas case was prompted by the media attention that focused on the manager's effort to raise residents' rents.

Prepayment of RD Rental Housing Loan

Owners of Section 515 and Section 514/516 rental developments have a restricted right to prepay their loans if the development is not subject to use restrictions.²⁷ Most prepayment requests that have been filed will not be acted on until the shutdown is over. Residents living in the developments should, therefore not be affected by the shutdown.

RD Vouchers

²⁵ See 7 C.F.R. § 3560.162.

²⁶ 42 U.S.C. § 1490a(a)(3)(C).

²⁷ See 42 U.S.C. § 1472 (c).

RD issues vouchers to residents who live in or have lived in developments that have been prepaid by owners or foreclosed on by the agency.²⁸ See 82 Fed. Reg. 21972 (May 11, 2017). There are about 7,000 vouchers that were in place at the end of 2018. Voucher funding is disbursed to owners in advance through monthly installments under a Housing Assistance Payment (HAP) contract between RD and the owner. It is believed that RD disbursed voucher funding to owners in January and it is expected that the agency will do so again in February. It is not known currently whether the agency will have funding to make future disbursements in March or thereafter if the shutdown lasts that long. Residents who continue to live in developments with use restrictions should not be affected by the shutdown because they can seek to enforce the use restriction if and when RD is unable to extend voucher payments to the owners.²⁹

Residents who have moved to private housing may be affected by the shutdown if the HAP contract with the owner expires during the shutdown. During the voucher's initial one-year term, residents should be protected by a HAP contract provision that precludes an owner from taking action against the resident if RD subsidy payments are not made on a timely basis.³⁰ However, if the HAP contract expires, the owner is free to terminate the resident's lease. Moreover, after the initial term of the HAP contract the owner may terminate the lease for good cause, which includes the right to terminate the lease for business or economic reasons.³¹ Tenants who are affected by expiring HAP contracts may be dislocated and without any alternative voucher options until the shutdown ends because RD must inspect and approve rental units that the voucher holder chooses to move to and must enter into a new HAP contract with the owner. Neither of these functions are being carried out by RD staff during the shutdown. In these cases advocates need to make sure that the owner is providing a good cause notice to the residents and is following all state and local laws in carrying out the court eviction.

RD Single Family Housing Loan

Most homeowners that have RD direct or guaranteed Section 502 loans should not be affected by the shutdown. They should continue to make their mortgage payments to RD or their private lenders. If they need to have their income certified, the homeowners should continue to make their regular payments and expect RD to recertify their income and, if necessary, adjust their mortgage payments after the end of the shutdown. Direct loan homeowners who need a moratorium on payments for hardships outside their control during the shutdown should be encouraged to continue to pay as much as they can. If they can't pay the full monthly mortgage payment, they should include a note with their payments advising the agency that they need a moratorium for reasons that are beyond their control. Hopefully, RD will act on these requests at the end of the shutdown.

Homeowners who are being foreclosed upon by RD should not be affected if the foreclosure is in federal court and RD is represented by Justice Department attorneys. Since they are currently

²⁸ See 82 Fed. Reg. 21972 (May 11, 2017).

²⁹ See 7 C.F.R. § 3560.662 (d).

³⁰ RD Voucher Program, HAP Contract Part C (Tenancy Addendum) ¶ 5(d) (available at <https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf>).

³¹ *Id.* ¶ 8 d (3).

furloughed, all federal foreclosure cases will be postponed. If, however, the foreclosure is undertaken by a private attorney with whom RD has contracted, the foreclosure may go on and the borrower may not be able to negotiate a settlement because the private attorney has no one at RD to consult. These borrowers should ask the foreclosing attorney or the court in which the foreclosure is taking place for a suspension of the proceedings until the shutdown is over. If the foreclosure is not going through a court, title companies or attorneys conducting the foreclosure sale should be asked to postpone the sale until after the shutdown ends.

All applicants for RD direct and guaranteed loans will have consideration of their applications postponed until the end of the moratorium. Even persons who have been approved for RD loans may not be able to secure disbursements until the shutdown is over.

For more information about the RD housing programs and how best to represent rental housing residents or homeowners contact Gideon Anders at NHLP (ganders@nhlp.org).