

NSP TENANT PROTECTIONS AT FORECLOSURE UNDER THE RECOVERY ACT

Overview

Congress has expressed concern about evictions of tenants from foreclosed properties. New laws have been passed recently to address this issue. The American Recovery and Reinvestment Act of 2009 (Recovery Act), Pub. L. No. 111-5, imposes requirements on Neighborhood Stabilization Program (NSP) grantees to ensure that *bona fide* tenants in NSP-affected properties receive proper treatment.¹ Additional amounts made available for NSP pursuant to Section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, are subject to Recovery Act tenant protection requirements. Please note that the Recovery Act tenant protection requirements do not preempt any federal, tribal, state or local law that provides greater protections for tenants, including, but not limited to the Protecting Tenants at Foreclosure Act of 2009 (PTFA) and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA). See the “Resource Links” section of this guidance document for links to more information on PTFA and URA.

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, 2009.² The revised definition of “foreclosed” published in the Federal Register on April 9, 2010 expands the properties considered acquired through foreclosure for NSP purposes. NSP grantees, subrecipients, developers or homebuyers need to be mindful of the NSP tenant protection requirements under the Recovery Act (and, where applicable, the PTFA) in acquiring foreclosed properties under the NSP program. The following highlights methods grantees can use to determine compliance with the NSP tenant protection requirements under the Recovery Act. Grantees should direct questions on these requirements to NSP-Questions@hud.gov, not to HUD Regional Relocation Specialists.

SUMMARY OF NSP TENANT PROTECTION REQUIREMENTS UNDER THE RECOVERY ACT

PERSONS AFFECTED	Any <i>bona fide</i> tenant occupying certain residential property under a lease in effect on or before the date of notice of foreclosure.	Any <i>bona fide</i> tenant occupying certain residential property without a lease or with a lease terminable at will under state law at the time of foreclosure
IMPLICATIONS	Initial successor in interest (ISII) (see key terms) must allow such tenants to remain to end of the lease term* and provide a minimum 90 days notice to vacate. These periods may overlap but cannot be less than 90 days.	ISII (see key terms) must provide such tenants a minimum 90 days notice to vacate.
EXCEPTION	*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.	

¹ Another law, the Protecting Tenants at Foreclosure Act of 2009 (PTFA), Pub. L. No. 111-22, also provides protections for tenants facing eviction as a result of foreclosure on virtually all mortgaged rental properties in the US. PTFA requirements, though similar to Recovery Act requirements in some respects, are **separate and distinct** obligations that are not affected *in any way* by the revised definition of “foreclosed” or this guidance document. PTFA may provide greater protection in certain instances. PTFA requirements, where applicable, must be fully satisfied independently of any obligations arising under the Recovery Act. HUD has published a notice in the Federal Register providing additional information on PTFA. See 74 FR 30,106 (Jun. 24, 2009). PTFA is not discussed further in this guidance document.

² Please note that links to all Notices cited are available in the “Resource Links” section of this document.

Grantees need to be aware that the NSP tenant protection requirements under the Recovery Act are separate and apart from the obligations imposed on grantees by the URA. The revised NSP definitions do not supersede or affect in any way protections available to property owners or tenants under the URA. The URA applies to any person displaced as a direct result of acquisition, rehabilitation, and/or demolition of real property for a federally-assisted project. Eligibility determinations under the URA and the required notices and relocation assistance requirements are separate and distinct from the NSP tenant protections in the Recovery Act. Grantees cannot assume that a person entitled to the NSP tenant protections under the Recovery Act is also eligible for assistance under the URA (or vice versa). Any tenant lawfully occupying the property evicted by the owner/mortgagor in order to facilitate an acquisition under the NSP program (including short sales) is most likely eligible for URA relocation assistance and payments as a displaced person.

Key Terms

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 arm's-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 home or residential property has been foreclosed upon if any of the following conditions apply: (a) the property's current delinquency status is at least 60 days delinquent under the Mortgage Bankers of America delinquency calculation and the owner has been notified of this delinquency, or (b) the property owner is 90 days or more delinquent on tax payments, or (c) under state, local, or tribal law, foreclosure proceedings have been initiated or completed, or (d) foreclosure proceedings have been completed and title has been transferred to an intermediary aggregator or servicer that is not an NSP grantee, subrecipient, contractor, developer, or end user.

Initial Successor in Interest (ISII): Typically, the ISII 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. Grantees should note that the revised NSP definition of "foreclosed" now includes the beginning stages of the foreclosure process as well as the end. For example, when a NSP grantee purchases a rental property directly from the mortgagor via a short sale as a "foreclosed" property, the grantee may become the ISII for NSP purposes.

Options for grantees to document compliance with NSP tenant protection requirements under the Recovery Act:

1. Purchase properties that were foreclosed and title transferred on or before February 17, 2009, and obtain evidence of the date of foreclosure; such properties are not covered by the NSP tenant protection provisions of the Recovery Act.
2. If purchasing properties after February 17, 2009, that meet the revised NSP definition of foreclosed, keep adequate documentation of compliance (or inapplicability) of NSP tenant protection requirements under the Recovery Act, such as:
 - a. Information that only the former mortgagor currently occupies and/or occupied the property at the time of the notice of foreclosure (NSP Recovery Act Tenant Protections do not apply);
 - b. Copies of the tenant's lease and any notice to vacate to substantiate compliance;
 - c. Where a tenancy existed without a written lease or at will, information on the tenancy and any notice to vacate to substantiate compliance;

- d. Documentation of compliance with the NSP Recovery Act tenant protection provisions (or their inapplicability) from the ISII.
3. If the ISII will not or cannot demonstrate compliance with the NSP tenant protections under the Recovery Act, abandon the transaction.
4. If the property is still desired, and no documentation of compliance can be obtained from the ISII, perform due diligence to determine whether any *bona fide* tenant occupied the property on or before the date of the notice of foreclosure. 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 under the Recovery Act and vacated the property contrary to the NSP requirements, abandon the transaction. NSP funds cannot be used for such properties.
7. In structuring its NSP acquisition and homebuyer assistance programs, grantees should educate potential subrecipients, developers, and homebuyers (and/or their real estate agents or other representatives) on the broader implication of how the NSP program defines “foreclosed” and the NSP tenant protection requirements under the Recovery Act (as well as tenant protection requirements arising under PTFA). The grantee may also adopt other procedures designed to minimize displacement of bone fide tenants.

NOTE: There is no assurance that these steps will eliminate potential lawsuits or other liability. These steps do not address compliance with tenant protection requirements under PTFA.

Notice of Foreclosure

Consistent with the NSP Bridge Notice of June 19, 2009, the grantee’s determination whether the ISII complied with the NSP Tenant Protection requirements under the Recovery Act includes identifying the notice of foreclosure. Pursuant to Section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

Resource Links

- “Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008,” 73 FR 58339 (Oct. 6, 2008).
<http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/nspnotice.pdf>
- NSP2 Notice of Funding Availability, 74 FR 21377 (May 7, 2009).
http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/pdf/nsp2_nofa.pdf
- NSP Bridge Notice, 74 FR 29223 (June 19, 2009).
http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/pdf/nsp1_bridgenotice.pdf

- “Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property,” 74 FR 30106 (June 24, 2009). <http://www.hud.gov/offices/adm/hudclips/notices/pih/files/09-17pihn.pdf>
- Notice of Change in Definitions and Modification to Neighborhood Stabilization Program, 75 FR 18228 (Apr. 9, 2010). <http://edocket.access.gpo.gov/2010/pdf/2010-8131.pdf>
- Eligibility for URA assistance and payments must be determined in accordance with the URA statute and regulations on a case by case basis. Questions on the URA requirements should be directed to the nearest HUD Regional Relocation Specialist. See “Contacts” at www.hud.gov/Relocation.
- Bulletin published by the Office of the Comptroller of the Currency regarding PTFA, Aug. 13, 2009. <http://www.occ.treas.gov/ftp/bulletin/2009-28.html>

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

Questionnaire on Compliance with NSP Tenant Protection Requirements under the Recovery Act[‡]

(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)[§] of foreclosed^{**} residential property located at: _____
(If property became foreclosed under state, tribal or local law on or before 02/17/09, Tenant Protections under the Recovery Act do not apply.)

2. On or after the date of notice of foreclosure^{††}, was the property occupied? Yes No
(If property was NOT occupied, Tenant Protections under the Recovery Act 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 IS or WAS the current or former mortgagor, stop here. Tenant Protections under the Recovery Act 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 property^{††}? Yes No
(If ANY answer to B-D is NO, Tenant Protections under the Recovery Act 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 on or before the date of notice of foreclosure? Yes No

A. **If YES:**

[‡] Another law, the Protecting Tenants at Foreclosure Act of 2009 (PTFA), Pub. L. No. 111-22, also provides protections for tenants facing eviction as a result of foreclosure on virtually all mortgaged rental properties in the US. PTFA requirements, though similar to Recovery Act requirements in some respects, are **separate and distinct** obligations that are not affected *in any way* by the revised definition of "foreclosed" or this guidance document. PTFA may provide greater protection in certain instances. PTFA requirements, where applicable, must be fully satisfied independently of any obligations arising under the Recovery Act. HUD has published a notice in the Federal Register providing additional information on PTFA. See 74 FR 30,106 (Jun. 24, 2009). PTFA is not discussed further in this guidance document.

[§] Please note that under the NSP definition of foreclosed, as revised on April 9, 2010, ISII can now refer to a wider group of persons, including NSP program participants acquiring foreclosed properties from mortgagors through short sales.

^{**} "Foreclosed" as used in this Questionnaire, is defined under the revised NSP definition of "foreclosed."

^{††} The date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

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

- i. What was the remaining term? _____ (end date)
- ii. Has tenant vacated the property? Yes No Date tenant moved: _____
- iii. Did the ISII allow the tenant to stay until the end of the lease term? Yes No
(If YES, skip to v. If NO, answer iv.)
- iv. If ISII did not allow tenant to stay through lease term, are they selling the property to an NSP-assisted purchaser who will occupy the unit as a primary residence? Yes No
(If YES, go to v. If NO, abandon transaction; ineligible for NSP funding.)
- v. Did the ISII provide tenant at least 90 days notice to move? Yes No
When did/will that 90-day notice expire? _____
- vi. Based on these facts, did ISII comply with NSP tenant protection requirements under the Recovery Act?
 Yes No
- vii. If the ISII did not comply and the tenant is still in occupancy will the grantee assume this responsibility? Yes No

B. If NO:

- i. Has tenant vacated the property? Yes No Date tenant moved: _____
- ii. Did the ISII provide tenant at least 90 days notice to move? Yes No
When did/will that 90-day notice expire? _____
- iii. Based on these facts, did ISII comply with NSP tenant protection requirements under the Recovery Act?
 Yes No
- iv. If the ISII did not comply and the tenant is still in occupancy will the grantee assume this responsibility? Yes No

5. 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 they did not, or that the tenant protections are not applicable. If the grantee learns that the ISII did not comply with the NSP tenant protection requirements under the Recovery Act 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.

6. If the property is occupied, or was vacated for the NSP-assisted project, the grantee must also determine if the tenant occupant would be eligible as a displaced person under the URA. (Note: Owner-occupants, who are displaced as a result of voluntary acquisitions under the URA, are not generally eligible for URA relocation assistance and payments.)

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.

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 who have purchased a property at sheriff's sale have the right to evict tenants 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 on or before 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.