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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket Number FR-5335-N-01]

**PROTECTING TENANTS AT FORECLOSURE:
NOTICE OF RESPONSIBILITIES PLACED ON IMMEDIATE SUCCESSORS
IN INTEREST PURSUANT TO FORECLOSURE OF RESIDENTIAL PROPERTY**

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, and Office of Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: Through this notice, HUD seeks to ensure that individuals or entities that participate in HUD programs or with whom HUD interacts through its programs are aware of obligations imposed on immediate successors of interest in any residential property pursuant to a foreclosure to provide tenants residing in such property, including but not limited to tenants with section 8 rental assistance, with at least 90 days advance notice of the need to vacate the property, where the successor desires to have the tenants vacate. In addition, except for purchasers who will occupy the property as the primary residence, successors take their interest subject to the remaining term of any bona fide lease. These obligations are broadly imposed on immediate successors in interest by the Helping Families Save Their Homes Act of 2009. While HUD is directing this notice to entities and individuals that participate in HUD programs or with whom HUD interacts in its HUD programs (for example, approved mortgagees, approved nonprofit organizations, housing counseling agencies, and public housing agencies), these obligations are not limited to FHA-insured or HUD-assisted housing. The responsibility for meeting the new tenant protection requirements applies to all successors in interest of residential

property, regardless of whether a federally related mortgage is present. The immediate successors in interest of a residential property, which is being foreclosed, bear direct responsibility for meeting the requirements of the law. These protections are self-executing, and became effective May 20, 2009.

FOR FURTHER INFORMATION: For questions relating to FHA's Insured Housing programs, including multifamily housing, contact FHA's Resource Center at 1-800-CALL-FHA (1-800-225-5342). For questions relating to HUD's Public and Indian Housing programs, including Section 8 vouchers, contact Brian Gage, Office of Housing Voucher Management, Room 4210, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 402-4254. For both sets of contact, the applicable address is Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Persons with hearing or speech impairments may access these numbers via TDD/TTY by calling 1-877-TDD-2HUD (1-877-833-2483).

SUPPLEMENTARY INFORMATION:

I. Background

The Protecting Tenants at Foreclosure Act of 2009 (PTFA), part of the Helping Families Save Their Homes Act of 2009 (Public Law 111-22, approved May 20, 2009), requires that tenants residing in foreclosed residential properties be provided notice to vacate at least 90 days in advance of the date by which the immediate successor, generally, the purchaser, seeks to have the tenants vacate the property. Except where the purchaser will occupy the property as the primary residence, the term of any bona fide lease also remains in effect.

With the unprecedented number of foreclosures occurring across the country, it became increasingly evident that not only were homeowners the victims of the downturn in the economy, but tenants residing in residential properties were also victims of the foreclosure crisis. All too

often, tenants were caught unaware that the residential property in which they reside was being foreclosed and were given little notice of the need to vacate the property. The objective of these new tenant protections is to ensure that tenants receive appropriate notice of foreclosure and are not abruptly displaced.

PFTA Sections 702 and 703 define the scope of PFTA's coverage over residential properties. The Section 702 requirements to provide tenants with at least 90 days advance notice to vacate and to preserve the term of any bona fide lease apply to foreclosures on all federally-related mortgage loans *or* on any dwelling or residential real property. Section 703 makes conforming changes consistent with the section 702 requirements to the Section 8 rental voucher assistance provisions of the United States Housing Act of 1937 (1937 Act). Both Section 702 and Section 703 sunset on December 31, 2012.

The American Recovery and Reinvestment Act of 2009 (Public Law 111-5, approved February 17, 2009) (Recovery Act) contains similar tenant protections under the heading "Community Development Fund" in Title XII of Division A, which applies to emergency assistance funding provided for the Neighborhood Stabilization Program. The requirement to comply with these protections was included in the funding allocation documents for the Neighborhood Stabilization Program and is not further discussed in this notice.

This notice provides an overview of these tenant protections provisions, addresses their applicability to HUD programs, provides basic guidance, and advises where HUD program participants and other interested parties may find more detailed guidance directed to their programs.

II. The Tenant Protections of Section 702

A. Overview of Section 702

The coverage of Section 702 is very broad. Section 702 applies, commencing after May 20, 2009, the date of enactment, to “any foreclosure” on (1) a federally related mortgage loan, *or* (2) any dwelling or residential real property. Section 702 provides that “federally-related mortgage loan” has the same meaning as that provided in section 3 of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2602).

The definition of federally-related mortgage loan is very broad in RESPA, but federally related mortgage loans represent only part of Section 702’s coverage. Section 702 also covers “any dwelling or residential property,” which extends the requirements to all residential property foreclosures, regardless of type or entity involved in the foreclosure, and regardless of whether the tenants are recipients of any type of housing assistance.

The tenants to whom the notice must be provided must be bona-fide tenants as this term is defined in Section 702(b). Section 702(b) defines bona fide lease or tenancy, and under this definition, bona fide tenants do not include the mortgagor or the child, spouse or parent of the mortgagor. (See 702(b)(1).) With respect to the lease, Section 702(b)(2) and (3) provide that a bona fide lease or tenancy must have been the result of an arms-length transaction, *and* the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit’s rent is reduced or subsidized due to a federal, state, or local subsidy. Section 702(a)(2)(B) clarifies that the protections provided by this new law are minimum protections and do not supersede any greater protections (longer advance notice or additional protections) provided by state or local law.

Accordingly, the requirement of Section 702 to provide at least 90 days notice to tenants

applies as follows:

- (1) The advance notice applies to tenants in any foreclosed dwelling or residential real property, regardless of the type of loan or other security interest on the property.
- (2) An advance notice of 90 days is the minimum period of notification. A longer period may be provided, for example, if greater protections are provided by state or local law.
- (3) Responsibility for providing the advance notice to tenants falls on the immediate successor in interest of the property, which will generally be the purchaser.
- (4) The notice must be given to anyone who, as of the date of the notice of foreclosure, is a bona fide tenant, whether or not there is a lease.

In addition, Section 702 provides that a tenant under any bona fide lease entered into before the notice of foreclosure has the right to occupy the premises until the end of the remaining term of the lease. The only exception to preserving the remaining term of the lease is for a purchaser who will occupy the unit as a primary residence. Even under this exception, however, the tenant must still be provided with the 90-day advance notice to vacate.

A lease or tenancy must meet the following requirements to be “bona fide” for purposes of Section 702:

- (1) the tenant cannot be the mortgagor or the child, spouse, or parent of the mortgagor,
- (2) the lease or tenancy must be the result of an arms-length transaction, and
- (3) the rent required under the lease cannot be substantially less than fair market

rent for the property or the rent is subsidized by a federal, state or local subsidy.

B. FHA-Insured Single Family and Multifamily Housing Programs, and Housing Counselors.

The Office of Housing will be providing additional guidance for its programs in an effort to ensure that, to the extent foreclosures involve FHA-insured or formerly FHA-insured mortgages, the requirements of PFTA are observed. Although terminations of tenancies are not usually sought immediately after foreclosure on HUD multifamily projects, prospective purchasers of multifamily properties in HUD's programs should nevertheless be aware that the Section 702 protections apply if, in fact, the immediate successor after a foreclosure wishes the tenants to vacate. HUD will include in its Invitation to Bid on multifamily foreclosures a reminder of the tenant protections that need to be followed if the new owner desires tenants to vacate the property.

III. The Tenant Protections of Section 703.

A. Overview of Section 703

Section 703 of PFTA addresses residential housing in which tenants who receive section 8 rental voucher assistance reside. The protections provided to tenants in Section 703 are not in lieu of the protections of Section 702 (the two statutory sections are not exclusive of one another) but rather Section 703 makes conforming changes to the United States Housing Act of 1937 (1937 Act) to provide PFTA coverage for the leases and housing assistance payments contracts applicable for tenants receiving section 8 rental voucher assistance.

Section 8(o)(7) of the 1937 Act (42 U.S.C. 1437f(o)(7)) provides that each housing assistance payment (HAP) contract entered into by the public housing agency and the owner of a dwelling unit shall provide, among other things that, during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of

the lease, for violation of applicable federal, state, or local law, or for other good cause, and that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking shall not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and shall not be good cause for terminating the tenancy or occupancy rights of the victim of such violence.

To these existing tenant protections, Section 703 provides that the HAP contract shall further provide that in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease, vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner:

(1) will occupy the unit as a primary residence, and

(2) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice;

Section 8(o)(7) of the 1937 Act is further amended by Section 703 to provide that the successor in interest in the case of any foreclosure of a property in which a voucher recipient resides assumes the interest in the property subject to the lease and HAP contract in place before the foreclosure. This provision confirms that the section 8 tenant's lease is, in effect, a bona fide lease and that the HAP contract survives the foreclosure, just as the lease does. Similar to Section 702, the provisions of Section 703 shall not affect any state or local law that provides additional time frames or protections for tenants.

B. Participants in HUD's Section 8 Voucher Programs.

Immediate successor owners of foreclosed properties in which section 8 voucher recipients reside become participants in HUD's Section 8(o) tenant-based voucher programs and

must comply with Sections 702 and 703. The following requirements apply to such foreclosed properties as long as the immediate successor in interest retains the interest and until the sunset date of the PTFA, December 31, 2012.

- A demand upon the section 8 voucher recipient to vacate the property prior to a sale of the property shall not constitute “other good cause” as meant in HUD’s regulations on termination of tenancy (24 CFR 982.310), except that:
 - The owner may terminate the tenancy effective on the date of the transfer to the owner if the owner:
 - Will occupy the unit as a primary residence; and
 - Has provided the tenant with a notice to vacate at least 90 days before the effective date of such notice.

C. Public Housing Agencies (PHAs).

With respect to PHAs, a PHA, after foreclosure, provides payments under the HAP contract to the new owner for the remaining term of the HAP contract, subject to the exception for an owner who will occupy the unit as a primary residence. In the case of the owner/occupant, the HAP contract would continue for the required notice period. The new owner also takes subject to the existing lease, which can only be terminated as described in this section.

The Office of Public and Indian Housing will be providing additional guidance as PHAs may need to help ensure that the requirements of Section 703 are carried out where applicable.

IV. Additional Guidance

As noted earlier in this notice, HUD will provide additional guidance as may be necessary to help ensure that the requirements of Sections 702 and 703.

Date: June 18, 2009

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Brian D. Montgomery, Assistant Secretary for Housing—
Federal Housing Commissioner

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Paula O. Blunt, General Deputy Assistant Secretary for
Public and Indian Housing