

February 17, 2011

Rules Docket Clerk
Room 5218
Department of Housing and Urban Development
Washington, DC 20410

PETITION FOR RULEMAKING
PETITION TO AMEND 24 C.F.R. § 203.675

Pursuant to the Department of Housing and Urban Development 's (HUD's) Petition for Rulemaking procedure,¹ The National Housing Law Project,² the National Low Income Housing Coalition,³ the National Law Center on Homelessness & Poverty⁴, and the Housing Justice Network submit this Petition to Amend 24 C.F.R. § 203.675.

Purpose

The purpose of this petition is to ensure that rights guaranteed by the Protecting Tenants at Foreclosure Act (PTFA), Public Law 111-22 and Public Law 111-203, are provided to tenants of properties with HUD-insured mortgages that are conveyed to HUD post-foreclosure. To do so, HUD must amend 24 C.F.R. § 203.675 - Notice to occupants of pending acquisition – to bring it into compliance with the PTFA.

Background Information

Congressional Authorization for HUD's Occupied Conveyance Notice

Congress authorized HUD to insure single-family mortgages.⁵ In addition, Congress gave the Secretary of HUD (Secretary) authority to make rules and regulations necessary for the HUD mortgage insurance program.⁶ Finally, the Secretary has Congressional authority to delegate his duties to officers and employees of the Department as may be necessary or desirable.⁷

In creating the mortgage insurance program, Congress authorized the Secretary to accept the assignment of an insured mortgage in order to make a payment on the insurance

¹ 24 C.F.R. § 10.20, as authorized by the Administrative Procedures Act (5 U.S.C. 553(e)).

² 727 Fifteenth Street, NW, 6th Floor, Washington, DC 20005; Phone: (202) 347-8775; Fax: (202) 347-8776; contact person: David T. Rammler

³ 727 Fifteenth Street, NW, 6th Floor, Washington, DC 20005; 202-662-1530; contact info/person: Linda Couch, 202-662-1530, ext. 228

⁴ 1400 K Street, NW, Suite 1400, Washington, DC 20005; Phone: (202) 638-2535; Fax: (202) 628-2737; contact person: Jeremy Rosen

⁵ 12 U.S.C. 1709.

⁶ 12 U.S.C. 1715b.

⁷ 42 U.S.C. 3535d.

claim.⁸ One way that a mortgagee can make a claim on a HUD -insured mortgage is for the mortgagee to foreclose on the property and then convey the property to HUD.⁹ Pursuant to this authority, HUD promulgated 24 C.F.R. § 203.675 as part of the process mortgagees must follow in order to convey a property to HUD and make an insurance claim on a HUD -insured mortgage.

The occupied conveyance policy, which requires that properties conveyed from insured foreclosing mortgagees to HUD be vacant before the agency will pay on a claim, is a HUD policy, not a statutory requirement. HUD may therefore revise the occupied conveyance policy without new Congressional authorization.

Protecting Tenants at Foreclosure Act

The Protecting Tenants at Foreclosure Act (PTFA) was passed as Title VII of the Helping Families Save Their Homes Act, Public Law 111-22 (May 20, 2009) and was clarified and extended by § 1484 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (July 21, 2010). Congress passed the PTFA as a way to protect tenants who were suffering evictions because the owner of the property they were renting defaulted on a mortgage and the mortgagee foreclosed.¹⁰

The PTFA requires that any entity (including a bank) that acquires title to a property through foreclosure (the immediate successor in interest) must honor the terms of any existing bona fide lease entered into before the complete transfer of title.¹¹ In addition, the immediate successor in interest must provide a 90-day notice to vacate to any bona fide tenant.¹² The foreclosing mortgagee cannot send a valid 90-day notice to vacate until it has acquired complete title to the property.¹³ Therefore, tenants have guaranteed occupancy rights in the property they are renting for a minimum of 90 days after the full transfer of title pursuant to a foreclosure.

HUD's Response to the PTFA Compliance Issue

After repeated communication and two meetings between HUD and petitioners over six months, HUD released a published guidance for FHA-approved mortgagees clarifying

⁸ 12 U.S.C. 1715u.

⁹ 12 U.S.C. 1710.

¹⁰ Senator Kerry, Congressional Record Page: S5110 (5/5/09).

¹¹ Pub. L. 111-22 (May 20, 2009), tit VII, as clarified and extended by § 1484 of Pub. L. 111-203 (July 21, 2010). Available at <http://nhlp.org/files/Public%20Law%20111-22%20title%20VII%20as%20amended1%20final.pdf>. The PTFA does make an exception to this requirement for new owners who will occupy the property as their primary residence. This exception does not apply in the context of occupied conveyance, as the immediate successors in interest are banks that cannot use the property as their primary residence.

¹² *Id.*

¹³ *Id.*

that mortgagees must comply with all state, local, and federal laws governing eviction proceedings, including the PTFA.¹⁴ The guidance also reassures mortgagees that under the occupied conveyance policy requirement that the mortgagees pursue possession of the property with reasonable diligence, the time needed to comply with the PTFA is automatically included in the definition of reasonable diligence.¹⁵ The guidance does not alter, in any way, information that must be provided to occupants of the subject residential property.

Proposed Changes to 24 C.F.R. § 203.675

Current Language

24 C.F.R. § 203.675 currently provides:

(a) At least 60 days, but not more than 90 days, before the date on which the mortgagee reasonably expects to acquire title to the property, the mortgagee shall notify the mortgagor and each head of household who is actually occupying a unit of the property of its potential acquisition by HUD. The mortgagee shall send a copy of this notification to the appropriate HUD Field Office.

(b) The notice shall provide a brief summary of the conditions under which continued occupancy is permissible and advise them that: (1) Potential acquisition of the property by the Secretary is pending; (2) The Secretary requires that properties be vacant at the time of conveyance to the Secretary, unless the mortgagor or other occupant can meet the conditions for continued occupancy in 203.670, the habitability criteria in 203.673, and the eligibility criteria in 203.674; (3) An occupant may request permission to remain in occupancy in the event of acquisition of the property by the Secretary by notifying the HUD Field Office in writing, with any required documentation, within 20 days of the date of the mortgagee's notice to the occupant; (4) If an occupant seeks to qualify for continued occupancy under the illness or injury provisions of 203.674(a), the occupant shall provide to the HUD Field Office, at the time of the occupant's request for permission to remain in occupancy, documentation to support this claim. Documentation shall include an estimate of the time when the patient could be moved without severely aggravating the illness or injury, and a statement by a State-certified physician establishing the validity of the occupant's claim. HUD may require more than one medical opinion or may arrange an examination by a physician approved by HUD; and (5) If an occupant fails to make a timely request, the property must be vacated before the scheduled time of acquisition. (Approved by the Office of Management and Budget under control number 2502 0268) [53 FR 875, Jan. 14, 1988, and 53 FR 8626, Mar. 16, 1988, as amended at 58 FR 54246, Oct. 20, 1993].

¹⁴ Protecting Tenants at Foreclosure Act: Guidance on Notification Responsibilities Under the Act With Respect to Occupied Conveyance. 75 Fed. Reg. 66,385, 66,386 (October 28, 2010).

¹⁵ *Id.*

Proposed Changes

Petitioners propose the following amendments to 24 C.F.R. § 203.675 (amendments highlighted in ***bold and italics***):

(a) At least 60 days, but not more than 90 days, before the date on which the mortgagee reasonably expects to acquire title to the property, the mortgagee shall notify the mortgagor and each head of household who is actually occupying a unit of the property of its potential acquisition by HUD. The mortgagee shall send a copy of this notification to the appropriate HUD Field Office.

(b) The notice shall provide a brief summary of the conditions under which continued occupancy is permissible and advise them that: (1) ***The Protecting Tenants at Foreclosure Act (PTFA, which was passed as Title VII of the Helping Families Save Their Homes Act, Public Law 111-22 (May 20, 2009) and was clarified and extended by § 1484 of Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (July 21, 2010)) requires that any entity (including a bank) that acquires title to a property through foreclosure must honor the terms of any existing bona fide lease entered into before the complete transfer of title to such successor in interest. In addition, the immediate successor in interest must provide a 90-day notice to vacate to any bona fide tenant. The new owner cannot send a valid 90-day notice to vacate until it has acquired complete title to the property. Therefore, tenants have guaranteed occupancy rights in the property they are renting for a minimum of 90 days after the full transfer of title pursuant to a foreclosure;*** (2) ***In addition to the protections under the PTFA, tenants may have rights under state and local law to continue occupying the unit;*** (3) ***federal, state, and local laws protecting occupancy are not dependent on the occupant meeting the conditions for continued occupancy in 203.670, the habitability criteria in 203.673, or the eligibility criteria in 203.674;*** (4) ***occupants should contact their local legal services provider or another attorney for more information;*** (5) Potential acquisition of the property by the Secretary is pending; (6) The Secretary requires that, ***subject to federal, state and local laws protecting occupancy***, properties be vacant at the time of conveyance to the Secretary, unless the mortgagor or other occupant can meet the conditions for continued occupancy in 203.670, the habitability criteria in 203.673, and the eligibility criteria in 203.674; (7) An occupant may request permission to remain in occupancy ***beyond the notice period required by federal, state and local laws*** in the event of acquisition of the property by the Secretary by notifying the HUD Field Office in writing, with any required documentation, within 20 days of the date of the mortgagee's notice to the occupant; (8) If an occupant seeks to qualify for continued occupancy under the illness or injury provisions of 203.674(a), the occupant shall provide to the HUD Field Office, at the time of the occupant's request for permission to remain in occupancy, documentation to support this claim. Documentation shall include an estimate of the time when the patient could be moved without severely aggravating the illness or injury, and a statement by a State-certified physician establishing the validity of the

occupant's claim. HUD may require more than one medical opinion or may arrange an examination by a physician approved by HUD; and (9) If an occupant fails to make a timely request under (7) above, the property must be vacated ***in accordance with all federal, state and local laws protecting occupancy*** before the scheduled time of acquisition.

Reasons for Amendment/Public Interest

The changes to 24 C.F.R. § 203.675 are proposed by the National Housing Law Project, the National Low-Income Housing Coalition, the National Law Center on Homelessness & Poverty, and the Housing Justice Network to ensure that the public interest in providing tenants with accurate information about their rights is upheld and that tenants do not lose their homes prematurely as a result of a HUD-required notice.

The National Housing Law Project (NHLP) is a charitable nonprofit national housing law and advocacy center. NHLP provides legal assistance, advice and housing expertise to attorneys, paralegals and tenant leaders nationwide to advance housing justice for low-income people. NHLP consults and works in coalition with advocacy groups, other intermediaries, and policymakers. Since 1968 NHLP has worked extensively on innumerable housing justice issues under all of the major federal affordable housing programs.¹⁶

The National Low-Income Housing Coalition (NLIHC) is a membership organization whose members include residents of public and assisted housing and their organizations, state and local housing coalitions, nonprofit housing providers, homeless service providers, fair housing organizations, housing researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. NLIHC focuses exclusively on what is in the best interests of people who receive and those who are in need of federal housing assistance.

The National Law Center on Homelessness & Poverty (the Law Center) was founded in 1989 as the legal arm of the nationwide movement to prevent and end homelessness. The Law Center is the only national legal advocacy organization dedicated to preventing and ending homelessness, and addresses the root causes of homelessness through impact litigation, policy advocacy, and public education at the local, state and national levels.

The Housing Justice Network (HJN) is a nationwide membership organization of over one thousand housing, legal services and civil rights advocates and attorneys.¹⁷

NHLP, NLIHC, the Law Center and HJN are dedicated to ensuring that tenants in foreclosed properties know their rights and are supported in asserting those rights. It is, therefore, of great interest to all of these organizations that tenants in foreclosed properties are not misled about their rights. Since there are a significant number of tenants

¹⁶ See <http://nhlp.org/aboutnhlp>.

¹⁷ See <http://nhlp.org/housingnetwork>.

living in FHA-insured properties who may be misled by the notice required by 24 C.F.R. 203.675, the petitioners are working to change HUD's occupied conveyance notice to ensure that tenants are not unknowingly forfeiting their rights under the PTFA.

HUD's rules for the notice to occupants of pending acquisition are misleading and fail to inform occupants of their rights guaranteed by the PTFA in the following ways:

1. The current rule requires the mortgagee to inform tenants that "potential acquisition of the property by the Secretary is pending" and that "[t]he Secretary requires that properties be vacant at the time of conveyance to the Secretary, unless the mortgagor or other occupant can meet the conditions for continued occupancy...." A tenant reading this notice could easily be led to believe that his or her continued occupancy in the unit shortly after the mortgagee acquires title will be conditioned on HUD's approval. This is contrary to the guarantee secured by the PTFA that the tenant can continue to occupy the property until the term of their lease expires and the successor to the mortgagor, in this case either the mortgagee or thereafter HUD, provides the tenant with a 90-day notice to vacate.
2. The rule requires that mortgagees send the notification 60-90 days before the mortgagee believes it will acquire title. At that time the mortgagee is only a potential successor in interest. Under the PTFA, the 90-day notice to vacate must be sent by the actual successor in interest once it has acquired complete title to the property. Mortgagees and tenants who may not understand that distinction may mistakenly believe that the mortgagee's notification complies with the PTFA's 90-day notice to vacate requirement, resulting in tenants moving out of properties before they would be required to move under the PTFA.
3. The rule does not currently require the mortgagee to provide occupants with information about the PTFA or to explain that even though HUD will probably become the owner of the property, the tenants may be protected by the PTFA and by other applicable state, local or federal laws.
4. The rule does not require that the insured mortgagee inform the tenant that the mortgagee may delay the transfer to HUD until the mortgagee has complied with the PTFA and allowed the tenant to continue to occupy the property under the rights established by the PTFA.
5. By couching its notice as defining the tenant's right to continued occupancy, but not providing information about tenants' rights under the PTFA and state and local law, HUD misleads a reasonable occupant to wrongly conclude that the only option for continued occupancy is set forth in the notice.
6. Although HUD's published guidance provides clarification for mortgagees as to their responsibilities under the PTFA, the guidance does not assist tenants residing in a property that is going through occupied conveyance. Tenants still receive the notification that misleads and misinforms them regarding their rights to continued occupancy. Even though the guidance may prevent mortgagees from affirmatively trying to evict the tenants, the wording of the notification will lead tenants to believe they have no choice but to leave.

This misinformation affects a significant number of households. In September 2010, HUD reported a total of 99,653 conveyance claims on single-family insured mortgages during FY 2010 (up 42.8% from FY 2009).¹⁸ The problem is only expected to get worse, since in September 2010, HUD stated that, based on the then current new 90-day delinquency rates and foreclosure starts, the number of conveyance claims will peak in the third or fourth quarter of FY 2011.¹⁹

These proposed amendments eliminate the misinformation that HUD now requires insured, foreclosing mortgagees to give to tenants of insured residences. The proposed amendments resolve inconsistencies between the HUD occupied conveyance notice and the PTFA by providing tenants with information about their rights to continue occupying the property under the PTFA.

The proposed amendments require corresponding changes to Chapter 9 and Appendix 40 of Handbook 4330.1 REV-5, "Administration of Insured Home Mortgages" and of Chapter 2 and Appendix 1 of Handbook 4310.5 REV-2, "Property Disposition" and associated notices. A proposed amended Appendix notice is attached and incorporated into this Petition to that end.

The proposed amendments also require a clarification that criteria for 'residential areas' (24 C.F.R. §203.672), 'habitability' (24 C.F.R. §203.673), and the 'eligibility for continued occupancy' criteria (24 C.F.R. §203.672) are not applicable if HUD accepts conveyance of a property occupied by a tenant protected by the PTFA or state or local laws.

In order to prevent further harm to tenants, petitioners request that HUD respond to this Petition for Rulemaking by March 25, 2011.

Respectfully submitted,



David T. Rammler,
Director of Government Relations

cc via email to:

Shaun Donovan, Secretary of the Department of Housing and Urban Development
David H. Stevens, Ass't Secretary for Housing and Commissioner of the Federal Housing Administration
Helen R. Kanovsky, General Counsel of the Department of Housing and Urban Development
Camille Acevedo, Associate General Counsel, Office of Legislation and Regulations

¹⁸ FHA Single Family Outlook – September 2010 at <http://www.hud.gov/offices/hsg/rmra/oe/rpts/ooe/ol2010.pdf>. There is no hard data on what number of these properties is wholly or partially tenant occupied.

¹⁹ Quarterly Report to Congress on FHA Single-Family Mutual Mortgage Insurance Funds Program – 2010 Quarter 4 at http://www.hud.gov/offices/hsg/rmra/oe/rpts/rtc/fhartc_q4_2010.pdf.