



July 8, 2022

Submitted via email: Rural_housing@smith.senate.gov

The Honorable Tina Smith
Chair
Subcommittee on Housing, Transportation,
and Community Development
Committee on Banking
534 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Mike Rounds
Ranking Member
Subcommittee on Housing, Transportation,
and Community Development
Committee on Banking
534 Dirksen Senate Office Building
Washington, DC 20510

Dear Madam Chair and Ranking Member:

Thank you for this opportunity to recommend improvements to the U.S. Department of Agriculture (USDA) Rural Housing Service (RHS) programs so that they better serve rural communities. We submit these comments with regard to USDA's Multifamily Housing Programs (MFH).

The National Housing Law Project's mission is to advance housing justice for people living in poverty and their communities. NHLP achieves this by strengthening and enforcing the rights of tenants and increasing housing opportunities for underserved communities. Our organization also provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 1,900 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and residents' rights for low-income families across the country, including in rural communities.

The National Low Income Housing Coalition (NLIHC) is dedicated solely to achieving racially and socially equitable public policy that ensures people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice. Our members include state and local housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on policy and funding improvements for extremely low-income people who receive and those who need federal housing assistance.

I. Improving Protections for Tenants

We are concerned that tenants in the USDA Rural Development (RD) housing programs are frequently treated as an afterthought and their statutory rights and interests are routinely discounted or ignored. We believe that there are a number of opportunities to improve the administration of the RD programs to ensure that residents, who are the intended primary beneficiaries of these programs, are treated fairly and are protected against the loss of their homes. Specifically, we recommend improving tenant protections as follows:

A. Develop an agency lease or lease addendum that enumerates minimum tenants' rights in the program as provided by 7 C.F.R. § 3560.156.

The current RD regulations enumerate the minimum rights for tenants participating in the Section 515, 514/516 and 521 programs. 7 C.F.R. § 3560.156. In reviewing leases for RD residents across the country, we have repeatedly observed examples of leases, which were created by the borrowers, that do not comply with current program requirements. As such, there is a need for the Agency to adopt a standard lease or lease addendum for MFH programs that includes all of the rights that are currently in the model lease, which includes that the lease:

- Is in writing and, in areas with a concentration of non-English speaking populations, leases (including the occupancy rules) must be available in both English and the non-English language;
- Is for a 1-year term, including both initial leases and lease renewals;
- Cannot be terminated except for good-cause and must provide residents written notice of the violations and the right to cure the violations; thereafter, termination may only occur when the incidences related to the termination are documented and there is documentation that the tenant was given notice prior to the initiation of the termination action that their activities would result in occupancy termination;
- Contain the procedures for resolution of tenant grievances consistent with the requirements of 7 C.F.R. § 3560.160;
- Give residents ten days to pay the rent and cap the late fee amount;
- Give the address of the management agent to which tenants may direct complaints;
- Include a statement of the terms and conditions for modifying the lease;
- Include a statement that the housing project is financed by the Agency
- State that the housing project is subject to (i) Title VI of the Civil Rights Act of 1964; (ii) Title VIII of the Fair Housing Act; (iii) Section 504 of the Rehabilitation Act of 1973; (iv) The Age Discrimination Act of 1975; and (v) The Violence Against Women Reauthorization Act of 2022 and any amendments thereto;
- Establish the tenant's responsibility to move to the next available appropriately sized rental unit if the household becomes over housed or under housed in the unit they occupy;

- Establish when a guest will be considered a member of the household and be required to be added to the tenant certification;
- State that the tenancy continues until the tenant's possessions are removed from the housing either voluntarily or by legal means, subject to state and local law;
- State that tenants who are no longer eligible for occupancy under the housing project's occupancy rules or do not meet the criteria set forth in § 3560.155(c) and (e) must vacate the property within 30 days of being notified by the borrower that they are no longer eligible for occupancy or at the expiration of their lease, or whichever is greater, unless the conditions cited in § 3560.158(c) exist;
- For rental units receiving rental assistance, include clauses that specify that the tenant's monthly tenant contribution and a description of the circumstances under which the tenant's contribution may change;
- Include a requirement that tenants notify borrowers when changes occur in their income or assets, their qualifications for adjustments to income, their citizenship status, or the number of persons living in the unit;
- Contain the amount and due date of monthly tenant contributions, any late payment penalties, and security deposit amounts;
- Contain the utilities, services, and equipment to be provided for the tenant;
- Contain the tenant's utility payment responsibility;
- Contain the certification process for determining tenant occupancy eligibility and contribution;
- Contain the agreement of the borrower to accept the tenant contribution toward rent charges prior to payment of other charges that the tenant owes and a statement that borrowers may seek legal remedy for collecting other charges accrued by the tenant;
- Contain the maintenance responsibilities of the borrower in buildings and common areas, according to state and local codes, Agency regulations, and Federal fair housing requirements;
- Contain the responsibility of the borrowers at move-in and move-out to provide the tenant with a written statement of the rental unit's condition and provisions for tenant participation in inspection;
- Contain the provision for periodic inspections by the borrower and other circumstances under which the borrower may enter the premises while a tenant is renting;
- Contain a provision regarding transfer of the lease if the housing project is sold to an Agency-approved buyer;
- Contain the procedures that must be followed by the borrower and the tenant in giving notices required under terms of the lease including lease violation notices;
- Contain the disposition of the lease if the housing project becomes uninhabitable due to fire or other disaster, including rights of the borrower to repair the building or terminate the lease; and
- Contain the terms under which a tenant may, for good cause, terminate their lease, with 30 days notice, prior to lease expiration.

B. Extend the same tenant protections to the 538 program that exist for the 514 and 515 programs as required by 42 U.S.C. § 1490p-2(n). When Congress approved the Section 538 program, it directed the agency to extend the same tenant protections to residents of the program as are extended to residents of the Section 514 and 515 programs. 42 U.S.C. § 1490p-2(n). RD regulations, however, only extend the tenant grievance and appeals process to residents in Section 538 housing. 7 C.F.R. § 3565.351(c). Critically, it omits the good cause for eviction standard that is extended to RD Section 514 and 515 residents, 7 C.F.R. § 3560.159(a)(2). Even prior to HUD and RD having adopted the standard, this good cause standard had long been recognized by the courts as applicable to all federally financed and guaranteed rental housing. RD should take steps to immediately extend good cause protections to Section 538 housing, particularly since a very large percentage of the housing is also financed under the Low Income Housing Tax Credit program, which requires good cause to evict. Since the right to good cause is well-established, RD should take immediate steps to advise Section 538 owners that good cause to evict is a federal requirement that is also applicable to the program. Moreover, RD should also extend the following Section 515 protections to Section 538 residents: automatic lease renewals, late payment protections, the right to receive notice of lease violations and the right to cure those violations prior to the commencement of an eviction action.

C. Collect and publish data detailing who is served by the Section 538 guaranteed multifamily loan program. RD publishes an extremely informative Multi-Family Housing Annual Fair Housing Occupancy Report that provides a detailed look at who is residing in Section 514 and 515 properties. The report should be expanded to include data on residents in Section 538 properties, which is currently the largest MFH program funded by RD. Moreover, the report should be expanded to include data about applicants to all RD multifamily housing so that RD and the public can analyze whether racial and ethnic disparities admission practices exist in these programs. Gathering and analyzing this data is necessary not only to affirmatively further fair housing, but also to address historic racial and ethnic inequities in RD's multifamily housing programs.

II. Preserving and increasing the affordable rental housing stock

The quickly rising cost of housing has been particularly devastating to low-income individuals and families who are completely priced out of many housing markets. In rural communities, the rental housing provided by USDA's Rural Housing Service has been a critical source of housing, especially as it is often the only source of stable, safe, decent housing. However, the stability of the Section 515 rental housing stock is at risk due to maturing mortgages and prepayments.

According to a 2018 GAO report, between 2028 and 2050, “over 90% of RHS’s assisted multifamily properties and units could exit the program via loan maturation or prepayment.”¹ Similarly, a March 2022 study published by the Housing Assistance Council found that “921 Section 515 properties left the portfolio between 2016 and July 2021 – nearly three times the original USDA projection for maturing mortgages alone during the five-year period.”² In the last year, 108 Section 515 properties left the portfolio.³ In addition, HAC also found that close to 40 percent of the properties in the 515 portfolio have prepayment rights that would allow them to exit the program early. As such, we recommend several strategies to address this impending crisis:

- A. **Increased funding to support both new construction and preservation of existing units.** As discussed in more detail in the Rural Preservation Working Group’s Priorities for Preserving Affordable Rural Housing (attached), we recommend the following annual appropriation amounts: \$1 billion for USDA’s Multifamily Housing Preservation & Revitalization Demonstration (MPR) program, \$200 million for USDA Section 515, including new construction, and \$350 million above the level needed for renewals to extend USDA Section 521 rental assistance to all currently unassisted households.

- B. **Amend Section 542 to make the operation of the voucher demonstration program permanent.** In doing so, the subsidy extended to voucher holders must be adjusted in the same manner that the HUD Housing Choice Vouchers are adjusted as rents increase or household income increases or decreases. Also, it is imperative that the voucher covers the cost of utilities by including a utility allowance in cases where the tenants are paying part or all of their utilities. Currently, the utility costs are not covered by the subsidy.

- C. **Preclude RD from issuing vouchers to residents remaining in prepaid properties.** Congress enacted the Emergency Low Income Housing Preservation Act (ELIHPA) to stop the displacement of rural residents living in USDA-financed developments that were exiting the program through prepayments.⁴ As amended, ELIHPA imposes prepayment restrictions on properties financed prior to December 14, 1989.⁵ Under ELIHPA’s prepayment restrictions, owners are still permitted to prepay their loans. If RD determines that the prepayment does not have an adverse impact on minority housing opportunities, but there is no alternative affordable housing in the community, the

¹ U.S. Gov’t Accountability Off., GAO-18-285, Rural Housing Service: Better Data Controls, Planning, and Additional Options Could Help Preserve Affordable Rental Units (May 17, 2018), <https://www.gao.gov/products/gao-18-285>.

² Housing Assistance Council, Rural America is Losing Affordable Rental Housing At An Alarming Rate, Rural Research Brief (March 2, 2022), https://ruralhome.org/wp-content/uploads/2022/03/rural_research_brief_usda_rural_rental_housing.pdf.

³ USDA Rural Development, Results of the 2021 Multi-Family Housing Annual Fair Housing Occupancy Report (May 12, 2022), https://www.rd.usda.gov/sites/default/files/RDUL-MFHreport_0.pdf.

⁴ 12 U.S.C. § 1715l note, Pub. L. 100-242 (1988), § 202 (b)(1) & (2).

⁵ For properties financed after December 14, 1989, Congress placed use restrictions and prepayment restrictions for the full term of the loan.

owners may prepay the loan subject to use restrictions. These use restrictions are intended to protect the residents of the property as of the date of prepayment.⁶

The intent of imposing the use restrictions was to discourage prepayments. By allowing the owner to exit the portfolio early subject to use restrictions, the owner is expected to subsidize the rent of the remaining tenants as a condition of being allowed to exit the program early.⁷ By providing vouchers, there's no financial risk to the owner, and therefore no incentive to stay in the program. Instead, providing vouchers creates an incentive for owners to prepay.

Moreover, this policy of issuing vouchers to residents in properties that prepay subject to use restrictions is contrary to Congress' intent. Congress did not intend to modify the effect of ELIHPA's use restrictions by the creation of the voucher program. The FY 2006 Conference Report language states in relevant part that:

The conference agreement provides adequate funding for vouchers as a safety net to prevent the displacement of low-income rural tenants that currently reside in section 515 projects that are subject to prepayment or foreclosure of their existing loans. The conference agreement does not alter prepayment restrictions or intend for vouchers to be used in a property that would not be eligible or able to prepay without the use of such voucher.

This language means that there was an intent not to issue vouchers to prepaying properties with use restrictions. By ignoring Congress' intent, the Agency's practice of issuing vouchers to residents remaining in prepaid properties has resulted in three times as many properties as USDA projected exiting the portfolio through prepayments over the past 5 years.⁸

D. Instruct RD to correctly apply the material impact on minorities factor under

ELIHPA. As noted above, under ELIHPA and its corresponding regulations, before RD can accept prepayment of a 515 mortgage, it "shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low-income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed." 42 U.S.C. § 1472(c)(4)(A). However, RD is not offering those incentives despite this statutory requirement.

Moreover, if the owner rejects incentives, RD must determine, through a Civil Rights Impact Analysis, if minority housing opportunities are "materially affected" (42 U.S.C. § 1472(c)(5)(G)(ii)). If minority housing opportunities are materially affected by the prepayment, the owner must offer to sell the development to a nonprofit or public agency for a term of 180 days.

However, RD has unlawfully elevated this standard by requiring a disproportionate adverse impact on minorities rather than a material impact. 7 C.F.R.

⁶ 42 U.S.C. § 1472(c)(5)(G)(ii) (2022).

⁷ 42 U.S.C. § 1472(c) (2022).

⁸ Housing Assistance Council, Rural America is Losing Affordable Rental Housing At An Alarming Rate, Rural Research Brief (March 2, 2022), https://ruralhome.org/wp-content/uploads/2022/03/rural_research_brief_usda_rural_rental_housing.pdf.

§3560. 658(b)). These regulations were challenged in *McFalls v. Purdue*, 3:16-cv-02116 (D. Or. Filed Nov. 4, 2016) but the challenged regulations remain in effect. *McFalls*, 2018 WL 785866 (D. Or. Feb. 8, 2018) (denying USDA's motion to dismiss on the basis that the agency's application of the statutory "material effect" standard after litigation was commenced did not moot the controversy because the challenged regulation that caused the initial violation had not changed and thus a violation was capable of repetition). The elevated standard is not only contrary to the law, but it also acts contrary to Congress' intent to protect affordable rural housing opportunities for minority households, regardless of whether or not there is an adverse disparate impact. It is imperative that RD take active and immediate steps to align its regulations and implementing policies with its civil rights obligations under ELIHPA.

- E. **Authorize decoupling Section 521 Rental Assistance (RA) from the Section 515 mortgages in the Senate's appropriation bill.** The proposal contained in the 2023 White House Budget to decouple Section 521 Rental Assistance (RA) from the Section 515 mortgages that are set to expire is critical to keeping housing affordable for the low-income and very low-income rural renters living in those homes. As such, we are supportive of this proposal so long as RA is extended to all eligible households and provides security of tenure for residents by maintaining existing tenant protections provided to renters in Section 515 properties.

Currently, 76% of Section 515 households (290,991 households) receive RA. While the average household income for Section 515 households is \$14,665, the average income of RA households is \$12,501. RA caps a household's rental payments at 30% of income, and, where tenants pay their own utilities, includes a utility allowance to address rising energy costs. In addition, 3,041 households are eligible for but not currently receiving RA. As a result, they pay more than 30% of their income toward their housing costs. In fact, more than 1/3 of rent-overburdened households (1,069) are paying 51% of their income toward housing costs. As such, RA would need to be offered not only to those residents currently receiving RA, but also to any tenants residing in the property to ensure that all low-income and very low-income households who are eligible for the assistance receive it.

To maintain security of tenure for rural, low-income households, the decoupling proposal must maintain the existing tenant protections offered by those programs. Currently, residents of Section 515 and 514/516 properties, including those assisted by Rental Assistance under Section 521, receive the same tenant protections. These critical protections are required to be in all leases, and are also described more fully in section I.A. above. 7 C.F.R. § 3560.156. RD should be required to explicitly extend all of the rights of residents in Section 515 properties to residents under the rental assistance contract decoupled from the mortgage. In addition, RD should have owners sign a regulatory agreement or contract, that can be enforced by the residents, that includes the tenant's rights and have it recorded. See, e.g. 12 U.S.C. §§ 1715l(d)(3), and 1715z-1(h) (HUD regulatory agreements with private owners); HUD Form HUD-52522-D (Housing Assistance Payment for Section 8 programs).

Also, important to maintaining security of tenure for these residents is offering owners long-term rental assistance contracts subject to annual appropriations. We would recommend 20-year contracts subject to annual appropriations as this is the model utilized by HUD (42 U.S.C. §1437f(o)(13)(F); 82 Fed. Reg. 5458 (2017)), to maintain the long-term affordability of projects while allowing owners to secure additional funding for maintenance and rehabilitation costs necessary to keep the properties in operation.

We appreciate your commitment to serving rural renters through USDA's Rural Housing Service and this opportunity to offer recommendations to improve these critical programs.

Sincerely,



Shamus Roller
Executive Director
National Housing Law Project



Diane Yentel
President & CEO
National Low Income Housing Coalition

Priorities for Preserving Affordable Rural Housing

The Rural Preservation Working Group's FY2023 appropriations priorities:

- \$1 billion for USDA's Multifamily Housing Preservation & Revitalization Demonstration (MPR) program
- \$200 million for USDA Section 515, including new construction
- \$350 million above the level needed for renewals to extend USDA Section 521 rental assistance to all currently unassisted households
- \$2 million for USDA's Multifamily Housing Transfer and Prepayment Technical Assistance Grants
- \$3 million for USDA's Multifamily Housing Preservation Revolving Loan Fund Demonstration Program (PRLF)

USDA Section 515 Overview

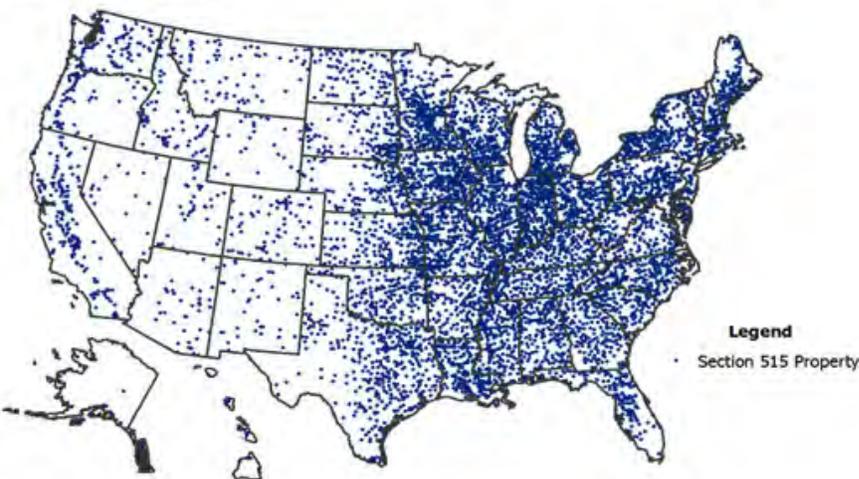
Many low-income rural families rely on USDA multifamily housing properties to provide affordable rental opportunities in rural places, and preserving those properties is rapidly reaching a crisis point in many communities. Since its inception in 1963, the Section 515 program has financed nearly 28,000 rental properties containing over 533,000 affordable apartment units, but fewer than 12,900 properties and approximately 370,000 occupied units remain in the program

today. No new construction has been undertaken in a decade. Without action, USDA and the rural families they serve will continue to lose thousands of affordable Section 515 units each year to mortgage maturations and prepayments.

The Rural Preservation Working Group is a group of over 30 local, regional, and national organizations focused on the preservation of USDA multifamily housing. For more information, contact Samantha Booth at the Housing Assistance Council at samantha@ruralhome.org.

USDA Section 515 Rural Rental Housing Properties

Properties as of June 30, 2017



Source: Housing Assistance Council (HAC) Tabulations of USDA Data

Recommendations in Depth

- \$1 billion for USDA's Multifamily Housing Preservation & Revitalization Demonstration (MPR) program
 - The cost to preserve the current USDA rental portfolio over the next 30 years is estimated to be over \$30 billion. MPR is USDA's most effective, and many times only feasible preservation funding tool, but applications have been closed for four years as the Agency works through its waiting list, which is projected to last another four years.
- \$200 million for USDA Section 515, including new construction
 - This funding would allow for new construction to resume and should be accompanied by a commensurate increase in Section 521 rental assistance to cover new units.
- \$350 million above the level needed for renewals to extend USDA Section 521 rental assistance to currently unassisted households
 - This funding would allow for the extension of rental assistance to cover all currently unassisted units. An estimated 67,000 households in USDA rental housing do not receive rental assistance from USDA, HUD or state sources. All are low-income with average annual income of only \$13,500. The vast majority pay more than 30% of their income for rent. Providing this assistance will not only help families in need, but also shore up the finances of many developments, encouraging preservation.
- \$2 million for USDA Multifamily Housing Transfer & Prepayment Technical Assistance Grants
 - This funding should be used to allow for both transformational preservation research & the provision of technical assistance to improve transaction-level preservation deal flow.
- \$3 million for USDA's Multifamily Housing Preservation Revolving Loan Fund Demonstration Program (PRLF)
 - PRLF was funded through appropriations for several years between 2005 and 2011 and provided loan capital to private non-profit organizations and state and local housing finance agencies to provide revolving loans for preservation.

