

# Now & Next

## Affordable Housing Alert

September 29, 2023

### **What a government shutdown will mean for affordable housing**

By Rebecca Simon, Deborah VanAmerongen, Nate Cushman, and Brendan Cardella-Koll

Insight for affordable housing owners and developers on HUD's updated Contingency Plan and the Agency's continued operations in the case of a federal government shutdown.



#### **What's the impact?**

- Some HUD operations will continue with an extremely limited "skeleton" staff
- Expiring Section 8 PBRA HAP contracts may be at risk
- Owners should review their portfolios to confirm which properties may be impacted and make a plan to cover gaps in the case of a prolonged shutdown

Update as of December 12, 2023:

Since the initial publication date of this alert at the end of September, Congress has passed two Continuing Resolutions to keep the federal government funded at existing levels for the short term. On September 30, Congress passed a Continuing Resolution that funded the federal government through November 17. On November 16, Congress passed a second Continuing

Resolution that funds certain parts of the federal government through January 19, 2024, and the remainder through February 2, 2024. The budget for HUD is included in the portion of the budget extended through January 19, 2024.

While current operations for HUD continue under 2023 budget levels, HUD is also again preparing for the prospect that a shutdown could occur on January 19. However, the updated Contingency Plan that is discussed in this alert would likely be put in place should a shutdown occur in January, there is less likelihood that any multi-year appropriations would be available to keep HUD operational during a shutdown. The same concerns surrounding staffing and operations discussed below will be of concern should a January shutdown happen.

It is not always clear what funding will be available during a shutdown, or how long any such funding would last following the closure of the federal government. To predict the impacts of a shutdown on affordable housing programs, we can look to lessons learned from previous shutdowns and HUD has released an updated Contingency Plan describing their plan for agency operations during any upcoming shutdown. New multi-year appropriations that began in 2019 may allow HUD to remain operational for a short period of time after October 1st; however, in past shutdowns, only a "skeleton" staff has been available to continue operations for the entire agency and the activities that agency staff undertake during a shutdown is limited.

## Continued HUD operations

HUD would not be entirely closed during a federal government shutdown, but the majority of HUD staff will be furloughed, and the activities undertaken by the remaining staff would be severely limited. This will impact the ability of purchasers of HUD-assisted properties to work with HUD on required elements of upcoming closings and the ability of owners to work with HUD staff in connection with continued project operations.

As far as staffing levels, a limited number of HUD staff would continue to work either because they are "excepted" or because they work in areas that are pre-funded beyond the annual appropriations process. HUD's guidance estimates that approximately 1,500 of HUD's 8,500 employees would be retained or intermittently called in during a shutdown under one of these categories.

The major categories of activities that will continue during a shutdown are:

- / Support of the FHA portfolio of insured mortgages;
- / Already-obligated annual grant programs, including emergency housing for homeless;
- / Already-obligated programs addressing imminent threats to health and welfare of HUD residents; and
- / Monthly subsidy programs, including public housing operating subsidies, housing choice voucher subsidies, and multifamily assistance contracts, but only for as long as funding

remains available.

Many other HUD functions would be suspended during a shutdown. The significant agency programs that would cease during a shutdown include the above-listed monthly subsidy programs once funding has run out, as well as most fair housing activities.

The daily operations at properties may be impacted as HUD staff is unavailable to answer questions and participate in normal processes. While contract administrators would remain operational for at least some duration of time, other HUD functions would cease or only operate on an emergency basis.

Previously scheduled and funded REAC inspections would continue. Future REAC inspections would be cancelled unless HUD has reason to believe there is a threat to life or property. CPD funds, including CDBG, HOME, HOPWA, and Homeless Assistance Grants funds would be available to be drawn down by CPD grantees.

Ongoing transactions with FHA-insured loans would pause unless the transaction is very close to closing. FHA Multifamily Production would conduct closings and endorsements only for projects with Firm Commitments or Firm Approval letters and only for as long as Commitment Authority is available. RAD conversions where a RAD Commitment or RAD Approval is already issued would continue. However, staffing would be limited for these closings, which may cause delays even where a transaction is able to move forward.

Owners or developers who are waiting for HUD approvals in order to proceed with their refinancing and/or acquisition, such as approval of HAP Assignment or a Mark-Up-to-Market HAP Contract renewal request, would be on hold until HUD returns to normal operations.

## **Impact to subsidy contracts**

Section 8 project-based rental assistance (PBRA) contracts with expiration dates in the future should not be impacted by a shutdown and should continue to receive monthly payments going forward for some period of time. Prior federal government shutdowns have lasted, at most 35 days and most PBRA contracts with later expiration dates have funding allocated to cover that period of time. HUD's guidance says that HUD will make payments with previously obligated funds and then with any permanent or indefinite authority or multi-year carryover funding that is available.

PBRA contracts that will soon expire may be funded through advanced appropriations, but in the case of a prolonged shutdown, funds could run out. During the 2019 shutdown—the one which lasted 35 days—over 1,000 HAP contracts expired in the first month of the shutdown and were not renewed until after the government re-opened. HUD authorized owners to use project reserves to cover shortfalls and the impacted contracts were retroactively funded following the re-opening of the government.

Contract administrators would continue to service PBRA contracts for as long as appropriated funds are available for their activities. The TRACS system would remain online, and owners and managers should continue to process certifications and voucher requests throughout a shutdown.

For voucher programs, public housing authorities (PHAs) would continue operations for at least some duration of time. PHA operational and administrative funding is dependent on federal funding so in the case of a prolonged shutdown, eventually PHA operations would be impacted by lack of funding. HUD advises owners to stay in close communications with local PHAs to understanding the plan for staffing and funding during a shutdown.

## **Impact beyond HUD**

Other affordable housing programs across the federal government would also be impacted by a potential shutdown. USDA Rural Development released an updated shutdown plan in September 2021. According to that plan, USDA Section 521 rental assistance contracts would continue to be renewed during a shutdown if funding is available. No advanced appropriations are available for rental assistance this year, as has been the case in past years, so funding will be very limited, if available at all. Rental Assistance contracts would be impacted as the contracts approach their anniversary date. In the past, USDA has discussed the potential for reserves to be used to fund operations during a prolonged shutdown so this may be an option for owners to explore. No new loans or grants would be made by USDA during a shutdown. USDA would continue to process payments for insurance and taxes from escrow accounts and some other processing activities that are considered essential to preserving the government's property.

## **Best practices for owners during a shutdown**

HUD would operate on a very limited basis during a shutdown. While some services would be available from a "skeleton" staff, owners should expect delays. For immediate needs that impact the health or safety of residents or threaten the protection of property, owners should contact the Asset Management Division Director in the applicable regional office for assistance.

In the event of a prolonged shutdown, owners should explore options to utilize project reserves and other resources to cover gaps in subsidy payments. HUD's guidance states that HUD will process requests for releases of reserves or residual receipts through the Asset Management Division Directors using the form HUD-9250.

Owners may refer to the FAQs that begin on Page 72 of [HUD's Contingency Plan](#) for guidance as to what owners can expect to be available during the shutdown and how to get help if needed.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:



**Deborah VanAmerongen**

212.940.3054

[dvanamerongen@nixonpeabody.com](mailto:dvanamerongen@nixonpeabody.com)

**Rebecca Simon**

202.227.7244

[rbsimon@nixonpeabody.com](mailto:rbsimon@nixonpeabody.com)

**Nathaniel S. Cushman**

202.585.8231

[ncushman@nixonpeabody.com](mailto:ncushman@nixonpeabody.com)

**Brendan Cardella-Koll**

202.585.8310

[bcardellakoll@nixonpeabody.com](mailto:bcardellakoll@nixonpeabody.com)