



CONSUMER FINANCIAL SERVICES | Temporary Stay on Residential Evictions to Slow Spread of COVID-19 Reveals Unique Authority of CDC

On Tuesday, September 1, 2020, the US Centers for Disease Control and Prevention (the “CDC”) filed a notice of an agency order in the *Federal Register* titled *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19* (the “Order”), which the CDC published on Friday, September 4, 2020. The Order prohibits landlords, residential property owners, or other persons or entities with the legal right to pursue an eviction from exercising such right with respect to any covered person for the period from publication through December 31, 2020.

The Order defines a “covered person” as any tenant, lessee, or resident of a residential property—including any property leased for residential purposes, such as a house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes but excluding hotels, motels, and other temporary or seasonal guest housing—who provides a declaration, under penalty of perjury, to the person holding a legal right to pursue eviction indicating that the individual:

1. Has used best efforts to obtain all available government rental or housing assistance;
2. (i) Expects to earn less than \$99,000 per year (\$198,000 for joint returns), (ii) was not required to report any income in 2019, or (iii) received an economic impact payment pursuant to the CARES Act;
3. Is unable to pay full rent or housing payments due to substantial loss of household income, loss of work hours or wages, a layoff, or extraordinary out-of-pocket medical expenses;
4. Is using best efforts to make timely partial payments as close to the full payment as the individual’s circumstances permit, taking into account other nondiscretionary expenses; and
5. Would likely be rendered homeless or forced to move into and live in close quarters in a new

shared living situation if evicted.

A declaration must be prepared by each adult listed on the lease, rental agreement, or housing contract. There is no requirement for the tenant, lessee, or resident to provide documentation to evidence the statements made in the declaration. Nor is there any express right of the person holding the legal right to pursue eviction to challenge the underlying statements made in the declaration.

The Order does not prohibit foreclosure on home mortgages nor does the Order relieve any tenant or resident of any contractual obligations to pay rent or housing payments; however, any eviction or other proceeding to remove a covered person from a residential property for failure to pay rent is prohibited under the Order. Notably, the Order does not prohibit evictions for other reasons, such as evictions for (i) engaging in criminal activity; (ii) threatening the health and safety of other residents; (iii) damaging, or posing a significant risk of damaging, property; (iv) violating applicable building codes or similar regulations related to health and safety; or (v) violating any other contractual obligation other than the timely payment of rent or housing payments (defined to include late fees, penalties, and interest). Nor does the Order apply in states or localities with greater eviction protections or in American Samoa (where there have been no reported cases of COVID-19).

Violations of the Order may be enforced by federal authorities as well as state and local authorities cooperating pursuant to the CDC's statutory authority to accept state and local cooperation. Violations carry potential criminal penalties for individuals of up to one year in jail and a fine of up to \$100,000, which increases to up to \$250,000 if a death occurs as a result of the violation. For organizations, violations can carry a penalty of up to \$200,000, which increases to up to \$500,000 if a death occurs as a result of the violation.

Background and Authority

The CARES Act already provides a stay on eviction but only in connection with residential properties securing "federally-backed mortgage loans," consisting of loans sold to Fannie Mae or Freddie Mac or insured or guaranteed by the Federal Housing Administration, US Department of Veterans Affairs or Rural Housing Service. While the statutory stay has expired, each of the federal entities has extended the stay through the end of the year. Some states and localities also have imposed stays on residential evictions. Accordingly, the Order is designed to fill the gap.

The CDC issued the Order pursuant to its authority to "take such measures to prevent such spread of the diseases as [the Director] deems reasonably necessary" when interventions by state and local health officials are, in the Director's determination, insufficient to prevent the spread of communicable diseases.¹ The Order highlights the potential for a large number of Americans to be evicted as a result of economic hardships caused by the COVID-19 pandemic and notes that a number of such evictions would result in interstate moves, moves that result in close-quarters living with friends or family, moves to homeless shelters or other congregate living situations, or unsheltered homelessness. In these scenarios, the Order notes, the rate of the spread of COVID-19 may be increased and the severity of resulting illness may be exacerbated.

As a result, the Director has determined that "[b]ased on the convergence of COVID-19, seasonal influenza, and the increased risk of individuals sheltering in close quarters in congregate settings such as homeless shelters, which may be unable to provide adequate social distancing as populations

increase, all of which may be exacerbated as fall and winter approach," a temporary halt in evictions is appropriate. Likewise, the Director has determined that any state or locality that does not implement this minimum level of eviction protection is taking insufficient measures to prevent the spread of communicable disease. Interestingly and surprisingly, the Order is not signed by the Director but instead by the Acting Chief of Staff.

The Order stems from President Trump's August 8, 2020, Executive Order on Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, which, among other things, directed the Secretary of Health and Human Services and the Director of the CDC to consider whether measures halting residential evictions of any tenants for failure to pay rent were reasonably necessary to prevent the further interstate spread of COVID-19. Consistent with other components of that executive order, the CDC Order notes that both the Department of Housing and Urban Development and the Department of the Treasury have informed the CDC of availability for funding and additional housing aid to assist with eviction-prevention programs.

The Order appears to be a novel application of the CDC's authority. We are unaware of any past efforts by the CDC to implement such broad, nationwide restrictions on activities with seemingly attenuated connection to preventing the spread of communicable diseases. While section 361 of the Public Health Service Act grants broad authority to the CDC to regulate the entry and spread of communicable diseases, it is unclear whether a nationwide eviction moratorium falls into the types of regulations contemplated by the Act or its implementing regulations, which describe measures such as "inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."²

A moratorium on evictions certainly is not of the same kind or with the same characteristics or common attributes of the listed health measures and thus may lack the necessary nexus with the underlying purpose of the law. Moreover, the public health risks on which the Order is based arguably are present in many other types of daily activities that the CDC has not sought to prohibit or limit through an order, thus raising questions about the potential unevenness of the use of the CDC's broad authority. Time will tell if the Order is challenged in court. Regardless of whether the Order is challenged in court, many industry groups publicly have stated that federal legislation to fund direct rental assistance or other economic benefits to tenants suffering economic distress is necessary.

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¹ 42 C.F.R. § 70.2; 42 U.S.C. § 264.

² 42 C.F.R. § 70.2