



## Update on COVID-19 Guidance for LIHTC Properties\*

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As the COVID-19 pandemic maintains its hold on the United States, affordable housing owners and managers remain in flux with regard to program requirements. On the development side, construction delays are affecting a significant number of properties. In terms of operations, lease-up efforts are being impacted because of social distancing and the hesitancy of many potential applicants to engage in face-to-face meetings.

The IRS and state Housing Finance Agencies (HFAs) continue to provide guidance to tax credit developers and managers regarding the development and operation of properties. This article provides an update on current guidance (as of early August 2020).

### IRS Guidance

#### IRS Notice 2020-53

In response to the COVID-19 pandemic, this notice provides temporary relief from certain requirements under §42 of the Internal Revenue Code and §§142(d) and 147(d) of the Code for properties with tax-exempt bonds.

#### Background

On March 13, 2020, the president issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing COVID-19 pandemic. This emergency declaration instructed the Treasury Department “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate...” The emergency declaration applies to all 50 states, Washington, D.C., and the five territories.

Revenue Procedure 2014-49 provides temporary relief from certain requirements of §42 for agencies and owners of Low-Income Housing Tax Credit (LIHTC) projects (discussed below). Revenue Procedure 2014-50 does the same thing for properties financed with tax-exempt bonds. Owners should work closely with their HFAs to determine the applicability of 2014-49 to their particular situation.

### Prior Relief Actions

On April 9, 2020, the IRS issued Notice 2020-23, which provided certain relief to low-income housing projects and postponed due dates until July 15, 2020, with respect to certain tax filings and payments, certain time-sensitive government actions, and all time-sensitive actions listed in Revenue Procedure 2018-58 that were due to be performed by April 1, 2020, but before July 15, 2020. These time-sensitive actions include, among others:

- The time to show that 10% of project basis has been established;
- The 24-month rehab period; and
- Annual Owner Certifications to the HFA.

### Scope of Relief Granted in Notice 2020-53

- **The 10% Test for Carryover Allocations:** If the last day for an owner of a building with a carryover allocation to meet the 10% test is on or after April 1, 2020, and before Dec. 31, 2020, the last day for the owner to meet the 10% test is postponed to Dec. 31, 2020.
- **The 24-Month Rehabilitation Expenditure Period:** If the 24-month minimum rehabilitation expenditure period for a building originally ends on or after April 1, 2020, and before Dec. 31, 2020, the last day for the owner to incur the minimum rehabilitation expenditures is postponed to Dec. 31, 2020.
- **Reasonable Period for Restoration or Replacement in the Event of Casualty Loss:** If a low-income building has suffered a casualty loss and the reasonable period to restore by reconstruction or replacement ends on or after April 1, 2020, and before Dec. 31, 2020, the last day for the owner of the building to restore the loss by reconstruction or replacement is Dec. 31, 2020.
- **Reasonable Restoration Period in the Event of Prior Major Disaster:** If a low-income building, because of a prior major disaster, has suffered a casualty loss that would have reduced its qualified basis and if the reasonable restoration period determined by the HFA for the building ends on or after April 1, 2020, and before Dec. 31, 2020, the last day for the owner of the building to complete the repair and restoration is Dec. 31, 2020.

- **The 12-Month Transition Period to Meet Set-Aside for Qualified Residential Rental Projects:** The last day of a 12-month transition period for tax-exempt bond projects that ends on or after April 1, 2020, and before Dec. 31, 2020, is postponed to Dec. 31, 2020.
- **The §147(d) Two-Year Rehabilitation Expenditure Period for Bonds Used to Provide Qualified Residential Rental Projects:** If a bond is used to provide a qualified residential rental project and if the two-year rehabilitation period for the bonds ends on or after April 1, 2020, and before Dec. 31, 2020, the last day of that period is postponed to Dec. 31, 2020.
- **Grant of Relief Pursuant to §1.42.13(a):**
  - o Income Recertifications: An owner of a low-income building is not required to perform income recertifications in the period beginning on April 1, 2020, and ending on Dec. 31, 2020. The owner must resume the income recertifications as due after Dec. 31, 2020.
    - e.g., a recertification that is due on Nov. 1, 2020, does not have to be performed. The next recertification will be due on Nov. 1, 2021, keeping in mind that HFAs may have their own requirement in this area. Note that the IRS has confirmed that these recertifications are “waived,” not “delayed.”
  - o Compliance Monitoring: An HFA is not required to conduct compliance monitoring inspections or reviews in the period beginning on April 1, 2020, and ending on Dec. 31, 2020. The HFA must resume compliance monitoring inspections or reviews as due under 1.42-5 after Dec. 31, 2020. The IRS has confirmed that these “reviews” are specific to file reviews, and are “waived,” not “delayed.”
  - o Common Areas and Amenities: If an amenity or common area in a low-income building or project is temporarily unavailable or closed during some or all of the period from April 1, 2020, to Dec. 31, 2020, in response to the COVID-19 pandemic, and not because of other §42 noncompliance, this temporary closure will not result in a reduction of the eligible basis of the building.
  - o Emergency Housing for Medical Personnel and Other Essential Workers: If individuals who are medical personnel or other essential workers (as defined by state or local governments) provide services during the COVID-19 pandemic, then for purposes of providing emergency housing from April 1, 2020, to Dec. 31, 2020, for both LIHTC and tax-exempt bond

projects, HFAs, owners and operators of low-income housing projects may treat these individuals as if they were displaced Individuals under Revenue Procedures 2014-49 or 2014-50.

**Effective Date:** This Notice was effective as of July 1, 2020.

Owners and operators of LIHTC and tax-exempt bond projects should consult with their HFAs or issuing agencies in order to determine if any requirements in addition to those outlined in this notice will be implemented.

### **A Note on Tenant Rent Protections and Owner Exposure**

The [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) provided certain protections from eviction and late fees because of nonpayment of rent for residents of LIHTC properties (as well as other federally-assisted properties).

From March 27 to July 24, 2020, owners of LIHTC properties were not allowed to:

- File a legal action to evict residents for nonpayment of rent or other fees or charges;
- Charge fees, penalties, or other charges related to nonpayment; or
- Give notice to vacate until July 25, 2020.

The CARES Act provisions relating to tenant protections did not apply if owners sought eviction prior to March 27, 2020, or if eviction was being sought for reasons unrelated to payment of rent or related fees/charges.

Rent payments during this period are not waived; owners may just not evict during that time if rent is not paid. However, beginning July 25, 2020, LIHTC owners may provide a 30-day notice to tenants who owe rent. If the full rent owed is not paid, eviction procedures under state law may be undertaken.

It is likely that the early CARES Act benefits (the one-time stimulus checks and \$600 per week in additional unemployment) did assist renters in being able to pay their rent. However, these benefits expired at the end of July, and at the current time this article has been written\*, Congress has not replaced or extended any of those benefits (*although the president may extend the tenant protections through executive order*).

Owners of tax credit properties are going to have to make some hard decisions in the weeks ahead — whether to seek removal of tenants who are behind in their rent because of COVID-19 income losses or whether to work with such residents in an effort to collect the rent that is owed. In some cases, landlords may agree to forgive rent that was not paid during the moratorium and just start fresh with their residents. Unfortunately, many landlords may not be in a position to forgo significant amounts of rent.

At the same time though, the delinquent residents may not be able to catch up, and if the landlord evicts the household, they will be starting fresh with a new resident anyway. At this point, LIHTC owners need to be assessing their situations — property by property, and working with lenders and residents to come up with a plan that will best position the properties to get through this pandemic in a reasonably sound condition.

## Recommendations

Owners should be proactive in taking steps to address the relevant issues related to the virus. Among the steps for consideration are:

1. **Examine Reserves:** As revenue from rental payments is reduced, one potential source of cash is the reserve account. Review loan documents to see what limitations exist relating to the release of reserve funds. Most permanent lenders and HFAs hold reserves and, at a minimum, you will need their consent to draw on them.
2. **Loan Covenants:** Declining revenue may affect certain financial covenants in project loan documents. Carefully analyze minimum debt service coverage ratios, net worth or liquidity requirements and loan-to-value ratios.
3. **Insurance:** Businesses impacted by COVID-19 may be able to seek relief via their property or business interruption insurance coverage. Recent developments indicate that there may be strong arguments that a pandemic is covered the same as any other natural disaster, and some states are enacting legislation to require coverage.
4. **Force Majeure:** These clauses in contracts can excuse performance of obligations or extend deadlines under exceptional and/or unforeseeable circumstances beyond the control of the parties. Carefully review these contract clauses to determine whether they may be triggered by COVID-19. Projects still under construction of that have not stabilized should review construction contracts to

see if the general contractor may have the right to invoke the force majeure clause to delay completion or ask for an increase in the contract price.

5. **Examine Local Resources:** Many jurisdictions have created or expanded emergency rental assistance programs, funded through a range of federal, state and local resources. As of mid-July, the National Low-Income Housing Coalition (NLIHC) had identified 44 state programs and 151 local programs that have been created or expanded in response to COVID-19 and its economic fallout. Approximately 82% of rental assistance programs created or expanded in response to COVID-19 are designed for short-term relief — which is better than no relief at all. Owners should reach out to state HFAs and local agencies regarding possible assistance for residents.

Without massive federal intervention — beyond what has already occurred — many low-income residents and operators of affordable housing are going to suffer serious financial damage, from which recovery may be impossible. For owners of LIHTC properties, a proactive approach to the problem may make the difference between short-term pain and long-term financial damage.

*\*Information in this article is current as of Aug. 11, 2020, unless otherwise noted.*

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