COVID-19 Webinar 3.0 —
Guidance and Updates for the Affordable Housing Industry

Wednesday, May 20, 2020
Disclaimer

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HUD Topics on Reopening Housing
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HUD has made several allowances for owners, managers, and residents during the national emergency and has provided guidance in the form of Frequently Asked Questions (FAQs).

HUD may continue to provide guidance related to property operations and asset management as restrictions are lifted and there are issues related to HUD-assisted properties that parties need to be thinking of as restrictions are lifted.
1. **Recertification**

   - May have been delays in processing annual or interim recertifications, depending on circumstances at properties.
   - HUD has recognized that there are extenuating circumstances but has stated that all certifications should be completed within 90 days.
   - HUD has allowed families to do self-certification of income in cases where proper paperwork could not be submitted and acceptance of electronic or copies of signatures where original “wet” ink signatures would normally be required.

   - In cases where the family did a self-certification, HUD expects that the owner/manager would document the file as to why proper paperwork was not available.
   - They do not require, but say that owners may seek the original paperwork when circumstances allow. Where another form of signature was used, HUD does require that original signatures be obtained when possible.
2. **Real Estate Assessment Center (REAC) Physical Inspections**
   - In mid-March, HUD suspended REAC inspections until further notice; it is unclear at this time when HUD will start doing REAC inspections again.

3. **Management and Occupancy Reviews (MORs)**
   - HUD has suspended the requirement that the Performance-Based Contract Administrators (PBCAs) perform MORs until the PBCA determines local conditions no longer limit or prevent the PBCA from performing MORs safely.
   - HUD is looking into a flexible model that would allow PBCAs to adapt to local conditions in a way that allows them to continue MORs on a modified basis to ensure acceptable conditions in HUD properties.
   - HUD has stated that additional guidance will be forthcoming.
     - Owners/managers are advised to review their files in preparation for a MOR, particularly if site offices were closed and any of the alternative asset management procedures HUD has allowed during this time were utilized.
4. **Contract Renewals**

- All HUD rental assistance contracts should have been renewed in a timely fashion during the national emergency.

- For contract renewals that would typically require the owner to submit a Rent Comparability Study (RCS), and the owner cannot obtain one, HUD has stated that they will, until June 30, 2020 (or such later date as HUD may determine), approve all renewals as short-term renewals with a 12-month term at current rents.

  - Where an owner’s RCS has triggered the need for a HUD RCS, HUD is not conducting RCS’s in areas that are under a state or nationally declared emergency or where public health officials have imposed limited travel.

  - Since late March, HUD has stated that they will be providing new guidance on this topic in the upcoming weeks.
5. **Filling Vacancies**

- HUD has stated that owners/agents may choose to conduct interviews remotely using technology or barriers (e.g., windows) as may be recommended by the CDC to prevent transmission of the virus.

- Owners may accept electronic signatures on owner-adopted verification forms to perform both owner-adopted and HUD-required screening criteria as long as they obtain original, “wet” signatures on verification forms at a later date.

6. **Vacancy Claims**

- Owners/agents not able to interview/fill vacancies as a result of the national emergency may be able to request vacancy claims to keep property solvent.

- HUD has advised that the owner should submit information to their contract administrator or HUD office documenting why the filling of vacancies was considered infeasible.
Property Management Considerations for Reopening Housing
Reopen Housing? It never closed!

For the last three months, our national strategy to deal with the pandemic was for everyone to stay home.

— Dilemma: as economy reopens, pressure to relax housing restrictions increases,

  • But reopening housing increases threat that tenants will bring virus home with them.

— In absence of a vaccine or effective treatment, housing providers need to be vigilant to renewed spread of COVID-19.

— So in many respects, the challenge will be to keep strong anti-virus protections in place at multifamily housing properties, even as restrictions in the rest of the economy are loosened.
In the not-post-pandemic phase, housing providers will need to examine and evaluate long-term responses:

1. The virus hasn’t gone away. Neither should social distancing.
   - What protections to keep and what to change?
   - Experiments with reopening public/common spaces. “Crowd creep”?

2. Understand impact of eviction moratoriums
   - 120-day eviction moratorium/mortgage forbearance moratorium/state-local moratorium
   - What happens when the moratoriums expire?
     • Impacts on market rate vs. affordable housing may differ
     • Forbearance agreements/repayment plans
3. **Evaluate new business practices for the long-term**

   — Housing providers have adopted innovations (electronic/remote transactions, changes in on-site management staff, etc.).
   
   — Need to evaluate what has worked and what hasn’t, and determine what to keep/change.

4. **Property management: keeping the lid on**

   — Maintaining aggressive cleaning/disinfection protocols
   
   — Policies to restrict visitors (especially at seniors properties)
   
   — Reestablishing “non-critical” repair rules/wider use of PPE for staff and residents

5. **Maintain effective communications**

   — Especially with other restrictions loosening, critical to communicate clearly and often with residents and staff
   
   • Control dialogue/manage expectations
6. Identify COVID-19 Coordinator and Develop a Response Plan
   — One size doesn’t fit all: you need a response plan to deal with COVID-19
   — COVID-19 coordinator: clearing house for information, best practices, responses

7. You are not in this alone: reach out/coordinate third-party help
   — Tremendous effort being made to support incomes, provide health/emergency care
   — Helping tenants to stabilize income/jobs helps reduce tensions/support rent payment

8. Avoid fair housing mishaps
   — HUD/Justice Dept. have warned against violations of fair housing laws during pandemic
   — Make sure policies do not have harsher impacts on protected classes
   — While COVID-19 itself may not be a disability, it may hurt disabled persons harder
     • Pay attention to possible reasonable accommodation requests
Transactional Considerations
Transactional Considerations—Closings in the Pandemic

—Mechanics

—Electronic vs. Manual Closings
<table>
<thead>
<tr>
<th>Fannie Mae</th>
<th>Freddie Mac</th>
<th>FHA</th>
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<tr>
<td>Lenders are delegated the authority to grant forbearances, if requested by borrower, for up to three months for loans current up to February 1, 2020</td>
<td>Borrowers can defer loan payments for ninety days by showing hardship as a consequence of COVID-19 and showing hardship</td>
<td>Borrower can obtain thirty-day forbearance of mortgage payments and two additional thirty-day periods all upon request of the borrower</td>
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<tr>
<td>Borrowers will repay any missed payments over twelve months beginning at the end of the forbearance period</td>
<td>Non-eviction of tenant based solely on non-payment of rent is required</td>
<td>Borrower may not evict a tenant for nonpayment of rent during the forbearance period</td>
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<td>In return, borrowers agree to a suspension of tenant evictions</td>
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<td>HUD/FHA encourages the borrower to work with the agency to use various resources, including residual receipts and replacement reserves, before mortgage payments are suspended</td>
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<td>There must be compliance with all other loan requirements</td>
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Transaction Considerations — New Loans/Debt Service Reserve

Fannie Mae

— A reserve deposit equal to six to eighteen months of principal and interest, depending on the loan sizing

— Additional deposits equal to six to twelve months of taxes and insurance impositions and possible increased replacement reserve deposits, depending on the loan sizing

Freddie Mac

— A six-to-nine-month Debt Service Reserve (DSR) is required, depending on the loan sizing
For conventional/market rate loans, HUD will require a six-to-nine-month DSR, depending on the status of the loan process.

For new LIHTC transactions, HUD will look at the projected operating deficit reserves and lease up reserves for adequacy of coverage, but may require an additional six to nine months of DSR.

For refinances of current LIHTC properties, HUD will require a twelve-month reserve as may be modified as a result of an analysis of various local conditions, but in no event less than 50% and a debt service coverage ratio of 1.15.

No DSR requirement for projects greater than project-based Section 8 assistance.

The debt service reserve is required to be held for the later of (a) six months, (b) meeting the required program debt-service coverage requirements for three consecutive months, and (c) the completion of all non-critical repairs, if applicable.
Miscellaneous

— Force Majeure
  • Loans and Construction Contracts
— General market conditions
— What’s next in the transaction world
Updated Federal Guidance
Paycheck Protection Program (PPP)

Section 1102 of the CARES Act created the Small Business Administration (SBA) Paycheck Protection Program (PPP).

Section 1102 (a)(D)(i) expands the kinds of small businesses that are eligible for an SBA loan, stating: “[I]n addition to small business concerns, any business concern . . . shall be eligible to receive a covered loan if the business concern . . . employs not more than . . . 500 employees . . . .”

SBA FAQs #3, 4, 5—issued April 6, 2020, supports this expansion and notes that a small business concern that does not qualify as a small business meets SBA size standards.
Unfortunately, and confusingly, the SBA issued an Interim Final Rule April 2nd, that incorporated part of 13 CFR Part 120 and SBA’s 2019 Standard Operating Procedure (SOP) 50 10 in conflict with these other authorities.

— Key to the PPP is the focus on protecting paychecks.

— SBA rules require at least 75% of any PPP loan must be spent on payroll. This may be changing. The balance can be spent on mortgage (other than principal), rent, utilities, and other interest on pre-existing debt.

— The PPP program provides loans, which are potentially forgivable, but loan forgiveness should not be presumed. Most guidance has not yet been issued.

  • So far, SBA guidance provides that the actual amount of loan forgiveness will depend on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan.
Eligibility—The CARES Act is clear, some of the SBA FAQs are clear, but the April 2\textsuperscript{nd} First Interim Rule muddies everything and indeed violates the CARES Act.

— “Passive” real estate entities, apartment buildings—muddy

— Operating companies—clear, or should be

Litigation over eligibility has begun—\textit{DV Diamond Club of Flint, LLC v. United States Small Business Administration, et al.}, No. 20-cv-10899 (E.D. MI May 11, 2020) “the SBA’s PPP Ineligibility Rule is invalid because it contravenes the PPP.”


— Administrative Procedure Act violations [PACER Dkt. #1]
PPP — Borrower Affiliates, Necessity

**Affiliate**

Who has control, voting rights, similar revenue streams and the effect of that—seems to be close to a “I know it when I see it” test coupled with “and it means what I say it means” test.

**Necessity**

— SBA FAQs 31, 37, 43, and now 46
— PPP is not supposed to be loan of last resort, but SBA very nearly makes it so.

FAQ 46, issued May 13th provides clearer safe harbor for loans under $2 million, more detail for loans over that amount, a notice and cure process, and confirmation that affiliated entities can properly have more than one loan. This seems to almost moot the need for a May 14th, “timing” safe harbor.
Economic Injury Disaster Loans

Direct SBA loans, not forgivable, 3.75% (small businesses); 2.75% (nonprofits). Also, can request up to $10,000 advance for allowable working capital needs. Paycheck Protection Program and Healthcare Enhancement Act appropriated additional funding and authorized additional funding for agricultural businesses. SBA reduced loan size and applicants from $2.0 million to $150,000.

Main Street Lending

- Businesses with 15,000 employees or fewer and 2019 receipts of $5 billion or less
- As with the PPP and EIDL programs, housing providers should carefully review Federal Reserve guidance with respect to how real estate-related enterprises can participate in these programs.
Related Tax Guidance

Internal Revenue Service (IRS) Notice 2020-32 provides loan recipients cannot deduct the business expenses paid for by the loan proceeds, which were slated to be forgiven.

**Employee Retention Credit (ERC)—**An alternative to the CARES Act lending programs, some businesses have considered taking advantage of ERCs, which provide a tax credit of up to $5,000 per employees. It is a credit, not a loan. Operations have been suspended, in whole or in part, due to COVID-19 related shutdown orders, or gross receipts for the calendar quarter when the credit is claimed are 50% less than the gross receipts for the same calendar quarter last year.
Emergency Rental Assistance:

$100 billion to provide emergency assistance to help low-income renters at risk of homelessness avoid eviction. Would provide more than $20b in other forms of rental assistance including $4 billion, including $1 billion for new, temporary, vouchers for individuals and families who are homeless or at risk of becoming homeless, or fleeing domestic violence. There is also another $750 million for project-based rental assistance, plus amounts for Section 202 and 811 and VAWA and many other programs.

Payroll tax credit:

For employers with up to 1,500 full-time equivalent employees or $41,500,000 in 2019 gross receipts. Provides a 50% refundable payroll tax credit for covered rent, mortgage, utility obligations; limited to 25% of qualified wages or 6.25% of 2019 gross receipts (which annualizes to 25%), up to $50,000. And other programs.
Additional Resources

— Nixon Peabody Affordable Housing Website
— Nixon Peabody Coronavirus Response Team
— Select Recent Nixon Peabody Housing Alerts
  • Updated HUD FAQs provide additional details regarding asset management issues, multifamily production issues and Mortgagee Letter 2020-11
  • Preparing to safely reopen: Employers should consider various OSHA safety regulations and OSHA hierarchy of controls
  • New York Attorney General James demands home loan servicers protect homeowners during the coronavirus (COVID-19) pandemic
  • Restarting safely: Construction under California’s shifting shelter-in-place orders
  • Senate approves $310 billion in additional funding to the Paycheck Protection Program
  • Update 4.0: HUD issues updated coronavirus (COVID-19) guidance
— Nixon Peabody Affordable Housing Blog
  • Update: HUD rules for reasonable accommodations for assistance animals
  • HUD COVID-19 FAQs Update: FHA multifamily closings, loan application processing, construction issues

*For additional information, be sure to subscribe to our affordable housing mailing list and our coronavirus alert list: NP Subscription List*