MAY 4, 2020

# Updated HUD FAQs provide additional details regarding asset management issues, multifamily production issues and Mortgagee Letter 2020-11

**By Nate Cushman and Alex Rosso**

The Department of Housing and Urban Development's (HUD's) Office of Multifamily Housing has provided periodic updates to its FAQs (frequently asked questions) relating to issues arising across HUD projects and programs from the unfolding coronavirus (COVID-19) pandemic. See our earlier alerts for further discussion of the issues raised by these FAQs and the related Mortgagee Letters 2020-09 and 2020-11 issued on April 10, 2020. The most recent guidance issued by HUD on May 1, 2020, provides additional clarifications regarding asset management issues, multifamily production and construction issues, as well as clarifications to Mortgagee Letter 2020-11.

## Clarifications related to ongoing asset management issues

Multifamily field staff have been granted authority to approve loans under the Small Business Administration's (SBA's) Paycheck Protection Program (PPP) (authorized under the Coronavirus Aid, Relief, and Economic Security (CARES) Act), without limiting repayment of those loans to surplus cash, but requiring that payments first be made from surplus cash before other funds are drawn for loan repayment. This applies to borrowers with market-rate properties.

The new FAQs clarify that CARES Act temporary payments received by a family are not included in the calculation of resident income. Specifically, this applies to the Economic Impact Payment and the temporary weekly federal enhancement to unemployment insurance provided under the CARES Act. Regular unemployment insurance payments are treated as income, per standard program rules.

The FAQs provide clarification that owners and agents of multifamily properties can use operating account funds for reasonable and necessary COVID-19-related preparedness and response actions. This includes supplies, and the specific example of masks and gloves for both staff and residents is given in the FAQs. This also includes staff hours and overtime. The FAQs also clarify that direct services to residents (i.e., meals to those who are home-bound) are not an eligible use of project funds per federal regulations.

## Clarifications related to multifamily production and construction issues

HUD will temporarily permit the deferral of the submission of capital needs assessments (CNAs) for Section 223(a)(7) refinance transactions until the earlier of (i) when a capital needs assessment can be safely completed or (ii) one year after the endorsement of the loan. However, all distributions from surplus cash will be temporarily suspended from the time of endorsement of the loan up to the submission, review, and approval of the updated CNA. However, this flexibility to delay submission of the CNA is only available for projects with a Real Estate Assessment Center (REAC) score of 80 or better.

To address potential supply chain disruptions regarding construction materials, HUD will consider waiving the retainage requirement on pre-purchased materials based on written justification submitted by the general contractor and supported by the lender. However, all pre-purchased materials are expected to be installed no later than 90 days after the date of delivery, and total pre-purchased materials are limited to an amount equal to 10% of the construction contract amount.

HUD will permit the development team to sign a letter-sized cover sheet in connection with the closing of Section 221(d)(4) transactions in lieu of requiring signatures on the architectural plans and specifications.

## Clarifications to Mortgagee Letter 2020-11

The FAQs clarify that the release of the Debt Service Reserve required for Section 223(f) transactions pursuant to Mortgagee Letter 2020-11 is the later of (i) six months, (ii) meeting the required program debt-service coverage requirements for three consecutive months, and (iii) the completion of all non-critical repairs, if applicable.

The FAQs confirm that cash-out proceeds that would be withheld at endorsement (i.e., the 50% cash-out holdback) may be used to fund the required debt service reserve escrow, with the remainder returned to the borrower or its principals.

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


- Nate Cushman at ncushman@nixonpeabody.com or 202-585-8231
- Harry Kelly at hkelly@nixonpeabody.com or 202-585-8712
- Susanna Mitchell at smitchell@nixonpeabody.com or 202- 585-8150
- Richard Michael Price at rprice@nixonpeabody.com or 202-585-8716
- Alex Rosso at arosso@nixonpeabody.com or 617-345-1393
- Kathie Soroka at ksoroka@nixonpeabody.com or 212-940-3736
- Deborah VanAmerongen at dvanamerongen@nixonpeabody.com or 212-940-3054