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IRS extends many deadlines relevant to Section 42 and affordable housing

By Forrest David Milder

The IRS has been diligent in addressing the timetables relevant to many aspects of tax credit finance that have been affected by the COVID-19 pandemic. Now, in Notice 2021-12, issued on January 15, 2021, the IRS has extended a great many deadlines that apply to Section 42 and affordable housing projects. Here's a summary of the extensions and modifications.

Carryover allocations and placed in service requirements

In general, projects can be allocated tax credits before being placed in service provided they incur at least 10% of the anticipated basis within one year of the allocation, and are placed in service not later than the end of the second calendar year after the year of the allocation. Under Notice 2021-12, if the last day to satisfy the 10-percent test for a carryover allocation is between April 1, 2020, and September 29, 2021, then the last day for the Owner to meet the 10-percent test is postponed to the earlier of one year from the original due date or September 30, 2021. In addition, if the deadline for a low-income building to be placed in service was December 31, 2020, then the last day to place the building in service is postponed to December 31, 2021.

Rehabilitations over 24 months

In general, used properties must be rehabilitated with capital expenditures equal to 20% of basis (or \$6,000, adjusted for inflation, if more) over a 24-month period. Under Notice 2021-12, if the 24-month minimum rehabilitation expenditure period for a building originally ends between April 1, 2020, and September 29, 2021, the last day for the Owner to incur the minimum rehabilitation expenditures with respect to the building is postponed to the earlier of one year from the original end date or September 30, 2021.

12-month period for bond-financed rehabilitation to meet percentage requirements

In general, a bond-financed rehabilitation, where 10 percent or more of a project remains in service, has 12 months after issuance of the bonds before the project must pass one of the low-income

percentage occupancy tests. Under Notice 2021-12, if the last day of the 12-month period would otherwise end between April 1, 2020, and September 29, 2021, the testing date is postponed to September 30, 2021.

2-year expenditure period for bond-financed projects

Bond-financed residential projects must incur required rehabilitation expenditures under Section 147(d) within a two-year period that starts with the later of the date the building was acquired or the bonds were issued. Under Notice 2021-12, if the period would otherwise end between April 1, 2020, and September 29, 2021, then the last day of that period is postponed to the earlier of one year from the original due date or September 30, 2021.

Casualty loss

In general, buildings that suffer casualty losses can be subject to recapture unless the building is repaired by certain deadlines, which depend on whether the loss is local to the project or part of a presidentially declared disaster area. Under Notice 2021-12, if a low-income building's qualified basis is reduced by a casualty loss and the "Reasonable Restoration Period" to restore the loss would otherwise end on or after April 1, 2020, then the last day of the Reasonable Restoration Period is postponed by one year from the original end date — but not beyond December 31, 2021. Despite the general rule, the housing agency can decide to shorten or not give an extension. In the case of a credit year that ends on or after April 1, 2020, and not later than the end of the Reasonable Restoration Period (as extended), if the Owner restores the building by the end of the extended Reasonable Restoration Period, then the building's qualified basis is that of the end of the taxable year immediately preceding the first day of the casualty.

Determining qualified basis

In general, a building's qualified basis is determined by multiplying its eligible basis by its percentage of low-income units at the end of the first year of the credit period. Under Notice 2021-12, if the end of the first year of the credit period is between April 1, 2020, and June 30, 2021, then the qualified basis for the first year of the credit period is calculated by including any increase in the number of low-income units by the end of the six-month period after the close of that first year.

Correction period

In general, agencies that determine that a project has violated the low-income requirements generally give the owner of the project not more than 90 days to cure the violation, with an extension of up to six months for good cause, as determined by the agency. Under Notice 2021-12, if a correction period that was set by the agency ends between April 1, 2020, and September 29, 2021, then the correction period is extended by a year, but not beyond December 31, 2021. The agency can decide to shorten or not give this extension.

Inspections, compliance monitoring, and income recertifications

Several aspects of project review must be done annually. Under Notice 2021-12, an Owner of a low-income building is not required to perform income recertifications, and the agency is not required

to perform inspections and compliance monitoring, from April 1, 2020, to September 30, 2021. These must be resumed no later than October 1, 2021.

Unavailable common areas

In general, a project can be subject to recapture if common areas are not available. Under Notice 2021-12, 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 September 30, 2021, and if the unavailability or closure is in response to the COVID-19 pandemic and not because of other noncompliance for Section 42 purposes, then this temporary unavailability or closure does not result in a reduction of the eligible basis of the building.

Hearings

An agency must conduct certain public hearings with respect to its qualified allocation plan (or “QAP”). Under Notice 2021-12, between April 1, 2020, and September 29, 2021, these hearings can be held by teleconference that is accessible to the residents of the locality where the Agency has jurisdiction by calling a toll-free telephone number.

Housing for medical personnel and essential workers

Among other things, low-income occupancy of a project is normally based on whether the tenants meet applicable low-income requirements. Under Notice 2021-12, from April 1, 2020, to September 30, 2021, housing owners may provide emergency housing for medical personnel or other essential workers (as defined by state or local governments) that provide services during the COVID-19 pandemic, in accordance with the two rulings that provide rules for major disasters: Rev. Proc. 2014-49 and Rev. Proc. 2014-50.

As always, do not hesitate to contact us at Nixon Peabody with your thoughts and questions:

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