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Treasury issues updated emergency rental assistance FAQs

By Richard Price, Harry Kelly, and Shaun Mark

The Department of Treasury (the Treasury) issued updated Frequently Asked Questions (FAQs) on May 7, 2021, regarding the Emergency Rental Assistance program (ERA) established by Section 501, Division N, of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020) (ERA1) and the initial FAQ's for the Emergency Rental Assistance program established by Section 3201 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2 (March 11, 2021) (ERA2, and together with ERA1, the Act). The Treasury released the initial FAQs for ERA1 on January 19, 2021, which it revised multiple times, the last being March 25, 2021. Under the Act, the Treasury disburses ERA funds directly to applicable state and local government agencies, large municipalities, and tribes and other indigenous entities (jointly referred to as "grantees") to assist households unable to pay rent or utilities during or due, directly or indirectly, to the coronavirus outbreak. Eligible Grantees may complete and submit ERA2 Financial Assistance Agreements on the Treasury's electronic portal to receive funding under the ERA program. Here are the highlights:

Direct payments to renters

One of the most significant changes in the Update includes the requirement that Grantees in receipt of ERA2 funds must offer emergency rental assistance directly to renters when landlords and/or utility providers will not accept direct payments from the ERA. Unlike the ERA1 program, which requires Grantees to make reasonable efforts to obtain the cooperation of landlords and/or utility providers to accept payments from the ERA, under the ERA2 program, Grantees are **not** required to seek the landlord and/or utility service provider's cooperation before providing direct assistance to renters. Further, when a request for participation is mailed to a landlord/utility service provider in accordance with the ERA1 program, the time frame to determine whether a landlord elects to participate has been reduced from a fourteen (14) calendar-day wait period to a seven (7) calendar-day wait period. Under circumstances in which a Grantee has made at least three attempts to request a landlord/utility service provider's participation by phone, text, or email, the time frame to determine whether a landlord elects to participate in the ERA program was reduced from a ten (10) calendar-day period to a five (5) calendar-day period.

Updated household eligibility requirements

Another significant change in the Update is the Treasury's expansion of the Department of Housing and Urban Development's (HUD's) authority to change the household eligibility requirements with respect to the ERA2 program. Notably, HUD may establish income ceilings higher or lower than 80% of the median income for the area under the ERA2 program if HUD determines that the newly established income ceiling is necessary due to prevailing construction costs or unusually high or low family incomes.

Even though there are some differences in the eligibility requirements under ERA1 compared to the eligibility requirements under ERA2, the Treasury's goal is to implement ERA2 consistently with ERA1 (where possible) to reduce administrative burdens for Grantees.

Other changes in the Update include:

Documentation requirements

Under ERA2, the Treasury strongly discourages establishing documentation requirements that would reduce participation for eligible households.

Cause of financial hardship

The Update clarifies that assistance under ERA1 must be "*due*, directly or indirectly, to the COVID-19 outbreak." Emphasis added. In other words, COVID-19 must be the cause of the financial hardship that triggers assistance. ERA 2, on the other hand, has a broader scope and can also be triggered where that hardship arose "*during*" the pandemic. Emphasis added. In other words, ERA2 assistance is available to address financial hardship that is not necessarily caused by the pandemic. Other advice in the Update (at page 3) suggests that Grantees should not be unduly concerned about the cause of the financial hardship suffered by a renter: "Treasury strongly encourages grantees to rely on the self-certification of applicants with regard to whether their financial hardship meets these statutory eligibility requirements."

Documentation in income determinations

The Update allows Grantees to rely on written attestations from renters to establish income eligibility, provided such agency uses any reasonable "fact-specific proxy" to determine household income. For example, reliance on geographic average income data is permissible to establish income eligibility for renters with irregular incomes, such as small business operators and/or gig workers, who are most vulnerable to stringent income document requirements.

Duplicative rental assistance for subsidized renters

Reports indicate that some Grantees have refused to authorize payments to households living in subsidized units on the grounds that they are already receiving rental assistance. The Update provides guidance for assistance to such households. Although ERA1 prohibits households from receiving duplicative payments of any other federally funded rental assistance, under ERA2, eligible renters must **not** be denied rental assistance because such renters are occupants of federally subsidized residential housing or mixed-use property or because such renters receive other federal rental assistance. An eligible household that occupies a federally subsidized residential or mixed-use property or receives other federal rental assistance may receive assistance under the ERA program, so long as ERA1 program funds are not allocated to costs that have been or will be reimbursed under any other federal assistance program. *We note that the Update expressly set forth the Grantees' obligation to comply with Title VI of the Civil Rights Act and evaluate its policies and practices with respect to renters residing in federally subsidized residential housing or receiving other federal rental*

assistance. Grantees must not refuse to provide assistance due to the disproportionate adverse effect refusal could have on intended populations.

ERA assistance for homeowners

Homeowners may be eligible for assistance under the ERA2 program using funds made available under the Homeowner Assistance Fund, established by the Treasury.

Prioritization for households with incomes less than 50% of area median income

The ERA requires that Grantees prioritize rental assistance disbursements to households with incomes less than 50% of area median income. The Treasury will require such Grantees to furnish reports by July 15, 2021, describing the methods used to implement its prioritization of assistance, and to publicly post a description of such prioritization methods, including on their program web page if one exists.

Duration of assistance

In ERA1, households may receive up to fifteen (15) months of assistance (twelve (12) months plus a possible additional three (3) months). The total amount under ERA2, when combined with assistance under ERA 1, is limited to eighteen (18) months.

Economic uncertainty is bound to continue even as pandemic control efforts offer hope of a return to normalcy. We continue to monitor and report on developments in the affordable housing space that affect your operations and your bottom line. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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