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New guidance on Emergency Rental Assistance issued by the Biden administration

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The Consolidation Appropriations Act enacted in December 2020 contained $25 billion in Emergency Rental Assistance. The $25 billion is being distributed through the U.S. Department of the Treasury, rather than through HUD. Payments are being made directly to states and to local governments with more than 200,000 residents. There are 426 counties and cities/towns on the Treasury's website with a population of more than 200,000 people in 2019 according to the Census Bureau. These eligible jurisdictions were obligated to provide payment information and an executed copy of the award terms by January 12, 2021. Funding then flows through these entities ("grantees"), which must each set up their own program that both conforms with federal requirements and requirements of the Appropriations Act, as well as state and local contracting and funding requirements. Grantees may choose to administer their programs through sub-grantees or contractors.

There is no deadline for the states and localities to establish their programs, but unobligated funds are subject to recapture starting September 30, 2021 (states and localities which have obligated at least 65% of their original allocation will be eligible for additional allocations from these recaptured funds) and funds only remain available thought December 31, 2021 (may be extended). Federal funds require prioritization of very low-income households (at or below 50% of AMI) and for arrears to be paid to applicants before any funds are released for prospective rent payments.

The Appropriations Act limits who may receive the benefit of the rent subsidy. An eligible household is a renter household in which at least one or more individuals:

- Qualifies for unemployment or has experienced a reduction in household income, incurred significant costs, or experienced a financial hardship due to COVID-19;
- Demonstrates a risk of experiencing homelessness or housing instability; and
- Has a household income at or below 80 percent of the area median income.

On January 19, 2021, the outgoing administration had issued Frequently Asked Questions (FAQs) in regard to these funds, but many industry participants had been hoping that the new administration would clarify and simplify some of this guidance. On February 22, 2021, the Treasury Department issued revised Frequently Asked Questions (FAQs) in regard to the administration of these funds. Now that these revised FAQs have been issued, it is anticipated that many grantees will start to roll out their programs.

The FAQs state that the administration's goal is to allow for various forms of documentation to demonstrate eligibility without imposing undue burdens on applicants or grantees. Grantees may accept photocopies or digital photographs of documents, emails, or attestations from employers, landlords, caseworkers, or others with knowledge of the household's circumstances. Grantees must require all applications for assistance to include an attestation from the applicant that all information included is correct and complete. In addition, grantees must adopt policies and procedures for determining eligibility and for prioritization of applicants and maintain records and work to prevent fraud.

Applicants must attest in writing that they qualified for unemployment benefits or experienced reduced income or increased costs due to Covid-19 that threatened their ability to pay rent. The tenant must also demonstrate risk of housing instability by providing documentation such as notices for past due rent or eviction notices or unsafe or unhealthy living conditions. While the household did not need to be current on rent or expenses as of March 13, 2020, arrears are not covered before the state of emergency was declared on March 13, 2020.

Grantees may choose between using HUD's definition of "annual income" in 24 CFR 5.609 and using adjusted gross income as defined for purposes of reporting under Internal Revenue Service Form 1040 series for individual federal annual income tax purposes. Grantees may accept a written attestation from the applicant as to household income and also documentation such as paystubs, W-2s or other wage statements, tax filings, bank statements demonstrating regular income, or an attestation from an employer. If relying solely on an attestation and no further documentation is available, grantees must reassess income for that household every three months. If an applicant's income has been verified since January 1, 2020, to be less than 80% AMI under another governmental program the grantee can accept that.

In order to determine the amount of rental assistance grantees must obtain, if available, a current lease, signed by the applicant and the landlord that identifies the unit where the applicant resides and establishes the rental payment amount. If a household does not have a signed lease, documentation of residence may include evidence of paying utilities for the residential unit, an attestation by a landlord who can be identified as the verified owner or management agent of the unit, or other reasonable documentation as determined by the grantee along with evidence of the amount of a rental payment (bank statements, check stubs, or other documentation) that reasonably establishes a pattern of paying rent, or a written attestation by a landlord who can be verified as the legitimate owner or management agent.

If an applicant is able to provide satisfactory evidence of residence but is unable to present adequate documentation of the amount of the rental obligation, grantees may accept a written attestation from the applicant to support the payment of assistance up to a monthly maximum of 100% of the Fair Market Rent for a period of three months at a time. In this case, the applicant must also attest that the household has not received, and does not anticipate receiving, another source of public or private subsidy or assistance for the rental costs. This short-term assistance is intended to stave off homelessness and provide applicants with time to gather documentation.

The rental assistance can extend for up to 12 months of assistance. There can be an additional three months of assistance for a total of 15 months if the grantee determines that is needed to ensure housing stability and grantee funds are available. Priority will be for arrears that could result in eviction. Indeed, the assistance must first be used to reduce arrears before future rent payments are made. Once a household's arrears are reduced, grantees are only permitted to provide future assistance for up to three months at a time. Households may reapply for additional assistance at the end of the three-month period if needed and the overall time limit for assistance (15 months) is not exceeded. Grantees can structure programs to provide less than full coverage of arrears.

In addition to covering rental arrears and rent payments, these funds may be used to cover utilities and home energy costs; utilities and home energy costs arrears; and other expenses related to housing incurred due, directly or indirectly, to the COVID-19 outbreak. Utilities and home energy costs include separately stated electricity, gas, water and sewer, trash removal, and energy costs, such as fuel oil. Payments to public utilities are permitted. A grantee can cover utility costs even if there are no rental arrears. "Other expenses" include relocation expenses and rental fees (if a household has been temporarily or permanently displaced due to the pandemic); reasonable accrued late fees (if not included in rental or utility arrears and if incurred due to the pandemic); and (in some circumstances) internet service provided to the rental unit. All payments for housing-related expenses must be supported by evidence such as a bill, invoice, or evidence of payment to the provider of the service.

The rental assistance under this law must not be duplicative of any other federally funded rental assistance—in other words, it is improper to get subsidy from two sources for the same expense. However, an eligible household that occupies a federally subsidized residential or mixed-use property may receive ERA assistance, provided that ERA funds are not applied to costs that have been or will be reimbursed under any other federal assistance program. The renter household may receive ERA assistance for the tenant-owed portion of rent or utilities that is not subsidized.

Priority should go to eligible households that include an individual who has been unemployed for the 90 days prior to the assistance application, and households with income at or below 50 percent of the area median income. Grantees must document the preference system they use.

The renter or the landlord on behalf of the renter may apply for the subsidy. Again, each application portal or process can be expected to vary a bit. Generally, if the landlord applies they must notify the tenant and there will need to be coordination in regard to submission of necessary documentation. Funds will be paid directly to landlords and utility service providers, unless the landlord basically refuses, in which case the funds may be paid directly to the eligible household to pay for those services. Grantees must make reasonable efforts to conduct outreach to landlords and utility providers; if, after that documented outreach effort the landlord or utility does not respond or refuses to accept payment, then payments can go directly to affected households.

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

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