LIHTC Compliance and the Material Impacts of COVID-19

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COVID-19 and the related stay-at-home orders issued by most states have created unprecedented uncertainty surrounding certain compliance and completion requirements related to the development of low-income housing tax credit ("LIHTC") projects. Developers and investors alike may be concerned with whether their 9% LIHTC projects will satisfy the ten percent test ("Ten Percent Test") and the mandatory placed-in-service deadline ("PIS Deadline") due to construction delays, labor shortages, and other issues arising from COVID-19. In addition, for 4% and 9% LIHTC projects alike, many developers are facing the potential for reduced capital in the event completion and credit delivery deadlines are not met under their agreements with investors, who determine their capital amounts and timing-based upon certain benchmarks and the returns they expect to receive.

Generally, in order to satisfy the Ten Percent Test, a taxpayer must incur within 12 months of the date the taxpayer receives an allocation of LIHTC from the applicable state housing finance agency ("**HFA**") a cost basis of at least 10 percent of the reasonably expected total cost basis in the project as of the PIS Deadline. The PIS Deadline is typically December 31 of the second calendar year after the year in which the taxpayer receives an allocation of LIHTC from the applicable **HFA**, and the taxpayer must place the project in service by this date in order to comply with the LIHTC requirements.

The Internal Revenue Service ("**IRS**") has provided some relief at the federal level by extending certain tax deadlines (including the Ten Percent Test in certain circumstances) until July 15, 2020, but some HFAs have provided relief as well through authority granted by the IRS. For instance, Indiana has granted across-the-board relief on the Ten Percent Test and the PIS Deadline. Ohio is granting relief on the Ten Percent Test and the PIS Deadline on a case-by-case basis. Recently, Pennsylvania has also provided relief on the Ten Percent Test and the PIS Deadline to projects meeting specific criteria, as

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discussed below. Other states may also be considering similar relief measures.

- **Indiana**: The HFA has automatically provided a six-month extension to satisfy the Ten Percent Test deadline for all projects receiving a 2019 allocation of LIHTC and a 12-month extension for the PIS Deadline for all projects receiving a 2018 allocation of LIHTC. We have recently advised a nationwide investor on the implications of these extensions and how best to structure the transaction documents to protect them with a specific focus on recapture, repurchase, and removal events.
- **Ohio**: The HFA is permitting developers to request a six-month extension to satisfy the Ten Percent Test deadline and/or a 12-month extension for the PIS Deadline, and the HFA will grant relief on a case-by-case basis only. We have counseled several clients through this discretionary relief process by focusing on the practical impacts of the COVID-19 crisis on the construction schedules and the supply chain.
- **Pennsylvania**: The HFA is providing a six-month extension to satisfy the Ten Percent Test deadline for certain projects that received a 2019 allocation of LIHTC and are required under the terms of such allocation to meet the Ten Percent Test by October 25, 2020. The HFA has extended the Ten Percent Test deadline for these projects to April 25, 2021. Projects with a forward commitment for a 2020 allocation of LIHTC are also eligible for this extension so long as the project received a carryover allocation agreement in April 2020 permitting such an extension. The HFA is also allowing projects that received a 2018 allocation of LIHTC or a forward commitment for a 2019 allocation of LIHTC to seek a 12-month extension for the PIS Deadline by submitting a written request for such relief.

Frost Brown Todd counsels clients across the country on ways to work through issues and problem-solve when it comes to these important deadlines and the impact of credit adjusters, among other COVID-19 related issues. We will stay at the forefront of all major developments from the HFAs nationwide, as well as legislative

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efforts impacting LIHTC, and we are ready to assist clients in seeking relief for their projects. For more information, please contact Amy Curry, Alex Derkson, Brad Butler, Matt Carr, Emily Meyer, or Darnell McCoy, or any other attorney in Frost Brown Todd's Real Estate or Multifamily Housing teams.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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