Tools for Multifamily HUD Insured Loans in Light of COVID-19 – Part II

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As the COVID-19 pandemic has continued throughout the United States, the U.S. Department of Housing and Urban Development (HUD) has been providing advice with respect to interpreting existing guidelines viewed considering the current pandemic. HUD reminds owners and their agents to follow directions from the Centers for Disease Control and Prevention (CDC), which is being updated on a regular basis. In addition to CDC guidelines, property owners should continue to track the recommendations from local health officials where their properties are located.

Recently, we published our article *Tools for Multifamily HUD Insured Loans in Light of COVID-19*, which was based on the guidance then available regarding loans insured by HUD. This article supplements the original article with additional information that is now available. Among the topics discussed in this article are (i) HUD Policy and Operations of Multifamily Facilities, (ii) the Coronavirus Aid, Relief, and Economic Security (CARES) Act and Additional Resources, (iii) Property Reviews, Inspections and Appraisals and (iv) links to the previous article and other sources for property owners and operators.

HUD Policy & Operations of Multifamily Facilities

Confirmed Case at HUD-assisted Properties

There are no tenant notification requirements in the event of a resident testing positive for COVID-19 at a property assisted by HUD. However, if a property owner or its agent is aware of a resident testing positive, then they should make information available to all residents, visitors, workers and volunteers of possible exposure. In providing such information, an owner should keep in mind that this type of information should only be presented in a way as to not associate any stigma or discrimination against any person testing positive. HUD suggests that the information can be distributed by

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way of placing signs near entrances and exits and delivering letters to each of the residents. Whenever disseminating this type of information, all steps should be taken to ensure that confidentiality is maintained with respect to a resident who has tested positive (*i.e.* , do not disclose the resident's name, apartment number or any other personally identifying information). The CDC provides printable resources for use under these types of circumstances. In addition to notifying residents and visitors of possible exposure to COVID-19, property owners and their agents should also notify the local health department upon learning about any confirmed cases.

Operating Accounts

The Asset Management Handbook is also a good source to determine what funds can be utilized and accessed in responding to the virus outbreak. According to Questions and Answers for Office of Multifamily Housing Stakeholders (Q&A) last issued on May 21, 2020, by the Federal Housing Administration (FHA), owners of multifamily properties may use operating accounts for a property to cover expenses that are reasonable and necessary to prepare and respond to the COVID-19 pandemic, including supplies, staff hours and overtime. HUD has clarified that these funds may be used to provide staff and residents access to protective gloves and masks, at the owner's discretion. The use of operating accounts in this manner does not require prior approval from HUD.

Debt Service Requirements

In Mortgagee Letter 2020-11, HUD addresses Section 223(f) Underwriting Mitigants for Multifamily Housing Projects Due to Economic Impact of COVID-19 Emergency. This mortgagee letter provides guidance that HUD underwriting will use to offset anticipated operating losses for 223(f) transactions after closing. For market rate transactions that have not rate locked yet, HUD will require a nine-month debt service reserve fund (cash or letter of credit) to be held by the lender. The debt service reserves shall be released upon the latter of six months, meeting the debt service coverage ratio for three consecutive months, and the completion of all non-critical repairs. It should also be noted that in a cash out

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refinance transaction, HUD is suspending the requirement that 50% of the cash out proceeds shall be held for assurance of completion of repairs. The funds available through the suspension of these requirements may be used to fund the required escrows.

Income Deductions for Childcare for Unemployed Residents

A resident of a HUD-assisted property may be receiving an income deduction for childcare. Normally, this type of deduction is allowed to provide assistance to the resident while he or she is working. If a resident receiving such a deduction is furloughed or loses their job, HUD will permit that resident to receive a deduction for childcare expenses in order for the resident to seek employment.

Utility Analysis

Owners may obtain Utility Analysis (UA) from tenants, which is permitted in HUD Notice H-2015-04. The current requirement is for owners to use an adjustment factor for two years and complete a full baseline analysis on the third year. If data is not available because of the COVID-19 pandemic, HUD will allow the owner to use an adjustment factor for three years. With respect to having new service to a unit, the unit must be ready for occupancy before a resident may occupy it. As such, an owner or agent may delay a new tenant from moving in if a utility provider cannot perform new service turn-ons.

PCNA Updates

For properties approaching their 10-year anniversary from their final closing, a Project Capital Needs Assessments (PCNA) will need to be scheduled. In order to allow for additional time to submit a PCNA, HUD is allowing for the regular 10-year PCNA updates due between March 15 and September 30, 2020 to be postponed until September 30, 2020.

Section 8 HAP Offsets

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Regulations permit HUD to use Residual Receipts to offset Housing Assistance Payments (HAP). However, because of the COVID-19 pandemic, HUD may approve the temporary suspension of Residual Receipts HAP offsets through December 31, 2020. Approval must be received in advance to suspend offset payments for properties where COVID-19 expenses are anticipated to exceed available resources. After December 31, 2020, all properties must offset HAP vouchers for all Residual Receipts in excess of the minimum allowed retainable balance.

Furlough of Service Coordinators

If a property owner is contemplating furloughing its service coordinator to reduce operating costs, a determination needs to be made on the source of the service coordinator's salary. If the service coordinator's salary is derived from a grant or the project budget, then the service coordinator needs to continue in that position for the proportionate period of time equal to the funding for their salary. HUD approval is required to use service coordinator funds for operating funds. It should also be noted that HUD discourages owners and operators from removing support for these positions as they function to support the needs of the residents.

Retainage on Pre-purchased Materials

In order to stay in front of any supply chain disruptions, HUD will consider waiving the retainage requirements on pre-purchased materials on construction loans. Besides submitting justification for the storage of materials with no retainage by the contractor, the justification must also be supported by the Multifamily Accelerated Processing (MAP) lender. All pre-purchased materials must be properly secured and protected, and the materials must be identified by original invoices from the manufacturer/supplier with an itemized cost. Additionally, the architect will be required to certify delivery and acceptance of all items. The pre-purchased materials should be installed no later than 90 days after date of delivery, and the total of the pre-purchased materials are limited to an amount equal to 10% of the construction contract at any one time.

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Architectural Plans and Specifications Signing Requirement

Because of restrictions that may be in place at the time the architectural plans and specifications are required to be signed, HUD will allow the development team to use a letter-sized cover sheet that includes the following language:

- Project name, FHA number, address, city, state, and zip code;
- Signature line for each individual representative (project architect, supervisory architect, owner, contractor lender and the bonding agent) with the signer's printed name, title, and the date signed;
- The title of the set of the plans and specifications that the cover sheet will be substituting. The required number of sets may vary for each regional office, but at minimum, there must be a set for the HUD regional office (Master), general contractor (Field), HUD inspector (Inspector), and the lender. A separate cover sheet is required for each of the sets.
- The coversheet must include the following certification language:

  "The undersigned acknowledges that the final plans and specs (date of the approved set) are approved and considered as part of the agreed-upon construction contract. Further, by their signatures certify that the date identified below is the date of final revision for the plan set or the dates identified for individual sheets on an attached list of drawings."

  Warning: *18 U.S.C. 1001 provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any manner in the jurisdiction of any department or agency of the United States, shall be fined or imprisoned not more than five years or both.*

Prior written consent by either the HUD regional director, production director or technical branch chief must be obtained to take advantage of using a replacement coversheet.

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Cares Act and Additional Resources

Small Business Administration Paycheck Protection Program (SBA PPP)

HUD typically has specific requirements with respect to any subordinate financing for a HUD insured loan (*e.g.*, subordinate financing not having a maturity date earlier than that of the HUD insured loan, payments coming from surplus cash, etc.). HUD is currently reviewing loans under SBA PPP and is providing guidance to field staff to approve such loans for market rate projects without limiting repayment to proceeds from surplus cash. However, repayment of an SBA PPP loan must first come from surplus cash before the borrower may use other funds.

CARES Act funding for HUD Multifamily Programs

The CARES Act provides for additional funding for HUD's Multifamily Housing program. Most of the additional funding is to provide for increased subsidies to help mitigate tenants' losses of income related to the COVID-19 pandemic. The CARES Act authorizes HUD to use funds to address unusual operating costs, such as increased cleaning costs, that resulted from the coronavirus pandemic.

CARES Act Forbearance Guidance

HUD requires approvals of borrowers and principals through its Active Partners Participation System (APPS) and completion of HUD Form 2530 (Previous Participation Certification). Guidance for multifamily housing field staff is to flag borrowers with delinquent and defaulted loans. Under the CARES Act forbearance guidance, HUD will not consider an eligible loan delinquent or in default provided that the forbearance occurs prior to the borrower missing a payment. HUD may place a flag on a project in which the borrower has missed a payment under the forbearance agreement or otherwise defaulted under that agreement.

Late Notices During Period of Forbearance

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Even though property owners are prohibited from evicting tenants for non-payment of rent during the eviction moratorium, the owners may send reminder notices for late rent to the tenant. The reminder notice may not include a notice to vacate, or any fees or penalties normally allowed for nonpayment of rent.

Evictions for Other Lease Violations

The eviction moratorium only applies to evictions or charging additional fees related to the nonpayment of rent. A tenant can still be evicted under guidance given in Housing Notice 2017-05 with respect to violence against women and other specified acts.

Abandonment of a Unit

Property owners and agents should keep in mind that guidance regarding abandonment of a unit requires a fact-specific determination. When taking requirements to not evict tenants during a forbearance period into account, the owner or agent will need to consider whether the tenant may have decided to quarantine in another location or may not be able to travel. Therefore, the owner must be cautious in its decision on whether a unit has been abandoned and take any additional steps necessary to confirm that the unit has indeed been abandoned.

CARES Act LIHTC Guidance

Owners of properties receiving Low Income Housing Tax Credits (LIHTC) should keep in mind that the LIHTC is administered by the Internal Revenue Service (IRS) and not HUD. Therefore, owners of LIHTC projects should contact the IRS regarding any restrictions on restrictions under the CARES Act.

Property Reviews, Inspections & Appraisals

Notice of Violation or Notice of Default Inspection

Under normal circumstances, HUD requires 100% of the units to be inspected within 60 days as a condition of a Notice of Violation or

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Notice of Default Inspection. HUD has suspended all physical inspections until further notice due to the COVID-19 National Emergency. If an owner received a Notice of Default prior to the suspension, all Exigent Health and Safety deficiencies must be corrected immediately, and the owner must provide a certification to HUD that such conditions were mitigated. If inspections of the units cannot be completed, the owner must submit a repair plan to HUD and should anticipate completing all repairs within 60 days of the date HUD resumes inspections.

Financial Audits

Under circumstances where a multifamily property owner's financial statements are complete but the auditor is not comfortable with coming to the office to conduct an audit, HUD has extended financial audit reporting deadlines until June 30, 2020 (this extension applies to entities which are required to submit their annual information on or before June 30, 2020). Entities required submit financial information on or before June 30, 2020 are now required to submit their financial information within 180 days of the end of its fiscal year for the reporting period.

For more information, please contact Geoff White, Amy Curry or Bob Cummings, or any attorney in Frost Brown Todd's Real Estate or Multifamily Housing team.

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.

Links to original article and support documents:

Tools for Multifamily HUD Insured Loans in Light of COVID-19

HUD Mortgagee Letter 2020-09

HUD Mortgagee Letter 2020-10

Best Practice Recommendations for Electronic Submission of Documents for Multifamily Closings during the COVIC-19 Pandemic

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Emergency

HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs

HUD Handbook 4350.1: Multifamily Asset Management and Project Servicing

Ginnie in Brief – March 27, 2020

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