Feb 19, 2022

Categories:

Blogs
Multifamily Matters

Authors:

Mackenzie L. Giannotti
Stephen M. Sparks
Christina M. Sprecher

New Operational Guidelines for Affordable Housing Projects

This article was originally published on February 18, 2022 in Westlaw Today, an imprint of Thomson Reuters.

The COVID-19 pandemic continues to have an impact on the operations of affordable housing owners and managers and the governmental housing credit agencies ("Agencies") that regulate them to ensure compliance with low-income housing tax credit (LIHTC) requirements under IRC § 42.

Ordinarily, LIHTC project owners must meet certain requirements for at least 15 years after the project is placed in service in order to receive LIHTCs, which owners allocate to investors in exchange for equity to finance the project. For example, LIHTC project owners must ensure that all tenants meet the income restrictions designated for the project and that the project is maintained in a manner that meets the local Agencies' requirements and the provisions of IRC § 42.

In the early stages of the pandemic, government regulators used and permitted operational strategies that minimized in-person interactions among regulators, project owners, project operators and tenants. Many of the requirements, such as compliance monitoring, were put on hold through most of 2021. However, now that we are "learning to live with" COVID-19, Agencies are planning a return to normal, with a brief transition period that minimizes in-person interactions while returning to normal operating procedures.

In January 2022, the IRS released Notice 2022-05 ("Notice"), which sets forth the rules governing operations during this transition period. The Notice provides additional operating guidelines and extended relief to owners and operators of qualified residential rental projects benefitting from LIHTCs during this pandemic transition period. The Notice's operational guidelines that affect LIHTC projects include:

- new compliance monitoring procedures;

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

- common area and amenity management practices; and
- protocol for providing temporary housing to medical personnel and essential workers.

While the Notice includes other provisions, such as deadline extensions for IRC § 42 requirements and new permanent procedures for Qualified Allocation Plan approval hearings, this article is solely focused on Section V of the Notice, the operational guidelines that affect LIHTC project owners and operators.

Compliance-Monitoring Procedures

Resumption of tenant file review. As a response to the disruption to governmental agency and LIHTC project owners' normal operations at the beginning of the COVID-19 pandemic, the IRS permitted Agencies to skip review of tenant files from April 1, 2020, through Dec. 31, 2021. But, as of Jan. 1, 2022, agencies must resume their review of tenant files. They do not, however, need to make up for any file reviews that were missed during the waiver period.

While LIHTC project owners and Agencies are required to resume review of tenant files, both may need to adjust their usual procedures to adequately complete their tenant file review in a safe manner during this transition period. For example, the Illinois Housing Development Authority encourages LIHTC project owners to conduct interviews via telephone or teleconferencing and to receive documents electronically.

As part of the transition back to normal, the IRS is permitting Agencies to extend the reasonable notice period from 15 days to up to 30 days until Dec. 31, 2022, for review of low-income certifications of not-yet-identified low-income units. After the transition period ends on Dec. 31, 2022, the reasonable notice period is scheduled to revert to no more than 15 days. Given the Agencies' discretion, it is important for LIHTC project owners to check with their local Agencies and ascertain the notice period they plan to provide.

Physical inspections — additional waiver. During the transition, Agencies may also extend the reasonable notice period for physical inspections of not-yet-identified low-income units from 15 days to

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

up to 30 days until Dec. 31, 2022. The reasonable notice period is scheduled to revert to no more than 15 days after the transition period ends on Dec. 31, 2022. Agencies may use this longer notice period to permit LIHTC project owners to provide more advanced notice of a potential inspection to their tenants.

To avoid the need for in-person interaction until the latest wave of the Omicron variant of COVID-19 has dissipated, the IRS is permitting Agencies to skip compliance-monitoring physical inspections until June 30, 2022. After consultation with public health experts regarding COVID transmission rates, Agencies may choose to continue to waive physical inspections until Dec. 31, 2022. Depending on varying rates of transmission of COVID-19, Agencies' waiver of physical inspections may be on a statewide, local, or individual project basis.

Because the IRS has granted Agencies a great deal of discretion about conducting physical inspections of LIHTC properties during the transition period, LIHTC project owners will need to stay informed throughout the year on the most recent changes in their jurisdiction. They should also keep in mind, however, that routine maintenance should be conducted as often as possible. When Agencies resume inspections, an inability to maintain the property during the COVID-19 pandemic will not be an excuse for noncompliance.

Closure of Common Areas and Amenities

To minimize in-person interactions, the IRS permitted LIHTC project owners to close common areas and amenities from April 1, 2020, through Sept. 30, 2021, without reducing the project's eligible basis, which otherwise would reduce the amount of LIHTCs generated by a LIHTC project. During the transition period, common areas may remain closed through Dec. 31, 2022.

Agencies, however, have discretion to deny such closures, or to limit changes to partial closures or limited/conditional access (such as limiting access to persons who are wearing a mask or are vaccinated), based upon public health criteria.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

LIHTC project owners should communicate with their respective Agencies to ensure that any closures or limitations of common areas and amenities comply with the Agencies' policies. This is especially necessary to ensure that the LIHTC project's eligible basis is not adversely affected so that the LIHTC project owner is not in violation of any agreement with equity investors.

Additionally, LIHTC project owners should ensure that the common areas and amenities remain in good condition during the time that they are closed or unavailable and are ready for operation by the time the relevant Agencies require reopening. If not, there is a risk of such common areas or amenities being removed from the LIHTC project's eligible or qualified basis.

Temporary Emergency Housing

From April 1, 2020, to Dec. 31, 2022, medical personnel and other essential workers providing services during the pandemic may be treated as "Displaced Individuals" under Revenue Procedures 2014-49 and 2014-50, which permit certain Displaced Individuals to use affordable housing. Therefore, LIHTC project owners may provide temporary emergency housing to such individuals without negatively affecting the project's qualified basis and/or minimum set-aside calculations. The scope of individuals included in the definitions of "medical personnel" and "essential workers" is determined by state and local governments and will vary depending on the jurisdiction of the LIHTC project.

LIHTC project owners with short-term vacancies should consider reaching out to Agencies to determine whether they can assist the broader community by offering temporary housing to these individuals. To offer this assistance, LIHTC project owners need written approval from their local Agencies. Additionally, the LIHTC project owners must obtain approval from the issuer of any tax-exempt bonds financing the project and maintain specific records of the temporary housing arrangement.

Conclusion

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

The administrative forbearances granted by the IRS may continue to change throughout the COVID-19 pandemic as different variants appear and the science that promotes public health is further refined. LIHTC project owners should work closely with their Agencies to stay up to date on the operational strategies Agencies will use to ensure compliance with the LIHTC rules and regulations, while minimizing risks to the public health.

Multifamily Matters Blog

Providing relevant legal perspectives to keep developers, investors, and lenders at the forefront of the multifamily industry in our footprint.

Visit Blog

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons