

# COVID-19 Update for Low Income Housing Tax Credit Developments

As the COVID-19 pandemic rages and the federal government seeks to mitigate the health and economic fallout, low-income housing tax credit (LIHTC) properties are facing economic burdens on the ground in the form of reduced rental payments and the inability to lease vacant units.

Below are some proactive steps businesses may want to consider taking to address the relevant issues implicated by the virus, along with outlines of the federal relief that may be available under the recent stimulus package passed by Congress.

## Top 6 Things LIHTC Owners, Syndicators and Developers Should be Thinking About

1. **Reserves.** As revenue from rental payments is reduced, one potential source of cash flow for a project are its reserves. It is critical to start reviewing loan documents to see what limitations there are on reserves held by project lenders as collateral. Most permanent lenders and state agencies hold reserves and, at a minimum, their consent will be needed to draw them down. In some cases, if a loan is in default, the lender may withhold consent and apply the reserve funds to pay down the principal balance of the loan. Careful reading of these documents and early conversations with lenders should be a high priority. Don't wait until the loan is already in default or it might be too late.
2. **Loan Covenants.** Declining revenue may implicate certain financial covenants in project loan documents. It is important to carefully read loan documents to understand obligations such as minimum debt service coverage ratios, net worth or liquidity requirements and loan to value ratios. Understanding these obligations is critical when seeking forbearance, consent to release reserves, or simply attempting to keep a project out of default.
3. **Insurance.** Businesses impacted by COVID-19 may be able to seek relief via their property or business interruption insurance coverage. The policies' notice provisions should be analyzed to ensure scrupulous compliance in order to avoid a foot fault leading to claim denial. Initial indications are that insurance companies will issue blanket denials for such claims but businesses should nonetheless file claims in order to satisfy the notice requirements, which secures a right to appeal. Recent case law suggests there may be strong arguments that a pandemic is covered the same as any natural disaster and many states are in the process of enacting legislation to require coverage.
4. **Force Majeure.** Force majeure clauses in contracts can excuse performance of obligations or extend deadlines under exceptional and/or unforeseeable circumstances beyond the control of the parties. There's no standard on what triggers these clauses so each clause needs to be reviewed closely to understand if COVID-19 might trigger it. Projects still under construction or that haven't stabilized should review their construction contracts to see if the general contractor may have the right to invoke the force majeure clause to delay completion or ask for an increase in the contract price. Those projects should also look closely at their loan documents to see if they have an argument for additional time to complete construction or lease-up based on force majeure.
5. **SBA Loans.** It's unlikely that project owners themselves will qualify for the new SBA loan program because they typically have no employees of their own. However, property management companies may have taken advantage of this assistance to meet their payroll needs. To the extent property management companies receive a loan under this program to pay employees at a project, the project should seek a rebate or reduction in the payroll costs typically passed through to the project. Project owners might consider applying under the argument that since they pay the

property level employees through a management company the employees are effectively employed by the partnership. However, provisions in contracts that forbid the partnership from having employees could make this argument difficult, if not impossible, to make. It will be important to make sure that two entities do not attempt to claim the same employees and that credit for paying them flows through to the project owner.

6. **IRC Deadlines.** If program deadlines, such as the satisfaction of the 10 percent test or placed in service deadlines, may be impacted by COVID-19, it would be best to confirm if an extension might be available and, if so, the process for requesting any such extension. Some state agencies require earlier satisfaction of program requirements than what is federally mandated so owners in those situations should work directly with the applicable state agency to obtain extensions up to the IRC deadline. Additionally, IRS Revenue Procedures 2014-49 and 2014-50, which provide relief in instances of Presidentially-declared Major Disasters to, in part, all Section 42 buildings, and IRS Notice 2020-23, which extends certain program deadlines until July 15, 2020, should be analyzed to see if they may offer additional relief. If so, it would also be best to confirm with the applicable state agency whether there are any state-imposed notification or application deadlines in order to take advantage of these extensions. Also, stay alert for additional guidance as various organizations are continuing to push for more extensive relief from the IRS of various program deadlines in light of COVID-19.

On March 27, Congress passed the Coronavirus Aid, Relief and Economic Security Act (CARES Act) to provide relief to the American people from the economic fallout related to COVID-19. While the CARES Act doesn't specifically address the LIHTC program, below are some of the more important provisions that could benefit project owners, developers and syndicators.

### **CARES Act: Main Street Lending Program**

The Main Street Lending Program will enhance support for small and mid-sized businesses that were in good financial standing before the crisis by offering 4-year loans to companies employing up to 10,000 workers or with 2019 revenues of less than \$2.5 billion. Notably, firms that have taken advantage of the Paycheck Protection Program (PPP) through the Small Business Administration (SBA) may also take out Main Street loans.

Loans can range from \$1 million to \$25 million. Maximum loan size is the lesser of a) \$25 million or b) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed four times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization. If "Upsizing" current eligible loans, the maximum combined loan size is the lesser of a) \$150 million, b) 30% of the Eligible Borrower's existing outstanding and committed but undrawn bank debt, or c) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed six times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization.

### **Eligibility Requirements**

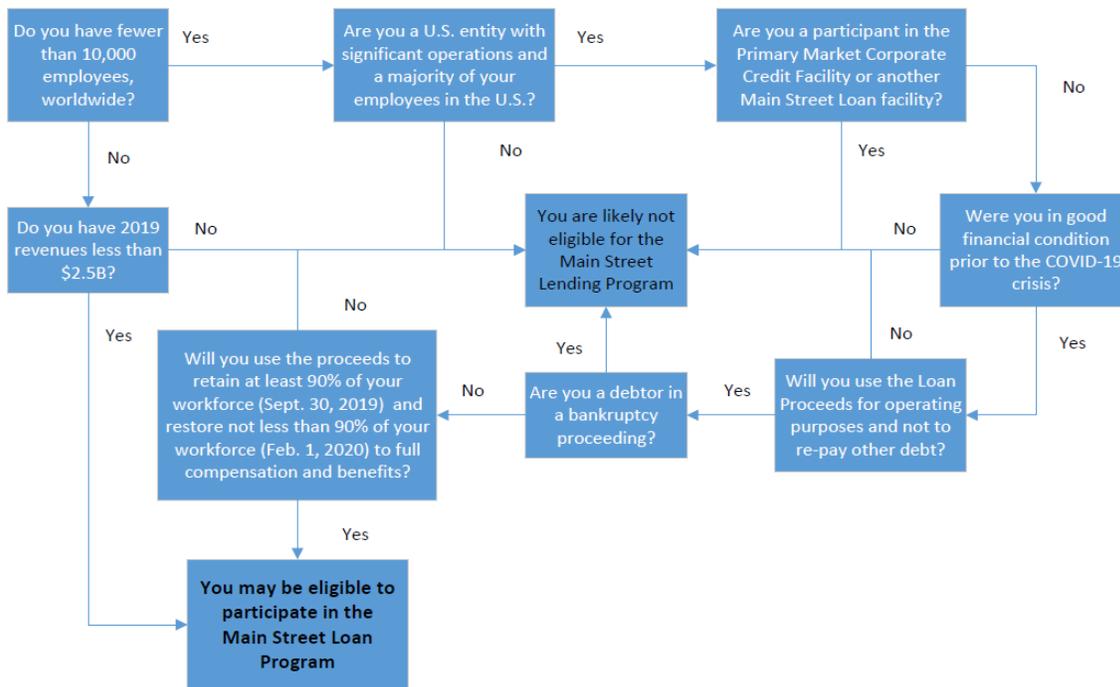
1. There is no minimum number of employees an applicant must have to be eligible for the Main Street Lending Program.
2. Principal and interest payments will be deferred for one year.
3. Eligible banks may originate new Main Street loans or use Main Street loans to increase the size of existing loans to businesses.
4. Firms seeking Main Street loans must commit to make reasonable efforts to maintain payroll and retain workers. However, there are no standards or procedures for retention or rehiring of workers. It is possible further guidance will restore some of the rehiring provisions mentioned in the authorizing statute, as previously discussed.

- Borrowers must also follow compensation restrictions for high-paid personnel, stock repurchase, and dividend restrictions that apply to direct loan programs under the CARES Act.

[Sec. 4003. Emergency relief and taxpayer protections.](#)

The below chart can help you think through whether a particular business qualifies for these loans.

### Main Street Lending Program Eligibility Chart



This publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.

Information taken from Federal Reserve Main Street Program details - April 14, 2020.

### CARES Act: Loan Forbearance

Under Section 4022 of the CARES Act, borrowers with federally backed mortgages are eligible for mortgage forbearance. Landlords with multifamily mortgages receive 30 days of forbearance with the option to extend for an additional two 30-day periods. Such borrowers are prohibited from charging fees or penalties related to rent nonpayment or late payment. This provides some relief to landlords that are barred from initiating eviction proceedings for properties with mortgages insured, guaranteed, supplemented, protected, or assisted in any way by HUD, Fannie Mae, Freddie Mac, the rural housing voucher program, or the Violence Against Women Act of 1994 during the 120-day period following the enactment of the CARES Act.

Lenders are likely to be inundated with forbearance requests. Borrowers should initiate discussions as early as possible rather than waiting until necessary to avoid default.

[Sec. 4022. Foreclosure moratorium and consumer right to request forbearance.](#)

## **CARES Act: Employee Retention Payroll Tax Credit**

Any employer whose business was fully or partially suspended in 2020 as a result of governmental orders or that experienced a significant decline in gross receipts due to COVID-19 may be eligible to receive an Employee Retention Payroll Tax Credit. The credit is 50 percent of wages and health benefits paid after March 12, 2020 with a cap of \$5,000 per employee. If the credit exceeds the employer's tax liability, it shall be refundable. Note that employers that receive a loan pursuant to the PPP, discussed below, may not take advantage of this tax credit.

[Sec. 2301. Employee retention credit for employers subject to closure due to COVID-19.](#)

## **CARES Act: Employer Payroll Tax Delay**

Section 2302 of the bill allows employers to defer the deposit and payment of the employer's share of social security taxes (i.e., 6.2 percent of wages). The deferral applies for the period of March 27 through the end of 2020. 50 percent of the deferred tax is payable on December 31, 2021 and the remaining 50 percent is payable on December 31, 2022. Note that employers that receive a loan pursuant to the PPP, discussed below, may not take advantage of this deferral.

[Sec. 2302. Delay of payment of employer payroll taxes.](#)

## **CARES Act: Paycheck Protection Program**

The CARES Act authorized \$349 billion through June 30, 2020, to expand the Small Business Administration Section 7(a) loan program, referred to as the Paycheck Protection Program (PPP). The aim of this program is to encourage employers to continue to employ its workers and pay benefits. Additional funds for the program are in the process of being approved.

### **Expansion of SBA Loans**

The loans may be used for payroll, parental, leave, insurance premiums, mortgage payments, rent, retirement benefits, utilities, and interest on debt. Each borrower that qualifies may receive a loan equal to the lesser of a) \$10 million or b) 2.5 times average monthly payroll (subject to a cap of \$100,000 of annual salary per employee). The interest rate for such loans shall not exceed 4 percent and term can be as long as 10 years for portions that are not forgiven.

To be eligible, a business must satisfy the following criteria:

1. In addition to businesses already qualified by meeting certain SBA industry employee-based size standards, the bill makes eligible nonprofit organizations, veteran's organizations and tribal businesses, if the business employs 500 or less employees.
2. For purposes of calculating the number of employees, affiliated companies must aggregate their employees. "Affiliate" is broadly defined to mean the "power to control, whether exercised or not."
3. The revenue requirement for traditional SBA loans was waived.

## Loan Forgiveness

Generally, the principal amount of the loans will be forgiven in the amount of total payments made during the 8-week period following receipt of the loan for payroll, utilities, rent, and mortgage obligations.

There are certain adjustment mechanisms built into the bill which reduce the forgiveness amount in the event of a reduction in the number of employees or a reduction in employee compensation. However, there is an exception for employers that cure any such reduction by June 30, 2020.

[Sec. 1102. Paycheck protection program.](#)

For more information, please contact the Barnes & Thornburg attorney with whom you work, or a member of the [firm's Community Development and Tax Credit Finance team](#).

*© 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.*

*This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.*

Visit us online at [www.btlaw.com](http://www.btlaw.com) and follow us on Twitter [@BTLawNews](https://twitter.com/BTLawNews).