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Treasury Department Issues New Guidance for the Use of Coronavirus State and Local Fiscal Recovery Funds for Affordable Housing



On July 27, 2022, the Treasury announced new guidance that significantly increases the availability of Coronavirus State and Local Fiscal Recovery Funds (“SLFRF”) under Sections 9901 and 9902 of the American Rescue Plan Act of 2021 (P.L. 117-2) (“ARPA”) for state, local and Tribal governments (“Recipients”) and their subrecipients^[1] to finance the development, repair and operation of affordable rental housing. The updated guidance clarifies key issues with the Final Rule implementing SLFRF issued by the Treasury on January 27, 2022 (the “Final Rule”) (codified at 31 CFR 35)^[2] and greatly simplifies how SLFRF funds may be incorporated into an affordable housing project. The new guidance includes an updated FAQ to provide for increased flexibility in how a Recipient may use SLFRF funds to finance affordable housing, and a How-to Guide for Affordable Housing to help guide Recipients in implementing SLFRF for the development and preservation of affordable housing.

The updated FAQ simplifies the use of SLFRF funds to finance long-term affordable housing in two key ways. First, Section 2.14 of the FAQ clarifies the type of affordable housing development activities that are eligible by both expanding the list of explicitly eligible housing programs and providing SLFRF specific affordable housing guidelines for projects not so enumerated. Second, Section 4.9. allows Recipients to make long term loans to affordable housing projects without the need to blend the loan with other funding sources as originally required under the Final Rule.

ELIGIBLE USES: Section 2.14 of the updated FAQ expands on the Final Rule by explaining that an affordable housing project may qualify as an eligible use of SLFRF funds in three ways:

- **Enumerated Affordable Housing Programs.** Under the Final Rule, SLFRF funds may be used for affordable housing programs if such program benefits households that qualify for the HTF program (12 U.S.C. 4568) or the HOME Program (42 U.S.C. 12721) (see 31 CFR 35.6(b)(2)(i)), households that reside in a qualified census tracts, households and populations receiving services provided by Tribal or territorial governments, or low-income households ^[3] (see 31 CFR 35.6(b)(2)(iii)(A)). The updated FAQ expands this list to include the following federal housing programs:
 - HTF Program (12 U.S.C. 4568);HOME Program (42 U.S.C. 12721);Low-Income Housing Tax Credits (26 U.S.C. 42);Public Housing Capital Fund (42 U.S.C. 1437g(d) and 1437z-2);Section 202 Supportive Housing for the Elderly

Program (12 U.S.C. 1701q); Section 811 Supportive for Persons with Disability Program (P.L. 101-625); Project-Based Rental Assistance (42 U.S.C. § 1437f); and

- Multifamily Preservation & Revitalization Program (7 CFR 1940.575).

A Recipient may choose to use SLFRF funds to invest in an affordable housing project in alignment with the above listed federal housing programs, provided that the Recipient require the covered project to comply with the applicable federal housing program's requirements related to rental income restrictions, the period of affordability and related covenant requirements for assisted units, tenant protections and housing quality standards.

- **Other Affordable Housing Presumed Eligible.** In addition to the above listed federal housing programs, the Treasury also presumes that the development, repair or operation of an affordable housing rental unit is eligible for SLFRF funding if the unit is limited to 65% of area medium income (AMI), as imposed through a covenant, land use restriction agreement or other enforceable legal requirement for a period of at least 20 years. For a mixed income project, SLFRF funds may still be provided so long as the SLFRF funds do not exceed the total development costs attributable to the affordable housing units limited to 65% AMI.
- **General Eligible Use Framework.** The updated FAQ also provides that an affordable housing program that does not fall under either of the presumed eligible uses described above may still be considered an eligible use if it satisfies the general eligible use requirements of SLFRF established in 31 CFR 35.6(b).[4]

SLFRF LOANS TO ELIGIBLE AFFORDABLE HOUSING PROJECTS: The updated FAQ also vastly enhances a Recipient's ability to finance eligible affordable housing project with loans of SLFRF funds. The Final Rule imposes significant timing constraints on the use of SLFRF funds, requiring that SLFRF funds be expended by December 31, 2026. The Final Rule treats as "expended", however, only that portion of a loan's cost that the lender does not project will be repaid. As a consequence, in order to make a long-term loan of SLFRF funds, a Recipient must blend SLFRF funds with another source of funds.

Section 4.9 of the updated FAQ provides an exception to this rule specific to affordable housing. Recipients may now use SLFRF funds for the full principal of a loan made to an SLFRF-eligible affordable housing project, provided that the loan and the related affordability period both have a term of not less than 20 years. For LIHTC projects, the project owner must also waive the right to request a qualified contract under 26 U.S.C. 42(h)(6)(F). SLFRF loans that satisfy these requirements are deemed expended when disbursed to the borrower, and thus satisfy the requirement that SLFRF fund be expended by December 31, 2026.

HOW-TO-GUIDE: To assist Recipients in implementing these funds for affordable housing, the Treasury in connection with the U.S. Department of Housing and Urban Development has prepared a [How-to Guide for Affordable Housing](#) which provides practical guidance on how SLFRF may be layered into affordable housing projects under the updated guidance. The How-to-Guide provides a detailed, program-by-program discussion and is a great source of information for Recipients that have SLFRF questions related to a specific federal housing program.

OTHER KEY SLFRF ISSUES: While updated guidance significantly clarifies the Final Rule as applied to affordable housing, Recipients should remain aware of other key issues still surrounding the use of SLFRF funds for affordable housing. These issues include capital expenditure and written justification requirements, timing constraints, and the applicability of the OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal

Awards (2 CFR part 200).[5] For a discussion of these issues that are not addressed by the updated guidance, please see our prior [Housing Alert](#) on the topic.

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[1] While this Housing Alert discusses the updated Treasury guidance as applied to Recipients, the same rules and requirements also apply to subrecipients of SLFRF funds. For purposes of this Housing Alert, where the term Recipient is used, the term can be read to include subrecipients of SLFRF funds.

[2] For background on the Final Rule as it applies to affordable housing, please see our [Housing Alert](#) from March 2022 on the topic.

[3] (see 31 CFR 35.6(b)(2)(iii)(A)).

[4] Please see our prior Housing Alert for a discussion on the general SLFRF eligible use framework.

[5] The Uniform Administrative Requirements are a generalized set of authoritative regulations applicable to various types of federal awards, including performance and financial monitoring requirements, conflict of interest restrictions, general procurement rules, program income restrictions, subrecipient monitoring and management requirements, record retention and audit requirements.

Authors



Chris Hornig
Partner
chornig@kleinhornig.com
202.926.3402



Mark R. Stokely
Partner
mstokely@kleinhornig.com
202.926.3414

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