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JANUARY 8, 2013

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LAW ALERT

HCD PROPOSES NEW CALIFORNIA HOLD HARMLESS POLICY FOR AFFORDABLE HOUSING INCOME LIMITS AND RENT

On December 20, 2012, the California Department of Housing and Community Development (HCD) published a proposed Hold Harmless policy that would protect affordable housing operators from having to lower rents because HUD has published decreases in the HUD calculation of area median incomes.

Background: In the past, the State of California's standard for affordable housing income limits (as adopted by HCD) have been tied to calculations published by HUD regarding Median Income, Low Income and Very Low Income. The State's definition of affordable rents has been stated as a percentage of the area median income limits. Many affordable housing developments have been financed based on use of those income limits to determine project income, and thus, project feasibility. Until 2010, HUD had a policy known as "Hold Harmless" which provided that—even if HUD's method for calculating income limits resulted in a number that decreased from the previous year—HUD would not publish income limits that actually decreased year over year. Beginning in 2010, HUD abandoned that policy, and the HUD-published income limit numbers for a large number of California counties were decreased. Because California affordable housing cost definitions are tied to the HUD-published income limits, affordable housing developments that were required to meet the California definition of affordable housing cost were required to lower rents, which had an adverse impact on the ability of a number of properties to meet their required operating costs, including debt service—thus risking default, foreclosure and the loss of affordable housing units.

HCD's Proposal: HCD proposes to end its practice of adopting HUD's published numbers and to adopt a Hold Harmless Policy for California income definitions which would adopt the highest HUD-published income limit from 2009 until now, so that California income limits and affordable rents would not have to be reduced even if HUD reduces its numbers. When HUD abandoned its Hold Harmless policy, Congress intervened and provided a statutory Hold Harmless policy governing rents to protect the financial feasibility of federally assisted programs such as HOME, Low Income Housing Tax Credits and Tax-Exempt Multifamily Housing Revenue Bonds. In response to complaints from affordable housing operators and their lenders about the negative financial impact on state and local programs when HUD ended its Hold Harmless policy, HUD replied that states were free to adopt their own Hold Harmless policies. HCD now proposes to do just that.

A link to HCD's proposed policy is as follows: http://www.hcd.ca.gov/hpd/hcd_hh_policy_dec2012.pdf. Comments—either positive or negative—regarding the proposed policy must be received by HCD by January 19, 2013. HCD hopes to adopt its policy by the end of January, 2013.

Practical Effect: For affordable housing developments in counties where the HUD published income limits have declined since 2009, more potential tenants will qualify as income eligible, and operators that are subject to California rent limits (such as properties governed by regulatory agreements with housing successors to dissolved redevelopment agencies) will not be required to lower rents below levels set when the project was underwritten. In turn, lenders will not be discouraged to commit funding to projects including extremely low income and very low income units.

It is important for operators to read their existing regulatory documents carefully to determine just how income limits and affordable rent calculations are described and whether they are tied to the HCD published income limits that will be affected by the proposed policy. Operators should also remember that, generally, they are required to charge rents that comply with the lowest applicable regulatory standard, although that also may require a close reading of the regulatory documents.

For further information regarding HCD's proposal and its effect on existing and planned affordable housing developments, call Polly Marshall, Dave Kroot or any other attorney at Goldfarb & Lipman.

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