

MEMORANDUM

To: Council of Large Public Housing Authorities

From: Reno & Cavanaugh, PLLC

Date: February 10, 2021

Re: Emergency Rental Assistance and the 2021 Appropriations Act

Summary

You have asked us to assess whether families receiving rental assistance from the U.S. Department of Housing and Urban Development (“HUD”) under the public housing and housing choice voucher programs are eligible to receive Emergency Rental Assistance (“ERA”) pursuant to Section 501 of the Consolidated Appropriations Act, 2021 (Public Law 116-260) (the “2021 Appropriations Act”). Based on the plain language of the 2021 Appropriations Act, it is clear that as long as the ERA assistance received by a family would not duplicate any Federally-funded rental assistance the family already receives, then the family should be eligible for ERA assistance.

In addition, as described further below, the Department of the Treasury (“Treasury”) published a series of Frequently Asked Questions (“FAQs”) on ERA which have resulted in some confusion regarding this question, although we believe that the FAQs nevertheless confirm eligibility for ERA assistance at least in some circumstances. Our understanding is that Treasury is in the process of revising the FAQs to be more consistent with the statute and, therefore, we urge states and other grantees of ERA funds to refrain from acting on any contrary interpretation until the revised FAQs are issued.

Under the 2021 Appropriations Act, receipt of Federal rental assistance does not automatically prohibit families from also receiving ERA assistance.

As requested, we have reviewed whether families receiving public housing or Section 8 housing choice voucher assistance are eligible for ERA funds. We are also aware that some have asserted that receipt of such assistance by itself automatically prohibits eligibility for ERA assistance. However, based on the plain language of the statute, that is not the case. The 2021 Appropriations Act states:

“To the extent feasible, an eligible grantee shall ensure that any rental assistance provided to an eligible household pursuant to funds made available under this section is not duplicative of any other Federally funded rental assistance provided to such household.”¹

Thus, under the statute, assisted families remain eligible for ERA funds as long as the ERA assistance does not duplicate any subsidy the family is already receiving. The statute also permits ERA grantees to determine whether there would be a duplication of benefits.

Accordingly, ERA grantees should affirm that these households are eligible and review applications from assisted households upon receipt to determine whether there is any such duplication. There are many potential uses for ERA funds that would not duplicate assistance received by a family receiving Federal rental assistance. For example, the 2021 Appropriations Act authorizes the use of ERA assistance for utility costs and for “other expenses related to housing” incurred due to COVID-19, as defined by the Secretary of the Treasury. Eligibility for and the use of ERA funds for these purposes would likely be broader than in the public housing or Section 8 programs and could include costs that may not be subsidized or taken into account in public housing or Section 8 rent calculations.

In addition, although the public housing and voucher programs may provide opportunities under normal circumstances for families experiencing a loss of income to recertify their income to reduce the tenant portion of their rent payments, the rent adjustment process is not immediate and in these times is uncertain, which can result in families accruing rental charges at pre-adjustment rates. These arrears are comprised of the tenant portion of the rent, not the HUD subsidy, and, therefore, would not be duplicative. There are also other similar situations for which families would seek relief in ways that are not duplicative. Accordingly, when developing eligibility criteria and reviewing applications, ERA grantees should take these considerations into account and also reach out to PHAs or families as necessary to resolve any questions regarding the eligible uses of public housing and Section 8 funds when determining whether the ERA assistance would be duplicative.

The FAQs published by Treasury on January 19, 2021 should not be used to exclude otherwise eligible rent-assisted families from applying for ERA assistance.

On January 19, 2021, as noted above, Treasury published a series of FAQs on ERA. Treasury has since amended their website to state that the existing FAQs “are currently being revised and will be posted very shortly.”² Accordingly, the FAQs remain in flux and subject to further

¹ Consolidated Appropriations Act, 2021, H.R. Res. 133, 116th Cong. (2020) (enacted).

² *Emergency Rental Assistance Program*, U.S. DEP’T OF THE TREAS., <https://home.treasury.gov/policy-issues/cares/emergency-rental-assistance-program> (last visited Feb. 9, 2021).

revision. The existing FAQs should not be viewed as binding on ERA grantees in developing their ERA program nor should they be considered a reflection of current Treasury policy under the Biden administration.

Having said that, our understanding is that portions of the existing FAQs have been incorrectly relied upon by some ERA grantees to support the blanket ineligibility of HUD-assisted families for ERA assistance. In particular, we are aware that some ERA grantees interpret the following sentence to exclude all HUD-assisted families: “If an eligible household receives a monthly federal subsidy (e.g., a Housing Choice Voucher, Public Housing, or Project-Based Rental Assistance) and the tenant rent is adjusted according to changes in income, the renter household may not receive ERA assistance.”³ We caution ERA grantees against arriving at such a conclusion as we understand that subsequent revisions to the FAQs are likely to revise this language in order to better align with the statutory requirements regarding duplication of benefits. In addition, even if left unchanged, this portion of the FAQ does not prohibit all HUD-assisted households from applying for or receiving ERA funds. It would only apply in situations where tenant rent has actually been adjusted due to a decrease in income such that the HUD public housing or voucher subsidy is increased. However, as noted above, even when families are able to obtain an adjustment in rent, the process is not immediate and may take longer to complete due to COVID-19. Until the actual rent adjustment occurs, the tenant rent remains at pre-adjustment levels, and the HUD-assisted family would remain eligible for ERA assistance under the existing FAQs.

We also emphasize that in other portions of the FAQs, Treasury expressly states that otherwise eligible households are able to receive ERA assistance “provided that ERA funds are not applied to costs that have been or will be reimbursed under any other federal assistance.”⁴ For example, when receiving other forms of rental assistance, Treasury states, “If a household receives rental assistance other than the ERA, the ERA assistance may only be used to pay for costs, such as the tenant-paid portion of rent and utility costs, that are not paid for by the other rental assistance.”⁵ These interpretations, which allow assisted households to remain eligible for non-duplicative ERA assistance, are consistent with the language in the 2021 Appropriations Act. ERA assistance has many eligible uses, including for utility and home energy costs and “other expenses related to housing,” that would not duplicate other public housing or Section 8 assistance received by a family. Accordingly, a family’s status as a HUD-assisted household

³ *Emergency Rental Assistance Program Frequently Asked Questions*, U.S. DEP’T OF THE TREAS., https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-1-19-21.pdf (Jan. 19, 2021).

⁴ *Emergency Rental Assistance Program Frequently Asked Questions*, U.S. DEP’T OF THE TREAS., https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-1-19-21.pdf (Jan. 19, 2021).

⁵ *Emergency Rental Assistance Program Frequently Asked Questions*, U.S. DEP’T OF THE TREAS., https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-1-19-21.pdf (Jan. 19, 2021).

should not impact their eligibility for these funds. We expect that, upon revision, the FAQs related to HUD-assisted families will more closely mirror the statutory requirements regarding duplication to avoid confusion.

Conclusion

Families receiving Federally-funded rental assistance such as public housing and housing choice vouchers are eligible for ERA assistance unless that assistance is duplicative, which it is not in many cases. Therefore, applications from those families may not be automatically denied and should instead be evaluated based on their merits consistent with the statutory requirements. More specifically, when reviewing applications for ERA assistance, grantees are required to consider the proposed use of funds to determine whether there would be any duplication of assistance. If not, and the family meets all other eligibility criteria, then the family is eligible to receive ERA funds. In addition, given that the FAQs remain in flux and will be subsequently revised, we suggest that ERA grantees should not rely on ambiguous guidance or other statutory interpretation contained therein pending revised FAQs being issued. Otherwise, a grantee's ERA program guidance may be inconsistent with both the statute and the final guidance published by Treasury. Instead, ERA grantees should rely on the statutory requirements when developing their ERA criteria, under which families receiving Federally-funded rental assistance remain eligible for ERA funds that do not duplicate the assistance already received by the family.