

Now & Next

Affordable Housing Alert

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HUD releases guidance on budget-based rent adjustments for Mark-to-Market portfolio

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Owners of certain properties in the Mark-to-Market portfolio can now submit for a budget-based rent adjustment.



What's the impact?

- Some Mark-to-Market Section 8 properties may submit an initial application for a budget-based rent adjustment in the next 28 days.
- The rent adjustment would support ongoing operations at the property or substantial rehabilitation.
- HUD's guidance limits initial eligibility for an adjustment based on financial and physical needs at the property.

Congress passed the Consolidated Appropriations Act of 2023 on December 30, 2022, which included language that will bring relief to the portfolio of Section 8 properties that went through a Mark-to-Market (M2M) restructuring. Properties in the M2M portfolio have restricted annual rent increases based on an operating cost adjustment factor (OCAF) since entering into M2M use agreements, many in the early 2000s. But, on February 29, 2024, the Department of Housing and Urban Development (HUD) issued

guidance on the budget-based rent adjustment (BBRA) opportunity for the M2M portfolio as authorized in the 2023 Appropriations Act. Eligible properties can now apply to HUD for a BBRA as described in the new guidance. This rent adjustment would cover operating expenses or substantial rehabilitation at the property. Eligible properties are limited to one (1) BBRA every ten (10) years and must submit initial and final applications to HUD's Office of Recapitalization (Recap) for approval.

Eligibility for BBRA

Approximately two thousand (2,000) Section 8 properties are encumbered by M2M use agreements. Not all are initially eligible for the BBRA. HUD's guidance sets forth multiple tiers of eligibility in an effort to direct funds available for these adjustments to properties with the most need first. Only the first tier of eligible projects, defined as "Group A," may submit applications at this time.

Group A projects are those that meet one (1) of the items in a list of criteria outlined by HUD in the Notice, including:

- / **REAC Score** — Most recent REAC score is below 30, or the previous two consecutive scores are below 60.
- / **Operating Cost Coverage Ratio** — The project's operating cost coverage ratio is less than 1.0.
- / **Owner Contributions** — Owner contributions were made in excess of \$3,000/unit in the most recent fiscal year or in excess of \$1,500/unit in each of the last three (3) fiscal years.
- / **HUD Disposition Action** — The project is within the HUD dispositions process, either because HUD has acquired the first mortgage debt or the property, through an FHA insurance claim foreclosure or otherwise, is subject to a disposition action as detailed in the Notice.
- / **Vacancy** — Average physical vacancy rate is 25% or higher for the most recent 24-month period.

HUD states that it will later consider applications from Groups B, C, and D and will alert owners when those applications will be considered by publishing a notice on HUD's website. The eligibility criteria for Groups B, C, and D are outlined in the Notice and reflect similar physical and financial criteria as those for Group A, as well as consideration of the fair market rents (FMR) as compared to the rents at the project.

BBRA application process

The BBRA application process consists of an initial submission and a final submission. An owner must be invited by HUD based on the initial submission to submit the final submission. HUD has reserved the more costly diligence items for the final submission to allow owners to confirm eligibility prior to incurring costs on submission materials.

Any initial application submitted by March 28, 2024, will be considered by HUD first. Following that initial group of applications, HUD will accept Group A initial submissions on a rolling, first- come, first-served basis. Owners interested in this opportunity should complete an initial submission, ideally, by the March 28, 2024, deadline. The initial submission requirements do not require third-party reports and consist of information that should be readily accessible to most owners.

Following the receipt of the initial submissions, HUD will estimate the budgetary impact of the requests. Upon determination of eligibility and a finding by HUD that it is likely to have sufficient funds to accommodate the BBRA, HUD will invite the owner to deliver a final submission. The final submission requirements are more substantive and include an owner narrative; capital needs assessment via the eTool, budget worksheet, and associated documentation (HUD Form 92547) and operating pro forma, RCS, tenant notices, and other requirements.

Upon approval, HUD will issue a conditional approval letter that contains requirements that must be met prior to the rent adjustment going into effect. Most notably, HUD will require owners to agree to an additional twenty (20) year term of the affordability and use restrictions under MAHRA, which will require the owner to renew the Housing Assistance Payments (HAP) Contract during that term.

Applications for BBRA will be submitted through a portal on HUD's website accessed via this [link](#). Additional information from HUD on the BBRA process can also be found on that website.

Next steps for M2M properties

The first group of initial submissions for Group A properties is due by March 28, 2024. We expect a significant number of applications in the first round now that this program is open. It is our hope that with additional increases to HUD's renewal budget, the opportunity for HUD to open the application process up to additional groups will happen quickly.

For help submitting a BBRA initial submission to HUD or for any questions related to this alert, please contact your Nixon Peabody attorney or:



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